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The Radical Possibility of Limited Community-Based Interpretation of the Constitution

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THE RADICAL POSSIBILITY OF LIMITED COMMUNITY-BASED INTERPRETATION OF THE CONSTITUTION

MARK D. ROSEN*

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INTRODUCTION

There always have been within the United States insular communities with norms radically different from those of general society. To preserve their way of life, many of these communities have sought literally to govern themselves as independent entities so as to be as free as possible from the influences of larger American society. Examples include the Oneidas, the Hopedales, the Mormons, Native Americans, the Rajneesh,¹ and, perhaps, today's militia movement.² Scholars from across the political spectrum have argued that, as a normative matter, foundational commitments require that American society grant extensive powers of self-governance to at least some of these insular communities.³ This Article asks the following question: As a doctrinal matter, what is the maximum room American constitutional law leaves for such communities to run their lives?

This Article identifies heretofore unnoticed flexibility in our country's federal system by showing that the scope of permissible political autonomy at one subfederal level of government is larger than is commonly thought. This finding is germane even to those who do not believe that the normative questions concerning whether and to what extent insular communities should be permitted to run their own lives have been fully answered, for the

1. Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1071-86 (1998).

2. Susan P. Koniak, *The Chosen People In Our Wilderness*, 95 MICH. L. REV. 1761, 1783 (1997) (book review). It is unclear whether the militia movement would be willing to live peaceably within the United States if they were permitted to largely govern themselves—in which case they would qualify as an insular community—or if their true goal is to establish their legal universe across the entire country.

3. Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4 (1996) (arguing on the basis of liberal premises); Rosen, *supra* note 1, at 1089-1125 (arguing on the basis of Rawlsian liberal theory); Mark D. Rosen, *"Illiberal" Societal Cultures, Liberalism, and American Constitutionalism*, 12 J. CONTEMP. LEGAL ISSUES (forthcoming 2002) (arguing on basis of synthetic reading of Rawls and Kymlicka); see also WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 5 (1989) (discussing minority group rights); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 297-331 (1974) (discussing the extensive powers of self-governance that groups should be allowed); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing society and communities and their interaction with the law).

conviction that the Constitution bars the exercise of extensive governmental powers by insular communities may account for the limited scholarly attention that has been paid to these underlying normative questions. With the understanding that accommodating these communities' needs is constitutionally possible, other scholars may revisit these issues.

Understanding how much room for self-governance is available under contemporary law requires careful analysis of two possible routes to self-governance: private ordering (through involuntary associations or contract) and public ordering (by creating a new local government). There are several fundamental differences between these two options.⁴ On the one hand, privately ordered groups might be said to have more freedom insofar as they are not ordinarily subject to constitutional limitations.⁵ On the other hand, private ordering has two important drawbacks vis-à-vis public ordering. First, groups that opt for private ordering do not enjoy the power to norm-shape and coerce via law—a profound handicap for those communities that believe law has unique socializing powers.⁶ Second, whereas private ordering typically only adds obligations onto society's laws,⁷ public ordering may grant the political

4. This is true despite the fact that it sometimes can be difficult to distinguish, in both law and fact, between public and private ordering. *E.g.*, JOEL GARREAU, *EDGE CITY* 184-85 (1991) (describing how the privately owned Sun City, Arizona closely resembles a public municipality).

5. With the exception of the Thirteenth Amendment, the Constitution limits governmental actors, not private parties. *E.g.*, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). Private groups would be subject to other constitutional limitations only if they were deemed to be state actors under the state action doctrine, *e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982), or if they were deemed to be federal agents. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) (holding that a corporation can be an "agency" of the federal government).

6. Rosen, *supra* note 1, at 1064-71. Professor Koniak has noted that [i]t is the commitment to act in accordance with the stories and norms that makes . . . material law. Law, as opposed to other forms of normative discourse, seeks to "impose meaning on [a resistant reality] . . . and then to restructure it in the light of that meaning." That is what separates law from literature; the judge's words from the philosopher's; and [the militia movement's] narratives from those of others.

Koniak, *supra* note 2, at 1783 (footnotes omitted) (quoting RONALD DWORKIN, *LAW'S EMPIRE* 47 (1986)); see also Koniak, *supra* note 2, at 1765-80 (discussing the Common Law World).

7. For an example of a rare statute that provides exceptions for private groups, see 42 U.S.C. § 2000e-1(a) (1994). Title VII protections against gender discrimination are inapplicable against an employer that is a "religious corporation, association, educational

community immunity from some of general society's regulations,⁸ increasing the extent to which the community can run its own life.

Whether private or public ordering ultimately holds out greater promise vis-à-vis self-governance thus turns on two considerations. First, what are the range of powers a group can exercise under each? Second, what are the group's particular needs?⁹ This Article helps to answer the first question by clarifying the scope of public power. It is part of a larger project that considers the maximal powers of self-governance that can be exercised by communities in the United States.¹⁰

Although the primary limits on the exercise of public power are constitutional, this Article is not a restatement of ordinary constitutional doctrines. Instead, it asks whether there are special constitutional limitations that may be operative when insular groups seek to exercise public power to govern themselves. In an earlier article, I suggested an affirmative answer to this question: ordinary federal and state courts may vary the application of

institution, or society." *Id.*

8. For example, a group that constitutes itself as a municipality typically is not subject to the ordinances of other municipalities. *E.g.*, *Board of Educ. v. Grumet*, 512 U.S. 687, 712 (1994) (O'Connor, J., concurring) (noting that an initial precipitator of the Satmar Chasidim's formation of the village of Kiryas Joel was a desire to free themselves from the town of Monroe's zoning requirements, which, among other things, disallowed the subdivision of apartments, which was important to the community due to their large extended families). Furthermore, the State is disabled from regulating in relation to matters that fall within a municipality's home rule immunity. *E.g.*, *City of LaGrande v. Public Employees Ret. Bd.*, 576 P.2d 1204, 1210-15 & n.30 (Or. 1978); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1175 & n.5 (1996) (noting that "[h]ome rule provides localities some autonomy from the states of which they are a part, either by allowing them to take certain actions without express grants of power from the state ('home rule initiative') or by insulating them from state interference within a certain circumscribed realm ('home rule immunity')," but also observing that "[b]oth of these attempts are plagued with conceptual and practical difficulties").

9. In a previous article I showed that some communities believe they require the powers that attend public ordering to survive. Rosen, *supra* note 1, at 1064-89. For a similar account of the militia movement, see Koniak, *supra* note 2, at 1764-85.

10. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000) [hereinafter Rosen, *Of Tribal Courts*]; Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999) [hereinafter Rosen, *Our Nonuniform Constitution*]. For a preliminary consideration of the prospects of private ordering, see Rosen, *supra* note 1, at 1086-87, 1129-30, 1143. In the future, I hope to more fully consider the scope of freedom afforded by private ordering.

constitutional standards as they are applied to insular groups, allowing such communities more options in the exercise of public power than ordinary state and local governments enjoy.¹¹ This Article examines an even more radical approach to the modulation of constitutional limitations with respect to insular communities. Rather than relying on federal and state courts to modify the application of constitutional principles to insular groups, Congress may empower the communities themselves to authoritatively construe designated provisions of the Constitution insofar as the provisions apply to them, subject to only modest limitations. This would reduce (although certainly not eliminate) the most important competitive advantage of private ordering over public ordering; insular communities that opt for public ordering may be made immune from constitutional limitations as construed by ordinary federal and state courts, and may be subject instead to the good faith determinations of their own community's courts of what limitations such constitutional provisions impose on them.

I recognize that at first glance (and perhaps even second or third) this might appear to be a doubly problematic solution. Many people would say, I imagine, that it would be best not to give insular groups extensive powers of self-governance, and that if we do, we should be sure to keep tight control over them. But sometimes our larger commitments as a society lead us to tolerate activities we do not like; flag burning and permitting the Nazis to march in Skokie are prime examples.¹² There is a similar normative claim here: foundational commitments may demand that our society give significant powers of self-governance to insular communities that

11. Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1138-66.

12. *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down law making flag burning a crime); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (upholding right of Nazis to march in Skokie, a largely Jewish suburb then populated by large numbers of Holocaust survivors); see also ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979) (defending right of the Nazis to march). To be sure, many have been critical of these applications of the First Amendment. *E.g.*, Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1389 (1998) ("From a rights-based perspective, one may well conclude that there is no substantive right to engage in public hate speech, such as the Nazi march in Skokie."). In any event, the veracity of the point made above in text does not turn on whether the courts were correct in permitting flag burning and Nazi marches.

are willing to live in accordance with certain limitations.¹³ As stipulated above, I will assume for present purposes that the reader either agrees with this, or that she has suspended judgment about the normative question so as to explore the scope of self-governance that our constitutional order potentially can accord such communities.

The mechanism for self-governance proposed and explored here—the delegation of circumscribed interpretive authority of select provisions of the Constitution to a limited number of “community-based courts”—is not as unique as it might at first sound. In fact, it is very similar to the powers exercised by Native Americans in Indian country.¹⁴ As explained in this Article, each tribe’s courts are authorized to provide their own interpretations of “due process,” “equal protection,” “search and seizure,” and the like, with no review from federal courts in virtually all cases. As a result, due process means one thing in Chicago, another in the 25,000 square miles of Navajo land, and yet something else on the Nisqually reservation.

Elsewhere I have analyzed the many benefits of the regime of community-based courts in Indian country.¹⁵ To quickly summarize, the regime permits the creation of unique doctrines and governmental institutions that support Indian culture, and the avoidance of doctrines and institutions that actively undermine it.¹⁶ Yet as the regime sustains cultural heterogeneity, it simultaneously helps to create a common nationwide culture insofar as all tribes are interpreting the shared text of American constitutional principles. Indeed, the tribes have deeply assimilated Anglo-constitutional principles even as they have given them unique constructions that reflect and support Indian culture.¹⁷

More generally, allowing diverse communities the opportunity to authoritatively construe a shared text holds out the possibility of creating commonality without commanding homogeneity. It is a

13. See *supra* note 3 and accompanying text.

14. “Indian country” is a statutory term denoting places of tribal jurisdiction. 18 U.S.C. § 1151 (2000).

15. Rosen, *Of Tribal Courts*, *supra* note 10.

16. *Id.* at 500, 511-22.

17. *Id.* at 525-78, 584.

method for simultaneously coordinating a diverse citizenry and championing heterogeneity.¹⁸ It is an approach that is consonant with one of the federal system's chief objectives of uniting without snuffing out difference.

The mechanism for self-government developed in this Article shows that these benefits could be achieved on behalf of non-Indian communities as well. There would be important differences, however, between community-based courts and the tribal courts. Most importantly, the law the tribes interpret is statutory rather than constitutional; the Constitution does not apply to Indian tribes, and the "due process" and other limitations on tribal governments that are construed by tribal courts derive from a statute—the so-called Indian Civil Rights Act.¹⁹ Yet the tribal experience is still highly instructive. This is because, as this Article shows, the Constitution permits Congress to create community-based courts for non-Indian communities that would be empowered to provide their own interpretations of select federal constitutional provisions, subject to only limited constraints, without review from federal or state courts. Tribal courts accordingly provide a suggestive glimpse of how a regime of multiple authoritative interpreters of constitutional language functions. The encouraging results in Indian country suggest that similar benefits might be obtained for other insular communities.

This Article proceeds in four parts. Part I explains the law that has created a regime of multiple authoritative interpreters in Indian country. It then identifies the potential benefits and costs of the tribal regime of multiple authoritative interpreters, and summarizes the findings of an extensive empirical study of tribal case law interpreting the Indian Civil Rights Act. The study shows that the tribal court regime has brought about significant benefits at reasonable costs.

Part II explains how a similar regime of community-based courts could be created on behalf of non-Indian communities. Creating

18. For the suggestion that the Bankruptcy Code analogously is drafted in a manner that establishes national general policies but permits variations across localities so as to preserve different local cultures, see Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 630-33 (1999).

19. See *infra* notes 24-60 and accompanying text.

community-based courts for non-Indian communities implicates a variety of constitutional considerations that are not applicable to tribal courts. The Article accordingly examines Congress's powers to strip jurisdiction from state and federal courts, including the Supreme Court, which requires careful analysis of due process, Article III jurisprudence, habeas corpus doctrine, and the Exceptions Clause. Also necessary is an evaluation of congressional powers in relation to federal lands, which calls into question the Property Clause, because it is on such lands that the communities would be situated.

A crucial distinction between tribal courts and the newly created community-based courts would be the source of law each interprets: whereas tribal courts construe statutory law, the community-based courts would be interpreting constitutional provisions. Part III considers to what extent this difference would limit community-based courts' interpretive freedom. It concludes that community-based courts would enjoy most, but not all, of the interpretive authority that tribal courts have. Part III explains why community-based court deviations from ordinary constitutional doctrines would not violate the foundational rules of interpretive hierarchy established in cases such as *Marbury v. Madison*,²⁰ *Cooper v. Aaron*,²¹ *Martin v. Hunter's Lessee*,²² and *City of Boerne v. Flores*.²³ Part III also explains why the mere existence of multiple authoritative interpreters of select constitutional provisions would not run afoul of structural constitutional limitations.

Part IV examines other considerations that bear on the pertinence of the tribal experience in respect of community-based courts for non-Indian communities. Part IV explains why many of the findings concerning tribal courts likely would transfer seamlessly to community-based courts. It also, however, identifies two unique risks that would be posed by community-based courts.

20. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

21. 358 U.S. 1, 1 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."); see *infra* notes 194-209 and accompanying text.

22. 14 U.S. (1 Wheat.) 304 (1816); see *infra* notes 194-209 and accompanying text.

23. 521 U.S. 507 (1997); see *infra* notes 179-93 and accompanying text.

Part IV then considers the factors that bear on predicting the likelihood of their realization and their probable costs.

I. THE TRIBAL REGIME OF COMMUNITY-BASED COURTS

A. *The Regime's Doctrinal Construction.*

The Constitution does not apply to tribal governments.²⁴ Concerned with potential abuses of power by the tribes, Congress imposed statutory obligations on tribal governments in the Indian Civil Rights Act (ICRA) that, with only a few exceptions, track verbatim the language of the Bill of Rights.²⁵ For example, the ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances."²⁶ Similarly a tribe may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law"²⁷ or undertake "unreasonable search[es] and seizures."²⁸

Although the ICRA is federal law, federal courts have subject matter jurisdiction over only a small set of ICRA claims;²⁹ according to the Supreme Court, imposing limitations on tribes without granting significant federal court jurisdiction was Congress's way

24. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959).

25. 25 U.S.C. §§ 1301-1341 (1994); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 & n.14 (1978). Some of the Bill of Rights provisions not statutorily applied against tribes are the prohibition concerning the establishment of religion and the requirements of jury trials in civil cases and appointment of counsel for indigents in criminal cases. *Id.* at 63.

26. 25 U.S.C. § 1302(1).

27. *Id.* § 1302(8).

28. *Id.* § 1302(2).

29. Federal courts can hear claims only where a party is in "detention." *Id.* § 1303; *Martinez*, 436 U.S. at 70. In all other cases, tribal courts have exclusive jurisdiction. Furthermore, virtually all ICRA claims concerning detention are litigated in tribal rather than federal courts. As a result, nearly all ICRA jurisprudence has been created by tribal courts. For a more complete discussion of the extent of tribal courts' independent jurisdiction, see Rosen, *Of Tribal Courts*, *supra* note 10, at 485-88.

of balancing the protection of individual rights against respect for tribal autonomy.³⁰ Of key significance, tribal courts are not required to interpret the ICRA's provisions as federal courts have interpreted the ICRA's sister terms in the Bill of Rights. Instead, tribal courts may interpret due process, equal protection, and the like, in light of tribal needs, values, customs, and traditions.³¹ Indeed, *each tribe* is allowed to develop its own interpretation of the ICRA's terms in light of its own tribe's unique needs, values, customs, and traditions.³²

These doctrines collectively explain why tribal courts function as a regime of multiple authoritative interpreters of quasi-constitutional federal law. Thus, although the Supreme Court has articulated a specific interpretation of, for example, due process, there is nonuniformity of interpretation of due process as between general society and the enclaves of Indian country. Furthermore, there is nonuniformity of interpretations as among Native American communities. And with respect to due process, as is the case with virtually all ICRA provisions, there is virtually no federal court review over the tribal court interpretations.

B. The Regime's Performance.

In an earlier article, I reported the results of a comprehensive analysis of thirteen years of reported tribal court decisions construing and applying the ICRA.³³ The article considered the potential benefits and costs of ICRA's regime of multiple authoritative interpreters of federal law, and concluded that significant benefits had been achieved at only minimal costs. More generally, the ICRA case law showcases the effects of allowing diverse communities the power to independently and

30. *Martinez*, 436 U.S. at 62.

31. *Id.* at 55 (noting that "standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause [are] not necessarily controlling in the interpretation of" the ICRA); *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976). Tribal courts have authority to offer independent constructions even of those few ICRA provisions over which federal courts have concurrent jurisdiction. *Rosen, Of Tribal Courts*, *supra* note 10, at 487.

32. *E.g.*, *Rave v. Reynolds*, 22 Indian L. Rptr. 6137, 6139 (Winnebago Tribal Ct. 1995) (noting that other tribes' holdings are "not binding on this court").

33. *Rosen, Of Tribal Courts*, *supra* note 10, at 489-578.

authoritatively construe identical legal texts. Shared interpretations of legal texts, such as due process and equal protection, help to create a common, nationwide culture. Yet the power to offer independent interpretations simultaneously allows diverse communities the opportunity to maintain, and even advance, their distinctive cultures.

The potential benefits of ICRA's regime of multiple authoritative interpreters are institutional diversity and self-governance, both of which support the well-being of tribal communities and tribal culture.³⁴ These potential benefits have been realized. The ICRA regime has allowed for the creation of doctrines and novel governmental institutions that reflect the distinctive needs and values of Native Americans.³⁵ For example, due process and free speech have been construed so as to secure these Anglo-values while still bolstering the traditional respect that is to be accorded to tribal leaders;³⁶ search and seizure has been interpreted so as to protect individuals without disabling tribal police from undertaking "welfare checks" that reflect the tribal value of proactively looking after other members' well-being;³⁷ and the right to a jury has been interpreted as an aspect of "participatory democracy" that requires that jurors be allowed to direct questions to witnesses.³⁸ Further supporting tribal culture, the ICRA regime of multiple authoritative interpreters has allowed the tribes to transform their community narratives and self-understandings (of "welfare checks" and "participatory democracy," for example) from mere literature to law, lending them the eminence, socializing power, and coercive potential that characterize law. The opportunity to construe the ICRA in accordance with tribal needs and values, in conjunction with the novel doctrines and institutions that such interpretive

34. *Id.* at 500-01.

35. *Id.* at 512-78.

36. *Id.* at 516 (discussing tribal due process case of *Colville Confederated Tribes v. Bray*, 26 Indian L. Rptr. 6061 (Colville Tribal Ct. 1999)); *id.* at 553-54 (discussing free speech case of *Brandon v. Tribal Council for the Confederated Tribes*, 18 Indian L. Rptr. 6139 (Grand Ronde Tribal Ct. 1991)).

37. *Id.* at 517 (discussing *Hopi Tribe v. Kahe*, 21 Indian L. Rptr. 6079 (Hopi Tribal Ct. 1994)).

38. *Id.* at 519-20 (discussing *Downey v. Bigman*, 22 Indian L. Rptr. 6145 (Navajo 1995)).

freedom has afforded, collectively amount to a grant of extensive opportunities for self-governance.

The principle potential costs of the ICRA's regime of multiple authoritative interpreters are the inefficiencies entailed by multiple court systems, the imposition of externalities upon those outside Indian country, and the risk of undermining the protection of individual rights that the ICRA was intended to afford.³⁹ The first two costs are not significant.⁴⁰ The third is of real concern, but a careful analysis of the tribal case law suggests that such "Protection" costs have been negligible. To begin with, it is important to understand that as both a normative and doctrinal matter, the mere fact that ICRA doctrines vary from Bill of Rights doctrines does not indicate that Protection has been undermined.⁴¹ A careful look at the case law can yield some preliminary inductive conclusions as to whether or not the ICRA regime has resulted in unacceptable costs to Protection, though full analysis requires a thick political theory that answers which communities ought to be given extensive powers of self-governance and to what extent.⁴² Analyzed inductively, the legal doctrines tribal courts have created, as well as their methods of interpretation, strongly suggest that tribal courts have interpreted the ICRA in good faith, a necessary though not sufficient condition for the containment of Protection costs.⁴³ The ICRA has been deployed to require significant changes in tribal governmental practices and to create extensive rights for individuals.⁴⁴ Tribal courts take federal case law seriously and tend to deviate from it only for good reasons.⁴⁵ The tribal case law also

39. *Id.* at 501, 505-06.

40. With regard to the second potential cost, there are virtually no externalities because the ICRA provisions govern activities that occur, and have consequences that remain, within Indian country. *Id.* at 579. The first potential cost is real, but it is merely financial, and tribes appear to be willing to absorb such monetary costs to gain for themselves the self-governance and other benefits that the regime affords. Furthermore, tribes have the option of saving costs by forming regional courts that cater to multiple tribes, as some have done. *E.g.*, Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 n.27 (1998).

41. Rosen, *Of Tribal Courts*, *supra* note 10, at 501-02.

42. *Id.* at 502-03.

43. *Id.*

44. *Id.* at 523-24, 529-78.

45. *Id.* at 513, 524-25.

has fared well when analyzed under the lens of a thick normative political theory that seeks to identify the appropriate outer limits of community self-governance;⁴⁶ there are no outcomes that flatly violate the protections that tribal members ought to have, and the reasoning of only one of the reported cases is clearly problematic.⁴⁷

A particularly important finding of the study was that even though tribal courts provide independent interpretations of the ICRA, they appear to have deeply assimilated many Anglo-constitutional values.⁴⁸ There is evidence of tribal courts' progressive fluency with the ICRA provisions:

[A] large number of tribal cases employ terms such as "due process," "fundamental rights," "equal protection," "warrant," "probable cause," and so forth, without citing to any statutory or tribal constitutional sources. Similarly, many recent tribal court decisions that cite to an ICRA provision ... articulate the [applicable] Legal Test without citing to case law even when other parts of the decision cite to legal authority to establish legal propositions. Ready invocation of the ICRA's terminology and doctrine without statutory and case citation suggests that the Anglo-concepts have worked their ways into tribal judges' basic professional vocabularies and ways of thinking. More evidence of assimilation is that tribal courts sometimes attribute the legislative purposes of advancing due process and other Anglo-values to *tribal ordinances* and accordingly construe the ordinances in ways that reflect those doctrines. Another sign of deep assimilation is that tribal courts sometimes adopt federal doctrines without apparently recognizing that there are plausible alternatives.⁴⁹

The result of tribal assimilation of Anglo-values is not the displacement of Indian values, but a rich cultural syncretism

46. Rosen, *supra* note 1, at 1089-1106.

47. Rosen, *Of Tribal Courts*, *supra* note 10, at 542-44 (discussing *Winnebago Tribe v. Bigfire*, 25 Indian L. Rptr. 6229 (Winnebago Sup. Ct. 1998)).

48. *Id.* at 525-29. In the words of one tribal court, "[a]lthough tribal due process may differ when it comes to its application to customary and traditional laws, many of the principles embodied in the Bill of Rights have become key ingredients in the Indian legal processes . . ." *Teeman v. Burns Paiute Indian Tribe*, 25 Indian L. Rptr. 6197, 6199 (Burns Paiute Tribal Ct. App. 1997).

49. Rosen, *Of Tribal Courts*, *supra* note 10, at 527-28.

between Anglo- and tribal values. Tribes frequently interpret the ICRA's terms by referring to tribal customs, and there is evidence that this effort may even affect tribal courts' understandings of their own tribal customs.⁵⁰ The most compelling evidence of this syncretism, however, is in the tribal court decisions themselves. The tribal courts' doctrines of ICRA, due process, equal protection, search and seizure, and the like, are familiar to students of American constitutional law, but also teem with Indian values of interpersonal responsibility,⁵¹ respect for leaders,⁵² the community good,⁵³ and "consensual and egalitarian principles of governance."⁵⁴

In short, the benefits that attend a regime of multiple authoritative interpreters seem to outweigh the costs under the ICRA. The case law suggests that the ICRA is a successful example of creating commonality through shared texts while permitting heterogeneous interpretations that support diverse local cultures.

II. CREATING ANALOGOUS COMMUNITY-BASED COURTS FOR NON-INDIAN COMMUNITIES

A. Overview

Although tribal courts and the ICRA are products of the unique experience and status of Native Americans, there is a doctrinal basis for creating "community-based courts" on behalf of non-Indian communities located on federal property that would be almost functionally identical to tribal courts. The community-based courts would be the virtual equivalents of tribal courts insofar as they would be local tribunals empowered to construe due process, equal protection, and the like, with virtually no federal or state court review. Like tribal courts, the community-based courts would be located in federal enclaves, where homogeneous communities could

50. *Id.* at 526-27 (discussing *Begay v. Navajo Nation*, 15 Indian L. Rptr. 6032 (Navajo 1988)).

51. *E.g., id.* at 514-15 (discussing a case that invoked the concept of *k'e*, which refers to "one's unique reciprocal relationships to the community and the universe," to construe due process).

52. *E.g., id.* at 516-17.

53. *E.g., id.* at 518-19.

54. *Id.* at 521 (quoting *Rough Rock Cmty. Sch. v. Navajo Nation*, 22 Indian L. Rptr. 6162, 6165 (Navajo 1995)).

live governed by their own special local governments. Though only a handful of communities presumably would be willing to go through the effort of uprooting themselves and moving to undeveloped federal land where they could build their ideal communities, it likely would not be a null set.⁵⁵

An example might be useful, though this Article will not identify or defend any particular beneficiaries of these federal enclaves.⁵⁶ Whereas the Mormon community relocated to the Utah territory in the 1840s to achieve political and religious autonomy,⁵⁷ there are no longer similar opportunities for contemporary Mormon-like communities that perceive the need to largely cordon themselves off from general society and run their own lives.

There are four necessary elements of any statute that would create community-based courts on behalf of non-Indian communities. First, the statute would have to set aside federal property on which select communities could live⁵⁸ and create community-based courts there; this could be done in reliance on the Property Clause of Article IV, Section 3, Clause 2. Second, the statute would have to withdraw jurisdiction over select constitutional claims that arise from such enclaves from the United States Supreme Court; this

55. Rosen, *supra* note 1, at 1071-86 (describing several nineteenth and twentieth-century groups that have sought to cordon themselves off from general society and build insular communities). To be sure, presumably only a few groups would seek to build communities on federal land. This appears to be a good thing, however, for two reasons. First, maintaining the integrity of the larger American community may not be possible if extensive powers of self-governance were granted to a large number of subfederal groups. *Id.* at 1097. Second, the difficulties of establishing such communities on federal land aids in the difficult administrative task of determining which groups deserve to have extensive powers of self-governance. Hardship ensures only groups deserving extensive powers of self-governance self-select for it. How so? The reasons for permitting extensive powers of self-governance are strongest in respect to those groups who believe that absent such autonomy their members will be unable to fully realize themselves as human beings. *Id.* at 1091-97. One would expect that it would only be such deserving ideologues that would be willing to absorb the costs involved in relocating and building a new community. This is particularly true if, as is the case with Indian reservations, the federal government did not alienate the federal property to the communities but only held it in trust for them, thereby eliminating a possible financial incentive that otherwise might attract undeserving beneficiaries. *See infra* note 58 and accompanying text.

56. For such an analysis, see Rosen, *supra* note 1, at 1089-1106, 1124-25.

57. *Id.* at 1071-74.

58. Though beyond the scope of this Article, federal Indian law offers one model of the federal government holding federal lands in trust for the use of special communities. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 471-73 (1982).

could be done pursuant to the Exceptions Clause of Article III, which grants the Supreme Court "appellate Jurisdiction ... with such Exceptions ... as the Congress shall make."⁵⁹ Finally, the statute would have to withdraw jurisdiction over such claims from both inferior federal courts and state courts to ensure that neither set of courts replaced the Supreme Court as the authoritative expositor of the select constitutional claims subject to the Exceptions Clause.⁶⁰

The next part of the Article will examine the constitutionality of such a statute to create community-based courts (CBC Statute) from the perspectives of Article III, the Exceptions Clause, due process, equal protection, the Suspension Clause, and the Establishment Clause. It will conclude that the constitutionality of the CBC Statute would turn on several normative and empirical considerations.

B. Creating the Community-Based Courts

Two issues arise in relation to the creation of the community-based courts: pursuant to what enumerated power could Congress act to create them, and would their creation run afoul of Article III or other constitutional limitations?

1. The Property Clause

Congress could rely on its powers under the Property Clause of Article IV, Section 3, Clause 2 to create community-based courts on federal lands within the borders of the United States.⁶¹ The clause grants Congress plenary power to legislate in federal lands,⁶² and

59. U.S. CONST. art. III, § 2, cl. 2.

60. In addition, there may be prudential limitations that Congress may wish to place on the community-based courts' interpretive freedom. For example, Congress could disallow community-based courts from engaging in Re-standardizing. See *infra* notes 233-36 and accompanying text.

61. It reads "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" U.S. CONST. art. IV, § 3, cl. 2. The word "territory" long has been understood to be equivalent to the word "lands." See *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840).

62. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (Property clause grants Congress complete power over federal property); *United States v. San Francisco*, 310 U.S. 16, 29-30

Congress has utilized the Property Clause to create "territorial courts" (also known as Article IV courts) in the U.S. territories.⁶³ Congress could even purchase land from states for the settlement of special communities because Congress's plenary power under the Property Clause extends to federal land that had once been part of a state.⁶⁴

Community-based courts would not be nearly as unique as they might at first sound, as there are other federally created "local" courts in the United States today. For example, the United States Supreme Court has upheld Congress's creation of non-Article III courts in the District of Columbia⁶⁵ to adjudicate "matters of strictly local concern" for a geographical enclave with "particularized needs and warranting distinctive treatment."⁶⁶ Similarly, federal courts have upheld Congress's power under the Property Clause⁶⁷ to create Courts of Indian Offenses on Indian reservations⁶⁸ that have jurisdiction to hear both private and criminal law claims.⁶⁹ Nor

(1940) ("The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'") (quoting *Light v. United States*, 220 U.S. 523, 527 (1911) (footnote omitted)).

63. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-65 (1982); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

64. *United States v. McGowan*, 302 U.S. 535, 537 & n.4, 539 (1938) (land purchased by the federal government from a state for the purpose of settling a community qualifies as federal property for purposes of the Property Clause).

65. Congress, however, did not rely on Article IV's Property Clause for this but on its powers under Article I, Section 8, Clause 17. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838).

66. *Palmore v. United States*, 411 U.S. 389, 407-08 (1973) (upholding creation of special non-Article III courts for special geographical area); see also *Northern Pipeline*, 458 U.S. at 76 (noting that *Palmore* upheld creation of special non-Article III court for distinctive "geographic areas"). Although Congress relied on its powers under Article I, Section 8, Clause 17 rather than the Property Clause to create the non-Article III courts for the District of Columbia, see *Kendall*, 37 U.S. at 619, Congress's powers under both clauses in respect to creating courts appear to be similar. The Court has consulted Congress's power to create territorial courts under the Property Clause for the purpose of identifying the scope of Congress's court-creating powers under Article I, Section 8, Clause 17. *Palmore*, 411 U.S. at 402-03. Relatedly, the Court has drawn an equivalence between Congress's powers to create territorial courts and its powers to create legislative courts within the United States. *Ex parte Bakelite Corp.*, 279 U.S. 438, 456 (1929).

67. *E.g.*, *McGowan*, 302 U.S. at 539 (Congress regulates Indians on federal lands pursuant to its powers under the Property Clause of Article IV, Section 3, Clause 2).

68. *Tillett v. Lujan*, 931 F.2d 636, 639-40 (10th Cir. 1991); see also *Williams v. Lee*, 358 U.S. 217, 222 (1959) (assuming the constitutionality of Courts of Indian Offenses).

69. 25 C.F.R. § 11.101-103 (2001).

could it be successfully claimed that community-based courts could not be given the jurisdiction to hear constitutional matters, for it is well-established that non-Article III local courts may entertain constitutional claims.⁷⁰

2. Article III

The next question is whether constitutional limitations external to the Property Clause would render creation of community-based courts unconstitutional. Article III, the most likely foe of such an effort, would not pose an obstacle. The most direct support for this conclusion comes from case law that has withstood Article III challenges to Congress's powers to create Article IV territorial courts.⁷¹ These cases, however, predate the Court's modern Article III jurisprudence, and therefore, a complete analysis of the Article III implications of Article IV community-based courts requires an independent examination under contemporary Article III doctrine.

70. *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 586 (1976) (concluding that "the federal territorial . . . courts generally had jurisdiction to redress deprivations of constitutional rights by persons acting under color of territorial law"). In fact, the Court in *Flores de Otero* considered the argument that the territorial court had *exclusive* jurisdiction over claims concerning constitutional violations. It concluded in the negative on the basis of statutory interpretation, never suggesting that exclusive jurisdiction would be constitutionally problematic. *Id.* at 594-97.

71. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (upholding Congress's powers to create territorial court, under the Property Clause); see generally *Northern Pipeline*, 458 U.S. at 64-65. For a trenchant criticism of *Canter*, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS (1789-1888)*, at 120-22 (1985). Nonetheless, *Canter* is unlikely to be overturned because it is longstanding, well-established precedent that has been heavily relied upon. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 922 n.35 (1988) (noting *Canter's* "entrenched historical status and the statutory practice justified by its authority"). Furthermore, the Court recently affirmed *Canter's* reasoning. *Palmore*, 411 U.S. at 403.

Article III jurisprudence⁷² identifies two general categories of Article III protections—"personal" and "structural"—and invasion of either will render a non-Article III court unconstitutional.⁷³ Personal protections refer to an individual's "right to have claims decided before judges who are free from potential domination by other branches of government."⁷⁴ This personal protection, however, may be waived by litigants⁷⁵ who "consent" to having a matter litigated by a non-Article III tribunal.⁷⁶ Waiver can be either express⁷⁷ or constructive.⁷⁸ Waiver can be effectuated by actions

72. Although contemporary Article III doctrine has been refined largely in the context of litigation challenging Article I courts, *see, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 836-37 (1986), *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583-85 (1985); *Northern Pipeline*, 458 U.S. at 50, 84, the doctrine should carry over seamlessly to the context of Article IV community-based courts. After all, what is significant vis-à-vis Article III is the creation of a non-Article III court, not upon which provision Congress relied to make it (except to the extent Congress relies on a constitutional provision that postdates Article III and is understood as implicitly amending it, *cf.* *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635-36 (1999) (Eleventh Amendment does not limit Congress's powers under Section 5 of the Fourteenth Amendment), which, of course, is not the case with Article III). Indeed, the relevance of case law from the territorial courts context to the context of Article I courts has been explicitly recognized in the case law. *E.g.*, *Ex parte Bakelite Corp.*, 279 U.S. 438, 456 (1929) (noting that when considering the issue of the constitutionality of an Article I court, the Court relied upon a case involving a territorial court and stated that "while that case related to lands in a Territory, there can be no real doubt that the same rule would apply were the lands in a State"). Similarly, the Court frequently speaks of "legislative" courts to refer both to Article I and Article IV courts. *See, e.g.*, *id.* at 451; *see also Northern Pipeline*, 458 U.S. at 70 (noting "three situations in which Art. III does not bar the creation of legislative courts," which includes territorial courts).

73. *E.g.*, *Peretz v. United States*, 501 U.S. 923, 936-37 (1991).

74. *United States v. Will*, 449 U.S. 200, 218 (1980).

75. *Peretz*, 501 U.S. at 936 ("We have previously held that litigants may waive their personal right to have an Article III judge preside over a civil trial. The most basic rights of criminal defendants are similarly subject to waiver.") (citation omitted).

76. *E.g.*, *id.* ("There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent.")

77. *E.g.*, *Schor*, 478 U.S. at 849 (finding "express waiver" of right to Article III adjudication).

78. *E.g.*, *id.* at 849-50 (finding an "effective waiver" of the right to proceed in state or federal court to pursue a private right of action where federal regulations indicated that the CFTC was empowered to adjudicate all counterclaims "aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint"). Indeed, all of the cases cited to by the Court for the proposition that parties can waive even their "most basic [constitutional] rights" involved circumstances where parties' attorneys failed to assert objections at the trial level and thus likely were examples of constructive waivers, i.e., instances where the parties (mostly criminal defendants) were not in fact aware that they

undertaken in advance of the dispute and cannot be withdrawn later at the time of lawsuit.⁷⁹ In the context of community-based courts, it should be the case that both members and nonmembers of the community can waive their rights, although the criteria for determining waiver may vary as between the two.⁸⁰ As a result, the personal protections of Article III offer no doctrinal obstacle to community-based courts insofar as they serve individuals who have consented, either expressly or constructively, to having their litigation heard in such courts.⁸¹

With respect to Article III's so-called "structural" protections, the Court has strongly suggested, though has not yet definitively concluded, that these cannot be waived.⁸² The analysis that follows assumes such protections cannot be waived.⁸³ Structural protections are a species of separation of powers doctrines; they are the protections that are necessary to guard the "role of the independent judiciary within the constitutional scheme of tripartite government."⁸⁴ The Court likewise has characterized these as protections against "congressional attempt[ts] 'to transfer jurisdiction [to non-

were waiving their rights. *Peretz*, 501 U.S. at 936.

79. Waivers are not a subset of *res judicata*, for waivers of constitutional rights have been upheld even where no trial has occurred. *E.g.*, *Boykin v. Alabama*, 395 U.S. 238 (1969) (upholding waiver of criminal trial by guilty plea).

80. The validity of the points concerning nonmembers is illustrated by federal Indian law, under which a person who is not a member of a tribe can undertake prelitigation acts that give tribal courts jurisdiction over her such that she is required to litigate in the tribal court notwithstanding her desire at the time of litigation to have her case heard in a state or federal court. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 221-23 (1959) (holding that a non-Indian owner of store on reservation is not permitted to litigate action to collect for goods sold on credit outside of tribal court). Although federal Indian law is a highly idiosyncratic field of law, its *sui generis* character does not undermine the lessons it can teach vis-à-vis generic waiver principles.

81. Although the details of what would qualify as constructive consent are beyond the scope of this Article, it is worth noting that federal Indian law once again offers an instructive model. *See, e.g., id.* (non-Indian obligated to litigate private law claim in tribal court).

82. *Peretz*, 501 U.S. at 937 (noting question not yet decided). Language in the previously decided case of *Schor*, however, suggests that structural protections cannot be waived. *Schor*, 478 U.S. at 850-51 ("To the extent this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2.")

83. Should this assumption prove untrue, the structural analysis would be a precise reproduction of the waiver argument provided immediately above in the text.

84. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985).

Article III tribunals] for the purpose of emasculating' constitutional courts"⁸⁵ and for "preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'"⁸⁶ In determining whether a statute runs afoul of these structural protections, the Court most recently has "declined to adopt formalistic and unbending rules [I]n reviewing Article III challenges, [the Court has] weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."⁸⁷ In particular, the Court looks to

the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.⁸⁸

Although not completely free of doubt, it is likely that community-based courts would not run afoul of Article III's structural protections under these standards. Though it is true that the community-based courts within the enclaves would be exercising the "range of jurisdiction and powers normally vested only in Article III courts,"⁸⁹ the Court has made clear that no single factor alone is determinative. The inquiry instead would turn on the "practical effect" of having limited numbers of community-based courts.⁹⁰ Analyzed from this perspective, the community-based

85. *Peretz*, 501 U.S. at 937 (quoting *Schor*, 478 U.S. at 850 (quoting *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, J., dissenting))) (second alteration in original).

86. *Schor*, 478 U.S. at 850 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

87. *Id.* at 851.

88. *Id.* Prior to *Thomas* and *Schor*, by contrast, the Court in *Northern Pipeline* sought to create a bright-line rule for Article III. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70-73 (1982).

89. *Schor*, 478 U.S. at 851.

90. *Id.* That the analysis above in text turns on the presence of only a limited number of community-based courts is not constitutionally problematic for "slippery slope" concerns. In *Schor*, the Court explicitly rejected such an argument, holding that "we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical 'slippery slope' may deposit us." *Id.* at 852. In short, the Court in *Schor* explicitly eschewed a bright-

courts should pass muster because they pose little danger of encroaching upon the judiciary from a separation of powers perspective if, as the analysis here assumes, only a limited number of enclaves with community-based courts are created.⁹¹ Under such circumstances, the "essential attributes of judicial power" are still reserved to Article III courts insofar as their jurisdiction remains unchanged, except in cases arising from a limited number of geographical enclaves.⁹² This understanding of the doctrine would explain why Courts of Indian Offenses do not offend Article III.⁹³

Also relevant to the analysis of Article III's structural protections are "the concerns that drove Congress to depart from the requirements of Article III."⁹⁴ It is here that the normative reasons for creating community-based courts become doctrinally germane. Elsewhere I have suggested that there are particularly strong arguments for granting communities significant powers of self-government when the failure to do so threatens to destroy communities whose presence does not destabilize the larger national polity.⁹⁵ Others have advanced similar claims.⁹⁶ Such normative arguments for granting significant powers of self-governance thus are doctrinally relevant to analyzing the constitutionality of community-based courts under Article III.

3. *Due Process*

Another potential doctrinal objection is that the CBC Statute would violate due process because it lodges the litigation of

line rule approach to Article III jurisprudence and instead adopted a fact-specific, case-by-case approach that looks closely at "practical effect."

91. See *supra* note 55 and accompanying text.

92. *Schor*, 478 U.S. at 851.

93. Cf. *Williams v. Lee*, 358 U.S. 217, 222 (1959) (assuming constitutionality of such courts); *Tillett v. Lujan*, 931 F.2d 636, 639-40 (10th Cir. 1991) (upholding constitutionality of Courts of Indian Offenses).

94. *Schor*, 478 U.S. at 851.

95. *Rosen*, *supra* note 1, at 1091-1106, 1126. There is a second implication of the observation made above in the text that is relevant to analyzing structural protections: Because only a few communities require such powers of self-governance to survive, there would be a need to create only a limited number of community-based courts. For this reason there would be little "practical effect" with respect to diminishing the judicial powers that reside in Article III courts.

96. See *supra* note 3.

constitutional issues in non-Article III courts. Though closely related to the Article III analysis discussed above, this is a distinct issue. The notion would be that due process itself demands that certain legal claims be heard in legal tribunals that have the life-tenure and other protections that Article III affords.⁹⁷ Such a challenge would fail, however, because it is well-established that, with respect to even constitutional claims, due process demands no more than—and indeed frequently does not even require⁹⁸—that parties have access to *some* judicial tribunal;⁹⁹ the tribunal need not be an Article III court.¹⁰⁰ Proceeding on the stricter view that due process would require access to some judicial tribunal in respect of the type and range of constitutional issues that would be directed to community-based courts, this requirement of due process would suggest that the tribunal that heard the constitutional claim would have to be more than just judicial in name but would need to have basic judicial attributes that provide “fair” process.¹⁰¹ Any Article IV

97. Cf. *Crowell v. Benson*, 285 U.S. 22, 87-88 (1932) (Brandeis, J., dissenting) (noting that due process might be a constitutional obstacle to the creation of a non-Article III tribunal even where Article III is not).

98. Indeed, the existence of such doctrines as sovereign immunity, the political question doctrine, and the public rights doctrine would appear to establish definitively that due process does not necessarily require access to a judicial tribunal even when a constitutional matter is at issue. RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 375 (4th ed. 1996) (noting that “no Supreme Court case squarely holds that there is a constitutional right of access to a judicial forum in every case involving a constitutional claim,” and suggesting that the aforementioned doctrines counsel against such an absolutist view of due process); see, e.g., *United States v. Stanley*, 483 U.S. 669 (1987) (finding no *Bivens* remedy for constitutional torts in limited contexts even though such a holding effectively precluded plaintiff any effective remedy); *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929) (noting that “claimants have [no] right to sue on [public rights claims] unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even requiring that the suits be brought in a legislative court”).

99. Although it is true that “under certain circumstances, the constitutional requirement of due process is a requirement of judicial process,” *Crowell*, 285 U.S. at 87 (Brandeis, J., dissenting), “[t]he due process clause does not guarantee a lower federal court adjudication of a federal claim any more than does article III.” Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 628 n.57 (1981).

100. E.g., *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 586 (1976) (holding that constitutional claims can be adjudicated in Article IV courts).

101. *Weiss v. United States*, 510 U.S. 163, 178 (1994) (noting that “a fair trial in a fair tribunal is a basic requirement of due process”) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

community-based courts accordingly would have to be created with such properties.

It is worth noting that the case law teaches that the procedures in non-Article III courts need not mirror what is constitutionally required in Article III courts.¹⁰² Whereas a full discussion of specifically what would be required by due process is beyond the scope of this Article, the relevant point for present purposes is that creating community-based courts that had certain judicial attributes that would guarantee their general fairness is not an impossible burden to satisfy.¹⁰³ Furthermore, what presumably would matter would not be the judicial attributes on paper but in action. In short, what would matter would be that the community-based court operated like a tribunal with basic judicial attributes. The empirical examination of the ICRA regime is relevant to understanding that creating such fair tribunals is possible. Because the tribal courts operate with the attributes of judicial tribunals,¹⁰⁴ it is reasonable to conclude that community-based courts could as well. If, on the other hand, the tribal court regime had radically failed, that would have erected a strong, even if not an absolute, presumption against such a possibility.

4. *Equal Protection*

Another possible challenge to the CBC Statute is that it violates equal protection insofar as it creates special tribunals on behalf of some communities. The statute, however, would readily satisfy the applicable low-level rational scrutiny test. Indeed, in several other contexts federal courts have understood that general federal courts may not be capable of discerning the needs of idiosyncratic communities and accordingly have upheld against challenge, and in

102. *E.g., id.* at 179-81 (holding that due process does not require that military judges have fixed length of service); *Palmore v. United States*, 411 U.S. 389, 410 (1973) (holding that due process does not require that judge in legislative court conducting criminal trial must have life tenure).

103. Requiring judicial attributes in the community-based courts would not undermine the purpose driving such courts' creation, for allowing communities to authoritatively construe select constitutional provisions does not turn on the absence of judicial attributes.

104. *Rosen, Of Tribal Courts*, *supra* note 10, at 522-78.

some cases even strengthened, local courts that cater to such communities.¹⁰⁵

5. *Establishment Clause*

A final possible challenge would be that the CBC Statute would violate the Establishment Clause if community-based courts were to be created on behalf of a religious community. Such a challenge would fail, however, because the CBC Statute is tantamount to "neutrally available state aid" that can benefit both religious and nonreligious insular communities, and such neutral benefits do not run afoul of the Establishment Clause.¹⁰⁶

C. *Limiting the Jurisdiction of the Inferior Federal Courts*

It is well-established that Article III itself imposes no limits on Congress's power to limit the jurisdiction of inferior federal courts.¹⁰⁷ Congress has plenary power with respect to the

105. The recognition that general courts may not be capable of discerning the needs of an idiosyncratic community has led the Supreme Court both to limit the jurisdiction of general federal courts, *see, e.g., Weiss*, 510 U.S. at 166-69 (concluding that ordinary federal courts are without "competence" to make what are essentially professional military judgments and holding that enlisted persons may not bring *Bivens* actions against their superior officers in federal courts), and to expand the jurisdiction of the community tribunals to adjudicate matters affecting the community. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (holding that federal courts have only limited subject matter jurisdiction with respect to ICRA claims because "resolution of statutory issues under [the ICRA] . . . will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts"). Similarly, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), the United States Court of Appeals for the D.C. Circuit upheld against an equal protection challenge the American Samoa territory courts, whose rulings could not be reviewed by Article III courts. The appellate court cited to the reasons adduced by the district court—"American Samoa's relatively small size" and "its desire for autonomy in local affairs"—and added that the scheme was a rational means to respect Samoan traditions concerning land ownership, which was communal in nature. *Id.* at 386. The Congress's policy of respecting traditional land ownership "could be frustrated if the High Court's judgments in such cases were reviewed by one of the circuit courts of appeal, which are Article III courts but which lack expertise in Samoan law and culture . . ." *Id.* at 387.

106. *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

107. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Having a right to

jurisdiction of inferior federal courts¹⁰⁸ and so could limit the jurisdiction of such courts at will, subject only to constitutional limitations external to Article III.

D. Disallowing Review by Article III and State Courts

The next core attribute of the CBC Statute whose constitutionality requires detailed demonstration is the absence of review by any Article III tribunal or state court of the community-based courts' constitutional and other determinations. This component of the statute actually implicates four distinct constitutional questions. First, does Congress have the power under the Exceptions Clause of Article III to strip the Supreme Court of appellate power to review the constitutional interpretations of community-based courts? Second, does Congress have the power to eliminate state court jurisdiction over cases heard by the community-based courts? Third, would the failure to provide review by the Supreme Court or any other Article III or state court violate due process? Fourth, and finally, would the Suspension Clause¹⁰⁹ demand that federal courts retain jurisdiction to hear habeas claims resulting from community-based court judgments that result in the custody of persons?

1. The Exceptions Clause

The first question is whether Congress has the power to withdraw the Supreme Court's appellate jurisdiction from cases arising from discrete geographical enclaves. The question turns on Congress's powers under the Exceptions Clause, which grants the Supreme Court "appellate Jurisdiction . . . with such Exceptions and regulations as the Congress shall make."¹¹⁰ Under the case law, and according to the bulk of commentators, the answer likely would be yes. The Supreme Court has directly ruled on the limits of Congress's powers to make exceptions to the Court's appellate

prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

108. *Lauf*, 303 U.S. at 330; *Sheldon*, 49 U.S. at 449.

109. U.S. CONST. art. I, § 9, cl. 2.

110. U.S. CONST. art. III, § 2.

jurisdiction in only two cases, *Ex parte McCordle*¹¹¹ and *United States v. Klein*,¹¹² and neither case precludes such a use of the Exceptions Clause. Showing this requires a full treatment of each case.

The petitioner in *Ex parte McCordle* was a newspaper editor in custody pending trial for libel. The petitioner appealed a lower court's denial of his habeas petition, which had been premised on the theory that the Act he was accused of violating was unconstitutional.¹¹³ After the Supreme Court heard oral argument, but before it had decided the case, Congress enacted a statute that withdrew the Court's appellate jurisdiction over a class of cases of which the petitioner's was a part. In *McCordle*, the Court directly confronted the question of whether this withdrawal of jurisdiction under the Exceptions Clause was a legitimate exercise of Congress's power. Relying on the Exceptions Clause's language, the Court found in the affirmative and dismissed the case for lack of jurisdiction. Stated the Court, "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."¹¹⁴

111. 74 U.S. 506 (1868).

112. 80 U.S. 128 (1871).

113. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 904-05 (1984); see also William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973).

114. *McCordle*, 74 U.S. at 514. To be sure, in the last paragraph of the opinion the Court obliquely noted that the statute in question only affected appeals from circuit courts and thus did not wholly divest the Supreme Court of its jurisdiction to hear habeas corpus cases.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

Id. at 515; see CURRIE, *supra* note 71, at 306 (making this point). The Court's interpretation of the Exceptions Clause, however, did not appear to turn on this belated observation, which is best understood as commentary concerning the Suspension Clause rather than the Exceptions Clause. These points appear to be confirmed by a case decided later that year in which the Court reiterated that Congress's 1868 legislation had not attempted to deprive the Supreme Court of the appellate jurisdiction over habeas cases that had been granted by the Judiciary Act of 1789. *Ex parte Yerger*, 75 U.S. 85, 102-03 (1868). Consistent with the view that *Ex parte McCordle* construes the Exceptions Clause as a grant of plenary power to Congress, the Supreme Court expressly stated in *Ex parte Yerger* that "[w]e are not at liberty to except from [our appellate jurisdiction] any cases not plainly excepted by law," *id.* at 102

In *Klein*, the second case in which the Exceptions Clause was construed, the Court held that Congress had overstepped its powers under the Clause. The facts are complex but vital to an understanding of the holding. Plaintiff Klein was the administrator of an estate who had sued in the Court of Claims for proceeds of a sale of property due the decedent. The decedent, a man by the name of Wilson, had been loyal to the Confederacy during the Civil War and during that time had abandoned certain cotton. An 1863 Act of Congress confiscated abandoned property, like Wilson's, in insurrectionary districts but also provided that any person who had not been disloyal and could prove ownership of abandoned property was entitled to receive the proceeds of the abandoned property's sale. The Act further recited that the President could grant "pardon and amnesty."¹¹⁵ Wilson had received a pardon in 1864 and died the next year. Klein, Wilson's administrator, filed a claim with the Court of Claims to recover proceeds from the sale of Wilson's abandoned cotton. Relying on the pardon to establish loyalty, the court found in Klein's favor. The Government appealed, and during the appeal's pendency Congress enacted legislation that declared in substance that no pardon would be admissible in evidence in support of any claim against the United States in the Court of Claims. The statutory provision further stated that a presidential pardon was conclusive proof of *disloyalty* and that claims based on pardons should be dismissed for want of jurisdiction. The Government accordingly urged the Supreme Court to remand the

(emphasis added), thereby suggesting that the Court's appellate jurisdiction over habeas matters would have been eliminated had Congress "expressly excepted" the Court's appellate jurisdiction. *Id.* at 106; see also *id.* at 98 ("The appellate jurisdiction [of the Supreme Court] is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make."); CURRIE, *supra* note 71, at 307 (noting that "no such construction of the statute would be adopted without a clearer statement from Congress"). On the other hand, the *Yerger* Court stated later in the opinion that denying appellate jurisdiction in the circumstances pertaining in the case would have left the person in custody "wholly without remedy" of habeas corpus, noted the constitutional requirement that habeas not be suspended, and stated that these considerations "would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are." *Yerger*, 75 U.S. at 103. Insofar as the Court in subsequent case law has spoken of Congress's plenary powers under the Exceptions Clause powers without qualification, see *infra* note 127, the Court's dictum in *Ex parte Yerger* is best understood as a commentary on the requirements of the Suspension Clause rather than a limitation on Congress's Exceptions Clause powers, just as are the final sentences in *Ex parte McCordle*.

115. Abandoned and Captured Property Act of March 12, 1863, 12 Stat. 820.

case back to the Court of Claims with instructions that the case be dismissed for lack of jurisdiction.¹¹⁶

The *Klein* Court determined that the new statute was an unconstitutional exercise of Congress's "exceptions" and "regulations" powers. Although the Court's reasoning is not a paragon of clarity, its holding appears to have been driven by separation of powers concerns and to have turned on the confluence of several factors.¹¹⁷ First, the Court held that Congress overstepped the boundary between legislating and adjudicating in attempting to legislate a "rule of decision" by, among other things, requiring the Court to look for certain facts and then directing how the Court was to construe them.¹¹⁸ Second, the Court gave weight to the fact that the statute sought to deprive the Court of jurisdiction in a case with respect to which the Court already had begun to exercise jurisdiction.¹¹⁹ Third, the Court relied on the fact that application of the statute would have financially benefitted the government.¹²⁰

116. *Klein*, 80 U.S. at 136-44.

117. For a recent approach that also understands *Klein* to be a separation of powers holding, see Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2529 (1998); see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2538-45 (1998) (critiquing Sager's suggestion).

118.

[T]he language of the [statute] shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . .

[T]he denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

....

The court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Klein, 80 U.S. at 145-47; accord *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (discussed *infra* note 126 and accompanying text).

119. *Klein*, 80 U.S. at 146 ("[T]he denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.") (emphasis added). *Klein* is inconsistent with *Ex parte McCardle* in this respect, for the *McCardle* Court gave no weight to the fact that the matter over which the Supreme Court lost its appellate jurisdiction was a cause pending. See *supra* text accompanying note 114.

120. *Klein*, 80 U.S. at 147 ("Can [Congress] prescribe a rule in conformity with which the

As if to underscore the determinative role played by these unique circumstances, the *Klein* Court stated that if the statute "simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."¹²¹

Two recent cases not concerning the Exceptions Clause have provided commentary on *Klein* that may shed light on the Clause's meaning. In *United States v. Sioux Nation of Indians*,¹²² the Court upheld a statute that required the Court of Claims to review the merits of a takings claim by the Sioux Nation without taking account of the res judicata effect of a previous Court of Claims decision in which the government had prevailed.¹²³ Addressing the argument that the statute in question ran afoul of *Klein*'s principle concerning the separation of powers between adjudication and legislation, the Court distinguished *Klein* on the ground that "the proviso at issue in *Klein* had attempted to 'prescribe a rule for the decision of a cause in a particular way' [whereas the statute in *Sioux Nations* only] waived the defense of res judicata so that a legal claim could be resolved on the merits."¹²⁴ Further, observed the Court, in *Klein* "Congress was attempting to decide the controversy at issue in the Government's own favor."¹²⁵ Similar to *Sioux Nations*, the Court in *Plaut v. Spendthrift Farm, Inc.*, explained *Klein* as standing for the principle that Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it."¹²⁶

court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.").

121. *Id.* at 145.

122. 448 U.S. 371 (1980).

123. *Id.* at 389-98. Thus, the case did not involve a congressional attempt to limit the Supreme Court's appellate jurisdiction. Nonetheless, in its opinion the Court addressed the argument that the statute in question ran afoul of *Klein* insofar as that case stood for the principle that there must be a separation of powers between adjudication and legislation. *Id.* at 402-05. Insofar as this principle appears to be inseparable from *Klein*'s holding with respect to the Exceptions Clause, the Court's holding in *Sioux Nation* sheds light on its understanding of *Klein*'s holding with regard to Congress's Exceptions Clause powers.

124. *Id.* at 405 (quoting *Klein*, 80 U.S. at 146).

125. *Id.* at 405.

126. 514 U.S. 211, 218 (1995).

These cases exhaust the Supreme Court's Exceptions Clause holdings.¹²⁷ On its face *Ex parte McCardle* appears to say that, consistent with the Exceptions Clause's plain language, there are no limits to Congress's powers under the Clause. *Klein* undoubtedly cuts back *McCardle* to some extent, but how much? A close reading of *Klein*, in conjunction with *Sioux Nations* and *Plaut*, suggests that the Court cannot use the Clause to prescribe rules of decisions, particularly where doing so benefits the government and (perhaps) where the Court already has begun to exercise jurisdiction in a particular case. But apart from these constraints, the cases suggest that "simply den[ying] the right of appeal in a particular class of cases"¹²⁸ would not be unconstitutional. And so conclude the bulk of scholars—including Herbert Wechsler, Gerald Gunther, Paul Bator, and John Harrison¹²⁹—who cite the plain language of the Exceptions Clause, the case law, history,¹³⁰ and

127. In a more recent case, the Court held that the Antiterrorism and Effective Death Penalty Act of 1996 did not deprive the Court of its jurisdiction to hear a petition for habeas corpus and consequently did not require a pronouncement concerning the Exception Clause's scope. *Felker v. Turpin*, 518 U.S. 651, 661-63 (1996). Several other cases have discussed the Exceptions Clause in dicta. Virtually all echo the perspective that the Congress has plenary power in respect of making exceptions to the Supreme Court's appellate jurisdiction. *E.g.*, *The Francis Wright*, 105 U.S. 381, 386 (1881) ("Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."); *Daniels v. Railroad Co.*, 70 U.S. 250, 254 (1865) ("But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law."); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796) ("If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."); see also Gunther, *supra* note 113, at 903-04 (citing more cases).

128. *Klein*, 80 U.S. at 145.

129. *E.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1039 (1982); Gunther, *supra* note 113, at 908-10; John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 209 (1997) (identifying as the "traditional" view the understanding that "[t]he congressional power to make exceptions from the Court's appellate jurisdiction is, in itself, limited only insofar as some limitations might be so large as no longer to constitute exceptions" but that "the exceptions power is subject to any external constitutional limitations that may apply"); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

130. For example, Gerald Gunther notes that until 1914 the Congress had not given the Supreme Court the appellate jurisdiction necessary to ensure that the Court would provide interpretations of federal law that would be uniform across the country. Until 1914, Supreme Court review was available only when a state tribunal denied a federal statutory or constitutional claim. Review was unavailable, however, when a federal claim was sustained,

dicta,¹³¹ to conclude that Congress has plenary power under the Clause to make exceptions to the Supreme Court's appellate jurisdiction,¹³² subject only to constitutional constraints external to the Exceptions Clause (such as due process and equal protection).

To be sure, virtually all of these scholars argue that, as a normative matter, Congress should not exercise its plenary power to make exceptions to the Court's appellate jurisdiction.¹³³ But these scholars' policy prescriptions have no bearing on the CBC Statute, for no scholar has contemplated using the Exceptions Clause in the manner deployed by the model statute; they have commented on use of the Clause to effectuate a nationwide divestiture of the Court's appellate powers¹³⁴ to express disapproval of Supreme Court decisions,¹³⁵ not deployment of the Clause to create geographical

even if the state court construed the federal claim differently than had the Court. Gunther, *supra* note 113, at 906-07.

131. *Id.* at 904 n.39 (citing cases).

132. There is a second group of scholars who argue that Congress does not have the power under the Exceptions Clause to legislate so as to undercut the "essential functions" of the Supreme Court. *E.g.*, Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 932-36 (1982); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 45-55 (1981). Although the CBC Statute is contrary to the spirit of these scholars' approaches, it is unclear whether it would undercut the Court's "essential functions" insofar as there would be only a limited number of community beneficiaries. *See supra* note 55.

133. According to Herbert Wechsler, for example, any such exercise of the Exceptions Clause is "more theoretical than it is real." Wechsler, *supra* note 129, at 1007. Bator similarly adopts the position that although "Congress may have the authority to carve out subject matters and withdraw them from the Supreme Court's appellate jurisdiction, [it] *should* not do so, not only because they represent bad policy but because they violate the structure and spirit of the instrument." Bator, *supra* note 129, at 1039. John Harrison is one of the few scholars who does not argue that exercise of the Exceptions Clause power necessarily would be bad. Harrison, *supra* note 129, at 250-53, 255 (noting that "Congress's power over jurisdiction is . . . among other things, a check on the judiciary" and taking issue with the notion that the Constitution's drafters had distrust for state courts, which would be the most likely entities responsible for construing the Constitution in the event Congress made exceptions to the Supreme Court's jurisdiction).

134. Wechsler, for example, expressly states that "when I speak of withdrawal I mean, of course, complete elimination of all cognizance of cases of the kind." Wechsler, *supra* note 129, at 1006. The other scholars similarly have assumed that any withdrawal of the Court's appellate jurisdiction naturally would entail complete withdrawal with respect to the excepted constitutional provisions. *E.g.*, Bator, *supra* note 129, at 1041; Gunther, *supra* note 113, at 910-12.

135. *See* Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975); Gunther, *supra* note 113, at 910-11; Wechsler, *supra* note 129, at 1007

enclaves to aid idiosyncratic communities whose special needs require adaptations of select constitutional doctrines that are approved of by Congress as they apply to general society. In any event, as these scholars themselves have argued, undesirability and unconstitutionality are two different things.¹³⁶ That is to say, even if the use proposed here were unattractive to them, such a normative judgment, in their view, would have no bearing on the statute's constitutionality.

2. State Court Jurisdiction and the Property Clause

In the context of discussing Congress's powers under the Exceptions Clause, scholars have noted that even if Congress had power to eliminate all federal court jurisdiction over select constitutional provisions, Congress could not abolish state courts' jurisdiction to hear such claims.¹³⁷ This congressional disability would present no obstacle to the CBC Statute because the community-based courts would be situated on federal land, and it is well-established that the Congress, acting pursuant to the Property Clause, has the power to oust state court jurisdiction and require that adjudications arising within land of exclusive federal jurisdiction be handled by non-Article III courts created by the federal government.¹³⁸

(explaining the Exceptions Clause as a part of a system designed to "preserve a measure of political control" over the Court).

136. *E.g.*, Bator, *supra* note 129, at 1039; Gunther, *supra* note 113, at 905, 910-11.

137. Bator, *supra* note 99, at 628 (noting that "Congress can validly limit the jurisdiction, or even the existence, of the lower federal courts; but it cannot control the jurisdiction of the state courts of general jurisdiction so as to foreclose the vindication of a federal constitutional right"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

138. *Williams v. Lee*, 358 U.S. 217 (1959) (Arizona state courts without jurisdiction over civil suit between non-Indian and Indian where cause of action arose on Indian reservation and noting that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive"); *United States v. McGowan*, 302 U.S. 535, 539 (1938) (noting that states are without "sovereignty" in areas of exclusive federal jurisdiction); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 521-28, 561 (1832) (striking down Georgia law that forbade Cherokees from holding courts and enacting law in lands formally part of Georgia that had been granted to Indians by federal government).

3. Due Process, Article III, and the Suspension Clause

The next question is whether the CBC Statute's withdrawal of appellate review from all Article III courts and state courts is unconstitutional even if withdrawal of appellate jurisdiction from the Supreme Court and eliminating inferior federal court and state court jurisdiction each on their own would be lawful. Due process, Article III, and the Suspension Clause are the relevant doctrinal considerations.¹³⁹ As this subsection shows, due process would not render the community-based courts per se unconstitutional under the proposed CBC Statute, but the regime of multiple interpreters established by the Statute might be violative of due process if in practice the community-based courts did not undertake their duties in a "good faith" fashion. An informed prediction concerning how community-based courts will conduct themselves accordingly is doctrinally relevant. To the extent tribal courts and community-based courts are analogous,¹⁴⁰ the ICRA study is germane to judge the constitutionality of the CBC Statute.

The difficult doctrinal question posed by the CBC Statute is whether due process, Article III, or the Suspension Clause requires the possibility of Article III review of a non-Article III court's federal law determinations. Let us focus first on due process and Article III. Such a review requirement, it could be said, flows from the case law insofar as all the legislative court schemes upheld by the Supreme Court have allowed for at least limited review in Article III courts.¹⁴¹ Even if Article III required limited review by an Article III court, the benefits of multiple authoritative interpreters

139. It is also possible that this aspect of the CBC Statute could be claimed to violate implicit "structural" aspects of the Constitution. See *infra* notes 247-82 and accompanying text.

140. See *infra* notes 283-319 and accompanying text (considering the extent of the analogy between the two regimes).

141. *E.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592-93 (1985) (Article III review of arbitrator's "findings and determinations" for fraud, misconduct, or misrepresentation" and "review of constitutional error" satisfies due process); *Ex parte Bakelite Corp.*, 279 U.S. 438, 447 (1929) (allowing only for certiorari petitions to the United States Supreme Court). The one possible exception is tribal courts: except where a party is in detention, federal courts are without jurisdiction to review tribal court determinations of the federal law of the Indian Civil Rights Act. See *supra* notes 24-32 and accompanying text. I will not, however, rely only on tribal courts to establish the principle above in text so as to preempt the argument that tribal courts are wholly *sui generis*.

would be largely unaffected because statutes providing only exceedingly weak review by Article III courts have been upheld; in *Thomas v. Union Carbide Agricultural Products Co.*, for example, there was judicial review only for "fraud, misconduct, or misrepresentation."¹⁴² Review of this sort would not undermine the benefits that the community-based courts are intended to confer—provided, that is, that an Article III court did not equate community-court deviations from ordinary doctrine with "fraud, misconduct, or misrepresentation," an issue that will be examined below.¹⁴³

There is firm ground for concluding, however, that a complete absence of Article III review in the CBC Statute would not offend due process or Article III. There are several contexts analogous to the community-based courts where there is no Article III review of federally created non-Article III courts' applications of federal law. Most analogously, Courts of Indian Offenses are federally created tribal courts on reservations that have jurisdiction to hear private civil and criminal matters,¹⁴⁴ including claims based on federal law.¹⁴⁵ These courts' decisions can be appealed to the appellate division of the Courts of Indian Offenses, but the appellate division's decisions cannot be appealed to the Department of the Interior or to Article III courts.¹⁴⁶ Though not created by the federal government, tribal courts are another example; federal courts are without jurisdiction to review tribal court interpretations of the ICRA where no party is in detention.¹⁴⁷ Military courts are yet another illustration. Before 1984, Article III courts were wholly without jurisdiction over cases tried before the non-Article III federally created military courts, and since 1984 there still has been

142. *Thomas*, 473 U.S. at 592.

143. See *infra* notes 172-286 and accompanying text.

144. 25 C.F.R. §§ 11.10-.103 (2001). The courts have jurisdiction over classical private law claims. *E.g.*, *id.* §§ 11.500-.501 (civil actions), 11.802 (judgment against a surety).

145. *E.g.*, *id.* §§ 11.400-.449 (criminal offenses).

146. *Id.* § 11.200(d) ("Decisions of the appellate division are final and are not subject to administrative appeals within the Department of the Interior."). The sole exception is that federal courts have jurisdiction under the ICRA's habeas provision when parties are "in custody." *E.g.*, *Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1208-09 (10th Cir. 1999); see also *supra* notes 24-32 and accompanying text. As a result, there is no appellate recourse to Article III courts for most cases tried before Courts of Indian Offenses.

147. See *supra* notes 24-32 and accompanying text.

no Article III review for most cases tried before military courts.¹⁴⁸ Although the Supreme Court has not heard a due process challenge based on the absence of Article III court review to Courts of Indian Offenses or military courts, the longstanding presence of these courts provides strong support for the proposition that there need not be Article III review of federal law determinations made by non-Article III courts created by the federal government.¹⁴⁹

Further support for the proposition that neither due process nor Article III demands the possibility of Article III review of a non-Article III court's federal law determinations can be found in the views of scholars like Henry Hart, Paul Bator, Gerald Gunther, and John Harrison, all of whom understand that state courts (i.e., non-Article III tribunals) would be the courts of last resort for constitutional interpretation were Congress to deprive the Supreme Court and inferior federal courts of jurisdiction over a category of constitutional provisions.¹⁵⁰ Under these scholars' views, due process and Article III require the possibility of *court* review, but not necessarily Article III court review.¹⁵¹ This is not inconsistent with the case law concerning Article I courts, which when considering the requirements of due process typically speaks of the need for *judicial* review, not *federal* judicial review.¹⁵² Under this

148. The only Article III review is discretionary review by the Supreme Court of cases reviewed by the Court of Military Appeals. 10 U.S.C. §§ 866-867 (2000); Fallon, *supra* note 71, at 973. The Court of Military Appeals itself has jurisdiction over a subset of cases heard in military courts—cases in which the “sentence is one of dishonorable discharge, bad conduct discharge, or confinement of one year or more.” *Id.* at 973 n.319. The Supreme Court is without jurisdiction to review any case in which the Court of Military Appeals has refused to exercise review and is expressly precluded from reviewing “any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.” 10 U.S.C. § 867a(a).

149. The instructiveness of Courts of Indian Offenses for present purposes is not diminished by the fact that federal constitutional limitations are not applicable to tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). This is because the Constitution is applicable to the federal government, and it is the federal government that created the Courts of Indian Offenses and that accordingly could be said to be violating the due process rights of Indians, who are American citizens, if due process indeed required appellate recourse to an Article III court when a non-Article III federal court makes a decision based on federal law. *See* 8 U.S.C. § 1401(b) (2000) (Indians are citizens of the United States).

150. Bator, *supra* note 99, at 627-29; Gunther, *supra* note 113, at 915-16; Harrison, *supra* note 129, at 250-53; Hart, *supra* note 137, at 1401.

151. Gunther, *supra* note 113, at 915 (“It is widely agreed that due process does assure access to some judicial forum in many circumstances. Traditionally, however, due process has not been thought to require access to a *federal* judicial forum.”); *see also supra* note 150.

152. *E.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (speaking

understanding, the CBC Statute would not be unconstitutional insofar as the entity that makes the final determination would be a *court*, albeit a non-Article III court and a nonstate court.

If legislators were of the view that due process, Article III, or good sense required that there be some federal review emanating from outside the community-based court, but still wished to avoid Article III review so as to foster community-based courts' independence, an option would be to provide deferential *executive* review.¹⁵³ An instructive example of this type of review can be seen in a decision of the D.C. Circuit Court of Appeals that held due process to be satisfied by federal executive review of the determinations of an Article IV territorial court even though the relevant executive official, the Secretary of the Interior, specifically refused to serve as an "appellate court" and limited his review of the constitutional claim that had been presented to him to the question of whether the Article IV court had committed "a clear abuse of judicial discretion."¹⁵⁴ In support of this understanding of

of "whatever judicial review might be required by due process"); *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

153. This would not run afoul of the rule of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), under which "Congress cannot vest review of the decisions of *Article III* courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (emphasis added).

154. *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 379 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). *Hodel* upheld against a due process challenge the federal legislation that created territorial courts in American Samoa, which provided no review of the High Court's decisions by an Article III tribunal. Instead, aggrieved parties could petition the Secretary of the Interior of the United States to reverse the High Court's decisions. In dicta, the court stated that "[w]hen Congress creates a territorial court apart from Article III, it matters not whether it makes no provision for, delegates to the Executive Branch, or delegates to the Judicial Branch the power to review its rulings . . ." *Id.* at 385. The court added, however, that "[a]t most, it might be necessary to provide somewhere, if not on review then by way of collateral attack, an Article III forum in which to raise a constitutional claim." *Id.* at 385 n.67.

The appellant in *Hodel* had purchased approximately 300 acres of land in American Samoa in 1953. In 1979, it filed a trespass action in the High Court of American Samoa. The High Court concluded that the Church did not have title to the land because the 1953 deed was invalid and because the Church had not acquired the land through adverse possession. The Church asked the Secretary of the Interior of the United States to intervene, claiming that the High Court's decision was based on a "perverse reading of the law" or an "arbitrary or capricious exercise of power" that consequently deprived the Church of due process and took its property without compensation. *Id.* at 379. The Secretary responded that he would not serve as "an appellate court, superimposed over the duly constituted judiciary" and that he

due process's requirements is the Supreme Court's approval of administrative schemes in which Article III courts are wholly without power to review the agency's "application of legal standards to facts,"¹⁵⁵ for the only check on the administrative agencies in such instances is via executive review. Under this view, the CBC Statute would satisfy due process's demands if the statute provided that a federal executive official was empowered to review the decisions of the community-based courts for clear abuse of discretion.¹⁵⁶ Such limited review would not undermine the very

would intervene only upon a finding of "clear abuse of judicial discretion," which he did not find in the case at hand. *Id.* at 378-79. The Church then sued the Secretary in Federal District Court for the District of Columbia, challenging the constitutionality of his decision not to review the High Court's decision and arguing, inter alia, that "the total absence of appellate review by an independent tribunal . . . leav[es] the potential for error and abuse totally unchecked" and thereby violates due process. *Id.* at 384.

The federal lawsuit in *Hodel* itself thus was an instance of collateral attack, that is, the plaintiff sued the Secretary of the Interior, claiming that he failed to keep the High Court within constitutional bounds. *Id.* at 387. Under this scheme, the non-Article III court is subject to executive rather than judicial review, and the executive officer in turn is subject to judicial review. In reviewing an equal protection challenge later in the opinion, the court noted that constitutional guarantees are not fully applicable in the territories. *Id.* at 386. This does not appear to have informed the court's due process analysis, however.

155. *Thomas*, 473 U.S. at 583 ("Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.") (emphasis added).

156. Though not necessary for purposes of the instant due process analysis, it merits noting that the executive official's check on the community-based courts might be even greater by virtue of the fact that the judges may constitute "inferior officers" who accordingly would be subject to the Appointments Clause and the executive control that the Clause entails. Judges in military tribunals and the Tax Court have been deemed to be inferior officers. *Weiss v. United States*, 510 U.S. 163, 169 (1994) (holding that military judges are "inferior officers" for purposes of Article II, Section 2, Clause 2, because they "exercis[e] significant authority pursuant to the laws of the United States") (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)); *Freytag v. Commissioner*, 501 U.S. 868, 880-82 (1991) (providing test for distinguishing "inferior officers" from "mere employees" whose appointment need not be made pursuant to the Appointments Clause). Under these standards, it could be argued that judges in community-based courts, charged as they would be to authoritatively construe the Constitution, qualify as "inferior officers." In such a case, Congress still would likely be able to provide that appointments to the community-based courts be made by the local communities, subject to limited review by the executive, since there are strong policy reasons for giving the communities a role in selecting their judges and in so doing Congress would not be increasing its own powers at the expense of the executive branch. *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (holding that separation of powers is not an issue where Congress does not attempt to "gain a role in the removal of executive officials" in addition to impeachment and conviction); *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 856 (1986) (similar). It is possible, however, that the community-based judges

purpose behind creating such courts, as long as the executive official understood that the mere fact that a community-based court adopted a varying application of a constitutional provision would not per se qualify as a "clear abuse of discretion."¹⁵⁷

Finally, even on the assumption that due process or Article III generally requires that parties have the option of Article III review of interpretations of federal law by non-Article courts, the CBC Statute still might not run afoul of due process. Parties always can waive their right to judicial review, so accordingly there is no reason to believe that parties cannot constructively waive any such right by electing to join and remain in, or to transact with, a special community located on federal land.¹⁵⁸ As in federal Indian law, persons not belonging to the community could be said to waive any rights to judicial review in an Article III court when they undertake activities that subject them to the community-based court's subject matter jurisdiction.¹⁵⁹

Finally, let us consider what, if any, review requirements might be demanded by the Suspension Clause. To begin, it is virtually certain that the local governments in federal enclaves would be deemed to be agents of the federal government.¹⁶⁰ As such, the Suspension Clause, which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended," would apply, as would the federal habeas statute.¹⁶¹ This would mean that federal courts presumptively would have collateral review over those cases

would *not* be considered "inferior officers." After all, state court judges who would be responsible to construe constitutional provisions in the event Congress exercised its Exceptions Clause power would not thereby become "inferior officers." Similarly, tribal court judges are not deemed inferior officers despite their responsibility for authoritatively construing the ICRA. This would allow the communities a larger role in selecting their courts' judges.

157. See *infra* notes 172-286 and accompanying text.

158. See *supra* notes 77-81 and accompanying text.

159. Indian law once again provides a helpful model, for outsiders who interact with tribal governments also effectively waive any right to have their federal, quasi-constitutional ICRA claims reviewed by an Article III court, except to the extent that the outsiders are in "detention." See *supra* notes 24-32 and accompanying text.

160. *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 65 & n.75 (1990) (noting that Justice White's concurrence "did not seem to deny that the action complained of in *Mankichi* was that of agents of the federal government").

161. 28 U.S.C. § 2241 (1994).

decided by community-based courts that resulted in "custody."¹⁶² Nevertheless, such review would not eviscerate the powers of self-governance that the CBC Statute seeks to grant. To begin, habeas review would not be available in the many cases where there is no custody. Further, insofar as the guarantee of habeas review says nothing about the substantive standards that should be used to determine whether custody violates the Constitution, habeas review would not undermine the very point of community-based courts so long as reviewing courts understood that community-court variations from ordinary constitutional doctrines would not be unconstitutional as a per se matter.¹⁶³ In fact, habeas review would only make the analogy between tribal courts and community-based courts tighter: the Indian Civil Rights Act (ICRA) contains a habeas provision that grants federal courts subject matter jurisdiction to review tribal court determinations that result in the "detention" of persons¹⁶⁴ even though tribal courts are permitted to construe ICRA provisions in accordance with tribal customs and needs.¹⁶⁵ Habeas review under the ICRA has not undermined the extent to which the ICRA has provided tribes important room for self-governance,¹⁶⁶ and there is no reason that habeas review over community-based courts need undermine the self-governance the CBC Statute is intended to provide any more than has habeas review over tribal courts.

Moreover, it is possible that Congress could structure the CBC Statute so that habeas review over community-based courts could be eliminated altogether should the communities situated in the federal enclaves so desire. Just last term in the case of *I.N.S. v. St. Cyr*,¹⁶⁷ three Justices in dissent argued that the Suspension Clause

162. *Id.* § 2241(c); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (providing broad interpretation of custody); *see also Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

163. *See infra* notes 172-286 for a discussion of the appropriate boundaries of community-based court interpretive freedoms.

164. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66-70 (1978) (holding that the ICRA's habeas corpus provision, 25 U.S.C. § 1303 (1994), provides the exclusive basis for federal court subject matter jurisdiction over claims under the Act). Federal courts have looked to habeas "custody" caselaw to construe the ICRA's "detention" requirement. *See, e.g., Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1208 (10th Cir.), *cert. denied* 528 U.S. 815 (1999).

165. *Martinez*, 436 U.S. at 55.

166. *See generally Rosen, Of Tribal Courts, supra* note 10, at 511-78.

167. 533 U.S. 289, 121 S. Ct. 2271 (2001).

proscribes the temporary elimination of habeas review but does not preclude "permanent repeal."¹⁶⁸ The other six Justices specifically refused to answer this question.¹⁶⁹ Whether permanent elimination of habeas review over a class of cases would violate the Suspension Clause accordingly is an open question, but one about which three Justices already have intimated their views in the affirmative. Furthermore, the Suspension Clause question addressed in *St. Cyr* is a more difficult question than the CBC Statute would present. After all, *St. Cyr* concerned the question of whether habeas review can be eliminated in respect of persons who *ex ante* desire such review. The question posed by the CBC Statute, by contrast, would be whether habeas review can be set aside for persons who *ex ante* desire to be part of a political community with respect to which federal courts do not have such review powers. In other words, the CBC Statute presents the issue of waiver. Many constitutional rights can be waived.¹⁷⁰ The reasons for respecting waivers are particularly strong in circumstances like this where waiver does not result in permitting a government official to perform an act that might be the sort that we as Americans believe the Constitution should not countenance;¹⁷¹ although we presumably would not want to allow a prisoner to waive her Eighth Amendment rights and elect to be hanged and quartered by the government, respecting the waiver of habeas simply means that federal courts will not hear

168. *Id.* at 2299 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.). The three Justices primarily relied on the historical understanding of "suspend" for purposes of interpreting the Clause. *Id.* at 2299-2300. Although the dissent stated that "suspension]" historically included "temporarily but entirely eliminating the 'Privilege of the Writ' for a certain geographic area or areas," *id.* at 2299 (emphasis added), such geography-based suspension did not include instances where the locality itself desired the elimination of the Writ, which would be the case under the CBC Statute. Furthermore, such geography-based suspensions were not permanent, as would be suspensions pursuant to the CBC Statute.

169. Justice O'Connor also dissented, but she did not join the part of Justice Scalia's opinion concerning the scope of the Suspension Clause because she did not think the question had to be answered to resolve the case. *Id.* at 2293 (O'Connor, J., dissenting). Five Justices, including Justice Kennedy, concluded that whether Congress could completely preclude federal courts from reviewing a pure question of law "would give rise to substantial constitutional questions" under the Suspension Clause, and so construed the statutory language at issue in a manner that did not implicate the question. *Id.* at 2279, 2287.

170. See *supra* notes 75-81 and accompanying text.

171. Cf. DAVID P. CURRIE ET AL., *CONFLICT OF LAWS* 785 (6th ed. 2001) (asking: "Shouldn't the Bill of Rights be understood as a set of restrictions imposed by the American people on what their government officials can do regardless of the identity of the person acted upon?").

certain sorts of cases. In other words, a waiver of constitutional rights that results in the absence of governmental action may be less problematic than a waiver that would permit the government to affirmatively undertake an action.

III. THE NEW COMMUNITY-BASED COURTS' INTERPRETIVE FREEDOM

Even if Congress has the power to create community-based courts whose decisions are free from Article III review, there remains the question of what if any interpretive freedom such courts would enjoy. After all, the absence of judicial review says nothing about what law must be applied. Even if the Supreme Court does not have appellate review over the community-based court's decision, the Supreme Court *has* provided an interpretation of, for example, what due process or search and seizure requires. Would not the community-based court be required to apply the Supreme Court's interpretation within its community?

The answer is no. Section III.A. explains why novel interpretations by community-based courts would not violate the canons of judicial hierarchy, or qualify as per se "abuse of discretion" under executive review.¹⁷² Community-based courts could not have the identical range of interpretive freedom enjoyed by tribal courts, however, and Section III.B. identifies the limitations on their interpretive independence that several lines of case law would require. Section III.C. defends community-based courts' interpretive freedom against the more general structuralist critique that a regime of multiple authoritative interpreters of the Constitution would be contrary to the nature of American constitutionalism.

172. For the same reason, deviation from ordinary doctrine would not qualify as "fraud, misrepresentation or other misconduct" were Congress to decide to subject community-based court decisions to deferential review so as to address possible due process concerns, *see supra* notes 141-43 and accompanying text, nor would they be unconstitutional under habeas review; *see supra* notes 160-71 and accompanying text.

A. *Doctrines That May Be Thought to Limit Community-Based Courts' Interpretive Freedom*

Community-based court deviations from Supreme Court interpretations call into question several doctrinal constitutional issues. Assuming that due process requires deferential executive review, would not a community-based court's disregard of Supreme Court precedent be the clearest possible case of abuse of discretion? Even if due process does not require executive review, would not variations in constitutional protections across locales violate the guarantee of equal protection?¹⁷³ Finally, should there be habeas review, would not any community-based court's unique interpretation be unconstitutional as a per se matter on the simple ground that the interpretation was not perfectly coterminous with the doctrine previously announced by the Supreme Court?

It also might be argued that allowing multiple contemporaneous interpretations of a constitutional provision would violate the canons of judicial hierarchy that have been established in several foundational Supreme Court cases. In *Cooper v. Aaron*, for example, the Court asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution,"¹⁷⁴ and the *Cooper* decision has been understood to stand for the proposition that other governmental actors are bound by the Court's exposition of the Constitution.¹⁷⁵ One also might suggest that the empowerment of

173. Cf. *Bush v. Gore*, 531 U.S. 98, 104-11 (2000) (per curiam) (holding that different standards across counties for determining whether a vote had been cast violates equal protection).

174. 358 U.S. 1, 18 (1958). The Supreme Court has reiterated this principle in cases subsequent to *Cooper*. E.g., *United States v. Nixon*, 418 U.S. 683, 704 (1974) (noting the "responsibility of this Court as ultimate interpreter of the Constitution") (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)); see also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225 n.18 (1994) (citing other cases). *Cooper* built on *Marbury v. Madison*'s assertion of the power of judicial review, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803), but went farther than *Marbury* insofar as the opinion declared that the Court's interpretive authority trumping other governmental actors extended beyond the decided case. These claims regarding the Court's position in the interpretive hierarchy have been subject to intense scholarly debate. See *infra* note 175.

175. For present purposes I will explain why the CBC Statute would not run afoul of this principle of *Cooper*. It should be understood, first, that this principle is merely dictum. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 52-53 (1993). Moreover, there are strong reasons to believe this

community-based courts to offer their own interpretations of constitutional provisions would run afoul of observations made by the Court in the 1816 case of *Martin v. Hunter's Lessee*.¹⁷⁶ The *Martin* Court held that States cannot serve as independent and authoritative interpreters of the Constitution on account of "the importance, and even necessity, of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."¹⁷⁷ Otherwise, continued the Court, "the constitution of the United States would be different in different states; and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable"¹⁷⁸ Would not community-based courts create the same problems as would the independent state court interpreters proscribed by *Martin*?

The attack against community-based courts can be sharpened further still. In the wake of *City of Boerne v. Flores*,¹⁷⁹ one might ask how Congress can claim the power to authorize variances from what the Supreme Court has said the Constitution means. The Supreme Court in *City of Boerne* held that Congress had exceeded its enforcement powers under Section 5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act of 1993 (RFRA).¹⁸⁰ The RFRA purported to permit government to substantially burden religious exercise only for compelling reasons and only via the least restrictive means. These requirements, however, were stricter than what the Court had declared the Free Exercise Clause required in the decision of *Employment Division*,

dictum to be wrong. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6-32 (1999); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987); Merrill, *supra*, at 59-78; Paulsen, *supra* note 174, at 343-45.

176. 14 U.S. (1 Wheat.) 304 (1816).

177. *Id.* at 347-48.

178. *Id.* at 348. For an elaboration of this, see JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 169-172, at 128-30 (abridged ed. 1833). For a critique of this aspect of *Martin's* holding, see Rosen, *Of Tribal Courts*, *supra* note 10, at 482-85.

179. 521 U.S. 507 (1997).

180. 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

Department of Human Resources v. Smith.¹⁸¹ *City of Boerne* consequently poses the following question with respect to the CBC Statute: If the Court struck down the RFRA on the ground that Congress does not have the power to "interpret the Constitution"¹⁸² in a manner that mandates conditions that the Court said the Free Exercise Clause does not require, how can Congress create non-Article III courts that have the power to independently interpret the Constitution?

This section of the Article first considers the challenge to the CBC Statute posed by *City of Boerne*, and then considers if and how the statute would square with *Cooper*, *Martin v. Hunter's Lessee*, executive review, and equal protection.

1. City of Boerne

Although superficially similar, the RFRA was fundamentally different from the CBC Statute. RFRA, concluded the *City of Boerne* Court, "contradicts vital principles necessary to maintain separation of powers and the federal balance."¹⁸³ The CBC Statute affects separation of powers and federalism values very differently, if at all. First, with respect to federalism, by purporting to prohibit state actions that substantially burden religious practices absent compelling reasons, when the applicable constitutional test forbade only non-neutral laws, the RFRA burdened the states in two respects: "in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power"¹⁸⁴ The CBC Statute plainly does neither. There is no foreseeable litigation burden that the CBC Statute would impose on states; if anything, litigation against states likely would decrease insofar as dissatisfied residents of the special communities on federal land would not sue states or localities but their community-based governments. Similarly, the CBC Statute would not curtail any general state regulatory powers, but instead

181. 494 U.S. 872, 885 (1990) (rejecting such strict scrutiny for free exercise claims and upholding a neutral, generally applicable law not supported by a compelling governmental interest).

182. *City of Boerne*, 521 U.S. at 528.

183. *Id.* at 536.

184. *Id.* at 534.

affect activity in federal lands over which the states are without inherent power.¹⁸⁵ For these reasons, it is most accurate to say that the CBC Statute would not affect federalism concerns *at all* insofar as the legislation only would affect federal property, not the states. This helps to explain another significant distinction between the RFRA and the CBC Statute: whereas Congress's powers under Section 5 of the Fourteenth Amendment are confined,¹⁸⁶ Congress has extraordinary plenary powers under the Property Clause, one of the bases of the CBC Statute.¹⁸⁷

There are two reasons why the CBC Statute likewise does not pose anything akin to the separation of powers concerns found in *City of Boerne*. First, at issue in *City of Boerne* according to the Court was whether Congress could define its own constitutional powers under Section 5 of the Fourteenth Amendment. That provision states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment.¹⁸⁸ Whereas the *Employment Division v. Smith* decision had held that state actions that substantially burdened religious practices absent compelling reasons were not necessarily unconstitutional, Section 5-based RFRA purported to prohibit such state actions.¹⁸⁹ Congress thus decided the meaning of the Fourteenth Amendment and then used that understanding as a predicate for creating enforcement legislation under Section 5, and in that sense could be said to have been "defin[ing] its own powers."¹⁹⁰ The CBC Statute presents no such difficulties. It could be enacted pursuant

185. The federal government's power over federal lands is "complete." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); see also *supra* note 62 (citing to other cases that stand for this principle). States accordingly have no inherent power over federal property located within their borders, though the federal government may delegate power to the states.

186. See *City of Boerne*, 521 U.S. at 532-33 (Congress has power under Section 5 of the Fourteenth Amendment only to enact "remedial, preventive legislation" that must meet a test of "proportionality or congruence between the means adopted and the legitimate end to be achieved").

187. See *supra* note 62.

188. U.S. CONST. amend. XIV, § 5.

189. *City of Boerne*, 521 U.S. at 512-16.

190. *Id.* at 529. Whereas the separation of powers implications of such a power are obviously grave, this does not mean that RFRA necessarily was unconstitutional. For thoughtful post-*Boerne* commentary arguing that the RFRA should have been upheld, see David Cole, *The Value of Seeing Things Differently: City of Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998).

to expressly provided congressional powers (the Property and Exceptions Clauses) whose scope the Court already has defined. For this reason, the statute could not plausibly be said to implicate Congress's ability to define its own powers.¹⁹¹

There is a second crucial distinction between the RFRA and the CBC Statute with regard to separation of powers. The RFRA in effect sought to reverse a Supreme Court decision that Congress viewed as mistaken,¹⁹² it purported to change the applicable rules nationwide under Section 5 of the Fourteenth Amendment, pursuant to Congress's view of what free exercise demanded across the country. The impetus behind the CBC Statute presumably would be very different. Congress could indeed think that although a constitutional doctrine works well as a general matter across general society, the specific needs of a discrete community, whose needs the Supreme Court has not assessed, demand the possibility of differential application of a constitutional principle in the geographically discrete area where the community is situated. This pinpointed rather than nationwide focus is reflected in the CBC Statute's reliance on the Property Clause. These doctrinal and motivational differences between the RFRA and the CBC Statute are fundamental in respect to what *City of Boerne* teaches about separation of powers. Assuming the creation of only a limited number of community-based courts,¹⁹³ the CBC Statute would neither reflect congressional dissatisfaction with contemporary Supreme Court constitutional jurisprudence nor in effect seek to alter the applicable constitutional rule across the country. For these reasons, the CBC Statute is distinguishable from the RFRA.

191. It might be argued that by creating community-based courts Congress could *indirectly* define its own powers insofar as it is possible that the Supreme Court could strike down a piece of general legislation that a community-based court would uphold. As discussed below, however, my analysis assumes that the community-based courts would engage in good faith interpretation. *See supra* notes 139-40 and accompanying text. This would mean that Congress would not have any real power to define its own powers in a *City of Boerne* manner even if a community-based court upheld legislation that the Supreme Court did not.

192. *City of Boerne*, 521 U.S. at 513-16.

193. *See supra* note 55.

2. Cooper, Martin, and "Abuse of Discretion"

A community-based court's election to apply substantive rules that differed in some respects from those adopted by the Supreme Court would not violate the dictates of *Cooper v. Aaron*¹⁹⁴ or *Martin v. Hunter's Lessee*,¹⁹⁵ nor would it constitute an "abuse of discretion" for purposes of executive review or create a doctrine that was unconstitutional as a per se matter insofar as it was not identical to the doctrine previously announced by the Supreme Court. This is so because the community-based court would not be deciding that the Supreme Court's interpretation was incorrect, but just that the constitutional principle requires a different application with respect to the confined geography where the community at issue is situated. This would not violate the dictates of Supreme Court supremacy because it essentially is a determination by the community-based court that there is no relevant Supreme Court precedent vis-à-vis the question presented. Determining whether precedent addresses the situation at hand is something that governmental bodies do all the time, and a good faith determination that there is no controlling precedent does no violence to the rules of judicial hierarchy.

Indeed, there is precedent for non-Article III governmental actors to provide highly contextualized applications of constitutional provisions—which permit or proscribe what is otherwise disallowed or permitted in general society—on the basis of a good faith belief that the circumstances before them fall outside of general rules announced in the Supreme Court's opinions. Consider the military. The executive and legislative branches often regulate in ways that plainly would be unconstitutional outside of the military context on the view that the needs of the military community¹⁹⁶ require that

194. See *supra* notes 174-75 and accompanying text.

195. See *supra* notes 176-78 and accompanying text.

196. The Court typically speaks of the military "community" when it discusses the deviations from ordinary constitutional doctrines that occur on military bases. *E.g.*, *Parker v. Levy*, 417 U.S. 733, 758 (1974) (referring to the "different character of the military community"). As I have stated elsewhere:

It is not mere happenstance that the Supreme Court refers to the needs of the military community when it creates [constitutional] nonuniformities. This is because the nonuniformities are deemed to be necessary to inculcate the distinctive norms that lead members of the military to think and act in the common ways that constitute the military into a group that merits the

the Constitution's provisions be given applications that differ from those in general society.¹⁹⁷ For example, unlike ordinary government officials, military officials may prohibit speech that is merely "intemperate, ... disloyal, contemptuous and disrespectful,"¹⁹⁸ may enact prior restraints,¹⁹⁹ and may ban private citizens' political speech from military bases.²⁰⁰ The decisions by these non-Article III governmental officials to authorize these acts are not inconsistent with *Cooper* or *Martin* (or, for that matter, with *City of Boerne*) because the military officials did not suggest that the Court had been incorrect in its identification of the constitutional rule that is applicable across general society. Instead, the officials concluded that the parties being regulated and the locus of the activities rendered the situation sufficiently different from the circumstance that the Supreme Court had faced that the case law was not controlling. Far from being aberrational or problematic, such case-by-case analogical reasoning lies at the core of common law methodology,²⁰¹ a methodology that well describes the development of constitutional doctrine itself.²⁰² As discussed further below, however, this way of understanding community-based courts' determinations implies certain limitations on their interpretive freedom.²⁰³ Interestingly—and perhaps

appellation of "community."

Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1154. For a more complete discussion of these issues, see *id.* at 1152-56.

197. Although constitutional provisions are applicable to the military, see, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981), it is black letter law that "the different character of the military community and of the military mission requires a different application of [constitutional] protections." *Parker*, 417 U.S. at 758; see also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). The Court has forthrightly acknowledged that the "fundamental necessit[ies]" of the military "may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. at 758.

198. *Parker*, 417 U.S. at 739, 759.

199. *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force regulation requiring members of the service to obtain approval from commanders before circulating petitions on Air Force bases).

200. *Greer v. Spock*, 424 U.S. 828, 837-38 (1976).

201. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 62-100 (1996).

202. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (discussing common law interpretation methods and their relation to the development of constitutional doctrines).

203. See *infra* notes 214-46 and accompanying text.

counterintuitively—the scope of permissible deviations would be largely independent of whether a judge in a community-based court adhered to an originalist or a nonoriginalist interpretive philosophy.²⁰⁴

There is a solid doctrinal foundation for importing to the CBC Statute the lesson found in the military context that governmental actors apart from Article III courts may identify instances where circumstances require atypical applications of constitutional principles. As is the case of the constitutional clauses that give Congress power with respect to the armed forces, the Property Clause has been held to grant Congress extraordinary plenary powers.²⁰⁵ Indeed, the Supreme Court has looked to Congress's powers regarding the military when analyzing the outer limits of Congress's powers under the constitutional provisions that grant Congress powers over federal property.²⁰⁶ So, parallel to military officials, the judges who sit on the community-based courts could be expected to have the power to determine that constitutional provisions apply differently in relation to their communities.

This conclusion should not be affected by the fact that there is Supreme Court review in the military context²⁰⁷ but that there would be none (or very little, as previously discussed) under the CBC Statute. This difference between the community-based courts and the military is due to the Exceptions Clause, which permits Congress to delegate final authoritative interpretation of select constitutional questions to entities apart from the Supreme Court;

204. See *infra* notes 238-39 and accompanying text.

205. See *supra* note 62.

206. *E.g.*, *Palmore v. United States*, 411 U.S. 389, 404 (1973) (looking to military courts to answer question of Congress's powers with respect to the District of Columbia pursuant to the Territory Clause of Article I, Section 8, Clause 17). In *Northern Pipeline*, which concerned Congress's powers to create Article I courts pursuant to its general powers, the Court treated military courts and territorial courts as discrete exceptions to general Article III principles, see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982), but subsequent case law has discarded this categorical approach, see *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."), and adopted a jurisprudence that draws lessons concerning Article III from the cases that *Northern Pipeline* identified as discrete exceptions. *Thomas*, 473 U.S. at 583 (looking to *Palmore*, which involved Congress's powers regarding the District of Columbia, with respect to Article III challenge to creation of general Article I court).

207. See *supra* note 148.

Congress has not exercised its Exceptions Clause power in the military context but would do so under the CBC Statute. The presence or absence of ultimate Supreme Court review is analytically distinct from a governmental actor's temporally prior power and responsibility to determine whether the circumstances at hand are sufficiently different to render the decided case law off-point and justify an uncommon application of a constitutional provision. To assert otherwise would be to suggest that limitations on the Supreme Court's jurisdiction diminish other governmental actors' powers and responsibilities to construe the Constitution. There is no basis for such a view. Indeed, the law from the political question doctrine suggests otherwise, for the absence of Supreme Court jurisdiction to interpret constitutional provisions under the political question doctrine has not been held to deprive the nonjudicial branches of the power and responsibility to interpret.²⁰⁸ Just the opposite is true: the absence of Supreme Court review has been understood to empower other governmental actors to become authoritative interpreters.²⁰⁹

In short, the Property Clause allows for the possibility that non-Article III actors can determine that discrete communities on federal property require a different application of constitutional principles, and the Exceptions Clause entails the possibility that the final arbiter of what particular constitutional provisions demand may not be the Supreme Court. A legal regime that drew upon both potentialities of the Property and Exceptions Clauses, but that still respected due process and Article III concerns (e.g., the CBC Statute), indeed may have qualities both strange and

208. See *infra* notes 264-70 and accompanying text (discussing political question doctrine). In any event, the benefits of decentralized interpretation of select constitutional provisions would not be undercut significantly if the CBC Statute provided, or if the Constitution were deemed to require, that the community-based courts' determinations be subject to review by the Supreme Court under the type of highly deferential standard that is applicable to the military. See, e.g., *Weiss v. United States*, 510 U.S. 163, 177 (1994) (holding that the Court must give "particular deference" to the judgment of military authorities when reviewing constitutional challenges to military regulations) (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)). The effect of such highly deferential review is that the Court has upheld significant variations in what the Constitution has been deemed to require as between general society and the military community. For a fuller development of this point, see *Rosen, Our Nonuniform Constitution*, *supra* note 10, at 1141-49, 1152-56, 1161-64.

209. See *infra* notes 264-70 and accompanying text.

unfamiliar. Such novelty, however, should not in and of itself render the statute unconstitutional.

3. *Equal Protection*

Variations in constitutional protections as between general society and the federal enclaves would not be an equal protection violation. When Congress acts pursuant to the Property Clause, it may treat federal property "differently from States so long as there is a rational basis for its actions."²¹⁰ This is true even if the affected parties on the federal property are citizens of the United States.²¹¹ Thus even though the Equal Protection Clause would be fully applicable in the federal property,²¹² the question would be whether there is a rational basis for varying the application of constitutional protections as between general society and the special communities in the federal enclaves. The constitutionality of varying requirement would thus turn on two queries: (1) the normative question of whether there is a rational basis for believing that accommodating insular communities qualifies as a legitimate governmental interest, and (2) whether the creation of community-based courts with such interpretive freedoms is rationally related to such a governmental interest.

The CBC Statute should readily pass this test. The normative arguments for accommodating insular communities²¹³ would appear to be strong enough to satisfy the deferential legitimate-governmental-interest test. Furthermore, the positive experience of tribal courts under the ICRA suggests that creating community-based courts with such interpretive powers is rationally related to achieving the end of empowering select insular communities.

210. *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (per curiam).

211. *Id.* at 653 (Marshall, J., dissenting).

212. *Harris*, for example, concerned Puerto Rico, and "the equal protection guarantee of either the Fifth or the Fourteenth Amendment" as applicable in Puerto Rico. *Id.* at 653 (Marshall, J., dissenting) (citing *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 599-601 (1976)). In contrast to Puerto Rico, the Constitution has been held *not* to apply to some territories. *E.g.*, *Dorr v. United States*, 195 U.S. 138, 146-47 (1904) (unincorporated territories such as the Philippine Islands).

213. *See supra* note 3.

B. The Limitations on Interpretive Freedom

As discussed above, community-based courts would not be required to apply constitutional provisions in the same way as the Supreme Court. This would not run afoul of the multifarious constitutional doctrines that establish the rules of judicial hierarchy because the community-based courts would not be determining that the Supreme Court's interpretations were incorrect, but instead would be providing highly contextualized applications of constitutional principles. This does, however, create some limitations on community-based courts' interpretive freedoms not shared by tribal courts.

The limitations are best understood in relation to a simple model for characterizing deviations from ordinary Supreme Court doctrines.²¹⁴ The model shows that there are five possible approaches to past Supreme Court pronouncements that an authoritative interpreter of a constitutional provision can take. Community-based courts would be disabled from taking two of these approaches. Tribal courts, it so happens, have not relied heavily upon these two. Insofar as tribal courts have realized important benefits under their regime of multiple authoritative interpreters, it would follow that imposing these restrictions on community-based courts need not unduly constrain them.²¹⁵

1. Mapping the Development of Constitutional Doctrine

The five approaches to past Supreme Court pronouncements can best be appreciated in relation to a model that describes the state of development of any particular constitutional doctrine. The model builds on the commonly appreciated distinction between "rules" and "standards."²¹⁶ Standards are legal edicts that describe the trigger of legal consequences in "abstract terms that refer to the ultimate policy or goal animating the law."²¹⁷ Rules, by contrast, are legal

214. What follows draws heavily from Rosen, *Of Tribal Courts*, *supra* note 10, at 489-500.

215. See *supra* notes 287-89 and accompanying text.

216. E.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE* 102-04 & 104 n.35 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992).

217. Rosen, *supra* note 18, at 623.

edicts that "describe the triggering event with factual particulars or other language that is determinate within a community."²¹⁸

Now to the model. Constitutional provisions typically take the form of standards that require active interpretation to identify concretely the actions that are required, permitted, or proscribed in particular circumstances. The interpretive process can be usefully conceptualized as involving three steps. Although the steps do not necessarily correspond to the chronology of the constitutional provisions' interpretation,²¹⁹ identifying them is useful because they provide a means of assessing the nature and scope of a community-based court's deviations from ordinary doctrine.

First, the constitutional provision can be identified with a general "Goal," by which I mean a broad-stroke description of what the provision attempts to accomplish. The Goal sets the parameters within which subsequent doctrinal development occurs.²²⁰ For example, the Goal of the Fourth Amendment has been identified as protecting various "personal and societal values" including a "right to privacy."²²¹ Although people typically view the contemporarily understood Goal as inevitable, the Goal almost always is a non-axiomatic translation of the constitutional provision.²²² That is to say, a different Goal (or Goals) plausibly can be ascribed to the constitutional provision (and, frequently, have been, as an historical matter). Understanding these characteristics of Goals is vital to appreciating the appropriate scope of a multiple authoritative interpreter's deviations from ordinary doctrine.

The second step in the process is the creation of a "Legal Test" to determine whether the identified Goal is met.²²³ This second step occurs because the Goal inevitably is too abstract, and consequently, unworkable for the judiciary's institutional needs of having a shorthand method for decision making that identifies as legally relevant only a subset of the infinite facts that characterize any given circumstance. The test almost always includes one or

218. *Id.* at 623.

219. Rosen, *Of Tribal Courts*, *supra* note 10, at 490.

220. *Id.* at 490-91 & nn.42-50. Perhaps counterintuitively, identification of the Goal frequently is *not* what happens first in time during the interpretive process. Once the Goal is identified, however, it affects subsequent doctrinal development. *Id.* at 490 n.43.

221. *Oliver v. United States*, 466 U.S. 170, 177, 182-83 (1984).

222. Rosen, *Of Tribal Courts*, *supra* note 10, at 490 & n.45.

223. *See id.* at 490 & n.46.

more "Standards." For example, the Supreme Court has translated the previously mentioned Fourth Amendment Goal into a Legal Test comprised of several Standards that ask whether "the individual manifested a *subjective expectation of privacy* in the object of the challenged search" and whether society is "willing to recognize that expectation as *reasonable*."²²⁴ This Legal Test helps to particularize the Goal, but by deploying Standards such as "expectation of privacy" and "reasonable," it still leaves ample uncertainty as to what concretely satisfies it.

Step three describes what occurs to the Legal Test's Standard over time. As the Standard is applied over a series of cases, it almost always becomes increasingly rule-like. This occurs because cases, by their nature, are disputes that involve particular facts. As the cases are decided they become showcases of what, as a concrete matter, the Standard actually requires.²²⁵ Step three's product is best identified as a "Rulified Standard." For example, do people have a "subjective expectation of privacy" in open fields? The Court has said no.²²⁶ In curtilage surrounded by a high double fence? Not from a naked-eye observation made from an aircraft, according to the Court.²²⁷

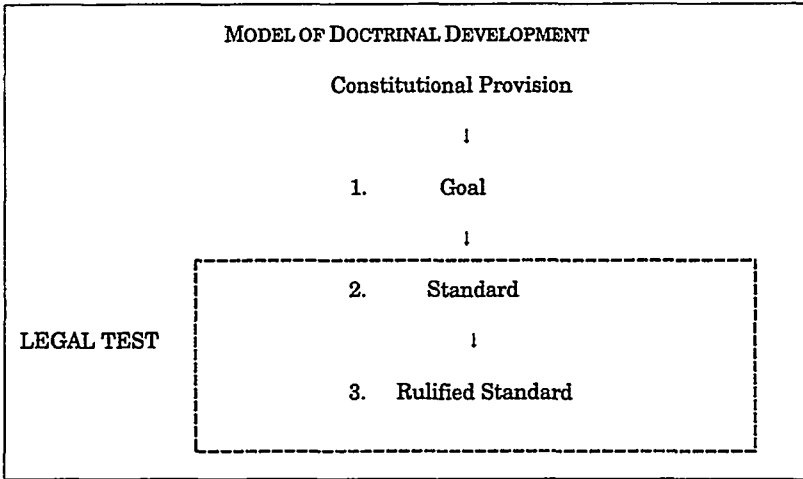
This simple model of interpretation can be graphically depicted as follows:

224. *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (emphasis added).

225. This process of utilizing case law to make standards more concrete is not logically necessary; some say, for instance, that it does not occur in French law. Barry Nicholas, *Introduction to the French Law of Contract*, in *CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS* 7, 9-10 (Donald Harris & Denis Tallon eds., 1989). It is, however, an accurate depiction of what happens under the United States' common law method of constitutional adjudication. Strauss, *supra* note 202, at 877-906.

226. See *Oliver*, 466 U.S. at 177.

227. *Id.* at 209-10 (quoting *Ciraolo*, 476 U.S. at 211 (emphasis added)).



2. Five Possible Approaches to Case Law

A community-based court theoretically could take any of five possible approaches to past Supreme Court pronouncements.

First, the community-based court could ignore altogether the federal case law and proceed to construe the provision wholly on its own. I have called this the "Tabula Rasa" approach.²²⁸ The second approach is the polar opposite of Tabula Rasa: the court could completely incorporate the federal doctrine to the extent the doctrine has been developed. This is what I have called "Incorporation." Perhaps surprisingly, community-based courts could be valuable even when they merely Incorporate.²²⁹

Third, a community-based court could adopt the Supreme Court's Standard but reject the Court's rulification of the Standard, instead opting to tailor it to the context at hand. I have called this "Tailoring."²³⁰ Such context-specific tailoring may require or proscribe actions that vary from what is required or proscribed in most other places. To provide an analogy, the United States Court of Military Appeals has relied on Tailoring to reject Rulified Standards that are applicable to general society and to adapt the

228. Rosen, *Of Tribal Courts*, *supra* note 10, at 492.

229. *Id.* at 494.

230. *Id.* at 495.

Constitution's application to the military community. For example, in upholding a warrantless entry into the defendant's two-person barracks in the middle of the night against a Fourth Amendment challenge, the court in *United States v. McCarthy*²³¹ adopted the ordinary Standard but employed Tailoring. It held that "a military member's reasonable expectation of privacy in the barracks is limited by the need for military discipline and readiness. ... [A]n intrusion that might be unreasonable in a civilian context not only [may be] reasonable but [may be] necessary in a military context."²³²

Fourth, a community-based court could adopt the Goal identified by the Supreme Court but reject the Court's Standard. I have dubbed this "Re-standardizing."²³³ For example, in *Hopi Tribe v. Lonewolf Scott*,²³⁴ the Hopi tribal court accepted that the Goal of the due process void for vagueness doctrine is to ensure that persons have fair notice of what conduct is criminally sanctionable. But instead of deploying the ordinary Standard—an objective test that looks to the mere "possibility of discriminatory enforcement" and lack of notice²³⁵—the court applied a subjective test and analyzed how the Native American community in question understood the ordinance and how the tribal authorities had applied it.²³⁶

Fifth, and finally, a community-based court could reject the Goal and put forward its own. I have called this "Re-targeting."²³⁷ Re-targeting and Tabula Rasa reject the largest quanta of Supreme Court precedent and hence allow for the largest deviations from ordinary constitutional doctrines.

To summarize, the five approaches that a multiple authoritative interpreter can take can be mapped onto the schematic of doctrinal development as follows:

231. 38 M.J. 398 (C.M.A. 1993).

232. *Id.* at 402 (quoting *United States v. Thatcher*, 28 M.J. 20, 22 (C.M.A. 1989)); see generally Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1152-56 ("Federal courts have relied on Tailoring and Re-standardizing to create geographical constitutional nonconformity in the domain of military law.").

233. Rosen, *Of Tribal Courts*, *supra* note 10, at 496.

234. 14 Indian L. Rptr. 6001, 6005 (Hopi Tribal Ct. 1986).

235. *Gentile v. State Bar*, 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring).

236. *Lonewolf Scott*, 14 Indian L. Rptr. at 6005.

237. Rosen, *Of Tribal Courts*, *supra* note 10, at 496.

This would mean that the community-based courts would be permitted to engage in Incorporation, Tailoring, and Re-standardizing, but not Re-targeting or Tabula Rasa.

Interestingly, this limitation suggests that the scope of deviation from ordinary doctrine is largely independent of whether a judge for a community-based court adhered to an originalist or nonoriginalist interpretive convention. This is true because originalist understandings seldom if ever are expressed at the level of detail (Standard or Rulified Standard) at which a community-based court would be permitted to deviate.

Such a limitation would still permit extensive variations from ordinary constitutional requirements. As mentioned above, all variations in constitutional requirements that are found in the military and in public schools are created via Re-standardizing and Tailoring.²³⁹ In fact, the same is true of virtually all variations in Indian Country.²⁴⁰ The potential for variation can be most dramatically illustrated by considering Tailoring, which is more limited than Re-standardizing in generating deviations from ordinary doctrines because Tailoring "rejects"²⁴¹ a smaller quanta of federal court precedent than Re-standardizing. In *Brown v. Glines*,²⁴² for example, the Supreme Court employed Tailoring in deciding that prior restraints within military enclaves do not violate the First Amendment. At issue was the constitutionality of an Air Force regulation that required service persons to obtain supervisory approval before distributing petitions. The Court adopted the ordinary First Amendment Standard and concluded that the regulations "protect a substantial Government interest unrelated to the suppression of free expression."²⁴³ The Court came to this conclusion because it highly contextualized the substantial government interest: "[t]o ensure that [soldiers] always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and [] discipline . . .'"²⁴⁴

239. *Id.* at 1144-45, 1152-56, 1159-61.

240. Rosen, *Of Tribal Courts*, *supra* note 10, at 516-78.

241. By "rejection" I mean a determination that the ordinary teachings of case law are not applicable to the context at hand, not a determination that the case law as decided upon its facts was incorrect.

242. 444 U.S. 348, 358-61 (1980).

243. *Id.* at 354.

244. *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)). Furthermore, the

In fact, the Court defined the substantial government interest in the military context in a manner that completely cut against what is generally understood to be core First Amendment values of protecting the exchange of political expression:²⁴⁵ the military requires the inculcation of "duty" and "discipline," and this requires the censorship of ideas that challenge orthodoxy and patriotism. In short, strongly context-specific use of Tailoring can generate profound variations. Re-standardizing can create even broader variations insofar as it deems even more precedent to be inapplicable to the case at hand than does Tailoring.

Furthermore, the tribal court experience suggests that requiring community-based courts to accept the Goal would not significantly impede realization of the potential benefits of a regime of multiple authoritative interpreters. This is because Re-targeting and Tabula Rasa are not heavily relied upon by tribal courts.²⁴⁶ Because tribes have been able to realize significant benefits by relying primarily on Incorporation, Tailoring and Re-standardizing, it stands to reason that non-Indian communities could as well.

C. Structural Challenges to the Existence of Any Interpretive Freedom

There is a final possible constitutional challenge to the community courts' interpretive independence: even if it is not unconstitutional upon a clause-by-clause analysis, the creation of multiple authoritative interpreters of the Constitution might offend structural fundamentals of the Constitution. It might be argued, for example, that a regime of multiple authoritative interpreters of

Court explained that the regulations met the second element of ordinary free speech jurisprudence because they "restrict speech no more than is reasonably necessary to protect the substantial government interest." *Id.* at 355.

245. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*) (noting that "[d]iscussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

246. *Rosen, Of Tribal Courts*, *supra* note 10, at 516-78.

select constitutional provisions is inconsistent as an *a priori* matter with the nature of American constitutionalism, if not constitutionalism generally. In fact, Professors Larry Alexander and Frederick Schauer recently have argued in the pages of the *Harvard Law Review* that there must be one authoritative interpreter of the Constitution, and that this conclusion inexorably follows from an understanding of the nature of constitutional law.²⁴⁷ Community-based courts with interpretive independence would seem to violate squarely this condition and hence undermine constitutionalism.²⁴⁸ Similarly, Professor Leonard Ratner has argued that

[t]he Constitution makes us one nation. It is the symbol of our shared purposes. If interpretation of that overriding document, which manifests our agreement on long term associational values, varies from state to state, respect for and confidence in the document is undermined. The nature of our governmental structure and its implications for all citizens become indistinct. Uncertainty and discontent proliferate.²⁴⁹

Although Ratner has phrased his argument in terms of nonuniformity "from state to state,"²⁵⁰ his logic compels the conclusion that constitutionalism by its nature requires one authoritative interpreter because the values he identifies as metonymic with the Constitution would be undermined regardless

247. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending *Cooper v. Aaron*'s "assertion of judicial primacy without qualification"); *id.* at 1370 ("The normative inquiry, however, and thus the question of which approach to nonjudicial constitutional interpretation is most desirable, can only be answered by inquiring into the nature of law and into the functions it serves.").

248. On closer look, however, community-based courts might not be problematic even under Alexander and Schauer's view. The core of their argument is that the authoritative settlement and coordination functions served by law, particularly constitutional law, are what demand a single authoritative interpreter of the Constitution. *Id.* at 1371-72, 1377-87. Even assuming as correct their assumption that the central function of the Constitution is to provide authoritative settlement and coordination, these purposes would not necessarily be undermined by the presence of a limited number of community-based courts that exercised the power to construe authoritatively select constitutional provisions within their enclaves.

249. Ratner, *supra* note 132, at 941.

250. *Id.*

of the governmental levels at which there were contemporaneous nonuniformity of constitutional interpretation. Thus community-based courts with independent interpretive powers would appear to be inconsistent with American constitutionalism as an *a priori* matter under Ratner's account, as well.

Notwithstanding the views of these prominent scholars, and the likely intuitions of many others, a regime of multiple authoritative interpreters of the Constitution is not *a priori* inconsistent with American constitutionalism. To the contrary, there are two distinct models of multiple interpreters of the Constitution that can be found in American constitutional law. The more radical of the two has a strong historical pedigree and makes powerful analytical sense, but is contrary to some contemporary Supreme Court dicta, whereas the second model is still good law. The community-based courts are more similar to the less radical of the two models, and they do not run afoul of the contemporary dicta. There accordingly are strong reasons to believe that the CBC Statute would not violate structural fundamentals of the Constitution.

1. *The First Model*

The first model of multiple interpreters in American constitutional law has strong historical foundations, but is inconsistent with some contemporary Supreme Court dicta. Its most recent advocates include Professors John Harrison, Sanford Levinson, Thomas Merrill, Michael Stokes Paulsen, and Mark Tushnet.²⁵¹ According to these scholars, the Constitution does not create a regime of judicial supremacy where the Supreme Court's interpretations are binding on the other branches of government, *pace* the dicta in *Cooper v. Aaron*. Instead, the Constitution creates a system of shared interpreters in which the other branches of the federal²⁵² government have the power, and indeed the responsibility, to offer their independent interpretations of the

251. See *supra* note 175.

252. Some scholars have argued that constitutional interpretation is appropriately done by actors aside from the federal government. *E.g.*, TUSHNET, *supra* note 175, at 181-82 (the people); Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1188-1201 (1998) (states).

Constitution.²⁵³ Whereas the federal judiciary's power to resolve "cases or controversies" includes the power to determine the applicable rule of law in the case, the judiciary's interpretations are not binding on the other branches outside of the decided case. That is to say, the executive branch has a duty to interpret federal law, including the Constitution, insofar as it must understand the law (i.e., have an interpretation of it) in order to execute it. Similarly, the Congress has a duty to judge its constitutionally granted and constitutionally limited legislative powers for itself when it legislates.²⁵⁴

There is strong historical support for this first model, which I shall label "Inherent Powers." Thomas Jefferson acted pursuant to such an understanding when, as President, he directed the Attorney General to stop prosecutions under the Sedition Act of 1798 and pardoned all who had been convicted under the Act during the previous administration of President Adams. He later explained his actions:

The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution.²⁵⁵

253. Some of these scholars explicitly acknowledge that their views are inconsistent with the constitutional doctrine of today. *E.g.*, Paulsen, *supra* note 174, at 225 ("I make no claim that the position for which I argue is the doctrine held by the modern Supreme Court. It is not."). Their arguments nonetheless are still relevant to the question of whether multiple authoritative interpreters of the Constitution are incompatible as an *a priori* matter with American constitutionalism. Further, the case law that cuts against their position—*Cooper v. Aaron* and a series of cases that have reiterated *Cooper's* dictum that other branches of government are bound by the Supreme Court's interpretations of the Constitution—did not concern the Exceptions Clause and accordingly does not necessarily serve as a doctrinal obstacle to the CBC Statute. After all, it is possible that the Exceptions Clause is an express constitutional exception to the ordinary rules of judicial hierarchy. *See supra* notes 194-209 and accompanying text.

254. *E.g.*, Harrison, *supra* note 175, at 371-74; *see also* Paulsen, *supra* note 174, at 322 & n.358.

255. Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), *quoted in* Paulsen, *supra* note 174, at 255.

President Jackson propounded a similar understanding of multiple authoritative interpreters of the Constitution when he explained his constitutional grounds for vetoing the rechartering of the National Bank notwithstanding the judgment rendered by the Supreme Court in *McCulloch v. Maryland*²⁵⁶ that the National Bank was constitutional:

*Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.*²⁵⁷

James Madison and Thomas Jefferson, as principal authors of the Kentucky and Virginia Resolutions of 1798, expressed even more expansive notions of multiple authoritative interpreters when they argued that *states* have the power to construe the Constitution independently of the Supreme Court.²⁵⁸ The Commonwealth of Virginia in *Cohens v. Virginia* advanced much the same understanding in 1821 when it argued (unsuccessfully) that the Supreme Court was without appellate jurisdiction over state courts' interpretations of the federal constitution.²⁵⁹ Furthermore,

256. 17 U.S. (4 Wheat.) 316 (1819).

257. Andrew Jackson, Veto Message (July 10, 1832), *quoted in* Paulsen, *supra* note 174, at 259. To be sure, "Jackson's veto did not actually *defy* the Court's ruling in *McCulloch*. The Court had not ruled that it was unconstitutional *not* to have the Bank." *Id.* at 259 n.159. Jackson's reasoning nonetheless reflects a notion of multiple authoritative interpreters, even if it is unclear whether Jackson would have cabined the principle to the context of veto. For an argument that the reasoning is not limited to the veto context, see *id.* at 262-84 & nn.165-240.

258. THOMAS JEFFERSON, KENTUCKY RESOLUTIONS OF 1798 AND 1799, *reprinted in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540 (2d ed. 1987) (arguing that the "government, created by this compact, [is] not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, *each party has an equal right to judge for itself . . .*").

259. 19 U.S. (6 Wheat.) 264, 290 (1821). The Supreme Court had resolved this issue five years earlier in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), yet still devoted

Abraham Lincoln's position in the Lincoln-Douglas debates rested on a similar understanding that nonjudicial actors had the responsibility to interpret independently the Constitution, and as President he "directed his subordinates to grant U.S. patents and visas to *citizens* that the Court in *Dred Scott* had said could not be considered citizens."²⁶⁰

To be sure, the above historical examples may not be good law today. At the very least, the Commonwealth's position in *Cohens v. Virginia* was decisively rejected by the Supreme Court in that case, and the dicta in *Cooper v. Aaron* suggests an even more fundamental erosion of the Inherent Powers model.²⁶¹ But this collection of perspectives strongly suggests that the concept of multiple interpreters of the Constitution is not *a priori* incompatible with American constitutionalism.

Furthermore, there are three key respects in which the model of Inherent Powers is a more radical regime of multiple authoritative interpreters than the CBC Statute. Consequently, the precedent that arguably undermines the first model does not necessarily apply to community-based courts. Consider first the degree to which there are multiple authoritative interpreters of the Constitution. Under the first model, governmental actors apart from the Supreme Court always have the power to offer their independent interpretations of the Constitution. Under the CBC Statute, by contrast, only a limited number of governmental actors have independent interpretive authority over select constitutional provisions.

The second distinction concerns the source of the power to independently interpret. The CBC Statute is a delegation of interpretive authority based on an express constitutional provision—the Exceptions Clause—whereas the claim of interpretive authority under the Inherent Powers model derives from far less explicit sources.²⁶² This difference makes the CBC Statute far less

eight pages to answering this question again in *Cohens*. For an enlightening discussion of this curiosity, see CURRIE, *supra* note 71, at 98-99.

260. Paulsen, *supra* note 174, at 276.

261. See *supra* note 252.

262. This is not to suggest that the institution of judicial review and judicial supremacy first established in *Marbury v. Madison* is textually grounded. As generations of scholars have noted, Chief Justice Marshall's analysis fundamentally is premised on nontextual structural and policy considerations, not constitutional text. In short, both sides of the debate rely primarily on indeterminate nontextual analyses to support their positions. Nevertheless,

threatening to contemporary sensibilities concerning judicial supremacy. This is all the more true because there are other well-established doctrines that similarly function as delegations of constitutional interpretive authority to entities other than the Supreme Court for circumscribed purposes.²⁶³

The third distinction between the Inherent Powers model and community-based courts is that Inherent Powers permits other branches of governments to disagree authoritatively with the Supreme Court's interpretation of the Constitution. Under the CBC Statute, by contrast, although the community-based courts would be empowered to fill-in interstices in determining that established constitutional principles require a unique application in a discrete locale on behalf of an idiosyncratic community, the community-based courts would not have the power to decide that the Court's interpretation was incorrect. There accordingly is no risk of confusion as to what is the applicable law: the community-based courts' interpretations would be applicable in their enclaves and the Supreme Court's would apply elsewhere. There also is no challenge to the Supreme Court's interpretive authority; other governmental entities simply are exercising interpretive authority where the Supreme Court is without jurisdiction to express its own views.

2. The Second Model

The second model comprises two contemporary instances in which there are multiple authoritative interpreters of the Constitution: the political question doctrine and the community standards doctrine. Similar to the CBC Statute, and in contrast to the Inherent Powers model, both examples of the second model can be conceptualized as delegations of interpretive authority. Also akin to the CBC Statute and unlike the Inherent Powers model, the delegates in the second model do not have the power to determine that the Supreme Court's interpretations were incorrect. That the political question and community standards doctrines are good law definitively establishes that a regime of multiple authoritative

the burden of justification today arguably falls on challengers to judicial supremacy primarily because judicial supremacy has largely won out as an historical matter.

263. See *supra* notes 228-37 and accompanying text.

interpreters of the Constitution is not inconsistent with American constitutionalism as an *a priori* matter. The two doctrines' similarity to the CBC Statute further suggests that the CBC Statute also would not run afoul of basic structural requirements of the Constitution.

Political question is the doctrine under which the Supreme Court determines that a provision of the Constitution is not suited to being interpreted by the Court but instead is to be construed by a coordinate branch.²⁶⁴ The Court determines that the issue is not justiciable and refuses to offer any interpretation at all, letting stand the understanding explicitly or implicitly propounded by a coordinate branch. Several constitutional provisions have been identified as falling under the political question doctrine, including the Guarantee Clause²⁶⁵ and important issues arising under the Impeachment Clause²⁶⁶ and the Article V amendment provision.²⁶⁷ The political question doctrine can be conceptualized as a type of delegation, for the Supreme Court decides that another branch, rather than it, will provide the authoritative interpretation of the provision at issue.²⁶⁸ The political question doctrine thus represents an established example of governmental actors apart from the Supreme Court having the power to construe authoritatively select

264. *Baker v. Carr*, 369 U.S. 186, 198, 208-37 (1962).

265. *Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849).

266. *Nixon v. United States*, 506 U.S. 224, 228-38 (1993) (noting what constitutes a "trial" for purposes of the Impeachment Clause is a nonjusticiable political question).

267. *Coleman v. Miller*, 307 U.S. 433, 454 (1939) (noting that whether there is a time limit by which amendments to the Constitution must be ratified by the States is a nonjusticiable political question).

268. The rhetoric of the opinions, however, does not reflect a self-consciousness of delegation but of duty, that is, a judgment that the provision is not capable of being construed by the judiciary for a variety of reasons. This is not the place to ask whether the criteria proffered by the Court to identify what is a political question provide a principled means for demarcating nonjusticiable political questions from justiciable questions. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988) (asking this question); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 667-69 (1989) (asking similar question). To the extent, however, that certain constitutional provisions call for interpretation by the political branches rather than the judiciary, the political question doctrine all the more illustrates that nonjudicial supremacy is not *a priori* incompatible with American constitutionalism. After all, under this understanding of the political question doctrine, the Constitution itself constitutes a regime of inherent, rather than delegated, multiple authoritative interpreters.

constitutional provisions.²⁶⁹ The political question doctrine also demonstrates that regimes of multiple authoritative interpreters need not generate interpretive conflicts and doctrinal non-uniformity. There is authoritative construction by a governmental entity apart from the Supreme Court without generating conflict under the political question doctrine because the Court's determination of nonjusticiability means that it at no point offers a substantive interpretation with which the coordinate branch's interpretation can conflict.²⁷⁰

The community standards doctrine is another²⁷¹ example of a regime of multiple authoritative interpreters through delegation rather than inherent powers. It operates in importantly different ways than the political question doctrine. The community standards doctrine is part of the First Amendment law of obscenity.²⁷² "Obscene" material receives no First Amendment protection,²⁷³ and material is "obscene" if, taken as a whole, it (1) "appeals to the prurient interest," (2) "depicts or describes" sexual conduct in "a patently offensive way," and (3) "lacks serious literary, artistic, political, or scientific value."²⁷⁴ The first two prongs of the obscenity test are determined on the basis of "community standards," meaning that a "juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes"²⁷⁵ What qualifies as "prurient interest" and "patently offensive" accordingly is determined on either a judicial district-by-district or city-by-city basis.²⁷⁶ Thus, unlike the political question doctrine, where there typically is only one (nonjudicial) governmental actor that is interpreting a constitutional provision,

269. See generally Mulhern, *supra* note 268, at 124-27 (discussing political branches' claims of interpretive authority).

270. There is only one conceivable exception: were the coordinate branch to conclude that the provision had to be judicially construed.

271. But see *supra* note 268.

272. E.g., *Roth v. United States*, 354 U.S. 476, 487-89 (1957).

273. *Id.* at 485.

274. *Miller v. California*, 413 U.S. 15, 24 (1973).

275. *Hamling v. United States*, 418 U.S. 87, 104 (1974).

276. Although the Court has not required as a constitutional matter that community standards be determined on the basis of a fixed geographical area, *id.* at 104, states are permitted to "impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case." *Smith v. United States*, 431 U.S. 291, 303 (1977).

under the community standards doctrine there are multiple interpreters. But whereas the governmental actor under the political question doctrine has full interpretive authority,²⁷⁷ each of the multiple authoritative interpreters under the community standards doctrine has been delegated interpretive authority only within delimited bounds: in the application of the legal test to identify "prurient interest" and "patently offensive." This is similar to the CBC Statute, under which community-based courts must work within the Goals identified by the Supreme Court.

There is another important difference between the political question and community standards doctrines. The community standards doctrine invites contemporaneous nonuniformity of interpretation. In fact, for the purpose of supporting diversity among subnational communities, the Supreme Court specifically rejected the position that obscenity should be determined on the basis of a single, national standard.²⁷⁸

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.²⁷⁹

In short, the community standards doctrine's very point is "to permit differing levels of obscenity regulation in such diverse

277. To say that the governmental actor has full interpretive authority is not to say that it can do whatever it wants. The actor would be bound to interpret the constitutional provision in good faith. See *Nixon v. United States*, 506 U.S. 224, 238 (1993) (Stevens, J., concurring) (responding to Justice Souter's hypothetical that the Senate could use a coin-toss to decide whether to impeach by arguing that "[r]espect for a coordinate branch of the Government forecloses any assumption that improbable hypotheticals like [the one] mentioned by . . . Justice Souter will ever occur"); Paulsen, *supra* note 174, at 321 (arguing that "the President is not bound by the other branches' legal views, not that he may do anything he wants. . . . [T]he President is bound by his oath to exercise independent interpretive power in good faith . . .").

278. *Hamling*, 418 U.S. at 106 ("[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard . . .") (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 200-01 (1964) (Warren, J., dissenting)).

279. *Miller*, 413 U.S. at 32-33.

communities as Kerrville and Houston, Texas"²⁸⁰ so that "material may be proscribed in one community but not in another" as a matter of constitutional law.²⁸¹

Contemporary nonuniformity, however, does not mean inconsistency with Supreme Court doctrine. Akin to the political question doctrine, the community standards doctrine's regime of multiple authoritative interpreters does not permit the creation of interpretations that contradict the Court's. The community standards doctrine identifies with particularity the bounds within which the decentralized interpreters are delegated the power to interpose their independent judgments (i.e., what constitutes "prurient interest" and "patently offensive"). In other words, the community standards doctrine invites Tailoring.²⁸² The doctrine tolerates the contemporaneous nonuniformity among inferior federal courts and state courts that results.

3. *The CBC Statute's Relation to the Two Models*

The two models of multiple authoritative interpreters that can be found in American law—Inherent Powers and Delegated Powers—are highly instructive to any effort to consider the constitutionality of community-based courts from a structuralist perspective. Most importantly, the two models provide an unanswerable challenge to the view that American constitutionalism demands that the Supreme Court be the sole authoritative interpreter of the Constitution as an *a priori* matter.

In addition, the two regimes of delegated interpretive authority, political question and the community standards doctrines, provide a useful context to analyze the Exceptions Clause and, more specifically, the CBC Statute. The Exceptions Clause, a pillar of the CBC Statute, can be usefully conceptualized as yet another instance of delegated constitutional interpretation; by depriving the Supreme Court of appellate jurisdiction under the Exceptions Clause, Congress in effect delegates the responsibility for

280. *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986). For more discussion of the community standards doctrine, see Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1149-52, 1170-72.

281. *United States v. Peraino*, 645 F.2d 548, 551 n.1 (6th Cir. 1981).

282. See Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1149-51.

interpretation to a governmental actor other than the Supreme Court. This consequence of de facto delegation long has been recognized by Exceptions Clause scholars: exercise of Congress's power under the Exceptions Clause would put final judicial review of the "except[ed]" constitutional provisions in the hands of the inferior federal courts or, if Congress also stripped the inferior federal courts of jurisdiction, the state courts.²⁸³ The CBC Statute is a variant on this, channeling appellate review of select constitutional provisions to community-based courts. To be sure, the Exceptions Clause differs from political question and community standards insofar as delegations would be made by Congress rather than the Court. This difference, however, ought not to matter in respect to the question at hand of whether a multiplicity of authoritative interpreters of the Constitution is inconsistent with the Constitution as an *a priori* matter.²⁸⁴

The political question and community standards doctrines also assist in analyzing the constitutionality of the scope of interpretive authority that would be enjoyed by community-based courts.²⁸⁵ The

283. *E.g.*, Bator, *supra* note 99, at 627-29; Gunther, *supra* note 113, at 910-16.

284. This is not to suggest that the analogy to delegation is the sole argument that the Exceptions Clause grants Congress plenary power—many other arguments have been put forward by scholars, *see supra* notes 129-32 and accompanying text,—but only that the plenary power interpretation of the Clause can be understood as part of a larger pattern of delegated constitutional interpretation and for that reason is less unusual than it may appear at first.

285. The observations in this paragraph pertain only to the CBC Statute and not to the Exceptions Clause generally. It is unclear what interpretive authority state courts would possess in the event Congress exercised its powers under the Exceptions Clause without creating special community-based courts on federal property. Paul Bator has suggested that Congress's exercise of its power under the Exceptions Clause would permanently freeze in place the interpretation given by the last Supreme Court precedent on the subject. Bator, *supra* note 129, at 1041. It is unclear, however, to what extent this would be true for two interrelated reasons. First, consistent with the incrementalist, common law adjudicatory style that is constitutional law, even apparently minor factual differences, as well as changed circumstances over time, could give rise to good faith legal conclusions that would adapt, or continue to develop, the legal doctrines over time. Second, such a process of continued development of the law in a manner that would make it not appear "frozen" would be all the more likely if there in fact were no supervening authority to review the state court decisions. Gunther, *supra* note 113, at 910-11 (making similar observations). Regardless of what role state courts would play in the event Congress made a country-wide exercise of its Exceptions Clause powers, community-based courts under the CBC Statute would have the power to determine that generally accepted constitutional principles require different applications in federal land for the reasons discussed *supra* notes 172-246 and accompanying text.

community-based courts would have interpretive powers somewhere on the continuum between the courts under the community standards doctrine and the nonjudicial federal actors under the political question doctrine, two regimes whose constitutionality is unquestioned. The community-based courts' powers would be less than that enjoyed by the coordinate branches under the political question doctrine because the community-based courts would not have the power to provide the single, nationwide meaning of any constitutional provisions; akin to the local courts under the community standards doctrine, the community-based courts' interpretations would apply only to geographically limited areas. Furthermore, in contrast to the political question doctrine, but similar to the community standards doctrine, community-based courts would not have complete interpretive freedom; they would have to accept the Goal identified by the Supreme Court. The community-based courts likely would exercise broader interpretive authority than the local courts under the community standards doctrine, however, in two respects. First, the community-based courts presumably would be empowered to construe a wider array of constitutional questions than just the definition of obscurity. Second, the community-based courts would have broader interpretive authority over those delegated provisions; in other words, the community-standards doctrine is a form of Tailoring,²⁸⁶ and community-based courts would have the power not only to Tailor but also to Re-standardize.

In short, the two models of multiple authoritative interpreters found in American constitutional law show that the view that multiple authoritative interpreters of the Constitution is *a priori* incompatible with American constitutionalism cannot stand. There is also strong evidence that the CBC Statute would not violate structural requirements of the Constitution because the CBC Statute would create a regime of delegated multiple interpreters similar to what is found under the political question and community standards doctrines.

286. Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1149-51.

IV. OTHER CONSIDERATIONS REGARDING THE TRIBAL COURT ANALOGY

Part III showed that community-based courts would have significant powers to offer independent interpretations much as tribal courts do, despite the fact that, in contrast to tribal courts, they would be interpreting constitutional law. Part IV considers other differences between community-based courts and tribal courts that bear on the pertinence of the tribal court experience under the ICRA.

A. Differences Between Native Americans and Insular Communities

There is little doubt that the benefits enjoyed by Native Americans under the ICRA's regime of multiple authoritative interpreters would be enjoyed by non-Indian communities. It is self-evident, after all, that community-based courts for insular communities would expand institutional diversity, extend the range of communities that could flourish, and increase the range of possible self-government. It is possible, however, that the limitations on community-based court interpretive freedoms discussed above²⁸⁷ would render the community-based courts inadequate to meet the needs of some communities. Such a possibility is unavoidable, for it is virtually inconceivable that any single polity could accommodate all possible forms of communal living.²⁸⁸ Nonetheless, the range of variations possible under Targeting and Re-standardizing, along with the fact that tribal courts have relied on Re-targeting and Tabula Rasa only occasionally,²⁸⁹ together suggest that the community-based courts still would be adequate for many, if not most, insular communities.

The more difficult question is to what extent the contained nature of the costs observed in the ICRA regime would carry over to non-Indian communities.²⁹⁰ Furthermore, as is discussed in the

287. See *supra* notes 214-46 and accompanying text.

288. For a discussion of what types of communities cannot be accommodated under liberal premises, see Rosen, *supra* note 1, at 1095-96.

289. See *supra* notes 239-46 and accompanying text.

290. This discussion expands on Rosen, *Of Tribal Courts*, *supra* note 10, at 579-81.

next subsection, the CBC Statute could impose additional potential costs not even implicated by the ICRA. Let us first consider the three possible costs that are potentially relevant to both the Indian and non-Indian communities. As discussed above, there are three potential costs posed by the ICRA: externalities, inefficiencies, and the undermining of the protection of rights that the ICRA was intended to provide.²⁹¹ The tribal court study suggests that these costs have been reasonably contained under the ICRA.²⁹² Whereas it is impossible to draw any incontrovertible inferences concerning costs from the practice of one set of communities to another, several factors suggest that the lessons from the ICRA experience are to a large degree transferable. Suggestive though not dispositive, the ICRA jurisprudence actually provides more than one example of contained costs; each tribe's judiciary has final and authoritative interpretive power of ICRA's provisions, and the tribal case law confirms that the tribes' courts operate largely independently of one another.²⁹³ Whereas this observation does not fully answer the question of transferability because these are all *tribal* communities, consistency of cost containment across multiple independent communities makes generalizing the phenomenon of cost containment more plausible.

Further, the contained costs cannot be attributed to tribal predisposition to Anglo-traditions. Just the opposite is true: at the time ICRA was passed most tribes opposed it insofar as it was yet another instance of federal encroachment on tribal sovereignty.²⁹⁴ The ICRA experience accordingly cannot be explained away as being unrepresentative of the nonconformist groups that likely would seek the benefits of community-based courts. Nor can it be maintained that tribal values fortuitously coincided with Anglo-values. Although there is some important overlap of values, many tribal norms are importantly different from Anglo-political

291. See *supra* notes 33-54 and accompanying text.

292. See *id.*

293. Tribal courts only infrequently cite to other tribal courts and typically utilize such opinions only for guidance when they do so. See, e.g., *Rave v. Reynolds*, 22 Indian L. Rptr. 6137, 6139 (Winnebago Tribal Ct. 1995) (noting that other tribes' holdings "are not binding on this court").

294. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 7-11 (1991); Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972).

principles.²⁹⁵ In fact, many tribal norms found in the ICRA case law might be described as quite "illiberal." For example, the tribal court decisions reflect such arguably illiberal values as encouraging respect for tribal authority,²⁹⁶ advancing the community's well-being at the expense of the individual,²⁹⁷ using religion to help constitute the political community,²⁹⁸ defining community membership on the basis of blood and racial lines,²⁹⁹ and maintaining traditional gender roles under which men serve as protectors of women.³⁰⁰

Another respect in which Native American tribes might be said to differ from other communities that may want to benefit from community-based courts is that Native Americans were not a "single issue" group with respect to whom it readily could be predicted how they would rule on the ICRA's provisions. By contrast, one can readily predict how some insular groups would rule on certain issues.³⁰¹ This difference between Native Americans and other communities may be more imagined than real, however, insofar as there are identifiable norms in tribal communities³⁰² that provide a basis for predicting judicial outcomes. More fundamentally, such predictability is irrelevant. The real issue is the normative question, answered by a thick political theory, of which groups ought to be granted significant powers of self-governance and to what extent. Once that is answered, it is irrelevant that the judicial outcomes correlate to the community's readily identifiable prior commitments.

In short, the tribal courts would appear to be representative of how a regime of multiple authoritative interpreters can be expected

295. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 511-58 (1998).

296. *E.g.*, Rosen, *Of Tribal Courts*, *supra* note 10, at 516, 553-54.

297. *Id.* at 537-38.

298. *Id.* at 551-52.

299. *E.g.*, Hoffman v. Colville Confederated Tribes, 22 Indian L. Rptr. 6127 (Colville Tribal Ct. 1995).

300. Rosen, *Of Tribal Courts*, *supra* note 10, at 542-45.

301. Consider, for example, the Rajneesh, who believed that practice of their religion required that they live separately from others in a homogeneous society, purchased undeveloped land, built and incorporated a city on it, only to have it struck down under the Establishment clause. Rosen, *supra* note 1, at 1082-84. It is not difficult to predict how they would have ruled on an Establishment Clause issue.

302. Cooter & Fikentscher, *supra* note 295, at 511-58.

to function in practice. The benefits of such a regime observed in tribal courts likely are wholly transferable to nontribal communities. Factors such as the numerosity and distinctiveness of tribal communities suggest that the ICRA regime also is representative vis-à-vis the possibility of containing the three aforementioned potential costs that would be common to both tribal and non-Indian insular communities.

B. Additional Potential Costs

Community-based courts that were empowered to authoritatively and independently interpret select constitutional provisions, however, might impose two additional costs not presented by the ICRA's regime of multiple authoritative interpreters of statutory law.³⁰³ These present the most significant problems in drawing inferences from tribal court experiences concerning the likely results of creating community-based courts. Even so, the analysis below does not lead to the conclusion that community-based courts are flatly infeasible, but that more thought must be given to clarifying the commitments that help constitute our national political community.

1. Respect for the Constitution

The first potential additional cost is the risk that the nonuniform interpretations of constitutional provisions that naturally would arise would undermine citizens' respect for the Constitution; it could be argued that the ICRA does not pose this risk because the law the tribal courts construe is statutory, not constitutional.³⁰⁴ Professor Leonard Ratner advanced such a concern vis-à-vis citizens' respect for the Constitution in the context of one possible regime of multiple authoritative constitutional interpreters: inferior federal courts that were responsible to authoritatively construe

303. *But see infra* note 304.

304. It also could be argued, of course, that this distinction is without significance: the fact that "due process" or "equal protection" is construed differently is what might matter to citizens' respect for the Constitution.

constitutional provisions in the event Congress used the Exceptions Clause to strip the Supreme Court of appellate jurisdiction.³⁰⁵

The conclusion that the nonuniformity created by community-based courts would undermine citizens' respect for the Constitution is contingent on several variables. Although the threat posed by nonuniform interpretations of the Constitution to citizens' respect for the Constitution may seem intuitive, the connection between nonuniformity and loss of respect is by no means obvious. In fact, before 1914, the Supreme Court's appellate jurisdiction did not ensure uniformity of interpretation of the Constitution across the states. There was no Supreme Court jurisdiction to review state court interpretations of the Constitution (and other federal law) that found in favor of plaintiffs, even if the state court had interpreted the federal provision differently than the Court had.³⁰⁶ There is no historical evidence to suggest that before 1914 there was a shortage of citizens' respect for the Constitution. As a purely empirical matter, then, nonuniformity does not ineluctably lead to the undermining of citizens' respect for constitutionalism. Whether it does more likely turns on citizens' expectations.

Furthermore, to the extent that there is a connection between nonuniformity and respect, it is important to note that not all regimes of multiple authoritative interpreters equally threaten citizens' respect. Citizens' respect is most vulnerable in the regime Ratner was discussing, where each state's highest court could play the role of final and authoritative interpreter of the Constitution and there might exist no single interpretation that was applicable across the country.³⁰⁷ The threat of undermining citizens' respect for the Constitution would be smaller in the community-based court regime for three reasons. First, the power to construe authoritatively would be granted to only a limited number of actors

305. Ratner, *supra* note 132, at 932-36. Ratner concluded that varying interpretations would undermine citizens' respect for the Constitution, and that this was a reason to conclude that Congress did not enjoy plenary power under the Exceptions Clause. *Id.* Whereas most scholars have rejected Ratner's conclusion concerning the scope of the Exceptions Clause, *see supra* note 129, the possible loss of respect for the Constitution remains relevant to assessing the possible costs of a regime of community-based courts.

306. *See supra* note 130.

307. Most of the country, to be more precise. *See generally* Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1149-66 (showing the geography-based variations from ordinary constitutional doctrines that are found in contemporary constitutional law).

in discrete geographical enclaves, thereby limiting the quanta of potential nonuniformity. Second, the community-based court's interpretation would not be a claim as to what the provision *means*—which would carry with it the implicit suggestion that other interpretations are incorrect—but instead would be a determination of the provision's appropriate application to the idiosyncratic needs of the special community.³⁰⁸ This might help to explain why the many variations across locales of what the Constitution requires³⁰⁹ has not undercut citizens' respect for the Constitution. Third, there would be far less risk that community-based courts would undermine citizens' respect for the Constitution because they would be subject to the interpretive limitations discussed above:³¹⁰ the courts would have to abide by the Goals identified by the Supreme Court.

Of course, to say that the CBC Statute would be less problematic than the regime Ratner was considering does not mean that community-based courts would not pose any risks at all to citizens' respect for the Constitution. It is impossible to determine in advance how problematic such a regime would be, however, because it ultimately is an empirical question that would turn on normative considerations as well as how well the community-based courts functioned. Normative considerations are relevant to citizens' respect for the Constitution insofar as they shape citizens' expectations.³¹¹ If citizens thought there were strong constitutional

308. See *supra* notes 194-209 and accompanying text. It would be far harder for a state court to make such a claim, for few if any state borders are coextensive with meaningful communities whose characters are sufficiently monolithic to justify the claim that the state court is merely adapting the provision to the needs of a discrete community. Cf. James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1227 (1998) (concluding that "the character differentiation hypothesis," which seeks to explain state constitutional interpretation on the basis of distinctive state characteristics, "does not hold up"); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 389-96 (1998) (same).

309. For example, the rules of free speech and search and seizure vary as between general society, military bases, and public schools. Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1152-56 (general society and the military); *id.* at 1159-61 (public schools).

310. See *supra* notes 216-46 and accompanying text.

311. This role of citizens' expectations is supported by the powerful arguments advanced by several scholars that the Constitution was originally designed to be interpreted by all branches of the federal government and accordingly was intended to be a regime of multiple authoritative interpreters. See *supra* notes 251-63 and accompanying text. If citizens' respect

reasons for accommodating select insular communities by means of community-based courts, it stands to reason that their respect for the Constitution would not be undermined by such courts; indeed, citizens' respect might be strengthened in much the same way that the Nazis marching in Skokie and flag burning strengthened many people's commitment to the Constitution. Whether citizens' respect is undermined also likely turns on the substantive doctrines created by the community-based courts. If the community appeared to be taking seriously the task of giving expression to the constitutional provisions that reflect both its community's needs as well as the values underlying the provision,³¹² it is quite plausible that citizens' respect would not be undercut.

2. *Creating a National Political Community*

A second additional possible cost of community-based courts is interference with the creation of the national political community. Professor Ratner alluded to this possible cost, as well, when he argued that the Exceptions Clause does not give Congress plenary power on the basis that "[t]he Constitution makes us one nation. It is the symbol of our shared purposes."³¹³ There are two aspects to this concern: whether a regime of multiple authoritative interpreters of the Constitution would preclude the creation of a national political community at all, and whether the citizens living in the federal enclaves would remain part of the national political community.

With regard to the first aspect of national community, whether the presence of limited numbers of regimes of multiple authoritative interpreters of the Constitution threatens the possibility of forming a national political community ultimately

did not turn on expectations, but if instead respect would necessarily be gutted by the presence of multiple authoritative interpreters of the Constitution, then the Constitution as originally designed was structured in a manner so as to undermine citizens' respect for it.

312. This has occurred in tribal courts. Rosen, *Of Tribal Courts*, *supra* note 10, at 522-78.

313. Ratner, *supra* note 132, at 941; *see also*; SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 5 (1988); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25 (1996) (noting the conclusion of some that "the people of the United States are, in some fundamental sense, constituted by our commitment to the Constitution and the principles of the Declaration of Independence. At the level of national self-definition, a commitment to constitutional principles . . . defines the people of the United States.") (footnote omitted).

depends on one's views of the substantive content of the national political community. If the "shared purposes"³¹⁴ that constitute our national political community include the granting of liberty and associational rights that require grants of significant powers of self-governance to select communities, then the creation of community-based courts would help to realize, not hinder, formation of the national political community.³¹⁵ Another factor that determines the effect of a regime of multiple authoritative interpreters is the level of detail of the "shared purposes" that constitute the national community. If the community-constituting shared purposes are broad principles rather than doctrinal details,³¹⁶ then having a national political community is not inconsistent with the differential application of the broad principles across some locales. The reasonableness of this is suggested by the durability of our national political community despite the fact that constitutional protections such as free speech and search and seizure do vary from place to place in some important respects. For example, these constitutional provisions require one thing in Manhattan and something different on a military base.³¹⁷

314. Ratner, *supra* note 132, at 941.

315. It seems to me that scholars's normative inquiries concerning the question of whether various hypothesized foundational commitments lead to the conclusion that certain insular groups must be given space to largely run their own lives, *see supra* note 3, can be usefully understood as philosophical examinations of what commitments constitute our national political culture.

316. *See TUSHNET, supra* note 175, at 9-14 (suggesting this).

317. Rosen, *Our Nonuniform Constitution, supra* note 10, at 1152-56. The plausibility of maintaining a national political community on the basis of shared commitments to broad principles also may be suggested by our country's temporal experiences with constitutional law insofar as there has been a certain continuity of political community over time even though the doctrinal details of constitutional law have changed radically over time. Nevertheless, I would not want to make too much of this point about changed doctrines over time, for I believe it well could be argued that the best way to characterize matters is that our country has an importantly *different* national political culture today than we had in 1789, 1865, or, indeed 1920. Ultimately, it seems to me, what defines a political community is only partly given by the abstract principles (such as a commitment to due process and equal protection) to which the polity is committed. The far more important determinant of what characterizes the political community is the concrete definition of the metes and bounds of the principles, which (among other things) demands the determination of how each commitment relates to competing commitments at the points when they come into conflict. It seems to me that a single national community can be maintained even across political communities that demarcate in different ways the borders of shared principles – but only up to a point. At *some* point, the concrete contours of "shared values" are too different to fairly

The answer to the second question of whether persons living in the federal enclaves would be part of the national political community turns on both normative and empirical considerations. The normative considerations hinge once again on the substantive content of the character of the national political community. If membership in the national community were understood to require lockstep citizen incorporation of the details of the Supreme Court's doctrinal formulations, then any variations in community-based courts perforce would take citizens in the enclaves outside the tent of the national political community. This, however, likely is an inaccurate description of what constitutes the national political community on both normative and empirical bases. Instead, membership in the national political community more probably is a function of shared commitments to principles of a higher level of generality. If this is true, then the commitment shared by inhabitants of the federal enclaves to principles such as due process and equal protection means that they may be able to remain members of the national political community, even if the principles' applications vary in the insular community enclaves from what is required in most other places in the country.³¹⁸

Finally, the requirement that community-based courts accept the Goal of constitutional provisions may be sufficient, if not ideal, to create a national political community over a country as large and diverse as ours. That limited numbers of community-based courts need not undermine the national political community or citizens' respect is strongly suggested by the fact that our constitutional order already tolerates limited variations of constitutional requirements across locales that are created by Tailoring and Re-standardizing.³¹⁹ The community-based court regime of multiple authoritative interpreters accordingly would alter current practice by a matter of degree rather than kind.

describe the two polities as being part of the same political community. As discussed in the text above, it seems to me that the degree to which the national political community can tolerate different expressions of shared abstract commitments iteratively turns on the content of the national political community itself. I plan to pursue these questions concerning political culture and political community in future work.

318. See TUSHNET, *supra* note 175, at 9-14 (making similar argument). But see *supra* note 317 (discussing the role of concretizing foundational principles in defining the political culture).

319. Rosen, *Our Nonuniform Constitution*, *supra* note 10, at 1144-47, 1149-66.

To conclude, although the potential costs to citizens' respect and the national political community are important, there is no reason to think that such costs inevitably would be actualized. Whether and to what extent such costs are incurred turns on normative as well as empirical considerations. The normative considerations are whether and to what extent our constitutional commitments counsel us to accommodate insular communities and, relatedly, are the substantive commitments that constitute our national political community's identity. The empirical considerations concern how community-based courts are likely to behave. Two factors, however, suggest that community-based courts cannot be rejected out-of-hand. First, the tribal court experience under the ICRA is comforting. Second, community-based courts would be subject to greater limitations on their interpretive freedoms than apply to tribal courts.

CONCLUSION

The Exceptions and Property Clauses may permit the creation of community-based courts on federal property. Subject to modest but important limitations, such courts would have the power to construe independently select constitutional provisions without federal or state court review (or possibly with only highly deferential judicial or executive review) and accordingly would be analogous to the regime of multiple authoritative interpreters of federal quasi-constitutional law that can be found in tribal courts under the ICRA. Community-based courts would be a vehicle for granting extensive powers of self-governance to particularly deserving communities. Moreover, the availability of community-based courts is pertinent to assessing the relative benefits of private and public ordering in respect of according insular groups room to run their own lives; community-based courts create an immunity from constitutional limitations as construed by ordinary federal courts, and this immunity narrows (though does not eliminate) private ordering's most important competitive advantage over public ordering of freedom from constitutional limitations.

The ICRA case law illustrates the many potential benefits of a regime of multiple authoritative interpreters. It also suggests that the potential costs associated with a regime of multiple

authoritative interpreters can be reasonably contained. Most of the lessons from the ICRA regime are transferable to non-Indian community-based courts. Community-based courts that construe constitutional law, however, could pose two risks that are not present under the ICRA's statutory regime: the threat of undermining respect for the Constitution and interfering with the creation of our national political community. The limitations on community-based courts' interpretive freedoms would help to offset these risks without significantly curtailing the benefits that community-based courts would be intended to provide. Whether the risks materialized ultimately would depend on both empirical and normative considerations that merit additional careful thought. The normative considerations include an assessment of whether and to what extent our country's foundational commitments demand the accommodation of some insular communities by affording them significant powers of self-government. A second crucial normative question concerns the nature of our country's national political community; depending on its content, it is possible that the creation of community-based courts could help to further realize, not hinder, it.

In short, there is astonishing flexibility in this country's constitutional federal structure. It may be doctrinally possible to grant heretofore unimagined powers of self-government to insular communities. Ultimately, whether such decentralization of political power is doctrinally permissible and practical turns on normative considerations. Because this Article has focused on doctrine, not normative questions, it, somewhat ironically, cannot fully answer the doctrinal question of whether the type of political decentralization it has discussed is constitutional. Much has been accomplished, though, if the Article has succeeded in showing that so extraordinary a grant of political power as authorization to offer independent constitutional interpretations is not flatly foreclosed by the Constitution. This recognition, in conjunction with the promising results in the ICRA regime, jointly underscore the relevance of taking seriously the underlying normative questions concerning whether and to what extent insular communities ought to be granted significant powers of self-governance.