



SUB Hamburg

A/548199

Tribal Constitutionalism

States, Tribes, and the Governance of Membership

KIRSTY GOVER

OXFORD
UNIVERSITY PRESS

Contents—Summary

<i>Table of Cases</i>	xix
<i>Table of Legislation</i>	xxi
Introduction	1
1 Tribal Membership Governance and the Cultural Production of Indigeneity: Reflecting Inter-indigenous Recognition in Public Policy	10
2 Tribalism Constitutionalized: The Tribal Governance of Membership in Australia, Canada, New Zealand, and the United States	67
3 Descent and Genealogy: The Changing Landscape of Tribal Membership Governance in the United States	108
4 Tribal Constitutionalism and Historic Claims: The Impact of Claims Settlement on Tribal Membership Governance in Australia and New Zealand	157
Conclusion	209
<i>APPENDIX I: LIST OF TRIBAL CONSTITUTIONS AND CODES</i>	213
<i>APPENDIX II: TRIBAL MEMBERSHIP IN THE UNITED STATES—CHARTS</i>	235
<i>Bibliography</i>	245
<i>Index</i>	265

Contents

<i>Table of Cases</i>	xix
<i>Table of Legislation</i>	xxi
Introduction	1
1 Tribal Membership Governance and the Cultural Production of Indigeneity: Reflecting Inter-indigenous Recognition in Public Policy	10
Introduction	10
I: Recognition in Pluralist Theory: Giving Public Meaning to Culture	14
Culture, continuity and constitution: the recognition and transformation of tribal communities	17
‘New culture’ and the cultural production of indigeneity	19
Recognition of cultural production: human boundaries in relational pluralism	22
New culture and its discontents: consequences for indigenous continuity claims	27
II: Tribal Practice: Enrolment and Recognition in Tribal Membership Governance	31
Tribes are descent-based communities but self-constitute relationally	31
a Tribes use tribe-specific definitions of descent and also recruit non-descendants	32
b ‘Descent’ can be reframed to serve tribal purposes	32
c The descent class is supplemented by rules allowing the enrolment of non-descendants	36
d Tribes sometimes include non-descendants as honorary, associate, and probationary members	38
Shared residency is not an essential element of constitutionalized tribalism	40
Tribes use concepts of indigeneity in the governance of membership	41
a Tribes recognize indigeneity when they express a preference for indigenous applicants	41
b Tribes recognize indigeneity when they limit the eligibility of persons enrolled in other tribes	43
Voluntary and associational characteristics of tribes: resignation and disenrolment	45

III: Operationalizing Indigenous Recognition Practices in Public Law and Policy	47
Tribal and indigenous demography: what is at stake and for whom?	48
Public categories: indigenous people and tribes	53
IV: Conclusion	61
2 Tribalism Constitutionalized: The Tribal Governance of Membership in Australia, Canada, New Zealand, and the United States	67
Introduction	67
I: Tribal Constitutions: Legibility and Accessibility	68
Publicity rules: tribes are usually not required to publish their constitutions	71
II: The Substance of Tribal Membership Regimes	76
Mandatory regimes: the meaning of descent	77
a New Zealand	87
b Australia	89
c Canada	90
d The United States	92
III: Multiple Membership	94
IV: Loss of Membership	98
V: Conclusion	104
3 Descent and Genealogy: The Changing Landscape of Tribal Membership Governance in the United States	108
Introduction	108
I: Race, genealogy, and tribes: normative controversies	111
Indianness v Descent	113
Indian blood v Tribal blood: the federal and tribal use of blood quantum rules	114
II: Formal Federal Influences on US Tribal Constitutionalism	116
Legislative mandates for secretarial review	117
Congressionally restored tribes: federal interventions on membership	120
Census rolls and base rolls: the legal meaning of descent	121
III: The Federal Concept of Blood Quantum and Its Enduring Influence on Tribes	123
Indian blood quantum and the sovereign status of tribes	125
IV: Changes in Tribal Membership Governance: The Genealogic Shift	130
Constitutional amendments	130
Changes in membership governance: 1941–2008	132

a Changes to descent rules	132
b Changes to discretionary incorporation rules	133
c Changes to multiple membership rules	133
V: Explaining Membership Changes: The Mutual Influences of Ideology, Money, and Documentation	134
IRA-era constitution making: creating tribes by organizing Indians	134
a Establishing the Indianness of tribes: organizing persons of one-half or more Indian blood	139
b The Act's ideal type and tribal migrations: setting the scene for termination policy	143
Termination policy	147
The impact of demographic and policy change on post-IRA membership governance	150
VI: Conclusion	155
4 Tribal Constitutionalism and Historic Claims: The Impact of Claims Settlement on Tribal Membership Governance in Australia and New Zealand	157
Introduction	157
I: The Normative Challenge of Tribal Constitutionalism—The Consequences of Formalizing Membership Rules	159
Formalization of tribal membership: anxieties and assumptions	161
Claims processes: Australia and New Zealand	167
Choosing tribal boundaries: the impact of public law and policy on the external boundaries of tribes	170
II: The Function of Descent Rules in the Claims Process and Post-claim Tribal Governance	176
Maoriness and membership in New Zealand: descent and the Treaty settlements process	181
Competing official and tribal concepts of descent: Australia	190
Indigeneity and membership in Australia: debates about descent in the native title process	199
III: Separating Culture and Governance: Strategies for Managing 'Membership Juridification'	202
IV: Conclusion	207
Conclusion	209
<i>APPENDIX I: LIST OF TRIBAL CONSTITUTIONS AND CODES</i>	213
<i>APPENDIX II: TRIBAL MEMBERSHIP IN THE UNITED STATES—CHARTS</i>	235
<i>Bibliography</i>	245
<i>Index</i>	265