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Reconciling Equal Protection and Federal Indian Law

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INTRODUCTION

Federal Indian law and policy, which largely concern the distinct status of Indian individuals and tribes defined in part by descent,[1] increasingly face

† Professor of Law, University of Connecticut School of Law. This Article is inspired and guided by Professor Frickey's scholarship and support, just as I have been and will continue to be throughout my career. It nevertheless reflects my distinctive interests and understanding of the law, and I expect that Professor Frickey would have challenged and even disagreed with some of its approach and arguments. Despite this, I dedicate it to him with my deepest thanks and admiration, and hope that it contributes to our shared goal of creating normatively and institutionally grounded frameworks for federal Indian law and policy. On a more personal note, Phil was not only a great scholar, but a truly good man. His generosity to colleagues and aspiring academics was unmatched, and will always be a model to me. I was lucky to know him, and am so sad that we lost him so soon.

1. Although the legal definitions of *Indian* and *tribe* vary by context and do not solely or always require biological descent from indigenous peoples, descent remains an important factor. Thus definition as "Indian" for criminal jurisdiction purposes requires both some descent from the indigenous peoples in the Americas before European settlement, and recognition of nonracial affiliation with a federally recognized tribe. *See* United States v. Bruce, 394 F.3d 1215, 1223–24 (9th Cir. 2005); United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001). Recognition as an "Indian child" for purposes of the Indian Child Welfare Act requires either membership in an Indian tribe, or eligibility for membership and one biological parent who is a member. 25 U.S.C. § 1901(3) (2006). Although a child of no Indian descent may be included if he has been enrolled as a member in an Indian tribe, *Matter of Dependency and Neglect of A.L.*, 442 N.W. 2d 233 (S.D. 1989), in practice most tribes require some tribal or Indian descent from the tribe for membership. *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 251 (2008–2009). The most common statutory definition of tribe is maddeningly circular, requiring that the group be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(e) (2006). The requirements for initial recognition as a tribe, however, are much more specific, and require both political, social, and cultural cohesion and influence and descent from a historical Indian tribe or tribes. 25 C.F.R. § 83.7(b), (c), (e) (2009). Indian law, then, is the federal law that governs the relationships between Indian tribes and the United States and the several states, and the special laws that affect Indian people with regard to these relationships. *See* ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, AMERICAN INDIAN LAW: CASES AND

challenges that they violate equal protection law. This Article argues that such challenges stem from what Professor Philip Frickey has criticized as the seduction of artificial coherence, and ignore the congruence of federal Indian policy and equal protection as matters of constitutional norms, history, and text. At their best, federal Indian policies undo the results of defining indigenous peoples as inferior racial groups rather than sovereigns entitled to political and property rights. This consistency between civil rights and tribal rights, moreover, is affirmed by the framers of the Fourteenth Amendment, judicial precedent, and historical practice.[2] Basic constitutional values and interpretive principles support both equal protection and tribal rights, and militate against any false dichotomy that would undermine the principles of equality and respect on which both are based.

Philip Frickey's seminal contributions to federal Indian law include two apparently inconsistent concepts. The first is his call to resist the impulse—exemplified by the current Court—to "mainstream" federal Indian law by demanding consistency between the legal principles governing Indian law and those governing other fields.[3] For Professor Frickey, to succumb to the seduction of coherence is to deny the history of colonization of Indian tribes and wipe away the doctrines that seek to ameliorate it.[4] The second is a rejection of the contrary impulse—exemplified by many accomplished federal Indian law scholars—to see Indian law as a closed field guided by certain foundational doctrines that can properly isolate itself from the continuing tension between tribal and nontribal interests.[5] This "foundationalist" approach, Frickey shows, largely fails to describe how judges have or will decide Indian law cases.[6] Instead, he argues, federal Indian law at its best is characterized by close attention to both the history and the contemporary impact of federal Indian law, and respect for the unique status of Indian tribes as a means to mitigate the ongoing realities of colonialism.[7]

Nowhere is the seduction of coherence or the threat to Indian law of heeding its call more apparent than in the area of equal protection. Federal Indian law, a body of law entirely concerned with the special status of Indian tribes and individuals, might seem irreconcilably at odds with equal protection

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COMMENTARY 1 (2008).

2. *See infra* Parts I & II.

3. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 48–49 (1996) [hereinafter Frickey, *Domesticating*].

4. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 435–36 (2005) [hereinafter Frickey, *Exceptionalism*].

5. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1206 (1990).

6. *Id.*

7. *See, e.g.*, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian* Law, 107 HARV. L. REV. 381, 384–85 (1993) [hereinafter Frickey, *Marshalling*].

jurisprudence, which has increasingly rejected all descent-based classifications.[8] Although the Court has not reconsidered *Morton v. Mancari*,[9] the 1974 case that gave the federal government special discretion under equal protection to carry out the unique federal obligations to Indian people, the need for a normatively satisfactory reconciliation is becoming necessary as a matter of policy and law. In 2000, the Court struck down a measure that provided descendants of Native Hawaiians exclusive voting rights for state trustees of lands set aside for Native Hawaiian benefit.[10] Since then, a proposal to provide political recognition to Native Hawaiians has floundered on equal protection grounds,[11] while numerous other programs benefiting Native Hawaiians have come under attack.[12] In 2004, the Court reserved the question of whether the *Duro* Fix, a federal law designed to advance native rights by affirming tribal criminal jurisdiction over Indians that are not members of the governing tribe, violated equal protection,[13] and three justices, in concurrence and dissent, suggested they might be amenable to such a claim.[14] In the lower courts as well, equal protection challenges increasingly undermine laws designed to protect the rights of indigenous peoples.[15]

Although questions regarding the congruence of Indian law and equal protection may seem more pressing now, they have existed since the framing of the Fourteenth Amendment and have reappeared at key moments in its history. The Reconstruction Congress debated the impact of the Fourteenth Amendment on Indian tribes,[16] and repeatedly invoked violations of tribal rights as a cautionary tale in arguing for federal protection for civil rights.[17] Fast forward to the 1952 oral arguments in *Brown v. Board of Education*,[18] and we find several justices questioning the implications of ending separate but equal for special schools for Indians.[19] Finally, it is possible to see *Morton v. Mancari*[20]

8. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating a school choice scheme that made racial desegregation one goal in student placement).

9. Morton v. Mancari, 417 U.S. 535 (1974).

10. Rice v. Cayetano, 528 U.S. 495 (2000).

11. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 505 – NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2007 (Oct. 22, 2007) [hereinafter *Presidential Statement on H.R. 505*] (setting forth Bush Administration position that bill was racially discriminatory).

12. ARIELA J. GROSS, WHAT BLOOD WON'T TELL 205 (2008).

13. U.S. v. Lara, 541 U.S. 193, 209 (2004).

14. *Id.* at 211–14 (Kennedy, J., concurring) (arguing that limitations on tribal jurisdiction over nonmembers are constitutional in nature); *Id.* at 226–31 (Souter, J., dissenting) (same).

15. *See* Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002) [hereinafter Goldberg, *Descent*] (critiquing this trend of allowing equal protection arguments to erode indigenous peoples' rights).

16. *See infra* Part I.

17. *Id.*

18. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

19. *See infra* Part II.

20. Morton v. Mancari, 417 U.S. 535 (1974).

as an early, albeit unsuccessful, attempt to immunize race conscious measures from the affirmative action challenges of the next decades.

This Article seeks a Frickey-esque approach to the tension between equal protection and federal Indian policy. Such an approach recognizes the role of history, text, and legal precedent as important tools of constitutional interpretation without seeing them as the only or best sources of legitimacy.[21] This approach also recognizes the value of interpretative methodologies that promote under-enforced public law norms or contribute to "constitutional evolution"[22] without violating the "'relationship of trust that the courts forge with the American people.'"[23] While committed to a pragmatic understanding of the interdependence of institutions, it is also deeply normative, seeing within the constitutional culture long-term commitments to democracy, fairness, and equality that transcend the will of any single Congress, Court, or constitutional convention. This normative vision is particularly clear in Professor Frickey's work on federal Indian law, in which he draws attention to the violation of constitutional norms entangled in the creation of our constitutional republic, and highlights the ways that federal Indian law may mediate, albeit not undo, this colonial reality.[24]

Equal protection law has emphatically not been one of Professor Frickey's mediating techniques. He has blamed "a good deal of confusion" in federal Indian law on references to analogies in other areas, in particular equal protection law.[25] He notes that the fundamental issue in federal Indian law is the structural relationship between sovereigns, rather than the relationship of sovereigns to disadvantaged individuals that characterizes equal protection claims. Understanding federal Indian law as a branch of equal protection law, argues Professor Frickey, both undermines the logic of federal Indian law and ignores the root of Indian claims.[26]

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21. *See, e.g.*, Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 309–12 (1985) (praising Judge Wisdom's minority vote dilution cases, which remain controversial as a matter of constitutional interpretation, but have the legitimacy of having influenced congressional voting rights cases).

22. Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 727 (1991).

23. Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 463 (2005) (quoting with approval Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003)); Frickey, *Marshalling*, *supra* note 7, at 411 (endorsing Justice Marshall's approach to interpretation of the Constitution and Indian treaties, which involves "significant deviations from textual plain meaning to promote the spirit of the underlying constitutive documents").

24. *See* Frickey, *Domesticating*, *supra* note 3; Frickey, *Marshalling*, *supra* note 7; Frickey, *Exceptionalism*, *supra* note 4.

25. Frickey, *Marshalling*, *supra* note 7, at 425 n.180.

26. *Id.* at 425.

This insight, I will argue, is in fact closely related to a normatively attractive resolution of the apparent conflict between federal Indian law and equal protection. In an earlier article I argued that while racism is paradigmatically understood as racial definitions of and discrimination against individuals, the core way it has worked in Indian policy has been to deny tribes political status by treating them as ethnic enclaves not entitled to the prerogatives of governments.[27] Thus while laws and policies often treated Indian individuals as amenable to civilization, the tribe and those who clung to tribal customs were marked as inferior and denied self-determination and property rights as a result.[28]

Because race-based discrimination manifested itself in denials of the special status of Indian people and tribes, applying a model of equal protection focusing on classifications of individuals to federal Indian policy is precisely backwards. Despite sharp conflict over the definition of illegal discrimination,[29] there remains broad agreement that an antidiscrimination norm lies at the heart of equal protection.[30] If the effect of racial discrimination is to see native peoples as inferior racial groups rather than governments, an antidiscrimination norm should lead to recognition of the political status of tribal groups, despite the descent-based connections of their members.[31] Although the Equal Protection Clause itself does not necessarily require restoration and furtherance of tribal sovereignty and culture, measures doing so are consistent with its broader purpose of undermining state-sanctioned racial discrimination. The doctrine of equal protection, therefore, should not be used to prevent such efforts.

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27. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593–96 (2009).

28. *Id.*

29. *Compare, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (arguing that there never can be an interest sufficient to justify race conscious governmental action under the Fourteenth Amendment) *with* Adarand, 515 U.S. at 247 (Stevens, J., dissenting) (arguing that governmental actions designed to benefit a disadvantaged minority are constitutionally "fundamentally different" from those designed to discriminate against a minority race); *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

30. *See, e.g.*, Richmond v. J.A. Croson, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) ("[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.") (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975)); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 257–58 (Perennial Classics 2002) (1988) (stating that despite disagreement on the meaning of equality, the Fourteenth Amendment "challenged legal discrimination throughout the nation and changed and broadened the meaning of freedom for all Americans"); Lawrence, *supra* note 29, at 323 ("The equal protection clause requires the elimination of governmental decisions that take race into account without good and important reasons.").

31. *See* Berger, *supra* note 27, at 654.

It is true that similar arguments for a substantive equality-promoting understanding of the Equal Protection Clause have had little impact in other areas.[32] In federal Indian law, however, constitutional history, text, and long-standing, judicially approved practice all support such an understanding. The text of the Constitution provides support for recognition of the special status of Indians in at least two places: first, in the Indian Commerce Clause, which singles out Indian tribes as a special subject of legislation;[33] and second, in the Equal Protection Clause itself, where the use of the term "jurisdiction" may be interpreted to accommodate the distinct status of Indian peoples.[34] Further, the role of the federal government in meeting obligations to Indian tribes has been recognized throughout the history of the United States,[35] despite the equally long-standing breach of those obligations in practice.[36] With the support of constitutional text and precedent established, an understanding of why federal Indian policies are normatively consistent with equal protection should have significant force.

Part I of this Article describes the discussions of tribal status in the Reconstruction era Congress, which framed and initially implemented the Fourteenth Amendment. In these debates, advocates of Reconstruction repeatedly invoked state violations of tribal rights to support arguments for strong federal enforcement of civil rights. Rejecting arguments that the Fourteenth Amendment fundamentally undermined Indian policy, these

32. Scholars have long argued that an approach that insists on individual equal treatment in fact undermines meaningful equality. *See, e.g.*, Gotanda, *supra* note 29, at 2–3 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."). Despite such arguments, the trend of the Court has been to increase its insistence on color-blindness. *See, e.g.*, john a. powell & Stephen Menendian, Parents Involved: *The Mantle of* Brown, *The Shadow of* Plessy, 46 U. LOUISVILLE L. REV. 631, 632 (2007–2008) (asserting that in *Parents Involved* "colorblindness has reached new ascendancy").

33. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

34. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

35. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831) (describing relationship of Indian tribes to United States as that of a "ward to his guardian"); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 8 (2005 ed.) ("The centuries-old relationship between the United States and Indian nations is founded upon historic government-to-government dealings and a long held recognition of Indians' special status.").

36. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 26–27 (noting contrast between legal force of Indian treaties and their lack of enforcement or consummation by coercion); Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 46 (1947) (noting discrepancy between the "cases that mark the norms and patterns of our national policy" and those that "illustrate the deviations and pathologies resulting from misunderstanding and corruption").

Congressmen also insisted that the limited sovereignty of native peoples was not only legally recognized but morally required. They further interpreted both the Indian Commerce Clause and the "jurisdiction" referred to in Section 1 of the Fourteenth Amendment in ways that provide textual support for a distinct status of Indians under the Equal Protection Clause.

Part II discusses the relationship between equal protection and federal Indian policy since *Brown v. Board of Education.*[37] Although there was initially little doctrinal understanding of the relationship between tribal rights and civil rights, the two movements proceeded along parallel tracks. With *Morton v. Mancari*[38] in 1974, the Court sought to reconcile equal protection doctrine and federal Indian policy. Subsequent decisions, however, have maintained the doctrinal reconciliation without developing its normative justification, leaving the doctrine vulnerable to challenge and backlash.

Part III analyzes two targets of this backlash: the *Duro* Fix,[39] the federal statute affirming tribal criminal jurisdiction over nonmember Indians; and efforts to further the property and sovereignty rights of Native Hawaiians. This Part shows how the problems addressed by each measure—the deprivation of tribal jurisdiction over nonmembers, and the conceptual transformation of the Native Hawaiian people from sovereign entity to an impoverished racial group—were rooted in beliefs in the racial inferiority of indigenous peoples. By moving away from the racialization of these groups and towards a political relationship with them, therefore, both initiatives undermine racial discrimination and further the goals of equal protection.

I
RECONSTRUCTION AND TRIBAL RIGHTS

Improving the status of Indians and tribes was neither the focus nor the goal of the Reconstruction amendments or the Civil Rights Acts. Their central purpose was to free the slaves and ensure that freedom was meaningful. But as the other non-white, non-citizen group with a long history in the United States, Indians inevitably figured in the debates of the Reconstruction Congress. The subject was raised in two central ways. For advocates of Reconstruction, violations of tribal rights, and particularly the showdown between the Cherokee Nation and the State of Georgia,[40] were powerful examples of the need for

37. Brown v. Bd. Of Educ., 347 U.S. 483 (1954).

38. Morton v. Mancari, 417 U.S. 535 (1974).

39. 25 U.S.C. § 1301(2) (2006) (1991 statute enacted in response to the Supreme Court's 1990 decision in *Duro v Reina*, holding that American-Indian tribes do not have criminal jurisdiction over nonmember American Indians on the grounds that these tribes had been implicitly divested of their inherent authority to prosecute all nonmembers, including nonmember American Indians).

40. On the struggle between the Cherokee Nation and Georgia over the state's attempts to have the Cherokee people removed west and assert state jurisdiction and ownership over Cherokee territory, see JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE

federal power to prevent state deprivations of essential rights. Opponents, conversely, argued against the Fourteenth Amendment by claiming it would make citizens of the Indians. To counter this argument, proponents emphasized the sovereign rights of tribes and the moral obligations these rights created. Throughout the period, pro-Reconstruction Congressmen advocated preserving the distinct rights of Indians in ways that suggest their consistency and even complementarity with the goals of Reconstruction.

A. Reconstruction Era Debates

The most notable references to tribal rights in the Reconstruction era did not specifically address the impact of the Fourteenth Amendment on American Indians. Gerard Magliocca has written about the repeated references to the Cherokee cases in abolitionist and reconstructionist debates,[41] but these references were part of a broader condemnation by Republicans of violations of tribal rights. For example, in 1866, Thaddeus Stevens, leader of the Radical Republicans in the House, objected to a bill that would have extended state law over Indian allotments in Kansas by telling the story of George Tassel, the Cherokee man Georgia illegally hanged to avoid a Supreme Court determination of the state's criminal jurisdiction over him.[42] According to Stevens,

> That is the manner in which the Indians are treated whenever they are put out of the protection of the United States, and placed under the control of the State laws. I trust that we shall never disgrace the national legislation by any act which will give the sanction of law to such an outrage as I have cited.[43]

When Representative John Hubbard questioned whether it was proper to build schoolhouses and roads for Kansas Indians without subjecting them to taxation or other obligations of citizens, Stevens replied by invoking the treaty obligations to the tribes: "That depends on the original bargain, which it is proposed we shall now try to evade."[44]

After ratification of the Fourteenth Amendment, Representative George Hoar of Massachusetts called the treatment of Indian tribes "an instructive

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FIGHT FOR SOVEREIGNTY (University of Oklahoma Press 2004). The battle, of course, initially resulted in legal victory for the Cherokees in *Worcester v. Georgia*, 31 U.S. 515 (1832), but ended in tragedy as the nation was forced to walk west on the trail of tears. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 1, at 75.

41. *See* Gerard Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003) [hereinafter Magliocca, *Cherokee Removal*]; Gerard Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487 (2002).

42. CONG. GLOBE, 39th Cong., 1st Sess. 1684 (1866) (debating HB 259).

43. *Id.*

44. *Id.*

lesson" in favor of passage of the 1871 Ku Klux Klan Act,[45] which provided federal authority to address violations of civil rights.[46] For Hoar, this treatment confirmed state participation in the abuse of out-groups, and the need for federal intervention to prevent it. "The history of the Indian tribes within our jurisdiction," he proclaimed, "is a history of violence, injustice, bloodshed, rapine, committed often under the direct authority of the States. Whatever resistance, feeble and impotent as it has been, has been made to all this has been by the United States."[47]

Four years later, Representative Joseph Rainey, the first African American to serve in Congress, again invoked the Indian in debating the 1875 Civil Rights Bill.[48] "We do not intend to be driven to the frontier as you have driven the Indian," he declared; "Our purpose is to remain in your midst as an integral part of the body-politic."[49] In this statement, Rainey, a member of the House Indian Affairs Committee, neatly encapsulated both the abuses committed against Indians when they tried to maintain their historic territories, and the differences between contemporary struggles of African Americans and American Indians.

For advocates of Reconstruction, Indian history provided a potent example of the wrongs committed by states and their citizens when not constrained by the federal power. African Americans sought those rights necessary for any individual to claim equality in American society: the right to freedom, to work for wages, to hold and sell property, and to participate in the legal and political systems that enacted and enforced those rights. American Indians, in contrast, sought rights that were distinctly tribal: the right to freedom from state jurisdiction, the right to territory, and the right to faithful observation of treaties. Despite the surface inconsistency of equal rights for African Americans and special rights for American Indians, for Republicans in the wake of the Civil War, denial of the first was analogous to denial of the second, and guarding against both was a federal responsibility.

B. Debates Regarding the Citizenship Clause

While proponents of Reconstruction invoked American Indians to further their goals, so did those hostile to Reconstruction's aims. Numerous legislators worried that the Fourteenth Amendment would make citizens of the Indians, and while their numbers included a few Republicans along with the Democrats, their sentiments rarely accorded with the principles of equal protection. In

45. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871).

46. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871), (codified as amended at 18 U.S.C. § 241, 42 U.S.C. §§ 1983, 1985(3), 1988 (2006)).

47. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871).

48. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

49. 3 CONG. REC. 959 (daily ed. Feb. 3, 1875) (statement of Rep. Rainey).

response, the advocates of Reconstruction insisted the federally protected sovereign rights of tribes prevented such a wholesale extension of citizenship. Their discussions of the meaning of "jurisdiction" in the Fourteenth Amendment, moreover, provide textual support for recognizing the distinctive status of Indians under the amendment.

Opponents of the Fourteenth Amendment often included Indians in their protests against extension of citizenship to non-white groups. Democratic Senator Thomas Hendricks, for example, warned that conferring citizenship on "the negroes, the coolies, and the Indians," would "degrade" the esteem and pride that rank conveyed when limited to those "descended from the great races of people who inhabit the countries of Europe."[50] Similarly, Democratic Senator Reverdy Johnson, the attorney who successfully argued against Dred Scott's plea for freedom in the Supreme Court, declared that "the rights and liberties of the white men of this country are greater than can ever legally be accorded to the inferior races," and denounced making citizens of the "negroes, Chinese, and Indians."[51]

Although arguments that the Fourteenth Amendment did not grant citizenship to Indians may seem inconsistent with the ideals of Reconstruction, Reconstruction's advocates made such arguments in ways entirely consonant with tribal rights. The central legal question in these debates was whether Indians were "subject to the jurisdiction" of the United States in the sense in which the Fourteenth Amendment used the phrase.[52] Arguments in favor depended on assertions that tribes possessed no sovereignty and were subject to the whims of Congress. Senator Johnson, for example, argued that the Indians had "no sovereign power whatever," and the United States could do with them "just what it thought proper."[53] Core Republicans, in contrast, insisted that although Indians were often subject to federal authority, they were not subject to the "full" and "complete" jurisdiction intended by the Citizenship Clause.[54] Such restricted jurisdiction was a matter of moral obligation as well as positive

50. CONG. GLOBE, 39th Cong., 1st Sess. 2939 (1866). This concern also appeared in President Johnson's message accompanying his veto of the first Civil Rights Bill. Although the bill specifically excluded "Indians not taxed," President Johnson noted that the "provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, people of color." President Andrew Johnson, Veto Message, March 27, 1866. Gypsies were the peculiar bête noire of conservative Republican Senator Edgar Cowan, a close ally of Johnson's. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

51. CONG. GLOBE, 40th Cong., 2d Sess. 1067 (1868).

52. U.S. CONST. amend. XIV, § 1, cl.1.

53. CONG. GLOBE, 39th Cong., 1st Sess. 506 (1866).

54. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (Sen. Trumbull); *id.* at 2895 (Sen. Howard); *id.* at 2897 (Sen. Williams). This phrase therefore excluded not only Indians, but also those born to diplomatic representatives of other countries. *See id.* at 2897 (1866); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 659–60, 682 (1898) (stating that the phrase included all but those who, like children of diplomats, alien enemies in conquered territories, and tribal members, clearly had another allegiance).

law. Senate Republican leader Lyman Trumbull, for example, argued that although there were "decisions that treat them as subjects in some respects," it would "be a breach of good faith on our part to extend the laws of the United States over the Indian tribes with whom we have these treaty stipulations."[55] These arguments also drew on the force of the Indian Commerce Clause in creating a distinct sovereign status for Indian tribes. Senator Jacob Howard noted that the Constitution gave Congress the power to regulate commerce "not only with foreign nations and among the States, but also with the Indian tribes," suggesting a "recognition of the national character . . . in which they have been recognized ever since the discovery of the continent and its occupation by civilized men."[56] Ultimately, a proposal explicitly excluding "Indians not taxed" from the Citizenship Clause failed. Democrats unanimously voted to include it, while all but three Republicans voted against it.[57]

Although their proponents' stances on the Fourteenth Amendment surely influenced arguments on both sides, similar Republican statements about the status of Indian tribes appeared as early as 1862, well before the debates regarding the Fourteenth Amendment or Civil Rights Act. In an April 11, 1862 speech, Representative John Bingham, who is credited with drafting the first section of the Fourteenth Amendment, passionately argued for extension of citizenship to "every human being, no matter what his complexion."[58] He nevertheless asserted that Indians were the only exception to this rule, not because they were unfit for citizenship, but because tribes had been "recognized at the organization of this Government as independent sovereignties. They were treated with as such; and they have been dealt with by the Government ever since as separate sovereignties."[59] For Bingham, as for others, such arguments appear to represent not only different strategic positions, but also different understandings regarding the rights and status of Indian tribes.[60]

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55. CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866).

56. *Id.* at 2895.

57. *Id.* at 2897.

58. CONG. GLOBE, 37th Cong., 2d Sess. 1640 (1862).

59. *Id.* at 1639.

60. Of course much of the evidence the Representatives marshaled in support of their arguments would soon disappear: that the United States made treaties with Indian tribes (which it stopped doing in 1871, 25 U.S.C. § 71 (2006)), that these treaties, rather than federal laws, controlled Indians (something decided to the contrary by the Supreme Court in 1870, *The Cherokee Tobacco Case*, 78 U.S. 616 (1870)), and that crimes by one Indian against another were not within federal jurisdiction (which changed with the Major Crimes Act, 18 U.S.C. § 1153 (2006), in 1885). Well after these indicia of foreignness had disappeared, however, the Supreme Court continued to hold that Indians were not "subject to the jurisdiction" of the United States in the sense of the Fourteenth Amendment. Elk v. Wilkins, 112 U.S. 94, 102 (1884); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 659–60, 682 (1898) (stating that Indians, along with children born to ambassadors and to alien enemies, were not made citizens by the Fourteenth Amendment). More importantly, these facts seem to be the contemporary manifestations of a separate, quasi-sovereign status, which is recognized to this day. *See, e.g.*, United States v. Lara,

These statements, of course, all concern the Citizenship Clause. Application of that clause to Indians has been largely irrelevant since 1924, when federal legislation made citizens of all Indians born in the United States.[61] But similar language is used in the Equal Protection Clause, which prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."[62] Although there is a difference in the phrases ("subject to its jurisdiction" in the Citizenship Clause versus "within its jurisdiction" in the Equal Protection Clause), and although there should not be slavish adherence to intratextualism in constitutional interpretation, the use of the same word in both clauses of Section 1 provides room to recognize the unique political status of the Indian in both.

The citizenship debates therefore further reinforce the consistency of equal protection and federal Indian policies. Advocates of Reconstruction repeatedly emphasized the sovereignty of Indian tribes, and argued that federal obligations to tribes prevented denying that sovereignty. Their discussions of the meaning of "jurisdiction" in the Fourteenth Amendment, moreover, provide textual support for the unique position of Indians under the amendment.

C. Indian Policy During the Reconstruction Era

Immediately after its ratification, the Fourteenth Amendment was used to challenge the sovereignty of Indian tribes in both Congress and the Court. These challenges went nowhere. The Court ignored them and in Congress they catalyzed a Senate Report strongly affirming the sovereign status of Indian tribes.[63] This rejection of alleged conflicts between federal Indian policies and the Fourteenth Amendment so soon after its enactment bolsters arguments for their fundamental consistency.

In December 1869, the federal government seized tobacco from Cherokee factories on Cherokee lands for failure to pay federal tobacco taxes.[64] In support of this action, the Revenue Commissioner argued that the Fourteenth Amendment, by bestowing citizenship on all those born in and "subject to the jurisdiction" of the United States, made the inhabitants of the Indian territory liable to taxation, "any so-called treaties to the contrary notwithstanding."[65] Although the Cherokees lost the case, the Court's 1870 opinion did not discuss the Fourteenth Amendment, relying instead on the principle that Congress could abrogate Indian treaties via ordinary legislation.[66]

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541 U.S. 193, 203–04 (2004) (discussing implications of tribal status as "dependent sovereigns" or "domestic dependent nations").

61. Act of June 2, 1924, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)).

62. U.S. CONST. amend. XIV, § 1, cl.2.

63. S. REP NO. 41-268, at 11 (1870).

64. *An Interesting Question of Revenue Law*, N.Y. TIMES, Dec. 30, 1869.

65. *Id.*

66. The Cherokee Tobacco Case, 78 U.S. 616, 621 (1870). As I have discussed elsewhere,

The Fourteenth Amendment was also initially invoked in efforts to end treaty-making with Indian tribes. In 1869, House proponents argued that the Fourteenth Amendment had granted citizenship to the Indians, making tribes inappropriate treaty partners.[67] In response, the Senate directed the Judiciary Committee to prepare a report on the impact of the Fourteenth Amendment on Indian tribes. In its 1870 report, the Committee concluded that the amendment has "no effect whatever upon the status of the Indian tribes within the limits of the United States, and does not annul the treaties previously made between them and the United States."[68]

Although the report relied in places on the practice of making treaties with Indian tribes and the non-citizenship of American Indians to support its argument,[69] these references do not capture its normative thrust. The report began with the following admission:

> The white man's treatment of the Indian is one of the great sins of civilization, . . . which it is now too late to redress. . . . But the harsh treatment of the race by former generations should not be considered a precedent to justify the infliction of further wrongs.[70]

Even after the Indians were "overshadowed by the assumed sovereignty of the whites," the report continued, the tribes retained "the right to regulate, without question, their domestic affairs, and make and administer their own laws," and were not deprived of their "character as a nation or political community."[71] The report cited with approval the 1866 decision in *The Kansas Indians*,[72] which held that Kansas tribes retained their treaty-promised freedom from state law so long as the federal government continued to recognize their organization.[73] The decision did not depend on some essential foreignness or physical separation: the Kansas Indians in question lived on allotments in the midst of white communities, and their "primitive customs and habits" had been "largely broken into."[74] Rather, the Court's holding depended on the rights promised the tribes by treaty, and their entitlement to federal protection of those rights.[75]

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the decision did undermine principles favorable to Indian tribes in a number of ways. *See* Bethany R. Berger, *"Power over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2042–43 (2004). It also violated the continuing principle that ordinary legislation will not be interpreted to abrogate Indian treaties absent clear evidence of congressional intent to do so. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

67. *See, e.g.*, CONG. GLOBE, 41st Cong., 1st Sess. 560 (1869) (Rep. Butler).

68. S. REP. NO. 41-268, at 1.

69. *Id.* at 9–10.

70. *Id.* at 1.

71. *Id.* at 2, 3.

72. *In re* Kansas Indians, 72 U.S. (5 Wall.) 737 (1866). Also discussed in S. REP. NO. 41-268, at 7.

73. 72 U.S. at 757.

74. S. REP. NO. 41–268, at 7 (quoting 72 U.S. at 738).

75. 72 U.S. at 755–56.

Similarly, the Senate report recognized that although the federal government had deprived tribes of true foreign status, it had promised them a measure of their former sovereignty and the Fourteenth Amendment should not be read as an excuse to violate that promise:

> To maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, to annul treaties then existing between the United States . . . and the Indian tribes . . . would be to charge upon the United States repudiation of its national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce their just rights.[76]

Even though the Senate Judiciary Committee rejected the Fourteenth Amendment as a reason to end treaty-making, Congress ended it anyway in 1871.[77] The House of Representatives initiated the change out of resentment that the Senate alone could approve treaties and thereby commit significant public funds without the House's input or control.[78] Although questions of whether Indian tribes were appropriate partners for treaty-making colored these debates as well,[79] none of the representatives argued that the Fourteenth Amendment required this shift in Indian policy. Congress, moreover, clearly envisioned the continuing distinct federal treatment of Indians and tribes after treaty-making ceased, stipulating that nothing in the prohibition "shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[80] Over the next decades, the Court readily upheld both implementation of existing treaties and other laws recognizing the distinct federal status of American Indians.[81]

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76. S. REP. NO. 41-268, at 11.

77. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (1871) (codified as amended at 25 U.S.C. § 71 (2006)).

78. *See* CONG. GLOBE, 40th Cong., 3d Sess. 763–64 (1871); *id.* at 1811–12.

79. *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 764 (1871).

80. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566.

81. *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 48 (1913) (holding that citizenship was not an obstacle to federal jurisdiction over Indians); United States v. Winans, 198 U.S. 371 (1905) (holding that Indian beneficiaries of off-reservation treaty fishing rights were not subject to state property law in accessing their fishing spots); Cherokee Nation v. Hitchcock, 187 U.S. 294, 305 (1902) (holding that although tribes were recognized as separate communities and had treaties with the United States they were still subject to ordinary domestic legislation); United States v. Kagama, 118 U.S. 375 (1886) (upholding extension of jurisdiction over crimes between Indians). One should not, of course, give to much credence to the Supreme Court that gave us the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), as an authoritative interpreter of the Equal Protection Clause. Still, past precedents are important building blocks of constitutional interpretation, particularly where they accord with contemporary constitutional norms.

D. Conclusion

Reconstruction-era debates provide several insights into the impact of the Fourteenth Amendment on federal Indian law and policy. First, for advocates of Reconstruction, respecting tribal rights was ideologically consistent with the Fourteenth Amendment's goal of securing equality for African Americans. Second, although some members of Congress argued that the Fourteenth Amendment undermined federal Indian policy by granting citizenship to Indians, these claims focused on the Citizenship Clause rather than the Equal Protection Clause, and were generally made by opponents of the amendment. In rejecting these arguments, advocates of Reconstruction expressed a clear sense of the moral foundation for the continued separate status of Indians, one rooted in both a long legal and historical tradition and the obligation to fulfill promises made to indigenous peoples. Congress reaffirmed this recognition in the period immediately after ratification, as the Senate insisted the amendment should not provide an excuse to permit the United States to renege on its promises. Throughout the Reconstruction era, we find a persistent sense of the consistency of Indian and tribal rights with equal protection's goals, and a conviction that the Fourteenth Amendment should not undermine them.

II
UNDERSTANDINGS OF EQUAL PROTECTION AND INDIAN POLICY IN THE MODERN ERA

The modern era has yet to produce a decision that challenges the consistency between equal protection and federal Indian law. Beginning with *Brown v. Board of Education*[82] and the post World War II period, there were limited but important intersections between civil rights and Indian policy debates. As Indian policy shifted toward self-determination in the 1970s, the Supreme Court, in *Morton v. Mancari*,[83] facilitated this shift by providing the first direct judicial attempt to reconcile equal protection law and federal Indian law. *Mancari* can be read to support a political relationship between Indian tribes and the federal government that is both normatively attractive and consistent with the goals of equal protection. Subsequent cases, however, have done little to build on *Mancari's* potential, leaving the field normatively barren and doctrinally vulnerable.

*A. Pre-*Mancari *Intersections in Indian Policy and Equal Protection*

Although contemporary discussions of equal protection and Indian law usually begin with *Mancari*, they might appropriately begin much earlier with *Brown v. Board of Education*. In the same period that *Brown* rejected the post-Reconstruction validation of the separate but equal doctrine, policymakers

82. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
83. Morton v. Mancari, 417 U.S. 535 (1974).

struggled with how to respect the rights of Indians in the modern era. Although these developments were rarely directly linked, Indian policy made a brief appearance in the oral arguments in *Brown*, and Indian communities experienced a similar resurgence of activism and increased respect for their rights after *Brown*. Both the parallels and the rare intersections of the movements for tribal and civil rights in this period provide helpful insights in understanding current controversies.

The post World War II period saw dramatic social movements and ultimately legal change for African Americans, and equally dramatic, though less well-known, shifts for American Indians. In the decades following the Civil War, federal Indian policy had grown progressively more coercive. The government divided tribal lands among individual tribal members and sold millions of acres to homesteaders and railroads, assumed jurisdiction to punish crimes between Indians, corralled Indian children in federal boarding schools, and erected Courts of Indian Offenses to regulate domestic and religious matters.[84] Policy began to shift back toward some measure of tribal control in the 1930s with the Indian New Deal, but both the existing federal control over tribal property and funds and New Deal imposition of governmental structures on tribes left Indian tribes and individuals largely dominated by the federal government.[85]

During World War II, vast numbers of Indian people left their reservations for the first time for military service and work in the defense industry.[86] They returned newly insistent on their right to independence and a decent standard of living. In these claims they had support both from the former Indian New Dealers, who advocated greater tribal control at the same time as individual Indian equality,[87] and by their opponents in Congress, who saw New Deal policies as dangerous communism but agreed on Indian rights to individual equality and freedom from federal domination.[88] As the New Deal opponents came to dominate Indian policy, their calls for Indian "emancipation" did as well.[89] By the late 1950s, Indian organizations and tribes rejected Indian emancipation as concealing further domination and impoverishment, and by 1970, federal policy shifted to embrace tribal calls for self-determination.[90] But although advocates of Indian self-determination policy used the rhetoric of civil

84. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 1, at 96, 101–07, 124–26.

85. *Id.* at 128–35, 138–39.

86. *See* ALISON R. BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS 43, 68 (1991).

87. *See, e.g.*, Berger, *supra* note 27, at 640–43; KENNETH R. PHILP, TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL TO SELF-DETERMINATION, 1933–1953, at 12, 14–15 (1999).

88. *See* Paul C. Rosier, *"They Are Ancestral Homelands": Race, Place, and Politics in Cold War Native America, 1945–1961*, 92 J. AM. HIST. 1301, 1306–09 (2006).

89. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 1, at 140–41.

90. *Id.* at 148–49.

rights to justify their positions, with few exceptions there was little overlap between those working for or against civil rights and tribal rights.[91]

Indian policy did, however, play a curious role in the arguments in *Brown v. Board of Education*. When the case was first argued before the Court in December of 1952, Justice Hugo Black asked Kansas Assistant Attorney General Paul Wilson where Indians in the state went to school.[92] Wilson replied that Indians generally lived on reservations where they attended their own schools, but if any lived in the cities they would go to the white schools.[93] Justice Jackson, who was far from convinced that the Constitution could be interpreted as the plaintiffs wished, returned to this issue, asking plaintiffs' lawyer Thurgood Marshall what his position would mean for Indian policy. Justice Jackson asserted that "on the historical argument, the philosophy of the Fourteenth Amendment which you contended for does not seem to have been applied by the people who adopted the Fourteenth Amendment, at least in the Indian case."[94] The Indian question was apparently the only one that surprised the well-prepared NAACP team.[95] Marshall answered in a scattershot fashion: first, in all the southern states he knew, Indians were in a preferred position over African Americans; second, the Fourteenth Amendment was passed for the specific purpose of raising the newly freed slaves; but third, the amendment would apply fully if the Indians took the time to litigate it.[96] "I think," he concluded, "that the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits."[97] Seizing on this issue, John Davis and Milton Korman, lawyers for the defendants, returned to the

91. Indeed, at times opponents of civil rights for African Americans used the rhetoric of civil rights to undermine tribal rights for Indians. Berger, *supra* note 27, at 643–44.

92. *BROWN V. BOARD*: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 29 (Leon Friedman ed., The New Press 2004) (1969) [hereinafter *BROWN* ORAL ARGUMENT].

93. *Id.*

94. *Id.* at 50. Jackson, who lived close to the Seneca Reservation in New York, also threw in that "In some respects, in taxes, at least, I wish I could claim to have a little Indian blood." *Id.* The comment reveals significant ignorance of federal Indian law—an ignorance common in the public, but dispiriting in a Justice ruling on Indian law cases. First, Indians pay all federal taxes, and all state taxes except those for goods purchased on their reservation or for income earned in their tribal territories while residing there. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 676, 711. Second, "a little Indian blood" is not sufficient for even this limited exemption from taxation; rather, one must be a member of the tribe within whose territory the otherwise taxable event occurs. *See id.* at 701; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160–61 (1980); United States ex rel. Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552, 1559–60 (8th Cir. 1997).

95. JACK GREENBERG, CRUSADERS IN THE COURT 175 (1994).

96. *BROWN* ORAL ARGUMENT, *supra* note 92, at 50.

97. *Id.* This statement reveals the deep disconnect between those working for Indian rights and African American rights. In the past few years, Indians had brought several successful lawsuits asserting their right to vote, the National Congress of American Indians had become a well-organized and influential pan-tribal voice on Indian policy, and tribes themselves were embroiled in a number of lawsuits regarding their interests. *See* PHILP, *supra* note 87, at 2, 14–15, 21–22, 52, 60 (describing founding and influence of NCAI, and lawsuits regarding rights to vote and tribal social security).

claim that overturning separate but equal would undermine federal Indian policy.[98]

There is no evidence that this debate influenced the Court's deliberations or decision in *Brown*. Nor did concern about the impact of the Fourteenth Amendment on Indians play a large role in the Court for the next few years. In 1954 and 1955, the Court twice ducked a straightforward civil rights issue affecting Indians in *Rice v. Sioux City Memorial Cemetery Association*.[99] In *Rice*, the widow of a Winnebago soldier killed in the Korean War challenged the refusal—made on the day of the funeral no less—to allow her husband's remains to be buried in a cemetery covered by racially restrictive covenants.[100] The Court granted certiorari in the case, but first affirmed the Iowa Supreme Court opinion denying the claim without opinion[101] and then granted rehearing but vacated certiorari as improvidently granted.[102]

The Court's unwillingness to stoke the embers lit by *Brown* explains the *Rice* decisions, but no such public pressures explain the 1955 decision in *Tee-Hit-Ton Indians v. United States*.[103] *Tee-Hit-Ton* went further than any previous decision to denigrate tribal property rights,[104] holding that tribes had no Fifth Amendment right to their lands unless the federal government had first formally acknowledged their interests.[105] Felix Cohen earlier called the casual acquisition of Alaska Native land challenged in *Tee-Hit-Ton* the product of "the feeling that Indians are not quite human, and certainly not fit to own their own homes, cut their own trees, or mine their own lands," and dismissed justifications for the seizure as "hollow rationalizations of racial prejudice."[106] Justice Reed, the Justice most reluctant to join in the unanimous *Brown* opinion, wrote the opinion, and Justice Douglas, the Justice most ready to follow his sense of racial justice, wrote the dissent.[107] Even so, the majority and dissent did not closely follow the allegiances formed in the civil rights cases, and issues of race did not feature in the briefs or resulting opinions.

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98. *Id.* at 51, 136–37, 216.

99. Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1955).

100. Rice v. Sioux City Mem'l Park Cemetery, 60 N.W.2d 110, 112 (Iowa 1953).

101. Rice v. Sioux City Mem'l Park Cemetery, 348 U.S. 880 (1954).

102. 349 U.S. at 77.

103. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

104. *See* Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1215, 1220 (1980) (calling *Tee-Hit-Ton* one of the most "significant cases on the constitutional rights of Native Americans to their aboriginal lands," and arguing that the decision was not supported by prior precedent).

105. *Id.*

106. Felix S. Cohen, *Breaking Faith with our First Americans*, 25 INDIAN TRUTH, No. 2, Mar.–Apr. 1948.

107. ROGER K. NEUMAN, HUGO BLACK: A BIOGRAPHY 432, 434 (2d ed. 1997); Alden Whitman, *William O. Douglas Is Dead at 81; Served 36 Years on Supreme Court*, N.Y. TIMES, Jan. 20, 1980, at 1.

Racial equality figured expressly in lower court arguments in *Williams v. Lee*,[108] the next major Indian law case heard by the Court. The 1959 case involved a collection action filed in Arizona state court against a Navajo couple by a non-Indian, federally licensed trader who sold goods on the Navajo Reservation.[109] Indians had only recently won the right to vote in the state in a 1948 Arizona Supreme Court decision,[110] and both the plaintiff's briefs and the trial court decision were full of assertions that continued immunity from state jurisdiction was inconsistent with the citizenship of native people.[111]

Although argument in the Supreme Court did not dwell on these claims, the Court was fully occupied by the civil rights question, having decided *Cooper v. Aaron*[112] just two months earlier. In the unanimous *Cooper* decision, the Court refused to enjoin implementation of *Brown* in Little Rock, Arkansas, even in the face of massive resistance by the Arkansas governor, legislature, and public. Although the obscure collection dispute in *Williams* may have seemed insignificant compared to the constitutional showdown in *Cooper*, Justice Black, who wrote the opinion in *Williams*, saw a paradoxical link between the cases. *Williams* helped Justice Black, who was deeply committed to the result in *Brown*, realize that respect for some marginalized groups meant protecting their right to be "separate and independent and themselves."[113] Just as the Republicans had after the Civil War, Black saw the parallels between the Supreme Court's championship of the Cherokees in their bitter struggle with Georgia and the battle for civil rights.[114] The Court's protection of tribal rights in the face of state defiance, Black believed, was an indirect affirmation of its duty to order integration in *Brown* and *Cooper*.[115]

B. Mancari *and Subsequent Equal Protection Challenges*

Over the next decade, as federal policy slowly turned toward the enforcement of civil rights, it also turned to the recognition of tribal rights. By the early 1970s, Congress and the Executive Branch had embraced tribal self-determination as the goal of federal Indian policy.[116] At this moment the Court

108. Williams v. Lee, 358 U.S. 217 (1959).

109. *Id.*

110. Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948).

111. Opinion and Order, Lee v. Williams (Az. Super. Ct. Dec. 3, 1954), in Transcript of Record filed with the Supreme Court in Williams v. Lee, 358 U.S. 217 (1959), at 40–41, October Term 1957, No. 811; Appellee's Answering Brief at 4, 15–17, Williams v. Lee, 319 P.2d 998 (Ariz. 1958) (No. 6172).

112. Cooper v. Aaron, 358 U.S. 1 (1958). The Court issued its opinion in *Cooper* on September 29, 1958, heard argument in *Williams* on November 20, 1958, and issued its opinion in the case on January 6, 1959. *Williams*, 358 U.S. 217.

113. Interview with Judge Guido Calabresi, U.S. Court of Appeals, Second Circuit (Dec. 29, 2008) (Judge Calabresi clerked for Justice Black during the relevant time).

114. *Id.*

115. *Id.*

116. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 1, at 149–55.

faced *Morton v. Mancari*, its first and most direct confrontation between equal protection and Indian law.[117] *Mancari* emerged from developments both in Indian law and in civil rights. In the early 1970s, native activists filed a successful lawsuit challenging the failure of the Bureau of Indian Affairs (BIA) to implement long-standing Indian employment preferences and the resulting white dominance of higher-level positions at the Bureau.[118] In response, the Secretary of the Interior agreed to implement the preference in all employment decisions, including promotion.[119] Four non-Indian BIA employees quickly challenged the policy as violating both the 1972 Equal Employment Opportunity Act and the Fifth Amendment of the U.S. Constitution.[120]

Although many expected the Court to take this opportunity to opine on benign racial preferences,[121] the Court chose not to address this issue head on. *Mancari* did state that the "preference is reasonably and directly related to a legitimate, nonracially based goal," which was "the principal characteristic that generally is absent from proscribed forms of racial discrimination."[122] However, that was not the primary theory for rejecting the constitutional challenge.

Unfortunately, the primary theory was not entirely clear.[123] In the portion of the opinion some scholars have focused on,[124] the Court stated that the regulation "is not even a 'racial' preference," following this with a footnote stating that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."[125] The Court went on to explain that the preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." The preference was therefore "similar in kind to the constitutional requirement that a United States Senator, when elected, be 'an

117. Morton v. Mancari, 417 U.S. 535 (1974).

118. 1972 U.S. Dist. LEXIS 10582 (D.D.C. Dec. 21, 1972), aff'd, 499 F.2d 494 (D.C. Cir. 1974); Carol Goldberg, Morton v. Mancari*: What's Race Got to Do with It?*, *in* RACE LAW STORIES 237, 240–41 (Rachel F. Moran & Devon Wayne Carbado, eds., 2008).

119. Morton v. Mancari, 417 U.S. at 538; Goldberg, *supra* note 118, at 243–44.

120. 417 U.S. at 539.

121. Goldberg, *supra* note 118, at 251, 256, 260. A few months earlier, the Court had similarly ducked the affirmative action issue in holding a law student's challenge to race conscious admission procedures moot. DeFunis v. Odegaard, 416 U.S. 312 (1974).

122. 417 U.S. at 554.

123. *See also* Goldberg, *supra* note 118, at 261–63 (discussing the multiple potential theories suggested in the opinion); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L REV. 759, 775 (1991) ("*Mancari* proposed several different theories without plainly endorsing or adequately defending either one").

124. *See, e.g.*, Williams, *supra* note 123, at 761.

125. 417 U.S. at 553 & n.24.

Inhabitant of that State for which he shall be chosen,' . . . or that a member of a city council reside within the city governed by the council."[126] Although this might be interpreted to mean that classifications of tribal members are not racial at all, this conclusion is dissatisfying, particularly because the challenged regulation itself required individuals to be *both* tribal members *and* have at least one-quarter Indian blood to qualify for the preference.[127] Fully extended, moreover, the suggestion that classifications based on tribal membership are *never* racial would greatly limit scrutiny of state measures, such as voting restrictions, which exclude Indians because of their connections to Indian tribes.[128]

These difficulties are resolved by reading the constitutional section of the opinion as a whole, and understanding the political-not-racial distinction in light of the discussion of the federal-tribal relationship with which the section begins.[129] The section begins by tying the legal status of the federal-tribal relationship to its historical and normative underpinnings: "Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and . . . a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[130] The opinion then sets forth the ways the constitutional text enshrines this relationship. Article I of the Constitution gives Congress the power to "regulate Commerce . . . with the Indian tribes,"[131] thereby explicitly recognizing Indian tribes as an appropriate subject for federal legislation.[132] Through the Article II treaty power, moreover, the United States has entered into numerous treaties with Indian tribes, creating distinct federal obligations to Indian peoples.[133] Although these provisions do not necessarily give federal power in Indian affairs the unlimited scope the Court has claimed for it in recent years,[134] they do provide textual hooks for a power that

126. *Id.* at 554.

127. *Id.* at 553 n.24.

128. *See* Berger, *supra* note 27, at 645–46.

129. For other arguments along these lines, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 926–28, and Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169, 172 (1991). I should note that Professor Frickey himself likely did not have such a favorable reading of *Mancari*. He has described it as resting on a "double-barreled cluster of constitutional fictions": that the Constitution provides Congress with plenary power over Indians; that there is "something called 'the equal protection component of the Due Process Clause of the Fifth Amendment'"; and that classification of members of tribes is solely political and not racial. Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1759, 1760–62 (1997). While agreeing with some of the sources of this criticism, I disagree with the work they do in the opinion. First, I do not see the opinion as depending on constitutionally granted federal plenary power, but rather simply on the special federal-tribal relationship, and second, I do not see the political-not-racial statements as core to its rationale.

130. 417 U.S. at 551.

131. U.S. CONST. art. I, § 8, cl. 3; *see also* 417 U.S. at 552.

132. *See* Goldberg-Ambrose, *supra* note 129, at 174–75.

133. U.S. CONST. art. II, § 2, cl. 2; *see also* 417 U.S. at 552.

134. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (stating

recognizes both Indians and tribes as distinct subjects for legislation.

The Court bolstered its textual argument in *Mancari* with historical and normative arguments. It described how, over the course of centuries, the federal government took much land from native peoples, both promising them protection in return and leaving them in dire need of it.[135] Subjecting all classifications of tribes and their descendants to strict scrutiny at this point would not only invalidate an entire body of law, but would also violate the "solemn commitment of the Government toward the Indians."[136] Therefore, *Mancari* held, different treatment of Indian people by the federal government is not subject to the strict scrutiny reserved for racial classifications, but instead will be upheld if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[137]

By emphasizing that the preference attached only to members of federally recognized tribes and concerned entities that governed those tribes in a unique fashion, therefore, the Court was not positing a counterfactual nonracial status for Indian people, but was instead demonstrating the ways the classification fulfilled the goals emerging from the unique federal relationship. The preference easily satisfied this test, as it concerned an agency with "plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes," and in fact replaced a proposal to allow tribes themselves to directly administer government services on their reservations.[138] The opinion thus echoes the views of Republican Congressmen during Reconstruction. Both the 1860s legislators and the 1970s Court asserted that the federal government has a special relationship with Indian people and tribes, one rooted in the original political status of tribes and sanctioned by constitutional text, norms, and historical practice. Both, therefore, rejected arguments that the Fourteenth Amendment undermined federal attempts to recognize that relationship or fulfill the obligations emerging from it.

Subsequent decisions relied on *Mancari* but did not develop or clarify its reasoning. The first, the 1976 decision *Fisher v. District Court*[139] was an easy application of *Mancari*. It held that the exclusion of state court jurisdiction over an adoption dispute between tribal members was not impermissible racial discrimination but rather a necessary result of retained self-government of the

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that Commerce Clause gives Congress plenary power in Indian affairs). *Contra* Frickey, *supra* note 128, at 1761 (arguing that plenary power cannot be found in the Commerce Clause).

135. 417 U.S. at 552. It is true that the language in this section, which quotes from a 1943 opinion, has more of the flavor of paternalism toward an "uneducated, helpless, and dependent people," than that of a relationship of one political entity to another. *Id.* (quoting Bd. of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

136. *Id.* at 552.

137. *Id.* at 555.

138. *Id.* at 542.

139. Fisher v. Dist. Ct., 424 U.S. 382 (1976).

tribe,[140] something clearly within the federal government's unique relationship to the Indians. But later decisions essentially washed away *Mancari*'s complexity by upholding governmental actions if they met minimal standards of rationality or solely classified tribal members.[141] In 1977, *Delaware Tribal Business Committee v. Weeks*[142] upheld a congressional scheme that excluded the Kansas Delawares from distribution of a judgment award to Delaware descendants against an equal protection challenge. The Court rejected the plaintiffs' claims on the grounds that Congress could rationally have found that excluding them was consistent with its obligations,[143] although the evidence showed that excluding them was in fact a congressional oversight.[144] By upholding the exclusion of the Kansas Delawares as "rational" despite the reality that no thought whatsoever had gone into their exclusion, the Court suggested that the *Mancari* test was a largely toothless rubric to sanction federal action. The same year, *United States v. Antelope*[145] upheld the disparate consequences of federal Indian law's complicated jurisdictional scheme on Indians and non-Indians. The opinion, despite long quotes from *Mancari*'s discussion of the special federal-tribal relationship, did not discuss how the scheme fell within that relationship, but instead relied solely on *Mancari*'s political-not-racial language and the tribal membership of the defendants.[146] Subsequently, *Washington v. Confederated Tribes & Bands of the Yakima Nation*[147] clarified that state classifications of Indians would be upheld under the *Mancari* test if—and only if—they implemented federal obligations toward Indians, but treated the question of whether the classification did in fact further that scheme as subject to the most minimal rationality test.[148] Together, these cases recite the language of *Mancari* while utterly failing to explain its rationale or build on its potential.

C. Conclusion

The modern era began with uncertainty as to whether Indian policy could survive under a robust understanding of equal protection, but shifted to an implicit recognition that tribal rights and civil rights are complementary rather than antagonistic. This recognition received judicial imprimatur with *Morton v.*

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140. *Id.* at 390–91.

141. *See also* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 274–86 (1984) (critiquing post-*Mancari* equal protection jurisprudence).

142. Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

143. *Id.* at 86.

144. *Id.* at 89.

145. United States v. Antelope, 430 U.S. 641 (1977).

146. *Id.* at 644–47.

147. Washington v. Confederated Tribes & Bands of the Yakima Nation, 439 U.S. 463 (1979).

148. *Id.* at 501–02.

Mancari, which recognized both the distinctive political status of Indian people and tribes under constitutional law, and the reasons that federal recognition of this distinctness did not violate equal protection. Subsequent decisions have upheld federal and even state classifications of Indians, but with little scrutiny of any tie between these classifications and the obligations arising from the federal-tribal relationship. None of these decisions were necessarily wrong under *Mancari*.[149] But by implying that all classifications are valid so long as they either only reach tribal members or are amenable to some minimally rational post-hoc justification, these decisions fail to develop *Mancari*'s potential to provide a normatively attractive reconciliation between federal Indian law and the mandate of equal protection. As I discuss next, this failure is beginning to have serious consequences for tribal and indigenous rights.

III

CURRENT EQUAL PROTECTION CHALLENGES TO FEDERAL INDIAN POLICIES

The need for a coherent reconciliation of policies regarding native peoples and the principles of equal protection has become more pressing in the face of popular and judicial backlash against both affirmative action and tribal sovereignty. In the late 1970s, as the Court minimized the potential of equal protection challenges to federal Indian policies, it also laid the groundwork for equal protection challenges to affirmative action. In the wake of *Regents of the University of California v. Bakke*,[150] the Court repeatedly struck down race-conscious measures intended to address inequality,[151] and further held that strict scrutiny applied even to race-conscious programs created by the federal government.[152] Popular backlash against affirmative action has also grown;

149. The classification in *Antelope*, for example, was based on the special federal jurisdictional status of crimes by or against Indians on tribal land, something easily justified under the federal government's unique obligations to Indian people. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) (justifying federal rather than state jurisdiction because states are often Indians' "deadliest enemies" and the federal government has a duty to protect Indians). The impact for the particular defendants in *Antelope* results from this jurisdictional difference, and the federal government's acceptance and Idaho's rejection of the felony murder rule. While the Court in *Antelope* noted this latter reason for rejecting the equal protection challenge, it did not deem it necessary to explain *why* the jurisdictional difference fit within Congress's obligations to the Indians. 430 U.S. at 648–50.

150. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion) (invalidating affirmative action scheme creating preference for minority medical school applicants).

151. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

152. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). While the Court had long held that the Fifth Amendment prohibits racial discrimination by the federal government, Bolling v. Sharpe, 347 U.S. 497 (1954), it had previously upheld race-conscious affirmative action

today, suggestions that the government unfairly disadvantages whites carry a powerful political punch.[153]

In the Supreme Court this backlash has largely manifested itself indirectly, as the Court has limited tribal sovereignty for reasons that hint at, but do not turn on, an equal protection violation.[154] A few lower court cases have also turned in part on concerns that federal Indian law measures might violate equal protection.[155] This Part shows how a better understanding of the consistency between equal protection and federal Indian law may ameliorate these concerns. In particular, it considers two likely targets of future challenges: the *Duro* Fix,[156] which affirms tribal criminal jurisdiction over nonmember Indians; and measures regarding Native Hawaiian sovereignty and property rights. Both measures, this Section shows, respond to and partially undo the denial of equal political rights founded in racialized images of native peoples, and thereby actually further the goals of equal protection.

A. Challenges to the Duro *Fix*

The statutory *Duro* Fix[157] may well be the occasion for the Supreme Court to revisit *Mancari*. This 1991 Act abrogated the holding in *Duro v. Reina*[158] that tribes lacked criminal jurisdiction over nonmember Indians, by affirming

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programs. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion). The defendants argued in *Adarand* that Section 5 of the Fourteenth Amendment gave Congress special discretion to implement race-conscious measures to accomplish the amendment's goals. 515 U.S. at 244 n.3 (Stevens, J., dissenting).

153. For evidence of this, consider the political fodder created during the confirmation hearings for Justice Sotomayor, an extremely moderate and well-qualified candidate, over her participation in a per curiam panel summarily affirming *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd* 530 F. 3d 87 (2d Cir. 2008), *rev'd* 129 S. Ct. 2658 (2009).

154. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 692–93 (1990) (suggesting that tribal criminal jurisdiction over nonmember Indians was prohibited because it had not yet included them in legislation satisfying the *Mancari* test, and that Indians could not be subject to tribunals of governments that did not include them and did not provide full constitutional rights). The district court and a dissenting member of the Ninth Circuit panel in *Duro* found that jurisdiction violated the equal protection provisions of the Indian Civil Rights Act. Duro v. Reina, 821 F.2d 1258, 1362 (9th Cir. 1987) (discussing unpublished district court holding); *Id.* at 1365 (Sneed, J., dissenting).

155. *See, e.g.*, Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) (rejecting the Department of the Interior's interpretation of the Reindeer Act to prevent reindeer-herding by non-Alaska Natives to avoid equal protection problems; *In re* Santos Y., 112 Cal. Rptr. 2d 692, 730–31 (Cal. Ct. App. 2d Dist. 2001) (applying strict scrutiny to hold that the Indian Child Welfare Act (ICWA) was unconstitutional as applied to a child of Chippewa descent whose tribal-member mother had not demonstrated sufficient connections to her tribe); *see also* Goldberg, *Descent*, *supra* note 15 (critiquing these decisions and the assumptions behind them). A more recent decision that is arguably more consistent with *Mancari* is *In re* A.W., 71 N.W.2d 793 (Iowa 2007) (holding unconstitutional state statute that applied ICWA to children the tribe identified as members of their community where children so identified had no contact with the tribe and no eligibility for membership).

156. 25 U.S.C. § 1301(2) (2006).

157. *Id.*

158. *Duro*, 495 U.S. 676.

that tribes have inherent criminal jurisdiction over Indians who are not members of the governing tribe. Because the Supreme Court had previously held in *Oliphant v. Suquamish Indian Tribe*[159] that non-Indians were not subject to tribal criminal jurisdiction, and the *Duro* Fix affirms jurisdiction over non-member Indians but not over non-Indians, the measure has been challenged as racially discriminatory.[160] Although the Supreme Court upheld the statute against a double jeopardy challenge in 2004, it pointedly left the equal protection question open for future decisions.[161] I argue that by undermining the historic racism that supports *Duro*, and responding to the decision by tribal sovereigns to subject their citizens reciprocally to each other's jurisdiction, the legislation promotes not racial discrimination but the equality at the heart of the equal protection norm.

As the Ninth Circuit explained in *Means v. Navajo Nation*,[162] the *Duro* Fix easily passes constitutional muster under *Mancari* analysis. First, by furthering tribal self-government and law and order on reservations, the *Duro* Fix is clearly related to the unique federal obligations to Indian tribes.[163] Second, to come within *Duro* Fix jurisdiction one must have not only some Indian heritage but also be recognized as politically a member of an Indian community.[164]

This easy legal answer may, however, leave observers uncomfortable. Even the court in *Means* acknowledged that "[the plaintiff's] equal protection argument has real force."[165] The Act subjects only Indians, and not "whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation," to the criminal jurisdiction of entities that are not bound by the U.S. Constitution, and of which they can never become members.[166] Although these arguments do point to real differences between tribes and state governments, both history and modern context suggest that the *Duro* Fix in fact mitigates distinctions grounded in racialization of Indian tribes.

Consider the context of the line of cases limiting tribal jurisdiction over nonmembers. As a number of scholars have argued, these cases are rooted in the

159. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

160. *See* Means v. Navajo Nation, 432 F.3d 924, 932 (9th Cir. 2005); Morris v. Tanner, 288 F. Supp. 2d 1133, 1141–43 (D. Mont. 2003), *aff'd*, 160 Fed. App'x 600 (9th Cir. 2005) (unpublished opinion) (rejecting equal protection claims of defendants).

161. United States. v. Lara, 541 U.S. 193, 209 (2004).

162. *Means*, 432 F.3d 924.

163. *Id.* at 932–35.

164. *Id.* at 934. To qualify as "Indian" for criminal jurisdiction purposes one must both have some heritage from the indigenous peoples in the Americas before European settlement, and have a recognized political affiliation with a federally recognized tribe. *See* United States v. Bruce, 394 F.3d 1215, 1223–24 (9th Cir. 2005); United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001). Thus individuals who are racially Indian but who are not recognized as politically Indian are not subject to tribal criminal jurisdiction. *See In re* Garvais, 402 F. Supp. 2d 1219, 1225–26 (E.D. Wash. 2004) (holding that a man with 6/32ds Indian blood who worked for a tribe was not an Indian for criminal jurisdiction purposes).

165. *Means*, 432 F.3d at 932.

166. *Id.*

racialized norms of colonialism: a hackneyed sense of what is acceptably Indian, a doubt in the ability of tribal courts to administer justice fairly, and a desire to limit the authority Indians wield over non-Indians.[167] *Duro* was particularly frank about this, resting its decision on the "special nature of the tribunals at issue,"[168] which, it asserted, were "influenced by the unique customs, languages, and usages of the tribes they serve,"[169] often "'subordinate to the political branches of tribal governments,'" and whose legal methods sometimes depended on "'unspoken practices and norms.'"[170] These qualities do not receive the same condemnation when they characterize non-Indian tribunals. As Professor Frickey recently pointed out, such unspoken practices and norms are celebrated when they are part of nontribal small-town justice.[171]

Still, the statute does not fully overrule this line of cases, but only subjects members of other tribes to tribal jurisdiction. One might argue that this distinction only compounds the offense of the original decisions, assuming a commonality between members of different tribes who share nothing but descent from the many different peoples that European American settlers labeled "Indian." The history of the *Duro* Fix shifts this perception. The *Duro* Fix was not imposed by a Congress that believed that tribal criminal jurisdiction was good enough for Indians even if not good enough for others, or that all Indians were the same. It was instead the result of a multilateral decision by tribal sovereigns to subject their citizens to each other's jurisdiction.

Duro v. Reina generated an immediate reaction in Indian country; within a few weeks of the decision, tribal leaders from across the country gathered to forge a legislative response.[172] Native people and those working with them shaped the legislation over the course of that summer, through numerous meetings and conference calls with tribal officials and Indian organizations.[173] The Justice Department responded to the bill by asserting "all Indian legislation

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167. *See, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1050–51 (2005); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 7 (1999) (describing nonmember jurisdiction cases as rooted in a "normatively unattractive judicial colonial impulse"); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 274 (1986) (calling *Oliphant* a "legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierarchic universalized worldview").

168. Duro v. Reina, 495 U.S. 676, 693 (1990).

169. *Id.*

170. *Id.*

171. Philip P. Frickey, *Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24 (2008).

172. Bethany R. Berger, United States v. Lara *as a Story of Indian Agency*, 40 TULSA L. REV. 5, 11 (2004).

173. *Id.* at 11, 13.

is unconstitutional because it is race-based."[174] But the *Duro* Fix, reaffirming tribal jurisdiction over nonmember Indians, entered into law as a temporary measure six months later,[175] and became permanent the following year.[176]

Throughout the drafting process and in the hearings to follow, both tribal leaders and Indian people were unanimous in their support before Congress.[177] Not surprisingly, since the *Duro* Fix was enacted, some individual Indian defendants facing tribal punishments have challenged the law.[178] But in the year and a half that the legislation was debated across Indian country, no tribal members came forward to oppose the bill. While opponents of the bill referred to the alleged unfairness and unconstitutionality of tribal governments,[179] the Indians who testified rejected these concerns. Kevin Gover, a Pawnee Comanche attorney, testified, "'the Indians who are here before you, we say freely when we go onto another reservation, we are willing to be subject to those laws. That is what we prefer, frankly, to being subject to the States or even to the U.S. courts.'"[180] Philip Sam Deloria, a drafter of the legislation and citizen of the Standing Rock Sioux Tribe, testified that he had lived on reservations of two tribes of which he was not a member and he "'felt safer living on the Pine Ridge Reservation than I certainly do living in Albuquerque, New Mexico sometimes.'"[181] Professor Alex Tallchief Skibine, an Osage citizen, later opined, "the fact that most Indian judicial systems are not bound by the Constitution is not half as threatening to most Indians as the racial prejudice they can encounter in non-Indian courts."[182] In an age of federal plenary power over Indian tribes, there is no democratic mechanism by which tribal communities can choose the federal law that governs their lives. But within this flawed system, the *Duro* Fix is as close as it gets: legislation catalyzed by and drafted from within Indian country and supported unwaveringly by tribal leaders and Indian people themselves.

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174. The Honorable Robert Yazzie, *"Watch Your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going*, 23 AM. INDIAN L. REV. 497, 498 (1998/1999) (recounting conversation with Senate Indian Affairs Committee staffer).

175. Department of Defense Appropriations Act, 1991, Pub. L. No. 101–511, § 8077, 104 Stat. 1856, 1892 (1990).

176. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301 (2006)).

177. *See, e.g.*, Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 768–69 (1993) (discussing reasons for the willingness of tribes to support the bill).

178. *See* Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005); Morris v. Tanner, 288 F. Supp. 2d 1133 (D. Mont. 2003), *aff'd*, 160 Fed. App'x 600 (9th Cir. 2005); *see also* U.S. v. Lara, 541 U.S. 193 (2004) (challenging *Duro* Fix on grounds that federal prosecution after tribal prosecution was double jeopardy).

179. Berger, *supra* note 172, at 16.

180. *Id.*

181. *Id.*

182. Skibine, *supra* note 176, at 769.

This context eliminates the apparent force of equal protection challenges to the *Duro* Fix. First, the legislation itself is consistent with the spirit of equal protection because it partially reverses discrimination against tribal governments by restoring a measure of their territorial sovereignty. Second, this differential treatment does not reflect the choices of political bodies that exclude the defendants, but instead the choices of the tribes that include them in concert with other tribes from across the country. Indeed, as legislation that begins to recapture the government-to-government negotiations of the treaty process, the legislative process leading to the *Duro* Fix itself counters some of the discriminatory excesses of the nineteenth-century plenary power decisions.

B. Challenges to Measures Regarding Native Hawaiians

Challenges to measures regarding Native Hawaiians constitute another growing area of equal protection litigation. Although Native Hawaiians have not historically been accorded the same rights as American Indians, they face comparable denials of sovereignty and property rights and are increasingly recognized to have a similar trust relationship with the United States.[183] Thus while Native Hawaiian classifications do not automatically come within the safe harbor *Mancari* provides for American Indian classifications, equal protection challenges regarding Native Hawaiians implicate similar questions and should be analyzed under similar principles.

In 2000, the Supreme Court decided *Rice v. Cayetano*, a challenge to a state constitutional provision that limited the right to vote in elections for the trustees of Hawaii's Office of Hawaiian Affairs to people of Native Hawaiian descent.[184] Although some thought the Court might take this opportunity to reconsider *Mancari*, *Rice* struck down the measure on separate grounds. First, *Rice* did not turn on equal protection, but rather relied on the Fifteenth Amendment's specific prohibition on the abridgement of the right to vote on account of race.[185] Second, the Court held that as a restriction on elections for state office, the limitation was not subject to the special rules that might apply to a tribal election or federal agency like the BIA.[186]

Since *Rice*, "[w]hite plaintiffs have brought lawsuits challenging nearly every public and private program benefiting native Hawai'ians."[187] Opponents have lodged equal protection attacks on measures regarding Native Hawaiians' equal protection in Congress as well. Claims of racial classification have repeatedly blocked reauthorization of the Hawaiian Homeownership Opportunity Act, the successor to an 87-year-old program seeking to address

183. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 364–65.
184. Rice v. Cayetano, 528 U.S. 495 (2000).
185. *Id.* at 517 (construing U.S. CONST. amend. XIV).
186. *Id.* at 520–22.
187. GROSS, *supra* note 12, at 205.

the dispossession of Native Hawaiians from their historic lands.[188] More significantly, efforts to provide Native Hawaiians with a measure of sovereignty similar to that of American Indian tribes have failed to pass in large part because of racial discrimination challenges.[189] A closer examination of the historical context, however, shows that the denial of Native Hawaiian sovereignty and property followed the familiar process of treating indigenous peoples as a race in need of reformation rather than a polity with political rights. Measures that seek to restore a portion of what this racialization took away should not falter under the guise of equal protection.

The annexation of Hawaii and deprivation of Native Hawaiians' land and sovereignty, while driven significantly by economic interests, was infused with racism as well. The United States and European countries initially recognized the sovereignty of the Kingdom of Hawaii, signing treaties with it as an independent nation.[190] Anglo-Americans also recognized Native Hawaiians' property rights in their lands, in part because of their dense and productive agricultural cultivation of the islands.[191] Despite this, they also saw Hawaii, its government, and its customs as distinctly inferior, and in need of reform and civilization through exposure to superior European and American culture. The memoirs of Hiram Bingham I, who was among the first group of American missionaries to arrive in Hawaii and who would later intervene significantly in Hawaiian political affairs, are almost a caricature of these sentiments. Bingham opens by describing the Hawaiian past as one in which a "gross darkness" covered its "stupid, unlettered, unsanctified heathen tribes."[192] Bingham's description of the Native Hawaiian political and property regime is equally derogatory: "This, in a conquered, ignorant and heathen country, without the principles of equity, was a low and revolting state of society."[193] While others were not as forthright in their condemnation of all that was indigenous to the Hawaiian people, they were firmly convinced that it was backwards, wrong, and in need of reformation by Anglo-Americans.[194]

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188. *Democrats Pass Native Hawaiian Bill on Second Try*, Indianz.com, Mar. 29, 2007, http://64.38.12.138/News/2007/002124.asp. The law was never reauthorized, although Congress has appropriated funds to continue the program. NATIONAL AMERICAN INDIAN HOUSING COUNCIL, WHITE PAPER ON LEGISLATION TO REAUTHORIZE TITLE VIII OF NAHASDA (Feb. 20, 2009), http://www.naihc.net/NAIHC/files/ccLibraryFiles/Filename/000000002122/02232009-Hawiian-Memo-NAHASDA.pdf.

189. *See, e.g.*, *Presidential Statement on H.R. 505* (opposing bill as racially discriminatory).

190. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 366.

191. Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW & SOC'Y REV. 273, 279–80 (2005).

192. HIRAM BINGHAM, A RESIDENCE OF TWENTY-ONE YEARS IN THE SANDWICH ISLANDS OR THE CIVIL, RELIGIOUS, AND POLITICAL HISTORY OF THOSE ISLANDS 17, 18 (3d ed. 1849).

193. *Id.* at 49.

194. *See, e.g.*, Alfred Brophy, *How Missionaries Thought: About Property Law, For Instance*, 30 U. HAW. L. REV. 373 (2008) (documenting missionaries' attitudes toward Hawaiian property use); *see also* Banner, *supra* note 191, at 283–85, 287 (recounting Anglo-American

The story of Hawaiian colonization in the nineteenth century is not a simple one of Anglo-American domination; native elites often accommodated and even cooperated with the non-Hawaiian settlers in an effort to preserve their power and further their own interests.[195] But when Hawaiian leaders stopped accommodating, they met with American force. In 1893, when Queen Liliuokalani sought to restore power to Hawaii's native government, American sugar interests forcibly deposed her with the backing of U.S. Marines.[196] Loath to sanction the illegal coup and acquire a predominantly non-white territory, Presidents Harrison and Cleveland initially refused to annex Hawaii to the United States.[197] President McKinley, however, ran for office in 1896 on a pro-annexation platform, arguing that although most residents of the islands were Native Hawaiian or Asian, they were under the control of the superior white minority, and annexation was a necessary preventative against Japanese takeover.[198] In 1898, amidst the fervor surrounding the Spanish American War, President McKinley secured the political domination of the territory of Hawaii and the appropriation of its lands.[199] The decision to annex Hawaii reveals the same denigration of indigenous interests and governments familiar from American Indian history.

Race played an even more explicit role in the subsequent creation of the Hawaiian Homes Commission Act.[200] The Act set aside 200,000 of the 1.8 million acres held by the government of Hawaii for homesteading by Native Hawaiians. Native Hawaiian advocates introduced the measure, which originally required Native Hawaiian descent but no specific amount of Hawaiian blood.[201] This accorded with traditional ideas of Hawaiian identity, which, like that of other indigenous groups, depended in part on descent or lineage.[202]

Non-Hawaiians, however, made eligibility turn on blood quantum.[203] Pro-sugar interests dictated this change: if the number of eligible homesteaders were limited, more lands would remain free for the "Big Five" sugar companies, whose plantations already dominated Hawaii's agricultural lands.[204]

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critique of Native Hawaiian property and governmental systems).

195. *See* Banner, *supra* note191, at 277–78; *see also* RICHARD KLUGER, SEIZING DESTINY: THE RELENTLESS EXPANSION OF AMERICAN TERRITORY 549 (2007) (describing embrace of English language and Christian religion).

196. KLUGER, *supra* note 195, at 555–56.

197. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 367; KLUGER, *supra* note 195, at 557–59; Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993).

198. KLUGER, *supra* note 195, at 563.

199. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, at 368; KLUGER, *supra* note 195, at 572–73. In 1993, Congress formally apologized for the "illegal overthrow of the Kingdom of Hawaii" and the resulting "deprivation of the rights of Native Hawaiians to self-determination." Apology Resolution, *supra* note 197.

200. Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108 (1921).

201. GROSS, *supra* note 12, at 189–90.

202. *Id.* at 184–85.

203. *Id.* at 186.

204. *Id.* at 186–87, 201.

Proponents of the limitation drew explicitly on ideas of racially derived character. It was only the "pure" Hawaiian who was dying out and whose race was worth saving.[205] These arguments invoked both romantic images of a noble race infused with the "spirit of aloha"[206] and decidedly negative images contrasting the part-Hawaiians with "these unenterprising, apathetic, thriftless natives of the pure blood."[207] Arguments for preserving the pure Hawaiians also received support from the virulent racism against the Japanese and Chinese immigrants on whose labor the sugar industry depended, but whose numbers the white population resented and feared.[208] In the end, the Native Hawaiian advocates of the Act accepted the half-blood limitation as the best they could get.[209] The result, however, was to erase their claims of justice, sovereignty, and territory and put preservation of the purity of the race in their place. As Ariela Gross writes, "race became the substitute for nationhood."[210]

If the impact of racism for Native Hawaiians was to translate their governmental bonds into racial ones, then recognizing the claims of their descendants to political and property rights is the means to undo this racism. Recognizing sovereign rights in Native Hawaiians and providing them with financial support and governance rights on the lands of the former Kingdom of Hawaii, far from creating racial inequality, instead takes tentative steps toward correcting it.

CONCLUSION

Today, measures seeking to restore indigenous peoples to meaningful self-governance and economic health are challenged as violating prohibitions on equal protection. But the history, purpose, and context of equal protection and federal Indian policy reveal that special federal treatment of Indians and tribes is consistent with equal protection and in service of its basic goals. While an anti-racial discrimination norm is at the core of equal protection, racial discrimination for Indian peoples had less to do with defining individuals according to race than with defining tribes as racial groups and denying them sovereignty and property as a result. Policies that seek to fulfill promises made to tribal governments, rebuild tribal lands, or restore tribes as political agents with the ability to provide for their people mitigate the effects of this state-sanctioned racial discrimination. These measures do not violate equal protection; they further it.

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205. *Id.* at 200.

206. *Id.* at 186.

207. *Id.* at 196 (quoting Alexander G.M. Robertson, chief justice for the Hawaiian Territory and a lobbyist for the Parker Ranch).

208. *Id.* at 187, 189.

209. *Id.* at 201.

210. *Id.* at 179.

Constitutional text, history and precedent affirm this argument. The special relationship between Indian peoples and the federal government has been recognized throughout American legal history and, when combined with recognition of tribal rights, reflects deeply held norms of consent, respect, and democracy. The written Constitution, while far from unambiguous, provides textual support for this special relationship and the distinctive status of native peoples under the Fourteenth Amendment. The proponents of the Fourteenth Amendment, moreover, recognized the political status of tribes in the American constitutional system, the consistency of this status with the Fourteenth Amendment, and the legal and moral obligations placed on the federal government as a result. Calls of inconsistency, in contrast, often came from those—whether opponents of the Fourteenth Amendment or proponents of separate but equal—who opposed faithful observation of either equal protection or tribal rights. Although similar claims of inconsistency are being made again today, they should be resolved in favor of the constitutional norms that support both equal protection and tribal rights, and against any artificial consistency that would undermine the fundamental principles on which both are based.