

2019

Savage Equalities

Bethany Berger

University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Berger, Bethany, "Savage Equalities" (2019). *Faculty Articles and Papers*. 461.
https://opencommons.uconn.edu/law_papers/461

SAVAGE EQUALITIES

Bethany R. Berger*

Abstract: Equality arguments are used today to attack policies furthering Native rights on many fronts, from tribal jurisdiction over non-Indian abusers to efforts to protect salmon populations in the Pacific Northwest. These attacks have gained strength from a modern movement challenging many claims by disadvantaged groups as unfair special rights. In American Indian law and policy, however, such attacks have a long history, dating almost to the founding of the United States. Tribal removal, confinement on reservations, involuntary allotment and boarding schools, tribal termination—all were justified, in part, as necessary to achieve individual Indian equality. The results of these policies, justified as equalizing the savage, are now recognized as savage themselves, impoverishing Native people and denying them fundamental rights.

Many, including some tribal advocates, respond to equality-based attacks by arguing that sovereignty, cultural difference, or some other value trumps the value of equality in Indian law and policy. This Article, in contrast, reveals the egalitarian roots of demands for tribal rights. It argues that such rights are in fact demands to recognize the equality of tribes as governments, so the proper comparison is to rights of other sovereign groups. This governmental equality yardstick, moreover, has an even older historical pedigree and has repeatedly triumphed when U.S. policy bent toward justice.

The governmental rubric does not lead to an easy metric for equality claims—tribal nations and their people are far too entwined with non-Native governments and communities for that. Additional principles, including individual equality, the history and context of modern disputes, and the impact of particular measures on the most vulnerable, are relevant as well. To show how these principles apply, the Article concludes by examining modern conflicts, including those over the Indian Child Welfare Act, Cherokee freedmen citizenship, and off-reservation fishing rights.

* Wallace Stevens Professor, University of Connecticut School of Law. Thanks to Seth Davis, Allison Dussias, Jacqueline Hand, Sanford Levinson, Tom Morawetz, Angela Riley, Addie Rolnick, Ezra Rosser, Michalyn Steele, Joseph William Singer, Gerald Torres, and participants in workshops at Harvard University, the University of Connecticut, the University of Miami, the University of Michigan, and Yale University for helpful feedback.

INTRODUCTION.....	584
I. THEORIZING EQUALITY AND INDIGENOUS RIGHTS.....	589
A. Equalities.....	590
B. Indigenous Equalities.....	592
II. DOMESTIC AND INTERNATIONAL RECOGNITION OF EQUALITY OF PEOPLES.....	597
A. Equality of Indigenous Peoples in International Law.....	597
B. Equality of Tribal Governments in U.S. Law and Policy.....	601
1. The Governmental Yardstick at the Founding.....	602
2. From Nations to Individuals: Removal, Civil War, and Reconstruction.....	604
3. The Rise, Fall, and Rise Again of Tribal Governmental Equality in the Twentieth Century.....	609
C. Conclusion.....	615
III. PARSING EQUALITY CONFLICTS IN THE MODERN ERA.....	615
A. Constitutional Parsing of Tribal Equalities.....	615
B. Political Parsing of Tribal Equalities.....	619
1. Taking Seriously Tribal Claims to Governmental Equality.....	619
2. History and Context Count.....	619
3. How Do Policies Affect the Worst Off?.....	621
C. Conclusion.....	623
IV. RESOLVING TODAY'S EQUALITY CONFLICTS.....	623
A. The Indian Child Welfare Act.....	623
B. Exclusion of Cherokee Freedmen.....	631
C. Treaty-Fishing Struggles.....	636
CONCLUSION.....	642

INTRODUCTION

Equality is in resurgence in law and political debate. Income inequality is at its highest point since the eve of the Great Depression, while Pope Francis tweets that “[i]nequality is the root of social evil.”¹ The deaths of unarmed Black men have catalyzed a new civil rights movement.² Self-proclaimed Nazis march in Charlottesville, Virginia chanting “[y]ou will

1. Pope Francis (@Pontifex), TWITTER (Apr. 24, 2014, 1:28 AM), <https://twitter.com/pontifex/status/46069707458598092> [<https://perma.cc/6K37-5YRR>].

2. *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 AM), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [<https://perma.cc/2AGX-CE6J>].

not replace us,” “Jews will not replace us.”³ Mass shootings at mosques and synagogues weaponize religious hatred in terrifying ways.⁴ We are living in the aftermath of one of the most surprising presidential elections in history, in which voters on both sides were motivated in part by competing notions of equality: on one side, that they were suffering from unfair preferences for racial minorities, women, and immigrants; on the other, that the opposing campaign was fueled by racism, xenophobia, and sexism.⁵

As these examples show, equality can be used in many ways. Affirmative action and progressive taxation, for example, are the remedy for racial and income inequality for some, but the source of such inequalities for others. Although deeply engrained in U.S. history and ideology, measures of equality are infinitely malleable, dependent on the question “equality of what?”⁶ As such, equality is a tool that has been used for multiple policy ends, including some that today almost all recognize as unjust.

One underexplored set of equality conflicts has colored U.S. policy almost since the founding: that over the law and policy affecting American Indians in the United States. Although the 1970s saw a temporary resolution of these conflicts in Congress and the U.S. Supreme Court, today, opponents use charges of racial inequality to attack everything from the Indian Child Welfare Act (ICWA) to gaming to salmon conservation efforts.⁷ In response to these attacks, Native peoples assert that the opposition itself is the product of discrimination against them.⁸

Equality-based attacks on federal Indian law recently won a potentially disastrous victory. In 2018, after years of unsuccessful litigation,

3. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/> [https://perma.cc/26FZ-TBQ6].

4. Les Perreux, *Quebec Mosque Shooter Told Police He Was Motivated by Canada's Immigration Policies*, GLOBE & MAIL (Apr. 13, 2018), <https://www.theglobeandmail.com/canada/article-mosque-shooter-told-police-he-was-motivated-by-canadas-immigration/> [https://perma.cc/QS85-SB5X]; Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [https://perma.cc/ERL2-TPW4].

5. See German Lopez, *Research Says There are Ways to Reduce Racial Bias. Calling People Racist Isn't One of Them.*, VOX (July 30, 2018, 3:39 PM), <https://www.vox.com/identities/2016/11/15/13595508/racism-research-study-trump> [https://perma.cc/7KP8-3J9L] (discussing racial disparities and how to strike the right balance among differing opinions).

6. DOUGLAS RAE ET AL., *EQUALITIES 2* (1981).

7. See *infra* Sections IV.A, IV.C.

8. *Id.*

opponents persuaded a U.S. District Court to rule ICWA unconstitutional in *Brackeen v. Zinke*.⁹ The decision is wrong under U.S. Supreme Court precedent, but it may find sympathy today, particularly given Justice Kavanaugh's past advocacy of a similar position.¹⁰ *Brackeen* also demonstrates ways that attacks on Indian law are tied to broader campaigns against egalitarian legislation. *Brackeen* was decided by Judge Reed O'Connor, who has become infamous for his subsequent decision that the Affordable Care Act (ACA) was unconstitutional.¹¹ This is not a coincidence. Peculiarities of judge assignment mean that plaintiffs filing in the Fort Worth Division in the U.S. District Court for the Northern District of Texas can be sure that Judge O'Connor will hear their cases.¹² Litigants have exploited these peculiarities to win decisions from Judge O'Connor invalidating not only ICWA and the ACA, but also family leave for same-sex partners and bathroom access by transgender students.¹³ The attacks on ICWA, in other words, are part of a wider crusade against the federal power to address discrimination and disadvantage.

This Article documents equality conflicts in federal Indian law and policy, explains why they occur, and presents some principles to resolve them. It is titled "savage equalities" to evoke two opposing concepts.¹⁴ First, non-Natives have long used equality to justify actions that today we recognize as savage, including the forcible expropriation of tribal lands and the involuntary removal of Indian children from their families. While these and other actions received support from less laudable arguments—founded in racism, ethnocentrism, or simple greed for wealth and land—arguments from equality have formed a persistent thread in actions

9. 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018).

10. See Brief of Amici Curiae Center for Equal Opportunity et al. at 25, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818) (arguing that distinctive constitutional status of Indian classifications only applied to those based on tribal membership involving activities on or near reservations).

11. Adam Liptak, *Texas' One-Stop Shopping for Judge in Health Care Case*, N.Y. TIMES (Dec. 24, 2018), <https://www.nytimes.com/2018/12/24/us/politics/texas-judge-obamacare.html> [<https://perma.cc/JS8L-SNL5>].

12. *Id.*; see also Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RIGHTS L. REV. 297 (2018) (describing judge-shopping in Texas).

13. Botoman, *supra* note 12.

14. This phrase draws on two different meanings of the word savage. The first, as used in Jonathan Kozol's *SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS* (1991), signifies something cruel, vicious, or aggressively bad. The second, as used in Robert A. Williams, Jr.'s *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* (2012) and Gregory Ablavsky's *The Savage Constitution*, 63 DUKE L.J. 999 (2014) plays on the dual meanings of the historical references to American Indians as "savages," indicating sometimes a distinct political status (a synonym for American Indian derived from the French term *sauvage*) and sometimes a lack of accepted civilization, to highlight the ways the peoples called savages often follow norms respected within a European American framework.

undermining Native peoples' rights for hundreds of years. These savage uses of equality continue in the twenty-first century, as members of Congress charge that equality prevents tribes from punishing non-Indians who abuse their Native intimate partners,¹⁵ and the U.S. Supreme Court invokes equality to remove a four-year-old girl from the father she loved.¹⁶

Second, drawing on Douglas Rae's notion of "equalities,"¹⁷ or the ways different yardsticks for equality can lead to very different judgments regarding equality, this Article reveals the equality arguments that undergird tribal claims. Much of the incommensurate and unjust uses of equality in debates regarding Native people derives from failure to use the appropriate yardstick for measuring equality claims. In the United States, discourse usually measures inequality by comparing individuals. For example, are Natives and non-Native individuals treated similarly in employment, voting, religious exercise, and the like? Do they have similar outcomes, in education, poverty, or health?

With respect to indigenous peoples, however, this yardstick is insufficient, and is indeed the source of inequality. As colonized groups with a distinct political status, one must also compare the treatment and outcomes of Native governments to non-Native governments. Do these governments, for example, have similar jurisdiction within their territories or control of their borders and citizenship? Are their agreements with other governments subject to the same criteria or given the same respect? While less familiar than individual equality comparisons, domestic and international policy have long acknowledged the rights of indigenous peoples as governments. The result is a legal system that demands that, with respect to American Indians, we consider not only the equality of individuals, but also the "equality of peoples"¹⁸ or governments.

Part I begins with an overview of how ideas of equality work in justice claims and the importance of considering equality along many dimensions. Next, it examines how this notion applies with respect to colonized indigenous peoples. It argues that it is necessary to consider not only equality of Indians as individuals in a broader settler society, but also their equality as citizens of self-determining peoples. This is not just because of the historic identity of Native peoples as independent governments, but because the governmental equality yardstick has been

15. See Bethany Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIR. 23, 24–25 (2013).

16. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013).

17. RAE ET AL., *supra* note 6, at 2.

18. See Patrick Macklem, *Distributing Sovereignty: Indian Nations and the Equality of Peoples*, 45 STAN. L. REV. 1311, 1315 (1993) (arguing that "the appropriate measure of distributions of sovereignty is equality of peoples, not equality of individuals").

adopted into international and domestic law and maintained by Native peoples themselves.

Part II demonstrates conflicts over and adoption of the governmental equality argument throughout history. It begins with international law, moving from the sixteenth-century Spanish attempts to theorize the rights of the indigenous peoples of the Americas to the 2007 United Nations Declaration on the Rights of Indigenous Peoples. It then turns to the United States, showing how the country early on embraced the idea that justice demanded egalitarian treatment of tribes under the law of nations, even as self-interest and ethnocentrism made it depart from this principle. Similarly, as Reconstruction made equality central to American thought and law, respecting tribal sovereignty was considered the complement to protecting civil rights for African Americans. As the nineteenth century progressed, however, policymakers used the rhetoric of individual equality for American Indians to justify involuntary allotment and removal of children to often abusive boarding schools.

Although the harms caused by individual assimilation policies led to embrace of tribal governmental rights in the early twentieth century, the 1940s saw a reversion to tribal termination in the name of individual Indian equality. Native people, many of whom initially supported aspects of this Termination Policy as a way to escape federal paternalism and domination, soon strongly advocated for tribal self-government as the only effective means of achieving Indian equality. By the 1970s, the federal government had embraced self-determination as the only way to truly respect and improve the welfare of Native people. This policy remains in effect today. Over more than two hundred years, the United States has fluctuated between governmental and individual metrics for Native equality but has always resolved that a governmental metric is necessary to guarantee justice in the end.

Part III moves to how to parse Native equality conflicts today. It begins with the constitutional test. This test emerges from *Morton v. Mancari*,¹⁹ a case which itself is the product of conflicting equality claims. While *Mancari* does not require tribal equality as a constitutional matter, it creates space for federal recognition of tribal equality claims in the face of challenges that they violate individual racial equality. Given this constitutional breathing room, this Part outlines three principles that should be considered as a matter of policy and justice. First, Native equality conflicts must be evaluated at a governmental as well as individual level. Second, history and context are relevant to whether a particular difference in treatment or outcome is an unjust inequality.

19. 417 U.S. 535 (1974).

Third, how a particular difference affects the least well-off is also relevant in determining whether it is or is not unjust.

The Article concludes by applying these legal and moral principles to three striking equality conflicts of the present day. The first concerns ICWA, which proponents justify as a necessary means to address disparate removals of Native children and respect tribal governmental authority over their citizens, and opponents challenge as implementing racially disparate treatment.²⁰ The second concerns the exclusion of descendants of African American “freedmen” from citizenship in the Cherokee Nation, which pits claims of racial equality against claims for equal governmental control over citizenship criteria.²¹ The third concerns the off-reservation treaty fishing rights of tribes in the Pacific Northwest and the Great Lakes states, which pit passionate arguments about equal respect for agreements with tribes against accusations of unjust special rights.²²

Just resolution of such equality conflicts is only gaining in importance today. First, although the roots of these claims stretch throughout American history, they have been strengthened by a new conservative rhetoric that decries claims to egalitarian treatment of LGBT people, women, people of color, and others, as unjust movements for special rights.²³ Grappling with existence of equalities—not simply a monolithic equality—has ever greater impact. Second, while Native people remain among the poorest people in the United States,²⁴ as tribal nations gain in *de facto* and *de jure* authority, just resolution of claims made by and against them is even more necessary. Finally, deprivation of rights to the first nations on this continent is one of our founding sins. We should no longer perpetuate that treatment in the name of equality, one of our founding values.

I. THEORIZING EQUALITY AND INDIGENOUS RIGHTS

Equality is often invoked as though it were self-defining—measures either increase or decrease equality, and the difference is clear. In reality, measures that increase equality as to some attribute often decrease it in

20. See *infra* Section IV.A.

21. See *infra* Section IV.B.

22. See *infra* Section IV.C.

23. JEFFREY R. DUDAS, THE CULTIVATION OF RESENTMENT: TREATY RIGHTS AND THE NEW RIGHT 2–3 (2008).

24. U.S. CENSUS BUREAU, FACTS FOR FEATURES: AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2017, at 5 (2017), <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-f120.pdf> [<https://perma.cc/EAX9-H3NE>].

another. In Indian affairs in particular, apparently incommensurable invocations of equality are often the result of conflicting yardsticks: equality for individuals separated from their groups, and equality for peoples or governments and individuals choosing to be part of them. This Section outlines this theoretical debate and its impact in Native claims.

A. *Equalities*

In political theory, equality means this: two or more things are alike in some morally relevant way, so justice demands they be treated alike in proportion to that similarity.²⁵ This does not mean that the comparators are identical.²⁶ Differences between individuals as well as between groups are inescapable and essential to the richness and freedom of social life. Rather, to borrow the language of Fourteenth Amendment jurisprudence, the question is whether the individual or group being compared is "similarly situated" in relevant ways,²⁷ so that the challenged difference is the result of injustice.

Whether differences amount to unjust inequality, however, depends on a preliminary question: equality of what? As political theorist Douglas Rae shows, the idea of "equality" is almost meaningless on its own: there are many equalities, and they are often in conflict.²⁸ The apparently simple and almost universally embraced concept of equal opportunity is a famous iteration of this conflict. Here, the choice is between the equality of means and the equality of prospects: are individuals to be afforded equal means to achieve the same ends, or are they to be afforded an equal opportunity to achieve those ends?²⁹ In a world in which individuals come to the table with different initial assets and abilities, affording complete equality of one necessarily means denying the other.³⁰

25. This has been a principle of moral philosophy at least since Aristotle. See PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* 28–29 (2002); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982) (paraphrasing ARISTOTLE, *NICOMACHEAN ETHICS* bk. V.3, at 1131a–1131b (W. D. Ross trans., Infomotions, Inc. 2000) (350 B.C.E.) as "[e]quality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood").

26. See, e.g., ARISTOTLE, *supra* note 25, at bk. V.5 (describing the need for a metric to compare the work of the shoemaker and the housebuilder).

27. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 447–48 (1985) (finding that while people with intellectual disabilities were different in some respects from others, these differences were "largely irrelevant" to the justifications for the special permit requirement for location of group homes).

28. RAE ET AL., *supra* note 6, at 2.

29. *Id.* at 64–66.

30. *Id.* at 68–69.

Some react to this dilemma by arguing that the concept of equality is superfluous. Legal scholar Peter Westen, for example, powerfully argues that reliance on equality concepts should be discarded in favor of focus on particular rights.³¹ But, as Amartya Sen points out, “every normative theory of social arrangement that has at all stood the test of time seems to demand equality of *something*—something that is regarded as particularly important in that theory.”³² Even those theories that appear to prioritize liberty over equality demand liberty for all, on equal terms.³³

The persistence of equality in theory and discourse is not simply the result of misguided habits of speech or thought. It is because ever since the demise of notions of divine superiority or status as bases for political organization, “ethical reasoning, especially about social arrangements, has to be, in some sense, credible from the viewpoint of others—potentially *all* others.”³⁴ Therefore, Sen concludes, “[t]he question ‘why this system?’ has to be answered, as it were, for all the participants in that system.”³⁵

Although political theorists sometimes identify a single dimension along which equality will be measured, political life is not so monistic. All mainstream political discourse recognizes the importance of equality on many levels—economic opportunity, fulfillment of basic needs, liberty, political participation, and the like. All mainstream political discourse also accepts different, even contradictory, means in the name of equality—sometimes by demanding the same rights and benefits for all,³⁶ for example, and sometimes by demanding different rights or benefits based on need.³⁷ All mainstream political discourse, therefore, incorporates the concept of equalities, even though the emphasis on particular equality domains shifts radically across the political spectrum.

Given the multiplicity of equalities, showing that a particular measure results in inequality in one dimension does not necessarily mean that the measure cannot stand. Even in the context of racial discrimination, the

31. Westen, *supra* note 25, at 539–42.

32. AMARTYA SEN, *INEQUALITY REEXAMINED* 12 (1992).

33. *Id.* at 13.

34. *Id.* at 17.

35. *Id.*

36. The right to free speech enshrined in the First Amendment, U.S. CONST. amend. I, for example, is one of the rights least qualified according to the characteristics of the speaker asserting the right.

37. Social welfare programs providing income, food, or health care based on need, are justified in part by the sense that all are entitled to a certain level of benefit based on their equality as citizens or human beings. In a different context, programs requiring accommodation of disabilities are founded in the recognition that such accommodation is necessary for equal participation of people with disabilities.

U.S. Supreme Court will uphold discrimination that is narrowly tailored to meet a compelling interest.³⁸ Perhaps because of that nearly “fatal in fact” standard, the Court has refused to find unconstitutional inequality outside restrictive definitions of intent³⁹ and state action,⁴⁰ and has exempted some areas, like immigration and national security, from any meaningful review.⁴¹ As a matter of justice, however, maintaining inequality in any morally relevant dimension requires a more morally compelling justification.

Evaluation of these justifications depends on many things, and not everyone will agree on the answers. Simply identifying inequality in one dimension, however, cannot stop the conversation. Rather, determining the salience of that form of inequality requires analysis of whether that is the right dimension in this context and whether another is more compelling. What follows argues that we have too frequently used the wrong dimension for analyzing equality for Native peoples, and that the results have been fundamentally unjust.

B. Indigenous Equalities

Most political theory starts from a point that automatically disadvantages indigenous peoples. It assumes a polis or state, then goes on to theorize the rights of individuals within that state.⁴² As Will Kymlicka argues, from this perspective, rights insisted on by all states—control of internal mobility and settlement, legislative and adjudicative authority, admission to citizenship, resources, official language, and educational policy—appear, when demanded by non-state groups, to be

38. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

39. *See McCleskey v. Kemp*, 481 U.S. 279, 293–97 (1987) (holding that evidence that death penalty in Georgia was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims was insufficient to establish discriminatory intent); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (holding that discriminatory impact does not violate the Fourteenth Amendment).

40. *See, e.g., Evans v. Abney*, 396 U.S. 435 (1970) (finding no state action when a public park reverted to private family because the testator who endowed the park provided that it was solely for people of the white race).

41. *See, e.g., Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392, 2402 (2018) (upholding ban on immigration against religious discrimination challenge because such measures need only be “plausibly related to the Government’s stated objective”).

42. *See* MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31 (2006) (arguing that most political theory misses “the first and most important distributive question” of how political groups are constituted).

unjust special rights.⁴³ Yet if a non-state group has a legitimate claim to political authority, denying political rights to the group is a “clear injustice.”⁴⁴ Indeed, invocations of other egalitarian principles, like universal citizenship, may exacerbate this injustice.⁴⁵

Imagine, for example, if particular governments were denied the right to punish non-citizens committing crimes in their territory.⁴⁶ Imagine if they could not tax or regulate businesses operating there.⁴⁷ Imagine if they could not control who crossed their borders and came to live there.⁴⁸ Imagine if their land could be taken against their will, and inheritance and taxation were made subject to foreign law.⁴⁹ Surely this would be condemned as rampant inequality. It would violate both the U.N. Charter’s fundamental principle of “equal rights and self-determination of peoples”⁵⁰ and John Rawls’s principle that fairness among peoples demands mutual respect for each other’s autonomy.⁵¹ Yet these examples all describe the situation of American Indian tribes.

Of course, tribes are not independent nations, and few tribes today demand complete independence from their colonizing states.⁵² But they are widely recognized as “peoples,” non-state groups with rights to

43. WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 72–82 (2001).

44. *Id.* at 76.

45. *Id.* at 77; see also Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 *CARDOZO L. REV.* 1185, 1235 (2016); Leti Volpp, *The Indigenous as Alien*, 5 *U.C. IRVINE L. REV.* 289, 290 (2015).

46. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 434 U.S. 191 (1978) (holding tribes lacked criminal jurisdiction over non-Indians).

47. See, e.g., *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (holding Navajo Nation could not tax non-Indian guests at hotel located on Navajo Reservation).

48. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997) (holding tribe could not adjudicate tort occurring on highway on reservation).

49. This happened to tribes across the country under the General Allotment Act. See 24 Stat. 387, 389–90 (1887); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 498–99 (1979) (holding that allotted land was subject to state property taxes).

50. U.N. Charter art. 1, ¶ 2.

51. JOHN RAWLS, *THE LAW OF PEOPLES* 37, 62 (1999).

52. See N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* 48 (2013) (“[N]o credible tribal leader in the modern era articulates tribal sovereignty claims with the view toward displacing the state.”). One notable exception is the peoples of the Haudenosaunee, or Iroquois, Confederacy, who have a long history of insisting on their political independence from the United States. See, e.g., *Ex Parte Green*, 123 F.2d 862 (2d Cir. 1941) (rejecting challenge that Iroquois man was exempt from Indian Citizenship Act and draft); Sid Hill, *My Six Nation Haudenosaunee Passport Is Not a ‘Fantasy Document’*, *GUARDIAN* (Oct. 30, 2015, 10:15 PM), <https://www.theguardian.com/commentisfree/2015/oct/30/my-six-nation-haudenosaunee-passport-not-fantasy-document-indigenous-nations> [<https://perma.cc/U7ZQ-XSBH>] (discussing use of Haudenosaunee issued passport).

political autonomy similar to those of governments. This recognition means that actions involving them must be evaluated, as Patrick Macklem writes, along the dimension of “equality of peoples.”⁵³

Macklem’s argument rests on two pillars. First, tribal nations were once independent sovereigns, and second, the deprivation of their sovereignty was unjust. He is correct that this history distinguishes indigenous claims to peoplehood from those of non-Native ethnic or racial groups.⁵⁴ He is also correct that prior sovereignty and unjust deprivation are a necessary addition to the frequent claim that the difference between Native groups and others is simply that “they were here first.”⁵⁵

Macklem does not, however, explain why this historic deprivation retains controlling moral salience today. As Jeremy Waldron points out, historic injustice alone is not a complete justification for current action.⁵⁶ Waldron’s thesis, which is also correct as far as it goes, is that over time, historic injustices will lose their sting, and contemporary efforts to correct the injustice may wreak new, more morally objectionable injustices today.⁵⁷

What both Waldron and Macklem miss is that the denial of governmental status to tribal nations is not simply a historic injustice. Both international and domestic law have recognized the entitlement of indigenous peoples to governmental rights from their founding to the present day.⁵⁸ While this recognition was often combined with belief that indigenous individuals would voluntarily cede their peoplehood when presented with “civilized” society, this hope was in vain: indigenous

53. See Macklem, *supra* note 18, at 1315. Macklem has incorporated his thinking into a book on the role of indigenous peoples under the Canadian Constitution. See generally MACKLEM, *supra* note 25. Although the book contains many of the same ideas, it focuses less on inequality and more on Canadian and international law.

54. Macklem, *supra* note 18, at 1328; see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832) (discussing pre-existing nationhood of tribal nations to shed light on their present status).

55. Macklem, *supra* note 18, at 1329–33 (quoting THOMAS R. BERGER, *A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS, 1492–1992*, at 160–61 (1991)); see also Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 496–97 (2017) (noting the importance of the historic sovereignty of tribal nations in constitutionalizing the use of tribal descent in federal classifications).

56. Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 27 (1992).

57. *Id.* at 26–27; see, e.g., *Cayuga Indian Nation of N.Y. v. Cuomo*, 1999 U.S. Dist. LEXIS 10579, at *77, 90–91 (N.D.N.Y. 1999) (holding that, although past illegal deprivations of land had caused immeasurable harm to the Cayuga Nation, present ejection of thousands of landowners from that land would be unjust).

58. See *infra* Parts II, III.

groups stubbornly retained their distinct peoplehood.⁵⁹ Moreover, as this Article demonstrates, each effort to strip it away created further suffering and deprivation. In the face of this persistence, and with the decline of the notion that race or religion entitles some peoples to more recognition than others, contemporary law and policy have strengthened their protection of indigenous peoplehood. The equality claims of indigenous governments, therefore, are based not on historic injustice, but on preventing new injustices to existing indigenous peoples.

Measuring indigenous peoples' rights against those of other governments does not lead to an easy metric for equality. There are important differences between tribes and foreign states. To name just a few, tribal nations are within the boundaries of another state, many if not most of their citizens depend heavily on economic and educational opportunities outside their own territories,⁶⁰ and non-indigenous citizens often have a long-established presence in tribal territories.⁶¹ But sovereigns come in different flavors. Foreign nations have a different status than U.S. states, which have a different status than Canadian provinces or German *Länder*,⁶² which in turn have a different status than microstates such as Monaco and San Marino.⁶³ But the differences between each of these does not mean their claims can only be compared to those of non-sovereign groups.⁶⁴ Indeed, the United States, with its long tradition of respected but intertwined federal and state sovereignty, is a leading exemplar of this idea.⁶⁵

59. See, e.g., STEPHEN E. CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 6–7 (1988) (describing continued agenda of tribal survival).

60. U.S. CENSUS BUREAU, *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010*, at 12–13 (2012), <https://www.census.gov/history/pdf/c2010br-10.pdf> [<https://perma.cc/TAN7-WRTD>] (showing that 78% of American Indians and Alaska Native people live outside reservations and tribal areas); Timothy Williams, *Quietly, Indians Reshape Cities and Reservations*, N.Y. TIMES (Apr. 13, 2013), <https://www.nytimes.com/2013/04/14/us/as-american-indians-move-to-cities-old-and-new-challenges-follow.html> [<https://perma.cc/DH6Z-QZWP>] (describing the growing numbers of Native people moving to metropolitan areas).

61. See, e.g., *Atkinson Trading Post v. Shirley*, 532 U.S. 645, 648 (2001) (discussing tax status of a non-Indian business present within the Navajo Nation since 1934).

62. See, e.g., Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 107–08 (1992) (discussing differences between provinces and states).

63. See generally JORRI DUURSMAN, *FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD* (1996) (discussing the status of such states).

64. Sovereign immunity jurisprudence, for example, frequently analogizes from federal to state to foreign nation sovereign immunity. See *Lewis v. Clarke*, 581 U.S. ___, 137 S. Ct. 1285 (2017).

65. See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) (“‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”).

Nor are metrics of individual equality irrelevant when it comes to indigenous peoples. First, indigenous governments are comprised of indigenous individuals. Denying indigenous governmental rights means denying the rights of the individuals whose identity and welfare depend on those governments. The United Nations, for example, has recognized that independence for colonized nations is a “fundamental human right,” derived from the “the equal rights of men and women and of nations large and small.”⁶⁶ Many individual rights, moreover, such as rights to religion, culture, and language, are intimately connected to recognition of tribal entities, because these rights are typically practiced as part of a tribal community.

History also shows the connection between tribal sovereignty and individual equalities, as strengthening tribes has proved to be the best way to improve Native individuals’ health, economic status, and voice in broader political debates.⁶⁷ Moreover, equal treatment of Native individuals outside the tribal context is crucial for Native well-being. Although citizens of independent nations rely primarily on opportunities within their borders to satisfy their needs, many Native people today are dependent on economic and educational opportunities outside Indian country largely because of the unjust destruction of tribal communities.⁶⁸

Because arguments based on one dimension of equality do not automatically defeat those from other dimensions, individual equality claims remain relevant as well. This is true both for non-Indian claims and for claims of Indians challenging tribal action. Particularly as tribes gain more *de facto* and *de jure* authority, their impact on individuals raises powerful justice claims that may in some cases trump arguments rooted in governmental autonomy.⁶⁹

While individual equality is relevant, evaluating Native claims solely on an individual basis without considering the connection of those individuals to their governments almost always leads to inequitable results. In asking “equality of what?” when it comes to indigenous peoples, therefore, we have to consider the rights of governments as well as rights of individuals. We have to recognize that demanding equal

66. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples at 66, 67 (Dec. 14, 1960).

67. See Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 207 (2017) (discussing the positive impact of greater tribal self-determination).

68. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 22.04[2][e], at 1423 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK] (“Because of the decimation of the Indian land base and economic systems, many Indians must leave the reservation to seek work and education, and more than half of those eligible for Indian health care now live in urban areas.”).

69. Washburn, *supra* note 67, at 202.

treatment of Native individuals without regard to their relationship to self-determining peoples may in fact deny another form of equality. While this may sound radical, the remainder of this Article shows that it has been recognized by different policymakers throughout history and is even enshrined in constitutional precedent.

II. DOMESTIC AND INTERNATIONAL RECOGNITION OF EQUALITY OF PEOPLES

Since Pope Alexander VI asserted Spanish claims over the Western Hemisphere on the basis of Christopher Columbus's landing in Hispaniola,⁷⁰ Native-settler relations have been replete with inequality. From this time, indigenous peoples have been slaughtered, enslaved, cheated, and deprived of property, family, and religion. And yet each time Europeans and Americans fully considered what justice demanded, they recognized that treatment of tribal peoples must consider governmental as well as individual equality. What is more, all the policies built on the assertion that Indians were entitled only to individual, and not governmental, rights, are today recognized as racist and inegalitarian.⁷¹ This Part describes the triumph of the governmental equality yardstick, first in international, and then in domestic U.S. law and policy.

A. *Equality of Indigenous Peoples in International Law*

International law itself—the law of what rights and obligations nations have with respect to other nations—began with questions of tribal rights. Starting from this founding moment, international law theorists have recognized that indigenous governments have equality claims against other nations. These same theorists, of course, also found excuses to deny those equality claims. Today, those excuses are largely recognized as the result of ignorance and ethnocentrism. In the twenty-first century, the international community—joined reluctantly by the United States—has overwhelmingly endorsed that equality demands recognition and protection of Native peoples as governmental groups.

70. ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 79–80 (1990).

71. Indeed, as Professor Addie C. Rolnick and I have both argued, much of the denial of sovereignty rights to Indian tribes was founded in racism. See Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967–68 (2011) (arguing that the “particular political and historical relationship” of tribes to the United States is “inextricably related” to the racialization of Indian tribes); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 607 (2009).

Spain's colonization of the Americas immediately generated questions on the rights of indigenous peoples.⁷² What authority could Spain have regarding peoples and property outside its borders? The early answers relied on assertions of innate European superiority—from the universal authority of the Pope to the inherent inferiority of other cultures—that all today would reject.⁷³ The inadequacy of these justifications inspired Fra. Francisco di Victoria's 1532 lectures *De Indis et de Jure Belli* (On Indians and the Law of War).⁷⁴ Today, these lectures are widely recognized as the origins of both international law⁷⁵ and federal Indian law.⁷⁶

Victoria's central contribution was to try to achieve neutral rules to govern peoples of different political and religious allegiances.⁷⁷ Following this principle, Victoria evaluated the claims of Native peoples along the same lines as claims by the Spanish state. First, Victoria rejected arguments that the Spanish held title through a "right of discovery" because, as the Indians were already owners of the land, discovery "gives no support to a seizure of the aborigines any more than if it had been they who had discovered us."⁷⁸ Similarly, he rejected Spanish claims based on assertions that "the Emperor is lord of the whole world" or that title was granted by the Pope because no law with jurisdiction over the Indians gave either the emperor or Pope such authority.⁷⁹ Finally, he rejected claims that Indians had consented to conquest both because the consent was not truly voluntary, and because "the aborigines [already] . . . had real lords and princes," thus they "could not procure new lords without other reasonable cause."⁸⁰ In short, Victoria insisted on equal sovereign and property rights of indigenous peoples, unless neutral rules justified their removal.

72. In particular, the reports of Fra. Bartholome de las Casas to King Ferdinand generated legal changes as early as 1512. COHEN'S HANDBOOK, *supra* note 68, § 1.02[1], at 10 n.18.

73. See WILLIAMS, *supra* note 70, at 13–14.

74. See FRANCISCUS DE VICTORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. of Wash. 1917) (1557), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed., Carnegie Inst. of Wash. 1917) [hereinafter VICTORIA].

75. See James Brown Scott, *Preface to VICTORIA*, *supra* note 74, at 5.

76. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942).

77. I write "try" to establish neutral rules, because the rules deeply reflect his own cultural position. Interpreting the Judeo-Christian bible as a neutral source of authority, for example, he found that just war could be made on the Indians if they prohibited preaching of the gospel, or, in contravention of the principle to love one's neighbor as oneself, prohibited the Spanish from making a profit from the Indians' land. VICTORIA, *supra* note 74, at 154–58.

78. *Id.* at 139.

79. *Id.* at 129–48.

80. *Id.* at 148.

The leading Enlightenment international law scholars, Hugo Grotius and Emer de Vattel, largely followed Victoria's lead. Grotius, for example, referred to the "nations of America"⁸¹ in his writings, insisting that both the law of nature and Christian gospel "admit[] not of a doubt" that it was lawful to make treaties with "strangers to the Christian religion."⁸² Vattel went further, declaring that "[t]hose ambitious European States which attacked the American Nations, and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion—those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous."⁸³ Vattel's work was foundational reading for American jurists, and helped shape the U.S. Supreme Court's arguments for tribal sovereignty in the Cherokee cases.⁸⁴

Of course, each of these theorists also found ways to justify colonization. Victoria wrote that the Spanish might justly make war on the Indians if they prevented the Spanish from preaching the gospel or making profit from their lands.⁸⁵ He even cautiously agreed that the Spanish might set themselves up as administrators of the Indians, because they were nearly "wholly unintelligent," having "no proper laws nor magistrates," no "mechanical arts" or "careful agriculture and no artisans."⁸⁶ Today, we know that these "unintelligent" peoples had built great pyramids, empires with cities larger than any in Europe, and developed agricultural products that comprise key parts of the world's diet today.⁸⁷ Grotius less explicitly discussed Native rights, but he endorsed Victoria's list of justifiable reasons for war against the Indians of America and vehemently defended the Dutch right to make war against any who would interfere with their right to trade.⁸⁸

Vattel, meanwhile, condemned Victoria's and Grotius's excuses for Spanish colonization as an attempt to "conceal their insatiable avarice."⁸⁹

81. 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 86 (A.C. Campbell, A.M., ed. and trans., M. Walter Dunne 1901) (1625).

82. *Id.* at 172.

83. 2 EMER DE VATTEL, *THE LAW OF NATIONS* 116 (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

84. *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting).

85. VICTORIA, *supra* note 74, at 154–58.

86. *Id.* at 160–61.

87. For more on the world before Columbus and its influence, see CHARLES C. MANN, *1491: NEW REVELATIONS OF THE WORLD BEFORE COLUMBUS* (2005).

88. HUGO GROTIUS, *THE FREE SEA* (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) (1609).

89. VATTEL, *supra* note 83, at 122.

But he supported British claims to parts of North America because (he said) the Indians there did not farm their land.⁹⁰ Today, again, we know that his empirical assertions were false; indeed, colonists were dependent on Native corn.⁹¹ While Vattel claimed earlier scholars' justifications for colonization were self-serving, moreover, his own support for colonizing North but not South America aligned with his role as a Saxon diplomat supporting England in its struggle with France and Spain.⁹²

As international law developed over the nineteenth and early twentieth centuries, it continued to find excuses to ignore the governmental claims of indigenous peoples.⁹³ As with the arguments of Victoria, Grotius, and Vattel, these excuses were often founded in self-interest and built on false or ethnocentric assumptions.⁹⁴ Ultimately, however, the inconsistency with the foundational international law principle of "equal rights and self-determination of peoples"⁹⁵ proved too much.

In the twenty-first century, the international community has embraced the equality claims of indigenous peoples. After decades of discussion, the United Nations proclaimed a Declaration on the Rights of Indigenous Peoples in 2007.⁹⁶ These are its initial paragraphs:

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such

Art. 2. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Art. 3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

90. *Id.* at 37.

91. See Berger, *supra* note 71, at 607.

92. Ian Hunter, *Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nation*, 31 GROTIANA 108, 116, 119 (2010) (discussing Vattel's interest in countering Catholic claims to supra-territorial authority and resulting elevation of agriculture as source of national duty); Richard Whatmore, *Vattel, Britain and Peace in Europe*, 31 GROTIANA 85, 86 (2010) (discussing Vattel's work for Saxony and his attacks on Catholic national aggrandizement).

93. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 20–33 (2d ed. 2004).

94. *Id.* at 11–16. See generally Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999).

95. U.N. Charter, art. I, ¶ 2 (1945).

96. G.A. Res. 61/295, U.N. Doc. A/RES/61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

Art. 4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.⁹⁷

Here as throughout the document, the declaration asserts both individual equality and equality of self-determining governments and insists both are necessary for justice.⁹⁸

One hundred and forty-four countries immediately voted in favor of the Declaration, four (Australia, Canada, New Zealand, and the United States) voted against it, and eleven more abstained.⁹⁹ Within three years, all of the no voters moved to accept it, and some of the abstainers did as well.¹⁰⁰ Although the Declaration is not itself binding, countries as diverse as Belize, Japan, Kenya, and Indonesia have relied on it in changing domestic law.¹⁰¹

International law—at least officially—has come full circle, back to acknowledging the equality rights of indigenous peoples as governments, not simply ethnic populations. The international community and its nation states still run roughshod over indigenous governmental rights when it is in their interests.¹⁰² But today, at least, they formally acknowledge that this is a violation of the equality principles to which they have subscribed.

B. *Equality of Tribal Governments in U.S. Law and Policy*

Every time that the United States grappled most passionately with the moral and constitutional identity of the nation, it also grappled with its relationship with tribes and Indians. At each of these moments, policymakers considered multiple options: disregarding all Native rights,

97. *Id.* at Preamble, arts. 2–4.

98. See generally Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493 (1995) (discussing role of equality in UNDRIP).

99. Press Release, Gen. Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), <https://www.un.org/press/en/2007/ga10612.doc.htm> [<https://perma.cc/M8PM-W6AR>]; G.A. Res. 61/295, *supra* note 96.

100. ROBERT ANDERSON, BETHANY BERGER, SARAH KRAKOFF & PHILIP FRICKEY, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 895 (2015).

101. *Id.* at 896–97.

102. See, e.g., Statement of Ms. Victoria Tauli-Corpuz Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council 39th Session (Sept. 19, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23595&LangID=E> [<https://perma.cc/9HK7-MH3C>] (describing “a worrying escalation in the attacks, criminalisation and threats against indigenous peoples who are defending their rights to protect their lands, territories and resources”).

measuring Native rights against those of individuals within a larger polity, or measuring them against rights of governments. While practice often reverted to total disregard of Native rights, official policy always recognized that some measure of equality must be observed. What is more, whenever justice triumphed over expediency, political leaders recognized that they must measure Indian equality against the rights of other governments, not merely those of other individuals. Indeed, all those policies built on insistence that Native people were entitled only to individual equality are today recognized as among the most egalitarian in the long, sad history of federal Indian policy. The next Sections show this pattern at the founding, during Civil War and Reconstruction, and in the New Deal and Civil Rights Eras.

1. *The Governmental Yardstick at the Founding*

Relationships with tribal nations were central concerns for America's founders. Tribal warfare posed one of the greatest existential threats to the new nation, and tribal land afforded its greatest economic opportunity. The initial response to this challenge was to assert that tribes had no governmental rights at all. Immediately, however, this response was replaced by an insistence that Indian tribes must be treated fairly under the rules generally applicable to sovereigns. Like the early international lawyers, the Founders were more than willing to bend or even break this goal to serve national interests. But that tribes were sovereigns, entitled to be treated according to the law of nations, was the dominant thread in both legal practice and constitutional text.

The initial U.S. position was that the new Americans gained sovereignty over tribes and their lands with victory over Great Britain in the Revolutionary War.¹⁰³ Tribal nations rejected this position, asserting that England had no authority over them.¹⁰⁴ They even framed their opposition as a matter of equality of nations, declaring that "we, as the original inhabitants of this country, and sovereigns of the soil, look upon ourselves as equally independent, and free as any other nation or

103. COHEN'S HANDBOOK, *supra* note 68, § 1.02[3], at 19–23; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1055 (2015).

104. *See, e.g.*, The Speech of the Complanter, Half-Town, and the Great-Tree, Chiefs and Councillors of the Seneca Nation, to the Great Councillor of the Thirteen Fires (Dec. 1, 1790), in IV AM. STATE PAPERS: INDIAN AFFAIRS 207 (1832) (rejecting claim that the United States had gained their lands through the Treaty of Paris with Great Britain because "the lands we have been speaking of belonged to the Six Nations; no part of it ever belonged to the King of England, and he could not give it to you").

nations.”¹⁰⁵ Tribal military power made such resistance dangerous to ignore. Equally important, the United States believed that its own acceptance into the international community of nations depended on its compliance with the principles of international law.¹⁰⁶

The United States, therefore, quickly repudiated its earlier position. Commissioners to the tribes “frankly” admitted to the Six Nations that its first position had been based on an “erroneous construction” of the Treaty of Paris with Great Britain, and “acknowledge[d] the property, or right of soil . . . to be in the Indian nations.”¹⁰⁷ Thomas Jefferson, as Secretary of State, opined that “the Indians had . . . full, undivided and independent sovereignty as long as they choose to keep it.”¹⁰⁸ Secretary of War Henry Knox similarly urged that “independent nations and tribes of [I]ndians . . . ought to be considered as foreign nations, not as the subjects of any particular [S]tate.”¹⁰⁹ Taking their land, moreover, absent tribal consent or “just war” (a concept governing relationships between nations) would be a “gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.”¹¹⁰

The Founders enshrined these sentiments in their laws. The 1787 Northwest Ordinance provided that “[t]he utmost good faith shall always be observed towards the Indians, their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress.”¹¹¹ Soon after, George Washington opined that treaties with Indians should be ratified in the same manner as those with foreign nations, arguing that “all treaties and compacts formed by the United States with other nations, whether civilized or not, should be made with caution and executed with fidelity.”¹¹² This established the rule that ratification of Indian treaties required the advice and consent of two-thirds of the Senate, as the Constitution demands for treaties generally.¹¹³

105. Reply of the Six Nations (Apr. 21, 1794), in *AM. STATE PAPERS*, *supra* note 104, at 481.

106. Ablavsky, *supra* note 103, at 1060.

107. Speech of the Commissioners of the United States to the Deputies of the Confederated Indian Nations (July 31, 1793), in *AM. STATE PAPERS*, *supra* note 104, at 353–54.

108. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 59 (1995) (quoting 17 *THE WRITINGS OF THOMAS JEFFERSON* 328–29 (Andrew A. Lipscom ed., Thomas Jefferson Memorial Assoc. 1903)).

109. Ablavsky, *supra* note 103, at 1062.

110. Report from H. Knox, War Sec’y, to President of the United States, Relative to the Northwestern Indians (June 15, 1789), in *AM. STATE PAPERS*, *supra* note 104, at 13.

111. 32 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 340 (1787).

112. 1 *ANNALS OF CONGRESS* 83 (1789) (Joseph Gales ed., 1834).

113. *Id.* at 87; see U.S. CONST. art. II, § 2, cl. 2.

Moreover, although the constitutional treaty, supremacy, property, and war powers are today thought to be primarily about foreign and state relations, relationships with Indian tribes significantly influenced the drafting of these provisions.¹¹⁴

This is not to say that the United States believed that tribal sovereignty was equal to federal sovereignty. Far from it. The new nation believed that its destiny was to dominate all the land within its borders, and its policy was designed to achieve that prerogative.¹¹⁵ But in this process, tribes were entitled to be treated as governments, with sovereign property rights and protection by concepts of just war, and relations governed by diplomatic agreements with the central government rather than general state and federal laws.¹¹⁶ Thus justice was measured not by the rules applicable to individual citizens—indeed, extending citizenship to tribal Indians was considered a violation of Indian rights¹¹⁷—but by the rules applicable under the law of nations.¹¹⁸

2. *From Nations to Individuals: Removal, Civil War, and Reconstruction*

Over the course of the nineteenth century, the United States moved from concern for fairness to tribes as governments to insistence on incorporation of tribes as individuals. Despite this policy shift, the advocates of abolition and Reconstruction equated respect for tribal governments with racial egalitarianism. By the end of the century, however, policymakers used racial egalitarianism to justify involuntary assimilation of Native people and their lands. Today, these assimilationist policies are recognized as among the most damaging and immoral in the history of federal Indian policy.

The Founders' commitment to respecting tribal governmental rights was always accompanied by an assumption that tribes would soon disappear from the American landscape, lured by the attractions of settler "civilization," or depart voluntarily to unwanted territory.¹¹⁹ This assumption proved false. Many tribes reacted to colonial encroachment

114. Ablavsky, *supra* note 14, at 1039–51.

115. Ablavsky, *supra* note 103, at 1067.

116. *Id.* at 1068–69.

117. *Goodell v. Jackson*, 20 Johns. 693, 717 (N.Y. 1823).

118. Ablavsky, *supra* note 103, at 1061.

119. ANDERSON ET AL., *supra* note 100, at 48–49.

by strengthening their formal commitment to sovereignty.¹²⁰ Population explosion and advances in transportation technology, moreover, meant that there soon was no more unwanted land.¹²¹ In reaction, federal policy shifted, first to removing tribes west of the Mississippi River, and then to confining them on ever smaller reservations under forcible control of federally-appointed Indian agents.¹²²

Both policies were justified partly in the name of individual Indian equality. Removal beyond the reach of white settlers, President Andrew Jackson and others insisted, would permit Native people to “cast off their savage habits and become an interesting, civilized, and Christian community . . . filled with all the blessings of liberty, civilization, and religion.”¹²³ By the 1840s, when the settlers demanded even more lands, policymakers insisted that confinement on smaller reservations would enable the Indian to overcome the “inequality of his position” and “be able to compete with a white population.”¹²⁴ Beginning with removal, moreover, treaties began to promise U.S. citizenship to Indians who chose to leave their tribes.¹²⁵

Despite their assertions of potential individual equality, policymakers were unapologetically racist toward tribes. President John Quincy Adams declared that although the principle had been adopted of treating tribal nations as “foreign and independent powers,” they were “rude and ignorant” and it was the obligation of the United States to bring them “within the pale of civilization.”¹²⁶ The House of Representatives declared removal justified by the “natural superiority allowed to the claims of civilized communities over those of savage tribes.”¹²⁷

But formal law continued to insist on tribal sovereignty. The 1830 Removal Act¹²⁸ and insistence on a treaty before removal of the Cherokees,¹²⁹ as well as the treaties implementing the reservation policy,

120. STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 77 (1988).

121. ANDERSON ET AL., *supra* note 100, at 80.

122. *Id.* at 79.

123. Andrew Jackson, President of the United States, Second Annual Message (Dec. 6, 1830).

124. ANNUAL REPORT OF THE COMM’R OF INDIAN AFFAIRS, WAR DEP’T, OFFICE OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 30-1, at 386-87 (1848).

125. *See* Treaty with the Choctaw, 1830 art. 13, Sept. 27, 1830, 7 Stat. 333; Cherokee Treaty of 1817 art. 8, July 8, 1817, 7 Stat. 156.

126. John Quincy Adams, President of the United States, Fourth Annual Message (Dec. 2, 1828).

127. H.R. REP. NO. 21-227, at 7 (1830).

128. 4 Stat. 411 (May 28, 1830).

129. After trying and failing to get the Cherokee government to sign the treaty for years, the United States finally signed one with Cherokee negotiators it knew did not have the authorization of the

continued to reflect the need for tribal governmental consent to acquisition of tribal land. The U.S. Supreme Court reacted to the Cherokee debate with *Worcester v. Georgia*,¹³⁰ declaring “the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive.”¹³¹ An 1834 Bill on the Indian Territory agreed, seeking that the tribes there be “secured . . . in the exercise of self-government,” admitted as a state of the Union should they choose, and “eventually placed on an equality, with respect to their civil and political rights.”¹³² Well into the allotment period, moreover, Congress continued to believe it needed tribal consent to acquire tribal lands.¹³³ Although formal law continued to treat tribes as possessing governmental rights, practice did not. As with the Cherokees, tribes were threatened when they refused to cede their lands, saddled with unauthorized treaties if they still did not yield, and forcibly removed if that did not work either.

These violations did not go unnoticed but were causes célèbres for progressives of the period. In particular, early abolitionists frequently equated abuses of tribal rights to the evils of slavery in condemning American inequality.¹³⁴ The 1838 report of the Massachusetts Anti-Slavery Society, for example, explained that “[t]he primary object of the South . . . is doubly atrocious: first, to get forceful possession of their lands—and next, upon those lands to establish slavery In their treatment of all those whose skins are not colored like their own, they manifest that they neither fear God nor regard man.”¹³⁵ Indeed, a number of early abolitionists were first radicalized by challenging Indian removal and only later came to the anti-slavery movement.¹³⁶ Although the tribal claims the abolitionists championed were distinctly governmental rather than individual—freedom from state jurisdiction, preservation of territory, observance of treaties—they saw them as necessary to racial equality.

Cherokee Nation. See Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478; Bethany R. Berger, “Power over this Unfortunate Race”: Race, Politics and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957, 1973 (2004).

130. 31 U.S. (6 Pet.) 515 (1832).

131. *Id.* at 557.

132. H.R. REP. NO. 23-474, at 14, 17 (1834).

133. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13–14 (1995).

134. Linda K. Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 275 (1975).

135. See *id.* at 278 (quoting SIXTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE MASSACHUSETTS ANTI-SLAVERY SOCIETY 2–4 (1838)).

136. *Id.* at 274–75.

The Republicans most supportive of racial equality brought these sentiments to the early Reconstruction Congress. In 1862, Representative John Bingham passionately argued for a statute to supersede *Dred Scott v. Sanford*¹³⁷ and extend birthright citizenship to “every human being, no matter what his complexion.”¹³⁸ But he believed Indians should be excluded from automatic citizenship because they were “recognized at the organization of this Government [and] dealt with . . . ever since as separate sovereignties.”¹³⁹ In 1866, Senate Republican leader Lyman Trumbull objected to arguments that tribal Indians were “subject to the jurisdiction” of the United States under the Fourteenth Amendment, stating that 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.”¹⁴⁰ In 1871, Representative George Hoar of Massachusetts invoked the “history of violence, injustice, bloodshed, rapine, committed often under the direct authority of the States” against Indian tribes¹⁴¹ to argue that the federal government should have power to address violations of civil rights through the Ku Klux Klan Act.¹⁴²

In 1870, the Senate Judiciary Committee, chaired by Senate Republican leader Lyman Trumbull, declared that the Fourteenth Amendment did not change the status of American Indians.¹⁴³ The committee justified its position with both sovereign and racial equality. “The white man’s treatment of the Indian is one of the great sins of civilization,” its report declared, “[b]ut the harsh treatment of the race by former generations should not be considered a precedent to justify further infliction of future wrongs.”¹⁴⁴ The committee questioned the “Christianity of the Christians” who “exclude[d] the Indians from the sovereign control of the country in which they were born.”¹⁴⁵ For the leaders of early Reconstruction, as for the early abolitionists, the egalitarian impulses that led them to champion the rights of African Americans led them to support tribal sovereign rights as well.

137. 60 U.S. (19 How.) 393 (1857).

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

139. *Id.* at 1639.

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

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

142. Ku Klux Klan Act, Pub. L. No. 42-22, 17 Stat. 13, ch. 22 (1871) (codified as amended at 18 U.S.C. § 241 (2018) and 42 U.S.C. §§ 1983, 1985(3), 1988 (2018)).

143. S. REP. NO. 41-268 (1870).

144. *Id.* at 1.

145. *Id.*

By the end of the century, however, this same class of policymakers—largely eastern liberals—had united around the cause of forcible Indian assimilation. Again, racial equality was central to their claims. The Lake Mohonk Conference, which was influential in securing the Allotment Act and expansion of federal boarding schools, described its platforms as “concerning justice, equal rights, and education.”¹⁴⁶ “We maintain,” it declared, that “the nation ought to treat the Indian as a man, amenable to all the obligations and entitled to all the rights of manhood under a free republican government.”¹⁴⁷

Where policymakers once had drawn links between slavery and violations of tribal sovereignty, now they linked slavery to maintaining tribal sovereignty. Philip Garrett, for example, founder and first President of the Indian Rights Association, advocated allotment and violation of tribal treaties as a way to free Indians from “their tribal thralldom,” stating “[w]e did not hesitate to set millions of negro slaves free in one day, and confer on them all the rights possessed by the wealthiest citizen in the land. . . . And yet we are doubtful about trusting these manly aboriginal owners of the soil to take care of themselves. Are they less equal to the task than the cotton-pickers of the seaboard slave States?”¹⁴⁸ The Dawes Act of 1887, which individually allotted reservation land without tribal consent, was celebrated as an “Emancipation Proclamation” for the Indians.¹⁴⁹ Soon after, the “friends of Indian emancipation” were urged to turn their energies to a system of compulsory federal education for Indian children.¹⁵⁰ “Education,” claimed Commissioner of Indian Affairs Thomas Morgan, “should seek the disintegration of the tribes, not their segregation.”¹⁵¹

The policies that allegedly supported Indian equality coincided with the erosion of equality for other non-white groups. Congress stood by as the U.S. Supreme Court undermined the scope of Reconstruction laws¹⁵² and

146. *The Mohonk Platform*, THE INDEPENDENT (N.Y.), Oct. 10, 1889, reprinted in 213 AM. PERIODICALS SERIES 17 (1921).

147. *Id.*

148. Philip C. Garrett, *Indian Citizenship* (1886), reprinted in FRANCIS PAUL PRUCHA, AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 57, 60, 62 (Francis Paul Prucha ed., 1973) [hereinafter PRUCHA, AMERICANIZING].

149. See FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865–1900, at 243, 255–56 (1976).

150. Lyman Abbott, *Education for the Indian* (1888), reprinted in PRUCHA, AMERICANIZING, *supra* note 148, at 207, 210.

151. Thomas Morgan, *Supplemental Report on Indian Education*, H. EXEC. DOC. 1, 51:1 (1889), reprinted in PRUCHA, AMERICANIZING, *supra* note 148, at 221, 225.

152. *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883).

sanctioned state codification of Jim Crow.¹⁵³ Congress curtailed Chinese migration,¹⁵⁴ and gradually prohibited migration by almost all Asians.¹⁵⁵ The United States began a new era of colonialism, annexing Puerto Rico, Hawaii, and the Philippines as subjugated territories.¹⁵⁶

In this context, it is perhaps not surprising that the reformers' assertions of egalitarianism were combined with denigration of Indian peoples.¹⁵⁷ The Board of Indian Commissioners advocated for the breakup of reservations, insisting "[t]his Anglo-Saxon race will not allow the car of civilization to stop long at any line of latitude or longitude on our broad domain."¹⁵⁸ Boarding school students were taught to despise Native cultures and languages, so that all "the Indian there is in the race should be dead."¹⁵⁹ Future President Theodore Roosevelt, in his celebrated book *The Winning of the West*, praised the dispossession of the Indians as fulfilment of the white "race's imperial destiny."¹⁶⁰ As the period progressed, policymakers even softened their stance on individual assimilability, blaming Native failure to thrive in the face of deprivation of their lands and their children on innate Indian deficits.¹⁶¹ While clothed in the rhetoric of racial equality, therefore, the policies equally relied on Anglo-Saxon racial superiority.

3. *The Rise, Fall, and Rise Again of Tribal Governmental Equality in the Twentieth Century*

The assimilationist policies of the gilded age were criticized, and then repudiated, in the 1920s and 1930s. Although the resulting "Indian New Deal" emphasized strengthening tribal governments to further individual Indian equality and prevent unjust oppression, implementation of its policies in practice increased control by the federal government. The mid-century turn toward individualism combined with Indian resentment of

153. *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

154. Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

155. Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1952).

156. Berger, *supra* note 45, at 1241.

157. See Berger, *supra* note 71, at 628–34 (discussing the assimilation and oppression of Indian tribes from 1871–1928).

158. PRUCHA, *supra* note 149, at 239.

159. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, reprinted in PRUCHA, *AMERICANIZING*, *supra* note 148, at 260, 261.

160. THEODORE ROOSEVELT, *THE FOUNDING OF THE TRANS-ALLEGHANY COMMONWEALTHS, 1784-1790*, at 99 (1894).

161. See FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920*, at 240–41 (1989).

federal control to lead to the Termination Era, which ended the federal status of numerous tribes and extended state jurisdiction over many others in the name of individual Indian equality. Native people, however, soon mobilized against Termination, demanding justice not only as individuals but as governments. These demands gained acceptance as the Native version of the movement for civil rights, leading to the inauguration of the federal self-determination policy that continues to this day.

By the 1920s, government-sponsored reports condemned both the ethnocentrism of assimilation policies, and their effect of impoverishing Native people and destroying the social fabric of Native societies.¹⁶² When Franklin Roosevelt came to power, John Collier, an activist for tribal rights, became his Commissioner of Indian Affairs.¹⁶³ Collier invoked both individual and governmental rights in his rhetoric. He condemned the "spurious assimilation implied in the mere haphazard scattering of pauperized and underprivileged Indian among the white population"¹⁶⁴ and called federal domination of Indian tribes "fundamentally un-American" and a "paternalism which they do not like any more than you like it, you Members of Congress."¹⁶⁵

At Collier's urging, Congress ended allotment and enacted other measures to increase tribal self-government.¹⁶⁶ Congress refused, however, to enact a proposal to transfer administration of federal services to Indian tribes.¹⁶⁷ In addition, in requiring tribes to use western voting methods to decide on participation in the Indian Reorganization Act (IRA), and encouraging them to adopt constitutions, measure to increase self-governance often forced tribes into alien, often dysfunctional, governmental forms.¹⁶⁸ Collier's own righteous conviction, moreover, led to bitter clashes with a number of tribes.¹⁶⁹

Perhaps more significant than the policies themselves therefore was the renewed insistence that disregard of tribal governmental choices was

162. See, e.g., LEWIS MERIAM ET AL., *THE PROBLEM OF INDIAN ADMINISTRATION* 7 (1928) ("Several past policies adopted by the government in dealing with the Indians have been of a type which, if long continued, would tend to pauperize any race.").

163. PRUCHA, *THE GREAT FATHER*, *supra* note 108, at 940–41.

164. *Hearings on H.R. 7902 Before the H.R. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 20 (1934).

165. *Id.* at 37–38.

166. See Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984, §§ 1, 12, 16–18 (1934).

167. *Morton v. Mancari*, 417 U.S. 535, 542–43 (1978).

168. See Charles F. Wilkinson, *Home Dance, The Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 B.Y.U. L. REV. 449, 458 (1996) (discussing adoption of Hopi Constitution).

169. See PRUCHA, *supra* note 108, at 994–95.

inegalitarian oppression. This insistence gained ammunition from the work of Assistant Solicitor of Indian Affairs Felix Cohen, whose *Handbook of Federal Indian Law* wove together precedent and policy to support a sovereign conception of Indian tribes.¹⁷⁰ Cohen's commitment to tribal sovereignty was part of his commitment to egalitarianism. In rejecting Indian assimilation, for example, he wrote that as a Jew of Russian descent, his impulse would be to "punch . . . in the nose" any "would-be reformer" who told him he should be "beneficially assimilated into the Anglo-Saxon protestant main stream of American life."¹⁷¹ In his final years, as federal policy shifted back to Indian assimilation, Cohen condemned the policy in an explicitly egalitarian phrase:

[T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.¹⁷²

Ironically, the policy he critiqued also clothed itself in the rhetoric of equality. Today known as the Termination Policy, it was then called Indian Emancipation, an effort to allow the Indian "to take his place in the white man's community on the white man's level and with the white man's opportunity and security status."¹⁷³ When Congress embraced termination of the sovereign status of Indian tribes in 1953, it called the measure an effort to make Indians "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship."¹⁷⁴ That same year, President Eisenhower signed Public Law 280, which extended state jurisdiction over Indians on reservations in many states. Although the law undermined tribal self-governance and independence without tribal or Indian consent, Eisenhower declared it "still another step in granting complete political

170. See *Introduction*, COHEN'S HANDBOOK, *supra* note 68, at xiv (excerpting and reprinting from 1982 edition).

171. CHRISTIAN W. MCMILLEN, *MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY* 170 (2007).

172. Felix S. Cohen, *The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

173. REVISION OF LAWS AND REGULATIONS AFFECTING INDIANS, H.R. REP. NO. 78-2091, at 2 (1944).

174. H.R. Con. Res. 108, 83d Cong., 67 Stat. 132 (1953); see also *Slash in U.S. Rule of Indians Urged*, N.Y. TIMES, Oct. 4, 1954, at 29.

equality to all Indians in our nation.”¹⁷⁵ In 1957, Senator Arthur Watkins of Utah, a lead architect of the Termination Policy, declared that it “[f]ollowed in the footsteps of the Emancipation Proclamation of ninety-four years ago.”¹⁷⁶

A number of Native people and tribes initially supported the policy shift. Newly empowered by successful service in World War II, they saw the policy as a way to escape the paternalist control of the federal government.¹⁷⁷ But as the federal government forced tribes into termination,¹⁷⁸ extended state jurisdiction without consent,¹⁷⁹ and even denied tribes use of their own funds to pay for attorneys troublesome to the government,¹⁸⁰ Native opinion shifted. After an emergency 1954 conference with fifty tribes from across the country,¹⁸¹ the National Congress of American Indians reframed their equality claims: “Shouldn’t Indians have the same right of self-determination that our government has stated . . . is the inalienable right of peoples in far parts of the world?”¹⁸² By 1961, hundreds of Indians gathered in Chicago to repudiate termination.¹⁸³ Equality, they insisted, required recognizing Native sovereign choices and cultural difference as well as their individuality.

This reframing gained support in both the Court and Congress. Five years after the U.S. Supreme Court unleashed a firestorm of equality debate with *Brown v. Board of Education*,¹⁸⁴ the Court adopted the sovereign view of Indian equality at tribal urging.¹⁸⁵ In *Williams v. Lee*,¹⁸⁶ the Court held that Arizona could not exercise jurisdiction over a lawsuit by a white trader against a Navajo couple to collect on goods sold on the

175. Statement by the President Upon Signing Bill Relating to State Jurisdiction Over Cases Arising on Indian Reservations (Aug. 15, 1953), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 1953, at 564 (1960).

176. Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restrictions Over Indian Property and Person*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 55 (1957).

177. Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1471–77 (2011).

178. *Id.* at 1479.

179. *Id.* at 1478.

180. *Id.* at 1475.

181. THOMAS CLARKIN, *FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961–1969*, at 10 (2001); *Indians Call Protest Meeting*, N.Y. TIMES, Feb. 19, 1954, at 34.

182. PAUL C. ROSIER, *SERVING THEIR COUNTRY: AMERICAN INDIAN POLITICS AND PATRIOTISM IN THE TWENTIETH CENTURY* 174 (2009).

183. CLARKIN, *supra* note 181, at 18.

184. 347 U.S. 483 (1954).

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

186. 358 U.S. 217 (1959).

reservation.¹⁸⁷ The plaintiff's attorneys sought to wrap the case in the equality rhetoric of termination. Their briefs claimed that holding the Navajo defendants immune from state jurisdiction would treat Indians as a "conquered race . . . not considered to have equal rights," and the trial court upheld state jurisdiction stating that "the grant of citizenship . . . has emancipated the Navajo Indians in all respects not expressly excluded by the Congress of the United States."¹⁸⁸ In response, the defendants raised a different kind of equality, claiming they were not asking for a special status, but rather the same status any member of a polity had within her own territory.¹⁸⁹

The U.S. Supreme Court ruled for the defendants, and Justice Hugo Black wrote the opinion.¹⁹⁰ The *Williams* dispute, however, showed him that there were some minority groups that really wanted to be "separate and independent and themselves."¹⁹¹ Black framed the case as about the rights of Native people to have and control legitimate tribal institutions, a right he believed was guaranteed by federal law.¹⁹²

Like the radical Republicans during Reconstruction, Justice Black saw links between his defense of tribal sovereignty and African American civil rights. The opinion began with a paean to *Worcester v. Georgia*, in which the U.S. Supreme Court held that Georgia's assertion of authority over Cherokee Territory was "repugnant to the [C]onstitution."¹⁹³ In response to *Worcester*, Georgia Governor Wilson Lumpkin promised "determined resistance,"¹⁹⁴ a phrase foreshadowing the "massive resistance" Georgia and other southern states later pledged in response to *Brown v. Board of Education*.¹⁹⁵ President Jackson initially would not enforce *Worcester*, only doing so after South Carolina's nullification of federal tariff laws convinced him how damaging state disregard of federal law could be.¹⁹⁶ Black's opinion called *Worcester* one of Chief Justice Marshall's "most courageous and eloquent opinions," stating that "[d]espite bitter criticism

187. *Id.* at 223.

188. Berger, *supra* note 177, at 1508, 1505.

189. *Id.*

190. Because of Black's support for school desegregation, the Alabama Senate had recently resolved that Black should not be buried in his native Alabama soil. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 443 (1997).

191. Berger, *supra* note 177, at 1515.

192. *Williams*, 358 U.S. at 223.

193. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 516 (1832).

194. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 27 (2010).

195. KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 131 (2005).

196. BREYER, *supra* note 194, at 28.

and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law."¹⁹⁷ Justice Felix Frankfurter caught the hidden comparison to the backlash against the Court's desegregation decisions, writing to Black, "I agree with every word, especially your essay on *Brown v. Board of Education*."¹⁹⁸

By the 1960s, some policymakers were beginning to embrace the equality claims inherent in the fight against termination. William Keeler, who advised Secretary of the Interior Stewart Udall on Indian affairs, charged that "the government has not been consulting the Indians, that it has tried to make them forget their heritage and 'become white,' although it has not tried to stamp out the cultural identity of any other ethnic group."¹⁹⁹ The 1961 U.S. Commission on Civil Rights Report, meanwhile, found that although Indians suffered poverty, discrimination, and mistreatment similar to other minority groups, "unlike most minorities, Indians were and still are to some extent a people unto themselves, with a culture, land, government, and habits of life all their own."²⁰⁰

By 1970 President Nixon repudiated Termination in a speech that forcefully stated the equality arguments in favor of tribal self-determination.²⁰¹ Nixon called American Indians "the most deprived and most isolated minority group in our nation," whose current state was "the heritage of centuries of injustice" in which "American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny."²⁰² Ending the federal-tribal relationship "would be no more appropriate than to terminate the citizenship rights of any other American."²⁰³ The response to this injustice had to be a "new era in which the Indian future is determined by Indian

197. *Williams*, 358 U.S. at 219.

198. Berger, *supra* note 177, at 1518; accord NEWMAN, *supra* note 190, at 483 (quoting remark but not identifying the context). More recently, Justice Stephen Breyer also linked *Worcester* and *Brown* as defining moments in the Court's exercise of judicial review in the face of popular opposition. BREYER, *supra* note 194, at 1-2.

199. See CLARKIN, *supra* note 181, at 24 (quoting December 1960 speech).

200. JOHN A. HANNAH ET AL., JUSTICE: U.S. COMM'N ON CIVIL RIGHTS REPORT, bk. 5, at 115-16 (1961).

201. Special Message to the Congress on Indian Affairs (July 8, 1970), in PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: RICHARD NIXON, 1970, at 364 (1972) [hereinafter PUBLIC PAPERS OF NIXON].

202. *Id.*

203. *Id.*

acts and Indian decisions,”²⁰⁴ in which the United States would “assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group.”²⁰⁵ Since that time, self-determination has been official congressional policy.²⁰⁶

C. Conclusion

The course of federal Indian law and policy is marked by repeated, even abrupt, shifts in course. While ethnocentrism and colonialism have often dictated these shifts, so too has a discourse about justice and equality. This discourse has shifted between measuring the rights of Indians as parts of tribal governments and measuring them solely against the rights of individuals separated from their tribes. To paraphrase Felix Cohen, however, the disregard of tribal governmental rights has always “mark[ed] the shift from fresh air to poison gas in our political atmosphere.”²⁰⁷ Policies insisting solely on individual Indian equality have always resulted in the greater impoverishment of Indian people and have in retrospect been condemned as failures of “our democratic faith.”²⁰⁸

III. PARSING EQUALITY CONFLICTS IN THE MODERN ERA

Although self-determination has remained official governmental policy since the 1970s, equality conflicts persist today. The U.S. Supreme Court announced the constitutional approach to these conflicts in the 1970s, but that approach is under attack. In Congress and the court of public opinion, equality challenges hold even more sway in Indian affairs, delaying, defeating, and weakening pro-sovereignty legislation. This Part first discusses the constitutional approach to such conflicts, then proposes a way to evaluate such conflicts as a matter of justice.

A. Constitutional Parsing of Tribal Equalities

Brown v. Board of Education and its aftermath ensconced equality as a constitutional norm but began a new era of debate over what equality meant.²⁰⁹ As “reverse discrimination” claims began to make their way

204. *Id.* at 365.

205. *Id.* at 367.

206. ANDERSON ET AL., *supra* note 100, at 152.

207. Cohen, *supra* note 172, at 390.

208. *Id.*

209. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Law*, 117 HARV. L. REV. 1470, 1471 (2004).

through the courts in the 1970s, a federal Indian law case seemed poised to bring the issue to the U.S. Supreme Court. That case, *Morton v. Mancari*, is a paradigmatic example of the many equalities involved in federal Indian policy. The decision is subject to different understandings,²¹⁰ but this Section argues it is best understood as turning on the distinct governmental status of Indian tribes.

Morton v. Mancari emerged from a claim of discrimination against Indian individuals. As part of the self-government measures of 1934, Congress established preference for Indians in federal Indian affairs positions.²¹¹ The legislation's sponsors argued that because of civil service requirements for employment in the Bureau of Indian Affairs (BIA), "[t]he Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs."²¹² As a result of the preference, American Indians comprised the majority of BIA employees by the 1970s. Nevertheless, they were almost entirely in low-ranked, menial positions, while BIA management was almost all white.²¹³ In 1971, Native BIA employees filed *Freeman v. Morton*,²¹⁴ a class action alleging discrimination in promotions and professional development. In 1972, the BIA responded to the lawsuit with a new policy clarifying that the Indian preference applied to promotions as well as initial hiring.²¹⁵ The policy provided that "to be eligible for preference . . . an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe."²¹⁶

A few months later, four non-Indian BIA employees filed suit claiming that the new policy constituted racial discrimination in violation of the Fifth Amendment and the Equal Employment Opportunity Act.²¹⁷ The U.S. Supreme Court unanimously rejected these claims. One sentence of the opinion suggested that a racial classification for a "legitimate, nonracially-based goal" did not violate equal protection,²¹⁸ but a plurality

210. Carol Goldberg, *Morton v. Mancari: What's Race Got to Do with It?*, in *RACE LAW STORIES* 237, 261–63 (Rachel F. Moran & Devon Wayne Carbado, eds., 2008).

211. Pub. L. No. 73-383, § 12, 48 Stat. 984, 986 (1934).

212. 78 CONG. REC. 11,729 (1934) (statement of Rep. Howard).

213. Goldberg, *supra* note 210, at 240–41.

214. No. 327-71, 1972 U.S. Dist. LEXIS 10582 (D.D.C. Dec. 21, 1972), *aff'd*, 499 F.2d 494 (D.C. Cir. 1974).

215. *Id.*

216. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

217. 42 U.S.C. § 2000e-16 (2018).

218. *Mancari*, 417 U.S. at 554.

of the Court would soon reject that suggestion in *California Board of Regents v. Bakke*.²¹⁹ A footnote of the *Mancari* opinion stated that because the eligibility criteria “exclude many individuals who are racially to be classified as ‘Indians,’” they were “political rather than racial in nature.”²²⁰ This is key to the opinion, but it can be misconstrued. First, the criteria themselves required that individuals have “one-fourth or more degree Indian blood,” a hallmark of race outside the constitutionally-distinct Indian context.²²¹ Second, understanding membership classifications to be not racial at all would insulate wholly discriminatory measures against tribal members from equal protection scrutiny. As I have argued elsewhere, however, the opinion is best understood by reading the constitutional section as a whole, so that “political rather than racial” refers to the distinctive constitutional and political status of tribal nations, rather than the particular eligibility criteria at issue.²²²

Read in this manner, it is clear that the distinctive equal protection status of Indian classifications derives from the governmental status of Indian tribes. The opinion emphasizes the constitutional power to deal with tribes as governments, through the Indian commerce and treaty clauses, and the history of treaty-making and diplomatic relationships with tribes.²²³ This history created distinct obligations, so that subjecting Indian classifications to strict scrutiny would violate the “solemn commitment of the Government toward the Indians.”²²⁴ The Indian preference at issue fit easily within that government-to-government relationship, because it was designed to put tribal members in control of an entity with “plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes.”²²⁵

Since *Mancari*, the Court has repeatedly rejected equal protection challenges to measures responding to the distinct governmental status of Indian peoples, including exclusion from state jurisdiction,²²⁶ subjection

219. 438 U.S. 265 (1978) (plurality opinion) (invalidating affirmative action scheme that created preference for minority medical school applicants).

220. *Mancari*, 417 U.S. at 553 n.24.

221. *Id.*

222. Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1186 (2010).

223. *Mancari*, 417 U.S. at 551–52.

224. *Id.* at 552.

225. *Id.* at 542.

226. See *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390–91 (1976) (per curiam) (recognizing exclusive tribal court jurisdiction over tribal adoptions); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673, n.20 (1979) (treaties securing preferential fishing rights).

to federal jurisdiction,²²⁷ and allocation of claims judgments.²²⁸ State classifications are immune as well, so long as they are rationally related to a federal scheme.²²⁹ After the U.S. Supreme Court held in *Adarand Constructors v. Peña*²³⁰ that restrictions on affirmative action applied to the federal government, dissenters worried that the decision would undermine *Mancari*.²³¹ But in 2000, when the *Rice v. Cayetano*²³² Court considered *Mancari* in the distinctive case of Native Hawaiians, the Court reaffirmed its past decisions, stating that “[o]f course . . . Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.”²³³

Under existing precedent, therefore, actions that rationally fulfill obligations to tribes and Indians derived from tribal governmental status are not subject to the restrictions on racial classifications based on individual status. In other words, conscientious responses to the distinct governmental status of Indian tribes are immunized from individual equal protection claims. This does not mean that the constitutional test demands tribal governmental equality. The *Mancari* Court itself relies on the “‘guardian-ward’ status” of tribes and the federal government, and quoted older cases referring to tribes as an “‘uneducated, helpless and dependent people.’”²³⁴ While the *Mancari* Court noted that the BIA preference rejected the “paternalistic approach of prior years,” it did not require future measures to abjure paternalism.²³⁵ Instead, *Mancari* gives the federal government discretion to determine what is rationally related to “Congress’ unique obligation toward the Indians.”²³⁶

This is perhaps as it should be. The details of government-to-government relationships, even more than government-to-individual relationships, are poorly suited to rigid constitutional strictures. But it leaves us where we began, with the moral dilemma of parsing equalities in federal Indian law and policy.

227. See *United States v. Antelope*, 430 U.S. 641 (1977) (upholding federal criminal jurisdiction).

228. See *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–85 (1977) (discussing the distribution of tribal property).

229. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979).

230. 515 U.S. 200 (1995).

231. *Id.* at 244 (Stevens, J., dissenting).

232. 528 U.S. 495 (2000).

233. *Id.* at 519) (holding that a Native Hawaiian voting preference in a state agency was invalid under the Fifteenth Amendment).

234. *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (quoting *Bd. of Cty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943)).

235. *Id.* at 553.

236. *Id.* at 555.

B. Political Parsing of Tribal Equalities

How then should Native equality conflicts be parsed as a matter of policy and morality? Valid equality claims are not moral trump cards. Instead, as discussed in Part I, showing inequality in some morally relevant dimension requires establishing a more morally compelling justification. Often this justification will be rooted in a competing equality claim, and Indian affairs is full of them. This Section argues that these competing claims should be evaluated according to three principles. First, by taking seriously the idea of tribal governmental equality. Second, by considering how history and context affect the present meaning of these claims. And, finally, third, by evaluating how challenged measures will affect the least well off.

1. Taking Seriously Tribal Claims to Governmental Equality

The struggle for governmental rights is core to Native peoples' equality claims. The original sin of colonialism was denial of sovereign and property rights to tribal governments. For generation after generation, Indians have decried the injustice and ethnocentrism of that denial. And while we have a tragic history of violating tribal equality, generation after generation of non-Indians have also recognized the essential justice of those claims. This recognition is enshrined in our Constitution, in our statutes, and in our case law.

While individual equality, toward both Indians and non-Indians interacting with them, is meaningful as well, policies that ignore tribal equality to promote individual equality have in the end, led to some of the most reprehensible Indian policies. Confinement on reservations, forced allotment, compulsory boarding schools, and termination of tribal status were all sold as means to achieve Indian individual equality. These policies resulted not only in denying individual rights to choose their governments and practice their religion and culture but also to greater economic disparities and vulnerability to private abuse.

The governmental equality yardstick alone is not sufficient to parse equality problems facing Native people or those they affect. But it must be considered, and frequently applied, lest we perpetuate the savage equalities of the past and present.

2. History and Context Count

Policies must also be considered against the backdrop of history. This is not because history provides a trump card against claims of present

injustice or inequality but because it helps to define the relevant categories according to which Native claims must be measured.

First, the past is the source of promises and commitments with continuing moral and legal force.²³⁷ Most directly, treaties ratified over a century ago often continue in effect, creating enforceable property and other rights. While abrogation or violation of treaty rights may be justified, it should only be done with proper respect for those treaties and remedies to compensate for that violation. Similarly, past violations often create rights to remedies. While blind correction of historic wrongs would raise its own justice concerns, denying remedies for legal wrongs must itself satisfy an equality calculus.²³⁸

Second, the history of failed Indian policies has much to teach about modern policy proposals. As this Article discusses, until the 1970s, policymakers tried again and again to solve the problems of Indian people by ending the existence of Indian tribes.²³⁹ Almost all of these policies depended on the belief that if Indians could just give up their tribes and assimilate, they and everyone else would be a lot happier. The main outcome of each policy was to leave Native people poorer and more miserable than they were before. The only thing that has consistently worked to improve Native well-being is tribal self-determination.²⁴⁰ History teaches us, in other words, that proposals to end tribal difference generally undermine rather than promote meaningful equality.

Third, history shapes the present. Individual identity and perception are tied up with community identity and perception, and the latter is formed over many generations.²⁴¹ Historic connections to particular territories, for example, shape the current cultural and religious significance of those territories.²⁴² Familial and community histories of governmental abuse

237. Special Message on Indian Affairs, in *PUBLIC PAPERS OF NIXON*, *supra* note 201.

238. To take one example, a land claim based on violations of treaty rights would not justify displacing owners of land that had been in private land for generations, but it would require the government responsible for the violation to provide land or compensation sufficient to give the tribe a land base to sustain its community. Similarly, indigenous people could not be expelled from land to which they have aboriginal claims under terms that would not satisfy the protections for property rights available to other groups.

239. See *supra* Section II.B.

240. See Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works*, 15 (Harv. Kennedy Sch. Faculty Research Working Paper Series, Paper No. RWP10-043 2010) (calling tribal self-determination “the only strategy that has worked”).

241. See WALZER, *supra* note 42, at 9 (“All distributions are just or unjust relative to the social meanings of the goods at stake” and “[s]ocial meanings are historical in character; and so distributions, and just and unjust distributions, change over time”).

242. Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 *IND. L. REV.* 1291, 1302 (2010).

and expropriation shape relationships to governments today.²⁴³ History shapes the material present as well. Loss of land and resources affects contemporary economic circumstances.²⁴⁴ Generations of family separation due to boarding schools and casual placement in foster care and adoption disrupt familial bonds and undermine parenting skills for the current generation.²⁴⁵

In other words, the past is a necessary dimension in parsing equality claims because it shapes the present needs and desires of individuals and communities, provides information about efficacy of potential responses to those needs, and contributes to the legal and moral force of their demands.

3. *How Do Policies Affect the Worst Off?*

Claims based on past wrongs or tribal governmental status may still face claims that they violate the rights of others on some other dimension. These claims are morally relevant as well; the inequalities facing tribal peoples are not more important than the inequalities facing non-tribal peoples. The governmental equality metric and use of history and context are necessary to ensure that these inequalities are not measured according to formal definitions that fail to capture the real significance of different treatment. But in order to balance competing claims along metrics meaningful to both sides, something like John Rawls's difference principle, that social and economic inequalities should be arranged so that they are "to the greatest benefit of the least advantaged"²⁴⁶ may be useful. Such a metric would, for example, justify discounting claims by vast gambling conglomerates like MGM that they are unfairly disadvantaged

243. See, e.g., Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 735 (2006) ("In Indian country, the federal government is held in the esteem it has earned in more than two centuries of federal-tribal relations.").

244. WALTER HILLABRANT, JUDY EARP & MACK RHOADES, *OVERCOMING CHALLENGES TO BUSINESS AND ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 12–13 (2004).

245. Marsha King, *Tribes Confront Painful Legacy of Indian Boarding Schools*, SEATTLE TIMES (Feb. 3, 2008, 12:49 AM), <https://www.seattletimes.com/seattle-news/tribes-confront-painful-legacy-of-indian-boarding-schools/.html> [<https://perma.cc/A7BS-AKRF>].

246. JOHN RAWLS, *A THEORY OF JUSTICE* 266 (2d ed. 1999). I say "something like" because Rawls designed the difference principle to evaluate whether inequalities in favor of a more powerful group could stand because they also benefitted the least advantaged, not (as used here) as a means of comparing competing claims to equality.

by tribal government gaming,²⁴⁷ but also taking seriously claims by low-wage casino workers that they need labor rights at tribal casinos.²⁴⁸

These criteria are no more decisive than recognition of governmental equality claims or the acknowledgement of history and context. If, for example, one could show that taking half of the United States' personally-held wealth and distributing it throughout India would improve the lives of the worst off more than it would damage those of the best off, that would not necessarily justify the measure. The violation of U.S. governmental rights and the violation of historical and legal norms may well make the measure unjust.²⁴⁹ Any assertion that this would increase the quality of life of the least well-off would also immediately be subject to factual challenges. Some might assert, for example, that such a redistribution would damage long-term productivity, or that theft or corruption would deprive the most vulnerable recipients of their new-found wealth.

Similarly, if someone could prove (contrary to all historical evidence) that full-throated assimilation would lead to greater prosperity for American Indians, it would not necessarily outweigh the injustice of denying sovereignty and culture to Native peoples. Factual questions would also abound, including whether gaining economic prosperity but losing religion, culture, and community really makes one better off,²⁵⁰ and whether assimilation within a society privileging whiteness would really lead to greater prosperity.

As these and the examples below show, asking whether existing inequalities lead to the greatest benefit of the least advantaged will rarely dictate the response to an equality conflict. But particularly as tribes gain in de facto and de jure sovereignty, justice must respond to the ways that tribal actions can create inequality.²⁵¹ The difference principle is necessary, therefore, to balance and compare inequalities across different groups.

247. See, e.g., *MGM Resorts Int'l v. Malloy*, 861 F.3d 40 (2d Cir. 2017) (rejecting challenge to state law authorizing tribal casino).

248. See, e.g., *Lytton Rancheria of Cal.*, 361 N.L.R.B. 1350 (2014) (applying National Labor Relations Act to tribal casino).

249. Rawls's own system prioritized liberty over the difference principle, and more generally argued generally that "desires for things . . . that cannot be satisfied except by the violation of just arrangements, have no weight." RAWLS, *supra* note 246, at 230.

250. See Kirsten Matoy Carlson, *Priceless Property*, 29 GA. ST. L. REV. 685 (2013) (explaining the decision of the Sioux—some of the poorest people in the United States—to turn down over a billion dollars in compensation for the Black Hills).

251. See Washburn, *supra* note 67, at 202 ("As tribal governments have begun to exercise substantial power, tribal decisions have begun to have more significant consequences.").

C. Conclusion

Neither constitutional jurisprudence nor moral principles easily resolve questions of equality in Indian affairs. But the Constitution does provide room for recognizing tribal governmental equality claims, and law, history, and theory can provide principles for how those should be assessed. The final Part applies these legal and moral principles to some of the most prominent contemporary equality debates.

IV. RESOLVING TODAY'S EQUALITY CONFLICTS

This Part turns to some of the most pressing equality conflicts in Indian law and policy today. It shows how they should be understood in light of the constitutional space granted by the *Mancari* line of cases, the governmental equality yardstick, the appreciation of history and context; and finally, the attention to their impact on the least well-off. While there are many other modern examples—those over tribal jurisdiction over non-Indian abusers and tribal gaming come to mind—I focus here on just three: first, the challenges to the Indian Child Welfare Act; second, the fight over inclusion of the Cherokee Freedmen; and third, struggles over off-reservation treaty fishing.

A. The Indian Child Welfare Act

Even before its passage, ICWA was a battleground over competing equalities. Today, these challenges are reaching new intensity. This Section parses those challenges.

From the kidnapping of Pocahontas by the Virginia Company²⁵² to the 1950s partnership between the BIA with the Child Welfare League of America to move Indian children to homes far from the reservation,²⁵³ removing Indian children from their families was a core strategy of individual Indian assimilation. Even after the explicit federal policy ended, social workers and missionaries on reservations continued this policy on a case-by-case basis. By the 1970s, Campo woman Valancia Thacker would testify, “I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn’t know why and I didn’t question it. It was just done and it had always been done.”²⁵⁴ Studies from

252. See RALPH HAMOR, A TRUE DISCOURSE OF THE PRESENT STATE OF VIRGINIA 4–11 (Va. St. Libr. 1957) (1615) (discussing kidnapping).

253. See DAVID FANSHIEL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF INDIAN CHILDREN, at ix (1972); PRUCHA, AMERICANIZING, *supra* note 148, at 1153–54.

254. H.R. REP. NO. 95-1386, at 8 (1978).

multiple states showed that Native children were separated from their families at rates thirteen to nineteen times those for other children.²⁵⁵ Calling the “wholesale separation of Indian children from their families . . . perhaps the most tragic and destructive aspect of American Indian life today,”²⁵⁶ Congress enacted ICWA in 1978 to address the “shocking” disparity in the child welfare system.²⁵⁷ The statute creates exclusive tribal jurisdiction over foster care and adoption cases involving Indian children domiciled on reservations and presumptive tribal jurisdiction over such cases for children domiciled outside reservations (so long as their parents do not object).²⁵⁸ When state courts hear such cases, ICWA mandates enhanced procedural protections to parents, intervention rights for tribes, clear and convincing evidence before children are involuntarily placed in foster care, and proof beyond a reasonable doubt before involuntary termination of parental rights.²⁵⁹ ICWA also requires that, absent good cause to the contrary, states place children with extended family if available, with families from the child’s tribe if not, and with other Indian families if not.²⁶⁰

Although ICWA responded to violations of both individual equality rights of Native families and tribal equality rights to have a say in the child welfare of their next generation, from the beginning ICWA has faced challenges that it unconstitutionally classifies children based on race. While these challenges were long unsuccessful,²⁶¹ they gained new steam in the fight that reached the U.S. Supreme Court in *Adoptive Couple v. Baby Girl*.²⁶² The arguments for the prospective adoptive parents in the case were rife with allegations of racial discrimination.²⁶³ The couple’s

255. *Id.*

256. *Id.* at 9.

257. *Id.*

258. 25 U.S.C. § 1911 (2018).

259. *Id.* § 1913.

260. *Id.* § 1915.

261. See, e.g., *In re Appeal in Pima Cty. Juvenile Action*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981) (rejecting equal protection challenge); *In re Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990) (same); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) (same); *In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987) (same), *aff’d*, 543 A.2d 925 (1988); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980) (same).

262. 570 U.S. 637 (2013).

263. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 295 (2015). As Matthew Fletcher and Kate Fort wrote, the petitioners “pushed so much anti-tribal and racial animus claims it is hard to keep up.” Matthew L.M. Fletcher & Kate Fort, *Second Read-Through of Baby Veronica Transcript*, TURTLE TALK (Apr. 16, 2013), <https://turtletalk.blog/2013/04/16/second-read-through-of-baby-veronica-transcript/> [https://perma.cc/6TCJ-VQVU].

attorney sought to enlist parallels to Jim Crow on behalf of her white, upper middle-class clients, claiming ICWA “relegate[ed] adoptive parents to go to the back of the bus.”²⁶⁴ Meanwhile the attorney for the guardian ad litem repeatedly (and falsely) asserted that the sole reason ICWA applied was because the little girl involved had “3/256ths of Cherokee blood.”²⁶⁵

In reality, Baby Girl’s blood quantum was irrelevant to her status under ICWA. The Act defines an Indian child as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”²⁶⁶ Citizens of Indian tribes, therefore, may qualify without any Indian heritage.²⁶⁷ The Cherokee Nation, moreover, does not rely on blood quantum for citizenship, but rather on whether one can trace descent to someone listed on census rolls of citizens of the Cherokee Nation created in the early 1900s.²⁶⁸

Nevertheless, a majority of the Court adopted the petitioners’ framing. The opinion began by repeating petitioners’ falsehood that “[t]his case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.”²⁶⁹ It later inaccurately claimed that “[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.”²⁷⁰ Although the opinion turned on statutory rather than constitutional grounds, it asserted that its interpretation was necessary to avoid “equal protection concerns.”²⁷¹

Inspired by the decision, the conservative Goldwater Institute has now filed thirteen complaints arguing that ICWA as a whole unconstitutionally discriminates against Indian children “based solely on their race.”²⁷²

264. Transcript of Oral Argument at 62, *Adoptive Couple* 570 U.S. 637 (No. 12–399).

265. Reply Brief for Guardian ad Litem, *ex rel.* Baby Girl, Supporting Reversal at 1, 2, 8, 16, 20–21, *Adoptive Couple*, 570 U.S. 637 (No. 12–399); Transcript of Oral Argument at 28, 29, *Adoptive Couple*, 570 U.S. 637 (No. 12–399).

266. 25 U.S.C. § 1903(4) (2018).

267. *In re Dependency & Neglect of A.L.*, 442 N.W.2d 233, 235 (S.D. 1989).

268. *Citizenship*, CHEROKEE NATION, <https://www.cherokee.org/Services/Tribal-Citizenship/Citizenship> [https://perma.cc/VTY9-FLH3].

269. *Adoptive Couple*, 570 U.S. at 641.

270. *Id.* at 646.

271. *Id.* at 656.

272. Civil Rights Class Action Complaint for Civil & Injunctive Relief at 15, *A.D. v. Washburn*, No. 15-01259 (D. Ariz. July 6, 2015); see also Kathryn Fort & Victoria Sweet, *Outlier Outsiders: The ICWA Litigation & What is Really Going On*, FED. B. ASS’N: 43 ANN. INDIAN L. CONF. (2018), <http://www.fedbar.org/Hidden-Files/2018-Indian-Law-Conference-Materials/P7-ICWA-PPT-FORT-SWEET.aspx?FT=.pdf> [https://perma.cc/DC8T-JVDU]; Bryan Dewan & Josh Israel, *A*

Although nine of these suits failed,²⁷³ on October 4, 2018, *Brackeen v. Zinke* gave the plaintiffs the decision they wanted: a ruling that ICWA is unconstitutional.²⁷⁴ The decision has been stayed pending appeal to the Fifth Circuit, and arguments are scheduled for 2019.²⁷⁵

As these attacks began, other developments exposed systemic inequalities in the treatment of Indian children and their parents in child welfare proceedings. In 2012, an NPR investigation revealed that over half of the children in South Dakota's child welfare system were Indian, although Indians made up less than 15% of the state's population.²⁷⁶ Children were being taken away for months, even years, with little or no evidence of the need to remove them.²⁷⁷ Eighty-seven percent of these children were placed in non-Indian homes, while tribal citizens certified as foster parents were never called.²⁷⁸ And because the state had designated all Indian children as "special needs," it received three times the federal funding to care for these children as it did for other children.²⁷⁹

In 2013, a federal class action challenged South Dakota's practice of ordering children to be removed from their families in "emergency hearings" lasting only a few minutes and keeping many of them in custody for weeks or months.²⁸⁰ In Pennington County, the focus of the lawsuit,

Conservative Legal Organization Is Desperately Trying to Kill the Indian Child Welfare Act, THINKPROGRESS (Apr. 8, 2016, 12:00 PM), <https://thinkprogress.org/why-a-conservative-legal-organization-is-desperately-trying-to-kill-the-indian-child-welfare-act-762ba8e62d5b/> [<https://perma.cc/22JP-DTZP>].

273. Fort & Sweet, *supra* note 272.

274. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

275. *Brackeen v. Cherokee Nation*, No. 18-11479, 2018 U.S. App. LEXIS, at *1 (5th Cir. Dec. 3, 2018).

276. Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011, 12:00 PM), <https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> [<https://perma.cc/7VN7-HAUG>].

277. *See generally id.*

278. *Id.*

279. *Id.* "Special needs" is defined more broadly under federal adoption law than it is in other contexts and applies to a child who the state determines has "a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing [federal] adoption assistance . . . or medical assistance." 42 U.S.C. § 673(c) (2018). The NPR ombudsman later found that the original reporting was unduly biased in suggesting that South Dakota's treatment of Native children was due to monetary incentives but did not question the facts regarding special needs designation and its impact on federal subsidies. Edward Schumacher-Matos, *S. Dakota Indian Foster Care 3: Filthy Lucre*, NPR: PUBLIC EDITOR (Aug. 9, 2013, 7:43 PM), <https://www.npr.org/sections/ombudsman/2013/08/09/186943952/s-dakota-indian-foster-care-3-filthy-lucre> [<https://perma.cc/8W5M-5SKH>].

280. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 757 (D.S.D. 2015).

823 Native families were involved in such hearings between 2010 and 2013.²⁸¹ In 2015, a federal district court found that parents in these hearings received no notice of the evidence against them, no representation, and no opportunity to present their own evidence.²⁸² In fact, transcripts revealed that no one presented any evidence of the need to remove the children at these hearings, yet courts issued formulaic findings that the children had to be removed.²⁸³ The federal court found that these actions violated both ICWA and the constitutional due process rights of the parents under the Fourteenth Amendment.²⁸⁴

How should the competing equality claims swirling around ICWA be parsed? First, *Brackeen* was wrong: the statute is constitutional under existing jurisprudence. ICWA's definition of "Indian children," which requires either tribal citizenship or that the child has a tribal citizen parent and is eligible for citizenship,²⁸⁵ rests squarely on the kind of "political rather than racial" belonging of which *Mancari* approved.²⁸⁶ *Brackeen* disagreed, holding that "by deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race and therefore must be analyzed by a reviewing court under strict scrutiny."²⁸⁷ This holding is unmoored from *Mancari* itself, which upheld the Indian preference although one-fourth Indian blood was required for eligibility.²⁸⁸ In fact, the *Mancari* Court noted this blood quantum requirement in the same footnote in which it called the preference "political rather than racial."²⁸⁹ In comparison, ICWA's

281. *Id.* at 757.

282. *Id.* at 759–61.

283. *Id.* at 762.

284. *Id.* at 769–72.

285. 25 U.S.C. § 1903 (2018).

286. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). Although some raised concerns about ICWA's coverage of children who had not themselves formally enrolled in their tribes, Congress determined that "[t]he constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical [enrollment] process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity." H.R. REP. NO. 95-1386, at 17 (1978). In contrast, the Iowa Supreme Court has held that a state statute that applied ICWA to children who were not eligible for tribal membership was unconstitutional. *In re A.W.*, 741 N.W.2d 793, 813 (Iowa 2007).

287. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

288. *Mancari*, 417 U.S. at 553 n.24.

289. *Id.*

reliance on tribal eligibility for membership is far more political than the preference upheld in *Mancari*.²⁹⁰

In enacting ICWA, moreover, Congress recognized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”²⁹¹ Particularly given the federal government’s long history of separating children from their tribes, preserving this connection is well within the *Mancari* requirement of “Congress’[s] unique obligation toward the Indians.”²⁹² ICWA’s provisions, which ensure tribal notice in ICWA proceedings, preserve or enhance tribal court jurisdiction, and give preference to placement with qualified tribal families,²⁹³ are consistent with the self-government enhancing measures that routinely pass equal protection scrutiny. Indeed, the U.S. Supreme Court rejected a challenge to exclusive tribal court jurisdiction over adoption of an Indian child on these grounds, finding that denying state court jurisdiction did not violate equal protection because the denial derived not from race but “the quasi-sovereign status of the Northern Cheyenne Tribe,” and because it furthered “the congressional policy of self-government.”²⁹⁴ Absent U.S. Supreme Court revision of the legal standard, therefore, ICWA does not violate equal protection.

What then about the principles for evaluating ICWA as a matter of justice? First, ICWA is supported by the principle of governmental equality. Countries typically assert control over adoption of their citizens, and several have recently prohibited or limited adoptions by non-citizens.²⁹⁵ The principles of exclusive tribal jurisdiction over children domiciled on the reservation, and the preferences for placements within

290. *Brackeen* found that ICWA’s eligibility requirement “mirrors the impermissible racial classification” in *Rice v. Cayetano*, 528 U.S. 495 (2000), which limited voting for trustees of the state’s Office of Hawaiian Affairs to those descended from the people in Hawaii before 1778. *Brackeen*, 338 F. Supp. 3d at 533. It is bizarre to compare the *Rice* restriction, which was based solely on ancestry unrelated to political affiliation, to the ICWA definition, which turns solely on political classifications. More importantly, *Rice*’s determination that Native Hawaiian ancestry was the equivalent of race was not the basis on which the Court distinguished *Mancari*. *Rice* found that the voting restriction was unconstitutional because the Fifteenth Amendment specifically applies to voting, and the voting restriction applied to a state agency. *Rice*, 528 U.S. at 522. The Court specifically stated that a state could not, consistent with the Constitution, limit votes in a state agency only to “tribal Indians.” *Id.* at 520 (holding that a state cannot constitutionally permit only tribal members to vote in state elections).

291. 25 U.S.C. § 1901(3) (2018).

292. See *Mancari*, 417 U.S. at 555.

293. 25 U.S.C. §§ 1911–1915.

294. *Fisher v. Dist. Court*, 424 U.S. 382, 390–91 (1976).

295. Kathryn Joyce, *Why Adoption Plays Such a Big, Contentious Role in US-Russia Relations*, Vox (July 22, 2017, 10:16 AM), <https://www.vox.com/the-big-idea/2017/7/21/16005500/adoption-russia-us-orphans-abuse-trump> [<https://perma.cc/7KP8-3J9L>].

tribal families, are, therefore, supported by parallels in practice among nations.

ICWA also, however, allows parents or tribes to assert tribal jurisdiction over child welfare cases involving children domiciled outside the reservation,²⁹⁶ which is not an established part of international law. This jurisdiction is quite fragile and may be defeated by the objection of either parent, or a finding of “good cause” by the court.²⁹⁷ Particularly given these limitations, this jurisdiction fits within established norms. Citizenship, even when contrary to residence, is a common ground for assertion of jurisdiction, both in the United States and elsewhere.²⁹⁸ Citizenship and descent-based measures are particularly common for populations that, like tribal nations, are in diaspora from their homelands. Iraq and South Sudan, for example, provide voting rights for descendants of citizens living abroad,²⁹⁹ while Israel provides a right of return for Jews abroad.³⁰⁰ For similar reasons, relying on tribal membership rather than residence as a basis of political rights has long been part of federal Indian law.³⁰¹ Thus comparison to rights and practices of other governments also supports reliance on the tribal citizenship of Native children or their parents as a factor in child welfare proceedings.

Moving to the second factor, history and context provide particularly strong arguments for upholding ICWA. The historical deliberate removal of children from Indian families is well-established. So are the disparate rates at which Native children continue to be removed today.³⁰² The South Dakota litigation in particular casts a spotlight on the bias and denial of rights Native people continue to experience in this process. By providing additional procedural protections in removal and reinforcing tribal

296. 25 U.S.C. § 1911(b).

297. *Id.*

298. *See, e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. ___, 136 S. Ct. 2090 (2016) (holding that federal courts have jurisdiction over RICO prosecutions against citizens acting abroad); John D. Falconbridge, *Renvoi in New York and Elsewhere*, 6 VAND. L. REV. 708, 728 (1953) (discussing European application of law of place of citizenship in contrast to law of place of domicile to inheritance questions); Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169 (2016) (discussing U.S. taxation of U.S. citizens domiciled abroad).

299. Article 18, *Dustūr Jumhūriyyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005 (citizenship based on citizenship of mother or father); Southern Sudan Referendum Act, § 25 (2009) (participation in referendum by descent).

300. Law of Return, 5730-1970, SH No. 586 p. 34 (Isr.) (permitting return to and citizenship in Israel of Jews and their children and grandchildren).

301. *See, e.g.*, *Kelsey v. Pope*, 809 F.3d 849, 858 (6th Cir. 2016) (summarizing case law on membership-based authority); *Vezina v. United States*, 245 F. 411 (8th Cir. 1917) (upholding right of tribal citizen residing off reservation to enrollment and allotment).

302. *See supra* notes 276–279 and accompanying text.

jurisdiction and voice in the process, ICWA addresses both historic and continuing injustices.

Applying the third factor, we should ask how ICWA affects the least well-off—those least able to protect themselves. In ICWA cases, the least advantaged are surely the children. If children's well-being were measured solely by financial wealth, we might call ICWA unjust because it facilitates placement with almost always poorer Native families over almost always wealthier non-Native ones. In *Adoptive Couple v. Baby Girl*, for example, the guardian ad litem allegedly regaled the Baby Girl's Cherokee father and grandparents with the wealth of the couple that wanted to adopt her, telling them they should "get down on [their] knees and pray to . . . make the right decision for this baby."³⁰³ In another ICWA case, an adoption agency tried to argue that there was good cause to prevent families from the child's tribe from adopting a child because none could afford the agency's \$27,500 fee.³⁰⁴ But no moral calculus would justify taking a child from her family or community simply because a wealthier family wanted her. And in protecting the children of less well-off parents and communities against wealthier, more powerful ones trying to take them away, ICWA in fact helps remedy inequitable power imbalances in child custody cases.

But what about the well-being of children under to other measures? There is no way to answer this question in every case, but the evidence suggests that ICWA does not undermine, and often furthers, child well-being. The leading child welfare organizations in America have opined that ICWA's procedural protections are the "gold standard" for adoption and child welfare cases, serving the interests of children as well as biological and adoptive families.³⁰⁵ The GAO has found that Indian children do not suffer longer or more disruptive placements in the child welfare system.³⁰⁶ And numerous studies of both international and Indian child adoptions emphasize the value to children of retaining connections to their biological families and communities of origin.³⁰⁷

303. Transcript of Record at 513, 570, *Adoptive Couple v. Baby Girl*, No. 2009-DR-10-03803 (S.C. Fam. Ct. Sept. 29, 2011); see also Berger, *supra* note 263, at 359.

304. *In re T.S.W.*, 276 P.3d 133, 137, 144 (Kan. 2012).

305. Brief for Casey Family Programs at 2–3, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399).

306. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 4 (2005), <http://www.gao.gov/assets/250/245936.pdf> [<https://perma.cc/8GCE-SLCP>].

307. See generally RITA J. SIMON & SARAH HERNANDEZ, NATIVE AMERICAN TRANSRACIAL ADOPTEEs TELL THEIR STORIES (2008); see also HOLLEE MCGINNIS ET AL., BEYOND CULTURE CAMP: PROMOTING HEALTH IDENTITY FORMATION IN ADOPTION 5–7, 17–19 (2009),

ICWA is constitutional under existing jurisprudence, furthers governmental equality of Indian tribes, redresses historic and continuing disparities, and provides added protection and resources to the most vulnerable in our society. ICWA furthers equality as a matter of law and justice.

B. Exclusion of Cherokee Freedmen

One of the most troubling equality conflicts of recent years has been the Cherokee exclusion of their freedmen descendants. While the Cherokee Nation has arguments rooted in equal respect for governmental definitions of citizenship, the combination of the Cherokee Nation's history of slavery and its own treaty promises resolve this case against the Nation.

Although some African Americans initially became valued participants in Cherokee society,³⁰⁸ by the nineteenth century, the Cherokee Nation had adopted Black chattel slavery and discriminatory laws.³⁰⁹ Despite bitter internal conflict, the Cherokee Nation also initially allied with the Confederacy in the Civil War.³¹⁰ In the wake of Union victory, the Cherokee Nation agreed to a treaty that, among other things, "forever abolished slavery," and provided that all "freedmen" and "free colored persons" resident in Cherokee country, or who returned there within six months, would have "all the rights of native Cherokees."³¹¹ Within a few decades, however, the Nation began trying to limit the rights of freedmen descendants to divisions of Cherokee lands and money.³¹² The United States exacerbated this conflict when, in preparation for allotment of Cherokee land, it created census rolls that divided Cherokee citizens into

http://adoptioninstitute.org/old/publications/2009_11_BeyondCultureCamp.pdf
[<https://perma.cc/V6AD-RP7P>].

308. See WILLIAM G. M'CLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* 338–39 (1983) (describing shift from position of relative importance to racism); TIYA MILES, *TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM* (2005) (describing changing status of an Afro-Cherokee family).

309. See *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 94–97 (D.D.C. 2017); Bethany R. Berger, *Power Over this Unfortunate Race: Race, Politics, and Indian Law in U.S. v. Rogers*, 45 WM. & MARY L. REV. 1957, 2021–22 (2004).

310. *Nash*, 267 F. Supp. 3d at 97–99.

311. Treaty with the Cherokee art. 9, July 19, 1866, 14 Stat. 799.

312. For a fascinating discussion of this internal conflict, see Melinda Miller & Rachel Purvis, *No Right of Citizenship: The 1863 Emancipation Acts of the Loyal Cherokee Council* (unpublished paper) (on file with author).

“Blood,” “Freedmen” and “Intermarried Whites” rolls.³¹³ These rolls were sometimes inaccurate, placing brothers and sisters on different rolls according to judgments about who looked Indian and who Black.³¹⁴ Nevertheless, they have become the official record as to Cherokee heritage and citizenship.³¹⁵

Since 1983, the Cherokee Nation has been trying to limit Cherokee citizenship to those who can trace descent to the Cherokee Blood rolls.³¹⁶ After over two decades of conflicting decisions from courts and political bodies of both the United States and the Cherokee Nation,³¹⁷ the dispute appears resolved for now. In August 2017, the U.S. District Court for the District of Columbia held that pursuant to the 1866 Treaty, the descendants of those on the Freedmen rolls must be accorded Cherokee citizenship.³¹⁸ The Cherokee Attorney General quickly announced that he would not appeal.³¹⁹

Legally, there are no viable equal protection claims against exclusion. Federal acknowledgement of tribal citizenship criteria is completely consistent with the political recognition of tribal nations under *Mancari*.³²⁰ Because tribal sovereignty does not come from the U.S. Constitution, tribes themselves are not directly subject to constitutional restraints.³²¹ Although the federal Indian Civil Rights Act imposes requirements parallel to most of the Bill of Rights on tribal nations,³²² it permits tailoring of those requirements to tribal values,³²³ and the Act

313. See ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 153–58 (2008).

314. *Id.*

315. *Nash*, 267 F. Supp. 3d at 109.

316. Circe Sturm, *Race, Sovereignty, and Civil Rights: Understanding the Cherokee Freedmen Controversy*, 29 CULTURAL ANTHROPOLOGY 575, 577 (2014); see *Nash*, 267 F. Supp. 3d at 110 (tracing dispute to 1992).

317. *Nash*, 267 F. Supp. 3d at 110–14.

318. *Id.* at 140.

319. Todd Hembree, *Extending Citizenship to Descendants of Former Slaves is 'The Right Thing to Do.'*, WASH. POST (Sept. 15, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/09/15/why-the-choke-ke-ation-is-ending-its-decades-old-fight-to-deny-citizenship-to-descendants-of-its-former-slaves/?utm_term=.067e8462d490 [https://perma.cc/R2UD-TERL].

320. See *Rice v. Cayetano*, 528 U.S. 495, 520 (2000) (stating that if “a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign”).

321. *United States v. Bryant*, 579 U.S. ___, 136 S. Ct. 1954, 1962 (2016) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

322. 25 U.S.C. § 1301 (2018).

323. See *Janis v. Wilson*, 385 F. Supp. 1143, 1150 (D.S.D. 1974) (noting that ICRA should be interpreted consistent with “maintaining the traditional values of their unique governmental and

cannot be directly enforced against tribes in federal court outside the criminal context.³²⁴

Although there are no enforceable constitutional equality arguments for the freedmen, the moral equality arguments are much more powerful. The equality argument for the freedmen is obvious: they seem to be excluded from citizenship because of their race. The reality is not quite so simple. First, the challenged citizenship criterion requires only that one have an ancestor on the Cherokee Blood rolls—not that one be a particular race—and many people that society would declare racially Black are Cherokee citizens under this criterion.³²⁵ Citizenship based on descent is the rule in many countries,³²⁶ and even the United States applies lineal descent citizenship to children born to citizens outside the United States.³²⁷ Requiring lineal descent for citizenship can lead to profound equality problems when the requirements create populations of long-term second class residents within national borders. But for tribal nations, as for other nations in diaspora,³²⁸ the dispersion of their people and the porousness of their borders make such descent-based citizenship hard to avoid.³²⁹ In addition, because tribal territories are small, and not usually a primary source of goods or life chances, such criteria do not create significant equality gaps in the way they do, for example, for guest workers in Germany.³³⁰

These arguments justify tribal lineal descent requirements in most contexts, but not for exclusion of freedmen descendants. Under an

cultural identity”); *McCurdy v. Steele*, 353 F. Supp. 629, 633 (D. Utah 1973) (stating that interpretation should be “harmonized with tribal cultural and governmental autonomy”).

324. See *Santa Clara Pueblo*, 436 U.S. at 72.

325. See *Meet Cherokee Nation Citizens*, CHEROKEE ANCESTORS, <https://web.archive.org/web/20121115131105/http://www.meetthecherokee.org/TakeAction/WatchOurVideo/tabid/1715/Default.aspx> (last visited Apr. 11, 2019) (video showing pictures of Cherokee citizens of many different races).

326. See Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 73, 77 (1997).

327. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2219 (2014) (discussing derivative citizenship).

328. See Article 18, *Dustūr Jumhūriyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005 (stating that citizenship is based on citizenship of mother or father); Law of Return, 5730-1970, SH No. 586 p. 34 (Isr.) (permitting return to and citizenship in Israel of Jews and their children and grandchildren); Southern Sudan Referendum Act, § 25 (2009) (discussing participation in referendum by descent).

329. See Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. IND. L. REV. 243, 250 (2009).

330. See WALZER, *supra* note 42, at 59–60 (decrying former status of German guest workers as “very much like tyranny”).

individual equality metric, the slavery that created this group is the very essence of inequality, and racism is one reason for the continuing efforts to exclude this group.³³¹ A governmental equality argument does not support exclusion either. Governments generally have substantial freedom to set citizenship criteria, and the international community generally will not interfere with these criteria absent deprivations of fundamental human rights. Slavery, however, is a fundamental human rights violation.³³² Although international conventions do not explicitly require that former slaves receive citizenship in the nations of the enslavers,³³³ such citizenship is an implicit part of fully abolishing slavery.

Perhaps most important under the governmental equality rubric, the Cherokee Nation explicitly agreed to incorporate former slaves as citizens in the Treaty of 1866.³³⁴ The Cherokee Nation may not have gotten everything it wanted in the treaty, but it negotiated hard with a country eager to resolve hostilities after the Civil War, and it was able to amend some terms in its favor.³³⁵ As Justice Stacy Leeds wrote in her opinion for the Cherokee high court³³⁶:

Although this Treaty was signed at the end of the Civil War, when the Cherokee Nation was in a weaker position, it was still an agreement between two sovereign nations. When the Cherokee Nation enters into treaties with other nations, we expect the other sovereign to live up to the promises they make. It is rightly expected that we will also keep the promises we make.³³⁷

The means the United States used to enforce this treaty promise, withholding federal aid³³⁸ and proposals to end government relationship with the Cherokee Nation, also precisely accord with principles of governmental equality.³³⁹

The history and context of the dispute also sheds light on the added costs of exclusion. To be among the freedmen descendants now, one's

331. Sturm, *supra* note 316, at 576.

332. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948); Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253.

333. See G.A. Res. 217, *supra* note 332; Slavery Convention, *supra* note 332 (not discussing citizenship of former slaves).

334. Treaty with the Cherokee, *supra* note 311.

335. Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 99–100 (D.D.C. 2017).

336. Allen v. Cherokee Nation Tribal Council, No. JAT-04-09, at 17–18 (Jud. App. Trib. 2006).

337. *Id.*

338. Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, § 801, 122 Stat. 4319, 4334 (2008).

339. H.R. 2824, 115th Cong. (2007) (proposing severing governmental relations).

ancestors must both have been within Cherokee Territory when the treaty was signed in 1866 or within six months thereafter and have been recorded on the final Dawes Rolls created between 1905 and 1907.³⁴⁰ The individuals who claim descent from freedmen today, in other words, have long family connections with the Cherokee Nation. Exclusion therefore carries the added psychic injury of separation from one's historical identity.³⁴¹ Meanwhile, because the Cherokee Nation already includes Delaware and Shawnee descendants without Cherokee heritage, and because freedmen descendants would comprise a small fraction of a population that is already extremely multi-racial,³⁴² arguments about the costs to Cherokee identity³⁴³ are misplaced.

Consideration of the impact of exclusion on the most vulnerable also favors the freedmen. Burdened both by society's anti-Black racism and by tribal exclusion, the freedmen descendants are "one of the most marginalized communities in Native North America."³⁴⁴ One historical study found that although Cherokee freedmen descendants had a higher socio-economic status than other African Americans, and less income inequality with whites or Indians, there still had significant income gaps with other Indians.³⁴⁵ Anecdotal evidence suggests this inequality continues, and yet it is precisely this population that is cut out of tribal housing and health benefits.

In short, all the factors in resolving equality conflicts in the freedmen case point toward inclusion. Cherokee Nation Attorney General Hembree has agreed, stating that including the freedmen descendants was "the right thing to do," and that he could "think of no better exercise of Cherokee

340. See Five Civilized Tribes Act, ch. 1876, § 3, Pub. L. 59-129, 34 Stat. 137, 138 (1906).

341. This is also true for many of the disenrollment battles tearing apart other tribal nations, but the stark equality arguments are not present there. See Gabriel Galandra & Ryan Dreveskracht, *Curing the Tribal Disenrollment Epidemic*, 57 ARIZ. L. REV. 383, 390 (2015) (quoting Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n, No. 06-113-AP, 2007 WL 6900788, at *2 (Little River Ct. App. June 24, 2007) (calling tribal membership "the essence of one's identity, belonging to community, connection to one's heritage and an affirmation of their human being place in this life and world")).

342. See Hembree, *supra* note 319 (noting that there are about 3,000 eligible descendants and 350,000 Cherokees).

343. See Heather Williams, *My Cherokee Identity*, N.Y. TIMES (Sept. 16, 2011, 11:17 AM), <https://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/my-cherokee-identity> [<https://perma.cc/PN22-HQS9>] (noting arguments by Cherokee blood and freedmen descendant that "Indian ancestry is crucial to the preservation of our identity").

344. Sturm, *supra* note 316, at 575.

345. Melinda Miller, *The Shadow and Blight of Slavery: How Long Did Advantages of Free Land Persist* (unpublished dissertation), <https://economics.yale.edu/sites/default/files/files/Workshops.../miller-081006.pdf> [<https://perma.cc/KBJ2-GYX4>].

sovereignty than to accept this decision and to take the Nation beyond this divisive issue.”³⁴⁶ While further disputes will likely arise as additional freedmen descendants seek to enroll, the current conflict has been correctly resolved.

C. *Treaty-Fishing Struggles*

A final example of continuing equality conflicts comes from struggles over off-reservation treaty fishing. In a number of nineteenth century treaties tribes reserved rights to fish on waters on lands they had ceded.³⁴⁷ States nevertheless blocked or undermined treaty-fishing and arrested tribal members for failure to comply with state fishing laws. In numerous cases, courts have ruled that states cannot impose general state laws on tribal treaty fishers, and must share the resource with the tribes.³⁴⁸ A more recent decision also holds that Washington may not block waterways necessary for salmon to reach the treaty-protected fishing places.³⁴⁹ While tribal citizens often see treaty fishing struggles as efforts to prevent unjust disregard of Indian legal rights and overcome past discrimination, opponents often present treaty rights as unequal special rights.

For the Pacific Northwest and Great Lakes tribes at the center of these conflicts, fishing was, like the practice of religion, core to both individual and community identity. Although tribal members had fought state efforts to deny treaty fishing rights for generations, in the 1960s the struggle was explicitly tied to efforts to reassert Indian rights and renew tribal communities.³⁵⁰ For Native people, this was an activist movement comparable to the civil rights movement for African Americans.³⁵¹

346. Hembree, *supra* note 319.

347. See Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty with the Chippewa art. 11, Sept. 20, 1854, 10 Stat. 1109; Treaty of Medicine Creek art. III, Dec. 26, 1854, 10 Stat. 1133; Treaty with the Chippewa art. V, July 29, 1837, 7 Stat. 536.

348. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (“[T]he 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation”); *Puyallup Tribe v. Wash. Dep’t of Game*, 414 U.S. 44 (1973) (holding state could not enforce its prohibition against net fishing against tribal citizens); *People v. Jondreau*, 185 N.W.2d 375, 389 (Mich. 1971) (holding state could not impose its regulations on treaty fishers).

349. *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016), *aff’d by equally divided court per curiam*, 585 U.S. ___, 138 S. Ct. 1832 (Mem.) (2018).

350. Bradley Shreve, “*From Time Immemorial*”: *The Fish-In Movement and the Rise of Intertribal Activism*, 78 PAC. HIST. REV. 403, 403–06 (2009).

351. Gabriel Chrisman, *The Fish-In Protests at Frank’s Landing*, U. OF WASH.: SEATTLE CIV. RTS. & LAB. HIST. PROJECT (2008), <http://depts.washington.edu/civlrfish-ins.htm> [<https://perma.cc/HH55-FWSQ>] (“Historically, the most important civil rights issue for Native

Borrowing from “sit-ins” at segregated lunch counters, tribal fishers staged “fish-ins” in the Northwest.³⁵² In the words of a leader in the Great Lakes fishing movement, “For a long time, we said nothing We knew our place. Now there is frustration from some of those on the outside who don’t like the idea that we are now exercising our rights.”³⁵³

As with the demonstrations against segregation, the fish-ins generated a violent and racist backlash. In Washington State, protesters affixed bumper-stickers reading “Save a Salmon—Can an Indian” to their cars and hung Federal District Judge Boldt in effigy after he ruled in favor of tribal fishing rights.³⁵⁴ Upholding his ruling, the Ninth Circuit noted that “[e]xcept for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”³⁵⁵

Treaty-fishing opponents employed blatantly racist rhetoric in the Great Lakes struggle as well. Washington’s “Save a Salmon—Can an Indian” became “Spear an Indian: Save a walleye” or even “Spear a pregnant squaw, save two walleyes.”³⁵⁶ Hundreds, and sometimes thousands of protesters followed tribal fishers on the lakes, calling the Ojibwa fishers “Tonto,” “Redskin,” “timber nigger,” and “welfare warriors,”³⁵⁷ and chanting “[y]ou’re a defeated people; you are a conquered people,” “the only good Indian is a dead Indian,” and “Custer had the right idea.”³⁵⁸

The backlash, however, often used the rhetoric of equality, calling tribal fishing rights unjust special rights.³⁵⁹ In 1977, the Washington State Supreme Court issued a passionate decision holding that tribal treaty

Americans in Washington State has been fishing rights.”); see Shreve, *supra* note 350, at 405 (discussing similarities and differences with civil rights movement).

352. Shreve, *supra* note 350, at 405.

353. William Schmidt, *Wisconsin Spring: New Fishing Season, Old Strife*, N.Y. TIMES (Apr. 8, 1990), <https://www.nytimes.com/1990/04/08/us/wisconsin-spring-new-fishing-season-old-strife.html> [https://perma.cc/2J57-3PNN].

354. Bruce Barcott, *What’s a River for?*, MOTHER JONES (May/June 2003), <https://www.motherjones.com/politics/2003/05/whats-river/> [https://perma.cc/62UL-8ZSL].

355. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 696 n.36 (1979) (quoting *United States v. Washington*, 573 F.2d 1123, 1126 (9th Cir. 1978)).

356. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284, 1289 (W.D. Wis. 1994).

357. *Id.* at 1288–90.

358. *Id.* at 1288–89. For a collection of documents regarding the protests, see GREAT LAKES INDIAN FISH & WILDLIFE COMM’N, *MOVING BEYOND ARGUMENT: RACISM AND TREATY RIGHTS* (1989), <http://www.wisconsinhistory.org/turningpoints/search.asp?id=1096> [https://perma.cc/V3BB-XKVS] [hereinafter *RACISM AND TREATY RIGHTS*].

359. See DUDAS, *supra* note 23 (discussing the rhetoric of this backlash).

fishing rights violated the Fourteenth Amendment.³⁶⁰ That same year, Washington voters sent John E. Cunningham III to Congress, where he proposed the Native American Equal Opportunity Act, which would have mandated repeal of all Indian treaties and full state jurisdiction over all Indians.³⁶¹ The bill failed to make it out of committee.

Similarly, in Wisconsin, pamphlets decried the “basic underlying inequality” that “Indians are given rights denied to other American citizens.”³⁶² Anti-treaty fishing groups raised money for their activities with the sale of “Treaty Beer,” whose cans featured a walleye being speared through the gut, and the words “Land Claims, Fishing Rights, Hunting Rights, Water Rights . . . EQUAL RIGHTS?”³⁶³

In the end, the courts generally accepted the Indians’ framing of equality. One of the first legal decisions in the struggle found it was “discriminatory” not to give “any consideration to the treaty rights of the Indians.”³⁶⁴ Later, the U.S. Supreme Court both summarily rejected the state court’s equal protection argument,³⁶⁵ and emphasized that protecting fishing rights was necessary to respect the bargain the Indians had made to secure rights that were “not much less necessary to the existence of the Indians than the atmosphere they breathed.”³⁶⁶ A federal district court decision out of Wisconsin was most explicit in this regard, finding that the racist protests to prevent Indians from exercising their legal rights sought to deny enjoyment of property rights on the basis of race in violation of the Civil Rights Act of 1866.³⁶⁷

Conflicts over treaty fishing are increasing again in the face of current litigation to preserve the salmon habitat. Over the decades, the United States, State of Washington, as well as private and municipal owners, have built numerous dams, roads, and other structures blocking the traditional path of salmon and other anadromous fish from the sea to their fresh water

360. *Fishing Vessel Ass’n v. Tollefson*, 571 P.2d 1373 (Wash. 1977), *rev’d*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

361. DUDAS, *supra* note 23, at 77–78.

362. RACISM AND TREATY RIGHTS, *supra* note 358, at 102 (reprinting Stop Treaty Abuse-Wisconsin pamphlet, *Wisconsin’s Treaty Problems—What Are the Issues?*).

363. *Id.* at 22 (discussing marketing of treaty beer). Beer can showing quoted language is on file with author.

364. *Sohappy v. Smith*, 302 F. Supp. 899, 902 (D. Or. 1969).

365. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979).

366. *Id.* at 680 (quoting *United States v. Winans*, 198 U.S. 371, at 380–81 (1903)).

367. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284 (W.D. Wis. 1994) (construing 42 U.S.C. § 1982 (1994)).

spawning grounds.³⁶⁸ In 2001, twenty-one tribes and the United States sued Washington State seeking an order to modify or remove blockages that disrupt the salmon life cycle and prevent salmon from reaching the usual and accustomed fishing grounds protected by their treaties.³⁶⁹ After extensive litigation, the U.S. District Court for the Western District of Washington ordered the State to remove the culverts, and the Ninth Circuit agreed.³⁷⁰ The U.S. Supreme Court's 2017 grant of certiorari raised fears it would reverse, but the Court ultimately split four-four, affirming the decision.³⁷¹

Despite the narrow affirmance, struggle over Native treaty fishing continues, as it has for 150 years, with equality arguments on both sides. As a matter of equal protection law, these arguments are easily dismissed: if existing jurisprudence establishes anything, it is that fulfilling treaty obligations to Indian tribes does not violate equal protection.³⁷²

The interpretation and enforcement of the treaties also finds support from both the governmental and individual equality yardsticks. As to individual inequality, non-tribal citizens are simply not similarly situated to tribal citizens, because they don't have treaty rights to fish. It is no more inegalitarian to treat the treaty beneficiaries differently than it is to give someone who owns property greater rights to that property than someone who does not own it.³⁷³ I can be in my house because I have a deed to it; it is not inegalitarian that you don't have the same right to be there.

Of course, the treaty-fishing guarantees have not been interpreted in the same way as similar contract language. Here, the governmental equality comparison, specifically the rules for interpretation and implementation of treaties with foreign nations, is useful. First, the obligation to keep treaty agreements is "the most fundamental proposition of international law."³⁷⁴ Like U.S.-Tribal treaties,³⁷⁵ moreover, international treaties must be "liberally construed so as to effect the apparent intention of the parties

368. See *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016), *aff'd by equally divided court per curiam*, 585 U.S. ___, 138 S. Ct. 1832 (mem.) (2018).

369. *Id.* at 841.

370. *Id.*

371. *Washington*, 138 S. Ct. 1832 (mem.).

372. *Rice v. Cayetano*, 528 U.S. 495, 518 (2000); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979).

373. A property system may violate equality principles if it results in excluding swaths of society from basic access to property, but equality does not demand abolition of all distinctions between owners and non-owners.

374. Oona Hathaway, Sabrina McElroy & Sara Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 55 (2012).

375. See COHEN'S HANDBOOK, *supra* note 68, § 2.02[1], at 113–16.

to secure equality and reciprocity between them . . . [I]f a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.”³⁷⁶ Thus, “treaties are construed more liberally than private agreements, and to ascertain their meaning [courts] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”³⁷⁷

While the general rules of international treaty construction lend support to the treaty fishing decisions, U.S.-Canadian conflicts provide an even closer analogy. In interpreting tribal rights to fish “in common with” the citizens of Washington, the U.S. Supreme Court relied on earlier treaties between the United States and Britain, in which “in common with” was interpreted to give each country an “equal” and apportionable “share” of the fish.³⁷⁸ Modern conflicts between the United States and Canada over salmon have continued, resulting in “salmon wars” and illegal, even violent, attacks on opposing fishers.³⁷⁹ Like tribal conflicts, U.S.-Canadian disputes have been resolved on principles of an equitable share of the salmon traversing their waters and mutual obligations to conserve and maintain the common resource.³⁸⁰ Notably for the recent tribal litigation against Washington, moreover, U.S.-Canadian agreements on the issue began with efforts to address and prevent blockage of fish passage.³⁸¹

The history and context of the modern tribal fishing disputes also supports the egalitarianism of protecting tribal fishing rights. First, as noted by the U.S. Supreme Court, preserving fishing rights was a key factor in the tribal agreement to exchange millions of acres of land.³⁸² It would be manifestly unjust to interpret the treaties to confer only the right to catch fish on equal terms with any other citizen of the state, or to permit downstream users to exhaust the resource before they reach the Indians’

376. *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933); *see also* *United States v. Stuart*, 489 U.S. 353, 368 (1989).

377. *E. Airlines v. Ford*, 499 U.S. 430, 535 (1999) (citations omitted).

378. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 677 n.23 (1979).

379. Karol de Zwager Brown, *Truce in the Salmon War: Alternatives for the Pacific Salmon Treaty*, 74 WASH. L. REV. 605, 625 (1999).

380. *Id.* at 626–27.

381. *Id.* at 613–14; *cf.* Kim Murphy, *Fish Wars Have Created a Real Stink Between the U.S. and Canada*, L.A. TIMES, July 30, 1997, at A5 (discussing contemporary impact of U.S. dams on U.S.-Canadian conflict).

382. *Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. at 678–77.

“usual and accustomed places.”³⁸³ Indeed, because until recently most tribes in Washington and the Great Lakes region were denied the homelands they anticipated from the treaties,³⁸⁴ for many years fishing rights were their only treaty benefits.

Context also reveals that a fish is not simply a fish to these tribes. The tribes of the Pacific Northwest were “‘salmon-people,’ and their salmon were a collective spirit and a nourishing life force.”³⁸⁵ Fishing was integral to the culture and subsistence of the Great Lakes Anishinaabe as well.³⁸⁶ Many tribes are named for the bodies of water they primarily fished on,³⁸⁷ and one, the Lac du Flambeau, was named for their practice of fishing at night with torches.³⁸⁸ In both areas, moreover, the modern struggle to restore fishing rights was not simply about fishing, but about a reassertion of tribal identity and sovereignty.³⁸⁹

Turning to the difference principle, the significance of fishing to these Native communities suggests that the marginal utility of each fish caught is much higher than it is for those outside the community. But there are other communities—commercial fishermen, sports fishermen, and the individuals whose livelihood supports sports fishermen—dependent on

383. See *id.*; United States v. Winans, 198 U.S. 371, 380 (1903) (rejecting argument that “the Indians acquired no rights but what any inhabitant of the territory or state would have” as “certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more”).

384. Although twenty-three tribes signed the Stevens treaties, the treaties created only two reservations—both in the southern part of the state—leaving many of the signatories without a protected homeland until recently. See FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMM’N: REPORT ON TERMINATED AND NON-FEDERALLY RECOGNIZED INDIANS 182 (1976). Similarly, the Anishinaabeg of both Wisconsin and Michigan signed treaties that ceded their homelands unbeknownst to them. See *Lac Courte Oreilles v. Voigt*, 700 F.2d 341, 346–47 (7th Cir. 1983) (discussing 1842 treaty that acquired Wisconsin Ojibwe lands contrary to understanding of the tribes); H.R. REP. 103-621 (1994) (describing amendment of 1836 treaty with the Michigan Ojibwe to provide that the fourteen reservations they negotiated for would be theirs for only five years).

385. Michael Blumm & James Brumberg, “*Not Much Less Necessary . . . Than the Atmosphere They Breathed*”: *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RESOURCES J. 1, 6 (2006).

386. See CHARLES E. CLELAND, RITES OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN’S NATIVE AMERICANS 23–24 (1999) (noting that tribes shaped their societies around fishing); LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OBJIWE SPEARFISHING AND TREATY RIGHTS 63 (2002) (“Being a man often means being a spearer.”).

387. *E.g.*, *Lac Courte Oreilles Chippewa, Red Lake Chippewa, Little River Odawa & Ojibwe, Sault St. Marie Chippewa, Lac du Flambeau Chippewa*.

388. NESPER, *supra* note 386, at 60.

389. See *id.* at 3–5 (describing conflict as leading to the “revitalization and reimagining of the Waswagoninniwug Anishinaabeg in the late twentieth century”); Shreve, *supra* note 350, at 434 (describing fish-in movement as the first modern “instance of united intertribal direct action,” encouraging a new era of activism of American Indians).

the same fish resource, and some of those, like most Native people, struggle economically. It is therefore important that conservation is part of the obligation of tribes as well as states,³⁹⁰ even if these obligations are hard to justify as a matter of treaty interpretation. Whatever the value of each fish to each tribal member, it would unjustly harm other communities to permit waste of the resource. Fortunately, tribes have been active participants in fish conservation, and fishermen's and environmental organizations supported tribal efforts to prevent the state from blocking fish passage.³⁹¹

In the end, protecting tribal treaty fishing rights satisfies egalitarian obligations to fulfill agreements with tribes as we would with other governments and individuals, and preserves practices essential to tribal identity and religion. While non-tribal citizens' interests in those resources are not protected by binding agreements, conserving the resource fulfills the general egalitarian demand not to unduly monopolize resources on which others depend.

CONCLUSION

"WWW.EQUALPROTECTION.ORG." One might assume the owner of this website was focused on protecting the disadvantaged and oppressed. In fact, it is the product of the Goldwater Institute, a conservative libertarian organization that usually represents taxpayers and property owners.³⁹² The Institute bought the website to publicize its attacks on the Indian Child Welfare Act.³⁹³ With this campaign, the Goldwater Institute joins older groups like the Citizens for Equal Rights Association in mobilizing the law and rhetoric of equality to undermine federal Indian law.

As political scientist Jeffrey Dudas argues, weaponizing equality in this way is not unique to federal Indian law.³⁹⁴ It is part of a broader movement to portray a host of claims by minority groups as unjust special rights disadvantaging "ordinary" people. Indeed, one could see the election of Donald Trump, fueled by discriminatory rhetoric but catering to a belief

390. *Puyallup Tribe v. Wash. Game Dep't*, 391 U.S. 392, 398 (1969); *United States v. Michigan*, 505 F. Supp. 467, 474–75 (W.D. Mich. 1980).

391. Brief for Pacific Coast Fishermen's Associations et al. as Amici Curiae Supporting Respondents, *Washington v. United States*, 585 U.S. ___, 138 S. Ct. 1832 (mem.) (2018) (No. 17-269); see ZOLTAN GROSSMAN, UNLIKELY ALLIANCES: NATIVE NATIONS AND WHITE COMMUNITIES JOIN TO DEFEND RURAL LANDS 52–54 (2017).

392. *Dewan & Israel*, *supra* note 272.

393. *Id.*

394. DUDAS, *supra* note 23, at 2–3.

that black and brown Americans were unfairly “cutting in line,”³⁹⁵ as the triumph of this movement. You can see the links between this broader campaign and anti-tribalism in this 2016 post by Elaine Tillman, former chair of the Citizens Equal Rights Alliance:

We will now have wealthy little Sharia compounds on Indian reservations to add to the 190 cities designated to receive Syrian refugees. Obama is polka-dotting the entire country with Sharia enclaves to enrich Indian tribes and reflect our generous heart for immigrants . . . I absolutely refuse to tolerate that my own citizenship in this country is denounced as inferior to that of any other American citizen.³⁹⁶

In this screed, anti-Muslim, anti-immigrant, and anti-Indian rhetoric join forces—all in the name of equality.

Although the current form of equality arguments developed in the wake of the modern civil rights era,³⁹⁷ the arguments have deep historical roots in federal Indian law and policy. As this Article shows, policymakers have fluctuated between recognizing the rights of tribes to governmental equality and insisting solely on equality for Indian individuals separate from their tribes since the early nineteenth century. Sometimes those advocating individual Indian equality appear sincere: the Friends of the Indian, for example, had cut their teeth in the abolitionist movement, and passionately believed their policies would serve Indian interests. Digging a bit beneath the surface, however, often reveals that the ways individualist policies serve non-Indian interests, from acquiring tribal lands to acquiring tribal children. In addition, the eras and movements in which individual equality arguments triumph—from the Jacksonian Era to Jim Crow, from post-War defenders of segregation and McCarthyism to the New Right—are the least egalitarian in American history. What is more, these policies—from Indian removal to allotment to termination—deeply damaged not just tribal sovereignty but also individual Indian well-being. Perhaps that is why, whenever the United States grappled honestly

395. Lopez, *supra* note 5.

396. Elaine Willman, *The Spreading Epidemic of Tribalism in America*, Klamath Basin Water Crisis (Jan. 11, 2016), <http://www.klamathbasincrisis.org/AskElaine/articles/thespreaingepidemicoftribalismminAmerica011116.htm> [https://perma.cc/U5W5-PR86]; cf. Vince Devlin, *Anti-Indian or Not? Controversial Conference on Tap in Kalispell*, INDEP. REC. (Sept. 23, 2015), https://helenair.com/news/state-and-regional/anti-indian-or-not-controversial-conference-on-tap-in-kalispell/article_41a937b9-2cd3-5f88-89d7-8146ea371339.html [https://perma.cc/EMX5-H7CN] (discussing CERA-organized conference including far right anti-federal and anti-UN speakers).

397. It has long roots in other areas as well. See Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 929 (2009) (showing arguments against civil rights as unfair special rights in Reconstruction Era).

with the demands of justice, it also recognized the need to evaluate tribal claims along a yardstick of governmental, not merely individual, equality.

The governmental yardstick does not provide a neat resolution to savage equality conflicts. No government is immune from equality claims against it. In addition, because both tribes and Native people are so entwined in non-tribal governments, comparisons with other, non-Native, individuals may sometimes be more relevant than comparisons with non-Native governments. But every time we insist that the comparator in the equality calculus is an individual with no Native affiliation, we act in inequalitarian ways by disregarding the tribal history and legal and cultural status that creates equality claims of their own. Doing so sanctions the ethnocentrism and international law violations of colonialism, violates the longstanding recognition that justice demands recognition of tribal governmental status, and undermines the well-being of Native people.

Colonialism, like slavery, is one of America's founding sins.³⁹⁸ Fully restoring the sovereignty and property stripped from Native peoples is impossible—it is politically unfeasible and would result in injustice to many. We are left, therefore, with equality conflicts, tensions between comparing Native people to others as individuals and as citizens of sovereign governments. While the conflicts and complexities will remain, one thing should be clear: we must not re-inscribe the inequities of colonialism in the name of unreflective assertions of equality. Understood properly, equality itself militates against this.

398. Cf. Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017).