2009

Red: Racism and the American Indian

Bethany Berger
University of Connecticut School of Law

civilization."[217] As in the westerns that soon followed *Malaeska*,[218] however, Indians who remain allied with their tribes were hardly human, characterized by a "demoniac thirst for blood,"[219] with their "savage yell" upon being interrupted during a war council "as if a company of fiends had been disturbed in their orgies."[220]

Like Malaeska, the individual Indian was a figure who, properly guided, would enable the expanding American nation to combine the beauty and wisdom of the natural world with the refinement of civilization. Without such humble submission, however, Indians were nothing more than an "unfortunate race," to be civilized if possible, and exterminated if not. By 1871, Congress had prohibited further treatymaking with Indian tribes.[221] The direct catalyst of this law was a conflict between the U.S. House and Senate regarding Indian policy, and existing treaties remained in full force.[222] But the law effectively symbolized what Indian policy had made increasingly clear: Having begun the century as nations negotiating with the United States, tribes were no longer regarded as governments, but instead as "wandering hordes, held together only by ties of blood and habit . . . ."[223] Law, policy, science, and culture thus joined in a coherent picture: While the legal and social status of the Indian individual would shift by context, the racialized inferiority of the Indian tribe would be increasingly inflexible.

B. 1871–1928: Assimilation and Oppression

The Jim Crow Era for African Americans was the Allotment and Assimilation Era for Native Americans. During the 1870s and 1880s, the military confined the last independent tribes on reservations, and in 1890, Wounded Knee marked the end of the Indian wars. With the waning of a significant military threat, policymakers would regulate tribes and Indian individuals more forcefully than ever before in the quest to separate the Indian from the tribe. Courts obliged by eliding the limitations that tribal sovereignty and treaties had placed on federal action. Historians self-consciously designated the triumph over Indian tribes as the formative experience of the white American race. Although assimilating Indians frequently confronted

217. STEPHENS, *supra* note 216, at 76, 124.
218. *See* BERKHOFER, *supra* note 77, at 99–100.
219. STEPHENS, *supra* note 216, at 74.
220. *Id.* at 73.
221. *See* Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 570 (1871) (codified at 25 U.S.C. § 71 (2006)).
222. *See* 2005 COHEN, *supra* note 21, at 74–75.
223. Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1, 26–28 (1831) (Johnson, J., concurring).

color prejudice, individual examples of Indian assimilation were celebrated in academic and cultural arenas, opening doors wholly closed to other races.

Federal Indian policy, which previously vacillated between sovereign and racialized views of tribes, moved decisively toward the latter. The 1887 Dawes Allotment Act was the defining legislation of the era. The Act authorized the federal government to divide remaining tribal territories among individual Indian households, with land not divided declared surplus and free for white acquisition.[224] Although the policy was supported as a means to open reservation land to white settlement, it was also "inspired by the highest motives" and "regarded as a panacea which would make restitution to the Indian for all that the white man had done to him in the past."[225] The law was "a mighty pulverizing engine for breaking up the tribal mass"[226] and separating the individual from the tribe.[227]

This direct intrusion on tribal economies was accompanied by coercive efforts directed toward the "ultimate absorption of the Indian race into the body politic of the nation."[228] Federal agents created tribal police forces and courts staffed with trusted Indians for the same purpose, to establish "a power entirely independent of the chiefs" and thereby "finally destroy, the power of tribes and bands."[229] Indian children were taken from their families and placed in boarding schools to enable the individual to overcome the fatal allure of the tribal community. Captain Richard Pratt, founder of the Carlisle Indian School, described the goal of the schools: "[A]ll the Indian there is in the race should be dead. Kill the Indian in him and save the man."[230] The way to kill the "Indian" in the Indian race was to kill the tribe, by planting "treason to the tribe and loyalty to the nation at large."[231]

The Supreme Court generally supported and provided justification for these policies. In a series of decisions, the Supreme Court further diminished the sovereign element of the Indian tribe to emphasize the racially Indian. In 1886,

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224. Dawes Allotment Act, 24 Stat. 388–91 (1887).

225. D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8 (Francis Paul Prucha ed., 1973) (1934).

226. Merrill E. Gates, Addresses at the Lake Mohonk Conferences (1900), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 24, at 342.

227. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1564–70 (2001).

228. *See* 1917 COMM'R INDIAN AFFAIRS ANN. REP. 3–5, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 158, at 214.

229. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 79 (1980) (quoting an 1881 report of Commissioner Hiram Price).

230. RICHARD H. PRATT, INDIAN EDUCATION, *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 24, at 263.

231. *Id.* at 269.

United States v. Kagama[232] held that Congress could enact legislation governing crimes between tribal members on reservations.[233] The Court stated that there were just two sovereigns within the geographical limits of the United States, the states and the federal government, and as for Indians, the "power of the [federal] government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection."[234]

In *Lone Wolf v. Hitchcock*[235] in 1903, the Court quoted this language to hold that Congress could unilaterally abrogate tribal treaty rights and exchange their territory for allotments and money.[236] Recognizing that the diminishment of tribal rights was for American Indians the equivalent of denying individual rights to African Americans, a protesting Senator called *Lone Wolf* the "Dred Scott decision No.2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding."[237] The logic of these decisions reinforced, and in turn was reinforced by, the Chinese Exclusion Cases establishing vast federal power over immigration, and the Insular Cases, upholding extra-constitutional power concerning Puerto Rico and the Philippines.[238] In the same era that *Plessy v. Ferguson*[239] held that African American individuals could be denied equal rights in white society,[240] these cases expanded the scope and limited the restrictions on federal power over quasi-sovereign peoples of color.

The Court justified the vast federal power over Indian tribes in explicitly racial terms. In *United States v. Sandoval*,[241] the Court considered whether the Pueblo Indians were Indian tribes over whom the federal government could exercise jurisdiction.[242] The Pueblos lacked many of the legal indicia previously used to justify federal power: They were arguably citizens of the United States; they farmed and resided in permanent stone dwellings; and, pursuant to Spanish

232. 118 U.S. 375 (1886).
233. *Id.* at 384–85.
234. *Id.* at 384.
235. 187 U.S. 553 (1903).
236. *See id.* at 567.
237. *See* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 116 (1997).
238. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 10–11 (2002) (discussing the links between these cases); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 39–48 (1997) (discussing the links between *Lone Wolf* and the Chinese Exclusion Cases).
239. 163 U.S. 537 (1896).
240. *Id.*
241. 231 U.S. 28 (1913).
242. *See id.*

land grants, they held their land in fee simple.[243] Stripped of a legal basis to differentiate them from other Americans, the Court was forced to turn to racial stereotypes to justify federal power. The Court found that although the Puebloans were "sedentary rather than nomadic" and "disposed to peace and industry," they were "nevertheless Indians in race, customs, and domestic government."[244] The Court explained what it meant by Indian: "Always living in separate and isolated communities . . . and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."[245] The Pueblo was therefore a "distinctly Indian communit[y]" that the federal government could choose to treat as an Indian tribe.[246]

The Court also began to undermine the territorial nature of tribal rights, upholding new exercises of state jurisdiction over non-Indians in Indian country.[247] The period did see several decisions protective of tribal treaty rights[248] and jurisdictional rights.[249] Even these cases, however, often assumed the inferiority of tribal societies, stating that they were allowed such rights of self-government as were "consistent with the safety of the white population . . . to encourage them as far as possible in raising themselves to our standard of civilization,"[250] referring to tribal law as "red man's revenge" in contrast with "white man's morality,"[251] and justifying even the reservation of water rights as part of a policy of converting Indians from a "nomadic and uncivilized people."[252] Thus these cases, while importantly continuing and affirming principles still

243. *Id.* at 39, 47–48.
244. *Id.* at 39.
245. *Id.*
246. *Id.* at 46.
247. *See* Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885) (holding that the territory could tax the railway running through Fort Hill Indian Reservation); United States v. McBratney, 104 U.S. 621 (1882) (holding that Colorado had exclusive jurisdiction over crimes between non-Indians on the Ute Reservation).
248. *See* Winters v. United States, 207 U.S. 564 (1908) (implying a treaty right to sufficient water to irrigate reservation); United States v. Winans, 198 U.S. 371 (1905) (upholding a treaty right to fish off of the reservation).
249. *See, e.g.*, United States v. Quiver, 241 U.S. 602 (1916) (holding that an exception for federal jurisdiction over crimes between Indians prohibited jurisdiction over the crime of adultery); Talton v. Mayes, 163 U.S. 376 (1896) (holding that the Fifth Amendment did not apply to a Cherokee court trying a Cherokee man); *Ex parte* Mayfield, 141 U.S. 107 (1891) (holding that a Cherokee man could not be federally prosecuted for adultery with a non-Cherokee woman); *Ex parte* Crow Dog, 109 U.S. 556 (1883) (rejecting the argument that jurisdiction over crimes between Indians could be implied from a treaty and an agreement with tribe).
250. *Ex parte* Mayfield, 141 U.S. at 115–16.
251. *Ex parte* Crow Dog, 109 U.S. at 406.
252. Winters v. United States, 207 U.S. at 576.

protective of tribal governmental rights, largely did so in ways consistent with a vision of tribes as inferior groups being prepared for assimilation.

Historians also increasingly identified triumph over the Indian tribes as the formative racial and national experience of white America. Between 1889 and 1896, future president Theodore Roosevelt published his six-volume *The Winning of the West*.[253] The work portrays the steady westward movement of American population as a "great period[] of race expansion."[254] All who had tried to limit acquisition of Indian land, whether the British in the Royal Proclamation of 1763 or the New Englanders seeking to preserve western lands for the tribes, had shortsightedly stood in the way of the "the destiny of the race."[255] Roosevelt acknowledges and regrets the cruelty to innocent Indians. He also presents certain Indian individuals as among the best of any race, quoting a description of the Seneca Chief Logan as "'the best specimen of humanity he ever met with, either white or red,'"[256] and describing the half-Scottish, half-Creek Alexander McGillivray as "perhaps the most gifted man who was ever born on the soil of Alabama."[257] But he has no doubt whatsoever that American domination of the continent and its racial stock was wholly just:

> The rude, fierce settler who drives the savage from the land lays all civilized mankind under a debt to him. . . . [I]t is of incalculable importance that America, Australia, and Siberia should pass out of the hands of their red, black, and yellow aboriginal owners, and become the heritage of the dominant world races.[258]

Frederick Jackson Turner reviewed the first volume of the *Winning of the West* in 1889, praising it and calling for a history of the "progress of civilization across the continent."[259] Four years later, at the 1893 Chicago World's Fair, Turner delivered the essay that would transform American historiography. Among exhibits contrasting live Indians displaying "varying aspects of fast-disappearing aboriginal life" and children attending a "model" Indian boarding school, Turner presented *The Significance of the Frontier in American History*.[260] Turner is less insistent than Roosevelt in describing westward expansion as a racial struggle, but he makes clear that triumph of European American over Indian culture is the defining American experience.

253. ROOSEVELT, *supra* note 25.
254. 1 ROOSEVELT, *supra* note 25, at 2.
255. 3 ROOSEVELT, *supra* note 25, at 53.
256. 1 ROOSEVELT, *supra* note 25, at 205.
257. *Id.* at 65.
258. 3 ROOSEVELT, *supra* note 25, at 45–46.
259. Frederick J. Turner, *The Winning of the West*, DIAL, Aug. 1889, at 71 (1889) (book review).
260. Robert A. Trennert, Jr., *Selling Indian Education at World's Fairs and Expositions, 1893–1904*, 11 AM. INDIAN Q. 203, 206–07 (1987).

At the frontier each generation of European immigrants "strips off the garments of civilization," dons "the hunting shirt and the moccasin," and "shouts the war cry and takes the scalp in orthodox Indian fashion."[261] Eventually, however, "he transforms the wilderness," reenacting the "record of social evolution" and the inevitable "disintegration of savagery . . . ."[262] In this crucible the immigrants were "Americanized, liberated, and fused into a mixed race, English in neither nationality nor characteristics."[263]Note that neither Roosevelt nor Turner demands Anglo-Saxon purity so long as the white "American" race remains dominant.[264] Roosevelt writes that in "[n]orthwestern cities I could point out some very charming men and women, in the best society, with a strain of Indian blood in their veins."[265] Policymakers went even further, explicitly supporting intermarriage with Indians as an assimilation tool.[266] In 1888, Congress enacted a law providing that Indian women who married white men would thereby become American citizens,[267] so that their husbands could not gain rights to Indian allotments. The law was intended both to "prevent the marriage or miscegenation of . . . degenerate whites with the Indian squaws," and to "encourage Indians to marry white men and become [assimilated] citizens of the United States."[268] The debate on the law provides a neat summary of the

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261. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 4 (Henry Holt & Co. 1921).

262. *Id.* at 4, 11.

263. *Id.* at 23.

264. *See id.* Thus Roosevelt, who winks at the prospect of a little Indian blood within the dominant white race, condemns black slavery for its introduction of an inferior race which threatens to dominate the white stock:

> [T]he negro, unlike so many of the inferior races, does not dwindle away in the presence of the white man. He holds his own; indeed, under the conditions of American slavery he increased faster than the white, threatening to supplant him. . . . Slavery is ethically abhorrent to all right-minded men; and it is to be condemned without stint on this ground alone. From the standpoint of the master caste it is to [be] condemned even more strongly because it invariably in the end threatens the very existence of that master caste.

4 ROOSEVELT, *supra* note 25, at 28–29.

265. 1 ROOSEVELT, *supra* note 25, at 18 n.1.

266. *See also* Maillard, *supra* note 211, at 362.

267. *See* Act of Aug. 9, 1888, ch. 818, 25 Stat. 392 (1888). The act was entitled "An act in relation to marriage between white men and Indian women."

268. 19 Cong. Rec. 6885, 6886 (1888). The reference to miscegenation does indicate the ways that prejudice blocked any integration, even of Indians, that challenged white dominance of the American race. Although Virginia's 1924 Racial Purity Act, (the miscegenation law finally declared unconstitutional in *Loving v. Virginia*), counted as white those whose descent was Caucasian and one-sixteenth American Indian, it also placed all those with more Indian blood in the nonwhite category. Six other states also prohibited marriages between Indians and whites. *See* STEPHENSON, *supra* note 12, at 82–83 (listing Arizona, California, Nevada, North Carolina, Oregon, and South Carolina, as prohibiting Indian-white intermarriage). These states were in a distinct minority, as most states did not prohibit Indian-white marriage. *See, e.g.*, Weaver v. State, 116 So. 893, 895 (Ala. Ct. App. 1928) (validating a marriage between a white women and a man of Indian and white

role of Indians in American society. As "squaws," still tied to their tribes and land, Indians were reviled, and any whites that chose to join with them were "degenerate."[269] By assimilating through marriage, however, female Indians would become both "women" and "citizens."[270] As a matter of policy, moreover, so long as white preeminence was preserved, absorption of the original, now conquered, race was a fitting tribute. Echoing Thomas Jefferson, one policymaker observed, "while ten grains of Indian to one hundred of white man might be injurious to the quality of the white race, half a grain to one hundred might supply exactly the element needed to improve it.... What happy result can there be to the lamb, but in absorption, digestion, assimilation in the substance of the lion."[271]

It is tribal culture, not Indian culture, that is explicitly opposed to whiteness. This is clear in the ceremony upon the assumption of citizenship of Indians who had accepted their allotments:

> After the American Indian male renounced allegiance to his tribe, shot his last arrow, and accepted the plow, the federal official said: "This act means that you have chosen to live the life of the white man—and the white man lives by work. From the earth we must all get our living.... Only by work do we gain a right to the land...."
> After the American Indian female renounced allegiance to her tribe, accepted the work bag and purse, the federal official said: "This means you

descent because neither had black heritage); Free v. State, 194 So. 639 (Fla. 1940) (holding that evidence that a husband was of Indian descent did not invalidate his marriage to a white woman); Scott v. Epperson, 284 P. 19 (Okla. 1930) (noting that a statute prohibiting marriage between whites and those of negro blood would also prohibit marriage between a negro woman and a Creek man); Follansbee v. Wilbur, 44 P. 262 (Wash. 1896) (describing a territorial law prohibiting marriages between white men and Indian women that was repealed in 1868); *see also* MURRAY, *supra* note 12, at 14 (noting that by 1950, only five states prohibited Indian-white marriages, although thirty states prohibited black-white marriages and fifteen prohibited Asian-white marriages).

269. 19 Cong. Rec. 6886 (1888).

270. *Id.* at 6885–86.

271. PHILIP C. GARRETT, INDIAN CITIZENSHIP (1886), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 24, at 61–62. Even the common gender divide, in which alliances with Indian women were an accepted means through which white men could obtain sexual access to tribal virtues, broke down to some extent. Well-known Indian men married white women, including Commissioner Ely Parker, physician Charles Eastman, writer-physician activist Carlos Montezuma, and Antonio Lujan, the Taos Pueblo husband of heiress Mabel Dodge Luhan. *See* DELORIA, UNEXPECTED PLACES, *supra* note 29, at 87. The many movies reiterating the grateful Indian maiden theme were joined by a handful of Indian man-white woman love stories, although these relationships were typically doomed. *Id.* That such movies were made, however, does not mean they were well received. Of RED DEER'S DEVOTION (1911), *Moving Picture World* complained, "While such a thing is possible, and undoubtedly has been done many times, still there is a feeling of disgust which cannot be overcome when this sort of thing is depicted as plainly as it is here." *Id.*

> have chosen the life of the white woman—and the white woman loves her home. The family and home are the foundation of our civilization."[272]

The Indian can thus live the life of a white man or woman, so long as he or she renounces that which is tribal.

Throughout this period, citizenship was extended on an ad hoc basis as a reward for civilization, given to tribal members disavowing allegiance to their tribes or accepting their allotments, and awarded to Indian women marrying white men.[273] In 1924, the same year Congress finalized the exclusion of Asians from citizenship, it extended citizenship to all Native Americans.[274] Although the law provided a legal tool for Indians struggling for legal rights in non-Indian communities, it also symbolized the prevailing notion of American dominance over the Indian tribe.

Despite the advocacy of assimilation, Indians leaving reservations to join the broader community often found themselves shut out of public and social institutions. At times this was part of the general exclusion of people of color under Jim Crow. Ariela Gross documents the ways that officials struggled to categorize Mexicans as either Spanish, and therefore white, or Indian, and therefore colored, to fit them into an established racial taxonomy.[275] But de jure discrimination was often on distinctly Indian grounds, focusing on the individual's connection with a tribe. Thus in *Elk v. Wilkins*[276] in 1884, the Supreme Court upheld a Nebraska decision to deny the vote to an Indian man on the grounds that he was not a citizen.[277] Although John Elk had left the reservation where he was born and severed his ties with the tribe over a year earlier, Indians born in tribal relations were not citizens of the United States, and did not acquire such citizenship automatically upon leaving their tribes.[278] Citizenship, moreover, had a peculiarly descent-based spin, as seen when the Minnesota Supreme Court upheld the disenfranchisement of an entire

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272. *See* Valencia-Weber, *supra* note 29, at 349 (quoting and discussing a 1937 Department of the Interior publication).

273. *See* Elk v. Wilkins, 112 U.S. 94, 100, 104–06 (1884) (listing and discussing various laws and treaties providing for citizenship); Dawes Allotment Act, ch. 119, 24 Stat. 390 (1887) (providing citizenship to Indians who took up allotment, separated from their tribe, and adopted the habits of civilized people); Act of Aug. 9, 1988, ch. 818, 25 Stat. 392 (1888) (providing citizenship for Indian women marrying white men).

274. Revenue Act of 1924, 43 Stat. 253 (1924); *see* Joseph William Singer, *The Stranger Who Resides With You: Ironies of Asian-American and American Indian Legal History*, 40 B.C. L. REV. 171 (1999) (reflecting on the juxtaposition of 1924 immigration and Indian citizenship acts).

275. *See* Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 346–47 (2007).

276. 112 U.S. 94.

277. *Id.* at 100.

278. *See id.*

community of mixed-blood men on the Red Lake reservation, finding that although they had "reached a degree of civilization superior to that manifested by many white men,"[279] and were likely the children of citizen fathers, they were also (the court assumed) illegitimate, and therefore took the status of their noncitizen Indian mothers.[280]

We see exclusion on the basis of both color and tribal status in *Piper v. Big Pine School District of Inyo County*,[281] a 1924 California Supreme Court decision. The school district had refused to admit California Indian Alice Piper, relying on a state statute providing that in areas within three miles of a federal Indian school Indian children could not be admitted to the general public schools.[282] The court rejected the school district's argument, holding that because the child and her parents "are citizens of the United States and of this state" and had never "lived in tribal relations with any tribe of Indians or has ever owed or acknowledged allegiance or fealty of any kind to any tribe or 'nation' of Indians,"[283] it violated the Fourteenth Amendment to deny "admittance to the common schools solely because of color or racial differences without having made provision for their education equal in all respects to that afforded persons of any other race or color."[284] In a testament to the flexibility of grounds for exclusion, however, the court took pains to affirm the constitutionality of the preceding section of the statute, which provided school districts with the power to "exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Chinese, Japanese or Mongolian parentage."[285]

Despite the color prejudice many Indians experienced, individual Indian integration was publicly celebrated as another symbol of the triumph of European-American civilization over savagery. Boarding schools took before-and-after pictures of Indian children, first arriving in tribal dress and then arrayed in the trappings of whiteness, and circulated them for eager consumption by organizations in the east declaring themselves Friends of the Indian.[286] Celebration of Indian assimilation also resulted in access to fora wholly barred to African Americans. Graduates of Indian boarding schools won academic and athletic scholarships to East Coast colleges, facilitating an

279. *In re* Liquor Election in Beltrami County, 163 N.W. 988, 989 (Minn. 1917) (citing Bem-way-bin-ness v. Eshelby, 87 Minn. 108 (1903)).
280. *Id.*
281. 226 P. 926, 928 (Cal. 1924).
282. *Id.*
283. *Id.* at 927.
284. *Id.* at 928–29.
285. *Id.* at 928.
286. *See Transformation of an Indian*, *in* 2 PRUCHA, *supra* note 149, plate 48 (1984).

Indian presence in professional sports that has not been matched since.[287] The football star Jim Thorpe, the only professional Indian athlete most people can name, was a product of this phenomenon.[288] Thirty-seven years before Jackie Robinson broke the black-white color barrier in major league baseball, Indians played on both sides in the 1911 World Series.[289] Native actor-writer-director James Young Deer became the head of a major West Coast studio,[290] while native opera singers were stars of the New York Metropolitan Opera,[291] translating the fascination with the "disappearing"[292] Indian culture into personal success and artistic influence.

Allotment and Jim Crow both further complicated the relationship between Indians and blacks. Tribal members sought to distinguish themselves from African Americans both to escape the yoke of segregation and to maintain an identity that was distinctly Indian in the face of pressure to assimilate. The Lumbee Indians of North Carolina, for example, began their continuing fight for official tribal recognition in the 1870s to avoid placement in the state's colored schools and to win the right to establish their own schools.[293] The division of tribal property among individual tribal members through allotment and claims for deprivation of tribal lands also placed stress on definitions of tribal membership. The Cherokee Nation, for example, began enacting laws to prevent the division of their lands and tribal funds among citizens without Indian blood.[294] At the same time, sexual relations between Indians and blacks were challenged as illegal in states whose miscegenation laws placed Indians in the same racial category as white.[295]

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287. For more on Philip and Ella Deloria, see AMERICAN INDIAN BIOGRAPHIES 141, 143 (Carole Barrett & Harvey Markowitz eds., rev. ed. 2005). The Deloria academic dynasty began in this fashion. The Lakota anthropologist and ethnographer Ella Deloria, was recruited to Oberlin College from the boarding schools, while her brother Vine Deloria, Sr., father of Philip S. and Vine Deloria, Jr. and grandfather of Philip J. Deloria, Jr., attended St. Stephen's College, later renamed Bard College, on an athletic scholarship before returning home to become an Episcopal minister and Lakota leader. DELORIA, UNEXPECTED PLACES, *supra* note 29, at 117, 133–34.

288. *Id.* at 135.

289. *Id.* at 227–28.

290. *See id.* at 93–96.

291. *See id.* at 184–85, 204–07.

292. BERKHOFER, *supra* note 77, at 101–02.

293. BLU, *supra* note 199, at 62. Such distinctions also served white interests: White Democrats may have supported the Lumbee petition for state recognition in part to divert some of the nonwhite vote from the Republican party. *Id.* at 63.

294. *See* Red Bird v. United States (Cherokee Intermarriage Cases), 203 U.S. 76, 83 (1906) (describing a 1875 Cherokee law providing that intermarried whites could not become citizens in an effort to prevent loss of land through allotment).

295. *See In re* Atkins' Estate, 3 P.2d 682 (Okla. 1931) (holding that a marriage between a Creek man and a negro woman was illegal, although their children could be considered legitimate and inherit from their father).

The emerging movie industry reflected the complexity of perceptions of the Indian. Although film studios quickly began churning out westerns portraying white triumph over brutal Indian tribes, they also made movies romanticizing the noble savage, and even dramatizing the brutality of white massacres of Indians. Many of these movies—with names like *An Indian's Gratitude*, *Dove Eye's Gratitude*, *Red Wing's Gratitude*, and *The Mesquite's Gratitude*—portrayed the drama of the grateful Indian who turns her back on her tribe to emulate white civilization.[296] In a more subtle reprise of the military claim that the only good Indian was a dead Indian, there are many good Indians in these movies, but they almost all must die to save white settlements.[297] These movies reenacted Roosevelt's saga of the racially inferior tribe that might share the virtues of a preindustrialized natural world, but was doomed to disappear in the face of the destiny of the white race.

Equally revealing are the movies that portrayed the dilemmas of integrated Indians in a white world. D.W. Griffith, whose *Birth of a Nation* positions the Ku Klux Klan as the progenitor of a white American nation, also made dozens of films portraying Native Americans.[298] One of the first was the 1908 *Call of the Wild—The Sad Plight of the Civilized Redman*.[299] The protagonist is the handsome George Redfeather, a Jim-Thorpe-like Carlisle honors graduate and football star. Feted by the white Indian agent Lieutenant Penrose, George falls in love with and proposes to the Lieutenant's daughter Gladys. The studio poster for the film tells us, "You may be sure he is indignantly repulsed by Gladys and ordered from the house for his presumption by her father."[300] Alone in his room, George realizes the "truth," that he is "good enough as a hero, but not as a husband."[301] Recognizing the futility of his struggle to assimilate, George gives in to his "long suppressed nature," "hears [the] call of the wild," and returns to his tribe.[302] After his tribe later captures Gladys out riding, George is about to wreak his "savage" vengeance on her, until Gladys stays his hand by reminding him of the "call of

296. DELORIA, UNEXPECTED PLACES, *supra* note 29, at 88.

297. *See, e.g.*, IOLA'S PROMISE (Biograph Co. 1912); THE BROKEN DOLL (Biograph Co. 1910); THE GIRL AND THE OUTLAW (American Mutoscope & Biograph 1908); *see also* Jack Temple Kirby, *D.W. Griffith's Racial Portraiture*, 39 PHYLON 118, 123–24 (1978).

298. *See* Gregory S. Jay, *"White Man's Book No Good": D.W. Griffith and the American Indian*, 39 CINEMA J. 3, 3 (2000); Kirby, *supra* note 297, at 119.

299. CALL OF THE WILD: SAD PLIGHT OF THE CIVILIZED REDMAN (American Mutoscope & Biography Co. 1908) [hereinafter CALL OF THE WILD].

300. Poster: Call of the Wild (American Mutoscope & Biograph 1908), *reprinted in* DELORIA, UNEXPECTED PLACES, *supra* note 29, at 86.

301. *Id.*

302. *Id.*

th[e] Higher Voice" of religion, at which he helps her to remount and sadly watches her ride away.[303] The lesson?

> "Gild the farthing if you will; but it is a farthing still." So it is with the Redman. Civilization and education cannot bleach his tawny epidermis, and that will always prove an unsurmountable barrier to social distinction. He may be lauded and even lionized for deeds of valor and heroism, or excellence in scientifics, but when it comes to the social circle—never.[304]

Like George Redfeather, Indians at the turn of the century were caught in a double bind. The denigration and near destruction of the Indian tribe was enshrined as part of the "grandeur of their race's imperial destiny."[305] Tribes were not envisioned as governments, but rather as racial groupings fixed at an earlier moment of social evolution. Assimilating those under the thrall of this innate "call of the wild" was a vindication of the white race, and the assimilated Indian was celebrated on the national stage. Individuals who chose to follow the white man's road,[306] however, were blocked by color prejudice and stereotypes of the innately wild Indian. While the national ideology meant that the racial barriers to individual Indians were not as absolute as those faced by other groups, their options were circumscribed both as tribal savages and colored individuals.

III. TWENTIETH CENTURY INNOVATIONS

The twentieth century saw two innovations in the racial understanding of Indian tribes. First, there was a short respite from policies that treated tribes as permanently inferior and Indians that chose to remain with them as racially misguided. During the Indian New Deal of the 1930s and 1940s, Indian policy and law recognized that securing wellbeing for native people required respecting their choices to remain with their tribes and culture, and accordingly sought to strengthen tribal governments. At the same time, native people seeking tribal rights self-consciously made claims to a distinct Indian ethnic identity. But in the following Termination Era of Indian policy, old assimilationist arguments were not only renewed, they were fortified by the emerging rhetoric of civil rights for individuals. By ignoring the different bases for Indian oppression and resistance, opponents of tribal equality were able to make the same old arguments in the name of equality itself. The Self-Determination policy that has replaced Termination is characterized by both elements, as support for tribal governments

303. *Id.*
304. *Id.*
305. 3 ROOSEVELT, *supra* note 26, at 99.
306. Poster: Call of the Wild, *supra* note 300.

clashes with efforts to reimpose racial limitations when tribal rights undermine non-Indian expectations.

A. A Brief New Deal—A New Twist on the Old One: 1928–1968

The assimilationist policy helped sow the seeds of its brief demise in the 1930s. A new generation of native people, educated at federal schools and liberal arts universities, used this education to publicize oppression of the Indian and organize against it.[307] At the same time, the emphasis on the supposedly disappearing Indian and the attempts to gather information on this vanishing culture generated new interest in, and respect for, tribal traditions. Scholarly trends, including emergence of cultural relativism in anthropology, as well as social scientific documentation of the impact of forcible allotment and assimilation,[308] also contributed to a new direction in Indian policy.

In 1934, under the direction of Commissioner of Indian Affairs John Collier, the federal government implemented a policy that for the first time sought to strengthen tribes and permit Indians to choose to maintain their tribal ties with dignity.[309] The Indian Reorganization Act (IRA), the cornerstone Indian New Deal legislation, ended allotment, sought to restore and consolidate tribal territories, provided tribal economic development loans, enhanced Indian preference in the Bureau of Indian Affairs, and sought to facilitate tribal governmental organization.[310] Felix Cohen, the legal architect of the Indian New Deal, recovered the elements of Indian law that had always, at least formally, recognized the status of tribes as governmental entities rather than racial groups and demanded some measure of respect for those governmental entities.[311]

The policy's architects saw the Indian New Deal as fully consistent with equal rights for individual Indians. The IRA was accompanied by the Johnson-O'Malley Act[312] which sought to counter state discrimination against

307. *See* 2 PRUCHA, *supra* note 149, at 782.

308. The most important of these was the so-called Meriam Report by the fledgling Brookings Institution. *See* Frank Miller, *Introduction*, *in* BROOKINGS INSTITUTION: INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION, at ix–xiii (1971) (discussing the Meriam Report's history and influence).

309. *See* 2005 COHEN, *supra* note 21, at 1339–40.

310. Indian Reorganization Act, 48 Stat. 984 (1934). For a critique stating that implementation of this policy imposed alien governmental forms on tribal societies, see STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 94 (1988).

311. The most succinct summary of this position, and the underlying structure of Cohen's later work, is found in Powers of Indian Tribes, 1 Op. Solicitor Dep't of the Interior 445, 448–50 (1934). For the lasting embodiment of this vision, see 2005 COHEN, *supra* note 21.

312. 25 U.S.C. §§ 452–457 (2000).

Indians in the provision of governmental services.[313] An administration lawyer issued an opinion declaring the unconstitutionality of voting restrictions on Indians who maintained tribal relations.[314] But these policymakers also recognized that equality for American Indians required governmental rights for Indian tribes. As D'Arcy McNickle, one of the key players in the Indian New Deal, later declared of Collier, "He was saying that Indians are people, as good as any other people. They love their own values, and they should be allowed to work out their own destinies without being beaten down by superior power. That really is what the argument was all about."[315]

The Indian New Deal did not survive the 1940s. World War II brought the rhetoric of individual Indian equality to the nationalism that had always existed in cries for Indian assimilation.[316] Congressional reports protested against the policy of strengthening Indian tribes. In language reminiscent of Richard Pratt and Carlisle, a 1944 House Report declared:

> The goal of Indian education should be to make the Indian child a better American rather than to equip him simply to be a better Indian .... The present Indian education program tends to operate too much in the direction of perpetuating the Indian as a special-status individual rather than preparing him for independent citizenship.[317]

Threatened with denial of funding for Indian programs if he remained in office, John Collier, the Commissioner of Indian Affairs who had been the principal champion of the policy, was forced out of office in 1945.[318] His departure was followed by those of the other architects of the policy over the next few years.[319] The way was clear for what became known as the Termination Era.

Under Termination, the federal government pursued a policy of ending its special relationship with Indian tribes and transferring tribal territories to the

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313. S. REP. NO. 73-511, at 1 (1934) (discussing the Johnson-O'Malley Act).

314. *See* 1 Ops. Solicitor Dep't Interior Relating to Indian Affairs 799–801 (1938). Felix Cohen filed amicus briefs on behalf of American Indian associations and tribes as well as brought some of the first cases challenging discrimination against individual Indians, helping to establish the Indian right to vote and receive public welfare and social security benefits. *See* Arizona *ex rel.* Ariz. State Bd. of Pub. Welfare v. Hobby, 221 F.2d 498 (D.C. Cir. 1954) (noting in dicta that the Social Security Administration properly refused to approve an Arizona plan that failed to provide for reservation Indians); Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (holding that Indians had the right to vote in Arizona); Acosta v. San Diego County, 272 P.2d 92 (Cal. Dist. Ct. App. 1954) (holding that a reservation Indian was eligible for county welfare relief).

315. 2 PRUCHA, *supra* note 149, at 1001 n.14.

316. For one of the first such cries, see Armstrong, *supra* note 11.

317. H.R. REP. NO. 78-2091, at 9 (1944), *quoted in* PRUCHA, *supra* note 286, at 1001–02.

318. 2 PRUCHA, *supra* note 149, at 1004–05.

319. *See* Felix S. Cohen, *The Erosion of Indian Rights 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 383 (1953).

members individually or as shareholders in state chartered corporations.[320] Despite the huge symbolic impact of termination, only about 3 percent of tribes were terminated, and many of those have now been restored to recognition.[321] A more lasting legal product of the era was Public Law 280, which extended state jurisdiction over Indians on reservations in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, and allowed other states to choose to assume such jurisdiction.[322]

Most relevant for our purposes is the rhetoric of the termination policy. The clarion cry for termination was the need for individual Indian equality. Senator Arthur V. Watkins of Utah, the Chair of the Senate Committee on Indian Affairs and the most important legislative advocate of the termination policy, argued:

> In view of the historic policy of Congress favoring freedom for the Indians, . . . we should end the status of Indians as wards of the government and grant them all of the rights and prerogatives pertaining to American citizenship.
>
> With the aim of "equality before the law" in mind our course should rightly be no other. . . . Following in the footsteps of the Emancipation Proclamation of ninety-four years ago, I see the following words emblazoned in letters of fire above the heads of the Indians—THESE PEOPLE SHALL BE FREE![323]

Despite this rhetoric, some of the key individuals in this Indian freedom program played notable roles in undermining equality for other racialized groups. Dillon Myer, the Commissioner of Indian Affairs who oversaw the beginning of the policy, had directed the relocation and internment of Japanese Americans during the war.[324] Even more interesting is the role of Senator Sam Ervin in the development of the Indian Civil Rights Act (ICRA), which requires tribes to act consistently with most provisions of the Bill of Rights.[325] ICRA was not finally enacted until 1968, the beginning of the Self-Determination Era, and reflects

320. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 152–54 (1977). The selection of tribes for termination was inconsistent and ad hoc: Although termination was supposed to target tribes considered prepared for independence, it appears that many were terminated because they were small, because they were in California or Oregon, or simply because they caught the attention of policy makers. *See id.* at 146. One of the strangest decisions was to terminate the federal status of those Utes with mixed blood. *See* 25 U.S.C. § 677(d) (2000).

321. *See* Wilkinson & Biggs, *supra* note 320, at 151.

322. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953).

323. 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).

324. Cohen, *supra* note 319, at 389 n.159.

325. *See* 25 U.S.C. §§ 1301–1303 (2000).

elements of both policies.[326] But when Senator Ervin began working on the project in 1961, it was Termination Era legislation, imposing the full panoply of constitutional individual rights on Indian tribal governments and providing comprehensive federal review of tribal actions.[327]

Senator Ervin was apparently deeply committed to the bill, which he saw as correcting part of the nation's injustice to Indian peoples and their unconstitutional treatment at the hands of their tribes.[328] But there are significant ironies in his championship of the bill. First, although the primary impetus for the hearings on civil rights in Indian country was the multiple complaints of abuse and discrimination by federal, state, and local officials, the bill addressed only violations by Indian tribes.[329] Even more revealing, Ervin was a celebrated opponent of civil rights for African Americans. The Governor of North Carolina appointed Ervin to the Senate in 1954, just months after the Supreme Court issued its decision in *Brown v. Board of Education*.[330] He used his first news conference to attack the decision and the justices who, he said, "'wished to recreate our Government in their own images.'"[331] The senator became "Jim Crow's most talented legal defender," and a man whom "southern apologists praised . . . as one of the nation's preeminent constitutional scholars."[332] In the Senate, Ervin was a leading voice arguing that the Constitution, "the most precious instrument of government the earth has ever known," prohibited the civil rights legislation intended to make real the unfulfilled promises of the Reconstruction Amendments.[333] In the midst of this battle, his advocacy for Indians allowed him to twit his northern liberal colleagues for ignoring "the minority group most in need of having their rights protected by the national government."[334] Ervin may have been the first to fall

326. In recognition of the central role of religion in Indian governments, for example, the Indian Civil Rights Act (ICRA) does not prohibit establishment of religion. *See* 25 U.S.C. § 1302(1) (2000); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 n.14 (1978) (discussing some differences between the ICRA and the Bill of Rights). In a further recognition of the important of tribal resolution of fundamental issues, federal review of ICRA matters is only permitted in habeas cases, those where the petitioner's liberty is at stake. Santa Clara Pueblo v. Martinez, 436 U.S. at 67; *see* 25 U.S.C. § 1303 (2000).

327. *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557, 588–89 (1972).

328. *See id.* at 575.

329. *See id.* at 584–89.

330. *See* Karl E. Campbell, *Senator Sam Ervin and School Prayer: Faith, Politics, and the Constitution*, 45 J. CHURCH & STATE 443, 445 (2003).

331. *Id.*

332. *Id.*

333. *Id.* at 444.

334. Burnett, *supra* note 327, at 575 (citing Letter From Lawrence M. Baskir, Chief Counsel and Staff Director, Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, to Bennett (March 5, 1970) (on file at the office of the Harvard Legislative Research Bureau)).

into what is today a familiar category: the policymaker who opposes sovereign rights for tribes on the grounds that they violate civil rights that he supports in no other context.[335]

Although the Termination Era reversed the congressional New Deal policy, the record in the Supreme Court was more mixed. Nineteen fifty-five saw a new low for judicial protection of tribal rights, as the Court held that the Takings Clause did not apply to federal acquisitions of tribal lands unless Congress had formally ratified the tribal property right.[336] Nineteen fifty-nine, however, saw an even more important success. In *Williams v. Lee*,[337] the Court held that state courts had no jurisdiction over a claim brought by a non-Indian against a Navajo couple to enforce a contract entered into on the Navajo Reservation. From an individual racial rights perspective, the decision might be seen as affirming a separate status of a people that are in part racially defined.[338] But the Court emphasized the ways that the decision was necessary to ensure tribal equality, which rested on governmental rights that did not depend on the racial status of the parties:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.[339]

At least some of the justices understood the links between *Williams* and their civil rights decisions. Justice Frankfurter sent Justice Black a note on *Williams v. Lee* stating that he was "pleased to concur in this indirect affirmation of *Brown v. Board of Education*."[340] Just as *Brown* was a landmark decision in the effort to undermine racial limitations on African American individuals, so *Williams* was a landmark in the effort to reverse the racially inferior position of Indian governments.

It is no coincidence that both decisions came in the same decade. Both African Americans and American Indians had served in large numbers in

335. For a more recent example, see OFFICE OF MGMT. & BUDGET, *supra* note 3 (opposing H.R. 505, which seeks to give Native Hawaiians the right to self-governance, on the grounds that it would "divide sovereign United States power along suspect lines of race and ethnicity").

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

337. 358 U.S. 217 (1959).

338. To be a citizen of the Navajo Nation, one must have at least one-fourth Navajo blood. NAVAJO NATION CODE tit. 1, §§ 701–703 (2006).

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

340. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 29 n.140 (1999).

World War II and experienced the novelty of competition in a white arena.[341] Both groups came back impatient with the limitations placed upon them by the country for which they had risked their lives.[342] For American Indians, this generated new efforts to resist the restrictions placed on tribes.[343] *Williams v. Lee* was a product of this movement, in particular of efforts by the Navajo Nation to develop and to assert the independence of its tribal courts.[344] Nationally, Indian tribes began joining together to pursue their quest for tribal equality. The National Congress of American Indians, the first national supratribal organization focused on tribal survival was created in 1954.[345]

At the same time, Indian people fought the persistent political limitations placed on Indians who maintained their connection with their tribes.[346] Long after Indians were declared citizens in 1924, several of the states with the largest Indian populations continued to deny Indians the right to vote.[347] In 1928, the Arizona Supreme Court held that two Pima Indians residing on the Gila River reservation as "wards of the federal government" were "persons under guardianship" ineligible to vote.[348] This decision was finally overturned in 1948, when two Mohave-Apache Indians, one of them a World War II veteran, again challenged the restriction.[349] In 1927, New Mexico had responded to the 1924 Indian Citizenship Act by declaring that all "Indians not taxed" were ineligible to vote, a term that apparently excluded even reservation residents who paid some federal and state taxes.[350] The legislature finally repealed this provision in 1951, after a 1948 federal court decision declared the law invalid.[351] In 1956, the

341. *See* ALISON BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS 40 (1991) (discussing Indian participation in military service).

342. *See* 2 PRUCHA, *supra* note 149, at 1009.

343. *See* NAGEL, *supra* note 29, at 118.

344. *See* Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 358 (1978) (describing the contribution of Navajo court reforms intended to protect court independence and the *Williams* decision).

345. *See* KENNETH R. PHILP, TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL TO SELF-DETERMINATION, 1933–1953, at 2 (1999) ("These Native American leaders advocated new forms of self-determination that differed from the melting-pot concept favored by most Euro-Americans.").

346. *See* TO SECURE THESE RIGHTS, *supra* note 13, at 40 ("Protests against these legal bans on Indian suffrage in the Southwest have gained force with the return of Indian veterans to those states.").

347. For an excellent summary of postcitizenship efforts to block Indian political participation, see Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 181–202 (1991).

348. Porter v. Hall, 271 P. 411, 417–18 (Ariz. 1928).

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

350. MURRAY, *supra* note 12, at 299; *see also* Tapia v. Lucero, 195 P.2d 621, 621–22 (N.M. 1948) (remanding despite a stipulation that plaintiffs paid "some state and federal taxes," for factual development of the kind of taxes paid, and "the tribal relationship, laws and customs of these Pueblo Indians").

351. *See* Montoya v. Bolack, 372 P.2d 387, 390–91 (N.M. 1962) (describing the unpublished 1948 order and the 1953 repeal of prohibition).

Utah Supreme Court held native people residing on reservations still could not vote because they were not "residents" of the state, rejecting arguments based on Indian citizenship, eligibility for the draft, and payment of taxes.[352] The legislature finally repealed the restriction in 1957 after the U.S. Supreme Court granted certiorari in the case.[353] Idaho repealed its constitutional prohibition on voting by "Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization" in 1950.[354] In 1951, South Dakota repealed the statutory provision that Indians "maintaining tribal relations . . . cannot vote or hold office."[355] In 1960, Minnesota also finally removed the constitutional provision limiting the Indian vote to "[p]ersons of mixed white and Indian blood who have adopted the customs and habits of civilization" and "[p]ersons of Indian blood . . . who have adopted the language, customs and habits of civilization, after an examination before any district court of the State,"[356] although it had apparently not enforced the restriction after 1934.[357]

Just as native people were fighting to break the limitations placed on tribes as governments, they were defeating the limitations placed on them as individuals for their decisions to remain with their tribes. In the name of racial equality, the Termination policy had reversed the New Deal support for tribal self-government, and resurrected old habits of treating tribes as racial minority groups to be assimilated into the white mainstream. At the same time, however, native people were building the foundation for a resurgence of tribal rights that is continuing today.

B. Equality and Backlash: 1968 to the Present

By the late 1960s, the Termination policy was moribund. All of the 1969 presidential election candidates opposed termination, and in 1970, President Nixon denounced termination as morally and legally unacceptable, initiating the Self-Determination Policy that has remained the official legislative and executive objective to this day.[358] Under this policy, over half of governmental services for

352. Allen v. Merrell, 305 P.2d 490 (Utah 1956).

353. *See* Rothfels v. Southworth, 356 P.2d 612, 613 (Utah 1960) (discussing the history of the repeal).

354. MURRAY, *supra* note 12, at 118. Idaho left in place, however, the prohibition disenfranchising "Chinese or persons of Mongolian descent, not born in the United States." *Id.*

355. *Id.* at 423.

356. *Id.* at 231; *see also* MINN. CONST. art. VII, § 1, cl. 3, 4 (repealed 1960).

357. *See* Minn. Op. Atty. Gen. 398 (1934) (opining that any Indian born in the United States who meets age and residence qualifications may vote in Minnesota).

358. Special Message on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970).

Indians have been turned over to tribal control,[359] while other legislation has enabled tribes to protect their cultural and natural resources[360] and has furthered tribal economic development.[361] These measures have gone some way in restoring tribes to the position of governments rather than doomed minority groups. By undermining the power expectations built around the helpless ward status of Indian tribes, however, these changes catalyzed a backlash that uses the rhetoric of race equality in the service of the old racial order.

Cheryl Harris wrote in *Whiteness as Property* that the privileges of race are a property right that law and policy protects in its holders.[362] She used the antiaffirmative action cases of the Supreme Court as an example of retrenchment against initiatives that would diminish the economic and social advantage attached to whiteness.[363] This Article has argued that in the Indian context, the privileges of whiteness are not so much individual superiority—only in certain communities is doing better than the Indian an important part of white individual identity. Rather, in Indian-white relations, whiteness includes the right to dominate and profit from tribal territories without regard for tribal governments. Although Congress has, to varying degrees, pursued the policy of self-determination, the Supreme Court has since the late 1970s acted to protect the privileges of whiteness in Indian law.

An important turning point in this trend was the Court's 1978 decision *Oliphant v. Suquamish Indian Tribe*.[364] The denigration of tribal governments and the denial of their right to interfere with non-Indian interests has lain at the heart of racism against Indian tribes. But with the New Deal and Self-Determination Eras, tribes were both developing and being encouraged in the development of judicial systems that could speak meaningfully to modern issues and exercise control over tribal territories. As part of this process, dozens of tribes were explicitly asserting jurisdiction over non-Indians on their reservations.[365] *Oliphant*, however, held that tribes had never had criminal jurisdiction over non-Indians, finding that "by submitting to the overriding sovereignty of the United States," tribes "necessarily give up their

359. *See* 2005 COHEN, *supra* note 21, at 1346.

360. *See, e.g.*, Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108 (2000); Native American Graves Protection and Repatriation Act, *id.* §§ 3001–3013; National Indian Forest Resource Management Act, *id.* §§ 3101–3120.

361. *See, e.g.*, Indian Financing Act, *id.* § 1451; Indian Gaming Regulatory Act, *id.* §§ 2701–2721; 2005 COHEN, *supra* note 21, at 1314–34.

362. Harris, *supra* note 48, at 1713–14.

363. *Id.* at 1766–77.

364. 435 U.S. 191 (1978).

365. *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1054–59 (2005).

power to try non-Indian[s]" except with the authorization of Congress. The case explicitly relied on older images of tribes as "characterized by a 'want of fixed laws [and] of competent tribunals of justice,'"[366] which could be allowed only such jurisdiction as was "consistent with the safety of the white population."[367] The historical understanding of tribal governmental inadequacy had become final, not subject to change in the face of modern circumstances. Despite governmental policies supporting tribal courts and the current state of the courts themselves, the Court would not allow them to intrude on the rights of white citizens (even those who, like Oliphant, got into drunken brawls on reservations and assaulted tribal police officers).[368]

Underlining that the Court was protecting the privileges of whiteness, not citizenship, in the same term the Court decided that tribes had inherent sovereignty to try tribal members,[369] and that a tribal decision to deny membership to the children of a Santa Clara woman could not be reviewed by the federal court.[370] Where only Indians maintaining tribal relations were concerned, the Court was willing to accord tribes governmental powers. *Oliphant*, although couched in terms of individual liberty, was an attempt not to let the shift in racial roles go too far, this time in modern garb.

Like *Regents of the University of California v. Bakke*,[371] decided just over three months later, *Oliphant* has spawned a whirlwind almost, but not quite, destroying tribal judicial and regulatory jurisdiction over nonmembers.[372] This judicial backlash has largely confined the 1959 *Williams v. Lee*[373] decision to its facts, resulting in the peculiar situation that states lack jurisdiction over activities occurring in Indian country where tribal members are the defendants, but tribes only in limited circumstances have jurisdiction over such activities where non-Indians are the defendants.[374] This jurisprudence has elided past affirmations of tribal rights as governments with territorial jurisdiction.[375]

This judicial backlash has been accompanied by a popular backlash that also affirms the racial limitations on the tribal role. Although the romanticized noble savage remains a treasured part of popular culture, modern-day

366. *Oliphant*, 435 U.S. at 210 (quoting H.R. REP. NO. 23-474, at 18 (1834)).
367. *Id.* at 204 (quoting *In re* Mayfield, 141 U.S. 107, 115–16 (1891)).
368. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 5–6, Oliphant v. Suquamish, 435 U.S. 191 (No. 76-5729).
369. *See* United States v. Wheeler, 435 U.S. 313, 332 (1978).
370. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
371. 438 U.S. 265 (1978).
372. *See* 2005 COHEN, *supra* note 21, at 224–37.
373. 358 U.S. 217 (1959).
374. *See* Berger, *supra* note 365, at 1067.
375. *See* Powers of Indian Tribes, 1 Op. Solicitor Dep't of the Interior 445, 448–55, 466–76 (1934) (discussing tribal territorial jurisdiction not limited by ownership of land).

manifestations of Indian rights are met with less approbation. As tribes assert governmental rights that impinge on the privileges of whiteness, protesters attempt to rerace tribes and their members to undermine those rights.[376]

One of the earlier manifestations of this phenomenon was in the treaty fishing battles beginning in the 1960s. Like many tribes, when the tribes of the Northwest and of the Midwest Great Lakes states ceded land by treaty in the nineteenth century, they preserved their right to hunt and fish in the ceded lands.[377] In the twentieth century, however, non-Indian commercial overfishing and depletion due to pollution, dam projects, and introduction of invasive species led to increased restrictions on fishing practices. When this regulation resulted in crackdowns on tribal fishing, the tribes fought back, asserting their ancient treaty rights.[378] For the tribes involved, these battles catalyzed the resurgence of tribal government and cultural identity.[379]

The struggle generated a renaissance of racial attacks on the Indian tribe. Indeed, the district court hearing the Washington cases made the parallels between the tribal struggles and the demand for individual racial equality clear, noting that "[e]xcept for some desegregation cases," in seeking to protect these treaty rights, "the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."[380] In the Great Lakes, for example, Indians had been incorporated into the tourism industry as guides, providing wealthy fisherman with indigenous access to the natural world.[381] Now, however, they were asserting rights to fish free of state regulation that were superior to and, it was asserted, interfered with the rights of sport fisherman.[382] The affront to the accepted racial-economic hierarchy brought hundreds of protesters to Anishinaabe fishing sites.[383] As conflict with Indians had throughout history, the dispute resulted in the cheapening of Indian bodies and life. The Northwestern bumper sticker "Can an Indian, Save a

376. *See, e.g.*, Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373 (2002).

377. *See, e.g.*, Treaty With the Chippewas, U.S.-Chippewa, art. 11, Sept. 30, 1854, 10 Stat. 1109 (granting the right to hunt and fish); Treaty With the Nisqualli, Puyallup, etc. (Treaty of Medicine Creek), art. 3, Dec. 26, 1854, 10 Stat. 1132 (preserving the "right of taking fish, at all usual and accustomed grounds and stations"); Treaty With the Ottawa and Chippewa Nations of Indians, U.S.-Ottawa-Chippewa, art. 13, Mar. 28, 1836, 7 Stat. 491 (providing a right of hunting "with the other usual privileges of occupancy").

378. *See* Puyallup Tribe v. Wash. Dept. of Game, 391 U.S. 392 (1968); People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976); People v. Jondreau, 185 N.W.2d 375 (Mich. 1971).

379. *See* LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS 31 (Univ. of Neb. Press 2002).

380. Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1979).

381. *See* NESPER, *supra* note 379, at 51, 64.

382. *See id.* at 70.

383. *See id.* at 4.

Salmon"[384] in the Midwest became signs saying "Spear an Indian: save a walleye" or even "Spear a pregnant squaw, save two walleyes."[385]

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse Wisconsin*[386] the federal district court documented the Northern Wisconsin protests.[387] Protesters used a barrage of racial epithets—"Tonto," "Redskin," and "timber nigger"[388]—but also employed insults that recalled tropes of the racialized Indian tribe. They renewed the nineteenth century characterization of tribal members as lazy and dependent on government handouts, referring to the fishermen as "[a]ll you Indians that are on welfare" and "welfare warriors," and stating: "Look at those fat Indians. Eating all the commodities up at Flambeau there."[389] Reasserting the history of Indian-white conflict, protesters yelled, "You're a defeated people; you are a conquered people," "the only good Indian is a dead Indian," and "Custer had the right idea."[390] The protesters also challenged the spearers as lacking Indian authenticity, singing "[a] half breed here; a half breed there,"[391] mocking the cultural and religious significance of spearing, and circulating pamphlets stating that Chippewa spearers use spears "mass produced in China and Korea," and outboard motors "manufactured in Japan."[392] The district court found that the protests sought to deny the Indians property rights because of their race in violation of 42 U.S.C. § 1982.[393] Discarding the evidence of the leader of the protests that he had previously treated Indians well, Judge Barbara Crabb opined, "It is one thing to treat a group well when its members present no economic or personal inconvenience; it is quite another to continue to treat them that way when they have asserted interests in competition with one's own."[394]

More recent examples of this truism come from the debates over Indian mascots and casino gaming. In further testament to the strange racial position of American Indians in the United States, Indians were until recently one of the

384. Bruce Barcott & Stephen Baxter, *What's a River for?*, MOTHER JONES, May/June 2003, at 44.
385. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse Wis., 843 F. Supp. 1284, 1289 (W.D. Wis. 1994).
386. 843 F. Supp. 1284.
387. *Id.* at 1288.
388. *Id.*
389. *Id.* at 1288, 1290.
390. *Id.* at 1288–89.
391. *Id.* at 1289.
392. *Id.* at 1291.
393. *Id.* at 1285–86.
394. *Id.* at 1294.

most popular sports team names.[395] The use of another racial group—African Americans, Mexicans, or Asians—in this fashion would generate horror in modern America.[396] But Indian team names and the accompanying stereotypical depictions of native people are justified as honoring native peoples.[397] This honor is reminiscent of the role of Pocahontas in the racist south. Absorbed within a white American nation, Indian mascots symbolize a pleasurable connection with the romanticized noble savage; when modern day Indians challenge non-Indian use of Indian images, however, they are quickly reduced to racist stereotypes. Efforts to replace Fighting Sioux as the University of North Dakota team name, for example, generated a poster representing Indians as an alcoholic, lazy, and defeated people dependent on government handouts: "If you get rid of the fighting Sioux we get rid of your free schooling," "Drink'em lots o' fire water," "Pay taxes," "Find something better for time [sic] 'like a job,'" and "You lost the war, sorry."[398]

Protests against tribal casino gaming are particularly interesting, because they draw directly on a racially fixed image of the tribe.[399] The accepted and honored tribe is poor, traditional, and close to the earth.[400] By engaging in profitable commercial enterprises, tribes act as modern governments and violate this accepted Indian image. Others challenge the right to game on the grounds that tribal members are not racially Indian enough. As an Indian Law professor in Connecticut, the site of two vastly profitable tribal casinos, I have more than once been asked, "But are they really Indian?" Although the Indian, or more appropriately tribal, status required for eligibility to enter into a gaming compact does not depend on biological race but rather political status as a recognized tribe,[401] the thrust of these questions is whether the asker would recognize the tribe's members as racially Indian. As one townsperson complained, "more than half [of the Mashantucket Pequots] are predominantly

395. *See* Christine Rose, *The Tears of Strangers Are Only Water: The Refusal of America to Understand the Mascot Issue*, 1 VA. SPORTS & ENT. L.J. 283, 284 (2002) (noting that over 2700 schools had Indian mascots or team names).

396. The only other human beings used as team names—the Boston Celtics, the Minnesota Vikings, the New England Patriots, and the Notre Dame Fighting Irish—are by groups who are, or historically were, largely descended from these people. Outside reservations, however, the teams named Braves, Indians, Redskins, or Scouts, have historically had virtually no native membership.

397. *See* Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1010, 1013–14 (1995) (discussing the claim of using Indian team names as a form of honoring).

398. Poster: If You Get Rid of the Fighting Sioux (Mar. 2001) (on file with Univ. of N.D.), *available at* http://www.und.nodak.edu/org/bridges/images/poster2.jpg.

399. *See* Cramer, *supra* note 29, at 314–315.

400. *See id.* at 319, 333.

401. *See* 25 U.S.C. § 2710 (2000).

African American and the rest are mostly white."[402] Renee Cramer notes the ways that cultural and racial traits blend in these critiques as the Pequots are also accused of being too successful, and therefore "too White," to be Indian.[403] The rights of Indian tribes are thus fixed by their race, but efforts to assert those privileges in ways that interfere with white expectations result in challenges to racial authenticity.

Most recently, questions of race and Indian tribes have reached the national stage in a different posture, through the exclusion of descendants of African American slaves by the Cherokee Nation of Oklahoma. As discussed above, members of the Cherokee Nation held African slaves and enacted oppressive slave laws in the period before the Civil War.[404] After the war, the Cherokee Nation agreed by treaty that former slaves would henceforth become tribal citizens.[405] During the Allotment Period, the United States created rolls of tribal members; these rolls placed whites who claimed citizenship by marriage on "Intermarried White" rolls, those of Indian appearance or those who could prove Indian ancestry on "Cherokee by blood" rolls, and those of African appearance, frequently even if they possessed Indian ancestry, on "Freedmen" rolls.[406] The Cherokee Nation has recently amended its Constitution to exclude from citizenship all those who cannot prove descent from the by-blood rolls, thus effectively excluding the few remaining descendants from the Intermarried White rolls as well as many more descendants from the Freedmen rolls.[407] Although these measures do not exclude those with both African American and Cherokee descent, and many phenotypically black individuals are enrolled tribal citizens, the measures raises the specter of de facto racial discrimination in a powerful way.

A recent comprehensive doctoral dissertation shows that in enacting new restrictions limiting membership to those of tribal descent, these tribes are following the trend of most other tribes who have amended their membership requirements since the 1960s.[408] Although federally influenced requirements of the 1930s were more likely to depend on residence and Indian blood quantum, more recently a number of tribes, seeking to establish historical continuity

402. Cramer, *supra* note 29, at 330.
403. *Id.*
404. *See* MCLOUGHLIN, *supra* note 35, at 31–32 (1983); THE CONSTITUTION AND LAWS OF THE CHEROKEE NATION: PASSED AT TAHLEQUAH, CHEROKEE NATION, 1839–51, at 19, 44, 53, 212 (1852).
405. Treaty With the Cherokees, U.S.-Cherokee, art. IX, July 19, 1866, 14 Stat. 799.
406. *See* Vann v. Kempthorne, 534 F.3d 741, 744 (D.C. Cir. 2008).
407. S.E. Ruckman, *Cherokee Freedmen: Tribe Reinstates Citizenship Until Appeals Finished*, TULSA WORLD, May 15, 2007, at A13.
408. *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance*, 33 AM. INDIAN L. REV (forthcoming 2009).

with their tribal ancestors in the face of geographic dispersion and intermarriage of their members, have shifted to a tribal blood standard.[409] This trend should be seen as an effort to assert and to maintain sovereignty rather than racism, a turn from the racially Indian to the politically tribal.

Although the Cherokee action is part of this trend, there is a powerful argument that racism against African Americans plays a role as well. The measure is entangled with the tribe's own participation in the racist institution of slavery and may reflect the tribe's adaptations to first Southeastern and then Oklahoman racist culture. Thus while a shift to a tribal blood quantum measure alone should not implicate charges of racism, the distinctive history here suggests that sovereignty should not insulate the tribe's actions from scrutiny. Importantly, however, the appropriate avenues for such scrutiny are those generally applicable to sovereigns: First, political pressure while the Cherokee Nation evaluates this issue through its own governmental mechanisms;[410] and second, federal evaluation of whether the tribe is in violation of its 1866 treaty with the federal government.[411] If the federal government decides to take action, the appropriate remedies are those familiar from international diplomacy, such as censure, economic sanctions, and refusals to enter into further agreements, rather than imposition of federal membership rules.

We are in a time of shifting racial roles, with tribes no longer fully limited by their inferior Indian status and, for the first time since they were powerful trading partners with the colonists, possessing important negotiating power as governments. Both in law and popular culture, however, there is a resurgence of racialized limitations on the Indian tribe in an attempt to cabin this shift. The Supreme Court attempts to fix tribal jurisdiction by race, limiting it to tribal members only, while popular protest both uses old stereotypes of Indian tribes and attacks the racial authenticity of tribes that challenge establish hierarchies of privilege. The history described in this Article suggests that, despite the new responsibilities sovereignty creates for tribes themselves, non-Indians concerned with racial equality should seek to protect meaningful tribal sovereignty rather than undermine it.

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409. *Id.*

410. Before the constitutional amendment, the Cherokee high court struck down as unconstitutional an ordinance preventing freedmen citizens from voting. Allen v. Cherokee Nation Tribal Council, JAT-04-09 (Okla. Trib. 2006). Since the constitutional amendment, a new suit has been making its way through the tribal courts. *See* S.E. Ruckman, *supra* note 407.

411. Legislative measures are largely stayed as a challenge to the measure continues through the courts. Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008).

CONCLUSION

Although history dominates this Article, this history has powerful implications for modern tribal survival. Native nations are in the midst of a cultural and political renaissance. Fueled by the refusal to give up the Indian identities that have sustained them, and supported both by intertribal action and overdue governmental encouragement, modern tribes have reemerged as formidable sovereigns. Development of tribal governments and economies has finally begun to shorten the gap between Indian and white health, education, and standards of living. By interfering with long-established hierarchies of power and non-Indian expectations, however, this renaissance has engendered protests that tribes are not governments but rather racial entities whose rights are fixed by their historic roles. Ironically, this effort to fix tribes in past-subordinate positions has been strengthened by the rhetoric of racial equality.

The history presented in this Article helps reveal that such efforts largely continue past patterns of racialization of native people and Indian tribes. Because civilizing individual Indians formed a central part of the rationale for colonialism, the permanent inferiority of, or need to segregate, the Indian individual was not the dominant expression of racism against Indians. Indeed, the most important racial defect of the individual Indian was the innate urge to cling to the Indian tribe and resist the benefits of assimilation. Tribes, however, were permanently defined by their racial origins. They were representatives of a primitive culture defined by familial ties and inherent habits, rather than modern consent-based governments. As such, they could be denied territory, sovereignty, and many other rights inconvenient with the destiny of the non-Indian, American race. This combination—denigrating the tribe, assimilating the individual—was perfectly tailored to the need to justify colonization yet maintain the moral superiority of Anglo-American identity and democracy. Modern backlash against tribes, which emphasizes the racial composition of Indian tribes and their adherence to insular traditions construed as inferior and unfair, is thus not the product of a society committed to racial equality, but the same old pattern of tribal oppression reshaped for modern ideology.

Shifting our understanding of the role of racism in Indian policy has important implications for equal protection law and its apparently anomalous treatment of American Indians. While classic equal protection jurisprudence can counter discrimination against Indians as individuals, it may pose obstacles to equality for Indians as members of tribes, because tribal membership often

is, and will likely continue to be, dependent in part on tribal ancestry.[412] Although the governing precedent upholds special treatment of Indians so long as those measures are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," thus permitting measures that are "reasonable and rationally designed to further Indian self-government,"[413] this precedent is under attack both as a matter of law and of policy.[414] Understanding that the most devastating manifestations of racism for American Indians were denial of the governmental status of the Indian tribe and limitation of tribal status to that of a racially inferior group provides a new lens to understand why protection of tribal governments is in fact a necessary means to undermine racism toward American Indians.

It also, however, should serve as a cautionary statement to Indian tribes themselves. There are important traditional and contemporary reasons for maintaining descent as a criteria for tribal membership.[415] But in order to truly act as sovereigns, tribes must consider tribal values of fairness, community, and justice, and reject those measures that do not serve those values.[416]

By examining the ways that race has worked for American Indians, this Article also contributes to a larger scholarly body of work seeking to understand the many manifestations of race in a multiracial America.[417] In particular, it helps to develop our understanding of the intersection of colonialism and racism, something that American scholars have been slow to incorporate given the forcible separation of African Americans, our archetypical racialized group, from their cultures and nations.[418] From the moment of racism's emergence in

412. *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 446–71 (2002) (discussing the federal pressures and tribal concerns that may support descent-based membership requirements); Gover, *supra* note 408.

413. Morton v. Mancari, 417 U.S. 535, 555 (1974).

414. *See, e.g.*, Goldberg, *supra* note 376 (discussing cases rejecting the application of the Indian Child Welfare Act and implementation of the Reindeer Industry Act to favor Alaska Natives); H.R. 505 POLICY STATEMENT, *supra* note 3 (opposing strongly a measure to recognize Native Hawaiian sovereignty on the grounds that it "would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups according to varying degrees of privilege").

415. Goldberg, *supra* note 412, at 446–71.

416. *See, e.g.*, Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

417. *See, e.g.*, LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007) (discussing the formation of a Mexican racial identity); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002) (discussing the position of Asians in American society); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005) (discussing the intersections of race and gender in citizenship laws affecting Asian women).

418. *See also* Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395, 1399 (2002) ("Typically discussions of race ignore the centrality of colonialism in understanding Mexican, Puerto Rican, Native American, Filipino, Native Hawaiian, and other now-American racial minority groups.").

early Modern Europe, race was conflated with culture and nation, with an inferior culture implying an inferior biology.[419] In the United States, this intersection has impacted not only American Indians but other groups for whom the social meanings of race, culture, and nation are fully entangled. Mari Matsuda reminds us that "[f]ear of blackness and oppression of African Americans formed American culture,"[420] providing a deadly model for the treatment of American Indians along with all other differently raced groups. In the same fashion, the patterns of racialization of American Indian governments and cultures have influenced not only responses to Latin Americans and Asians, but also the cultural demands for "whiteness" that now confront African Americans.[421]

Race, the complex body of social meanings that attach to group differences of ancestry and appearance, has deeply influenced the history and institutions of the United States. Understanding the way that race has worked with respect to American Indians, one of two differently raced groups present throughout the formation of American identity, is thus necessary to understanding and grappling with the history of the United States. Because this history of racialization shaped and continues to impact policy and treatment of American Indians, it is also an important part of the ongoing quest for Indian and tribal survival. This Article, by unpacking and examining the formation and continuing uses of American Indian race, hopefully contributes to both of these goals.

419. *See* James H. Sweet, *The Iberian Roots of American Racist Thought*, 54 WM. & MARY Q. 143, 144 (1997); *see also* Brooke, *supra* note 77, at 20.

420. Matsuda, *supra* note 47, at 170.

421. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (discussing legal and public reactions to traditionally "Black" hairstyles); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (discussing employment discrimination and performative aspects of race).

Native America

A History

Michael Leroy Oberg
State University of New York,
College at Geneseo

Second Edition
2010

WILEY Blackwell

religious life, Blue Lake became part of the Carson National Forest in 1906. The Forest Service opened the area to the American public soon after but also to timber interests. As early as 1350 AD, Pueblos from Taos had farmed lands watered by rivers flowing from Blue Lake. They depended upon Blue Lake, and did not feel that this precious resource could be shared. Taos Pueblo brought a suit before the Indian Claims Commission. New Mexico's congressional delegation and representatives of the United States Forest Service challenged Taos Pueblo every step of the way.

In September of 1965 the Indian Claims Commission found that the United States had taken Blue Lake and the surrounding lands without just compensation. The Commissioners ordered that researchers determine the value of the lands Taos Pueblo had lost. The ruling pleased the Pueblos, but they did not want monetary damages. They sought the return of the land. Editorials appeared in newspapers around the United States supporting Taos Pueblo, and New Mexico Senator Clinton Anderson reluctantly introduced legislation in 1966 to arrange for the return of Blue Lake.

Other native nations sought the return of their lands. Some won their cases before the Indian Claims Commission and, like Taos Pueblo, refused to accept the monetary award because they wanted the land. Acceptance of the award would, under the law establishing the Indian Claims Commission, have quieted all their claims. Unlike other native peoples, however, Taos Pueblo succeeded. The Taos and their numerous supporters argued on religious and moral grounds; the significance of the lands they had lost lay in their religious and spiritual importance. Their leaders pursued a vigorous campaign to inform the public about the importance of Blue Lake in their religious life and made their struggle a symbol of the historic mistreatment of native peoples. In this sense, President Nixon was only too happy to sign the legislation returning Blue Lake to Taos Pueblo when it finally reached his desk late in 1970. It cost him nothing to do so. The president said at the signing ceremony that "this is a bill that represents justice, because in 1906 an injustice was done in which land involved in this bill, 48,000 acres, was taken from the Indians involved." Nixon argued that by signing the legislation, his administration had broken with a troubling past. The United States, he said, had embarked "in a new direction in which we will have the cooperation of both Democrats and Republicans, one in which there will be more of an attitude of cooperation than paternalism, one of self-determination rather than termination, one of mutual respect." The bill returned Blue Lake to Taos Pueblo, a significant act by the man who presided over a government that had done so much historically to dispossess native peoples.

Red Power

Yet native peoples might have pointed out to the president that plenty of injustice remained, and that many of the crimes of the past still occurred in Indian country. The president could choose his battles, addressing symbolic measures that helped specific native communities. The representatives of Taos Pueblo were well-behaved, but growing numbers of young native peoples, on college campuses and in relocated Indian communities, on the reservations and at protests against the Vietnam War, lurked behind them, determined to combat what they considered their continuing marginalization. Had not these young activists organized to protest the existing state of affairs in the government, it is not likely that the president would have felt compelled to act.

The roots of this activism ran deep. Though many historians have paid more attention to the dramatic, attention-grabbing tactics of the American Indian Movement, the modern movement for Indian rights began with struggles against termination in the immediate aftermath of World War II and continue today. Native men who had fought in the war returned assertive and determined to enjoy their full rights as citizens. Many of them took advantage of the G.I. Bill of Rights to attend college, acquiring skills that they carried back to their communities and channeled into activism, or the administration of OEO programs that played so large a role in the War on Poverty. These veterans had fought for freedom and democracy in Europe and the Pacific, for the United States and for their homelands. They expected those things for their people at home.

Many of them were aware of decolonization struggles in Asia and Africa. According to the journalist Edmund Wilson, who visited the Iroquois in the late 1950s, "the leaders of these Indian movements ... have sensed that the white man has been losing his hold, and, like the rest of the non-white races, they are sick of his complacency and arrogance." They believed, Wilson continued, that "in view of our righteous professions in relation to the Germans and Russians, they know that, for the first time in history, they are in a position to blackmail us into keeping our agreements and honoring their claims."

Certainly Wilson overstated his case, but he was fundamentally correct that native peoples were coming together in unprecedented ways to criticize government policies. There were the moderate proposals offered by the Fund for the Republic, which published in January of 1961 "A Blueprint for Indian Citizens," written by a special blue-ribbon commission headed by Cherokee chief and oil executive W.W. Keeler. "An objective which should undergird all Indian policy," the Keeler Commission wrote, "is that the Indian individual, the Indian family, and the Indian community be motivated to participate in solving their own problems." Favoring assimilation, and writing from the position that "only men who have a foot in each way of life and an appreciation of both can effectively" bridge the chasm between native peoples and white Americans, the Commission concluded that tribes should not be terminated, and that "the Indian must be given an opportunity he can utilize."

The summer of 1961 brought the American Indian Chicago Conference. Some 467 delegates from ninety native communities attended the gathering organized by the anthropologists Sol Tax and Nancy Lurie. The conference brought national attention to a host of local problems in Indian country, but also placed the movement for the rights of native nations in an international context. Senecas educated attendees about Kinzua, for example, while the Santa Clara Pueblo delegate Edward Dozier described the struggles of native peoples for freedom as part of a larger moment, "manifested in many parts of the world," and of which "the situation in Africa, in Southeast Asia and elsewhere are examples."

It was a diverse gathering. The delegates wanted different things. They could not agree on everything, but they did produce a startling "Declaration of Indian Purpose," a manifesto that laid out the goals of Indian activists. They argued that the United States had "a positive national obligation to modify or remove the conditions which produce the poverty and lack of social adjustment as these prevail as the outstanding attributes of Indian life today." That meant abandoning the desiccated logic of termination, but also providing native peoples with the assistance they required to solve the problems they faced in their own ways. "What we ask of America," the delegates wrote, "is not charity, not paternalism, even when benevolent." Rather, they asked "that the nature of our situation be recognized and made the basis of policy and action."

But getting the government to act was difficult. Sometimes direct action was needed to prod American officials to do the right thing. The National Indian Youth Council (NIYC), founded in Gallup, New Mexico, in August, in a sense grew out of the Chicago Conference. The founders, drawn from a cross-section of Native America that included Crows, Potawatomis, Mandans, Sioux, and many others, had been active in college Indian clubs and organizations going back to the 1950s. They hoped to effect the repeal of HCR 108, and they wanted to protect the treaty rights of native nations. Under the leadership of the Ponca Robert Warrior, they adopted confrontational rhetoric, denouncing more accommodating Native American leaders as "Uncle Tomahawks" and as "Apples," red on the outside but white within. Warrior and other members of the NIYC spoke of "Red Power," the right of native peoples to protect their rights and their culture on their own terms in modern America.

The NIYC, for instance, involved itself in the effort to defend the fishing rights guaranteed to native communities in Washington State by their federal treaties. Ever since the 1950s, native peoples in the Pacific Northwest caught fewer fish each year, a product of dam construction, competition from non-native fishermen, and environmental destruction of riverine ecosystems by the timber industry.

Washington State fish and game officers harassed native fishermen, beating, tear-gassing, and arresting native peoples. The violence grew to so great an extent that witnesses likened it to the segregated American south. The NIYC and Washington native fishermen demonstrated in defense of the rights guaranteed them in their 1855 treaties, a series of "Fish-Ins" designed to educate the public and capture their attention.

The NIYC received outside assistance—journalists like Hunter S. Thompson and celebrities like Marlon Brando. The protesters issued statements and manifestos, like that of the Nisqually Indians in January of 1965 that called upon "any and all nations, kindred, and tongues" to recognize that "if the policies enacted by the United States government concerning the Indian people were examined under close scrutiny the similarities between them and Hitler's policies concerning the Jewish people would be self-evident." Hyperbole, to be sure, but the "Fish-In" protests slowly bore fruit. By 1974, a circuit court in Washington recognized the Indians' right to their fair share of the fish, a right guaranteed to them in the treaties negotiated 120 years before.

The emergence of the NIYC contributed to the revitalization of the National Congress for American Indians (NCAI), which had stood largely alone as a national Indian-run organization advocating for the interests of native peoples. The activist and scholar Vine Deloria ran for and was elected executive director of the NCAI. Under his energetic leadership, the organization revived. At the time of his election, nineteen tribes belonged; by the end of his three-year term, 156 native groups had joined. The NCAI raised money, established its solvency, and became an effective lobbying force in Washington, D.C. Deloria believed that the NCAI should work with groups like the NIYC and, later, AIM, the American Indian Movement. It needed to demonstrate its relevance to the struggles waged by a younger generation of Native American activists. Deloria contributed to this effort through his writings. Watching treaties being broken in Washington and western New York and places in between, Deloria wondered in *Custer Died for Your Sins: An Indian Manifesto* if America's word was "good only to support its ventures overseas in Vietnam or does it extend to its own citizens?"

Dennis Banks and Clyde Bellocourt founded AIM in the Twin Cities of Minnesota in 1968, an organization that resulted from the challenges native peoples faced as a result of relocation. AIM protested police brutality in the Twin Cities by monitoring and filming police patrols as they moved through Indian neighborhoods. They soon broadened their agenda,

looking to improve housing and educational opportunities in the cities. Membership grew. John Trudell, a Santee Sioux, brought his considerable charisma to the organization. Russell Means joined AIM in 1970, a strident leader who would soon become one of the movement's best-known spokesmen.

While AIM gained strength in the Twin Cities, on the west coast "Indians of all Nations" claimed Alcatraz Island, the home of a former federal penitentiary in the San Francisco Bay. The occupiers brought attention to the conditions under which native peoples lived, and educated the public about the rights of native communities. Dozens of Indian groups across the country lent their support to the Alcatraz occupation and President Nixon received thousands of letters, telegrams, and petitions urging him to give the island to the Indians. He could not do that, but the sympathy the occupation generated pressured Nixon to take action on issues of Indian affairs, and inspired other protests. American Indian activists occupied a number of strategically significant sites. The United Indians of All Tribes in Seattle, for instance, after an occupation lasting two years, negotiated with US Senator Henry "Scoop" Jackson a lease to part of the former Fort Lawton military base, on which they established in 1976 the Daybreak Star Cultural Center. Their protest produced results. AIM activists in Milwaukee seized an abandoned Coast Guard installation on Lake Michigan. Women involved with Milwaukee's alternative Indian Community School began to hold classes at the Coast Guard station while men from AIM ran drug and alcohol treatment programs. The AIM activists would move on by 1972, but the Indian Community School continued to meet there.

Protests, as well, took place outside of Bureau of Indian Affairs offices throughout the western United States. In October of 1972 leaders from AIM and the National Indian Youth Council began planning for a march on Washington dubbed the "Trail of Broken Treaties." They occupied the Bureau of Indian Affairs building, the headquarters of the agency many native peoples most closely associated with their mistreatment and marginalization. Four hundred Indians occupied the building, chaining the doors or barricading them with office furniture. The protestors stayed for a week. They stood on the steps of the building, wearing war paint and carrying weapons fashioned from whatever they could find inside. They readied Molotov cocktails, should police seek to remove them from the headquarters by force. They would die there, if necessary, the occupiers told reporters covering the occupation. And they ransacked the Bureau completely, carrying away tons of incriminating documents that highlighted the agency's historical mismanagement of Indian affairs. But the Trail of Broken Treaties suffered from poor planning and disorganization. The occupiers achieved none of their goals. The Nixon administration dismissed their calls for fundamental change in federal Indian policy as "impractical." When the stolen Bureau of Indian Affairs documents began to appear in newspaper columns written by syndicated columnist Jack Anderson, the Nixon administration began persecuting and prosecuting the occupiers and their sympathizers.

Several months after the occupation of the Bureau of Indian Affairs, the activism of the Nixon years reignited in South Dakota. In January of 1973, a white man killed a Sioux named Wesley Bad Heart Bull outside a bar in Custer County. Local authorities charged the attacker with manslaughter, nothing more, and AIM arrived to protest. Led by Dennis Banks, they asked the prosecutor to consider more serious charges. When he refused, a riot broke out. The protestors set the local Chamber of Commerce building on fire; local police and county sheriffs responded with tear gas and violence. Twenty-two people were arrested, nineteen of them native peoples.

In the aftermath of the Custer riot, elders at the Pine Ridge Reservation invited AIM to aid them in their struggles against tribal chairman Dick Wilson, the head of an IRA-based government notorious for its corruption and strong-arm tactics. Wilson maintained a

Figure 9.4 The occupation of Alcatraz Island. © AP/Photo.

personal police force, the well-armed GOON squad (Guardians of Ogallala Nation) to control and intimidate dissenters. He had defeated efforts by the Reservation's residents to impeach him. His authority challenged, he called upon federal authorities for support: federal marshals with automatic weapons came to Pine Ridge, setting the stage for a showdown.

Led by Russell Means and Dennis Banks, AIM hoped to bring the attention of the world to the Pine Ridge Indian Reservation. If they had little familiarity with tribal traditions—both had spent much of their lives in cities—they knew how to draw the media and generate interest. Late in February of 1973, they and a group of their followers, perhaps 300 in all, occupied the small village of Wounded Knee, the site of the massacre of Sioux Ghost Dancers eighty-three years before. The majority of the occupiers came from the surrounding Lakota reservations,

but they received support from their fellow occupiers, among them Kiowas, Pueblos, Potawatomis, Senecas, and many others. Two Rappahannocks who had lived in New Jersey traveled west to join AIM at Wounded Knee. The occupiers had a handful of rifles; one of the occupiers had an AK-47 with an empty banana clip. Some had served in Vietnam, and felt keenly the injustice of the colonial system existing at Pine Ridge, where reservation residents had few rights and no redress. Desperate means called for desperate measures. Wilson's GOONs and federal forces quickly surrounded the occupiers with an impressive array of the latest military technology: armored personnel carriers, high-powered rifles, machine guns, grenade launchers, and armor. The federal authorities fired off more than 130,000 rounds of ammunition during the occupation. In cities like San Francisco and Washington, the Nixon Administration was willing to exercise restraint in its response to Native American protests. Not so on a remote reservation in South Dakota.

On March 11, the occupiers issued a statement declaring the independence of the Oglala Nation. "We are a sovereign nation by the treaty of 1868," the occupiers said, and "we want to abolish the Tribal Government under the Indian Reorganization Act. Wounded Knee will be a corporate state under the Independent Oglala Nation." They rejected the "reorganized" government of the Pine Ridge Reservation, and objected to a corrupt government out of touch with tribal traditions and willing to harass and violently persecute its opponents. Means and Banks were out of touch with these traditions as well, but they held numerous news conferences. They succeeded in attracting a considerable amount of attention but they could not succeed in achieving their fundamental goals, for the federal government would not see to the removal of Wilson, or address the fundamental structural causes of so much misery on Indian reservations. The occupation of Wounded Knee lasted seventy-one days. At its end, two of the occupiers had died, and one federal marshal received a wound that left him paralyzed. Given the number of rounds fired, that so few were killed and injured was something of a miracle.

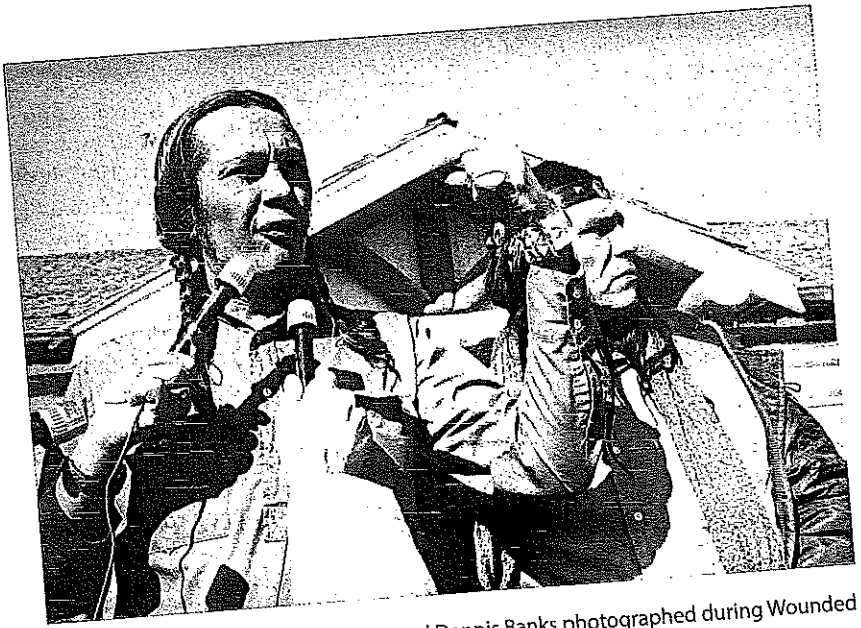

Figure 9.5 AIM Leader Russell Means and Dennis Banks photographed during Wounded Knee showdown in 1973. © AP/Photo.

The occupiers left Wounded Knee in May of 1973. According to Banks, "Wounded Knee was the greatest event in the history of Native America in the twentieth century. It was," he continued, "our shining hour." Leonard Crow Dog, the spiritual leader and another of the occupiers, agreed that "our seventy-one day stand was the greatest deed done by Native Americans." Still, Crow Dog noted, "we never got our Black Hills back, the Treaty of Fort Laramie was not honored, nor did the government recognize us as an independent nation." In the words of historian Paul Chaat Smith, "there was a clear-eyed, if often unspoken, acknowledgment that frequently our elders are lost or drunk, our traditions nearly forgotten or confused, our community leaders co-opted or narrow," but "they knew only one thing for sure: business as usual was not working, their communities were in pain and crisis, and they had to do something." AIM brought considerable attention to the problem native peoples faced. Thanks to the organization's efforts, many American people became aware for the first time of their nation's long history of injustices toward American Indians. These achievements are significant.

Still, federal authorities relentlessly harassed and prosecuted the leaders of AIM. After the occupation, Dick Wilson resumed his campaign of repression and violence against what he viewed as outside agitators. And the protests did little to remove the fundamental problem: the United States, though willing to embrace self-determination, and to consider piecemeal changes in its policies toward native peoples, never abandoned the notion that Indians remained wards of the nation. It is important to remember this. The federal government favored self-determination and, in specific cases, implemented programs and policies that addressed historic injustice and the poor conditions under which many native peoples lived. But it would only go so far. A tension existed, between self-determination and wardship, between sovereignty and colonialism, that individual native peoples, tribal, local, state and federal governments, and the federal courts would wrestle with over the coming years. Native peoples gained more control over their lives, but the ambiguities created by the conflicting forces of sovereignty and colonialism remained.

The Red Power movement—Alcatraz, the BIA takeover, and Wounded Knee—has received so much attention in a sense that it has diverted attention from the efforts of native peoples to act on the principles of self-determination, as limited as they may have been, to promote the interests of their communities. The Cherokees, for instance, governed after 1907 by a principal chief appointed for them by the Bureau of Indian Affairs, used the award money it received from the Indian Claims Commission to assert itself as a regional economic power. The Cherokee Nation in 1967 built a hotel and restaurant on its land, and employed its own people in the construction and management. A tribal complex followed, which included an arts and craft center and tribal government offices. In 1969, the Cherokee Nation founded Cherokee Nation Industries to provide jobs in manufacturing for Cherokee Nation citizens. The Cherokee Nation won approval from the Interior Department in 1975 on revisions to its tribal constitution that allowed for the popular election of the principal chief.

Landless and urban Indians in Washington, in a powerful 1973 report that charged the state government with carrying out a campaign of "ethnic genocide by assimilation," and supporting the process of "destroying our identity," announced that they would hold on to "the scraps and parcels" of their culture that remained and to work "as earnestly as any small nation or ethnic group was ever determined to survive and retain its identity." They were critical of AIM. The destruction of records at the Bureau of Indian Affairs Headquarters in 1972, they feared, might inadvertently have covered up the incompetence and corruption of federal officials by destroying the evidence of their wrongdoing. Wounded Knee, "as a drawn out

affair with many unprioritized demands," in fact "did nothing to help Indian development," they said. Native peoples pursuing self-determination never spoke with one voice.

And in Washington, they spoke of institution-building. Because the Puyallup Reservation was so close to Tacoma, the tribal government had created a number of programs for the urban Indian population: the Indian Education Center, established in 1971, with representation coming from the Puyallup, Nisqually, and Muckleshoot communities; the Tacoma Area Native American Center (TANAC) incorporated in 1972 "with the express purpose of providing community organization for Indians and Alaskan Natives which in turn would promote unity and cooperation among all Indian people"; and groups for Native American students at Tacoma Community College. There were a host of organizations in Seattle: service organizations like the Chief Seattle Club, the Seattle Indian Center, and the United Indians of All Tribes Foundation; education and employment programs, advocacy groups, legal aid, health, and recreation.

Tribal governments confronted dissent, as did other governments, but they began to assert themselves with greater force and determination in the postwar years. They learned to develop the administrative machinery to govern effectively. Like many governments in the United States they failed on occasion. But the important point is that native peoples began to assert themselves in the second half of the twentieth century, to call upon the federal government to acknowledge its past mistreatment of Indians, and to give them an increasingly large share of the power to determine how they would live their lives and govern their communities.