

## The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship

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### ABSTRACT

This Article explores the dynamics of U.S. citizenship and indigenous self-determination to see whether, and how, the two concepts are in tension and how they can be reconciled. The Article explores the four historical frames of citizenship for indigenous peoples within the United States—treating indigenous peoples as citizens of separate nations, as wards of the federal government, as American citizens, and as members of a racial minority group—as well as a fifth frame, which emerges through recognition of the right to self-determination. Taken in historical context, the doctrines defining eligibility for U.S. citizenship have created an overarching view of nationality that supports the political identity of the nation-state. Today, this approach continues under the rubric of “birthright citizenship” and efforts to deploy immigration law to restrain the transnational movement of people across borders. This approach clearly affects indigenous groups that are divided by an international border, but it also affects other indigenous peoples because of its implicit understandings about the nature of their rights. The U.N. Declaration on the Rights of Indigenous Peoples specifies that nation-states should accommodate the spiritual, social, and cultural needs of indigenous peoples divided by an international border. Yet, that right is challenged by a domestic politics about immigration that is often racialized and discounts the political identity of transborder peoples. This Article posits that the dynamics of inclusion and exclusion have always served as the twin pillars of American equality—and oppression. Today, this binary extends beyond U.S. domestic law to affect the rights of indigenous peoples under international law; there is a growing tension between multiculturalism and multinationalism within the realms of domestic and international policy. In this Article, I argue that a human rights framework requires the development of coherent theories about citizenship, sovereignty and self-determination, and I outline an approach for this work.

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Senior Editor, for their excellent editorial contributions to this Article. I am grateful to the faculty members who participated in colloquiums at the University of Arizona and Arizona State University and offered valuable insights and comments, which have been incorporated into the text. Finally, I thank my research assistant, Simon Goldenberg (2L, ASU), and Beth DiFelice, Tara Mospan, and David Gay, law librarians at the Ross-Blakeley Law Library at ASU, who provided invaluable research support as I prepared and finalized this Article.

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## INTRODUCTION

*My mother gave birth to me  
in an old wooden row house  
in the cotton fields.  
She remembers it was windy.  
Around one in the afternoon.  
The tin roof rattled, a piece uplifted  
from the wooden frame, quivered and flapped  
as she gave birth.  
She knew it was March.  
A windy afternoon in the cotton fields of Arizona.*

*She also used to say I was baptized standing up.  
“It doesn’t count,” the woman behind the glass window tells me,  
“if you were not baptized the same year you were born  
the baptismal certificate cannot be used to verify your birth.”*

*“You need affidavits,” she said.*

...

*Who was there to witness my birth?*

...

*Who was there when I breathed my first breath?*

*Took in those dry particles from the cotton fields.*

*Who knew then that I would need witnesses of my birth?*

*The stars were there in the sky.*

*The wind was there.*

*The sun was there.*

*The pollen of spring was floating and sensed me being born.*

*They are silent witnesses.*

*They do not know of affidavits, they simply know.*

—Excerpted from *Birth Witness* by Ofelia Zepeda<sup>1</sup>

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1. OFELIA ZEPEDA, *Birth Witness*, in *WHERE CLOUDS ARE FORMED* (2008).

It is a tremendous honor to be part of this magnificent Symposium in honor of my dear colleague and mentor, Carole Goldberg. Professor Goldberg's sustained intellectual contributions over her career have been a major force in the field of federal Indian law, and I commend her leadership within our field and thank her for guiding my professional development, first as a student and then as a law professor. Carole Goldberg's pivotal work on tribal citizenship requirements inspired this Article, although it is futuristic in its scope and themes.<sup>2</sup> My intent in this Article is to illuminate the discourse on indigenous citizenship within international law, domestic U.S. law, and federal Indian law.

I am from Arizona and my scholarly work is situated in a place that we call the Borderlands. That concept has a physical essence as well as an intangible essence. The political boundary between the United States and Mexico is not always visible, particularly when one stands upon the rocky, cactus-strewn soil of the Sonoran Desert. Nevertheless, it is a tangible boundary and one that is heavily policed by the military and law enforcement units that secure the border.<sup>3</sup> Many human lives are lost daily within the Borderlands, and the nationality of the victim as Mexican or American is often the first inquiry.<sup>4</sup> This Article does not explore the differentiation of nationality in those terms. What interests me is the identity of transborder indigenous peoples as citizens of the land. To be indigenous is to belong to the land, through time and through tradition.<sup>5</sup> That intergenerational presence has a spiritual dimension, as well

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2. See Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373 (2002) [hereinafter Goldberg, *Descent Into Race*]; Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002) [hereinafter Goldberg, *Members Only?*]; Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003) [hereinafter Goldberg, *Individual Rights*].
  3. U.S. CUSTOMS & BORDER PROT., DEP'T OF HOMELAND SEC., FISCAL YEAR 2015 CBP BORDER SECURITY REPORT (Dec. 22, 2015), [https://www.dhs.gov/sites/default/files/publications/CBP%20FY15%20Border%20Security%20Report\\_12-21\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/CBP%20FY15%20Border%20Security%20Report_12-21_0.pdf) [<https://perma.cc/G4GP-WVYB>].
  4. Katie Conner, *Refusing to Answer Border Patrols' Questions Could Have Consequences, Says Attorney*, ABC15 (June 27, 2014, 5:43 PM), <http://www.abc15.com/news/region-phoenix-metro/north-phoenix/refusing-to-answer-border-patrols-questions-could-have-consequences-says-attorney> [<https://perma.cc/4FSY-RR9T>]. See generally Luis Cabrera, Associate Professor, Lecture at Arizona State University: Faith, Death and Freedom on the Arizona Frontier (Jan. 21, 2015) (discussing the many lives lost on the U.S.-Mexico border and the difficult issues of defining nationality and responsibility, and arguing for a conception of "global citizenship" within a human rights framework).
  5. See S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 1 (2009). As Professor Anaya observes, the "rubric of indigenous peoples" includes many diverse groups on many continents. *Id.* But what unites them as "indigenous" is that "their ancestral roots are embedded in the lands on which they live, or would like to live," and they constitute "peoples" in that they "comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past." *Id.*

as a political dimension, according to Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, which provides:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. . . . States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise . . . of this right.<sup>6</sup>

How this process of engagement should work is not altogether clear. Typically, the members of federally recognized Indian tribes are U.S. citizens, unlike the members of culturally related groups across the U.S.-Mexico border. In that sense, the political identity of a group that has secured federal recognition controls the question of American Indian identity, rather than the group's cultural identity. Because most federally recognized Indian tribes do not see themselves as affected by the issue of competing national identities, this may seem irrelevant in the grand scheme of things. I argue, however, that there is a deeper discourse about inclusion and multinationalism that is highly relevant to the discourse of indigenous rights, and in that sense, citizenship is a cross-cutting theme for the future.

To think carefully about citizenship and inclusion requires us to explore the intangible essence of the Borderlands as “those geographic areas where distinct cultures, spaces, and ideologies meet,” and to acknowledge that “[t]his meeting can be an intersection, a confluence, a clash, or simply, just an artificial demarcation between ‘us’ and ‘them.’”<sup>7</sup> What does it mean to belong to the land? What does it mean for an indigenous person to be an American citizen or, alternatively, a citizen of Canada or Mexico? How are our notions of citizenship crafted on a binary of inclusion or exclusion and what are the consequences of accepting that binary for our collective future? These are the questions I raise in this Article. As Professor Goldberg notes in her work, the criteria for tribal citizenship as membership constitute one of the most contested issues for contemporary tribal governments.<sup>8</sup> Similarly, the national politics surrounding the identity of the Dreamers—young people who were born in Mexico and raised in the United

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6. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at 13 (Sept. 13, 2007).

7. Adrian Quijada et al., *For a Sustainable Future: Indigenous Transborder Higher Education*, 26 TRIBAL C.J. 32, 34 (2015).

8. Goldberg, *Members Only?*, *supra* note 2, at 437.

States to be Americans—has generated significant controversy about what birthright citizenship is and what rights it entails.<sup>9</sup>

These debates over who is entitled to citizenship, taken in historical context, reveal that inclusion and exclusion have always been the twin pillars of American equality—and American oppression. Today, the politics surrounding birthright citizenship raises issues of critical importance to Native peoples, implicating political challenges and longstanding traditions about the nature of indigenous peoples as spiritual beings who are instructed to live in harmony with each other and with the lands that they belong to. In an era where politics and religion are restricted from sharing a space by the constitutional mandates of our secular democracy, we must examine our beliefs about the appropriate place of the indigenous nations of this land. Those peoples still reside within territories that predate the formation of the United States, Canada, and Mexico and the newer categories of nationality can interfere with the ancient obligations of the Indigenous peoples.<sup>10</sup>

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9. See Memorandum From Sec'y of Homeland Sec. Janet Napolitano to David Aguilar, Alejandro Mayorkas, and John Morton (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; *Fact Sheet: Immigration Accountability Executive Action* (Nov. 20, 2014) [<https://perma.cc/K975-C2P3>]; Press Release, *Fact Sheet: Immigration Accountability Executive Action*, WHITE HOUSE OFF. PRESS SEC'Y, <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<https://perma.cc/AX9R-EHAY>]; *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/7T4E-CUNC>]. The issue of birthright citizenship was also recently contested in national debates about whether, if elected, Senator Ted Cruz (born in Canada) could become the next President of the United States. See Robert Clinton, *Ted Cruz Isn't a 'Natural Born' Citizen*, US NEWS & WORLD REP. (Jan. 27, 2016, 7:00 AM), <http://www.usnews.com/opinion/articles/2016-01-27/ted-cruz-is-not-a-natural-born-citizen-according-to-the-constitution> [<https://perma.cc/7KHU-VQ92>]; see also *Wagner v. Cruz*, No. 2:16-CV-55-JNP, 2016 WL 1089245 (D. Utah Mar. 18, 2016) (dismissing petition challenging eligibility of Sen. Cruz to serve as President on grounds that petitioner lacked standing to raise issue).
  10. An example of this occurred when the United States constructed a border wall on the Texas/Mexico border, without regard to the rights of Native landowners and communities in the region, including the Lipan Apache, who are not federally recognized, and the Kickapoo and Ysleta del Sur tribes, who are federally recognized, but experienced impacts upon their traditional cultural and religious practices in the area. See MICHELLE GUZMAN & ZACHARY HURWITZ, VIOLATIONS ON THE PART OF THE UNITED STATES GOVERNMENT OF INDIGENOUS RIGHTS HELD BY MEMBERS OF THE LIPAN APACHE, KICKAPOO, AND YSLETA DEL SUR TIGUA TRIBES OF THE TEXAS-MEXICO BORDER 10–11 (June 2008, rev. Oct. 18, 2008), <https://law.utexas.edu/humanrights/borderwall/analysis/briefing-violations-of-indigenous-rights.pdf>; see also Letter From Denise Gilman, Clinical Dir., Immigration Clinic, Univ. of Tex. Sch. of Law, to Santiago A. Canton, Exec. Sec'y, Inter-American Comm'n on Human Rights, Request for General Hearing on the Texas/Mexico Border Wall (Aug. 27, 2008) (requesting a general hearing on the Texas/Mexico border wall, and identifying the Working Group on Human

This Article interrogates U.S. citizenship and indigenous self-determination to see whether the two concepts can operate harmoniously, or whether they are hopelessly in conflict. The Article starts by examining recent controversies in Arizona that illustrate the basic tensions. It then examines the norm of equal citizenship and probes the four historical frames of citizenship for Native peoples. The Article then analyzes the contemporary norm of indigenous self-determination and asks whether the rights of American Indian and Alaska Native peoples as U.S. citizens are consistent with the rights of indigenous peoples. In doing so, I explore the fifth frame of indigenous citizenship and place the issues within a global context. The Article concludes by examining the effect of transnational movement of peoples across borders, framed by the theory of superdiversity. I examine the tensions between multiculturalism and multinationalism within domestic and international politics. In that sense, my Article has broader implications, for example, with respect to the discussion about home rule for the indigenous peoples of Greenland or the status of the people of Puerto Rico.<sup>11</sup> Although this Article does not directly engage those cases, I believe that the discussion of indigenous peoples' human rights requires us to develop coherent theories about citizenship, sovereignty, and self-determination, and I hope that this Article inspires that discussion.

## I. THE POLITICS OF INCLUSION IN ARIZONA: A 2010 SNAPSHOT

In 2010, national attention focused on the state of Arizona, as then-Governor Jan Brewer signed into law S.B. 1070, which makes it a state crime to be in the United States illegally.<sup>12</sup> At first glance, the law seemed a bit redundant. After all, federal law already criminalizes illegal entry into the United States.<sup>13</sup> But, the Arizona law enforced this prohibition through a series of draconian provisions that raised civil rights concerns and led the federal court to issue partial injunctive relief, pending full adjudication.<sup>14</sup> Most notably, the law required police officers to make a "reasonable attempt" to determine the immigration status of a person stopped, detained, or arrested if there is a "reasonable

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Rights and the Border Wall as a collaborative enterprise generated by faculty members of the University of Texas at Austin and the University of Texas at Brownsville).

11. See generally Rafael A. Delet, Jr., *The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico's Political Status, and the Right of U.S.-Resident Puerto Ricans to Participate*, 28 SYRACUSE J. INT'L L. & COM. 19 (2001); Frederik Harhoff, *The Status of Indigenous Peoples Under International Law: Greenland and the Right to Self-Determination*, 32 CAN. Y.B. INT'L L. 243, 248 (1994).
12. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
13. 8 U.S.C. § 1325(a) (2012).
14. *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

suspicion” that the person is in the country illegally.<sup>15</sup> Law enforcement officers were required to check the immigration status of persons who were arrested, and, if they could not provide immediate proof of citizenship, detain them until their status could be ascertained.<sup>16</sup>

Not surprisingly, news reports began to emerge involving Latino, Asian, and Native American citizens who were detained because they resembled someone who might be in the country illegally and could not offer immediate proof of citizenship.<sup>17</sup> Some Arizona citizens were outraged, some were fearful that the same thing would happen to them, and some were completely unperturbed because they could not fathom being mistaken for a noncitizen. Was this law based on racial profiling? Critics analogized S.B. 1070 to the infamous Jim Crow laws of Mississippi, although Arizona lawmakers vehemently disclaimed any racial intent.<sup>18</sup> Despite the legislators’ claims, the law’s racial implications became the topic of conversation in many communities. I remember sharing a laugh with a father who was waiting for his daughter to finish a class at my dance studio, wearing a T-shirt with the message: “I only LOOK illegal.” Native Americans in the Southwest are often mistakenly identified as Hispanic. And yet, who could be more fully American than the first peoples of this land? In fact, however, legislators denied that the law would burden real U.S. citizens, implicitly lumping Native Americans into the same category as other U.S. citizens.<sup>19</sup>

Oddly enough, that proposition was tested immediately. The Birthright Bill was introduced during the same 2010 legislative session.<sup>20</sup> The Birthright Bill questioned the legitimacy of birthright citizenship in cases where the parents were noncitizens and the child was born within the boundaries of the

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15. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

16. *Id.*; see also Mary Jo Pitzl & Daniel Gonzalez, *Tough Immigration Bill OK'd by Arizona House*, ARIZ. REPUBLIC, Apr. 14, 2010, at A1.

17. Andrea Nill Sanchez, *Native American Suggests He Was Profiled by Arizona Police: New Bill Targets People of My Color*, THINKPROGRESS (May 3, 2010, 5:40 PM), <http://thinkprogress.org/security/2010/05/03/176035/native-american-immigration/> [<https://perma.cc/6BRH-ML6N>].

18. Robert Robb, *When Voters Want Change, Not Much Will Prevent It*, ARIZ. REPUBLIC (Oct. 15, 2011, 7:17 PM), <http://archive.azcentral.com/arizonarepublic/viewpoints/articles/20111015-voters-change-robb.html> [<https://perma.cc/7KM5-GSEU>].

19. See Mary Jo Pitzl & Daniel Gonzalez, *Tough Immigration Bill OK'd by Arizona House*, ARIZ. REPUBLIC (Apr. 14, 2010, 12:00 AM), <http://archive.azcentral.com/arizonarepublic/news/articles/20100414immigration0414.html> [<https://perma.cc/Ry2K-KDU8>] (quoting ACLU attorney Annie Lai, who stated that “[o]ne of the most disturbing aspects is that many innocent U.S. citizens, Native Americans and lawful residents will be swept up in the application of the law” and mentioning that this was a topic of discussion by state legislators, although all thirty-five Republicans eventually supported the bill, even though a few still had concerns about racial profiling).

20. H.B. 2562, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 1308, 50th Leg., 1st Reg. Sess. (Ariz. 2011).



United States. The Fourteenth Amendment, of course, provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>21</sup> By virtue of this language, the Fourteenth Amendment ensured the citizenship of African Americans who had been born on American soil for generations, but had been denied the opportunity for citizenship under the perverted logic of the *Dred Scott* case, which found that African Americans lacked the fundamental capacity to become citizens based on their perceived racial inferiority.<sup>22</sup> The proponents of the Birthright Bill sought to invoke U.S. Supreme Court review of the phrase “subject to the jurisdiction thereof” within the Fourteenth Amendment, arguing that the framers would not have intended to admit to citizenship the children of aliens who lacked authority to be within the boundaries of the United States.<sup>23</sup>

What many people failed to understand, however, was that the simple text of the Birthright Bill also would have excluded many Native Americans from eligibility for U.S. citizenship.<sup>24</sup> In a stinging editorial, Arizona State Representative Albert Hale, a member and former president of the Navajo Nation, noted that as a Dine person, his ancestors had been “inhabitants of this land from time immemorial,” and yet his mother, who was born in 1919, was not a U.S. citizen, nor were his grandparents U.S. citizens, given the fact that U.S. citizenship was bestowed by a federal statute, the 1924 Indian Citizenship Act, and not by the U.S. Constitution.<sup>25</sup> Thus, Albert Hale, who is undeniably the descendant of the first peoples of this land, would have been disqualified from U.S. citizenship by the Birthright Bill because his ancestors prior to 1924 were noncitizens, while the immigrants who arrived at Ellis Island between 1802 and 1924 were “offered immediate citizenship with a simple medical exam and signing of a ledger.”<sup>26</sup> As Representative Hale noted, this would make him subject to deportation, although it is far from clear where, as an American Indian, he would be “deported

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21. U.S. CONST. amend. XIV, § 1.

22. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

23. See CNN Wires Staff, *Arizona Bill Would Deny Citizenship to Children of Illegal Immigrants*, CNN (June 16, 2010, 12:09 PM), <http://www.cnn.com/2010/US/06/15/arizona.immigration.children/> [<https://perma.cc/WH4J-KA8G>]; Tim Gaynor & David Schwartz, *Proposed Arizona Law Targets 'Birthright' Citizenship*, REUTERS (Jan. 28, 2011, 7:25 AM), <http://www.reuters.com/article/us-immigration-arizona-idUSTRE70Q94G20110128> [<https://perma.cc/RZ2H-X6P4>] (recapping arguments that children born to undocumented parents are not “subject to the jurisdiction of” the United States in a way that would require the grant of citizenship, and this argument could then support the state’s decision to deny issuing a birth certificate to those children).

24. See Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).

25. Albert Hale, Opinion, *The “Birthright” Bill*, NAVAJO TIMES (Jan. 27, 2011), <http://www.navajotimes.com/opinions/2011/0211/020311hale.php> [<https://perma.cc/QC8G-EQKQ>].

26. *Id.*

to.<sup>27</sup> The Arizona Birthright Bill was ultimately defeated, and yet it represents part of a larger political movement to eliminate birthright citizenship on the theory that it incentivizes undocumented immigrants to enter the country and give birth to children who are citizens by birth, with the further hope that the parents, too, will be permitted to stay in the United States and naturalize as citizens.<sup>28</sup> Again, the widespread assumption is that this is a unique problem that would not affect any legitimate American. Native Americans, furthermore, are implicitly assumed to be covered under the language of the Fourteenth Amendment.

Senate Bill 1070 and the Birthright Bill are widely understood as representing the anti-immigrant fervor sweeping a nation reeling from the economic downturn.<sup>29</sup> For Native peoples, however, the two bills represent an opportunity to revisit the constitutional shortcomings of equal citizenship and to resist the false premise that constitutional citizenship belongs to every person born on American soil. As this Article demonstrates, the politics of inclusion for Native peoples within the United States have been historically quite problematic, and they continue to be so. Both S.B. 1070 and the Birthright Bill attach a set of values to U.S. citizenship that do not necessarily correspond to the aspirations of Native people. It is much more convenient to disassociate these bills from the interests of tribal governments by labeling them an immigration issue essentially irrelevant to tribal governments, which are political rather than racial entities. But, this Article takes the position that the past is always part of the current fabric of American political life, and suggests that we must be prepared to engage the continuing tensions over equal citizenship in an era where indigenous self-determination is the pervasive aspiration of Native peoples.

## II. THE NORM OF EQUAL CITIZENSHIP IN U.S. CONSTITUTIONAL LAW

Although equality is routinely associated with citizenship in the United States, it is important to realize that, as originally drafted, the U.S. Constitution was not designed to enforce a norm of equal citizenship. The Constitution granted the U.S. Congress the power to “establish an uniform Rule of Naturalization.”<sup>30</sup> Congress, at that time, of course, was comprised of those who had the requisite qualifications pertaining to age, U.S. citizenship, and residency in

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27. *Id.*

28. See Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 71 (1997).

29. See Priscila Diaz et al., *Economic Dynamics and Changes in Attitudes Toward Undocumented Mexican Immigrants in Arizona*, 11 ANALYSES SOC. ISSUES & PUB. POLY 300, 304-05 (2011).

30. U.S. CONST. art. I, § 8, cl. 4.

a particular state.<sup>31</sup> Citizenship did not entail equal rights. For example, women were citizens, but were not entitled to vote in federal and state elections until 1920, when the U.S. Constitution was amended to confirm that right.<sup>32</sup> Women were, however, counted as “free Persons” for purposes of apportionment, unlike African American slaves, who were considered “other Persons” and counted as three-fifths of a person.<sup>33</sup> The Constitution never explicitly refers to slavery, and yet the original document contained the Three-Fifths Clause, as well as its distinction between persons who enter the states by “[m]igration” (immigrants) and those who enter by “[i]mportation” (slaves), providing that only the latter could be taxed as chattel.<sup>34</sup> The Constitution also contained the Fugitive Slave Clause, providing that if a person “held to [s]ervice or [l]abour” escaped into another state, they would be “delivered” up to the person who owns the obligation.<sup>35</sup>

Slavery, of course, was prohibited after the Civil War by the Thirteenth Amendment.<sup>36</sup> The protections of the Fourteenth Amendment extended to African Americans born in the United States as natural born citizens,<sup>37</sup> thereby overturning the racist doctrine of *Dred Scott v. Sandford*, which found that African Americans could not become members of the constitutional political community known as “citizens” because they were “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations.”<sup>38</sup> The U.S. Supreme Court in *Dred Scott* drew upon more than a century of the prevailing social attitudes for this conclusion, finding that African Americans “had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”<sup>39</sup> African Americans were to be treated as “an ordinary article of merchandise and traffic,” and the laws prohibiting miscegenation between blacks and whites were designed to create a “perpetual and impassable barrier” between the two races and prohibit interracial marriage as both “unnatural and immoral.”<sup>40</sup> Thus, the offspring of white slave owners and their black slaves became chattel and not citizens, despite

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31. U.S. CONST. art. I, § 2, cl. 2.

32. U.S. CONST. amend. XIX.

33. U.S. CONST. art. I, § 2, cl. 3.

34. U.S. CONST. art. I, § 9, cl. 1.

35. U.S. CONST. art. IV, § 2, cl. 3.

36. U.S. CONST. amend. XIII.

37. U.S. CONST. amend. XIV.

38. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

39. *Id.*

40. *Id.* at 407, 409.

their birth within the United States and despite the fact that their fathers were full U.S. citizens.

Consistent with the Constitution's original text, the 1790 Naturalization Act expressly limited the acquisition of U.S. citizenship to free persons of the white race.<sup>41</sup> After passage of the Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments), the Act was amended to include "persons of African nativity or descent" within the grant of U.S. citizenship.<sup>42</sup> Not surprisingly, a slate of cases ensued as persons of Chinese, Japanese, Syrian, and Hindu descent sought to prove their eligibility for citizenship as "free white aliens."<sup>43</sup> In most of these cases, the federal courts employed a racial definition, limiting the term "white person" to members of the Caucasian race, and finding that other races were not eligible for naturalization to U.S. citizenship.<sup>44</sup> In the words of the Supreme Court in *United States v. Thind*, the Naturalization Act is not intended to "exclude" any particular class of persons, but rather it is intended to include "only white persons . . . within the privilege of the statute."<sup>45</sup> The Court further held that the test for status as a "white person" is a "racial test" that appeals to the sentiments of the "average man," who would share the Framers' understanding that the term "white person" would be limited to those of Western European descent.<sup>46</sup>

Although the Fourteenth Amendment was designed to include African Americans within the polity of the United States, they still were not equal citizens under the infamous Jim Crow laws that governed post-Civil War America and lasted until the civil rights era of the 1960s and 1970s. The states developed laws justifying the social exclusion of African Americans from the benefits of full citizenship, and the Supreme Court upheld those laws on the grounds that separate facilities in the areas of education, public accommodations and transportation, and the like, were acceptable so long as they were equal. The separate-but-equal doctrine was enshrined into American constitutional law by the Supreme Court's 1896 ruling in *Plessy v. Ferguson*, which upheld the constitutionality of a Louisiana statute providing for separate railway carriages for the white and colored races

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41. Naturalization Act, 1 Stat. 103 (1790).

42. Naturalization Act of 1870, § 7, 16 Stat. 254, (1870) (extending citizenship to "aliens of African nativity and to persons of African descent").

43. See, e.g., *United States v. Thind*, 261 U.S. 204, 204 (1923) (holding that a "high-caste Hindu, of full Indian blood" is not "white" because the term "white person" is primarily limited to those of Western European descent); *In re Ah Yup*, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) (No. 104) (holding that petitioner, a Chinese national, was not eligible for naturalization because "a native of China, of the Mongolian race, is not a white person").

44. *Thind*, 261 U.S. at 208.

45. *Id.* at 207.

46. *Id.* at 209–10.

as applied to Homer Plessy.<sup>47</sup> Plessy claimed that, as a person of seven-eighths Caucasian blood and one-eighth African blood who looked white, he had wrongfully been excluded from the carriage intended for white persons.<sup>48</sup>

The Court minimized Plessy's claim as one for social rights, rather than "political rights," and stated that "social equality" results from the choice of individuals who voluntarily associate with others outside their race and cannot be implemented by legislative order.<sup>49</sup> Furthermore, because Plessy was defined as "colored" by Louisiana state law, he had no right to the "reputation" of a member of the white race.<sup>50</sup> Had Plessy been a "white man" and "assigned to the colored coach," he might have had an "action for damages" for being deprived of his "property" (the reputation of being white).<sup>51</sup> As a "colored" person under Louisiana state law, however, he had no protectable interest. This holding inspired a vehement dissent by Justice Harlan, who noted the odd result caused by this case, which was that Plessy, who was a full citizen of the United States, was banned from sitting in a Louisiana railroad coach, which was open to white citizens and also to Asians, who were not even entitled to citizenship in the United States.<sup>52</sup> Harlan's words in that case have become a hallmark in American jurisprudence: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."<sup>53</sup>

Although this statement carries great rhetorical value, it is hardly representative of the truth of American citizenship. In fact, it took the U.S. Supreme Court until 1954 to overrule the basic logic of *Plessy* in the famous case of *Brown v. Board of Education*, which held that "in the field of public education the doctrine of 'separate but equal' has no place," and that "[s]eparate educational facilities are inherently unequal" because they deny "the children of the minority group" their right to equal educational opportunity.<sup>54</sup> It took several decades of intensive litigation and the passage of broad-ranging civil rights legislation, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, to effectuate the norm of equal citizenship within American law.<sup>55</sup>

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47. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

48. *Id.* at 538.

49. *Id.* at 551.

50. *Id.* at 549.

51. *Id.*

52. *Id.* at 561 (Harlan, J., dissenting).

53. *Id.* at 559 (Harlan, J., dissenting).

54. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954).

55. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

Despite these advances in the law, racial discrimination is still a pervasive feature of American life and the gains made through affirmative action era policies are being attacked under both federal and state law. Some states have banned the use of affirmative action in hiring or admissions to state universities by amending their state constitutions.<sup>56</sup> The Supreme Court recently affirmed that a state university may use race as one factor in its admission policies without violating federal law, but this ruling does not require states to do so.<sup>57</sup> It is unclear whether state constitutional limitations on affirmative action will affect policies designed to facilitate the admission of Native American students. Although Native American students who are enrolled in federally recognized tribes are protected in relationship to the federal government's services to tribal governments as political and not racial entities,<sup>58</sup> it is at least ambiguous whether this federal status requires states to treat the hiring or admission of Native Americans as an exception to a general ban on the use of race as a relevant criterion.

Although all Native Americans are U.S. citizens today, they have a particular status, informed by historical circumstances, that defies the notion of equal citizenship. Individuals may have additional rights because of their membership in federally recognized tribes, and other citizens may view these rights as a form of racial preference. The justifications for differential treatment are complex, however, and cannot be adequately understood in isolation. The next Part of the Article places the issues within historical context, which illuminates the various frames of citizenship that have been extended to Native peoples.

### III. NATIVE AMERICANS AND CITIZENSHIP: FIVE FRAMES

Within the United States, federal law has shaped a unique relationship between the American Indian and Alaska Native Nations and the federal government. That body of law, known as federal Indian law, is quite complex and contains conflicting principles, which are rooted in the contentious politics that shaped the United States as a nation, rather than a set of higher principles that would sustain a unified whole. The Native Hawaiian people are also technically Native Americans because they are the indigenous peoples of the Hawaiian Islands, which were annexed into the United States after the overthrow of the internationally recognized Kingdom of Hawaii and now constitute a separate state

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56. See ARIZ. CONST. art. II, § 36 (2010).

57. Fisher v. Univ. of Tex. at Austin, No. 14-981, 2016 WL 3434399 (U.S. 2016).

58. Morton v. Mancari, 417 U.S. 535, 553-54, 553 n.24 (1974) ("The preference is not direct towards a 'racial' group consisting of 'Indians' . . . [T]he preference is political rather than racial in nature.")

of the union.<sup>59</sup> The political status of Native Hawaiians remains ambiguous under federal law, however, as this Article later demonstrates.

As Professor Robert Porter has noted, federal law and policy has historically characterized Indian people in at least four different ways: “(1) treating Indians as citizens of separate nations, (2) treating Indians as wards of the federal government, (3) treating Indians as American citizens, and (4) treating Indians as members of a racial minority group.”<sup>60</sup> When the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples in 2007, the defining moment came as indigenous peoples were recognized as “peoples” with a right of “self-determination” under international human rights law.<sup>61</sup> Thus, the contemporary question is whether the United States will actualize indigenous self-determination as part of its federal law, creating yet a fifth category of federal law and policy. If it does, will this entail a return to the idea that Indians are primarily citizens of separate nations, or will the tropes of citizenship and racial minority continue to control the domestic political rights of Indians who are still considered to be domestic dependent nations (which is the modern and preferred terminology for their status as wards of the U.S. government)? These issues are alive and well in the state of Hawaii, where the state has recently enacted a law acknowledging the right of the indigenous Kanaka Maoli people to self-determination, even though Congress has not yet formally extended federal recognition.<sup>62</sup>

This Part first outlines the four frames that have been used to describe Native citizenship since the formation of the United States and illustrates the differing views on Native rights that have ensued under each frame. It is worth noting that all of these frames currently operate to some degree, which causes a great deal of uncertainty (for example, in relation to the affirmative action issue). Finally, this Part evaluates the meaning of citizenship for Native peoples in the context of the discussion on self-determination—a fifth frame that recognizes the political and spiritual autonomy of Native peoples and differentiates the character of their rights as citizens.

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59. See Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 80 Fed. Reg. 59113 (Oct. 1, 2015) (to be codified at 43 C.F.R. pt. 50).

60. Robert B. Porter, *The Demise of the Ongweheweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 128 (1999).

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

62. S.B. 1520, 26th Leg. (Haw. 2011).

### A. Frame I: Indians as Citizens of Separate Nations

Federal Indian law is founded upon the notion that Indian nations are separate political sovereigns with their own territorial boundaries.<sup>63</sup> The treaties initiated by Great Britain and then by the United States recognized Indian nations as separate governments with internal self-governing powers, as well as the ability to declare relations of war and peace with external sovereigns.<sup>64</sup> The treaties also acknowledged the property rights of Indian nations in the various provisions that solicited land cessions and reserved portions of those lands for the exclusive use and occupancy of the Indian nations.<sup>65</sup> This treaty relationship became the cornerstone for Chief Justice John Marshall's conception of Indian nations as "domestic dependent nations" in the famous trilogy of nineteenth-century Supreme Court cases known as the Marshall Trilogy.<sup>66</sup> In relationship to the Cherokee Nation's petition to vindicate its treaty against violations by the state of Georgia, Marshall found that Indian tribes had the political status of "nations," but were not "foreign" nations for purposes of Article III of the U.S. Constitution because they were within the territorial boundaries of the United States and because they had placed themselves under the "sole and exclusive protection of the United States" by treaty.<sup>67</sup> Marshall described the Cherokee Nation as a "domestic[,] dependent nation," which is a category that came to describe all Indian nations that maintained a political relationship with the United States.<sup>68</sup> But, Marshall subsequently found that the Indian nations were not incorporated into the federal union, and thus the states had no ability to govern the Indian nations or enter their lands, except with the consent of the federal government or the Indian nations themselves.<sup>69</sup> Federal law, in fact, governed the intercourse of American states and their citizens with the Indian nations.

Because Indian tribes and their members were not incorporated into the United States, they were not subject to its jurisdiction as citizens. Rather, the relations between the United States and Indian nations reflected the discourse of international law and were regulated by treaty and by federal laws, such as the

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63. For a summary of the general historical framework that I describe here, see Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 192–94 (2001).

64. *Id.* at 192.

65. *Id.* at 193.

66. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

67. *Cherokee Nation*, 30 U.S. at 24.

68. *Id.* at 2.

69. *See Worcester*, 31 U.S. at 519.



Trade and Intercourse Acts, which implemented treaty provisions.<sup>70</sup> Consequently, the text of the Constitution, as originally drafted, entirely excluded Indians from being counted for purposes of apportionment and representation in Congress. Article I, Section 2, Clause 3 states that “[r]epresentatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed.”<sup>71</sup>

The 1790 Naturalization Act permitted only “free white persons” to naturalize to citizenship, which required Congress in the latter part of the nineteenth century to selectively enact further laws permitting some Indians to naturalize to U.S. citizenship, such as Indian women who married white men or, in some cases, Indians who relinquished their lands and renounced their tribal relations.<sup>72</sup> In fact, Justice Taney acknowledged this structure in the *Dred Scott* case, when he distinguished those of the “Indian race” from African Americans, finding that Indians were “a free and independent people, associated together in nations or tribes, and governed by their own laws.”<sup>73</sup> “These Indian Governments,” Taney wrote, “were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged” through the treaties that “have been negotiated with them.”<sup>74</sup> Taney continued:

[Individual Indians] may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.<sup>75</sup>

The premise that Indians were free was not without controversy, as the legendary Ponca Chief Standing Bear discovered in 1879, when he brought a petition for habeas corpus to federal district court. Chief Standing Bear challenged his detention by U.S. authorities in the Indian territory following his attempt to take a small band of Ponca Indians back to their ancestral territory in what is now

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70. See Porter, *supra* note 60, at 111.

71. U.S. CONST. art. I, § 2, cl. 3.

72. See Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 217–33 (Shareen Hertel & Kathryn Libal eds., 2011).

73. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857).

74. *Id.* at 404.

75. *Id.*

the states of Nebraska, South Dakota, and North Dakota.<sup>76</sup> The district court found that the Poncas had always been at peace with the United States and had signed two treaties with the United States reserving their rights to live on their ancestral lands in Nebraska.<sup>77</sup> In 1868, the United States signed another treaty with the Sioux Nation, which dissolved the Ponca reservation without the knowledge or consent of the Ponca people.<sup>78</sup> In 1876, Congress enacted legislation to appropriate money for the removal of the Ponca people to the Indian territory in what is now the state of Oklahoma.<sup>79</sup> Although this removal was initially envisioned to be with the consent of the Poncas, by 1878 when the money was actually appropriated, the federal government removed the Poncas without their consent.<sup>80</sup> Chief Standing Bear testified that 581 Ponca Indians were removed from their reservation to the Indian territory and that 158 Poncas died the first year and many more became ill and disabled.<sup>81</sup> Chief Standing Bear said that he had no choice but to take his immediate band of twenty-five Indians, dissolve his ties with the other Poncas who chose to remain in the Indian territory, and return to his ancestral lands.<sup>82</sup> He testified that the political leaders of the Omaha Nation in what is now Nebraska agreed to let the band reside on their reservation.<sup>83</sup> The U.S. military instead arrested Chief Standing Bear and all of the members of his band and held them in custody pending a forced return to the Indian territory, thus inspiring Standing Bear to petition the court for a writ of habeas corpus.<sup>84</sup>

The court in the Standing Bear case held that the remedy of habeas corpus is not limited to American citizens, but applies to all “persons” in federal custody.<sup>85</sup> Using the dictionary definition of “person” which includes any “individual of the human race” and any “living soul,” whether “man, woman, or child,” the court found that this term included “Indians” as a part of “mankind” in addition to “the more favored white race.”<sup>86</sup> The court also held that the United States had legally recognized the “God-given right” of expatriation as belonging to all

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76. United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891); see also WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 116–17 (2010).

77. *Crook*, 25 F. Cas. at 696–98.

78. *Id.* at 698.

79. *Id.*

80. *Id.* at 700.

81. *Id.* at 698.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 697.

86. *Id.*

people, including Indians.<sup>87</sup> This meant that Standing Bear was legally entitled to renounce his ties to the other Ponca Indians. But, the court also held that the federal government had the power to regulate entry onto the Omaha reservation, and because the U.S. military had not given permission to the Poncas to reside on the Omaha reservation, they were to be treated as any other person who is unlawfully on an Indian reservation and needs to be removed.<sup>88</sup> Moreover, because the Poncas were not at war with the United States, they could not be detained as prisoners of war by the U.S. military.<sup>89</sup> The court ordered Standing Bear and the other Poncas in his band to be discharged from military custody, thus marking the end of the legal case. The factual case, however, continued to unfold.<sup>90</sup> As noncitizens, these Poncas were not eligible to purchase or settle land, as were non-Indians under the Homestead Act. They were stateless persons, without any legal right to reside on any lands within the United States, including their aboriginal homelands.

This story confounds many people, who wonder why the Fourteenth Amendment, which was ratified in 1868, could not have been read to encompass Standing Bear and the other Poncas as natural born citizens entitled to equal rights and privileges, along with black and white citizens.<sup>91</sup> The answer to that question resides in another Supreme Court case, *Elk v. Wilkins*.<sup>92</sup> The petitioner in that case, John Elk, is identified as an Indian born under tribal authority who had severed his tribal relations and moved to Omaha, Nebraska, where he lived as a city resident.<sup>93</sup> Elk sought to register as a voter in the city of Omaha's elections for city council and the registrar, Charles Wilkins, refused to allow him to do so on the grounds that Elk was an Indian.<sup>94</sup> Elk sued Wilkins in federal district court, seeking \$6000 in damages for the violation of his constitutional right to vote.<sup>95</sup> The Supreme Court held that Elk could not invoke the Fifteenth Amendment's protection against racial discrimination in voting because that provision only protected citizens and Elk remained a noncitizen even after the adoption of the Fourteenth Amendment.<sup>96</sup> Elk argued that because he had

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87. *Id.* at 699.

88. *Id.* at 700.

89. *Id.*

90. *Id.* at 701.

91. *See Berger, supra* note 72, at 221 (noting that some members of Congress opposed the Fourteenth Amendment precisely because they believed it would confer citizenship on Indians and that they advocated for language specifically excluding tribal Indians from the citizenship clause).

92. *Elk v. Wilkins*, 112 U.S. 94 (1884).

93. *Id.* at 98.

94. *Id.* at 96.

95. *Id.* at 95–96.

96. *Id.* at 109.

completely severed his tribal relations and had surrendered himself to the jurisdiction of the United States, he was a citizen within the meaning of the Fourteenth Amendment, which provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>97</sup>

The Supreme Court disagreed with Elk’s position and found that the original text of the Constitution had excluded “Indians not taxed” from the population base for apportioning seats in the U.S. House of Representatives, and that this language was preserved in Section 2 of the Fourteenth Amendment,<sup>98</sup> which provides that “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”<sup>99</sup> The Court found that the language “Indians not taxed” describes Indians living on tribal lands as “distinct political communities,” owing “immediate allegiance to their several tribes” and not constituting “part of the people of the United States.”<sup>100</sup> Although Indians could naturalize to citizenship, this could be accomplished only with the consent of the federal government and not by the unilateral act of an individual Indian, like Elk, who chose to separate himself from his tribe.<sup>101</sup> Thus, the Court held that Elk, “not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment.”<sup>102</sup>

Compare the status of Native Hawaiian people, who were citizens of the Kingdom of Hawaii. The Kingdom of Hawaii was an internationally recognized nation that signed treaties of peace and commerce with many European and Asian countries, as well as the United States, and was not treated as an Indian tribe under U.S. diplomacy in the nineteenth century.<sup>103</sup> In fact, the U.S. Secretary of State, Daniel Webster, expressly stated that the doctrine of discovery, which had been applied to American Indian nations in *Johnson v. McIntosh*<sup>104</sup> to deny them full title to their lands, was not applicable to the

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97. U.S. CONST. amend. XIV.

98. 112 U.S. at 99, 103.

99. U.S. CONST. amend. XIV.

100. *Elk*, 112 U.S. at 99.

101. *Id.* at 109.

102. *Id.*

103. Ryan William Nohea Garcia, *Who is Hawaiian, What Begets Federal Recognition, and How Much Blood Matters*, 11 ASIAN-PAC. L. & POL’Y J. 85, 107 (2008).

104. *Johnson v. McIntosh*, 21 U.S. 543 (1823) (holding that first European nation to discover lands occupied by the indigenous peoples gained title to the land, and could perfect the title by taking possession).

Hawaiian Kingdom.<sup>105</sup> In 1893, a group of American insurgents, backed by the U.S. Marines, coerced the involuntary surrender of Queen Lili'uokalani and imprisoned her in Iolani Palace in an overthrow of the Hawaiian monarchy.<sup>106</sup> The insurgents were largely American landowners who held plantations and other economic interests in Hawaii. They created their own entity, the Republic of Hawaii, and formed a provisional government.<sup>107</sup> The overthrow of the Hawaiian Kingdom violated U.S. domestic law and arguably violated international law, as well. The subsequent annexation of the Republic of Hawaii into the United States was also a political aberration because it was accomplished by a joint resolution of Congress in 1898, rather than a bona fide annexation petition that could command the two-thirds vote necessary to effectuate treaty ratification by the Senate.<sup>108</sup> The Native Hawaiian people were steadfastly opposed to annexation, but the joint resolution ultimately resulted in the creation of the Territory of Hawaii<sup>109</sup> and the admission of residents of the Hawaiian Islands to U.S. citizenship. Thus, Native Hawaiians were considered U.S. citizens as of 1898, unlike American Indians.<sup>110</sup> Today, that unilateral action of the United States has worked against their claims for continuing status as a separate nation or people. In *Rice v. Cayetano*, the Supreme Court describes the multicultural citizenry of the state of Hawaii and rejects the state's attempt to restrict elections for trustees for the Office of Native Hawaiian Affairs to Native Hawaiians as a preference based on "ancestry" in violation of the Fifteenth Amendment.<sup>111</sup>

As Professor Goldberg notes, the Supreme Court's holding in *Rice v. Cayetano* aligns with the "concerns underlying opposition to affirmative action," namely that the Constitution protects individual, rather than group, rights, and that group rights are divisive and undermine a unitary civil society.<sup>112</sup> The Supreme Court's language confirms that view:

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105. ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 792 (5th ed. 2007).

106. Michael Carroll, Comment, *Every Man Has a Right to Decide His Own Destiny: The Development of Native Hawaiian Self-Determination Compared to Self-Determination of Native Alaskans and the People of Puerto Rico*, 33 J. MARSHALL L. REV. 639, 645–46 (2000).

107. *Id.*

108. See Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. INT'L L. 407, 418 (1990).

109. *Id.*

110. See David D. Day & Maxwell Kopper, *A Tale of Two Territories: Hawai'i, Puerto Rico, and the Insular American State*, HAW. B.J. 18, 21 (2012).

111. *Rice v. Cayetano*, 528 U.S. 495, 499 (2000).

112. Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 952 (2002).

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.<sup>113</sup>

In this respect, American Indians are unique. They operated as foreign nations initially, but were incorporated into the United States as pre-constitutional and extra-constitutional entities. Their very identity as noncitizens of the United States preserved their continuing political status.

#### B. Frame II: Indians as Wards of the U.S. Government

What were the rights of American Indians as noncitizens of the United States when they operated as separate political communities? Chief Justice John Marshall's conception of Indian nations as domestic dependent nations confirmed the sovereign identity of the tribal governments, including their ability to govern themselves autonomously through their own laws and institutions. The Court's later opinions in *Ex Parte Crow Dog* and *Talton v. Mayes* acknowledged that the Indian nations were not bound by the Constitution or by general federal laws, except to the extent that Congress imposed such restrictions.<sup>114</sup> The tribal governments were pre-constitutional because their political identity preceded that of the United States, and they were also extra-constitutional because they were not parties to the Constitution and, therefore, existed outside the constitutional structure that governed the allocation of power between the federal government and the states.<sup>115</sup>

A competing line of cases emerged in the nineteenth century that challenged the notion of tribal political autonomy. In cases such as *United States v. Kagama* and *Lone Wolf v. Hitchcock*, the Court took the position that Indian tribes were uncivilized wards in need of the paternalistic oversight of the federal government.<sup>116</sup> The Supreme Court in *Kagama* upheld the constitutionality of the Major Crimes Act, which, for the first time, subjected intra-Indian offenses to federal jurisdiction, not because this was justified by any of Congress's

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113. *Rice*, 528 U.S. at 524.

114. See *Talton v. Mayes*, 163 U.S. 376 (1896); *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

115. See generally Coffey & Tsosie, *supra* note 63 (describing the nineteenth-century jurisprudence that created the notion of tribal political status as "domestic dependent nations").

116. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886).

enumerated powers, but because the federal government had a “duty” to protect the Indian tribes, who were “a race once powerful, now weak and diminished in numbers.”<sup>117</sup> This decision paved the way for a virtually unlimited notion of federal plenary power to govern Indians. In fact, that notion of plenary power exists in only two places in federal constitutional law:<sup>118</sup> Congress’s power to regulate Indian affairs and Congress’s power to regulate immigration, on the theory that both involve political questions that are beyond the authority of the federal courts.<sup>119</sup>

The political question doctrine was specifically addressed in a subsequent case. In *Lone Wolf v. Hitchcock*, the Kiowa, Comanche, and Apache (KCA) tribes in Oklahoma tried to resist the allotment of their treaty-guaranteed reservation and subsequent opening of tribal lands to non-Indian settlement on the grounds that the Treaty of Medicine Lodge required a three-fourths vote of all adult males in the affected tribes before further land cessions could take place.<sup>120</sup> The Supreme Court deemed treaty abrogation to be a unilateral power of Congress, and found that “the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States” meant that Congress’s unilateral decision to allot the reservation was essentially a political question beyond the capacity of the federal courts to adjudicate.<sup>121</sup> The tribes’ only recourse was to petition the very Congress that had passed the law dispossessing them of their land and transferring the title to eager land speculators.<sup>122</sup> Needless to say, the KCA tribes lost most of the lands that had been guaranteed to them by the Treaty of Medicine Lodge.<sup>123</sup>

As wards of the U.S. government, members of Indian tribes were deprived of many civil rights that other Americans take for granted, including rights to decide how to raise their children and how to exercise their religious freedom.<sup>124</sup> Native peoples’ rights to their ancestral land and resources were dependent upon

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117. *Kagama*, 118 U.S. at 384.

118. Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1128–29 (2002).

119. 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, 33 (2002).

120. *Lone Wolf*, 187 U.S. at 555–56.

121. *Id.* at 564.

122. See Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 AKRON L. REV. 245, 272 (2003).

123. See Saito, *supra* note 118, at 1133–34.

124. See generally Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002) (describing the contemporary effects of nineteenth-century federal policies intended to effectuate the assimilation of American Indians into the dominant culture).

the willingness of the federal government to honor its promises, since the doctrine of aboriginal title or the right of occupancy is not given the same status as a fee simple absolute under American property law.<sup>125</sup> As the Standing Bear case indicates, there was little recourse for tribes who protested the actions of the federal government to take their treaty-guaranteed lands and substitute others, often in distant locations. The federal government's nineteenth century land policies, including the removal policy and the allotment policy, resulted in a massive displacement and dispossession of Native peoples from their traditional lands.<sup>126</sup>

The federal government's nineteenth century civilization policies caused further trauma to Native peoples, who were struggling to maintain both their lands and traditional economies against the attack of white settlers.<sup>127</sup> The Bureau of Indian Affairs (BIA), which is the federal agency that regulates Indian affairs, was initially housed in the Department of War and then was moved to the Department of Interior when that department was created in the mid-nineteenth century.<sup>128</sup> The BIA instituted the boarding school policy, which forcibly removed Indian children from their families and sent them to distant boarding schools where they were forbidden to speak their language or practice their customs, and where parents were precluded from even visiting their children for extended periods of time.<sup>129</sup> Many Indian children died in these military-style boarding schools, such as the Carlisle Institute.<sup>130</sup> Although some were returned to their families at death, others were buried on site, often in unmarked graves.<sup>131</sup> Today, many scholars in the United States and Canada have questioned the operation of government-sponsored boarding schools for indigenous youth, citing the suspicious circumstances surrounding some of the deaths at those institutions, as well as instances of physical abuse perpetrated by some boarding school staff.<sup>132</sup> This history has never been formally acknowledged or redressed in the United States.<sup>133</sup>

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125. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 283 (1955) (holding that the Fifth Amendment's Takings Clause does not apply to governmental appropriation of tribal aboriginal title because "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law").

126. Cf. Saito, *supra* note 118, at 1133.

127. *Id.* at 1149–50.

128. Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 358 (1997).

129. See Saito, *supra* note 118, at 1149.

130. Jacqueline Fear-Segal, *Institutional Death and Ceremonial Healing Far From Home: The Carlisle Indian School Cemetery*, 33 MUSEUM ANTHROPOLOGY 157, 157 (2010).

131. *Id.* at 160–63.

132. *Id.* at 158.

133. *Id.* at 158–59.



The U.S. government's civilization policy also entailed assigning Christian missionaries to act as federal agents in charge of the reservations and the enactment of the Code of Indian Offenses in the nineteenth century, which criminally banned many cultural practices, including traditional plural marriages and religious ceremonies, such as the Sun Dance.<sup>134</sup> These laws were understood not to violate the First Amendment's Establishment Clause because the federal government was engaged in a civilization mission, which involved assigning reservations to many different Christian denominations.<sup>135</sup> Further, policymakers believed that a Christian set of values would improve Indians as human beings.<sup>136</sup> In the words of Colonel Pratt, the founder of the Carlisle Institute, the prototype for the military-style Indian boarding school: "[A]ll the Indian there is in the race should be dead. Kill the Indian in him and save the man."<sup>137</sup>

The Bureau of Indian Affairs established Courts of Indian Offenses on reservations to adjudicate cases involving violations of the Code of Indian Offenses. Although individual Indians were detained in jails and punished for their violation of the Code, they were not entitled to basic due process rights. In *United States v. Clapox*, a federal district court held that such protections were not required in these courts because the "courts of Indian offenses' are not constitutional courts provided for in section I, art. 3" of the Constitution, but rather were "mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."<sup>138</sup> The court further found that "the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."<sup>139</sup>

The status of a dependent ward meant that any and all rights for Native peoples were dependent upon the willingness of the United States to vindicate these rights. As noncitizens, Native peoples were not directly represented in the

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134. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 778–79, 788–89 (1997).

135. See, e.g., *id.* at 784.

136. See, e.g., *id.* at 802–03.

137. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 629 (2009) (quoting RICHARD H. PRATT, INDIAN EDUCATION, reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880–1900, at 263 (Francis Paul Pucha ed., 1973)).

138. *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

139. *Id.*

U.S. Congress that controlled all of their affairs through the fiction of plenary power that emerged from the constitutional language that Congress has the authority to regulate commerce with foreign nations, among the several states, and with the Indian tribes. Nor did Native people sit as judges on the federal courts that dictated their rights in the formative years of federal Indian law.<sup>140</sup> Although some Indians served in the executive branch of government, such as Ely S. Parker, a Seneca Indian who served as an officer in the U.S. military and then was assigned to a post as a Commissioner of Indian Affairs, the Bureau of Indian Affairs reflected the policies of the United States and not the aspirations of Native peoples.

During World War I, many American Indian men served in the U.S. military, but returned home as noncitizens with few rights to the civil liberties enjoyed by all other Americans.<sup>141</sup> This led to the passage of the 1924 Indian Citizenship Act,<sup>142</sup> which represents the third frame of citizenship.

### C. Frame III: Indians as Citizens of the United States and the States Where They Reside

In the late nineteenth century, Congress used the allotment policy, represented by the Dawes Allotment Act and the Burke Act, as a tool of civilization, offering individual tribal members a share of tribal lands for their own individual use and management, and opening the surplus lands for settlement by non-Indians.<sup>143</sup> The allotment statutes generally conferred U.S. citizenship on Indians who agreed to the division of tribal lands, or who chose to leave the reservation and cut their ties to the tribe altogether.<sup>144</sup> The result of this selective conferral of citizenship was that some Indians were U.S. citizens and many more were not. As a means to equalize this system and validate the rights of the Indian men who had served honorably in the U.S. military, Congress enacted the Indian Citizenship Act of 1924, which unconditionally

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140. See Rob Capriccioso, *Obama Nominates Native American Woman to Federal Court*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 19, 2013), <http://indiancountrytodaymedianetwork.com/2013/09/19/obama-nominates-native-american-woman-federal-court-151358> [https://perma.cc/E6CE-73DD] (describing Obama's nomination of Diane J. Humetewa, who would become only the third Indian in history to receive a federal judgeship).

141. See generally THOMAS A. BRITTEN, *AMERICAN INDIANS IN WORLD WAR I: AT HOME AND AT WAR* (1997).

142. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified at 8 U.S.C. §1401(b) (2012)).

143. Saito, *supra* note 118, at 1132–33.

144. Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1427 (2011).

conferred U.S. citizenship on all Indians born within the United States.<sup>145</sup> The effect of this statute was to naturalize all Indians who were previously noncitizens and also guarantee that all Indians subsequently born in the United States would be treated as natural born citizens. Thus, Indians are citizens by federal statute and not by constitutional right, although the effect may seem to be identical because the protections of the Fourteenth and Fifteenth Amendments were finally applicable to Indian people.

The 1924 Act also expressly stated that Indian treaty rights and the rights enjoyed by tribal members under federal law were not impaired in any way by the grant of citizenship.<sup>146</sup> Thus, tribal members became dual citizens, both of their sovereign nations under the protection of U.S. law (the trust status) and of the United States. Presumably, they also became citizens of the state where they resided. This peculiar structure raised two fundamental problems for the norm of equal citizenship.

First, the concept of the ward had to be harmonized with the concept of citizenship. Under other doctrines, the conferral of citizenship is by consent. The person naturalized consents to citizenship in the United States, and the United States consents to admit the individual to citizenship. In the case of American Indians, many individuals received citizenship without their consent. Professor Robert Porter mentions that this bill was vehemently resisted by the constituent nations of the Iroquois Confederacy (including the Seneca Nation), who did not seek to incorporate into the United States, but rather sought to maintain their international and separate identity as sovereign nations residing on lands that are now part of the United States and Canada.<sup>147</sup> In Professor Porter's view, the Seneca Nation existed long before the United States or Canada, and the 1924 Act is not only of dubious constitutionality, but also impaired the sovereignty of the Seneca Nation and other indigenous nations.<sup>148</sup>

The second problem was that, while Indians were considered citizens of the state where they reside after passage of the 1924 Act, reservation lands are technically not part of the state.<sup>149</sup> In fact, under the *Worcester* decision, the state may not extend its laws into Indian country even to regulate non-Indians.<sup>150</sup> That is the sole and exclusive province of federal law and of the tribal governments themselves. The state may not tax Indians living in Indian country and it

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145. 8 U.S.C. § 1401(b) (2012).

146. *Id.*

147. Porter, *supra* note 60, at 127.

148. *Id.* at 135–37.

149. Carole Goldberg, *Not So Simple: Voting Rights for American Indians in State Elections*, 7 ELECTION L.J. 355, 355–56 (2008) (book review).

150. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519–20 (1832).

may not regulate the activities of tribal governments on their own lands.<sup>151</sup> So, did Indians on the reservation actually reside within the state? Did the states have to recognize their equal citizenship and entitlement to the benefits of state citizenship even though they could not tax or regulate tribal members living on the reservation?

Many states took the position that the 1924 Act could not and did not expressly grant state citizenship. The federal government may have had the right to grant them U.S. citizenship, but the states argued that they did not have to admit Indians living on the reservation to state citizenship. In 1936, the Attorney General of Colorado issued an opinion that “Indians had no right to vote in state elections because they were not citizens of the state.”<sup>152</sup> Similarly, the 1947 report of the President’s Committee on Civil Rights documented that American Indians were denied the right to vote in Arizona and New Mexico, even though many Indian men had served in the U.S. military during World War II.<sup>153</sup>

Essentially, the grant of U.S. citizenship opened a Pandora’s box that is still unsettled. What is clear is that Native Americans hold a differentiated citizenship that is not necessarily equal to the citizenship of other state citizens, but rather is comprised of rights that derive both from U.S. citizenship and from the political relationship of Indian nations with the United States. I will look at two areas by way of illustration: (1) voting rights and (2) the benefits of state citizenship in the area of education.

### 1. Voting Rights

The Voting Rights Act of 1965 (VRA) legislatively implements the Fifteenth Amendment’s guarantee that the right to vote shall not be abridged or denied on account of race or color. It prohibits discriminatory conduct, and also provides federal oversight to ensure that state laws cannot deny or dilute the vote of minority communities.<sup>154</sup> The VRA requires the U.S. Attorney General to approve changes in voting arrangements when a jurisdiction has demonstrated

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151. *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 165 (1973).

152. See BYRON G. ROGERS, BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF COLORADO (1935–1936), <https://dspace.library.colostate.edu/bitstream/handle/10974/249/sagco1935-1936%281%29.pdf?sequence=1&isAllowed=y>; see also DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 9 (2007).

153. TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 40 (1947).

154. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 438 (current version at 52 U.S.C. § 10301 (2012)).

problematic practices in the past.<sup>155</sup> The VRA was amended in 1975 to protect members of language minorities as well, including Native Americans.<sup>156</sup> The enforceability of the VRA's antidiscrimination provisions has been compromised by the Supreme Court's 2013 ruling in *Shelby County v. Holder*, which held the statutory formula for determining whether a state is subject to preclearance unconstitutional; however, the section 5 federal preclearance requirement is still effective as a matter of law.<sup>157</sup>

There has been a long history of discrimination against all minorities in many states, and this was true in Arizona, as well as New Mexico.<sup>158</sup> States used different rationales and mechanisms to deny Indians the right to vote.<sup>159</sup> Some were facially neutral, like the literacy test, and were applied to all voters, but disproportionately disenfranchised minority voters.<sup>160</sup> Some were premised on the different status of Indian people.<sup>161</sup> In New Mexico, for example, the state focused on the "Indians not taxed" language to hold that because Indians living on the reservation did not pay local or state property taxes, they were not eligible to vote.<sup>162</sup> In a 1948 case, *Trujillo v. Garley*, the Supreme Court finally overturned this state doctrine as unconstitutional under the Fourteenth and Fifteenth Amendments.<sup>163</sup> In Arizona, the state courts focused on the status of Indians as wards, finding that because Indians were under a legal guardianship they lacked the competence to vote as a matter of state constitutional law.<sup>164</sup> The Arizona Attorney General subsequently issued an opinion finding that Indians living off the reservation also lacked the competence to vote, given their status as wards.<sup>165</sup> This disqualified all of the American Indian war veterans

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155. *Id.* § 5.

156. Voting Rights Act Amendments of 1975, Pub L. No. 94-73, § 203, 89 Stat. 400, 401 (current version at 52 U.S.C. § 10303(f) (2012)).

157. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (holding coverage formula of section 4(b) unconstitutional because it was outdated and constituted an impermissible burden upon states' rights).

158. See Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, a Case Study*, 29 AM. INDIAN L. REV. 43, 47 (2004-05) (noting the Library of Congress recognized that states had regularly denied American Indians the right to vote).

159. See *id.* at 53-56.

160. See *id.* at 47.

161. See *Montoya v. Bolack*, 372 P.2d 387, 388-89 (N.M. 1962).

162. *Id.* at 390.

163. *Id.*

164. See, e.g., *Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928).

165. Letter From John L. Sullivan, Att'y Gen., to Dan E. Garvey, Sec. of State, 1946 ARIZ. ATT'Y GEN. REP. & OPINIONS 1 (Apr. 8, 1946).

from voting. The Arizona Supreme Court ultimately overturned this doctrine, based on state constitutional law, in the 1948 case of *Harrison v. Laveen*.<sup>166</sup>

These cases invalidated the notion that the ward status of Indians was a disqualification to state citizenship. But, they did not protect Indian people from discriminatory practices designed to exclude all minorities from voting. For example, many states, including Arizona, used a literacy test to qualify voters, which excluded many African Americans, Latinos, and Indians.<sup>167</sup> Indeed, practices that states developed after the passage of the Fifteenth Amendment to keep African Americans, Latinos, and Indians off the rolls of qualified voters largely motivated the enactment of the VRA.<sup>168</sup>

Section 2 of the Voting Rights Act<sup>169</sup> contains two provisions that are relevant. First, the statute prohibits states or their political subdivisions from imposing any voting qualification, practice, or procedure that would deny or abridge the right of a citizen to vote on account of the citizen's race or color.<sup>170</sup> Second, the statute also prohibits the states from adopting structures that would dilute a minority or racial group's voting strength.<sup>171</sup> The latter issue, which involves the constitutionality of state redistricting plans, is quite complicated to prove.<sup>172</sup> Dilution occurs when a politically cohesive minority group is dispersed into several different districts where they have no power to outvote the prevailing group.<sup>173</sup> It also occurs when districts are drawn to concentrate the minority group in one district, where they have no effective way to counter the vote in numerous other districts.<sup>174</sup> A 1986 case<sup>175</sup> establishes a test to determine whether dilution has occurred, but it is intensely fact specific.

The provision regarding discriminatory screening devices emerged through a 1975 VRA amendment that permanently banned the use of literacy tests and similar devices used to exclude minority voters.<sup>176</sup> In the original 1965 Act,

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

167. McDonald, *supra* note 158, at 45.

168. See Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH. L. REV. 95, 97 (1989).

169. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (current version at 52 U.S.C. § 10301 (2012)).

170. *Id.*

171. *Id.*

172. Ethan Weiss, Comment, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 727–29 (2013).

173. See generally *id.* at 710.

174. See generally *id.* at 727–28.

175. *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

176. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401 (current version at 52 U.S.C. § 10303(f) (2012)).

Congress suspended literacy tests for five years in jurisdictions with depressed levels of political participation by minority voters, allowing jurisdictions to bail out from the Act's coverage only if they could show that for the preceding five years, their test had been administered without discriminatory purpose or effect.<sup>177</sup>

Arizona sought to bail out from the Act, and although a group of Navajo voters tried to intervene to show the state's discriminatory conduct, a three-judge panel entered an order permitting the counties to do so.<sup>178</sup> The court described Arizona's use of the literacy test as "bona fide," and found that the Arizona test had been adopted when Indians were noncitizens, demonstrating the state's permissible purpose.<sup>179</sup> The court acknowledged that there was documented evidence of inadequate facilities for voting and registering on the reservation, but found that the state was trying to remedy those problems.<sup>180</sup> The Vice-Chairman of the Navajo Nation in fact sought to use the 1965 Act to persuade the federal government to send a registrar to the Navajo Nation, but was unsuccessful.<sup>181</sup>

In 1970, Congress amended the Voting Rights Act to extend the suspension of literacy tests for another five years and impose the ban nationwide.<sup>182</sup> Arizona refused to abandon its test, leading the United States to sue Arizona, as well as certain other states.<sup>183</sup> Ultimately, Congress acted in 1975 to permanently ban the use of literacy tests and similar devices.<sup>184</sup> Redistricting issues continue to emerge, given the VRA's requirement that every ten years the census be used to determine whether there is a need to draw new lines for congressional districts.<sup>185</sup> This recently occurred in all states in the Southwest, including Arizona.<sup>186</sup> Pursuant to this process, leaders from several Arizona tribal governments testified in

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177. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (current version at 52 U.S.C. § 10301 (2012)).

178. Apache County v. United States, 256 F. Supp. 903, 913 (D.D.C. 1966).

179. *Id.* at 911.

180. *Id.* at 910.

181. Karlan, *supra* note 144, at 1428 n.35.

182. Laughlin McDonald, *A Challenge to the Constitutionality of Section 5 of the Voting Rights Act: Northwest Austin Municipal Utility District Number One v. Mukasey*, 3 CHARLESTON L. REV. 231, 238 (2009).

183. *See Oregon v. Mitchell*, 400 U.S. 112, 117 n.1 (1970).

184. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (current version at 52 U.S.C. § 10303 (2012)).

185. *Id.*

186. *See* Alia Beard Rau, *Arizona Redistricting Panel Meets Today*, AZ CENTRAL (Aug. 18, 2011, 12:00 AM), <http://www.azcentral.com/news/election/azelections/articles/2011/08/18/20110818-arizona-redistricting-panel-meeting.html> [<https://perma.cc/X7AQ-GYVQ>].

front of the Independent Redistricting Commission.<sup>187</sup> Leonard Gorman, speaking for the Navajo Nation, stated that the Commission is required to create a new congressional district that represents the population.<sup>188</sup> The Navajo and Hopi tribes united in their proposal to create a majority Native American district in Arizona.<sup>189</sup> Hopi Chairman Leroy Shingoitewa stated, “We have been here a long time and we want you to understand we are citizens of the state of Arizona.”<sup>190</sup> Both tribes believe that a unified voice will be more effective when dealing with the federal government.<sup>191</sup> Because of Arizona’s history of discrimination against Latinos, the final map must be submitted to the U.S. Department of Justice for approval.<sup>192</sup>

## 2. Access to Public Education

Voting rights are pivotal to the exercise of civil rights. Education provides the foundation for understanding the tenets of American democracy and the role of the citizen. The states have historically taken responsibility for public education. The federal government, however, had the earliest responsibility for Indian education. In the Northwest Ordinance of 1787, the United States promised to “provide a suitable education for American Indian peoples.”<sup>193</sup> This guarantee was implemented through various Indian treaties, as well as statutory and regulatory provisions.<sup>194</sup> Over 110 treaties provided that the federal government would provide an education to members of the signatory tribes, generally by provisions that required the building of schools on reservations and the provision of teachers.<sup>195</sup> Until the 1870s, the United States contracted its responsibilities out to Christian missionaries.<sup>196</sup>

In the late nineteenth century, federal policy shifted to favor off-reservation boarding schools, which facilitated the civilization mission.<sup>197</sup> This practice continued until the 1930s, when the famous Miriam Report documented the harms

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187. Laurel Morales, *Navajo and Hopi Tribes Reconcile to Send a Voice to Washington*, FRONTERAS (Oct. 5, 2011), <http://fronterasdesk.org/content/navajo-hopi-tribes-reconcile-send-voice-washington> [<http://perma.cc/GMH2-E37P>].

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Rebecca Tsosie, *The Challenge of “Differentiated Citizenship”: Can State Constitutions Protect Tribal Rights?*, 64 MONT. L. REV. 199, 222–23 (2003).

194. *Id.* at 223.

195. *Id.*

196. *Id.*

197. *Id.*



to Indian children and their families caused by this practice.<sup>198</sup> The New Deal reformers believed that the better alternative would be to promote the integration of Indian children into public school systems.<sup>199</sup> This became the BIA's educational policy from the 1930s to the 1970s.<sup>200</sup> The Johnson O'Malley Act of 1934 (JOM) authorized the Secretary of the Interior to contract with "any state, university, college or with any appropriate state or private corporation, agency, or institution for the education of Indians in such state or territory."<sup>201</sup> While the states were eager to accept JOM funding for the Indian students, they were in most cases unwilling to make appropriate accommodations to enable Indian students to succeed.<sup>202</sup> So, while thousands of Indian children entered the public school system, they were not able to access the benefits of equal educational opportunity.

Two federal studies ultimately concluded that the JOM program had not resulted in the intended educational benefit to Indian children.<sup>203</sup> In the 1970s, the federal government developed a new policy envisioning American Indian education as a shared responsibility of federal, state, and tribal governments.<sup>204</sup> This policy has also been difficult to implement for many reasons.<sup>205</sup> Given that the majority of Indian children are in public schools, it would seem logical that there ought to be tribal input into curriculum, language, and teaching instruction.<sup>206</sup> This input has been difficult to effectuate, given the overriding structure (federal standards/mandates), teacher training and licensing, school board composition, and the composition of administrators, faculty, and counseling staff.<sup>207</sup> There is very little Native American representation in state decisionmaking bodies. States like Arizona that tend to promote English-only policies in schools and restrict the use of bilingual programs have clashed with tribes like the Navajo Nation, who are committed to promoting the teaching of Navajo language at all levels of education.<sup>208</sup> Moreover, school funding formulas that rely on

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 223–24.

202. *Id.* at 224.

203. *Id.*

204. *Id.*

205. *Id.* at 219–20.

206. See Jennifer L. Gilliard & Rita A. Moore, *An Investigation of How Culture Shapes Curriculum in Early Care and Education Programs on a Native American Indian Reservation*, 34 EARLY CHILDHOOD EDUC. J. 251, 257–58 (2007).

207. *Id.*

208. Application of Proposition 203 to Schools Serving the Navajo Nation, Ariz. Op. Atty. Gen. No. I01-006 (Feb. 15, 2001), <https://www.azag.gov/sgo-opinions/application-proposition-203-schools-serving-navajo-nation> [<https://perma.cc/MC5L-EJVM>].

property taxes impose tremendous inequalities in areas where there is not a property tax base, such as reservation communities.<sup>209</sup>

In sum, access to equal educational opportunity continues to be quite problematic for American Indians. In addition, Native people in many border towns, such as Gallup, Farmington, and Flagstaff, continue to assert that there is active racism toward Native students and Native instructors,<sup>210</sup> which raises the fourth frame of Indian citizenship.

#### D. Frame IV: Indians as Racial Minorities

The U.S. Civil Rights Commission and the Civil Rights Division of the U.S. Department of Justice have documented pervasive inequities that affect American Indians as a population.<sup>211</sup> In 1846, the Supreme Court indicated that the term “Indian” constitutes a racial classification when it decided the case of *United States v. Rogers*, which dealt with the murder of a non-Indian member of the Cherokee Nation by another non-Indian member of the Cherokee Nation.<sup>212</sup> Under the logic of *Ex Parte Crow Dog*<sup>213</sup> and the Cherokee Nation’s treaty, the Cherokee Nation would have had exclusive jurisdiction over a crime committed by one tribal member against another. In this case, the non-Indian men had been naturalized to Cherokee citizenship by their respective marriages to Cherokee women and the tribe’s consent to their membership.<sup>214</sup> But, the Court held that the status of being Indian was defined by race and not by nationality.<sup>215</sup> The Cherokee Nation was not the type of government that could naturalize citizens of any race, the Court held, and thus, the defendant was not an Indian for purposes of the statute that exempted crimes between Indians from federal jurisdiction.<sup>216</sup>

State laws banning miscegenation between whites and members of other races also operated to preclude white/Indian marriages, and in some of the southern states, Indians were subject to the same restrictions on property ownership

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209. Tsosie, *supra* note 193, at 239–40.

210. See generally U.S. COMM’N ON CIVIL RIGHTS, DISCRIMINATION AGAINST NATIVE AMERICANS IN BORDER TOWNS (2015).

211. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY ix (2003) (documenting extensive disparities supporting the conclusion that “Native Americans continue to rank at or near the bottom of nearly every social, health and economic indicator” when compared to other groups).

212. *United States v. Rogers*, 45 U.S. (4 How.) 567, 567–68, 573 (1846).

213. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

214. *Rogers*, 45 U.S. at 568.

215. *Id.* at 573.

216. *Id.*

and contractual rights as black slaves.<sup>217</sup> Discrimination was the norm in U.S. society until the modern civil rights era.<sup>218</sup> By the 1960s and 1970s, the federal civil rights statutes were enacted banning discrimination in federal and state employment.<sup>219</sup> A group of non-Indian employees within the Bureau of Indian Affairs challenged a regulation that accorded an Indian preference to promotions within the BIA, extending the Indian Reorganization Act's statutory provision giving Indian preference in employment within the Bureau.<sup>220</sup> In the 1974 case of *Morton v. Mancari*, the Supreme Court held that the statutory preference had not been explicitly repealed by the Equal Employment Opportunity Act, and further held that the preference was not a racial classification for constitutional purposes, which would have required strict scrutiny.<sup>221</sup> The preference was instead a political classification based on the trust relationship between federally recognized tribes and the federal government and served by the BIA, which required the employment of the tribal members who would effectively discharge that role.<sup>222</sup> The preference was addressed under rational basis scrutiny and upheld, and the Court indicated that all similar laws governing federally recognized tribes would be entitled to similar deference.<sup>223</sup>

For this reason, the prevailing view is that American Indians and Alaska Natives are not racial groups, but are political groups. In contrast, Native people often do face discrimination in housing, employment, and voting, so they are still a protected group for purposes of U.S. civil rights law.<sup>224</sup> In this sense, American Indians are both racial minorities for purposes of U.S. civil rights law and members of sovereign governments for purposes of U.S. federal Indian law. This dual status often causes conflicts when courts must decide whether individual Indians should be treated as equal citizens for purposes of antidiscrimination law, or as differential citizens, given their tribal status. Are tribal preferences another form of racial preference?

Professor Carole Goldberg foreshadowed this issue in her 2002 article, *American Indians and Preferential Treatment*, where she noted that preferences for American Indians predate American affirmative action policies and yet are

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217. *In re Walker's Estate*, 46 P. 67, 70 (Ariz. 1896) (declaring a marriage between a white man and Pima Indian woman void).

218. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

219. *See* 42 U.S.C. § 2000(e)-2(a) (2012).

220. *Morton v. Mancari*, 417 U.S. 535, 539 (1974).

221. *See id.* at 553-55.

222. *Id.* at 541-42.

223. *Id.* at 554.

224. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (current version at 52 U.S.C. § 10301 (2012)).

increasingly the target of protests that use the rhetoric of equal rights to attack continued recognition of Indian treaty rights and other unique tribal rights (such as the right to engage in gaming on the reservation) which are seen as undeserved preferences for a certain group of citizens.<sup>225</sup> In this article, Professor Goldberg identified three primary responses to these attacks. The first would proceed under the theory that preferences for American Indians are a form of racial preference and should stand—or fall—under the same test of strict scrutiny that is now used for all government-sponsored racial classifications.<sup>226</sup> This approach is widely condemned as inconsistent with the accepted view, under *Morton v. Mancari*, that tribal governments are political rather than racial entities and that this sovereign status enables a government-to-government relationship with the United States that justifies rational basis scrutiny for federal legislative actions which further that trust relationship.<sup>227</sup> As Professor Goldberg points out, however, a simplistic acceptance of this argument is not sufficient to protect the rights of all persons who might rightfully be described as Indians because the trust responsibility extends only to federally recognized tribal governments.<sup>228</sup> In that sense, the tendency to “racialize” American Indian political identity can be used to limit, rather than further, Indigenous self-determination. As Professor Kimberly Tallbear has demonstrated, the United States inherited a colonial mentality that considered indigenous peoples to be an “inferior” race that could be conquered.<sup>229</sup> Today, the carefully delineated federal requirements for proof of “racial” identity that are necessary to gain status as a federally recognized tribe, or tribal membership requirements conditioned upon blood quantum, may perpetuate forms of racism that are antithetical to indigenous self-determination.<sup>230</sup>

Under the second response, which is premised upon notions of citizenship (both federal and tribal), Indian preferences are only constitutionally acceptable if they are limited to enrolled members of federally recognized tribal

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225. See generally Goldberg, *supra* note 112.

226. *Id.* at 952–60 (discussing Judge Kozinski’s opinion in *Williams v. Babbitt*, 115 F.3d. 657 (9th Cir. 1997), which struck down an administrative regulation limiting reindeer herding to Alaska Natives).

227. See generally *Mancari*, 417 U.S. 535.

228. See Goldberg, *supra* note 112, at 957–58.

229. Kimberly Tallbear, Paper Presented at the Indigenous Peoples and Racism Conference at Sydney, Australia: Racialising Tribal Identity and the Implications for Political and Cultural Development (Feb. 20–22, 2001); see also International Institute for Indigenous Research Management (on file with author).

230. *Id.* at 6 (pointing out that “[t]ribal and indigenous advocates who . . . espouse racialized ideas of cultural and political authenticity, may unwittingly strengthen anti-tribal movements that may use the same stereotypes to attack tribal political and cultural authority”).

governments.<sup>231</sup> Preferences for persons who have Indian ancestry but are not enrolled, or who are enrolled members of tribes that lack federal recognition, would not be upheld. Rather, as Professor Eugene Volokh has written, “[c]lassifications based only on being an Indian . . . are racial; discrimination against or preference for nontribal Indians—or even for tribal Indians if the justification is their race and not their tribal status—would thus violate [anti-affirmative action and nondiscrimination laws].”<sup>232</sup> Professor Volokh’s account of the purpose of antidiscrimination legislation is worth noting because it aligns with the convoluted logic of a “post-racial” America, in which race is both central to the identity of the settler nation (as White) and then becomes irrelevant in the contemporary racial politics that embodies a norm of whiteness, unseen by those at the center, but always problematic for “other” racial groups, who are relegated to the periphery.<sup>233</sup> Such legislation is, he claims, “aimed at hastening the day when people’s race or ethnicity will be irrelevant to their civic lives.”<sup>234</sup> The colorblind ideology, which is used to justify the assertion that racial identity is irrelevant to the enterprise of American citizenship, exempts only the subset of Americans that the U.S. government recognizes as legitimately entitled to claim an indigenous nationality in addition to their U.S. citizenship. In that sense, to use Professor Tallbear’s language, the colonizer defines the terms of indigenous identity as it is permissibly located within the nation-state, rather than the indigenous peoples themselves. This feature of federal Indian law seems antithetical to the premise of indigenous self-determination.

This point is enhanced by the third response that Professor Goldberg identifies, which is based upon the Commerce Clause. The Commerce Clause specifically authorizes Congress to regulate commerce with foreign nations, among the several states, and with Indian tribes.<sup>235</sup> This provision can be interpreted as a specific authorization of congressional authority to act on behalf of Indian tribes, thereby immunizing such legislation from attack under the equal protection guarantee that is now interpreted to be part of the Fifth Amendment.<sup>236</sup> As Professor Goldberg observes, however, this approach can also be used to challenge

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231. *Id.* at 965.

232. Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1359 (1997).

233. See generally Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1052 (2012) (describing the racialization of indigenous identity under U.S. law and policy and the impact of this history on contemporary American Indian tribes).

234. Volokh, *supra* note 233, at 1359.

235. U.S. CONST. art. I, § 8, cl. 3.

236. See Goldberg, *supra* note 112, at 966–74. See generally Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples”*, 39 UCLA L. REV. 169 (1991).

federal legislation that benefits individual Indians, on the theory that the Commerce Clause only authorizes legislation on behalf of the tribal governments.<sup>237</sup> So, the equality argument might still be invoked to strike down legislation that extends benefits to individual Indians, such as educational or employment benefits, because of their status as Indians. The Commerce Clause argument is also unable to sustain state preferences that serve American Indians, but are not intended only to effectuate an existing federal law. This is one reason why attacks on state university programs that serve American Indian students might well succeed if other forms of affirmative action for underrepresented minority groups are banned.

In addition, the Commerce Clause argument deals only with the political status of tribal governments. So, federal policies that confer certain immunities (for example, from state taxation on a tribal member's income earned on the reservation) may not be applicable to enrolled tribal members living and working off the reservation.<sup>238</sup> The limits on Congressional power to regulate individual Indians living off the reservation have not been clearly defined. This issue is currently being litigated in an Arizona federal district court in a class action lawsuit filed by the Goldwater Institute challenging the constitutionality of the Indian Child Welfare Act as applied to Native American children living off the reservation.<sup>239</sup> The suit claims that the federal law deprives Native American children of equal protection in foster care placements and adoptions because the federal law "puts tribal supremacy ahead of the children's best interests."<sup>240</sup> While the lawsuit does not challenge the jurisdiction of tribes to adjudicate these issues for Indian children living on the reservation, it asserts that children living off the reservation have Constitutional rights to equal protection, due process, and freedom of association, and consequently, they should be protected under the same state laws that protect all children.<sup>241</sup>

The U.S. constitutional structure accommodates the rights of American Indians and Alaska Natives in part by the explicit mention of Indian tribes in the Commerce Clause. Native Hawaiians are in a distinctive situation because they have not been formally acknowledged as a political entity. They are clearly indigenous peoples and they also had a preexisting sovereign identity. Without formal recognition, however, they are vulnerable to claims that any special treatment by

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237. Goldberg, *supra* note 112, at 968.

238. See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973).

239. See Mary Jo Pitzl, *Lawsuit Challenges Native American Adoption Law*, ARIZ. REPUBLIC (July 7, 2015, 9:18 PM), <http://www.azcentral.com/story/news/arizona/politics/2015/07/07/arizona-lawsuit-challenges-indian-child-welfare-act/29827303/> [<https://perma.cc/8NRX-KM8B>].

240. *Id.*

241. *Id.*

the state is based on their racial status. This became an issue in *Rice v. Cayetano*, in which the Office of Hawaiian Affairs (OHA) promoted a special election for the trustees that would administer the one-fifth ceded lands trust that Congress had reserved for the use and benefit of Native Hawaiians.<sup>242</sup> Only Native Hawaiians could vote in the election, and the state used the rationale of *Morton v. Mancari* as a justification.<sup>243</sup> The Supreme Court held that the classification, which depended upon descendance from the indigenous peoples of Hawaii as of the date of contact with Western explorers, was a classification based on ancestry, which operated as a proxy for race, and not a political classification.<sup>244</sup> The Court found that this violated the Fifteenth Amendment because the OHA election was a state election and not a tribal election.<sup>245</sup> The Kingdom of Hawaii was a political sovereign that naturalized non-Natives to citizenship.<sup>246</sup> After the overthrow of the Hawaiian monarchy, however, all of these individuals became U.S. citizens.<sup>247</sup> The Court construes Hawaiian sovereignty claims as related only to those who are alleging indigenous status on the basis of race or ancestry and finds that these individuals now comprise a multiracial group sharing only a core political identity as U.S. citizens.<sup>248</sup>

In an interesting twist on the notion of multicultural citizenship within an indigenous nation, the Cherokee Nation recently became the target of attention in the wake of the Cherokee Nation's decision to disenroll the descendants of the Cherokee Freedmen from tribal membership. The Cherokee Nation allowed its members to own African American slaves prior to the Civil War and sided with the Southern states during that war.<sup>249</sup> After the Civil War, the Cherokee Nation signed a treaty with the United States requiring the tribe to accept the slaves as members of their society.<sup>250</sup> The 1866 treaty specifically provided that the Freedmen and their descendants "shall have all the rights of native Cherokees."<sup>251</sup> Consistent with U.S. social norms, however, the racial divide persisted.<sup>252</sup> When

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

243. *See generally id.* at 498–99.

244. *Id.* at 514.

245. *Id.* at 521–22.

246. *Id.* at 503.

247. *Id.* at 533–34 (Stevens, J., dissenting).

248. *See id.* at 524.

249. *See* Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop*, 47 J. MARSHALL L. REV. 1227, 1231–35 (2014).

250. *Id.* at 1236.

251. *Id.* (quoting Treaty With the Cherokee, U.S.-Cherokee Nation, art. IV (July 19, 1866)).

252. *See id.*

the Dawes Allotment Act was passed, the Cherokee Freedmen were listed separately from blood Cherokees on the membership rolls.<sup>253</sup>

In 2007, the Cherokee Nation amended its constitution to limit tribal membership to blood Cherokees.<sup>254</sup> In 2009, the Cherokee Nation sued the U.S. Department of Interior, seeking to remove Freedmen descendants from the Cherokee Nation's roster of citizens.<sup>255</sup> The Department of Interior responded with a counterclaim, seeking a declaratory judgment that relief was barred by the 1866 treaty and asking the federal court to deny the Cherokee Nation's petition.<sup>256</sup> In related tribal court actions, the Cherokee Nation's courts reached opposite conclusions.<sup>257</sup> The Cherokee Nation District Court ruled that the constitutional amendment was invalid because it operated in violation of the treaty of 1866.<sup>258</sup> The Cherokee Nation Supreme Court reversed and vacated this holding on the grounds that the tribe has the sovereign power to define its membership (or redefine it), and that the tribe enjoys immunity from any action protesting such a change in policy.<sup>259</sup> The Cherokee Freedmen have filed their claims in federal court, claiming that the Cherokee Nation's actions violate federal law, and after a series of procedural rulings, the consolidated cases are currently docketed in the District of Columbia District Court.<sup>260</sup>

Following these developments, the Congressional Black Caucus called for Congress to terminate the Cherokee Nation's trust status if the tribal government's allegedly racist policy was upheld.<sup>261</sup> Some Congressmen expressed concern that the United States could be held to be in violation of the United Nations Convention for Elimination of All Forms of Racial Discrimination (CERD) if it tolerated an act of racism by the Cherokee Nation.<sup>262</sup> The question of citizenship is complicated by the fact that the case is the product of historical and modern reactions to racial discrimination. Can the Cherokee Nation limit their membership to blood Cherokees in accordance with the

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253. *Id.* at 1237.

254. *Id.* at 1242.

255. *See* Cherokee Nation v. Nash, 724 F. Supp. 2d 1159 (N.D. Okla. 2010).

256. Chin, *supra* note 249, at 1245.

257. *Id.* at 1242–43.

258. *Id.* at 1242.

259. *Id.* at 1244.

260. *See* Court Docket, Cherokee Nation v. Nash, No. 1:13-cv-01313 (D.D.C. Aug. 28, 2013).

261. Chin, *supra* note 249, at 1242–43.

262. *See* H.R. 2824, 110th Cong. § 2 (2007) (bill introduced by Rep. Diane Watson to sever the trust relationship with the Cherokee Nation unless it restored citizenship to the Cherokee Freedmen); Arica L. Coleman, *Are Blacks Being Victimized Twice by the Cherokee?*, HISTORY NEWS NETWORK (May 11, 2008), <http://historynewsnetwork.org/article/50202> [https://perma.cc/QPQ7-UBFE] (arguing that disenrollment of Cherokee Freedmen is a contemporary human rights issue).



federal blood quantum policies that have influenced tribal enrollment policies, or is this case a departure from that norm, requiring analysis of racial discrimination by the Cherokee Nation? In effect, who are the Cherokee as a people and what norms are used to determine their rights as citizens?

### E. The Fifth Frame: Indians as Peoples

The Cherokee Freedmen case raises the paradox of indigenous self-determination: Indigenous peoples hold equal rights within a participatory democracy because they are now U.S. citizens, and they hold the right of self-determination because they have always existed as separate peoples. The Congressional Black Caucus is holding the Cherokee Nation to the norm of racial equality under U.S. constitutional law and threatening to terminate the Cherokee Nation's political status as a federally recognized Indian tribe if it refuses to honor the right of the Freedmen descendants to tribal membership. Of course, the rights of the Freedmen initially derived from a federal treaty, initiated in the wake of the American Civil War, that forced a new constitutional norm of inclusion upon an entity, the Cherokee Nation, which was not even a member of the constitutional structure of the United States (necessitating a treaty as a political mode of consent between nations). Over time, however, the Freedmen claim that they intermarried with tribal members and were integrated into the social fabric of the community in a way that now makes their disenrollment unjust.<sup>263</sup> Today, the Cherokee Nation claims that the right of self-determination includes the right to determine its own membership, and the federal cases on tribal sovereignty are in accord.<sup>264</sup> Under contemporary human rights law, is the norm of nondiscrimination in tension with the norm of self-determination? If so, how should these principles be reconciled?

Bethany Berger maintains that throughout history, efforts to grant U.S. citizenship to American Indians were "repeatedly linked to efforts to deny them self-determination."<sup>265</sup> In apparent agreement with Robert Porter, Berger asserts that "[s]tate citizenship was the triumph of assimilation and the opposite of

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263. See Chin, *supra* note 249, at 1237–38.

264. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that tribal government had sole authority over its membership requirements and plaintiff's challenge to the ordinance could only be litigated under tribal law). In this case, the Santa Clara Pueblo's membership ordinance treated women differently than men, but the Supreme Court held that tribal governments can make their own requirements for membership without regard to whether the federal government considers those requirements compatible with U.S. constitutional norms of gender equality. See generally Gloria Valencia-Weber, *Three Stories in One: The Story of Santa Clara Pueblo v. Martinez*, in INDIAN LAW STORIES 451 (Carole Goldberg et al. eds., 2011).

265. Berger, *supra* note 72, at 217.

indigeneity.”<sup>266</sup> According to Berger, “[t]his anomaly derives from a deeper legal and conceptual failing, one that takes individual citizen and national state as fundamental legal categories and fails to recognize nonstate collective self-governance rights.”<sup>267</sup> In the contemporary era, the category of indigenous rights straddles a difficult line between the rights of ethnic minorities to exist as separate cultural groups within a nation-state and the political right of governments that were unjustly subordinated under colonial rule to achieve self-determination. There is a clear tension between the politics of multiculturalism and the politics of self-determination, as indicated by the Supreme Court’s analysis in *Rice v. Cayetano*.<sup>268</sup>

Importantly, the Declaration on the Rights of Indigenous Peoples expressly maintains a commitment to the norms of self-determination and equal citizenship (antidiscrimination), and refers to both individual and collective rights. For example, Articles 1 and 2 incorporate by reference the central human rights identified under international law and make these equally applicable to indigenous peoples:

*Article 1:*

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

*Article 2:*

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.<sup>269</sup>

These provisions require an ethic of nondiscrimination and inclusion of indigenous peoples as equal citizens. In comparison, Articles 3 and 4 expressly include indigenous peoples within the category of peoples entitled to exercise self-determination:

*Article 3:*

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

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266. *Id.* at 231.

267. *Id.*

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

269. G.A. Res. 61/295, *supra* note 5, at 4 (footnote omitted).

*Article 4:*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.<sup>270</sup>

These Articles require states to recognize the separate political status of indigenous peoples and their right to self-determination. There are forty-six separate Articles in the Declaration, which delineate the unique nature of indigenous peoples in relationship to their traditional territories, including the cultural, environmental, and political dimensions of these relationships over time.<sup>271</sup> The Declaration acknowledges that many indigenous peoples have been divided by national borders, but ought to still have the right to access their sacred sites and maintain their relationships with their members across the border, as well as other peoples.<sup>272</sup> Similarly, their treaties and constitutive agreements should be honored by the nation-states that now govern their territories.<sup>273</sup>

The Declaration also references the spiritual rights of indigenous peoples, including their right to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>274</sup> How will recognition of spiritual rights, transborder rights, historic treaty rights, and territorial rights affect the construction of indigenous citizenship into the future? This is a provocative question and it deserves attention.

The next Part of this Article examines indigenous self-determination and the implications of the concept of super-diversity, a theoretical construct that examines how the politics of claiming national identity is being reframed in the wake of new forms of immigration and transnationalism.<sup>275</sup>

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270. *Id.* at 4–5.

271. See generally Aliza Gail Organick, *Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. INT'L L. & POL'Y 171, 173–75 (2009).

272. See, e.g., G.A. Res. 61/295, *supra* note 6. The Declaration provides, in pertinent part: “Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.” *Id.* art. 36, at 13.

273. *Id.* art. 37, at 13.

274. *Id.* art. 25, at 10.

275. See, e.g., Steven Vertovec, *The Emergence of Super-Diversity in Britain 1* (Ctr. on Migration, Poly & Soc'y, Working Paper No. 25, 2006) [hereinafter Vertovec, *Emergence of Super-Diversity*]; see also

#### IV. SUPER-DIVERSITY, INDIGENOUS PEOPLES, AND THE POLITICS OF MULTINATIONALISM

American constitutionalism maintains that all citizens within the democracy are united by their adherence to the secular values and ideals of the Constitution. Because the United States is a pluralistic society open to immigrants from many countries, there is a need to accommodate a multicultural society and the discourse of “diversity” is generally used to further this goal. In the contemporary era, however, the transnational movement of peoples and cultures has challenged the standard discourse of multiculturalism as a “strategy” to manage “diversity.” Steven Vertovec utilizes the theory of “super-diversity” to explore how national identity is constructed, maintained, transformed or undermined given the diverse forms of human migration and social organization that characterize our modern world. This section of the Article builds upon Vertovec’s work to examine the dynamics of indigenous self-determination as a political movement. I argue that the movement consciously rejects multiculturalism in favor of what Professor Duane Champagne terms multinationalism, that is, the construction of a new consensual political order in which indigenous peoples are included as distinctive sovereign governments entitled to equal respect.<sup>276</sup>

Vertovec claims that standard policy frameworks in Great Britain have not caught up with contemporary demographic and social patterns, and thus the reality of “super-diversity” requires attention to the complex interplay of variables that accompanies the movement of immigrants into Great Britain.<sup>277</sup> Similarly, as this section demonstrates, the movement of indigenous peoples across borders is increasingly common due to development, climate change, labor markets, and globalization.<sup>278</sup> In addition, the international human rights movement has galvanized a collective consciousness of indigenous rights, which serves as a unifying force across national boundaries.<sup>279</sup> Indigenous self-determination includes the

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Steven Vertovec, *Super-Diversity and Its Implications*, 30 ETHNIC & RACIAL STUD. 1024, 1025 (2007) [hereinafter Vertovec, *Super-Diversity and Its Implications*].

276. See generally Duane Champagne, *Rethinking Native Relations With Contemporary Nation-States*, in INDIGENOUS PEOPLES AND THE MODERN STATE (Duane Champagne et al. eds., 2005).

277. See generally Vertovec, *Super-Diversity and Its Implications*, *supra* note 276.

278. See UNITED NATIONS, STATE OF THE WORLD’S INDIGENOUS PEOPLES 87–90 (2009) (discussing how indigenous peoples are increasingly facing the dispossession of their traditional lands and territories due to development policies and globalization).

279. See generally S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004) (describing the rise of an Indigenous human rights consciousness). The U.N. Declaration is the tangible embodiment of that movement.

right of cultural survival,<sup>280</sup> making culture of central importance to the articulation of the political and spiritual rights of indigenous peoples. The standard discourses of pluralism, multiculturalism, and diversity are not adequate to build a theory that will support the fifth frame of indigenous citizenship, and therefore I use Vertovec's work as a starting point to flesh out a more robust theoretical basis for this frame of citizenship.

### A. The Discourse of Super-Diversity

Steven Vertovec uses the term super-diversity to describe the intersection of issues of "ethnic diversity and the stratification of immigrants' rights," noting that these topics are generally analyzed separately.<sup>281</sup> Vertovec observes that the theories that have typically informed the study of multigroup relations have only limited application to contemporary issues of public policy formation and delivery.<sup>282</sup> In relation to diversity in Great Britain, Vertovec notes that the mid-eighteenth century represented a time when people with "culturally cosmopolitan' outlooks" debated those with "populist[,] xenophobic attitudes" to determine how diverse pockets of immigrants would affect the essential culture of Britain.<sup>283</sup>

Of course, in the eras that followed, Britain became populated by many additional groups, some quite numerous, leading to the modern notion of multiculturalism as a "kind of diversity management strategy."<sup>284</sup> This strategy entails "the promotion of tolerance and respect for collective identities," which is accomplished through a variety of policies, including "supporting community associations and their cultural activities, monitoring diversity in the workplace, encouraging positive images in the media and other public spaces, and modifying public services (including education, health, policing and courts) in order to accommodate culture-based differences of value, language, and social practice."<sup>285</sup>

Vertovec claims that multicultural policies tend to miss the "[n]ew, smaller, less organized, legally differentiated and non-citizen immigrant groups," even though it is the growth of these types of groups that has "radically transformed

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280. See generally *id.* (describing the concept of self-determination for indigenous peoples as including cultural rights).

281. See *Emergence of Super-Diversity*, *supra* note 275, at 1; see also *Super-Diversity and Its Implications*, *supra* note 275.

282. Vertovec, *Super-Diversity and its Implications*, *supra* note 275, at 1025.

283. Vertovec, *Emergence of Super-Diversity*, *supra* note 275, at 2.

284. *Id.* at 3.

285. *Id.*

the social landscape in Britain.”<sup>286</sup> In particular, many of these groups may actively participate in their cultures and countries of origin, in some cases across borders. So, the project of transnationalism is a key component of super-diversity, rather than the project of nationalism that has marked the study of ethnic diversity and immigration to date. Today’s migrants “maintain identities, activities and connections linking them with communities outside Britain.”<sup>287</sup>

The theory of super-diversity can be invoked to illuminate several contemporary social dimensions. First, it reveals new patterns of inequality and prejudice, commonly conceptualized as racism, but including all constructed categories of otherness.<sup>288</sup> Second, the theory explores new patterns of space and contact.<sup>289</sup> For example, many theorists posit that regular contact between groups mutually reduces prejudice and increases respect.<sup>290</sup> The theory of super-diversity, however, reveals “a complex entanglement between identity, power, and place” designated as “a located politics of difference,” in which people define their differences in relationship to uneven material and spatial conditions.<sup>291</sup> Naturally, indigenous identity is heavily tied to place. Although some tribes were removed from their ancestral lands during the nineteenth century, they relocated in areas as cultural groups and often recreated the cultural context (for example, sacred sites, medicines, and foods) that they once enjoyed.<sup>292</sup> Unlike other groups, indigenous culture maps very closely to place.

Super-diversity also identifies new forms of cosmopolitanism and creolisation: “[T]he enlarged presence and everyday interaction of people from all over the world is leading to evidence of multiple cultural competence, new cosmopolitan orientations and attitudes, the appearance of creole languages, practices of ‘crossing’ or code-switching, particularly among young people and the emergence of new ethnicities characterized by multi-lingualism.”<sup>293</sup> This indicates an increased need for different structures and modes of government support for minority organizations, public service delivery, and community cohesion.

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286. *Id.*

287. *Id.* at 23.

288. *See id.* at 24–27.

289. *See id.*

290. *See id.*

291. Vertovec, *Super-Diversity and Its Implications*, *supra* note 275, at 1046.

292. Many Southeastern tribes, for example, were relocated to what is now the state of Oklahoma. At conferences I have attended over the years, I have heard Cherokee practitioners speak about how they found medicines in Oklahoma with same properties as those in Georgia, and elders from the Muscogee Creek Nation speak about the ceremonial fires that were transported from their traditional grounds to the new lands in Oklahoma.

293. Vertovec, *Emergence of Super-Diversity*, *supra* note 275, at 25–26.

## B. Super-Diversity and Cultural Production

Within “the cultural politics of nation and migration,” Vertovec argues that “[i]mmigrant cultures are routinely posed as threats to national culture” and, therefore, issues surrounding migration “stimulate, manifest, and reproduce cultural politics.”<sup>294</sup> Within this matrix, policymakers manipulate “popular notions of national versus alien culture” by invoking a notion of difference premised upon “particular images, narratives, and symbols of national culture.”<sup>295</sup> For example, some version of this occurred in Oklahoma, where the state legislature sought to ban state courts from invoking any alien or foreign law, specifically referring to Sharia law, but, of course, encompassing many other systems as well (including tribal law).<sup>296</sup> Culture is constructed to serve the politics of (1) defining the nation, (2) constructing the nation as a state with institutions of governance and a “bounded and distinct community which mobilizes a shared sense of belonging and loyalty predicated on a common language, cultural traditions, and beliefs,”<sup>297</sup> and (3) managing migration of people across the nation’s borders. Difference, of course, is often constructed along racial lines, which means that race becomes a paramount factor in debates over immigration (and we can see this in Arizona in the wake of S.B. 1070). Race as culture becomes associated with various policies designed to secure the identity of the nation-state. For example, English-only legislation reinforces the identity of Arizona as an Anglo-American entity, despite the prevalence of Latino and Native peoples and the multiplicity of languages.

The problem, in the context of super-diversity, is that the traditional frame treats culture as a reified and relatively static set of symbols, which define national identity as “shared cultural community.” The modern reality, however, may involve a more fluid set of symbols. Media has a prominent role in developing “national narratives” and “in the construction of imagined (national and transnational) communities.”<sup>298</sup> This highlights the important role of ethnic media. As Isabelle Rigoni notes, the role of ethnic media can either be to support “hegemonic ideologies of racial and gender stratification,” or to challenge these systems

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294. Steven Vertovec, *The Cultural Politics of Nation and Migration*, 40 ANN. REV. ANTHROPOLOGY 241, 241–42 (2011).

295. *Id.* at 242.

296. *Awad v. Ziriax*, 670 F.3d 1111, 1117–18 (10th Cir. 2012).

297. Vertovec, *supra* note 294, at 244 (quoting Verena Stolcke, *Talking Culture: New Boundaries, New Rhetorics of Exclusion in Europe*, 36 CURRENT ANTHROPOLOGY 1, 8 (1995)).

298. Isabelle Rigoni, *Intersectionality and Mediated Cultural Production in a Globalized Post-Colonial World*, 35 ETHNIC & RACIAL STUD. 834, 835 (2012).

“through politics of resistance.”<sup>299</sup> In addition, ethnic media production can foster and mobilize “new communities of belonging,” redefining the meaning of citizenship, given gender, ethnic, and class divides.<sup>300</sup>

In addition, the framework of intersectionality can be used to evaluate the “complex interactions that shape relations of domination and resistance among migrant and ethnic actors.”<sup>301</sup> In particular, three sets of associations inform the analysis of how indigenous peoples fit within the discussion of super-diversity: ethnicity, cosmopolitanism versus multiculturalism, and the concept of self-determination in relation to multinationalism.<sup>302</sup>

### 1. Ethnic/Religious Divides in Relation to Culture

Indigenous peoples tend to have integrated functional structures in which there are not sharp differentiations between secular culture and religious culture.<sup>303</sup> Rather, within indigenous cosmologies, it would be nonsensical to try and separate the sacred elements of human existence from the mundane elements. Governance structures can incorporate what seem to be religious norms because clans or moieties often have ceremonial and political obligations.<sup>304</sup>

Importantly, the United States’ project to assimilate indigenous peoples depended upon invoking a secular concept of civilization for its nineteenth and early twentieth century Indian policy, and then implementing that policy by evoking Christian norms, employing missionaries as agents or educators. Today, the norms of religious liberty and freedom of conscience (belief) that are present within the First Amendment provide excellent sites of analysis for the evaluation of super-diversity. Native people continue to experience the epistemic injustice of having to frame their claims for protection of sacred sites on public lands as religious claims.<sup>305</sup> In 1988, the U.S. Supreme Court decided *Lyng v. Northwest Indian Cemetery Protective Association*, finding that the First Amendment Free Exercise Clause did not preclude the Forest Service from constructing a road through a portion of National Forest land that was considered to be a highly sacred site by three of the American Indian nations that held historic occupancy of

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299. *Id.*

300. *Id.*

301. *Id.* at 836.

302. *Id.* at 835.

303. Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181–82 (1992).

304. *Id.* at 181–82, 189–91.

305. Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1153, 1158 (2012).



these lands.<sup>306</sup> The Supreme Court found that the government, as land manager, merely had a duty to accommodate different interests, to the extent that it could. Moreover, so long as the government was not coercing individuals to forego their religious practice, there was no actionable “burden” for purposes of triggering the Free Exercise Clause. The Indians were free to “believe” whatever they wanted, and the fact that the construction would foreclose their actual religious practice was an unfortunate outcome of permissible land management practices. The Court’s reasoning in *Lyng* is quite problematic because only indigenous peoples have cultural and spiritual practices associated with their ancestral lands, and their interests are subordinated to the interests of all other citizens in accessing public lands under the prevailing “multiple use” policies that govern public lands.<sup>307</sup> This case continues to impede the realization of Native spiritual rights in domestic courts, promoting Indigenous peoples to turn to international human rights tribunals for recognition of these rights.<sup>308</sup>

## 2. The Tension Between Cosmopolitanism and Multiculturalism

Many liberal philosophers, such as Will Kymlicka, have treated diversity under justifications that relate to multiculturalism and pluralism.<sup>309</sup> Kymlicka accepts the premise that equal citizenship is the central political commitment for justice in democratic societies, but he recognizes the case for cultural rights on the theory that it is important for each individual to have a culture to give shape and meaning to his life.<sup>310</sup> Thus, to the extent that individual identity is premised upon membership in a distinctive minority culture, the state has an obligation to protect that cultural context for individual members by refraining from actions that harm the culture or, perhaps, by adopting affirmative measures to preserve the culture.<sup>311</sup> Kymlicka has applied his theory in support of the right of indigenous peoples to some level of group rights (albeit qualified by the possibility that the group would act to harm individual members) and for special rights

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306. 485 U.S. 439 (1988).

307. Tsosie, *supra* note 305, at 1155–60.

308. See Navajo Nation Petition to the Inter-American Commission on Human Rights, P-620-05 (filed Mar. 2, 2015) (alleging that Forest Service approval of artificial snow on San Francisco Peaks with use of treated wastewater violated human rights of Indigenous spiritual practitioners within the tribal Nations who consider the mountain to be a sacred site).

309. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 126 (1995).

310. *Id.* at 124–26.

311. *Id.* at 125–30.

recognized by the state, which protect the group from external pressures by the dominant society that would jeopardize their cultural survival.<sup>312</sup>

On the other hand, scholars such as Jeremy Waldron assert that, in reality, we are cosmopolitan peoples that voluntarily draw on different cultures and traditions to constitute our individual selves.<sup>313</sup> By recognizing a “right to cultural preservation,” Waldron argues, we might inhibit the natural flow of the cosmopolitan world and harm individuals within specific cultural groups by tolerating their preference to construct artificially segregated communities.<sup>314</sup> He claims that these communities are reminiscent of Disneyland because the group fits their contemporary identity within a fanciful and artificial traditional set of practices.<sup>315</sup> Waldron says that there is “something artificial about a commitment to *preserve* minority cultures,” because all living cultures should grow, change, amalgamate, and adapt.<sup>316</sup> They are not “museum display[s].”<sup>317</sup>

According to Waldron, the cosmopolitan citizen does not think of himself as defined by his location or his ancestry or his citizenship or his language. Rather, he is “a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.”<sup>318</sup> Waldron is not even sure that it makes sense to use the term community, given the fact that we are now engaged in national and global forms of community based on “language, literature, and civilization.”<sup>319</sup>

Think about how powerful that statement is. In fact, Waldron’s argument is the antithesis of what indigenous advocates are arguing for in the context of self-determination and the demand to have their cultural integrity respected by enforceable rights.

Not surprisingly, Waldron has little sympathy for advocates of indigeneity. He contests the notion of indigenous rights and asks, “[W]hat is special about indigeneity[?]”<sup>320</sup> He claims that there are only two possible explanations for recognizing the category of “indigenous rights” as distinctive from other forms of rights-claims.<sup>321</sup> First, indigenous peoples could claim that they were the first

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312. *Id.* at 126–27.

313. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 754 (1992).

314. *Id.* at 758–66.

315. *Id.* at 763–64.

316. *Id.* at 787.

317. *Id.* at 787–88.

318. *Id.* at 754.

319. *Id.* at 755–56, 793.

320. Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. PUB. & INT’L L. 55, 55 (2003).

321. *Id.*

possessors of their lands.<sup>322</sup> Alternatively, they could claim a priority of rights as compared to the European colonizers. That is, even if they cannot prove that they were the “original” first possessors of the land, they can prove that they were already in possession at the time that the Europeans landed and took possession. In that sense, they have a claim for prior possession, if not first possession.<sup>323</sup> Note that both claims directly relate to the land-based status of indigenous peoples, and in that sense, their rights are unlike those of any later immigrant group. It is also important that the claim for prior possession is tied to a claim that indigenous peoples were unjustly deprived of this right, for example, by the fiction of “discovery” which accorded title to the European colonizers. In reference to New Zealand, Waldron contests the notion that the politics of inclusion pose a bicultural reality (Maori/Pakeha) and says it is in fact a multicultural reality.<sup>324</sup> He does not see any reason why the Treaty of Waitangi is given privileged status within New Zealand governance, and he disputes the idea that Maori people are sovereigns with a prior rightful claim to their lands analogous to the principle of reversion under international law, which is based on the continuity of de jure sovereignty, even under adverse conditions, like colonialism.<sup>325</sup>

This suggests to me that the notion of cosmopolitanism is inconsistent with indigenous claims to a multinational state, and I believe that this is also true of multiculturalism, as it is constructed around equal citizenship and diversity. This is very well illustrated by the Supreme Court’s analysis in *Rice v. Cayetano*.<sup>326</sup>

### 3. Self-Determination and Super-Diversity

The theory of super-diversity seems quite relevant to states such as California, whose historic political and cultural identity has Latino, Anglo, and Native roots, but where various immigrant groups have reshaped the cultural and political environment in complex ways. In California, the indicators of diversity are focused on cultural, language, religious, ethnic, and racial categories.

The relevance of this theory is not restricted to immigrant populations. It is interesting and important to explore the social and cultural space of the numerous California tribes, some recognized and others unrecognized, that occupies a unique dimension within the discussion of diversity.

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322. *Id.* at 63.

323. *Id.* at 64.

324. *Id.* at 57.

325. *Id.* at 58, 73–74.

326. 528 U.S. 495 (2000). *See also* text accompanying notes 111–112.

On this point, I would like to refer to Carole Goldberg and Gelya Frank's work on the Tule River Tribe.<sup>327</sup> Their book presents the story of how "a distinct indigenous community originating in forms of social organization that predate California statehood has maintained and asserted its sovereignty against the most difficult odds."<sup>328</sup> At various points in the tribe's history, its political sovereignty was recognized by other governments, and at other points, it was not.<sup>329</sup> But, the tribe maintained its internal cohesion and commitment to cultural sovereignty, defining itself in relationship to other governments and peoples from within an indigenous understanding of what those relations entailed.<sup>330</sup> It is this ability of a people to define itself culturally and socially that forms the foundation of the moral and political right to self-determination that is now recognized in the Declaration on the Rights of Indigenous Peoples.<sup>331</sup>

Importantly, as Goldberg and Frank observe, tribal sovereignty:

[I]ncludes the right of a people to define and govern itself, to speak Native languages and engage in distinctive beliefs and practices, to express its own forms of religion or spirituality, to regulate relations among its members, to undertake development of its economic resources, and to protect itself from intrusion and harmful acts by non-members.<sup>332</sup>

Cultural preservation is key to this effort.

The project of self-determination is quite different from that of super-diversity, and the importance of cultural production within each must be examined. The right of self-determination is an inherent human right of all peoples. Peoples have a territory and a political and cultural identity that is distinctive from that of other peoples. The project of nation building within nation-states and within indigenous nations illuminates the differences. The project of nation building within the settler state depends upon assimilation of immigrants and articulation of a national identity.<sup>333</sup> This may inspire cultural appropriation of indigenous peoples to build the new national identity.<sup>334</sup> It may also inspire the forcible assimilation of indigenous peoples.<sup>335</sup> Consider the role of cultural

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327. See generally GELYA FRANK & CAROLE GOLDBERG, *DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES* (2010).

328. *Id.* at 5.

329. *Id.* at 22–25.

330. *Id.* at 26–27.

331. See generally G.A. Res. 61/295, *supra* note 6.

332. *Id.* at 5–6.

333. Rebecca Tsosie, *Native Nations and Museums, Developing an Institutional Framework for Cultural Sovereignty*, 45 *TULSA L. REV.* 3, 6–7 (2009).

334. *Id.* at 6.

335. *Id.* at 10–11.

imagery and cultural sovereignty within museums and courts, which are institutions of national identity.

Museums are educational tools used to create and perpetuate specific ideologies and historical memories.<sup>336</sup> Because of this, they are vital to the contemporary effort of indigenous peoples to exercise cultural sovereignty, reclaiming their own histories as distinct from the American history that has been used to portray them as primitive peoples on the path to civilization.<sup>337</sup> Within the United States, the role of the museum has shifted in relation to Native peoples.<sup>338</sup> Initially, the project of nation building for the United States depended upon having museums that were analogous to those of European countries.<sup>339</sup> The collections of museums housed fine art from Europe and artifacts collected (or looted) from indigenous nations.<sup>340</sup> The fine art was housed in museums of art. The artifacts were housed in natural history museums, along with mummies and dinosaurs.<sup>341</sup>

The U.S. museums were committed to creating a common identity for the settler state.<sup>342</sup> But, contemporary museums, like their European counterparts, are engaged in a postcolonial effort to celebrate pluralism and multiculturalism through more inclusive models.<sup>343</sup> The National Museum of the American Indian (NMAI) represents the transformation of the public museum into a separate institution dedicated to the preservation and study of living Native American cultures.<sup>344</sup> The NMAI is engaged in a politics of representation that seeks to portray the nation-state as a respectful partner to indigenous nations.<sup>345</sup> Consequently, the project is oriented toward reconciliation, and the contemporary repatriation movement embodies that dynamic.<sup>346</sup> The NMAI seeks to promote dialogue between Native and non-Native citizens, and engages in a process of consultation and collaboration when designing its displays.<sup>347</sup> The museum attempts to construct viewpoint as an intercultural and

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336. Tsosie, *supra* note 333, at 3 (citing Myla Vicenti Carpio, *(Un)disturbing Exhibitions: Indigenous Historical Memory at the NMAI*, 30 AM. INDIAN Q. 619, 627 (2006)).

337. *Id.* at 4.

338. *Id.* at 7–8.

339. *Id.* at 7.

340. *Id.*

341. *Id.* at 6.

342. *Id.* at 7.

343. *Id.* at 7.

344. *Id.* at 8.

345. *Id.*

346. *Id.* at 13–15.

347. *Id.* at 8–9.

intracultural enterprise and enables Native voices to access the public space.<sup>348</sup> In this sense, the collective memory of the United States about federal-tribal relations is important to the overall project.<sup>349</sup> Similar processes are underway in New Zealand, Canada, and Australia.<sup>350</sup>

The right of self-determination depends upon the ability of a people to define themselves autonomously as separate (cultural) groups with distinctive ties to territory, ways of structuring themselves as separate social groupings (kinship), separate languages, and their own governing institutions (laws). In short, indigenous identity has always and will always depend upon some separation from the nation-state and other groups, even though all indigenous peoples in the United States are now citizens of the nation-state.

The question is: What about the future generations? What is the role of hip-hop culture, skateboarding culture, and other forms of shared culture, which might express new forms of linkage and resistance? In addition, the category of multiracial is increasingly encouraging young people from mixed-blood backgrounds to explore their own identity and the expectations or assumptions that are made about this identity.<sup>351</sup> Clearly, the project of super-diversity has implications for tribal governments, as well as other governments.

## CONCLUSION

Many indigenous epistemologies hold that the people belong to the land, rather than the inverse premise that the land belongs to people.<sup>352</sup> Under this view, many of the people deemed to be illegal immigrants are indigenous peoples on the wrong side of an international border.<sup>353</sup> In North America, the traditional lands of indigenous nations have been carved into separate national boundaries for the United States, Mexico, and Canada.<sup>354</sup> The United States, as of its creation in 1776, had no political claim to the lands in the Southwest.<sup>355</sup> Arizona and

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348. *Id.* at 9.

349. *Id.*

350. *Id.* at 16–17 (discussing New Zealand and Australia).

351. THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER 154–55 (Maria P.P. Root ed., 1996).

352. See generally Laurie Anne Whitt et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701 (2001).

353. Eileen M. Luna-Firebaugh, *The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas*, 17 WICAZO SA REV. 159, 160 (2002).

354. *Id.* at 159–60.

355. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1616 (2000).

New Mexico were originally annexed through a treaty with Mexico as a single territory, and then admitted separately to statehood in 1912.<sup>356</sup> One hundred years later, that border now divides many indigenous nations, including the Tohono O'odham, Apache, Yaqui, and Kickapoo.<sup>357</sup> The members of each Indigenous nation may be split by an international border, but this does not relieve them of continuing duties to carry out the spiritual obligations associated with their ancestral territories. In some cases, the right to access a sacred site or practice religious ceremonies that implicate restricted items, such as peyote and eagle feathers, may be protected by federal law.<sup>358</sup> For example, the Tohono O'odham Nation's reservation straddles the border and the tribal government provides limited services to tribal members on the Mexican side of the border, with the approval of Congress.<sup>359</sup> In other cases, however, the United States discounts the human rights of tribal members born on the other side of the border because they lack the political status of those peoples whom the United States recognizes as indigenous.<sup>360</sup> Is the status of an indigenous people inherent or is it created by the modern nation-state?

Whether the individuals are indigenous or not, it should give us great pause to see that the current group most likely to be deprived of rights under U.S. law is the group constructed as an illegal (undocumented) immigrant. This was the only group to be denied health coverage under the Obama administration's comprehensive statute governing national healthcare.<sup>361</sup> They do not merit the same due process rights as U.S. citizens or lawful permanent aliens, nor do they enjoy the same set of civil rights.<sup>362</sup> Yet, do they not have rights as human beings? Many of these individuals are, in fact, indigenous peoples from Mexico and Central America, pushed out of their traditional lands by development projects and disenfranchised from legal rights by their

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356. See generally Linda C. Noel, "I am an American": *Anglos, Mexicans, Nativos, and the National Debate Over Arizona and New Mexico Statehood*, 80 PAC. HIST. REV. 430 (2011) (describing the different politics that created the states of Arizona and New Mexico out of territory of New Mexico).

357. Luna-Firebaugh, *supra* note 353, at 160.

358. See Leah Castillo, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 197 (2000) (discussing federal law protecting rights of American Indians born in Canada).

359. Luna-Firebaugh, *supra* note 353, at 159.

360. See generally Castillo, *supra* note 358.

361. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

362. See *Demore v. Kim*, 538 U.S. 510 (2003) (failing to decide whether the plenary power doctrine, which gives the political branches authority over substantive immigration decisions, extends to procedural due process in the context of mandatory detention, and indicating that deportation proceedings embody substantive decisions). See generally Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801 (2013) (discussing due process rights of detained immigrants).

domestic governments.<sup>363</sup> Can we craft a conception of human rights that is more just and more humane than the current laws of states such as Arizona, or nation-states such as the United States? That is the question that we must address in an era of indigenous self-determination.

The human rights of indigenous peoples are both political and cultural.<sup>364</sup> We must acknowledge the inherent cultural sovereignty of all indigenous peoples, including their right to exist as separate peoples within the nation-states that encompass them.<sup>365</sup> This should not detract from the political rights that have been negotiated and validated with particular groups, such as the federally recognized tribes in the United States. The pervasive tendency of liberal theorists to demand equality on a categorical basis (for example, as applied to citizens) while negating the rights of others (for example, as applied to undocumented immigrants) must give way to a more nuanced account of the fundamental human rights of the indigenous peoples that belong to the lands that are now under the political control of the United States.

One of those rights might entail the need to acknowledge the histories and narratives that have shaped our conceptions of human rights and civil rights. This became clear to me in 2010, when the Arizona legislature enacted a law prohibiting any school district from offering classes that “promote resentment toward a race or class of people,” or “[a]re designed primarily for pupils of a particular ethnic group.”<sup>366</sup> In an effort to comply with the law, the superintendent of the Tucson Unified School District (TUSD) banned a program intended to educate Mexican American children about their cultural histories in an effort to

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363. See, e.g., Traci Watson, *Border PostMortem: What Dead Migrants Tell Us*, USA TODAY (May 6, 2016, 2:15 PM), <http://www.usatoday.com/story/news/2016/05/06/border-postmortem-what-dead-migrants-tell-us/84005166/> [<https://perma.cc/ZK6H-Z6XF>] (describing DNA analyses of human remains found in the Arizona desert, which reveal that the remains of many found in the Arizona desert have DNA that is similar to the population of that area, but that display bone traumas and deformities consistent with malnutrition and marginal living conditions that are found in Mexico but not often seen in developed countries like the United States).

364. See Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 924 (2011).

365. See Coffey & Tsosie, *supra* note 63, at 192. In my view, the concept of “spiritual rights” delineated in the U.N. Declaration on the Rights of Indigenous Peoples represents the spiritual connection between land and identity which is at the heart of “indigeneity” and has persisted through countless generations. This category of rights, however, is not recognized under U.S. domestic law, which has a limited conception of “religious liberty” under the First Amendment. For this reason, spiritual rights are very likely to be impacted by contemporary governance policies affecting traditional lands that are no longer within the possession of indigenous peoples. See Human Rights Petition of Navajo Nation in Inter-American Commission regarding San Francisco Peaks (University of Arizona’s Indigenous Peoples Legal Program Clinic is handling human rights claim).

366. ARIZ. REV. STAT. ANN. § 15-112-A (2014 & Supp. 2015).



enhance their self-esteem and promote their educational achievement.<sup>367</sup> TUSD has a long history of inequality in dispersing educational resources, purportedly due to the differential funding that exists for the schools (predominantly Latino and Native American) in the poorer neighborhoods in the southwest part of the city, as opposed to the affluent schools (predominantly white) in the northeast part of the city.<sup>368</sup> As an economic issue, the disparity is constitutionally tolerable under federal law pursuant to the logic of *San Antonio Independent School District v. Rodriguez*.<sup>369</sup> The net result of these disparities in Tucson, however, has denied equal opportunity to a broad cross section of Latino and Native American children in public school education. Not surprisingly, the schools in these neighborhoods suffer from high dropout rates and historically low achievements on standardized tests.<sup>370</sup>

As Richard Delgado points out, the Mexican American Studies (MAS) program had, over eleven years, proven effective in improving student achievement and retention.<sup>371</sup> Prior to the program's inception, the Latino schoolchildren in this district suffered from a 50 percent dropout rate. Eleven years later, 90 percent of the Latino schoolchildren were graduating from high school, and a significant number went on to attend colleges and universities.<sup>372</sup> Students read Latino and Native American authors, studied accounts of indigenous histories on the Borderlands, and experienced an empowering account of indigenous/Latino intellectualism by teachers who often came from similar cultural backgrounds.<sup>373</sup> Despite the proven success of the program, the school district

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367. See Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

368. See *id.* at 1516, 1516 n.14, (citing Recent Case, *Ninth Circuit Requires Continued Federal Oversight Over School District*, 125 HARV. L. REV. 1530, 1530–31 (2012)).

369. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that poverty is not a “suspect classification,” even if it disproportionately encompasses members of a minority group, and, therefore, discrimination against the poor should only receive rational basis review).

370. A recent report to the Arizona Legislature by the State Office of Auditor General clearly delineates these inequities and also illustrates the correspondence between poverty rates and the ability of students to meet state standards. See generally DEBRA K. DAVENPORT, AUDITOR GEN., REPORT NO. 16-202, ARIZONA STATE SCHOOL DISTRICT SPENDING (CLASSROOM DOLLARS) FISCAL YEAR 2015 (2016), [https://www.azauditor.gov/sites/default/files/AZ\\_School\\_District\\_Spending\\_FY2015.pdf](https://www.azauditor.gov/sites/default/files/AZ_School_District_Spending_FY2015.pdf). For example, students in the Tucson Unified School District, where poverty rates exceed 17%, have a 25% passage rate in Math, 28% passage rate in English and Language Arts, and a 38% passage rate in Science. *Id.* In the Catalina Foothills Unified School District, which serves the affluent northeast area of Tucson, there is little poverty (less than 10%) and student passage rates are 63% in Math and English, and 83% in Science. *Id.*

371. Delgado, *supra* note 367, at 1527–28.

372. *Id.* at 1551.

373. *Id.* at 1528.

acquiesced to political pressure and banned the program as promoting separatism and impairing the values of unitary democratic citizenship for all Americans.<sup>374</sup> The banned books included several by Native American authors, inspiring an immediate negative reaction from tribal leaders.<sup>375</sup> Amidst the resultant furor, the superintendent clarified that nothing in the ban was intended to preclude Native American students from reading Native American authors because Native American students are part of their tribal governments.<sup>376</sup> Nor did the Tucson book ban preclude white students in the affluent and exclusive public high school from reading the same texts by Latino and Native American authors in their program for academically talented students.<sup>377</sup> It turned out that the only group barred from accessing their cultural history was the targeted population of Latino students, largely comprising U.S. citizens of Mexican descent, as well as some children of immigrant parents.<sup>378</sup> According to population geneticists, the transborder population within the Southwest Borderlands region shares a genetic heritage.<sup>379</sup> But, the genetic identity (ancestry) of these individuals is irrelevant within the cultural politics of the Borderlands, which treats indigenous peoples separately with regard to race and political status.<sup>380</sup>

There is an eerie similarity between the Tucson case, which primarily affects Mexican American people, and the logic of *Rice v. Cayetano*<sup>381</sup> for Native Hawaiian peoples. Both groups have longstanding cultural and political ties to their

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374. See Luna-Firebaugh, *supra* note 353 (citing text of Arizona law that School District sought to enforce).

375. See Delgado, *supra* note 367, at 1523 n.48 (listing the books that were removed from the classroom, including books by Native American author Sherman Alexie).

376. See *id.* at 1521–22, 1522 n.41 (explaining that the law still “allows school districts to teach Native American and Jewish history, including that of the Holocaust”).

377. See *id.* at 1525, 1526 n.55 (noting that same books banned for Mexican American Studies students continued to be used in the curriculum of Tucson’s public college preparatory high school, University High).

378. See *id.* at 1522.

379. See Katarzyna Bryc et al., *The Genetic Ancestry of African Americans, Latinos, and European Americans Across the United States*, 96 AM. J. HUMAN GENETICS 37, 43 (2015) (showing that Latinos in the Southwest Borderlands tend to have a high proportion of Native American ancestry). Current literature within pharmacogenomics documents similar responses of Latino and Native American populations within the Southwest to drug therapies, including recommended dosage of chemotherapy, as compared to European-descended populations. Population genomics looks at markers within geographic regions, maintaining that this is a different method of sampling that is race neutral.

380. With respect to indigenous groups within the Borderlands, if the individuals are members of a federally recognized Indian tribe with U.S. citizenship, they fall within the U.S. political classification for Native Americans. If they are not, they are treated as “Mexicans” or “Latinos” and often raced as an “immigrant” group.

381. 528 U.S. 495 (2000).

lands, which predate the existence of the United States.<sup>382</sup> Their rights are now entirely dependent upon the will of a nation-state, however, that continues to selectively include and exclude them from the benefits of citizenship and the enjoyment of their human rights. The assimilationist focus of American citizenship is apparent in both examples, and in both cases, courts and policymakers are careful to differentiate the political rights of the federally recognized Indian nations from the position of other groups within the multicultural politics of American democracy.

We might be tempted to accept that logic because it secures the special rights of members of federally recognized indigenous nations using the logic of the plenary power doctrine. In both cases, U.S. Congress has the power to define who may be a citizen and which groups may be recognized as having a trust relationship with the United States. But, by reviewing the four historical frames of American citizenship for indigenous peoples, we can see the perils of an essentialist account of birthright citizenship. In fact, members of the Bush administration formally opposed efforts to extend federal recognition to Native Hawaiian people on the grounds that it would open the door to a similar movement among Mexican Americans in Texas, which was also annexed into the United States by a joint resolution.<sup>383</sup> Similarly, the people of Puerto Rico are carefully examining their political status, which also positions U.S. citizenship in relation to self-determination.<sup>384</sup> If, as Bethany Berger claims, the individual citizen and the nation-state are the “fundamental legal categories” defining civil rights in the United States, then all “nonstate . . . self-governance rights” exist as a limited exception to the norm.<sup>385</sup> They can then be categorically included or excluded from the structures and institutions of the nation-state, depending upon the will of the political majority.<sup>386</sup>

The politics of citizenship and multiculturalism must be reconciled with the right of self-determination in a manner that honestly engages the multiple histories and cultural identities of the affected peoples. It is likely

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382. See generally Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000) (comparing the effect of U.S. treaties with Indian tribes to the provisions of the Treaty of Guadalupe Hidalgo, which annexed Mexican citizens into the United States).

383. Joint Resolution for Annexing Texas to the United States, S.J. Res. 8, 28th Cong. (1845).

384. See Lani E. Medina, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 FORDHAM INT'L L.J. 1048 (2010) (discussing the challenges of effectuating self-determination for the people of Puerto Rico).

385. Berger, *supra* note 72, at 231.

386. *Id.*

that the fifth frame of citizenship for Native peoples will require articulation of a framework of multinationalism that serves the human rights of indigenous peoples to self-determination.