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CRITIQUE BY COMPARISON IN FEDERAL INDIAN LAW*

Carole Goldberg**

Federal Indian law's central question is the legal status of the indigenous peoples whose traditional territories now comprise the United States. A fledgling United States made treaties that recognized both the governmental status and property holding rights of these groups. For example, treaties established intergovernmental extradition arrangements, effected land sales from tribes to the United States, and recognized lands "reserved" by the Native groups for their exclusive use and occupation.¹ Treaty-making of this type continued past the Civil War. In 1871, the House of Representatives insisted that it participate in Indian affairs, and future relations with indigenous peoples were conducted through agreements ratified by Congress as a whole and by legislation.² Federal policies over the subsequent 130 years fluctuated, sometimes offering more, sometimes less recognition of indigenous peoples as governments and property owners. Over the past fifty years, federal policies in Congress and the executive branch have favored greater respect, while the Supreme Court has leaned in the opposite direction, taking an activist role to diminish Native governmental and property rights through development of federal common law.³

As an Indian law scholar, I inevitably engage questions surrounding the legal status of indigenous peoples, and many scholarly approaches are available. One line of research focuses on basic principles established during the early years of United States-Native relations, and criticizes recent court cases for their departure from those principles.⁴ Other lines of scholarship take more of a legal process approach, challenging the propriety of policy-making by courts rather than the Congress.⁵ Still others focus on the tainted origins of doctrine in the field, steeped in racism and colonialism.⁶ And other scholars, drawing on moral and political philosophy, emphasize the divergence of doctrine from basic principles of social justice.⁷ Increasingly, historical and empirical research has documented the persistence and growth of Native institutions of governance and land management, emphasizing the underlying political realities that drive legal development.⁸ At one time or another, my own scholarship has traveled down each of these intellectual paths.⁹

When the University of North Dakota invited a group of nationally recognized Indian law scholars to reflect on pedagogy in the field, I turned my attention to a form of critical argument or approach that cuts across these scholarly enterprises—criticism that challenges internal inconsistency in the law. This genre of criticism typically looks at the way federal Indian law treats Indian nations, and compares that treatment with the way American law treats some other entity, one that supposedly shares key characteristics with the Native tribes or nations. For purposes of the Indian law pedagogy symposium, I wanted to engage the issue of comparison as comprehensively as possible. One could ask, how should Anglo-American law conceive of the Native nation or Indian tribe in relation to other, more familiar legal constructs? Should it be treated the same as a foreign nation? As a state of the Union? As a municipal entity? As a private property owner? As a government property owner? As a corporate business? As an ethnic group? As none of the above, because its position is too distinct? As a critical method, this way of assessing proper legal treatment for Indian nations has natural appeal for law students. They are taught that the Anglo-American legal system is based on precedent, striving for consistency and predictability, and deploying reasoning by analogy. Like individuals and entities should be treated alike. If you can find a relevant difference, you can argue for different treatment. The challenge, of course, is to determine which differences of fact should justify different treatment in law.

I focused on this form of analysis and critique in Indian law not only because of its pedagogic relevance, however. Finding the proper comparison set for Indian nations has taken on greater practical significance over the past twenty years, as Native nations have undertaken new forms of economic development and expanded their governmental roles, and as international bodies have intensified their interest in the claims of indigenous peoples. All of these developments have produced novel, though dissimilar, arguments about the proper way to think about Indian nations. Beginning with passage of the Indian Gaming Regulatory Act in 1988, for example, some well-located Native nations have been able to establish highly successful tribal casinos, and have used the revenue to launch other substantial economic enterprises. Some politicians and courts have responded by arguing that Native nations should be treated as private businesses for purposes of labor law, taxation, and other state and federal regulatory schemes.¹⁰ In contrast, Native nations have begun arguing that they should enjoy the same immunities and privileges as state and local governments because they serve many of the same functions, such as law enforcement, environmental

protection, and child welfare.¹¹ In the international context, bodies such as the United Nations General Assembly and the Organization of American States have generated new understandings of the rights of indigenous peoples, carving out a distinctive category of rights that doesn't fully map onto established international law categories, such as the right of "peoples" to self-determination.¹²

As the struggle to situate tribal polities, lands, and individuals within the Anglo-American legal system has intensified in the political and legal realms, it has also prompted greater scholarly reflection on the appropriate comparisons between Native nations and other legal entities. Most provocative has been the exchange of views stimulated by Professor Philip Frickey's penetrating article on *(Native) American Exceptionalism in Federal Public Law* in the *Harvard Law Review*,¹³ and various responses to it posted in the *Harvard Law Review Forum*.¹⁴ Professor Frickey challenges the Justices and scholars who want to import general constitutional doctrines and values into federal Indian law, ending distinctive treatment of tribes where such matters as federal preemption, equal protection, and inherent sovereignty are involved. Federal Indian law is different for good reasons, he asserts, reasons grounded in the uneasy coexistence of American constitutionalism and colonialism. What some of the ensuing commentaries on his article suggest, however, is that federal Indian law cannot always be viewed as *sui generis* within the Anglo-American legal system. According to this view, continuities with non-Indian law are sometimes justified—indeed desired—in order to achieve justice for Native nations and their peoples and to steer clear of racism.

But when? Identifying the circumstances where such continuities may be appropriate is no small task, and has never been carried out in systematic fashion. One could argue that courts should simply rely on the characterizations of tribes offered by the political branches, following or rejecting comparisons as Congress and the Executive Branch have dictated in treaties, statutes, and regulations. That would be fine if the positive law afforded a crisp and comprehensive characterization. Alas, it does not. The Constitution addresses the character of Indian tribes in relation to other entities only obliquely.¹⁵ And statutory law offers no consistent treatment, as a look at the federal environmental laws reveals. In some statutes, such as the Clean Air Act¹⁶ and the Clean Water Act,¹⁷ Native nations are clearly classified the same as states of the Union. Yet, in the Resource Conservation and Recovery Act, tribes are treated the same as municipalities.¹⁸ Similarly, in the Nonintercourse Acts,¹⁹ which limit land transfers by Native nations,

tribes are framed as property owners. Yet in other federal statutes, where Native nations could conceivably hold rights as property owners, such as the basic federal civil rights act,²⁰ their status is not mentioned at all. For the tribes that have treaties, those documents were almost never intended to clarify the comparisons between tribes and other legal entities, leaving one to develop a theory of appropriate comparison.

I have tried to advance this line of inquiry by examining some of the more prominent types of comparisons that arise in federal Indian law, specifically as they affect treatment of tribes, and to suggest some criteria for sorting the more helpful from the less helpful. Mostly, I find, they are unhelpful, because they are not or cannot be carried through consistently. Largely aligning myself with the “exceptionalist” camp, I suggest an alternative to comparative analysis as a way of arguing for Native nations’ claims to governmental status and property holding. That alternative emphasizes an in-depth, historical and empirical exposition of the strivings, capacities, and actual functions of Native nations as they contend with the forces of colonialism, leading to a distinctive position within the American political and legal system. As I discuss below, my own research has increasingly turned in that direction.

In the early nineteenth century, when the Supreme Court decided its first major Indian law case, *Johnson v. M’Intosh*,²¹ the prevailing natural law philosophy demanded “reasoned” comparisons in order to establish appropriate legal rules. Courts felt obliged to consider the requirements of “natural justice,” which were thought to be accessible to “natural reason;” and natural reason presupposed logical consistency. In *Johnson*, the question was whether a Native nation could hold and convey full fee simple title to the property within its territory, title that would survive a treaty ceding that same territory to the United States. Chief Justice Marshall looked to Europe for a familiar analogy. He framed the inquiry as whether private property owners in one European country would retain full title even after their country came under the political domination of another European country. Since the Napoleonic and Austro-Hungarian Empires were known phenomena at that time, this was not an entirely speculative project. Marshall’s conclusion was that private property rights would be retained in the European context in order to foster the integration of the dominated peoples into the new political arrangement. Then, having asserted this comparison, Chief Justice Marshall rejected it on the basis of differences between indigenous North

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Americans and Europeans, which made such integration “impossible,” as well as on the basis of positive law to the contrary. Instead, Chief Justice Marshall set forth what has become known as the “doctrine of discovery,” which limited the rights of Native nations in their territory by inserting an ownership interest in the “discovering sovereign” or its successor, which in *Johnson v. M’Intosh* was the United States.

As if to underscore the contrast between Native nations and European states, Justice Marshall wrote another opinion, ten years later, reaching the opposite result from *Johnson v. M’Intosh* in the case of a European sovereign that had granted land to a private party and then ceded the same land to the United States. The case, *United States v. Percheman*,²² considered whether an individual who had received a Spanish grant of land in what is now Florida would retain his property rights after Spain ceded the entire Florida territory to the United States. Chief Justice Marshall insisted on the universal character of a nation’s right to confer private property rights and then cede territory to another government, claiming that the “sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled” once the source of political authority changes in a given part of the world.²³ Nowhere in the opinion discussing this “universal” law of nations does *Johnson v. M’Intosh* even merit a mention.

Professor Kenneth Bobroff has argued that the Court was wrong to reject the comparison between Native nations and foreign states in *Johnson v. M’Intosh*. His point is that considerations of “race and culture” determined the different outcomes in *Johnson* and *United States v. Percheman*; and implicit in his claim is that such considerations are inappropriate. The Illinois and Piankeshaw Indians, who had granted the land in *Johnson*, were just as much nations as Spain, and therefore their grant of land should have been respected in the same way after a cession of territory to the United States. The appropriate analogy, then, was between a Native nation and a foreign, European state.

Such a comparison between the land grant of the Illinois and Piankeshaw Indians on the one hand and the land grant of Spain on the other has strong appeal. The cases also present interesting differences, however. First, at the level of positive law, the land cession from the Tribe to the United States and the cession from Spain addressed private property rights differently. The Tribes’ treaty with the United States included no terms protecting existing private property rights. Spain,

in contrast, had included specific terms in its treaty of February 22, 1819, which protected the rights of preexisting private property owners.²⁴ This difference in the treaties should perhaps come as no surprise, as the non-Native private property holders in Illinois and Piankeshaw territory were not people toward whom the Tribes felt any allegiance. Thus, *Johnson v. M'Intosh* could merely reflect the Court's deference to a different positive law as the context for its "natural law" analysis.

Second, as the Court noted in *Johnson v. M'Intosh* itself, it was not at all clear that the original grant made by the Illinois and Piankeshaw was designed to convey a full ownership interest to the grantees. In contrast, Spain, which was in the business of rewarding its influential and loyal citizens with land grants, intended that its grants convey full private property rights.²⁵ Indeed, the value of those rights probably depended on individuals' expectations that Spain would look out for them in negotiations with other countries. A different characterization for the tribal grant to Johnson's predecessor can be inferred from the Tribe's later cession of the same land to the United States without any protection for existing private property rights. It is also suggested by the nature of most tribes' legal systems, which did not generally acknowledge property rights beyond revocable use rights. In other words, the underlying assumption of natural law in the international realm was that the granting sovereign intended a full private property grant. If that condition was not met, then the natural law requirement did not apply.²⁶

When considering the comparison between Native nations and European states, the problem with *Johnson v. M'Intosh* is not so much its unwillingness to draw an appropriate analogy, as its elaboration of doctrines of discovery and aboriginal title that were contrary to the facts and unnecessary to the decision in the case. The characterization of Native peoples as savage hunters was erroneous and racist,²⁷ and scholars such as UCLA Professor Stuart Banner have exposed the characterization of positive law as partial and historically inaccurate.²⁸ The Court would have done better, in my view, to accept, *arguendo*, the analogy to foreign nations, and then explain why the different treaty language and national (tribal) property law dictated a different decision than if the granting sovereign had been Spain or another European nation. But like Professor Bobroff, most Indian law scholarship is highly critical of the *Johnson* court for rejecting the analogy.²⁹

Not long after *Johnson v. M'Intosh*, the Court again confronted the comparison between Native nations and foreign nations in *Cherokee Nation v. Georgia*.³⁰ *Cherokee Nation* posed the question squarely in relation to positive law, specifically

Article III of the Constitution. The Cherokee wanted to invoke the Supreme Court's original jurisdiction for its suit against the state of Georgia, arguing that it presented a controversy "between a state ... and foreign states," within the meaning of Article III, section 2. The Court rejected the characterization of the Cherokee Nation as a "foreign state," relying in part on the distinction drawn in Article I, section 8, the Indian Commerce Clause, between "commerce ... with the Indian tribes" and "commerce with foreign nations." Had the framers of the Constitution believed Indian tribes were the same as foreign nations, the Court observed, they would not have referred to them in separate and distinct phrases.

In *Cherokee Nation*, the Court also offers some natural law-inspired discussion of the nature of Indian tribes, considering whether they match the characteristics of foreign nations in relation to the United States. This discussion, which gives rise to the oft-quoted and obscure characterization of tribes as "domestic dependent nations," first considers whether the Cherokee Nation is properly deemed a "state," and then focuses on what it means for one state to be "foreign" to another state. Can a state be foreign at the same time it acknowledges itself to be "dependent" and under the "protection" of another? As Justice Thompson noted in dissent, "A weak state, in order to provide for its safety, may place itself under the protection of one or more powerful, without stripping itself of the right of government, and ceasing to be a state."³¹ Yet, Chief Justice Marshall, writing for the majority, used that very dependent position of the Cherokee Nation as a reason to deny it the status of a "foreign" state. Not surprisingly, teachers and scholars of federal Indian law have criticized that denial of the comparison to foreign states. In our casebook, for example, Professors Robert Clinton, Rebecca Tsosie, and I note that international status is given today to at least two "feudatory" states that depend for protection and defense on other nations—Monaco, which relies on France, and the Vatican, which relies on Italy. Both are represented in some way in the United Nations. Monaco is a member of the General Assembly, and the Vatican has a permanent observer status. While the positive law argument may have some force, the argument from essential difference between foreign states and Native nations is one we challenge.³²

But if Indian law scholars are often drawn to the international comparison in *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia*, they often recoil from it in addressing a case decided in the opening years of the twentieth century, *Lone Wolf v. Hitchcock*.³³ *Lone Wolf* considers whether the United States may abrogate treaties with Indian nations through subsequently enacted legislation. After

rejecting the comparison between tribes and foreign states in *Cherokee Nation*, the Court embraces it in *Lone Wolf*, pointing out that since federal law affirms the power of the Congress to pass laws that conflict with international treaties, it follows that Congress can pass laws that abrogate Indian treaties.³⁴ Is that a sound analogy? Our casebook offers reasons to doubt that it is, questioning whether the consequences of unilaterally abrogating a foreign treaty are the same as the consequences of unilaterally abrogating an Indian treaty.³⁵ We ask,

Does it make any difference that Indian tribes are geographically within exterior boundaries of the United States and foreign nations are not? Does unilateral abrogation of a foreign treaty enlarge United States sovereignty over the foreign government, its lands, or people? Did abrogation of the Medicine Lodge Treaty do so in *Lone Wolf* to the Kiowa, Comanche, and Apache? Is this difference a sufficient reason to formulate a different rule for Indian treaties?³⁶

Interestingly, at least one of the grounds we suggest for distinguishing Indian treaties from foreign treaties, namely the presence of Indian nations within the geographical boundaries of the United States, is one of the very reasons Chief Justice Marshall gave for distinguishing Indian nations from foreign states in *Cherokee Nation v. Georgia*.³⁷

Are scholars and teachers of Indian law merely picking and choosing among the comparisons between Native nations and foreign states to argue for results favoring tribal parties? Is there perhaps some principled basis for favoring the comparison in the cases of *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia*, and then opposing it in *Lone Wolf v. Hitchcock*? Would changes in the circumstances of Indian nations between the early nineteenth and early twentieth centuries justify dropping a once-valid comparison? Or should we be avoiding all these arguments from comparison altogether as hopelessly inadequate to the normative work of federal Indian law? Certainly scholars who favor the analogy to foreign nations must think through some tough implications, such as the applicability of the ban on political campaign contributions by foreign nations and the use of comity rather than “full faith and credit” for enforcement of foreign judgments. The fact that Indian people have been United States citizens since 1924, along with the geographic location of Native nations within the United States, suggests the need for some hard thinking about the equation of Native nations with foreign states. *Cherokee Nation* suggested a way of thinking about Native nations as *sui*

generis—in a category by themselves—that may retain value to this day. While this approach lacks the clear predictability of analogy to a known legal commodity, and opens the door to judicial hostility, it also confronts, directly, essential and unavoidable normative questions.

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Some Native nations that entered into early treaties with the United States were offered a form of representation in the American government;³⁸ and the possibility of turning the Indian Territory (later Oklahoma) into a multi-tribal state of the Union attracted some interest in the late nineteenth century.³⁹ Still, nothing in American constitutional law or treaties posits that Native nations are the equivalent of the states. And only recently have some federal environmental statutes⁴⁰ and locally-administered federal benefit programs⁴¹ expressly put Indian nations on par with states.

Nonetheless, opportunities to analogize Native nations to states arise regularly in scholarship and teaching of federal Indian law, and a frequently heard critique of the Court's contemporary Indian law decisions is that the Court denies Native nations the same kinds of governmental powers typically exercised by states. Illustrations abound. In discussions of federal "plenary" power over Indian affairs, the ebbs and flows of congressional power under the Indian Commerce Clause are often compared with similar movements in judicial interpretation of the Interstate Commerce Clause. Specifically, as Supreme Court decisions of the past decade have contained the reach of federal power over interstate commerce, ostensibly because the states and their people never consented to or delegated broad, plenary commerce powers to the federal government,⁴² many, including our casebook, have questioned the Court's consistency in continuing to uphold robust federal power over Indian affairs. Considering the treaty relationship between the United States and Native nations, we ask:

[W]ould not an even-handed application to Indian tribes of the same legal principles the Court applies to states suggest a total lack of federal authority over the tribes and their members without their consent reflected in a treaty or treaty-substitute? ... Why has the Supreme Court not applied the same principles even-handedly between protecting state sovereignty through the New Federalism cases and protecting tribal sovereignty from the excesses of the exercise of congressional power?⁴³

If we are not arguing that Native nations are generally the equivalent of states, at least we are suggesting that in certain relevant respects, Native nations and states share certain attributes, particularly lack of consent to the extension of federal power.

In other situations, teachers and scholars of federal Indian law raise concerns about the Court's consistency in denying jurisdiction to tribes under circumstances where state jurisdiction is clearly recognized. For example, as Professor Sarah Krakoff points out, the Supreme Court has denied tribes authority, exclusive of the states, to impose sales taxes on non-Indian purchasers buying goods on reservations, purportedly because it is wrong for tribes to "market a tax exemption."⁴⁴ Yet states are allowed to do this all the time, competing for customers by marketing their lower taxes.⁴⁵ Likewise, one of the reasons the Court has given for denying tribal criminal jurisdiction over non-Indians is that non-Indians are ineligible to become tribal citizens.⁴⁶ Yet states regularly exercise jurisdiction over non-citizens. It is true that some of these non-citizens subject to state jurisdiction may be eligible to become state citizens if they change their residence, at least those who are American citizens. However, at the time the state jurisdiction is exercised over them, that eligibility does them no good. Non-citizens are still unable to exercise any political influence over the state government that is attempting to regulate their conduct or their property. And the foreigners subjected to state jurisdiction may never be able to become state citizens.

Where federal law is silent with respect to tribes but mentions states, Indian law scholars and teachers often must ask whether any special treatment or exemptions accorded to states should be extended to tribes as well. The issue arises in numerous contexts, including interpreting the "full faith and credit" provisions of the Constitution and its implementing federal statute,⁴⁷ determining the proper scope of federal tax laws concerned with issuance of tax exempt government bonds,⁴⁸ and deciding whether the National Labor Relations Act and other federal employment legislation apply to tribal enterprises.⁴⁹

In the full faith and credit context, the legal question is whether tribal courts are included in the obligations of mutual enforcement of orders and judgments imposed upon the states and territories of the United States.⁵⁰ Sharply different answers to this question have emerged among Indian law scholars as well as among state and federal courts. Do Native nations benefit from the comparison with states and territories, especially since the obligations are reciprocal, and

tribes would have to enforce state judgments as well as having their own judgments enforced in state courts? How could we go about assessing their interests in inclusion or exclusion? For example, would we have to know whether it was more likely that Native nations would want to be able to have their judgments enforced in state courts, as opposed to states wanting to have their judgments enforced in tribal courts? How, exactly, would tribes be integrated into the federal system if they were to be treated like states and territories under these provisions? The inquiry is complicated by the fact that some federal laws that address particular cross-boundary enforcement needs, such as those presented by child support orders, specifically define “states” to include tribes.⁵¹

In the tax-exempt bond and labor law contexts, the analysis of tribal-state comparisons is different, because the tribes largely benefit from treatment as states under these legal regimes, and do not assume reciprocal burdens. Nonetheless, challenging questions emerge because of agencies’ and courts’ concern that Native nations sometimes function more like business entities than like state governments, and therefore do not deserve treatment as states. Indian law scholars generally subscribe to the view that tribal commercial development is the object of improper discrimination if it is treated differently for tax purposes from the many commercial development projects initiated by state and municipal governments.⁵² Emphasis is placed on the fact that tribes, like states, have obligations to provide their citizens with public services, infrastructure development, and economic opportunities. One commentator has even argued that it is racist (*i.e.*, grounded in racist views of the inferiority of tribalism) for the federal government to deny tribes the same tax treatment as states.⁵³

Critiques have also been leveled at the D.C. Circuit’s recent decision applying the National Labor Relations Act to tribal commercial activities employing large numbers of non-Indians, even though the Act specifically excludes state governments without reference to the type of employment offered by the state, and territories of the United States have been treated as exempt, despite not being mentioned in the Act.⁵⁴ Similar challenges have been made to court decisions that make tribal exemption from federal employment laws of general applicability depend on whether the tribal activity in question has a commercial as well as a conventionally governmental dimension, even though that overlap is not considered for state-owned enterprises.⁵⁵ One commentator has described this differential treatment as “incorrect logic,” pointing to the taxing, law-making and judicial powers that Native nations share with states, and arguing

that tribal employment is always governmental in nature because even when their businesses make money, those businesses are “imperative to tribal self-determination,” and that money is “predominantly for the benefit of the tribal government and members.”⁵⁶

Should scholarship in federal Indian law be devoting time and energy to arguments about the “illogic” of treating Native nations differently from states for such purposes? Certainly we need to consider whether there are differences between Native nations and states that warrant differences in treatment.⁵⁷ Both states and tribes are subject to federal law. A crucial difference between them, however, is that states consented to this arrangement in the Constitution, and Native nations did not.⁵⁸ Furthermore, as Professor Clinton has noted, these two sets of governmental entities may not be similarly situated with respect to the Supremacy Clause of the Constitution, with only states subject to direct federal review of their decisions regarding federal law.⁵⁹ Native nations are also not subject to the limiting force of the Fourteenth Amendment, although the Indian Civil Rights Act of 1968 has extended many of those individual rights protections to persons affected by tribal action.⁶⁰ Furthermore, when we compare state jurisdiction over non-citizens with tribal jurisdiction, as many Indian law scholars do, we must keep in mind that an American residing in a state is eligible to become a voter after a very short period of time,⁶¹ while an American non-tribal member who has lived on a reservation for decades is not and will never become eligible for citizenship. Furthermore, a state of the Union never has to be concerned about another state having sovereignty within its boundaries, while a Native nation must, at least under federal Indian law doctrine dating from the late nineteenth century.⁶² In this litany of arguable differences between states and tribes, we should also note that implicit in the way United States law deals with states is an assumption of basic normative regularity among them, despite local differences. That assumption does not hold for many Native nations. Indeed, one of the mainstays of normative appeals for tribal sovereignty is that Native nations need autonomy in order to maintain alternative normative orders. Increasing international attention to the rights of indigenous peoples means that Native nations must be mindful of the baseline human rights that international law also affirms.⁶³ For purposes of current federal Indian law, however, the nature and extent of this restraint are speculative, at best.

There are also some anomalous ways in which Native nations act in ways that states do not—ways that may make them appear to be more like private entities

than like governments. The most noteworthy of these is the financial participation of tribes in state and federal elections,⁶⁴ something that states are forbidden. One could argue that Native nations should be allowed to participate in state elections, even though states themselves may not, because only Native nations are subject to the exercise of state power directly over their people, via statutes such as Public Law 280 that were passed without their consent.⁶⁵ This, of course, is an argument from difference, not from similarity with states, a difference that alludes to the history of colonialism.

There is a need for more sustained attention to the validity of the comparison at a deeper level, so that when scholars and teachers arrive at specific instances of potential comparison, they have an effective theory of the similarities and differences between the two polities within the United States system. Any such comparisons need to take account of the history of colonialism and meaning of the federal trust responsibility to Native nations. In fact, the “gotcha” claim of hypocrisy and/or racism within United States law may be deflated and turned back on the tribes if tribal opponents are able to seize upon inconsistencies in the use of the tribal-state comparison.

**TRIBES
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OWNERS**

Except where reservations have been wholly allotted or land bases entirely lost, Native nations are property owners as well as governments, holding land in common for the members of the tribe and often assigning it to individuals or families for residential, commercial, or other uses. Tribal property rights are a central topic in federal Indian law, and scholarship in the field often draws comparisons between Native nations as property owners and other holders of property rights, with Native nations frequently receiving less protection. Professor Joseph William Singer, a nationally known expert in the field of American property law as well as an esteemed federal Indian law scholar, has presented these disparities with particular force.⁶⁶ In his articles on Indian law, we are required to confront the unexplained and unjustified differences between the treatment of tribal property and the treatment of all other property.

The Supreme Court’s refusal to grant compensation for the taking of Native nations’ aboriginal title in their lands is a particularly striking instance of such disparity,⁶⁷ especially after the Court had earlier described aboriginal title as being “as sacred as the fee simple of the Whites.”⁶⁸ The Court’s reasons for denying compensation to aboriginal title simply do not stand up if we compare the nature

of the Indians' property claims to those of non-Indians.⁶⁹ Another noteworthy instance of this differential treatment is the Court's allowance of forced allotment, redistributing tribal property to individual tribal members without the tribe's consent. As Professor Singer has taught us, the forced distribution of tribal lands to individual tribal citizens looks like just as much of an unconstitutional "taking" as the forced distribution of corporate assets to the corporation's shareholders.⁷⁰ Another striking illustration that has received somewhat less attention is the Supreme Court's treatment of tribal water rights in the case of *Nevada v. United States*.⁷¹ There, the Court refused to allow litigation of the Pyramid Lake Paiute Tribe's claims because those claims had already been adjudicated in an earlier proceeding in which the United States represented the Tribe as trustee. The Tribe responded that the United States had simultaneously represented conflicting interests in the earlier proceeding, a fact that would have triggered a violation of the due process rights of any private property owner.⁷² The Court dismissed that concern, however, based on its view that Congress had directed the trustee to split its loyalties.⁷³

As casebook authors in federal Indian law, my colleagues and I have been quick to incorporate such critiques based on inconsistent treatment of Indian and other property owners.⁷⁴ What we have not done is to examine how such arguments from comparison with private property owners (or for that matter, other governmental entities that may own property) fit into the larger discussion of the exceptional nature of federal Indian law within the American constitutional scheme. We know, for example, that in the international context, it is not uncommon for countries that overtake others to claim the "sovereign" lands of the subordinated government, leaving individual property rights protected. Professor Stuart Banner has suggested that this concern led Hawaiian monarchs in the pre-American period to privatize collectively held lands in anticipation of a likely American seizure of the islands.⁷⁵ But for Native nations that had no notion of privately owned property (as opposed to privately used property) before contact with the United States, the status of their lands was difficult to incorporate into this dichotomy.⁷⁶ Non-Indian governmental entities may be property owners, but except under socialism, they are rarely the owners of their entire territory. Their claims to sovereignty are not founded in treaties that reserved or set aside lands for their collective use under the protection of another government. In other words, the connections between property and sovereignty are not nearly so intimate. These differences may not be sufficient to warrant disparate treatment of tribal property claims. But until we confront them, particularly as they relate to

claims of the special status of Native nations, we will not be fully serving the aims of Indian law pedagogy as well as scholarship.

**TRIBES
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BUSINESSES**

The comparison of Indian nations with private businesses is a relatively recent phenomenon, nourished by the spectacular growth, for some Indian nations, of tribal gaming and the economic development that it facilitates. Unlike comparisons with foreign nations, states, and property owners, this comparison is invoked far more often by opponents of tribes than the tribes themselves. Opponents invoke it, among other reasons, to argue against tribal sovereign immunity⁷⁷ and to argue that tribes should be subjected to federal laws of general application, such as labor laws, that apply to businesses and do not expressly exempt Indian nations.⁷⁸ Tribes have succeeded in repelling the comparison for purposes of sovereign immunity, based on longstanding congressional practice and the constitutional recognition of Indian nations as governments in the Indian commerce clause.⁷⁹ Their record has been more mixed with respect to laws of general application, especially where those other laws refer specifically to other governmental entities and neglect to address the treatment of tribes.⁸⁰

The growing inclination of the non-Indian public to equate Indian nations with casinos, since those are the entities receiving greatest publicity, is something I, as a teacher of Indian law, find disturbing. In California, for example, this simple equation led the Governor to demand that tribes pay their “fair share” of gaming proceeds to the state, the share defined according to tax obligations of private businesses.⁸¹ Although the effort failed to pass, it should not have been necessary to explain that Indian nations, unlike businesses, have governmental responsibilities to their citizens and territorial inhabitants, including utilities, public safety, and fire protection. Furthermore, under the Indian Gaming Regulatory Act, Indian nations do not have the same freedom as private businesses to allocate their earnings as they wish, being limited to funding tribal government operations or programs, providing for the general welfare of the tribe and its members, promoting tribal economic development, donating to charitable organizations, and helping to fund operations of local government agencies.⁸²

What may confuse the non-Indian public are instances where tribes claim the right to conduct themselves in a capacity more closely associated with private businesses, especially contributing to state and federal elections. As noted above, a case can be made for Indian nations’ participation in such political activity, even where state,

local, and international governments may not. But it is a case resting on unique characteristics of Indian nations in relation to the United States and the states.

Teachers and scholars of federal Indian law commonly resort to comparisons with non-Indian law in order to craft critiques of judicial doctrine and positive law in the field. It is a powerful way to turn the legal and moral norms of the dominant society against its own practices, a hallowed American tradition.⁸³

CONCLUSION

However, the Supreme Court has been remarkably resistant to such comparison-based arguments, applying them only rarely for the benefit of Native nations (as in the sovereign immunity cases), and using them selectively (as in the treaty abrogation cases) to deny tribal jurisdiction and property rights. Does that mean Indian law scholars and teachers should be employing this type of critique more effectively, more selectively, or not at all? In the absence of such comparisons, will the courts operate unconstrained, with even more harmful effects for Indian nations' sovereignty and property?

Within the field of Indian law, comparison-making is rarely addressed at a meta-level, and there is little consideration of whether comparisons in one realm may undermine comparisons in another or even the entire enterprise of comparison-drawing. This survey has attempted to draw together many instances of this enterprise so we can begin to view the process more holistically, recognizing that the comparisons are in service of a larger vision of justice for Native nations in an American system tainted by colonialism. Most of them, I fear, are vulnerable to countercharges of inconsistency. Furthermore, they may distract us from the tougher but essential job of examining how much colonialism a constitutional system such as the United States can and should tolerate.

The best way to pursue that task, I have found, is to demonstrate, through historical and contemporary studies, the political and cultural identities, aspirations, practices, and achievements of Native nations. Where such political and cultural groups persist and do not consent to full incorporation, constitutional systems have great difficulty justifying their exercise of power. My recent book, *Defying the Odds: The Tule River Tribe's Struggle for Sovereignty in Three Centuries*, co-authored with anthropologist Gelya Frank and published by Yale University Press,⁸⁴ presents a narrative of persistence for one prominent central California tribe. It emphasizes efforts by the United States to suppress tribal political and

legal institutions, including the federal government's decision to prosecute four tribal members for murder based on their carrying out a tribal death penalty sentence. It then shows how the Tribe adapted its traditional leadership system and cultural practices through decades of domination, manipulation, and theft of assets by United States agents, ultimately developing a tribal government capable of advancing community goals in culturally appropriate fashion. The recent United Nations Declaration on the Rights of Indigenous Peoples recognizes that groups with such a history deserve rights of autonomy and cultural protection, just like other "peoples" in the world. But it also avoids a direct equation of indigenous peoples with foreign nations, an equation that would carry with it politically sensitive rights such as the right of secession from dominant nation states. In that sense, it carves out a status for Native nations that rests on normative claims of intercultural justice rather than on claims of illogic or inconsistency through comparison. Comparisons may sometimes be helpful, but they cannot perform all the work required to determine the governmental and property rights of Native nations.

* This Article builds upon the Author's previously published as *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719 (2006). Copyright © 2006 North Dakota Law Review.

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1 See Carole Goldberg, *Federal Policy and Treaty Making: A Federal View*, in 1 TREATIES WITH AMERICAN INDIANS 13-26 (Donald L. Fixico ed., 2008).

2 See NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 74-65 (4th ed. 2005) [hereafter 2005 COHEN'S HANDBOOK].

3 For an account of federal legislative and executive branch policy over the past fifty years, emphasizing its support for tribal self-determination, see 2005 *Cohen's Handbook* at § 1.07. For a portrayal of the Supreme Court's contrary view of Native nations, see Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010).

4 See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1995); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

5 See, e.g., Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) [hereinafter Singer, *Canons of Conquest*] (challenging the substance of the Court's policy-making); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind-Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

6 See, e.g., ROBERT WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

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

8 See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2005) (providing an in-depth account of the exercise of Navajo governmental powers).

9 See, e.g., Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002) (examining racial dimensions of federal Indian law); Carole Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L. J. 889 (2003) (applying political theory and philosophy to issues of individual rights in Indian country); CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007) (empirical investigation of criminal justice on reservations, conducted with grant from the National Institute of Justice), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>.

10 See, e.g., *San Manuel Bingo & Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007) (applying National Labor Relations Act to tribal casino, characterized as a "purely commercial enterprise"); Chet Barfield, *Indian Casinos' Payout to State Spurs Debate*, SAN DIEGO UNION-TRIB., Oct. 10, 2004, at A-3 (describing a public perception that tribal gaming revenue "should be treated like any other corporation").

Dan Walters, Op-Ed., *A Slippery Slope: Are Tribes Governments or Businesses?*, SACRAMENTO BEE, Aug. 15, 2006, at A3. Showing some impatience with Native nations, Walters contends, "In effect, the tribes are governments when it suits them, and businesses when it suits them."

11 See, e.g., *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) (successful tribal claim that state law barring light bars on tribal police vehicles discriminated against tribal governments, because vehicles of other state and local governments were allowed to have the light bars).

12 For discussion of this right, which is enshrined in international law, see Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773 (1998).

13 119 HARV. L. REV. 431 (2005).

- 14 See, e.g., Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47 (2005); Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1 (2005) [hereinafter Singer, *Double Bind*].
- 15 See discussion of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), *infra* at notes 30-37.
- 16 42 U.S.C. § 7601(d).
- 17 33 U.S.C. § 1377(e).
- 18 42 U.S.C. § 6903(13).
- 19 Now codified at 25 U.S.C. § 177.
- 20 42 U.S.C. § 1983. *But see* Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 711-12 (2003) (finding that tribes may not use § 1983 to vindicate sovereign rights).
- 21 21 U.S. 543 (1823).
- 22 32 U.S. 51 (1833).
- 23 *Percheman*, 32 U.S. at 86-87.
- 24 *Compare* Treaty with the Wyandot, Etc., Aug. 3, 1795, art. III, 7 Stat. 49, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 42-43 (Charles J. Kappler ed., 1904) [hereinafter INDIAN AFFAIRS], *with* Amity, Settlement, and Limits, Cession of Florida with Spain, Feb. 22, 1819, art. VIII, 8 Stat. 252, T.S. No. 327.
- 25 See Elizabeth Nelson Patrick, *Land Grants During the Administration of Spanish Colonial Governor Pedro Fermin de Mendinueta*, 51 N.M. HIST. REV. 5, 6 (1976).
- 26 For elaboration of this point, see Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3.
- 27 See ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 61-63 (Rev. 4th ed. 2005) (discussing sources that contradict the portrayal of Native peoples in *Johnson v. M'Intosh*).
- 28 See STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).
- 29 See, e.g., ROBERT WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312-17 (1990).
- 30 30 U.S. (5 Pet.) 1 (1831).
- 31 30 U.S. (5 Pet.) at 54.
- 32 See CLINTON ET AL., *supra* note 27, at 75. For a similar critique of the *Cherokee Nation* holding, see Vine Deloria, Jr., *The Size and Status of Nations*, in NATIVE AMERICAN VOICES: A READER 457-65 (Susan Lobo & Steve Talbot eds., 1998). Deloria argues that in terms of geographic size, population, location in relation to other countries, and degree of economic dependence, many Native nations are quite similar to countries maintaining independent sovereign status as foreign nations. *Id.*
- 33 187 U.S. 553 (1903).
- 34 *Id.* at 566.
- 35 See CLINTON ET AL., *supra* note 27, at 452-53.
- 36 *Id.*
- 37 30 U.S. (5 Pet.) 15, 18 (1831).
- 38 Treaty of Fort Pitt with the Delaware Nation, art. VI, Sept. 17, 1778, 7 Stat. 13, *reprinted in* INDIAN AFFAIRS 4-5; Treaty of Hopewell with the Cherokee Nation, art. XII, Nov. 28, 1785, 7 Stat. 18, *reprinted in* INDIAN AFFAIRS 10.

- 39 See Annie H. Abel, *Proposals for an Indian State 1778-1878*, 1 ANN. REP. AM. HIST. ASSN. 89, 94-102 (1907).
- 40 See notes 16-18, *supra*, and accompanying text.
- 41 For example, tribes and intertribal groups are included in the definition of “state agencies” that can receive direct federal funding under the federal Special Supplemental Nutrition Program for Women, Infants, and Children program. 42 U.S.C. § 1786(b)(13).
- 42 See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997).
- 43 CLINTON ET AL., *supra* note 27, at 466.
- 44 *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).
- 45 Krakoff, *supra* note 14, at 51 n.22.
- 46 *Duro v. Reina*, 495 U.S. 676, 688 (1990).
- 47 See, e.g., *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (finding that the federal obligation of full faith and credit does not extend to tribal judgments).
- 48 See Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333 (1994).
- 49 See *Menominee Tribal Enterprises v. Solis*, No. 09-2806, 2010 U.S. App. LEXIS 6100 (7th Cir. Mar. 24, 2010) (finding the federal Occupational Safety and Health Act applicable to a wholly owned tribal sawmill enterprise, notwithstanding statutory exemptions for state and local governments); *San Manuel Indian Bingo & Casino v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007) (holding that the National Labor Relations Act applies to a tribal casino, even though states and their political subdivisions are exempted from its application).
- 50 28 U.S.C. § 1738.
- 51 See 28 U.S.C. § 1738B.
- 52 See, e.g., Gavin Clarkson, *Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009 (2007).
- 53 *Id.*
- 54 See, e.g., Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 431-34 (2007) (criticizing *San Manuel Indian Bingo & Casino v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007), and pointing out that territories of the United States, such as Puerto Rico and the Virgin Islands, have been found exempt from the NLRA, even though they are not expressly mentioned in the Act). The statutory exemption from states and their subdivisions is at 29 U.S.C. § 152(2).
- 55 E.g., *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).
- 56 *Id.* at 218-19.
- 57 For example, the United States Supreme Court has justified its special federal preemption doctrine for Indian law by contrasting Indian nations with states of the Union:
- The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.
- 58 See Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).
- 59 See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

- 60 See 2005 COHEN'S HANDBOOK 915-18.
- 61 *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down one-year state durational residency requirement for voting as violation of equal protection clause); *Burns v. Fortson*, 410 U.S. 686 (1973) (indicating that state requirement that voters register at least 50 days before election may reach the limit of permissible timing regulation).
- 62 See, e.g., *United States v. McBratney*, 104 U.S. 621 (1881) (upholding state jurisdiction over crime by one non-Indian against another committed within Indian country).
- 63 See generally Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).
- 64 See Mary Beth Maloney, Note, *Native American Federal Campaign Contributions: Rules, Risks, and Remedies*, 16 S. CAL. INTERDIS. L.J. 523 (2007); Cameron A. Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 BYU L. REV. 793, 823-24.
- 65 Public Law 280 is a federal statute authorizing certain state criminal and civil jurisdiction within Indian country in certain states. For an explanation of Public Law 280, see 2005 COHEN'S HANDBOOK at § 6.04[3]. For an early and spirited debate over the propriety of tribes and their members participating in state and federal politics, see John LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533 (2001); 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 (1999).
- 66 See Singer, *Double Bind*, *supra* note 14, at 4-6; Joseph William Singer, *Lone Wolf or How to Take Property by Calling It a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37, 44 (2002) [hereinafter Singer, *Lone Wolf*]; Joseph William Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).
- 67 See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); Singer, *Double Bind*, *supra* note 14, at 4-6.
- 68 *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).
- 69 Singer, *Double Bind*, *supra* note 14, at 4-6.
- 70 Singer, *Lone Wolf*, *supra* note 66, at 43-45.
- 71 463 U.S. 110 (1983).
- 72 See *Hansberry v. Lee*, 311 U.S. 32 (1940).
- 73 *Nevada*, 463 U.S. at 135-36 n.15.
- 74 See CLINTON ET AL., *supra* note 27, at 1019-23, 1031-39, 1124.
- 75 See Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 L. & SOC'Y REV. 273 (2005).
- 76 For in-depth analysis of the clash of property regimes that affected indigenous land rights after the coming of the British to New Zealand, see Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Co-colonial New Zealand*, 34 L. & SOC'Y REV. 47 (2000); Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 L. & SOC. INQUIRY 807 (1999).
- 77 See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).
- 78 See generally 2005 COHEN'S HANDBOOK § 2.03; *supra*, notes 54-55 and accompanying text.
- 79 See generally 2005 COHEN'S HANDBOOK § 7.05[1][a].
- 80 See cases cited in note 49, *supra*, and accompanying text.
- 81 See Carole Goldberg, Commentary, *Governor Is Double-Dealing on Indian Gaming; California Has Already Broken Too Many Promises to Its Native Tribes*, L.A. TIMES, Jan. 20, 2004, at B13.
- 82 See 25 U.S.C. § 2710(b)(2)(B).

83 For example, civil rights claims, including recent claims by proponents of same-sex marriage, typically draw upon fundamental American values of equal dignity of all persons, affirmed at the outset of the nation in the Declaration of Independence.

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