2020-01-01

Trials Of Belonging: Indigenous Peoples' Struggle With Law And Power In Twentieth-Century North America

Kevin Thomas Guay
University of Texas at El Paso

TRIALS OF BELONGING: INDIGENOUS PEOPLES' STRUGGLE WITH LAW AND POWER IN TWENTIETH-CENTURY NORTH AMERICA

KEVIN THOMAS GUAY

Doctoral Program in Borderlands History

APPROVED:

Jeffrey Shepherd, Ph.D., Chair

Ernesto Chávez, Ph.D.

Brad Cartwright, Ph.D.

Marion Rohrleitner, Ph.D.

Stephen L. Crites, Jr., Ph.D.
Dean of the Graduate School

Dedication

For Courtney and Killian, you are my world.

TRIALS OF BELONGING: INDIGENOUS PEOPLES' STRUGGLE WITH LAW AND POWER IN TWENTIETH-CENTURY NORTH AMERICA

by

KEVIN THOMAS GUAY, B.A., M.A.

DISSERTATION

Presented to the Faculty of the Graduate School of

The University of Texas at El Paso

in Partial Fulfillment

of the Requirements

for the Degree of

DOCTOR OF PHILOSOPHY

Department of History

THE UNIVERSITY OF TEXAS AT EL PASO

May 2020

Acknowledgements

I would first like to recognize my friends and family who provided tremendous emotional support over the years and helped me through this arduous process. Mom, Michael, Christopher, Kevin, and Julie, you are loved and appreciated. I must also express my endless gratitude to the teachers and mentors who paved my academic path and ensured a successful journey, including Dr. John Paul Nuño, Dr. Jeffrey Kaja, and my esteemed dissertation committee: Dr. Jeffery Shepherd, Dr. Ernesto Chávez, Dr. Brad Cartwright, and Dr. Marion Rohrtleitner. I am especially indebted to Dr. Shepherd, who, throughout my doctoral experience, provided immeasurable and unmitigated guidance, going to great lengths to foster my intellectual development and create an encouraging space of learning. You will always have my respect and appreciation. And, of course, thank you to my loving wife and amazing son, who sacrificed so much to ensure this research's completion.

Table of Contents

Introduction: Trials of Belonging

For nearly two-and-a-half centuries, America's Indigenous communities confronted a relentless barrage of assaults on their land, bodies, and way of life. This long history of violence, displacement, genocide, exploitation, disease, survival, and resistance is well documented and thoughtfully explained by scholars around the world. But more recently, a broader intellectual conversation has developed around Indigenous peoples' modern struggle to obtain full legal personhood in the United States and, in some cases, to have their own legal traditions acknowledged by society at large. The following research ascribes to this philosophic endeavor, which carefully examines how Native people and nations vied—and continue to strive—for a legitimate sense of belonging throughout the twentieth century and beyond. Fortified by a racially stratified system of discriminatory governance and legal control, exclusionary barriers have threatened the very existence of those residing outside the traditional boundaries of white America. In this study I reconstruct the dominant historical narratives to include individual cases of resistance that collectively represent the persistence and power of Indigenous peoples across time and space.

Despite living in a volatile environment that, more often than not, called for their annihilation, Indigenous communities, as a whole, implemented resourceful methods to adapt to their difficult and dynamic circumstances. With varying degrees of success, Indians and their non-Indian allies utilized sophisticated legal strategies to oppose attempts at acculturation and assimilation by local, state, and federal agencies. And in doing so, they reimagined the American legal system not as a conduit for oppressive exclusionary policies, but rather an instrument for safeguarding Indigenous autonomy and identity. For generations, individuals and groups navigated the legal labyrinth of treaties, sovereignty, and citizenship in this effort for equality and justice.

Courtrooms frequently became an accessible rallying point for this expression of civil defiance. With each courtroom victory, Native communities enhanced their individual and collective agency and thereby made important steps towards some semblance of belonging within this "liberal" national experiment we call the United States.

Spanning multiple fields of scholarly inquiry, the bulk of this study concerns itself with competing notions of sovereignty, citizenship, boundary-making, and belonging in twentieth and twenty-first century Indigenous North America. Situated at the productive confluence of Borderlands history, Native American and Indigenous Studies, Critical Legal Studies, and Immigration history, this dissertation analyzes the numerous treaties, codes, edicts, bylaws and other expressions of settler colonial jurisprudence that penetrated the everyday lives of Indigenous peoples across North America. These statutes—designed to limit Native power, dissolve Indigenous cultural identity, and strip tribal peoples of their landholdings and personhood—constituted an ongoing settler colonial project across the United States and Canada. The interdisciplinary approach adopted in this dissertation highlights four specific case studies of Indigenous Peoples encountering—and in most cases resisting—legal regimes that sought to dismantle their rights of free movement across traditional homelands, self-governance, and equal engagement with modernity. Yet paradoxically, the same twentieth-century legal system that enacted such coercive legislation also provided an opportunity for lasting and positive change in Native communities across North America.

Several key questions and ideas inform this study's analysis: First, to what extent did various overlapping policies both directly and indirectly shape the quotidian lives of Indigenous communities throughout the U.S.? Second, how did Indigenous groups survive, and in some cases

thrive, amidst such a violent and repressive settler-colonial regime? Third, how do stories of resistance, particularly through their engagement with the American legal system, showcase the ability of Indigenous peoples to successfully challenge seemingly omnipotent political entities? Fourth, to what extent did the movement of Indigenous peoples across literal and figurative borderlands illuminate Native agency and activism throughout the twentieth century? Lastly, and to a great extent, this dissertation examines the complex histories and competing notions of "belonging" through a survey of multiple modes and registers of citizenship, status, treaty entitlements, and membership in a tribe, band, and nation.

The intent of this research is to shed light on the typically unrecognized experiences of individuals and groups existing during a crucial time of U.S. nation building. By weaving together an informative narrative, it traces the trajectory of subjective, situational, inconsistent, and contradictory laws intended to categorize, marginalize, and exclude the Native American population. Anchored by the conceptual framework of "belonging," it examines four particular case studies that illuminate the temporal and spatial dynamics of American law and its tendency to exclude Native peoples from the national body politic and to simultaneously alienate them from their own political traditions and cultural homelands. Importantly, these case studies—whether centering on immigration, race, citizenship, status, or treaty rights—have been given little to no scholarly attention, especially in conjunction with each other and through an interdisciplinary analysis. Moreover, this dissertation draws on a borderlands lens of inquiry to investigate the legal relationship between indigenous peoples and local, state, and federal settler colonial entities. This borderlands approach not only supplies a comparative perspective on threatening legislation designed to prevent Native peoples' access to a better life, but also aids in understanding the shifting boundaries of law itself. The work's overall purpose is to problematize the dominant

interpretation of American history and reconsider the myriad cultural dilemmas that suffused legislation, social values, and court rulings over the twentieth century vis-à-vis Indigenous people.

TERMINOLOGY

I want to provide a brief note on language and terminology used in this research. For the purpose of clarity and cohesion I collectively refer to the diverse ethnic population of native North Americans as "Indigenous peoples, groups, or communities." I also use the terms "American Indian," "Indian," "Indigenous," "Native," and "Native American" in the U.S., and "aboriginal" and "First Nations" in Canada, interchangeably in the context of the sources. Nevertheless, whenever possible I employ specific tribal, band, and clan affiliations to denote individual and group identities. Although categorizing and imposing terms on a particular cultural community can be, in and of itself, an incredibly problematic endeavor, I remain sensitive about the misrepresentation and misunderstandings language and certain phrases connote. Because language is dynamic and can hold multiple meanings I try to reference people in the most accurate and respectful way possible.

REVIEW OF THE LITERATURE

This work draws upon various schools of thought and engages with some of the most influential scholarship in Indian law, Native history, Indigenous studies, immigration history, and borderlands studies. It tracks the dynamic methodological shifts within such analytical frameworks, and reexamines contemporary issues concerning Indigenous identity, citizenship, status, and sovereignty. In addition, it attempts to locate common scholarly threads regarding the aggressive, unfair, erratic, ambiguous, and frequently contradictory federal-Indian policies of the nineteenth and twentieth centuries. From recognizing many tribes as autonomous nations, to

terminating reservations and tribal governments, litigation and judicial decisions have shaped Indigenous peoples' worlds since America's inception. Engaging with these diverse interpretations provides a logistical means of addressing the multitude of overlapping, intersecting, and, at times, opposing ideological discussions among scholars.

More than three decades ago, Wilcomb E. Washburn, Vine Deloria Jr., and Clifford M. Lytle spearheaded inquiries that focused on the legal history of North American Indians. Much of their research investigated the legal definitions of Indigenous identity, status, and rights according to the federal government, as well as its change over time. In the early 1970s, Washburn's *Red Man's Land, White Man's Law: The Past and Present Status of the American Indian* suggested an "Indian," both legally and judicially, had been traditionally defined in terms of his or her relationship to the U.S. legal system. He also indicated that the interpretation of "Indian" appears more closely tied to cultural and legal criteria than to biological ones.[1] In 1983, Vine Deloria Jr. and Clifford M. Lytle's *American Indians, American Justice* examined federal Indian law and the legal rights of indigenous peoples in respect to status, citizenship, suffrage, and welfare. Perhaps Deloria and Lytle's greatest contribution was their analysis of diverging tribal governments' judicial, legal, and criminal structures. Their work provided readers with a comprehensive manual for the complex law and policy surrounding "Indian treaties, water rights, taxation, civil and criminal jurisdiction, and property."[2] Deloria's subsequent edited collection, *American Indian Policy in the Twentieth Century*, broke from a chronological narrative, removing the "better or

---

[1] Wilcomb E. Washburn, *Red Man's Land/white Man's Law: The Past and Present Status of the American Indian* (Norman: University of Oklahoma Press, 1971), 164.

[2] Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), ix.

worse" dichotomy that he found hindered new scholarly directions. Instead, he and the other authors viewed federal Indian policy as a "sometimes-connected 'bunch' of topical interests."[3]

Ten years later, David E. Wilkins *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* shattered scholarly conceptions of federal Indian law. His work looked at fifteen landmark U.S. Supreme court verdicts that directly impacted both American Indians specifically, and minority groups collectively. Wilkins shifted the understanding of federal Indian law by arguing that "federal Indian law" as a discipline is entirely a myth. He implied the accumulation of policy decisions in regards to the "constitutional and treaty rights of American Indian Tribes, and individuals constituting these tribes," had been improperly reduced to "federal Indian law."[4] The Supreme Court, on the other hand, which is responsible for "the data cumulatively referred to as 'federal Indian law"' is quite real. Wilkins' selection of case studies reveals the fact that "Indian law," as "developed, articulated, and manipulated" by the Supreme Court, explicitly aided in the diminishment of indigenous tribes' sovereign status and destabilized the lives of its members.[5] Overall, and employing a critical legal lens, he posited the U.S. High Court justices purposefully and strategically undermined tribal rights, which resulted in massive land loss, cultural erasure, and "masked" questionable federal policies that constrained political power for Native inhabitants throughout North America.[6]

---

[3] Vine Deloria Jr., ed., *American Indian Policy in the Twentieth Century* (Norman, OK: University of Oklahoma Press, 1985), 6.

[4] David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 1.

[5] Ibid., viii, 2.

[6] Ibid., 4-5.

By way of contrast, Daniel McCool, Susan M. Olson, and Jennifer L. Robinson's 2007 monograph *Native Vote: American Indian, the Voting Rights Act, and the Right to Vote* and Laughlin McDonald's 2010 *American Indians and the Fight for Equal Voting Rights* traced how landmark legislation at the local, state, and federal levels had a tremendous—often favorable—effect on Indigenous peoples' right to participate as electorates in the political realm. Of course this was due in no small part to the resistance of myriad Indigenous groups who sought redress with the judicial system in order to do away with such discriminatory policies. For these authors, there had been a frightening lack of scholarship dedicated to Indian voting rights outside the arena of tribal elections. The passage of the Indian Citizenship Act, they reasoned, perhaps skewed people's perspective on Indigenous suffrage—that with the Act's passage suddenly Native groups achieved equal voting rights on par with those of non-Indians.[7] But the unfortunate truth was that American Indians faced a long, onerous struggle towards enfranchisement during the early-to-mid twentieth century. However, as McCool and Laughlin clearly articulated, change ultimately came from the courageous and organized Indigenous activists who overturned unfair and unjust exclusionary policies.

At the same time, some scholars took issue with the lack of attention paid to Indigenous women's perspective in legal history. Katrina Jagodinsky's 2016 book *Legal Codes and Talking Trees: Indigenous Women's Sovereignty in the Sonoran and Puget Sound Borderlands, 1854-1946* aimed to correct this glaring historical gap. Jagodinsky centered her work on the "poetics and politics" of Indigenous legal history though the myriad stories of Native women mediating

[7] Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (New York: Cambridge University Press, 2007), x. see also Laughlin McDonald, *American Indians and the Fight for Equal Voting Rights* (University of Oklahoma Press, 2011).

invasion and traversing change.[8] One of her underlying arguments rested on the fact that Indigenous women's attempts to assert and guard "personal and embodied autonomy" warrants the same historical analysis that studies of "treaty negation and federal Indian law have attracted in the years between Felix Cohen and Robert A. Williams."[9] Furthermore, she insists that amidst "enemy immigrants" and "purveyors of the law" who desired to dispossess Indigenous peoples of their land and culture under a perceived legal authority, nineteenth-and early-twentieth-century Native women challenged their "economic and sexual vulnerability" head-on.[10] In the end for Jagodinsky, American conquest and settler-colonialism relied in large part on the colonizer's ability to master Indigenous women's productive and reproductive nature and access to land, in addition to the legal and military violence invaders used to imprison or integrate Indian men.[11]

More recently, scholars have shifted their focus toward explaining American Indian policy as a component of the United States' imperial ambition. Mark Rifkin's *Manifesting America: The Imperial Construction of U.S. National Space*, for example, reconsiders the traditional narrative of manifest destiny through the verbal and written language of the time. For Rifkin, the U.S. employed "imperial constructions of national space" to justify the forced incorporation, subjugation, removal, and murder of native peoples and Mexicans. Treaties and other legal rhetoric formed the basis of a U.S. national project that subsumed a diverse array of communities in order to curtail resistance. Yet through an analysis of subaltern texts—including petitions, maps, correspondences, and tribal laws—Rifkin shows how non-consenting groups directly, and often

---

[8] Katrina Jagodinsky, *Legal Codes and Talking Trees: Indigenous Women's Sovereignty in the Sonoran and Puget Sound Borderlands, 1854-1946* (Yale University Press, 2016), 1.

[9] Ibid., 3.

[10] Ibid., 4.

[11] Ibid., 4.

successfully, challenged U.S. notions of national space and perceived borders of authority. Rifkin's contribution of a "jurisdictional imaginary" also reveals the "fetishized image of territorial coherence" that the U.S. promoted, and the how its inconsistencies clashed with "existing polities and regional networks."[12]

As of late, varied notions of the U.S. as an imperial political body or as a perpetual settler-colonial entity have permeated academic discussions. Turning the attention away from Indigenous peoples and their experience, this postcolonial dialect has primarily focused on what settlers did and how they thought, and is expanded upon in such texts as Lorenzo Veracini's *Settler Colonialism: A Theoretical Overview*, Walter L. Hixson's *American Settler Colonialism: A History*, and Alyosha Goldstein's *Formations of United States Colonialism*. According to Veracini, settler colonialism is distinct from colonialism as it was a particular structure that "operated autonomously in the context of developing colonial discourse and practice." Hixson defines settler colonialism as a narrative in which settlers pushed Indigenous populations from their ancestral homeland in an effort to build their "own ethnic and religious national communities."[13] Unlike the settler colonial studies of Veracini and Hixson, Goldstein underscores how "normative forms of jurisprudence, racialization, violence, militarism, politics, property, and propriety" collectively worked to delineate and expedite circumstances of colonial dispossession.[14]

Emerging over the last two decades, scholars have also questioned many established assumptions revolving around American Indian identity and its intersection with legal, social, and

---

[12] Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space* (Oxford: Oxford University Press, 2009), 35.

[13] Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010), 1.

[14] W. Hixson, *American Settler Colonialism: A History, 2013 ed.* (New York: Palgrave Macmillan, 2013), 4.

biological constructions of race. Published in the late 1990s, Alexandra Harmon's *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* engaged with ongoing debates concerning "Indianness" and its transformation over time. Harmon argues that ethnic and racial categories are more a process than a fundamental quality, and that Indians—particularly in the Puget Sound region—have depended on historical interpretations to legitimize their classification as "Indian." But equally significant, she contended that scholars must acknowledge the fact that the meanings of Indian and tribes have histories of their own.[15] Throughout the last hundred and fifty years, American Indians, both as individuals and communities, constantly redefined themselves. This ever-changing conception of Indigenous self-identity made it difficult for state officials and federal entities to classify "authentic" or "treaty" Indians, complicating legal disputes over rights such as fishing during the 1960s.

Building upon the aforementioned work, Eva Marie Garroutte's 2003 *Real Indians: Identity and the Survival of Native America* explored the identity-making process for both Indians and non-Indians in the twentieth century. Attempting to untangle the incredibly complex and deeply entrenched ideas associated with Indigenous identity, Garroutte interrogated the ambiguous system of racial classification in the United States. According to her, different definitions of identity have been thrust upon Indigenous groups "in different contexts and with different" and far-reaching repercussions.[16] If federal and state polities officially classified Indigenous tribes as "recognized" or "acknowledged," said groups are imbued with "special rights and responsibilities." And consequently, by recognizing certain groups as Indian tribes and established

---

15 Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities Around Puget Sound* (Berkeley: University of California Press, 1999), 3.

16 Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003).

government-to-government relations with them, the federal government formally recognized their sovereignty as a domestic dependent nation.[17]

Employing a comparable analytic formula, Paige Raibmon's *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* probed the complex and dynamic ideology behind American Indians' cultural authenticity in the late-nineteenth and early twentieth centuries. Deviating from previous scholarship, Raibmon angled the spotlight onto public spaces from which, she argued, much of the discussions over Indianness occurred. Perpetuated in large part by tourists and anthropologists, Wild West shows, and world's fairs, public demonstrations and assumed understandings of Indigenous identity had entrenched a false, but gradually accepted, binary between "authentic" and "inauthentic" Indians. However, the subject of her book is not so much to gauge what authentic means, but rather to scrutinize "the work it did" throughout the years.[18] Centered on the colonizer-Native relationships occurring in the Pacific Northwest Coast, she suggests that whites and Indigenous peoples were both collaborators—although unequally—in the fabrication of what was considered "authentic," "pure," or "real" Indianness.[19] Many of these shared assumptions of authenticity became a strategic marker from which both groups would capitalize. Yet, Native peoples' engagement with colonizer's conceptions of authenticity stigmatized Indian culture and reinforced an oppressive colonial hegemony.

In a similar fashion, Andrew Fisher's *Shadow Tribe: The Making of Columbia River Indian Identity* critically observed the development of a distinct Indigenous identity in the Pacific Northwest's Columbia River region from the mid-nineteenth to the late twentieth centuries. Fisher

---

[17] Ibid., 25.

[18] Paige Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham: Duke University Press, 2005), 3.

[19] Ibid., 3.

stressed that through an intricate "process of negotiation with other Indians and non-Indians," the categorization of "Columbia River Indian"—an administrative label that designated the divergent communities in the Columbia River area who rejected forced removal and acculturation—gradually matured into a unique tribal identity.[20] This fluidity of River Indians' self-identity against competing legal and cultural perspectives among recognized tribes, off-reservation "renegades," and state agents, led to major problems when fighting for "tribal" rights (primarily fishing) in the late twentieth century. Because River Indians were powerless to enroll as a "legitimate and legal" tribe and obtain the coveted status of "recognized Indians," they were never considered an "official" Indigenous group. As a result, federally recognized tribes and state officials banded together to halt any attempt of River Indians' claims of sovereignty.

In the early twenty-first century, some scholars drew upon a borderlands framework to analyze evolving identity formations, legal systems, and global movements during different, but equally vital, phases of U.S. history. Eric Meeks' *Border Citizens: The Making of Indians, Mexicans, and Anglos in Arizona* highlighted this intellectual trend. His book tracked the social, political, economic, and cultural repercussions of U.S.-border demarcation and enforcement during the early twentieth century. Concentrating on Arizona's borderlands, he argues that America's restrictive immigration policies, notions of white supremacy, and closed paths to citizenship relegated much of Southern Arizona's population—including the Yaquis, Tohono O'odham, and ethnic Mexicans—to "a second-class status." These "border citizens," whose rights of inclusion positioned them on the fringes of national, social, and cultural boundaries,

[20] Andrew H. Fisher, *Shadow Tribe: The Making of Columbia River Indian Identity* (Seattle: University of Washington Press, 2010), 10.

aggressively reshaped U.S. belonging from Arizona's borderlands.[21] And in the process, redefined "what it meant to be Mexican Indian, and Anglo" in twentieth-century America.[22]

Contributing to a wealth of scholarship dedicated to uncover America's long history of exclusionary policies, Barbara Young Welke's *Law and the Borders of Belonging in the Long Nineteenth Century United States* explored how United States law played a crucial role in constructing personhood, citizenship, and what she terms "borders of belonging" in the "long" nineteenth century. For Welke, late nineteenth and early twentieth century personhood, citizenship, and nation, were imagined in a particular way—through abled, racialized, and gendered notions of identity. Because white males were the only "fully embodied legal persons, they were America's 'first citizens,' and they were the nation," they in turn set the legal precedent that would fashion law's borders and defined what it meant to belong.[23] Through a conceptual borderlands approach, Welke laid bare how abled, racialized, and gendered conceptions "came to be self-consciously embraced, marked in law, and manipulated" in order to protect white male privilege. Moreover, the centrality of law in relation to ability, race, and gender became the foundation for denying personhood and citizenship, and "fundamentally shaped the development of the American legal and constitutional system for the twentieth century."[24]

Kornel Chang's *Pacific Connections: The Making of the U.S.-Canadian Borderlands* shifts the borderlands perspective to investigate U.S.-Canadian interactions, immigration policies, and

---

[21] Eric V. Meeks, *Border Citizens: The Making of Indians, Mexicans, and Anglos in Arizona* (Austin: University of Texas Press, 2007), 11.

[22] Ibid., 11.

[23] Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (United Kingdom: Cambridge University Press, 2010), 2.

[24] Ibid, 2-3.

dueling imperial projects in the Pacific Northwest during the late nineteenth and early twentieth centuries. Chang contends that the constant influx of migrant Asian laborers and businessmen's desire to create and maintain direct trade connections to Asia stifled Euro-American attempts to demarcate clear racial and national boundaries in the Pacific Northwest. Focused on a transnational history that attempts to avoid the "Atlanticist" perspective, he instead probes the intricate and intersecting cross-cultural nexus that existed along the Pacific Rim. Indeed, his transnational narrative engulfs the experiences of Chinese, Japanese, and South Asian migration in the context of early twentieth century globalization, nation-building, and anti-Asian sentiment. In the end Chang argues that Canada, Britain, and the U.S.'s attempts to control human movement through hardening borders, restrictive immigration laws, and systems of surveillance contributed to a cultural logic that imprinted race and nationalism onto the global populace, and cemented citizenship as a determining factor for inclusion.[25]

Construed broadly, scholarly interpretations regarding federal Indian law, Indigenous identity, colonialism, immigration, and status have gradually evolved over the years. Initially, there existed a seemingly common understanding among researchers that the American legal system was a powerful tool of dispossession, destabilization, and displacement. However, more recent studies—through a multidisciplinary approach and heavy use of theory—have attempted to shift the focus to highlight how the manipulation of law enabled colonial and national structures the legal justification—backed by real military might—to impose their will and assert dominance over others. In this regard, U.S. settler colonialism, statecraft, and nationalism worked together, bolstering one another, employing myriad strategies of inclusion and exclusion in an effort to

[25] Kornel S. Chang, *Pacific Connections: The Making of the U.S.-Canadian Borderlands* (Berkeley: University of California Press, 2012), 3-4.

create and strengthen a clear American hegemony. But these scholars continue to showcase Indigenous peoples' active participation in the settler colonial and nation-building processes, making public subaltern primary source materials that offer new and interesting perspectives, and which change the narrative. As this study demonstrates, only by brining each of these fields into the conversation will we begin to have a full and accurate picture of Indigenous history in the twentieth century.

METHODOLOGY AND THEORETICAL ENGAGEMENT

This work takes as its starting point the early twentieth century, a critical time in U.S. nation building. It subsequently approaches four specific law cases that highlight landmark struggles between Indigenous groups and U.S. polities. It engages with various primary source materials, many of which have never been critically examined, and supports its arguments through myriad secondary investigations and theoretic frameworks. By using Michel Foucault's theories of biopower, Patrick Wolfe's settler colonial perspective, and Kevin Bruyneel's concept of a third space of sovereignty, it hopes to broach perennial questions surrounding Indigenous sovereignty, status, and freedom of movement. Fundamentally, the four case studies interrogated in this dissertation are microcosms for larger patterns of U.S. law and legislation intended to legitimize the dispossession, destabilization, and destruction of North America's indigenous peoples.

Foucault's ideas pertaining to biopower or biopolitics helps peel back the complex layers of U.S.-Canadian policies concerning public health, international border surveillance, and control over human movement in the early twentieth century. As competing national projects, the U.S. and Canada enacted laws that reconsidered the nature of national territories as systems of repression that could stop movement, impose cultural identity markers, and silence people through

force. These neocolonial measures—constitutions, bylaws, and edicts—intended to codify the exclusion of "others" from white society, restrain Indigenous advancement, and control the racial power imbalance; all of which severely limited indigenous peoples' autonomy.[26]

Wolfe's settler-colonial (settler-state) philosophy aids in recognizing the extralegal actions the federal government and its satellite states employed as a means to eradicate Indigenous culture, diminish tribal autonomy, and occupy Native peoples' ancestral homelands. Although settler colonialism formed as a distinct social process that sought to destroy in order to replace, the settler-state operated under a "logic of elimination" that established structures of dominance concerned with the exclusion, exploitation, and eradication of Indigenous communities to the extent that is required for settler access to territory.[27] This is imperative because it helps elucidate the inherent contradiction between the politics of elimination and recognition: A settler-state bestowing limited cultural protections and individual rights did not always equate to Indigenous autonomy and, coupled with the dependency of many Native communities on the state for survival, there existed little likelihood of a serious threat to the colonizer's dominance.[28]

Borrowing from Homi K. Bhabha's postcolonial cultural theory, Bruyneel's third space of sovereignty exposes the political contest between American impositions and Indigenous opposition across spatial and temporal boundaries.[29] This third space allowed Native communities to engage with, and often successfully challenge, the U.S. settler system in order to receive rights and resources while, simultaneously, retaining their distinct tribal identity, cultural practices, and

---

[26] Foucault, Michel. *The History of Sexuality*.

[27] Wolfe, "Elimination of the Native," 387-388.

[28] Ibid., 399-400.

[29] Bruyneel, x.

political autonomy.[30] As both citizens and semi-sovereign entities, Indigenous peoples' numerous victories in American courts—including freedom of movement, suffrage, re-recognition of status, and fishing rights—affirmed a "third space" and sparked greater political opposition against an imposing settler state.

In addition, Bruyneel adeptly shows how the United States, from its inception, adhered to a feudal conviction that sovereignty remained the root of political authority and national domination. But Indigenous groups refused this American paragon of power, opting instead for a political geography that coincides, rather than lives within, the singular plenary structure institutionalized by the United States over the centuries. And by doing so, Indigenous peoples offered a feasible, albeit unconventional, alternative to statist or colonist notions of sovereignty that monopolize conceptions of political geographies—a third space of sovereignty.[31] For Bruyneel, it is not whether Indigenous tribes and nations are independent or dependent, outside or inside, or achieve a modern form of legitimate sovereignty, because these false choices privilege colonialist expectations about Indigenous political organization and settler-state's jurisdictional authority.[32]

CHAPTER SUMMARIES

The first chapter, "A Fluid State of Law and Power," offers a brief historical account of the major policy shifts and courtroom battles that destabilized, dispossessed and, at times, utterly destroyed tribal communities over the last two hundred years. It presents a contextual foundation

---

[30] Ibid., xvii.

[31] Ibid., 221-222.

[32] Ibid., 229.

for the work's subsequent case studies and bridges the chronological gap between spatially diverse experiences of Native peoples. This overview chooses some of the most prolific legal doctrine and legislation to provide a better understanding of the central themes the dissertation seeks to unpack.

From its genesis, the United States established a long tradition of relocation and assimilation policies aimed at North America's Indigenous inhabitants. Beginning in the nineteenth century, American Indians were systematically, and often forcefully, removed from their tribal homes and resettled in designated locations known as reservations. The reservation plan supplied displaced tribes with parcels of land from which Natives exercised limited sovereignty. However, most land ceded to Native tribes was undesirable, void of natural resources and without personal ancestral connections. Gradually, conditions on reservations deteriorated, and tribal survival became progressively dependent on federal aid. Coupled with the end of treaty making in 1871 and the passage of the Allotment Act in 1887, Indigenous peoples endured a serious blow to tribal autonomy and cultural continuity. The degree to which Native peoples survived and resisted America's nation-building project was contingent on uncontrollable circumstances, but when the courtroom served as an important outlet for meaningful change. Over the next century, Indigenous groups faced a landslide of tyrannical assimilationist legislation and court rulings engineered to severely denigrate Native identity and effectively break down tribal power.

The second chapter, "Navigating Law and Crossing Nations: Indigenous Experiences with Early Twentieth-Century Immigration Restrictions along the U.S.-Canadian Border," focuses on early twentieth-century border constraints, eugenic influences on U.S. national policy, and organized Iroquoian resistance. It centers on Paul Kanento Diabo, member of the Rotinohshonni, and his experience being arrested for "illegally" crossing the international boundary between

Montreal and Pennsylvania in 1926.[33] According to border officers, Diabo explicitly violated the newly established Immigration Act of 1924, and should therefore be deported immediately. The arrest spurred a series of appeals on behalf of Diabo, his lawyers, and the larger Rotinohshonni community. The crux of Diabo's defense lay embedded in the Jay Treaty of 1794, which guaranteed his right to traverse through the territorial lines demarcated by the U.S. and Canada. Judge Oliver B. Dickinson ruled in favor of Diabo, recognizing all Six Nations peoples' entitlement to move freely between countries.

Diabo's case is emblematic of the twenty-first-century conceptions and constructions of formative national boundaries. Following the First World War, both the United States and Canada strategically implemented policies designed to harden borders, categorize citizens, and restrict immigration. As competing national projects, each established an intricate matrix of policing and controlling practices that refused entrance of people considered "unfit." This became a hazy morass when dealing with the Iroquois Nation, which happened to rest on both sides of the international border. Diabo's story emerged at the nexus of eugenic-racialized ideologies, assimilationist agendas, and immigration policies of the time. He and his allies represented a direct challenge to American laws that prioritized the criminalization of human movement as well as the attempt to degrade the Rotinohshonni's long-established treaty rights.

Chapter three, "The Landmark Decision of *Harrison v. Laveen*: Arizona Indians and the Right to Vote During the Mid-Twentieth Century," delves into one of the most basic tenants of a democratic society—the right to vote. Whether casting a ballot or holding public office, the importance of suffrage cannot be overstated as it provides individuals with the opportunity to make

[33] The Rotinohshonni is the Indigenous community commonly known as the Iroquois, also spelled Rotinonshionni depending on context and source.

meaningful change in the political structure of their respective community. In 1940s America, however, certain states continued to deny this essential right through a combination of repressive, racist, and capricious laws. In Arizona, those residing on the fringes of the white society, including Indigenous peoples, faced the brunt of these various modes of discrimination firsthand. The Arizona constitution provided county registrars with the legal ammunition to spurn Indigenous attempts to register. Buried within section 2, article 7, it stipulated that Native peoples were under the guardianship of the United States and therefore unqualified to vote. But in 1947, two Yavapai members of the Fort McDowell Reservation, Frank Harrison and Harry Austin, presented a united front to combat this unfair, illegal, and ignominious discrimination by suing the state of Arizona.

Both men sparked a lengthy and trying courtroom battle to appeal the state's exclusionary legislation and empower American Indians in Arizona politically. After making its way through the lower courts, the case eventually reached the Arizona Supreme Court, which sided in favor of Harrison and Austin and heralded an important advancement of Indigenous civil rights in the American Southwest. The case garnered national attention and support from myriad organizations and individuals, including The National Congress on American Indians (NCAI), the American Civil Liberties Union (ACLU), the U.S. assistant attorney general, and famed American Indian attorney-at-law, Felix Cohen. The landmark case of *Harrison v. Laveen* uncovers the prism of racial intolerance occurring during the late 1940s, the legal constructions informing and shaping Arizona, and the decisive actions Indigenous peoples took to challenge the suppression of their right to vote.

The fourth chapter, "Fighting Wrongs and Restoring Rights: Mid-Twentieth Century Termination Policies and the Struggle for Tribal Recognition in California," examines the violent and compulsory assimilationist policies blanketing Indigenous societies during the mid-twentieth

century. In 1953, the eighty-third Congress passed House Concurrent Resolution 108 into law, a termination program with the goals of integrating American Indians into mainstream society and finally severing its paternal obligations. This egregious Congressional act played into the "logic of elimination" and speaks directly to the range of strategies the government employed in an effort to breakdown tribal power. Yet, termination not only demonstrates federal attempts to erase Indian identity through urban assimilation, but also clearly shows efforts to circumvent established treaty rights and dispossess of tribal communities of their landholdings at the tempestuous behest of white society. Nevertheless, the liquidation of Indigenous peoples' tribal status was met with resounding opposition as it clashed with a surge of national, organized, and highly political Native resistance.

In northern California, the aftermath of termination left a small reservation known as Robinson Rancheria absent of property, rights, healthcare and educational programs, and basic utilities. Although the federal government originally persuaded the residents of Robinson Rancheria to sign away their tribal status in exchange for an updated water system and other modern improvements, it fundamentally failed to uphold its contractual obligation and over time left tribal members vulnerable to contaminated drinking water. As a venerable elder of the Pomo-speaking people of Robinson Rancheria, Mabel Duncan stood up to the fraudulent federal inaction that threatened the health of her community. Resisting cultural annihilation and posing a direct challenge to the Secretary of the Interior, Duncan and her legal team utilized the courts as an avenue for immediate restoration of the rancheria's tribal status. In 1977, the United States District Court of California ruled in Duncan's favor, not only ordering the re-recognition of Robinson Rancheria, but also leaving room for future lawsuits dedicated to monetary relief. Through

unfaltering resolve and ardent advocacy, Duncan repudiated cultural eradication and placed her tribe's traditional homelands back into federal trust.

Chapter five, "Saving Salmon Through the Power of Treaties" investigates the power struggle over fishing rights between Washington State and Pacific Northwest tribes at the turn of the twenty-first century. By the late 1990s, the state began reporting a staggering decrease in salmon yields, which proved devastating for those depending on the fish for subsistence and commercial purposes. The Washington Department of Fish and Wildlife's research into the matter singled out one key contributor to the extreme drop in salmon counts—state-constructed culverts. These human-made systems of water conduits were intended to divert excess rain and stream runoff under state highways, allowing for safe travel over roadways and a reduction in flooding. Unfortunately, the design of these culverts also severely disrupted the natural migratory patterns of salmon, creating impassable barriers and reducing the physical space needed for spawning. Despite Washington clearly recognizing the problem culverts presented to the region's salmon reproduction, the state made little headway into solving the issue in a timely manner.

Determined to prevent an irreversible ecological collapse and ensure generational access to salmon, twenty-one Pacific Northwest tribes (the Tribes), joined by the United States, submitted a Request for Determination against the state of Washington in 2001. The Tribes argued that under the Stevens Treaties of the 1850s, the state had a treaty-bound responsibility to protect salmon from total destruction so Indigenous peoples' have the opportunity to earn a moderate living. Notwithstanding, Washington still refused to repair the culverts, contending the treaties did not specifically call for environmental protections, and went so far as to lay the blame on the federal government for engineering and approving the use of state culverts. Without faltering, Native peoples moved on and around established American legal boundaries to defy the settler state's

attempts at physical, financial, cultural erosion. In 2018, the United States Supreme Court finally settled the matter, upholding the lower courts' rulings ushering a decisive victory for salmon, the Tribes, and the power of treaties.

The concluding chapter offers a general summary of the dissertation and outlines its important contributions to the field of history. It then provides a chapter overview that synthesizes the main case studies, followed by potential ideas for future research. It ends with an interpretation of law and power and general reflection on the overall project.

Chapter I: A Fluid State of Law and Power

The aftermath of the American Revolution signaled a turning point in North American settler-Indigenous relations. With the signing of the Treaty of Paris in 1783, power officially transferred from Great Britain to the newly formed republic of the United States, leaving many Indigenous groups living on the eastern seaboard—both friend and foe of the Americans during war—in an ambiguous position. Countless Native communities found themselves in the flux of sovereignty as U.S. settlers wholly believed the lands between the Appalachians and the Mississippi, which were central to the independence the Revolution promised, now belonged to the victors.[34] U.S. citizens looked at westward lands as the quickest, most viable way to establish an American empire; but in order to do so, it required the subjugation, removal, assimilation, and, in some cases, overall eradication of Indigenous inhabitants.[35]

Throughout the ensuing two hundred years of the United States, American settlers, squatters, and speculators aggressively penetrated into Native regions by any means necessary. This unique form of U.S. colonialism, unlike the former British colonization, almost always involved violent conquest, displacement, and dominion over Indigenous peoples and their ancestral homelands. However, the same settler-colonial system aimed at dispossessing, destabilizing, and diminishing indigenous peoples, simultaneously supplied an important, although frequently unbalanced and inconsistent, outlet for redress and change—the court of law. For the next two-and-a-half centuries, federal, state, and tribal polities engaged in a perpetual legal struggle over land, sovereignty, and human rights. Ultimately, through strategic use of the

---

[34] Kathleen DuVal, *Independence Lost: Lives On the Edge of the American Revolution* (Random House Trade Paperbacks, 2016),, 291.

[35] Colin G. Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities* (Cambridge: Cambridge University Press, 1995), 301.

American legal system, North America's indigenous populations withstood, challenged, and adjusted to U.S. colonialism—albeit not without substantial loss.

Like the British before them, treaty-making became the central mechanism for legal relationships between Indigenous peoples and the fledgling United States. The U.S. Constitution provides specific reference to Indian nations in Article I, Section 8, stating, "[Congress shall have Power] to regulate commerce with foreign nations and among the several states and with the Indian Tribes."[36] In 1778, the United States negotiated its first official treaty with an Indigenous polity, the Delaware, and twelve years later formalized the Trade and Intercourse Act of 1790, which declared all interactions between Indians and non-Indians remained under federal control.[37] Throughout the following century, the U.S. entered into over six hundred additional treaties and agreements with various Native tribes across North America, though the Senate did not ratify them all. These diplomatic, and often unequal, agreements were intended to not only insure peaceful relations between the U.S. and indigenous groups, but also act as an apparatus from which the transfer of land could occur easily and orderly.[38]

In the early 1800s, Indigenous peoples responded to Americans' territorial acquisition in numerous and diverse ways. In an attempt to limit the incessant encroachment of squatting settlers and military pressure, members of groups such as the Iroquois, Shawnee, Delaware, Anishinaabeg, and many others formed pan-Indian coalitions that advocated giving up alcohol,

---

[36] Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States (Revisioning American History)*, Reprint ed. (Beacon Press, 2015), 79, 80.

[37] Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space*, (New York: Oxford University Press, 2009), 45.

[38] Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 3-4.

refusing intermarriage, rejecting Christianity, laying down manufactured tools, removing European clothing, reverting back to a traditional diet, and resisting U.S. aggression with force. Led by Shawnee warrior-and-chief Tecumseh, this pan-Indian confederation hoped to not only foster a revitalization of Indigenous culture but also create a powerful united front against U.S. intrusions. Tecumseh argued that no tribe had the right to sell lands that belonged to all Indians. His influence rose quickly as he denounced pro-American chiefs who surrendered millions of acres of land to the U.S. during the "whiskey treaty" at Fort Wayne in 1809.[39]

Only a few years later, Tecumseh and his Indigenous alliance joined the British in their assault against the U.S. in the War of 1812. Although Tecumseh and his supporters suffered significant setbacks during the course of war, the British-Indian partnership orchestrated some early victories, such as Tecumseh and General Isaac Brock's capture of Detroit in 1812. Yet Britain's preoccupation with halting Napoleon's expansion severely hindered their support of Tecumseh in North America. Shortly thereafter, the British troops, under the command of Colonel Henry Procter, fled and subsequently surrendered at the Battle of the Thames in Ontario (1813), leaving Tecumseh to die on the battlefield. Tecumseh's death dealt a crushing blow to tribal unity and military resistance east of the Mississippi.[40]

Towards the South, a confederation of Creek tribes headed by Alexander McGillivray also continued to assert Indian dominance in the region. Born the son of successful Scottish trader Lachlan McGillivray and his French-Indian wife, Sehoy Marchand, McGillivray existed in a unique space between two culturally distinct worlds. In an effort to protect Creek interests

---

[39] Colin G. Calloway, *First Peoples: A Documentary Survey of American Indian History* (Boston, MA: Bedford/St. Martin's, 1999), 219. Here, unrecognized Indigenous leaders ceded millions of acres of lands that did not belong to them in exchange for goods, monies, and promises. This land cession happened after copious amounts of alcohol were consumed, influencing the name, "whiskey treaty."

[40] Ibid., 219.

against an escalating U.S. threat, he denied any claims the U.S. made to tribal lands, which the British conceded in the Treaty of Paris, because no Indians took part in the negotiations.[41]

However, following McGillivray's death in 1793, Upper Creek and Lower Creek towns grew divided on how to handle the United States. Conflicts between the Upper Creek who favored a militant stance and Lower Creek who preferred peace and accommodation erupted into large-scale war, one which engulfed American settlers and drew the attention of the U.S. military. In the Creek War of 1813–14, General Andrew Jackson conducted a series of devastating campaigns that concluded with the annihilation of some eight hundred Creek warriors at the Battle of Horseshoe Bend. The Treaty of Fort Jackson, which put an end to the war, inflicted another devastating strike by completely stripping the Creek Nation of 14 million acres of ancestral homelands.[42] As a result of ceaseless military crusades, settler encroachments, and general pro-removal mentalities, the U.S. had effectively destroyed organized Indian opposition in the eastern portion of North America by 1815.

By the early 1830s President Andrew Jackson, in conjunction with a supportive Congress, seized upon the opportunity to make Indian removal an official government policy. Following the passing of the Indian Removal Act of 1830, Indigenous communities living in the Ohio and Mississippi valley—including the Cherokee, Choctaw, Chickasaw, Muskogee (Creek), and Seminole—were violently ripped from their territorial homelands and relocated to reservations, areas typically void of natural resources, in the western plains' region.[43] Approximately seventy thousand people were relocated during the Removal Era. The U.S. also

---

41 Ibid., 219.

42 Ibid., 220.

43 Ibid., 7.

entered into eighty-six treaties with twenty-six Indigenous nations that forced land cessions.[44] Not surprisingly, many Indigenous peoples rejected removal, opting instead to remain on their lands—though not without serious repercussions, such as losing federal recognition of landholdings and tribal status. Yet, existing treaties opened up a significant amount of space from which Native groups could enter the legal realm of lawsuits in an effort to combat further settler encroachment, as well as assert their rights and identity as sovereign nations.

Anglo settlers' insatiable need for land and seemingly never-ending expansion led to incessant conflict with Native peoples. The Cherokee Cases of 1831-1832 brought to the foreground the first extensive legal and constitutional debate over competing rights to the land of indigenous peoples and white settlers. Following the American Revolution, various treaties made between the Cherokee Nation and the U.S. chipped away at once-significant Cherokee landholdings. Beginning with the Treaty of Hopwell in 1798, and reaffirmed and clarified by the Treaty of Holston River of 1791, the Cherokee lost their portion of South Carolina. But the catalyst for true territorial loss came in the 1820s with the discovery of gold on Cherokee lands in Georgia and Jackson's election. In response, Georgia enacted a wave of laws intended to dissolve the Cherokee centralized government, repeal Cherokee laws, and increase state power over Georgia's Indigenous inhabitants.[45] Faced with an altogether dismal situation, Cherokee turned to their only source of recourse, the American legal system.

The lawyer William Writ, previously the U.S. attorney general under James Monroe and John Quincy Adams, took up the challenge in defense of the Cherokee. Writ filed a lawsuit that

---

[44] Dunbar, *An Indigenous Peoples'*, 110-111.

[45] Bryan H. Wildenthal, *Native American Sovereignty On Trial: A Handbook with Cases, Laws, and Documents, The On Trial Series* (Santa Barbara, California: ABC-CLIO, 2003), 39.

appealed to the Supreme Court's power to oversee any dispute concerning the state—the landmark case of *Cherokee Nation v. Georgia*. The suit charged that Georgia laws violated the stipulations of existing treaties, which were explicitly constitutionally recognized in Article VI of the Constitution. Cherokee plaintiffs and Writ requested an injunction to reduce the disastrous impact of Georgia's legislation surrounding Cherokee territory and governance that attempted to supersede the authority of the federal government and Constitution—the supreme law of the land. The case became an opportunity for Writ and the Cherokee Nation to test the constitutionality of Georgia's anti-Cherokee laws and extent of both state and federal sovereignty.[46]

Yet, rather than focusing on the individual rights or status of a specific person or property, it framed the case as a more general fight against Georgia state law. The state rejected the case in its entirety, denying the Supreme Court held power over the state and it would ignore any decision made. Georgia Governor George Gilmer submitted the official Supreme Court citation to appear before it to the legislature stating, "So far as concerns the executive department, orders received from the Supreme Court in any manner interfering with the decisions of the courts of the State in the constitutional exercise of their jurisdiction will be disregarded, and any attempt to enforce such orders will be resisted with whatever force the laws have placed at my command."[47]

The Court, therefore, was dealing with a quite volatile situation involving a defendant who refused to appear or acknowledge the court's jurisdiction and a slew of legal questions that

---

[46] Mark Rifkin, *Manifesting America: the Imperial Construction of U.S. National Space* (Oxford University Press, 2012), 49.

[47] Ibid., 49.

threatened to rupture a relatively new and fragile republic. Because of this, and coupled with the fact that indigenous groups held an ambiguous legal status in relation to the United States, the justices dismissed the Cherokee's claim. Chief Justice John Marshall wrote in the opinion of the Court that the Cherokee Nation technically did not fall within the Court's jurisdiction, due to the fact that they were not recognized as a "foreign state."[48] He and the Court rested their decision on Article I, Section 8, of the Constitution, which dictated Congress had the power to " regulate commerce with foreign Nations . . . and with Indian tribes," suggesting the founders' objective to differentiate political bodies and define "Indian tribes" as something other than "foreign" nations.[49]

Cherokee Nation harbored profound and lasting consequences on future matters regarding Indigenous groups and encroachment on their sovereignty and land rights. Chief Justice Marshall wrote that although Native peoples possessed an unquestionable right of occupancy, their lands still rested within the territorial boundaries of the United States. Marshall further noted that tribal units occupied a unique status within American law, a "domestic-dependent" national status.[50] Although Marshall offered no exact meaning of "foreign," his interpretation established legal reasoning to deny Cherokee a particular status and relationship with the United States. Indeed, to categorize Cherokee territory as "foreign" would compromise the assumed limits of the United States' jurisdiction. The model of "domestic dependent nation"—one which resembled a ward to their guardian—also served as a means to resolve issues of state sovereignty, federal policy and preemption, and Indian treaties, by condensing

---

[48] Wildenthal, *Native American Sovereignty*, 41.

[49] Rifkin, *Manifesting America*, 50.

[50] David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 42.

them all within a shared legal geography that identified the Cherokees as a "domestic nation" of limited autonomy and legal power.[51]

In the same month of *Cherokee Nation*, Georgia officials arrested and later convicted Vermont minister Samuel A. Worcester and other missionaries for remaining on Cherokee lands without securing a license or pledging allegiance—per a recent Georgia law. The governor, wishing to avoid a test case and well aware of the public disdain for arrests of men of the cloth, proffered pardons for all missionaries if they complied with the law. Worcester and Dr. Elizur Butler declined, instead opting for attorney Writ to appeal to the Supreme Court to gauge the legal status and effectiveness of treaty terms.[52] The formative case of *Worcester v. Georgia*, unlike in *Cherokee Nation*, demonstrated an apparent shift because the latter case of Worcester and Butler posits actual plaintiffs, as opposed to the former which advances Cherokees as a contextual object. Despite the core of the case decided on whether non-Indians, in this situation white missionaries, had the right to travel into Cherokee lands with federal backing, it also became a broader test between treaties and state laws.[53]

Chief Justice Marshall ruled in favor of Worcester, finding that Indigenous tribes held adequate autonomy to protect their people and land from state encroachments. The Court, fearing that their decision in *Cherokee Nation* magnified Georgia aggression and violence toward the Cherokee, took the opportunity to move away from the language of conquest used in previous cases.[54] Marshall officially identified Indian nations' independence while at the same time

---

[51] Wildenthal, *Native American Sovereignty*,42, and Rifkin, *Manifesting America*,50, 51.

[52] Wildenthal, *Native American Sovereignty*, 42.

[53] Rifkin, *Manifesting America*, 51.

[54] David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (University of Oklahoma Press, 2002), 61.

questioning the principles of discovery as a method of obtaining territorial sovereignty in North America.[55] He explained, "America . . . inhabited by a distinct people, divided into separate nations . . . having institutions of their own, and governing themselves by their own laws . . . it is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claim over the inhabitants . . . or that discovery" should annul "the preexisting rights of its ancient possessors."[56]

Yet such a ruling, though clearly beneficial to Indigenous peoples given the context, did not overturn or diminish past opinions asserting the specific aspects of doctrine of discovery and general discourse regarding Euro-American conquest. In 1823, the formal decision of *Johnson v. McIntosh* found the Doctrine of Discovery as the legitimizing factor in European's superior rights in the "New World."[57] The Supreme Court proclaimed that upon the "discovery" of the New World, European sovereigns obtained full ownership of discovered lands, while Native communities maintained a mere "occupancy" status. The Court's deceptive assertions had profound and far-reaching consequences—despite its initial intention as being utilized in a limited practice, it fomented complete and utter displacement of Indigenous peoples and established an entire legal system of justification.[58]

---

[55] Alexandra Harmon, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest (Emil and Kathleen Sick Book Series in Western History and Biography)* (Seattle: University of Washington Press, 2008), 39.

[56] Ibid., 39, 40.

[57] Robert A. Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest*. (Oxford University Press, 1992), 231.

[58] Lindsay G. Robertson, *Conquest By Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford University Press, 2007), 4.

Marshall suggested that the American government's acquirement of title came from entering into treaties that incorporated tribes into the United States as "domestic dependent nations." Following conquest by treaty, or more regularly by force, Indigenous peoples were subject to the sovereignty of the dominant nation or political entity, however, they also retained sovereign authority over internal matters.[59] The Cherokee victory in *Worcester*, in particular the recognition of treaty rights trumping state laws, also expressed patronizing language and solidified paternal ideals of a parent-child relationship between indigenous groups and the federal government.

This mindset of legal superiority emboldened the U.S. and its settler satellites as they rapidly expanded westward during the early nineteenth century. However, for decades prior to the official declaration of war between the United States and Mexico, Southwestern Indigenous groups continued exercised considerable control over the peripheries of western Texas and northern Mexico. But the region soon felt the major effects generated by the Indian Removal Act as eastern tribes were forcefully displaced and settled onto already occupied western lands. Within a short period of time, the Plains transformed into an arena of competition for resources between rival tribes, Anglo-settlers, and Mexico's northern residents.[60]

The Comanche, in particular, held several neighboring peoples in perpetual servitude and successfully engaged in a booming market-orientated, and slavery-driven economy. In fact, La Comanchería—Comanche governed territory or "the Comanche Empire"—had transformed into a dynamic, multiethnic imperial core that incorporated myriad voluntary immigrants from weaker surrounding communities. Not unlike imperial Euro-Americans, the Comanche were

---

[59] Harmon, *The Power of Promises*, 40, 41.

[60] Colin Calloway textbook, 278.

powerful actors who had the ability to influence societies and reshape histories.[61] In a similar fashion, the loosely affiliated tribes of Apache and Comanche-allied Kiowas strategically dominated vast stretches of land on both sides of the Río Grande. Therefore, Mexico played a crucial role in the geopolitical decisions and the ways in which both security and expanded markets would facilitate and reward raiding campaigns into northern Mexican settlements.[62] More often than not, residents of Sonora, Chihuahua, and Coahuila were forced to deal with trade, diplomacy, and war on Native peoples' terms.

The U.S. was fully aware of the fact that northern Mexico was a place where Mexicans and Indians had been killing, capturing, and ransacking one another for over a decade—such knowledge directly shaped U.S. strategies for war and occupation.[63] Not long after the United States declared war on Mexico the violent contest for control over the southwestern borderlands increased exponentially. Northern and western Comanches and Kiowas greatly intensified raiding activities along the Santa Fe Trail, killing more than sixty Americans, burning hundreds of wagons, and pilfering six thousand heads of livestock.[64] Throughout Mexico's battle with the United States, Comanche aggression sparked increased anxiety amongst Mexican communities as they commenced enormous raiding parties below the Río Grande. Comanche leaders understood that they could take full advantage of Mexico's distraction as long as they directly

---

61 Pekka Hamalainen, *The Comanche Empire (The Lamar Series in Western History)* (New Haven: Yale University Press, 2009), 142.

62 Brian DeLay, *War of a Thousand Deserts: Indian Raids and the U.S.-Mexican War (The Lamar Series in Western History)* (New Haven & London: Yale University Press, 2009) 84.

63 Ibid., 254.

64 Gary Clayton Anderson, *The Conquest of Texas: Ethnic Cleansing in the Promised Land, 1820-1875* (Norman: University of Oklahoma Press, 2005), 200.

focused their Indigenous campaigns on Mexico's northern provinces and paid critical attention to the ever-changing geopolitical geography of U.S. occupation.[65]

Before the takeover of Mexico commenced, however, Texas served as a blueprint for Anglo colonialism. In the mid-1830s, disagreements over Texas' geopolitical boundaries and system of government led to multiple violent engagements between Mexico, Texan residents, and various Indigenous groups. Three years after the collapse of the Mexican military presence in Texas, the region experienced massive migration, increasing the Anglo population by thousands. Tensions between Texas and Mexico resulted in the formation of the Texan Consultation of Representatives that sought independence and established a provisional government. President Antonio López de Santa Anna, a prominent and charismatic Mexican figure, declared those who acted against the interests of Mexico were rebels.[66] Santa Anna became locked into a complex struggle over land rivalries, politics, and debates over Texas independence. In 1836, he launched an attack on a rebel hideout known popularly as the Alamo. Although some Texans surrendered, by the end of the campaign the Alamo was nothing more than a mass of smoke and dead bodies.[67] Despite his victory, Santa Anna was eventually captured and forced to recognize Texas as an independent republic. Not long after, Texas petitioned the U.S. for annexation.

The U.S.-Mexico War ended in 1848 with the signing of the Treaty of Guadalupe Hidalgo that secured a perceived U.S. dominance in the Southwest region. Yet Article XI of the treaty, which explicitly expressed Mexico's desire to transfer the responsibility of policing

---

65 DeLay, 270.

66 Ernesto Chávez, *The U.S. War with Mexico: a Brief History with Documents* (Boston, MA: Bedford/St. Martin's, 2007), 8-9.

67 Anderson, *The Conquest of Texas*, 109.

borders and prevent devastating indigenous raids onto the U.S. However, during the Treaty of Mesilla in 1853, which finalized the Gadsden Purchase, the U.S. annulled Article XI of the Treaty of Guadalupe Hidalgo citing America's inability to defend the territory against Indigenous raids as the main factor. The controversy over Article XI indicates the tremendous power Southwestern Indian groups wielded well into the second half of the nineteenth century.

The mid-nineteenth century brought a change in federal intervention on behalf of Indigenous groups and preserving their rights through treaty-making and legal recognition. By the 1850s, Native communities had lost a considerable advantage in the competition for land against invading Americans, and the purpose and terms of treaties changed in response.[68] Rather than upholding the legitimacy of treaties, the U.S. Senate sided with proponents of Manifest Destiny, Anglo settlers, and the ideas behind '"squatters sovereignty' backed by 'violence and outrage."[69] Indigenous nations across the continental United States faced increasingly hostile state laws directed at their overall dispossession, displacement, and destruction.

Throughout the years, various states continued to pass legislation designed to undermine Indigenous sovereignty and create space for settler colonial violence. The expansion of state authority altered the federally recognized legal pluralism that existed in most areas to a state-centered legal system.[70] This transformation from indirect rule, which maintained acknowledgement of indigenous peoples' jurisdictional rights, to direct rule, which absorbed Native peoples into the state's legal and political structure, was the only way state's could justify their legal dominance over Indians and their land. Indeed, if states continued to recognize

---

[68] Harmon, *The Power of Promises*, 10.

[69] W. Hixson, *American Settler Colonialism: A History* (Palgrave Macmillan, 2013), 134.

[70] Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880* (University of Nebraska Press, 2009), 204.

Indigenous groups as distinct, self-governing polities with chosen leaders, they would also find it progressively more difficult to challenge federal power over tribes remaining within state boundaries.[71]

Direct rule led to an unequal power distribution and a shift in jurisdictional rights and subsequent turmoil for indigenous inhabitants in states such as California. In 1859, Judge Serranus C. Hastings, former first chief justice of the California Supreme Court and third attorney general, commanded considerable influence on the state's law and order regarding Indigenous peoples. Hastings and other well-established white officials used the democratic process and systems of republican government to legally treat Indians as sub-human with the goal of gaining land, and in many cases extermination of the indigenous population—legal genocide. Through petitions, letters, and rights as citizens, men like Hastings spurred the state government to action on their behalf, and at the expense of California's Native people.[72]

The shortage of a malleable and subservient workforce grew out of California's peculiar entrance into, and status within, the Union. It became a state quickly after the U.S. War with Mexico and the Treaty of Guadalupe Hidalgo, which wrenched it from Mexico, and its official ban on chattel slavery left landowners without a "dependable source" of labor. With that vacuum in mind, the state legislature turned its eye towards the Native population. Chapter 133, or "An Act for the Government and Protection of Indians," permitted justices of the peace to resolve all issues pertaining to Indigenous peoples, particularly filling California's incessant need for short-term labor. The vagrancy laws of Chapter 133, Section 20, allowed those found on the street

---

71 Ibid., 205-206.

72 Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846-1873* (University of Nebraska Press, 2015), 1, 2.

without money to be arrested and auctioned off for a term of up to four months and served as the linchpin of legal genocide in California. Coupled with Section 5, which enabled citizens to purchase arrested Indians without going to auction, resulted in exacerbating unwarranted arrests and even the kidnapping of Indigenous children. In 1860 an amendment to Chapter 133 expanded the extent of apprenticeship laws and continued the growing Native slave system. The apprenticeship section of Chapter 133 functioned for thirteen years to enslave at least ten thousand Indigenous peoples through sales, indentures, and apprenticeships.[73]

The following year, civil war erupted between the Northern Union and the Southern Confederacy causing a temporary decrease in westbound settler migration and a diversion of American troops away from the frontier.[74] However, it did little to stem the tide of violent outbreaks among Indian communities protecting their homelands from encroaching American settlers. Those Indigenous individuals who served in the Civil War as a means to safeguard their lands were disappointed to find little changed after the war's close. In fact, of the some 20,000 Indians participating in the war, tribes who joined the Confederacy such as the Choctaw and Chickasaw or whose loyalties were divided like the Seminole, Creek, and Cherokee experienced sudden and extensive loss following the Union crisis. In the Civil War's aftermath, the United States decided that even partial Indigenous support for the Confederacy indicated a pretext for stripping additional lands away from Indians. In the end, the outcome of the Civil War fortified the U.S. military and stimulated industrialization and railroad development, all of which

---

[73] Ibid., 258.

[74] Calloway, *First Peoples*, 284.

promoted settler advancement westward with utterly disastrous results for Indigenous communities.[75]

In the subsequent decades of the Civil War, the United States enacted legislation designed to further undermine tribal autonomy and erase cultural identity. In 1868, President Ulysses S. Grant proposed a "peace policy" intended to reform what he saw as immoral practices conducted against North America's indigenous population. Grant went to great lengths to removed corrupt Indian agents and officials supervising reservations and replaced them with Christian missionaries that he believed brought an altruistic component to the oversight of Indigenous lives. Over the years, those who saw themselves as "friends of Indians" wished to "save" the Indian by dismantling reservations in order to "modernize" and assimilate Native peoples into mainstream American culture.[76] In a similar spirit, Congress passed the Indian Appropriation Act in 1871, which brought an official end to U.S.-indigenous treaty making. With such legislation in place, the federal government progressively considered tribal polities as domestic entities rather than foreign nations.[77]

In the 1880s, Congress extended criminal jurisdiction over all Indigenous peoples (aside from the Five Civilized Tribes) through a rider attached to the general appropriations act. Such Congressional actions came in direct response to the Supreme Court's unanimous decision in *Ex parte Crow Dog* (1883), which held that retained full criminal jurisdiction over their Indian-on-Indian crimes.[78] The Major Crimes Act included incidents of murder, manslaughter, rape, assault

---

[75] Hixson, *American Settler*, 111.

[76] Calloway, *First Peoples*, 353.

[77] Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007), xvii-xviii.

[78] Wilkins and K., *Uneven Ground*, 112.

with intent to kill, arson, burglary, and larceny.[79] The constitutionality of this federal intrusion became central to the case of *United States v. Kagama*. In 1885, Kagama and Mahawaha—two Hoopa Valley Reservation Indians from Humboldt County, California—were indicted for the murder of another Indian named Iyouse. The defendants' attorney, Joseph Redding, argued three main points on behalf of his clients: first, that Congress' authority to control commerce with indigenous communities does not give said polity the right to enact laws regulating Indian-on-Indian crimes perpetrated on Indian land; second, prior to the Major Crimes Act, Congress regularly acknowledged tribal rights and the social structure existing on reservations; and finally, in almost every treaty with Indigenous peoples, the United States inserted a clause that disavowed jurisdiction over Indian-on-Indian crimes within Indian territory.[80]

The *Kagama* Court emphasized the "dependent" nature of Indigenous peoples as "wards" of the United States. Justice Samuel Miller disregarded roughly a century of federal legislation, treaties, and early Supreme Court precedents, noting the Constitution actually explained virtually nothing about the relationship between tribes and the federal government. Because of this, Miller relied little on the Constitution for guidance in his opinion, in effect releasing himself from democratic principles and rule of law. Instead he depended on the "law of necessity."[81] The Court drew upon the geographical incorporation reasoning of *United States v. William S. Rogers* to reject the territorial sovereignty of the Hoopa Reservation. The Court reached a unanimous conclusion, insisting, "The power of the [federal] government over these . . . once powerful, now weak [people] . . . is necessary to their protection. The United States . . . alone can enforce its

---

[79] Ibid., 69.

[80] Ibid., 69.

[81] Ibid., 79.

laws on all the tribes."[82] Otherwise stated, the Court based its decision on the proprietorship of land, which supplied the federal government with total dominion over tribes.[83]

Only years later, the federal government enacted the General Allotment Act, also know as the Dawes Act, in 1887. The central premise of the legislation sought to carve Indigenous lands into simple private lots owned by individuals and families—not unlike their white counterparts. Indeed, allotment served as a method of "civilizing" and assimilating Indigenous peoples into mainstream American society by encouraging notions of private property and agricultural production. But the act also garnered substantial favor from those wanting an acceleration of indigenous land loss. The Dawes Act officially permitted the Bureau of Indian Affairs (BIA) to review reservation lands to determine whether they were suitable for farming and grazing purposes. The head of a family would obtain 160 acres, single adults or orphan children 80, and other children 40. Between 1887 and 1934, Native groups across the continental United States lost a significant portion of their landholding, approximately 86 million acres following the Act's passing.[84] Moreover, allotment jeopardized wealthy ranchers and planters who had accrued large estates and the poor farmer who depended on common lands for subsistence.[85]

Collectively, these late nineteenth-century court decisions and legislation elevated Congress to a plenary and paternal figure over "dependent" tribes. Arguably, however, the nadir

---

82 Wildenthal, *Native American Sovereignty*, 53.

83 Wilkins and K., *Uneven Ground*, 77,

84 Stuart Banner, *How the Indians Lost Their Land: Law and Power On the Frontier* (Cambridge: Belknap Press, 2007), 257, 276.

85 David A. Chang, *The Color of the Land: Race, Nation, and the Politics of Landownership in Oklahoma, 1832-1929* (Chapel Hill, NC: The University of North Carolina Press, 2010), 85.

of indigenous sovereignty came with the ruling of *Lone Wolf v. Hitchcock* in 1903. The ruling found that Congress possessed absolute power to nullify Indigenous treaties at will, without legal responsibility of recompense. Despite the Constitution lacking any explicit defense of Indigenous sovereignty, it does clearly permit treaty-making and expressly protects the legitimacy of prior treaties.[86] As a result, the Office of Indian Affairs could, at will, dispose of indigenous peoples' land, property, and resources regardless of existing treaty agreements between the federal government and the respective tribe. In turn, reservations became increasingly vulnerable to non-Indian settlers flooding west and leasing or purchasing allotments that had often been acquired through unjust federal-Indian policy. By the early twentieth century, white settlers came to inhabit almost all desirable lands once held by various indigenous groups throughout the U.S.[87]

Entering into the 1920s, the U.S. shifted its repressive policies toward Indigenous communities. Although the start of the twentieth century saw sweeping immigration policies designed to categorize, restrict, and exclude certain peoples from the American citizenry, it simultaneously enacted the Indian Citizen Act, which imposed unsolicited citizenship over any Native person born within the territorial boundaries of the United States—including those retaining tribal citizenship. Its seemingly contradictory stipulations not only imparted American Indians with U.S. citizenship but also recognized the fact that Indigenous groups held a unique citizenship status. Following the Citizenship Act in 1924, Indians generally possessed three distinct sets of rights: federal, state, and tribal—most notably the right to vote, which caused profound tension among local, regional, state, and federal political spheres. However, because the indigenous population of the U.S. in 1924 totaled only a few hundred thousand, many

---

[86] Wildenthal, *Native American Sovereignty*, 53, 56.

[87] Dunbar-Ortiz, *An Indigenous Peoples'*, 189.

officials believed their suffrage could hardly impact national elections. Furthermore, this extension of citizenship did not remove the trust status of indigenous lands, from which the Bureau of Indian Affairs maintained full authority over. Ultimately, the decree of citizenship failed to provide any fundamental control over the lives and property of American Indians.[88]

In the 1930s, President Roosevelt's New Deal policies offered a moderate and temporary reprieve for America's Indigenous inhabitants. Roosevelt's administrative programs—implemented to stem the tide of economic collapse—also recognized Indigenous self-determination, appointing John Collier as U.S. Commissioner of Indian Affairs in 1933. Collier, after spending years with the Pueblo Indians, assisting with issues associated with land claims and helping establish the All-Pueblo Council, understood Indigenous peoples' opposition to U.S.-driven assimilation strategies such as allotment and the Citizenship Act.[89] In concert with Senator Burton K. Wheeler of Montana and Edgar Howard of Nebraska, Collier pushed through a bill that became the Indian Reorganization Act (IRA). The IRA eliminated the legal practice of breaking up tribal lands, and promoted Indigenous self-government. However, the continued trust status under the federal government—as well as the recurring idea of tribal communities as "domestic nations" and Indigenous peoples as "wards" of the state—required tribal governments to seek approval from the Secretary of the Interior. If BIA officials deemed a tribal council's decision on property or expenditures in any way questionable, they could veto the resolution.[90] Nevertheless, by acknowledging Indigenous self-determination and collective cultural rights, the IRA redirected the American political paradigm and created a legal avenues from which

---

88 Vine Deloria Jr. ed., *American Indian Policy in the Twentieth Century*. (Norman, OK: University of Oklahoma Press, 1985), 29, 91.

89 Calloway, *First Peoples*, 440-442.

90 Deloria, ed. *American Indian Policy*, 93.

Indigenous groups could challenge ongoing repressive, settler-colonial policies.[91] But for many Native peoples, the IRA merely represented another form of paternalistic colonial oppression drafted by non-Indians, which fomented serious fissures between tribal members who embraced the Act as a crucial means of retaining sovereignty.[92]

The post World War II era represents another momentous shift in federal Indian policy. In 1946, Congress enacted the Indian Claims Commission as an instrument to deal with unsettled Indigenous land disputes against the United States. The act overturned a previous law passed in 1863 that prohibited Native peoples to sue in the Court of Claims. The Commission had jurisdiction to hear and determine cases on behalf of any Indigenous tribe, band, or other "identifiable group" in the U.S. and Alaska.[93] Between 1946 and 1976, the Commission received 370 petitions representing 850 claims. Lawyers for the Department of Justice faced a considerable challenge, as most of the claims were well-documented cases of unlawful dealing by the U.S.[94] Unfortunately for those registering claims, the standard turnaround time, from filing to resolution, was fifteen years. Importantly, in establishing the Indian Claims Commission, Congress recognized the illegal seizure of land that occurred throughout the years and created a forum for indigenous groups to voice opposition, strengthen sovereignty, and seek recompense for past abuse and theft.[95]

---

91 Dunbar, *An Indigenous Peoples'*, 172, 173.

92 Calloway, *First Peoples*, 440-442.

93 Wilcomb E. Washburn, *Red Man's Land/white Man's Law: The Past and Present Status of the American Indian*, 2nd ed. (Norman: University of Oklahoma Press, 1995), 103.

94 Deloria, Jr., and Clifford M. Lytle, *American Indians*, 147.

95 Dunbar, *An Indigenous Peoples'*, 173.

Almost simultaneously, certain states grappled with legal issues surrounding Indigenous suffrage, taxation, and the rights of citizenship. In 1940, Idaho, Main, Mississippi, New Mexico, and Washington employed Constitutional language, specifically the phrase "Indians not taxed," in order to withhold Native enfranchisement. However, the issue surrounding Indigenous peoples not paying taxes while living on a federally recognized reservation had been previously used to justify disenfranchisement. In 1917, justices hearing the case of *Opsahl v. Johnson* ruled that Indigenous peoples who were not subject to taxation could not participate as electorates.[96] Approximately thirty years later, World War II veteran Miguel Trujillo from the Isleta Pueblo reservation of New Mexico attempted to register to vote in 1948 but was refused because he was an "Indian not taxed." Despite Trujillo's argument that he paid federal income tax, sales tax, and other forms of tax, the country clerk denied his right to vote. He subsequently sued sparking the case of *Trujillo v. Garley*. Judge Orie Phillips found in favor of the plaintiff, ordering an indefinite injunction against the state's Indians-not-taxed clause.[97] Thereafter, New Mexico's Indigenous peoples possessed the legal ability to voice their opinion in the polling booth.

Arizona too refused Indigenous suffrage rights based on the assumption that Indians were under the guardianship of the federal government. The State of Arizona determined that because American Indians living on reservations resided outside state boundaries, and due to the fact that they were recognized as wards of the state, they possessed no right to engage as electorates at the local and state level. The landmark case of *Harrison v. Laveen* perhaps best illustrates this attempt to rectify injustices against American Indians' basic civil rights. In 1948, World War II

---

[96] Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (Cambridge University Press, 2007), 12-13.

[97] Ibid., 13.

veteran, Frank Harrison, and his friend Harry Austin—both Mojave-Apache members—filed suit against Maricopa County registrar Roger Laveen. The attorneys for the plaintiffs relied on the passing of the Nationality Act and Selective Service Act to posit Indigenous peoples were no longer, if ever, under the guardianship of the United States. Judge J.J. Udall ruled in support of Harrison, granting Arizona's indigenous inhabitants the right to vote.[98]

Less than a decade after the creation of the Indian Claims Commission, the government focused upon breaking up those reservations, enacting a termination program with the goals of integrating Indians into mainstream society and finally severing its paternal obligations. In 1953, the eighty-third Congress passed House Concurrent Resolution 108 into law, which formally ushered in the Termination Era. This Resolution, coupled with other public laws—most notably Public Law 280—enlarged the gap between federal entities and Indian nations, placing the responsibility of Native American affairs into individual states' control.[99] Congress, and the bill's supporters, believed that dissolving reservations would not only benefit the United States, but also the collective Indian community. Eliminating reservations, they reasoned, would break up the remaining tribal structures, beliefs, cultures, and religious practices that hampered successful incorporation and assimilation into mainstream American society.[100] As a result of such political maneuvers, large masses of indigenous peoples were shepherded into urban areas. Approximately 109 tribes were terminated, a minimum of 1,363,155 acres of homelands lost,

---

[98] Ibid., 15-18.

[99] According to the United States Department of Justice, the passage of Public Law 280 took away the federal government's authority to prosecute Indian Country crimes. Additionally, it authorized the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin to prosecute most crimes that occurred in Indian country.

[100] Troy R. Johnson, *The Occupation of Alcatraz Island: Indian Self-Determination and the Rise of Indian Activism* (Urbana: University of Illinois Press, 1996), 6.

and estimated 11,466 individuals were directly affected.[101] Though this Act of Congress commenced modern Indian displacement, the arduous task was long and complicated, and during Termination many tribes continued to assert their presence within U.S. borders as federally recognized nations.

Meanwhile, Congress passed the Indian Relocation Act of 1956 with the goal of moving Indians from their reservation homelands to urban industrial areas—an attempt to undermine Indigenous identity through assimilation. With the help of the BIA, the Relocation Act—also know as Public Law 949—assisted individuals and families with relocation to metropolitan areas such as the San Francisco Bay area, Los Angeles, New York, Seattle, Chicago, Phoenix, Dallas, Denver, and Cleveland. Once there, Indigenous peoples turned to BIA officials for housing arrangements and job placement and training. However, in reality, it placed Indigenous families into impoverished working-class communities, and had them laboring in low-skilled jobs. Further, this project, designed to integrate and assimilate indigenous peoples, actually fostered an increased sense of tribal identity, pan-Indian ideology, and organized political opposition.[102] In the following decades, Indigenous peoples belonging to myriad distinct tribes joined together publicly to protest long-standing injustices.

Simultaneously, the National Congress of American Indians (NCAI) emerged in 1944 as a pan-Indian organization that bridged the gap between urban and reservation residents and defended Indians' legal rights and cultural identity on a local, state, and national scale. By the mid-1960s, with the ominous threat of termination policies gradually fading, executive director Vine Deloria Jr. enacted successful measures to stabilized the NCAI both financially and

---

[101] Ibid., 7.

[102] Dunbar, *An Indigenous Peoples'*, 174.

structurally.[103] Unsatisfied with the moderate and seemingly pacified nature of the NCAI at the American Indian Chicago Conference (AICC), indigenous college students rose up to challenge older tribal leaders. Advocating for a more active militant direction and political spirit, the students formed the National Indian youth Council (NIYC), which quickly grew in popularity and became a key participant in organized urban protests.[104]

The occupation of Alcatraz Island highlights the frustration and desperation of mid-twentieth-century urban Indians regarding their current situation and relationship to the federal government. Alcatraz served as an effective place to organize because in accordance with the 1868 Treaty of Fort Laramie, indigenous peoples may reclaim all retired, abandoned, or out-of-use federal lands.[105] From 1969 to 1971, Native Americans from all over the United States and delegations from around the world visited the island and contributed their resources and goodwill to the real and symbolic struggle.[106] On a national scale, the occupation represented both a challenge to the stereotypical image of indigenous peoples as victims, and a clear demonstration of resistance to the policies and treatment of indigenous peoples over the last two centuries.[107] The events that transpired during the nineteen-month occupation sent reverberations across the nation, effectively prompting smaller, more localized pockets of resistance to join under a new

---

[103] Thomas W. Cowger, *The National Congress of American Indians: The Founding Years* (University of Nebraska Press, 2001), 3-4.

[104] Ibid., 140.

[105] Calloway, *First Peoples*, 320-326.

[106] Troy R. Johnson, Joane Nagel, and Duane Champagne, eds., *American Indian Activism: Alcatraz to the Longest Walk* (Urbana: University of Illinois Press, 1997), 1.

[107] Ibid., 1.

banner of Indian self-determination. Events such as these are what caused significant and permanent change in Indigenous status and ushered in new and favorable federal Indian policies.

After facing major opposition during the Civil Rights era, the U.S. government once again changed its stance on Indian policies. In response to the militant activism of the American Indian Movement (AIM)—a faction that later became synonymous with the Red Power movement—the government executed operations of suppression and reform. In the first approach, the BIA, FBI, and other federal agencies joined in a campaign of surveillance, organizational infiltration, and indictment directed at Indian activists and organizations.[108] For the most part, these crusades to stifle Native Americans' political redress were effective. Over the next few decades, the decline in—but not complete abolishment of—extra-institutional actions, such as community demonstrations and militant occupations, reflects the ostensible success of such campaigns.[109]

The second strategy attempted to directly address Indigenous peoples' political grievances. In his 1968 statement on Indian affairs, President Richard Nixon declared, "Termination of tribal recognition will not be a policy objective . . . the right of self-determination of the Indian people will be respected and their participation in planning their own destiny will actively be encouraged."[110] As a result, the Division of Indian Self-Determination was created with the responsibility of furthering American Indian tribes' exercise of Self-Determination—self-governance and control over their own affairs—as a matter of policy. This decision, of course, stood on the shoulders of previous legislation such as the Civil Rights Act of

---

[108] Stephen E. Cornell, *The Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988), 202–203.

[109] Ibid., 203.

[110] Washburn, *Red Man's Land*, 97.

1964, which outlawed segregation and prohibited any form of discrimination based on race, religion, sex, color, or nationality; the Educational Assistance Act of 1975, which allowed various government agencies to distribute grants and other assistance to federally recognized tribes; the Indian Child Welfare Act of 1978, which banned the unlawful and violent removal of Indigenous children from their home and family; and decades of highly organized pan-Indigenous grassroots activism and civil rights protests. Such examples illustrate inconsistent, complicated, and at times extremely contradictory relationship between the U.S. government and collective North American Indian community.

California set the stage for tribal self-determination through active political and economic amelioration. In 1987, the Cabazon Band, seeking to carve out a modest monetary existence, implemented a bingo parlor and card club that offered games such as poker.[111] Not long after, California State officials threatened to close down Cabazon's operations arguing that its high-stakes gambling violated state law. The dispute made it all the way to the Supreme Court. The decision of *California v. Cabazon Band of Mission Indians* ruled to uphold the authority of indigenous tribes to conduct some gambling operations independent of state law and fueling a nationwide trend of Native American reliance on gambling for economic development.[112] Moreover, Congress followed up by passing the Indian Gaming Regulatory Act of 1988, largely confirming the *Cabazon* Court's approach.[113] The Supreme Court's decision in favor of the Cabazon Band set a precedent from which future gaming regulations and policies would be framed. The case's outcome reverberated across the country, influencing countless other tribes to

---

[111] Bryan H. Wildenthal, *Native American* Sovereignty,105.

[112] Ibid., 314–315.

[113] Ibid., 315.

take Cabazon's lead and enact some form of tribal gaming. Casinos became a staple in the economic viability of Native tribes and have come to symbolize the change from dependent Indigenous groups, to independent Native nations.

On a national level in 1990, Indigenous peoples won a substantial victory with the passage of the Native American Graves Protection and Repatriation Act (NAGPRA). From the mid-nineteenth to early twentieth centuries, federal, public, and private museums, as well as amateur scientists and phrenologists, subsidized expeditions designed to uncover and collect the burial remains of indigenous communities.[114] During the Civil War, United States army surgeons stationed in the West unburied the bodies of countless Native Americans and sent their skeletal remains to museums in Washington. By the end of the nineteenth century, the Smithsonian's National Museum of Natural History, alone, housed more than eighteen thousand specimens of human remains. NAGPRA attempted to correct this long history of inappropriate and offensive displays of Indigenous artifacts, skulls, skeletons, and body parts. The Act called for burial security on tribal, federal, and private lands, banned the buying and selling of Indigenous remains, and called for federally funded museums to publish inventories of the collected remains and arrange for their repatriation.[115]

Over the last two-and-a-half centuries, struggles between federal, state, and tribal political entities have shaped and reshaped laws regarding sovereignty, rights, and personhood. Amidst a formidable U.S. settler-colonial system designed to exclude, assimilate, and gradually terminate, Indigenous peoples found success as a united front. Through decisive legal action,

---

114 Peter Iverson and Wade Davies, "*We Are Still Here": American Indians Since 1890, 2 ed.* (Wiley-Blackwell, 2014), 204.

115 Ann Fabian, *The Skull Collectors: Race, Science, and America's Unburied Dead* (Chicago: University Of Chicago Press, 2010), 5, 218-219.

North America's Native population cultivated a renewed sense of tribal heritage, challenged a seemingly omnipotent political entity, and redefined their position within the larger American society. Importantly, however, the strength that many Indigenous individuals and groups wield today was in no way inevitable—it was contingent on circumstance, and only developed through sequential decades of hardship and resolution. The efforts of twentieth-century Indigenous groups created a new standard for tribal power, and the conventional story of the U.S. changes considerably when Native voices, actions, and ideas are taken into account.

Chapter II: Navigating Law and Crossing Nations: Indigenous Experiences with Early Twentieth-Century Immigration Restrictions Along the U.S.-Canadian Border

In 1926, immigration officials arrested Paul Kanento Diabo—an ironworker and Mohawk from Kahnawake, Quebec—and his wife Louise Kawennes Diabo for "illegally" crossing the international border between the Dominion of Canada and the United States.[116] Under the Immigration Act of 1924, the Bureau of Immigration asserted that Diabo, an alien residing in Montreal, unlawfully entered U.S. territory and therefore should be extradited immediately. Diabo subsequently appealed his deportation, arguing that under the Jay Treaty of 1794 he possessed every right to travel unmolested across the boundary between the U.S. and Canada. For members of the Rotinohshonni (Iroquois Nation), the imaginary line that divided North America did not, in fact, cut through and separate their ancestral homelands. Long after the U.S.-British wars came to a close, the Rotinohshonni continued to travel their lands with relative ease. But by the early 1920s, a once intangible boundary evolved into an increasingly rigid physical barrier, one which greatly obstructed Canadian Indians' ability to move freely across Iroquoia—severing meaningful connections to family, friends, and commerce. Following the passage of the Immigration Act, Diabo, like so many other Rotinohshonni, became engulfed in the nation-building maelstrom of immigration policy and legalized categorizations of non-citizens and "aliens."[117]

---

[116] Illegal, alien, and other terms are euphemisms that criminalize and dehumanize individuals and groups. These peoples are often categorized as vulnerable and are acting to seek asylum or access to a better life while crossing national lines. Indeed, it is consequential to note that no human being is actually illegal, as his or her presence is not a criminal violation of the law, but is more akin to a status offense. Furthermore, legal analysts suggest terms such as "illegal immigrant" are fundamentally flawed because they fail to recognize the social, political, and economic forces that displace people and force migration.

[117] For a detailed interpretation of Paul K. Diabo's arrest, deportation, and appeal, please consult Gerald Reid's article "Illegal Alien? The Immigration Case of Mohawk Ironworker Paul K. Diabo". For reference, the names of the Iroquois or Rotinohshonni/Haudenosaunee may change depending on context and sources used.

Diabo's experience marks a seminal moment in twenty-first-century border constraints and the national lines that divided communities, particularly Native communities that had lived on the continent long before nation-states constructed geopolitical lines. The aftermath of World War I witnessed older empires crumble, modern nations emerge, international institutions created, and new boundaries demarcated as countries scrambled to define their territory, themselves, and others. In North America, Canada and the United States underwent similar endeavors to harden borders, categorize citizens, and restrict immigration. These competing national projects established systems designed to police and control their respective boundaries and exclude "unfit" people from entering. Indeed, during this era the northeast international borderlands became a virtual kaleidoscope of overlapping and intersecting people, ideas, and policies. But what happens when these national territorial lines drive a wedge between long-established Native communities? What happens when the restrictionist impulses to exclude "others" collides with the treaty-bound right of Native peoples to move freely throughout their homelands? For Indigenous groups existing on both sides of the international border, these and other questions became paramount in the early 1920s.

In order to curtail the rapid influx of post-war migrants, the U.S. enacted numerous discriminatory policies aimed at inhibiting and discouraging immigration. Although earlier legislation such as the 1917 Immigration Act and 1921 Emergency Quota Law clearly impinged on peoples freedom of movement into the U.S., it was the ensuing passage of the 1924 Immigration Act (Johnson-Reed Act)—in concert with the National Origins Act, and Asian Exclusion Act—that ushered in the grim impetus of twentieth-century U.S. border control; legislation which generated lasting and profound consequences for those deemed "outsiders."

Canada also codified extensive laws to exclude certain peoples from entrance as well as reduce the actual number of immigrants with quotas. In the early twentieth century, amendments to the Immigration Act, Opium and Narcotic Drug Act, and Chinese Exclusion Act added new grounds for denying entry into the country and justified deportation. Not unlike the U.S., the official reasons for such laws were state security, public health, and furthering a national hegemony. But perhaps the most decisive moment in immigration reform stemmed from the First Red Scare. Specifically, that communism would take root in North America. Panic among top officials influenced the Cabinet (Canada's government) to obstruct the flow of immigrants—as well as the radical ideas many of which carried—in an effort to insure "homeland security" and financial stability.

Yet absent from both countries' legislation were Indigenous communities. How would these national bylaws and edicts impact those who had lived in North America long before the arrival of Europeans? Over the years, the U.S. and Canada developed a rich, but clearly different, mode of dealing with its Native inhabitants. While Canada typically grouped all Indigenous peoples together through blanket legislation such as the Indian Act, the U.S. generally dealt with Native peoples on a tribe-by-tribe basis. In 1924, however, Congress passed the Indian Citizenship Act (ICA), making—in theory—all Indigenous peoples across the country legal citizens.[118] Since the 1870s, the Canadian Indian Act classified first peoples as "Status Indians." Those seeking citizenship, or to be enfranchised, could do so only if they completely cut ties with their respective band. The ambiguity of immigration laws in reference to Indigenous peoples left migrating Indians

118 "Indian Citizenship Act of 1924." Clarifies the political status of Indigenous peoples born within the United States. Because the citizenship rights and equal protection rights of the Fourteenth Amendment of the U.S. Constitution did not clearly address Indigenous peoples, alhttp://www.archives.gov/global-pages/larger-image.html?i=/historical-docs/doc-content/images/indian-citizenship-act-1924-l.jpg&c=/historical-docs/doc-content/images/indian-citizenship-act-1924.caption.html

in a vague and increasingly susceptible position. Diabo's case is indicative of the complicated and unclear laws regulating the movement and stratification of people at this time.[119]

Perhaps no scholar has explored the case of Diabo more thoroughly and effectively than Gerald Reid. Laying the groundwork for future researchers, Reid's "Illegal Alien? The Immigration Case of Mohawk Ironworker Paul K. Diabo" meticulously chronicles the events before and after Diabo's arrest for "illegally" crossing the international border between the U.S. and Canada. According to Reid, Diabo argued that as a member of the Rotinohshonni (Iroquois Confederation) the Jay Treaty of 1794 granted him every right to pass the border without interference or restriction. The trial and Immigration Department's subsequent appeal became an important test of Rotinohshonni sovereignty and treaty rights.[120] Reid suggests the most significant result of Diabo's initial court victory was the energizing effect on small pockets of resistance emerging within the Kahnawake community.[121] This political and cultural revitalization, as it turns out, sparked a popular consciousness among the larger Indigenous community about the political and economic ramifications of immigration restrictions, and the importance of protecting their inherent human rights.

---

[119] A brief note on the language and terminology used in this research: For the purpose of clarity and cohesion I collectively refer to the diverse ethnic population of native North Americans as "Indigenous peoples, groups, tribes, bands, or communities." I also use the terms "American Indian" and "Indian" interchangeably in the context of the sources without consciously carrying over any negative undercurrents. Further complicating the language being used is Canada's terminology when referencing its native population—often employing First Nations, First Peoples, or simply "Indian." Nevertheless, whenever possible I employ specific tribal affiliations to denote individual and group identities. Although categorizing and imposing terms on a particular cultural community can be, in of itself, an incredibly problematic endeavor, I remain sensitive about the misrepresentation and misunderstandings language and certain phrases connote. Because language is dynamic and can hold multiple meanings, I try to reference people in the most accurate and respectful way possible.

[120] Gerald F. Reid, "Illegal Alien? The Immigration Case of Mohawk Ironworker Paul K. Diabo," *Proceedings of the American Philosophical Society* 151, no. 1 (2007): 61-78, 61.

[121] Ibid., 74.

Paul Spruhan's "The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law" enhances the scope of analysis to include themes associated with race and gender. Using the Diabo episode—and a few other case studies involving border arrests and deportations—he exposes the origins of early twentieth-century border control, and explains how officials on both sides of the border employed blood quantum to pass racialized legislation and clarify Indian status.[122] Spruhan's interpretation reveals the racial and gender dimensions and uncovers much about the case's larger sociopolitical and cultural implications. Moreover, he extends the scope of study to extend beyond the early twentieth century and highlights the problems that arose for Canadians Indians who after 1952 were forced to prove their amount of Indian blood to exercise their Indian free passage right—the right extended to Indigenous peoples through the Jay Treaty and reaffirmed in the Treaty of Ghent.[123] Spruhan also attempts to unpack the U.S.'s intricate and anomalous legal construction of Indian status as "political" or "racial."[124]

Further complicating the discussion of race, citizenship, and immigration during the early twentieth century is Natalia Molina's monograph, *How Race is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts*. According to Molina, this era witnessed the emergence of a distinct "immigration regime," one which redefined racialized notions of individual and group identities and forever altered U.S. border policy and procedure.

---

[122] Paul Spruhan, "The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law," *North Dakota Law Review*, vol. 85, p. 301-328, 2009, 303.

[123] Ibid., 303.

[124] Spruhan delves deeper into the U.S.'s conception of Indian status as political and not racial in his analysis of *Morton v. Mancari*. The Court found that despite Congress or the Bureau of Indian Affair's implementation of blood quantum as a chief factor in defining "Indian," legislation benefitting Indigenous peoples does not consider them a racial group because the U.S. has a distinct relationship with Indians as sovereign political entities.

Concentrating on the years between 1924 and 1965, she carefully shows how America developed comprehensive immigration law that "remapped the nation in terms of new ethnic and racial" categories and, in the process, criminalized certain peoples that traveled across the border without explicit consent.[125] According to her, certain wealthy white capitalists bought into the idea of a biological hierarchy of difference because it suited their insatiable "need for an exploitable work force."[126] And in doing so, some whites directly shaped broader understandings of racial "scripts" in the United States. It also benefitted those elites who pitted stratified ethnic groups against one another in order to obstruct a deeper class-consciousness that could potentially erupt into a substantial, highly coordinated labor movement.[127]

While continuing the themes associated with Molina's work, Brendan Rensink's *Native but Foreign: Indigenous Immigrants and Refugees in the North American Borderlands* offers a comparative analysis of Indigenous migration, identity, and status in the northern and southern borderlands of the United States during the nineteenth and twentieth centuries. By juxtaposing the experiences of Yaquis, Crees, and Chippewas, Rensink masterfully illustrates how the "arbitrary lines that went across ancient Native landscapes ascribed new realities that all had to negotiate."[128] In this complex and daunting practice of nation building, immigration reform, and "evolving prejudice," the U.S. imprinted a "foreign" designation on these groups seeking "permanent

---

125 Natalia Molina, *How Race is Made in America: Immigration, Citizenship, and the Power of Racial Scripts*, (Berkeley: University of California Press, 2014), 2.

126 Ibid., 10.

127 Ibid., 10.

128 Brenden W. Rensink, *Native But Foreign: Indigenous Immigrants and Refugees in the North American Borderlands,* (College Station: Texas A&M University Press, 2018), 37.

residence" and official tribal recognition.[129] Not unlike Molina's exploration into capitalist markets and their impact on racial perceptions and ethnic disaggregation, Rensink scrutinizes the level of indigeneity that gave rise to exclusionary mindsets and actions in Arizona and Montana.[130] It was this perceived degree of indigeneity that either helped or hindered the Yaqui, Cree, and Chippewa community efforts at achieving federal recognition and reservation lands.

Read in unison, these authors engage with the major themes this chapter seeks to uncover and problematize—specifically, citizenship, status, and belonging in early twentieth-century Indigenous North America. During this time, Native peoples, through assimilation and citizenship laws, were being naturalized and nationalized into one nation-state as opposed to other ethnic groups. But legislation such as the ICA seriously confounded the issue associated with a clean and clear delineation of American belonging and the rights and status therefore inferred. Diabo's case speaks to the larger historical commentary about nation-states creating citizens as those who belong, and non-citizens as people who do not. There also existed an acute irony with Native Americans' inclusion into a presumed racial hierarchy of American belonging, having been the original inhabitants of the lands. Yet, in the rapidly changing context of nationhood and personhood in the United States, Indigenous peoples—without an official legal presence—remained in a state of ambiguity. Considered "alien" in their ancestral homelands, Diabo and others gauged the limits of their sovereignty and the nation's exclusionary resolve.

Using the Immigration Act of 1924 as a starting point, Diabo's story reveals the tangled history of U.S.-Canadian border formation intended to undermine and overpower select groups of people. His exposure to early twentieth-century state surveillance, shifting geopolitical boundaries,

---

[129] Ibid., 38.

[130] Ibid., 49.

and evolving exclusionary strategies uncover the changing status of Indigenous peoples in North America. But his involvement in the American legal system also displays the organized resistance various Indigenous individuals and groups demonstrated in opposition to unfair obstructions to their sovereign rights.

In 1924, the U.S. approved legislation meant to curb foreign migration into the country. Though the reasons for solidifying the nation's borders were multifaceted, public security remained the formal and foremost justification. Despite much of its momentum petering out in 1920, the First Red Scare swept anticommunist sentiment across North America. Its lasting effects may be seen in Congress' decision to pass the National Origins Act of 1924 which tightened the quota system, considerably slowed immigration from Southeastern Europe—where most radical "aliens" were believed to originate—excluded all Japanese migrants, and capped total immigration to 150,000 a year.[131] Additionally, some scholars suggest that the movement against communist collaborators was more cultural than political, clearly connected to a growing trend of "Americanism." As a result of increasingly rigid immigration laws, the numbers of foreigners barred from entering the U.S. rose from 2,164 in 1892 to 33,041 in 1914, and 30,284 in 1924. Simultaneously, the number of immigrants deported increased from 637 in 1892 to 4,610 in 1914, and 6,409 in 1924[132] The Red Scare, as it turns out, was not an extreme departure from the norm in American politics, but rather the logical consequence of bourgeoning federal intolerance towards communists and radical sympathizers.[133] This period signifies the intensification of state

---

131 Regin Schmidt, *Red Scare: FBI and the Origins of Anticommunism in the United States, 1919-1943* (Copenhagen: Museum Tusculanum Press, University of Copenhagen, 2000), 56.

132 Ibid., 56.

133 Ibid., 15.

surveillance and the use of radicals or "others" as scapegoats in order to enforce a stricter control of national borders. At the same time, those seeking asylum or work opportunities in North America became stigmatized as harmful to the nation's overall well-being.

Almost simultaneously, and in an effort to distinguish "American" Indians from other "non-American" Indians, Congress enacted the Indian Citizenship Act of 1924. The Act stated that "all non-citizen Indians born within the territorial limits of the United States" were to be "citizens of the United States: provided, that the granting of such citizenship shall not in any manner impair or otherwise affect the right to tribal or other property."[134] Unfortunately, its confusing stipulations not only imparted American Indians with U.S. citizenship but also recognized that Indigenous groups held a unique status and were therefore afforded certain tribal privileges. Moreover, members of communities such as the Kumeyaay, Tohono O'odham, and Rotinohshonni—who existed on both sides of the U.S. border—were excluded from obtaining citizenship if born outside the national boundaries of the United States. Diabo, for instance, despite being a part of the larger Iroquois Confederation that extended beyond the U.S.-Canadian border, was not eligible for citizenship because he carried an identity of "Canadian" Indian, rather than simply "Iroquois" or "Mohawk" Indian. By imposing U.S. citizenship over a diverse range of cultures and independent political bodies without universal consent, the ICA demonstrates the superseding power of nation states over Native sovereignty and their tendency to inflict violence through disrupting cultural continuity.

The ICA found its most vociferous opposition with the Iroquoian nations of Mohawk, Seneca, Onondaga, Oneida, Cayuga, and Tuscarora. Approximately a year before the Act's passage, the Department of Interior conferred with the Iroquois about issues such as the Indigenous

134 "Indian Citizenship Act of 1924."

citizenship. In its annual report, once official stated, "The great majority [of Iroquois] were opposed to the proposal to make all New York Indians citizens of the United States."[135] Following the ICA's approval in 1924, political agents of Iroquois nations mailed complaints to the President and Congress expressing their widespread dissatisfaction at the Act's passage and the unwanted political status it imposed.[136] It appeared that through these assimilation and citizenship laws, such as the ICA, Indigenous peoples were being systematically and unfairly "naturalized and nationalized" into one nation-state. Ironically, the ICA, in collaboration with embryotic immigration policies of the early twentieth century, began to affirm the prescribed geopolitical boundaries of the American settler state through the conveyance of citizenship that both included and excluded members of the same Indigenous community.[137]

In the 1920s, Canada also implemented amendments to its Indian Act designed to better police Indian lives. From its inception, the Act governed nearly all matters concerning Indigenous status, communities, and reserves. From the outset, the Act had been generally criticized as an extremely invasive, paternalistic, and discriminatory piece of legislation.[138] At its core, it provided the Canadian government full authority to monitor and regulate the daily affairs of registered Indians and their communities.[139] The Act imposed institutional structures to suppress Indigenous power and decide who qualified as a status Indian—specifically excluding the Métis and Inuit

---

135 United States Department of the Interior, "Fifty-fifth Annual Report of the Board of Indian Commisioners," 20. Cited by Kevin Bruyneel in *The Third Space of Sovereignty: The Post-Colonial Politics of U.S.-Indigenous Relations* (Minneapolis MN: University of Minnesota Press, 2007), 111-112.

136 Ibid., 112.

137 Ibid., 114-115.

138 "Canada Passes the 'Indian Act,'" The Eugenics Archive, Canada: Timelines 1876, http://eugenicsarchive.ca/discover/timeline/54e158966fecf60000000001.

139 Ibid.

peoples. This Act intended to manage Canada's Indian inhabitants by defining who belonged and who did not, and which groups of people possessed the freedom of movement within and across national borders.

Also at the forefront of such stringent immigration policies were scientific notions of race and public health. From the late nineteenth century to the early twentieth, scientific racism permeated discussions surrounding the biological differences between human beings. Although not universal and vehemently contested by world-leading anthropologists such as Franz Boas, Emile Durkheim, and later ethnologists Paul Rivet and Marcel Mauss, the widely accepted belief that there existed a hierarchy among humans swayed local, state, and federal opinion to guard against those deemed genetically inferior from entering the nation. Race and racism were broadly understood as a network of hierarchized cultural values with highly structured biological characteristics that naturally created specific categories of people with varying degrees of intellectual capacity and ability. While biopower can be "described as bringing together" this stratified schema of biological preferences through a "variety of phenotypic, morphological, or genitative qualities and characteristics associated with individual bodies," biopolitics deals with the population, especially one of biological difference, as a "political problem" and "power's problem."[140] These conceptions and constructions of race allowed political entities such as the U.S. and Canada to target "desirable" and "undesirable" people and prohibit those considered "unfit"

---

[140] Susan Stryker, "Biopolitics," *Transgender Studies Quarterly*, no 4, vol. 2 (2014). http://tsq.dukejournals.org/content/1/1-2/38.full. Stryker speaks to race and Foucault's ideas of biopower and state regulation. Michel Foucault, *Society Must Be Defended: Lectures at the College de France*, "Lecture 11, 17 March 1976," (New York: Picador Press. 2003), 239-264.

from entering the country, all in an effort to preserve the "pure" national body—biopower and biopolitics in action.[141]

This idea of racial purity underpinned and informed many of the laws being passed regarding the betterment of national "stock." Perceived as a fact-based science founded on human heredity, American physicians and lawmakers imagined eugenics as a panacea to the plague of "imbeciles," "diseased immigrants," "dysgenics," and "racially unfit" individuals that infiltrated the country and obstructed their ideal national hegemony. Eugenics fostered perceptions and techniques that molded cultural interpretations and led to the development of social and political strategies aimed at both improving and protecting public health.[142] As a result, the U.S. Public Health Service (USPHS) and Immigration and Naturalization Service (INS) labored together to create a modern system of eugenic gatekeeping that sought to safeguard the presumed purity of the ideal "American" nation.[143] In 1917, for example, a Typhus fever outbreak sparked irrational fear among many U.S. officials and the USPHS, leading to a massive quarantine along the U.S.-Mexican border. For the next two decades, Mexicans desiring U.S. entrance were subjected to extreme methods of disinfection and fumigation. Propelled in no small part by active participants in eugenics and public health meetings at the 1915 Panama-Pacific International Exposition held in San Francisco, the border quarantine cemented a boundary that had once been much more fluid

---

141 This "immigration" remade ethnic and racial identities, which subsequently criminalizing undesirable workers who crossed international boundaries without authorization as "illegal." Natalie Molina's *How Race is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts* delves into the origins of immigration policy predicated on racial understandings, 1.

142 Nancy Leys Stepan, *The Hour of Eugenics: Race, Gender, and Nation in Latin America* (Ithaca: Cornell University Press, 1996), 11-31.

143 Alexandra Minna Stern, *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America* (Berkeley: University of California Press, 2005), 58.

and, in tandem, helped racialize and stigmatize Mexicans as a biologically inferior "other" among popular and scientific communities.[144]

By the 1920s, this xenophobic attitude also blanketed sentiments towards incoming Eastern European, Jewish, and Middle Eastern immigrants. Despite existing legislation directed at inhibiting immigrants from entering the United States, including the Chinese Exclusion Act of 1882, Immigration Act of 1903 and 1907, and 1918, and Emergency Quota Act, many eugenicists desired stronger federal policies that deterred the influx of those recognized as dysgenic, feebleminded, and diseased. Newly appointed "Expert Eugenical Agent" of the Committee on Immigration and Naturalization in 1921, Harry H. Laughlin in collaboration with Republican representative, Albert Johnson, East Texas congressman John C. Box, and other political allies affiliated with the American Eugenics Society advocated for passage of the Johnson-Reed Act, also known as the National Origins Act, which explicitly targeted Southern and Eastern Europeans and virtually halted all Asian immigration.[145] In 1923 and 1924, Laughlin testified before the House Committee on Immigration, providing a eugenics perspective and playing a crucial role in adoption of the Johnson-Reed Immigration Act.[146]

Eugenic advocates also prompted state-facilitated anti-miscegenation laws. The Virginia's Racial Integrity Act of 1924, for example, —championed by Virginia eugenicists John Powell, Earnest Cox, and Walter Plecker—required that people register under one of two categories: white or colored. It created racial certificates and fomented strict definitions of who would qualify as members of the white race and, at the same time, criminalized the marriage between whites and

---

144 Ibid., 59.

145 Ibid., 67.

146 Kevles, *In the Name of Eugenics,* 94-104.

non-whites; it emphasized a scientific assessment of race and the "dysgenic" dangers of racial intermixing.[147] "It shall hereafter be unlawful for any white person in this State to marry any save a white person . . . the term "white person" shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic [*sic*] blood shall be deemed to be white persons."[148] Such rationale dominated debates concerning racial identify and peoples' legal status as citizens. Moreover, these ideas helped precipitate the stigmatization and structural subordination of non-whites—including Indigenous peoples—throughout the United States.[149]

Canada was not immune to eugenic beliefs sweeping modern nation states' conceptions of who belonged and who did not. A more thorough and complex explanation, however, lay at the understanding and practice of racial inheritance and how it would impact governmental policies. In the first part of the twentieth century, many respectable Canadians feared racial "degeneration" and looked to eugenics for protective action.[150] In 1919, amendments to Canada's Immigration Act allowed the Cabinet to prohibit "immigrants belonging to any race deemed unsuited for the

---

147 Paul Lombardo, "Eugenic Laws Against Racial Mixing" (*Image Archive on the American Eugenics Movement*, Dolan DNA Learning Center, Cold Spring Harbor Laboratory) http://www.eugenicsarchive.org/eugenics/ Site also contains a bulletin issued by Virginia's Department of Health instructing agents how to properly register citizens with the Bureau of Vital Statistics. It highlights the intent of government officials to regulate racial borders.

148 Racial Integrity Act of 1924, "An Act to Preserve Racial Integrity" Virginia Center for Digital History http://www2.vcdh.virginia.edu/lewisandclark/students/projects/monacans/Contemporary_Monacans/racial.html. See also the VCDH's Walter Plecker letter to local officials indicating a desire to remove the American Indian clause within the act because of "mongrels" sneaking in birth certificates "unchallenged as Indians are making a rush to register as white."

149 Tomas Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California*, With ed. (University of California Press, 2008), 6-7.

150 Angus McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Canadian Social History Series) (University of Toronto Press, 2015), 11.

climate or requirements of Canada, or immigrants of any specific class, occupation or character."[151]

Throughout the following decade, popular upswell from various organizations called for the hardening of national borders. In 1924, the United Farm Women of Alberta formed a committee to have the feeble-minded, epileptic, tubercular, dumb, blind, illiterate, criminal, and anarchistic barred from entering Canada.[152] Four years later, the Legislative Assembly of Alberta passed "The Sexual Sterilization Act," which approved the "surgical operation for sexual sterilization" of "undesirable" people living in state-run institutions, including Indian residential schools.[153] Yet, because the Canadian government never employed intelligence tests or quota systems to regulate and limit immigration, some scholars suggest the country was far less restrictive than that of the United States.[154] But Canada, like the U.S., continued to select "preferred" immigrants for entry and excluded others considered "unfit." These attempts to solidify borders and identify "preferred" citizens in the early twentieth century became all the more complicated when migrating Indigenous peoples were taken into account.

Yet Native peoples on both sides of the international border did not sit idle as national edicts forced unwanted change over their lives. In the United States, early twentieth-century

---

151 National Library and Archives of Canada, "Moving Here, Staying Here: The Canadian Immigrant Experience" http://www.collectionscanada.gc.ca/obj/021017/f1/nlc011078-v6.jpg. Interested parties should also reference Canadian Council for Refugee Website which offers a brief but informative timeline chronicling Canada's discriminatory immigration policies and how the government denied entry by reason of "economic, industrial, or other condition temporarily existing in Canada." http://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999.

152 McLaren, *Our Own Master Race*, 59.

153 "The Sexual Sterilization Act of 1928," Our Future, Our Past: The Alberta Heritage Digitization Project, *The Alberta Law Collection*, http://www.ourfutureourpast.ca/law/page.aspx?id=2906151. Also see "Hidden from History: The Canadian Holocaust," page 43-44 provide detailed information on Indigenous peoples being sterilized "as a matter of policy," http://canadiangenocide.nativeweb.org/genocide.pdf.

154 Ibid., 60.

pantribal activism took shape with various organizations that promoted the collective recognition of North American Indigenous sovereignty. The Society of American Indians (SAI) emerged in the late 1910s with a group of leaders including Charles Eastman, Carlos Montezuma, Sherman Coolidge, Thomas L. Sloan, Hiram chase, and Henry Red Cloud who proclaimed "Indianess" went far beyond a physical definition. For them, identity and culture exceeded tribal borders and all Indians shared common ideas and practices that made them special in American society.[155] Unfortunately, the SAI's determination to abolish the reservation system failed to levy support from the many tribes who wished to retain their ancestral homelands. Moreover, the inability of SAI leaders to foster meaningful connections between reservation and non-reservation Indians led to its final convention being held in 1923.[156] The very fact that the SAI existed, however, reflects the desire and need of divergent native groups to work together to defend their rights, and to redirect governmental programs in their favor.[157]

The Mission Indian Federation (MIF) also materialized as a grassroots organization designed to improve the overall condition of Indigenous peoples in southern California. Beginning in 1919, its leaders grappled with the Bureau of Indian Affairs' (BIA) gross mishandling of American Indians across the southland, and rallied to stop the repeated abuses that Mission Indian Agency (MIA) policemen inflicted on reservation community members. Drawing its affiliations from both reservation and non-reservation California Indians, the MIF best resembled a quasi-governmental, pan-Indian organization claiming to represent the collective consciousness of

---

155 Roger L. Nichols, *Indians in the United States and Canada: A Comparative History* (Lincoln: University of Nebraska Press, 1999), 271.

156 Paul C. Rosier, *Serving Their Country: American Indian Politics and Patriotism in the Twentieth Century* (Harvard University Press, 2012), 105.

157 Nichols, *Indians in the United States and Canada*, 271.

Southern California's Indigenous population.[158] The MIF Constitution stated that the objectives of the organization were "to secure by legislation . . . all the rights and benefits belonging to each Indian;" protect each member "against unjust laws, rules, and regulations;" and to "guard the interests of each member against unjust and illegal treatment."[159] Moreover, it advocated for the protection of human rights and tribal sovereignty, instituting as their official slogan, "Human Rights and Home Rule."[160] Above all, the MIF acted as a forum for community members to voice grievances and act as a barrier for ever-increasing injustices of MIA police surveillance. In addition, its creation shows the commitment pantribal organizations held in order to combat overwhelming neocolonial pressures and bring public attention to the physical and cultural violence plaguing Native communities across the country.

As early as the 1910s, Canadian Indians began organizing official pantribal political and economic organizations. Many Indigenous peoples saw these organizations as a way to express their overall dissatisfaction, challenge the bureaucratic systems dictating Indian policies, and to bring public attention to social injustices waged against native peoples. The League of Indians of Canada, for example, sought to "free themselves from the domination of officialdom and from being ever the prey and victims" of Canadian oppression. They mailed pamphlets to bands on various reserves, organized large public meetings, and tied together an intertribal network through

158 "Mission Indian Federation," *Juaneño Band of Mission Indians: Acjacheman Nation* http://www.juaneno.com/index.php/history/mif-articles.

159 "Mission Indian Federation Constitution, ca 1922," *Documented Rights: National Archives' Records of District Courts of the United States*, http://www.archives.gov/exhibits/documented-rights/exhibit/section3/detail/mif-constitution.html.

160 Membership dues receipt from the Mission Indian Federation, "Nukil Forbidden and the Mission Indian Federation" *Agua Caliente Cultural Museum*, 1927. http://www.accmuseum.org/Nukil-MIF.

common interests and issues.[161] Interestingly, in an attempt to impede Indigenous resistance, and echoing the panic of the Red Scare sweeping the United States, Canadian officials sent spies to the League's meetings, contending that the incessant attacks on the Department of Indian Affairs warrants such surveillance.[162] For Canadian authorities, pantribal organizations posed a real threat to national tranquility and state control. However, individuals and communities alike continued to organize in opposition against unfair and unjust discriminatory policies—the case of Paul Diabo exemplifies the spirit of such acts and attitudes.

Before being arrested in 1926 for "illegally" crossing the international border between the United States and Canada, Paul Diabo, sometimes with his wife Louise, made recurrent trips without passing through official channels of entry. Indeed, until the enactment of the Immigration Act of 1924, Canadian Rotinohshonni entered the U.S. relatively unencumbered.[163] Although not specifically directed at North America's Indigenous population, the tightening of border control and increased immigration surveillance critically impacted Native communities' way of life; as their once unchallenged freedom of movement became entrenched in the political milieu of the time. The Act of 1924 specifically barred those ineligible for citizenship from entering, and because of racially restrictive naturalization laws, this applied to Indigenous peoples born outside the United States.[164] This became especially detrimental for many Kahnawake men who had established their livelihood as high-steel construction workers in the United States. Throughout the early twentieth century, Mohawk men frequently journeyed to job sites located in New York,

---

[161] Nichols, 267.

[162] Ibid., 267.

[163] Marian Smith, "The INS and the Singular Status of North American Indians" *American Indian Culture and Research Journal*, vol. 21, no. 1, 1997, 136.

[164] Immigration Act of 1924, "No alien ineligible for citizenship may enter the U.S."

New Jersey, Pennsylvania, and other Northeastern locations.[165] But as immigration policies and procedures changed, the Iroquois and other Native peoples found the path to the U.S. riddled with long delays and onerous obstructions. Kahnawake ironworkers who wished to cross the border now faced the possibility of disbarment and deportation, which not only jeopardized a viable source of income for Iroquois individuals and families, but also endangered Rotinohshonni's sovereign right to move freely across the U.S.-Canadian border.

The preliminary apprehension of Diabo and Louise occurred after they attempted to test international border restrictions between the U.S. and Canada on March 8, 1926. Both were charged with violating the newly implemented immigration laws, such as entering the U.S. without proper identification documents (passports), the inability to read the English language, and the possibility of becoming public charges. Deported sometime in the summer of 1926, their border experience reveals the hardening of U.S. boundaries and attempt to safeguard the American status quo. These immigration laws laid the burden of proof onto the individual migrants, and the apparatus of exclusion and policing was implemented as a pragmatic means to ensure "undesirables" would not taint the national blood, harass society, and create an imbalance of racial power that could diminish the national white hegemony. Thus, "alien" became a catch-all for the embodiment of "negative traits" perceived by many eugenicists, state and federal agencies, as well as the general public, when contemplating immigration into the U.S. and Canada. Most eugenic proponents believed in a universal biological supremacy, which impinged on overlapping issues concerning mental health, immigration, anti-miscegenation, and sterilization. Unfair targeting of certain groups based on an assumption of white supremacy backed by an unfounded racialized science and major component of early twentieth-century state craft. Accordingly, deciding whether

---

[165] Reid, *Illegal Alien?*, 65-66.

Diabo fell under the category of "alien" became imperative in determining where Indigenous peoples fell in the dynamic immigration strata being developed at the time. These legal definitions of "other" or "aliens" progressively crystalized racial classifications of non-citizens around the world, and directly impacted those seeking to emigrate to North America.

Concerned with the growing border-crossing issues, Diabo and other prominent members of Kahnawake sought council with the Six Nations Confederacy at Grand River. The Grand River People, like Diabo and other Indigenous communities, encountered growing difficulties moving between Canada and the U.S. following the passage of the 1924 Immigration Act. Specifically, the ambiguity of certain provisions within the Act allowed immigration officials to refuse admittance of Indigenous peoples based on the idea that they are "aliens"—holding the same legal classification as the Chinese, Japanese, and other ethnicities denied citizenship.[166] Together with the legal counsel of Adrian Bonnelly, an attorney versed in immigration law, and the Six Nations Defense League, an organization formed in 1926 with the direct purpose of defending border-crossing rights of Native peoples, they developed a strategy to gauge both Rotinohshonni jurisdiction and Indigenous treaty rights by disputing Diabo's deportation.[167] The Six Nations Confederacy viewed his deportation as "a breach of faith under the Jay Treaty and encouraged Diabo to come back to the United States to be rearrested as a test case."[168] As the community, allies, and sympathizers expected, Diabo returned to the U.S. to contest his case to the Immigration Board of Review in December of 1926. After reviewing the appeal, the Board found that, in

166 Ibid., 70.

167 Ibid., 68-69.

168 "Case of Indian Born in Canada Before Court," *Rochester Democrat and Chronicle*, January 22, 1927 and March 19, 1927.

accordance with the Immigration Act, Diabo assuredly fell under the category of "alien," and was thus deported legally.[169]

The public quickly took notice of the case as it sparked criticism from various organizations. The *Anaconda Standard*, a newspaper based in Montana, wrote a biting article entitled "An American Alien," which emphatically denounced the U.S. Department of Labor and Immigration Bureau for its mishandling of Diabo's case. The author asserted, "The immigration bureau of the United States is not always afflicted with the ordinary dictates of common sense nor the promptings of humanitarian principles in the transaction of its business." However, the "most stupid and intolerable extremity of official fuss and red tape" came to light after "it held a pure blood American Iroquois Indian to be an alien because his habitat happened to be in Ontario, Canada." The author concluded with, "The bureau's effort to make an alien out of one of our American Indians, and protected by tribal treaty with the government at that, is an offense to sentiment throughout the country."[170] Undeniably, the *Anaconda* and news sources like it placed the emerging border issues squarely upon the Immigration Bureau. For them, how could a government agency ever consider questioning a Native American's right to belong in North America? It not only broke sharply with any semblance of human logic, but also flagrantly ignored the fundamental treaty rights that guarded Indigenous peoples from erroneous attempts to restrict their mobility. The bold and ardent author actively voiced support for Diabo's cause, holding no punches as to why Indigenous peoples should never be considered "aliens."

---

169 Reid, *Illegal Alien?*, 71.

170 "An American Alien," *The Anaconda Standard*, Montana, April 4, 1927. Although the author states Diabo resides from Ontario, Canada, other sources point to his residence in Montreal. While still others suggest he resided in Pennsylvania at the time of his arrest.

While some chose to air their grievances in writing, others opted to take the fight to streets with large-scale, organized opposition. The *Kingsport Times* reported that Indigenous peoples had "been trekking" to Syracuse for "their first big pow-wow of 1927 . . . near one of their largest reservations." According to the source, the demonstrators were "protesting against the exile of members of the old Iroquois tribe under the new immigration laws, which … class all the redmen not born on this side of the Canadian border as aliens."[171] Following the rally in Syracuse, the protestors made their way to Canada, where they honored Italian lawyer, Adrian Bonnelly, for his work in defending the rights of Diabo and the larger Rotinohshonni community.

Meanwhile, Bonnelly released a statement mirroring the myriad news sources of the time, and offered some clarification on his decision to work as Diabo's counsel:

> I saw fit to use Paul Diabo, now working in Philadelphia, a full-blooded Iroquois Indian, born across the Canadian border, as a test case. I will take the case to the supreme court, if necessary, for I must make good my appointment as an Indian chieftain. I always wanted to stand by the redman. I see them [Rotinohshonni] being chased from the land of their birthright with a moral whip. They are treated like smuggled aliens. They were part of America before it had any boundaries and I am going to win this case for them. I am going to see that John Jay's words are carried out, and that the Indian is not made to go through all the formalities on his native soil of an alien.[172]

Bonnelly understood the gravity of Diabo's case as well as the media attention it would garner. Although his motivations appear veiled as a protectorate of the "redman," a white savior of sorts, his objective is likely multifaceted. Notwithstanding, he still represented the main line of legal defense against a juggernaut of institutional power—the U.S. Department of Labor.

---

171 "Indians Barred by Law Meet in Angry Pow-Wow," *The Kingsport Times*, February 3, 1927.

172 "Indians Barred by Law Meet in Angry Pow-Wow," *Berkeley Daily Gazette*, Wednesday January 26, 1927.

In January, Diabo and Bonnelly traveled back to Philadelphia to further oppose the Immigration Board's decision. While in the custody of John B. McCandless, Commissioner of Immigration for the Port of Philadelphia, Bonnelly filed for writ of habeas corpus in U.S. District Court for the Eastern District in Philadelphia, which formally transferred the case from the state authorities to the federal court system.[173] The petition laid out a fourteen-point argument against Diabo's seemingly unjust detainment and deportation. A number of the points revealed the strength of the Diabo's case: point 8, stated that Diabo, "since his first admission in the United States and prior thereto has always considered this country his permanent home and legal domicile;" point 9, explained that "under the law and treaties relating to Indians of the six nations [sic], he is entitled and is privileged to enter the United States at will;" point 11, that Diabo is "now imprisoned, restrained by virtue of any final order or decree of any court;" and finally point 14, that "deportation of your relator [Diabo] would be cruel, inhuman and contrary to the provisions of the treaties and law thereunder of the united States of America relative to the Indians of North America and especially the Indians of the Iroquois Tribes, of which your relator is a member."[174]

In response, J. A. Ettinger, Immigration Inspector attached to the Philadelphia Immigration Station, and George W. Coles, United States Attorney representing McCandless, submitted a return to petition for writ of habeas corpus, denying the allegations posited by Diabo and Bonnelly. With hopes that the district court judges would dismiss the writ and remand Diabo back into the custody of McCandless, Ettinger and Coles insisted that Diabo had never been "legally admitted into the United States" in the first place. Furthermore, "Under Section 19 of the Act of February

---

173 Reid, *Illegal Alien?*, 71.

174 *United States ex rel. Paul Diabo v. John B. McCandless*, "Petition for Writ of Habeas Corpus," January 7, 1927, 4-5.

5, 1917, the Secretary of Labor is the authority in whom final decisions in all matters involving deportation is vested; that decisions involving deportation of individuals are purely an administrative function and are not subject to review or interference by the Courts of the United States."[175] To a large extent, Ettinger and Coles suggested the court had no place in matters of deportation, nor the power to intercede in the vetting process of immigration officials.

Not persuaded by Ettinger and Coles' proposition, United States district judge Oliver Booth Dickinson granted the writ of habeas corpus, discharging Diabo upon payment of a $500 bond. On March 19, 1927, Dickinson wrote the opinion of the court:

> The boundary line to establish the respective territory of the United States and of Great Britain was clearly not intended to and just as clearly did not affect the Indians. It made no division of their county. The Jay Treaty of 1794 recognized this fact. We do not see that the rights of the Indians are in any way affected by the Treaty whether now existent or not . . . the right of the Indians remained whether the agreement continued or was ended. From the Indian viewpoint he [Diabo] crosses no boundary line. For him it does not exist. This fact the United States has always recognized, and there is nothing in this legislation to work a change in our attitude.

In other words, the Bureau of Immigration did not possess the authority to detain and deport Diabo as an "illegal alien" or interpret whether a Congressional Act supersedes the virtue of a treaty. The decision also acknowledged Rotinohshonni sovereignty and solidified the district court's power to reside over cases pertaining to immigration and Indigenous free passage. Yet the same day McCandless, "aggrieved by the decision," appealed the ruling of the District Court of the United States for the Eastern District of Pennsylvania and, in his dissent, "prayed that his appeal may be allowed and . . . sent to the United States Circuit Court of Appeals for the Third Circuit."[176]

---

175 *United States ex rel. Paul Diabo v. John B. McCandless*, "Return to Petition for Writ of Habeas Corpus," January 20, 1927, 7-8.

176 *United States ex rel. Paul Diabo v. John B. McCandless*, "Attorney Petition for Appeal," June 17, 1927, 13.

By October 1927, the U.S. Circuit Court of Appeal for the Third Circuit began hearing the case of *John B. McCandless v. Commissioner of Immigration for the Port of Philadelphia v. United States of America, ex rel. Paul Diabo*. Representing McCandless, U.S. Attorney George W. Coles and Assistant U.S. Attorney R.M Anderson compiled a clear and organized brief that centered on four pressing questions: What are the legal rights of American Indians; Does "a treaty has superior sanctity over an Act of Congress; Shall the rights under a treaty be held to be in force when the same appears to be annulled by an Act of Congress;" and finally, whether or not articles embedded within a treaty, which had been terminated by war, persist.[177] They subsequently reiterated the initial reasoning for Diabo's apprehension, explaining that at the time of his arrest, "the alien, Paul Diabo," did not possess a valid visa, that he was unable to "read the English language or any other language or dialect," that he entered the U.S. "without inspection," and "that he was a person likely to become a public charge at the time of entry."[178] Therefore, "the alien," Paul K. Diabo, broke the new rules brought to fruition through the Immigration Act of 1924. The attorneys for McCandless relied heavily on the term "alien" as a means to criminalize Diabo's actions and justify his exclusion. The legal construction of "illegal alien," or "alien immigrant," came to denote the worst and irrational fears within the larger American society—illegal aliens would drain vital resources, inundate the U.S. with transient criminals, and distort the reality of a great white nation. From the attorney's point, immigration officials such as McCandless were not only dutiful agents apprehending and deporting "aliens" from U.S. soil, but also heroes preventing the degradation of American society.

---

177 *John B. McCandless v. United States ex rel. Paul Diabo* "Brief of Appellant," October 22, 1927, 4.

178 Ibid., 3.

Framing their argument carefully and anticipating the foundational crux of the appellee's retort, Anderson and Coles tackled the issue of Indigenous treaty rights head on. In Article III of the Jay Treaty, also know as the Treaty of Amity, Commerce, and Navigation, it had been written, "Indians dwelling on either side of the boundary line" are free to "pass and repass [*sic*] by land or inland navigation, into the respective territories and countries of the two parties."[179] But the attorneys questioned whether the Treaty's validity even continued between the U.S. and Great Britain following the War of 1812. Employing President James K. Polk's 1847 annual message to Congress, they posited, "A state of war abrogates treaties previously existing between the belligerents."[180] If war did indeed extinguish or annul a previous legal covenant between nations, Diabo's case would no longer hold merit.

Nevertheless, if it were to be assumed that the Treaty had not been terminated by the War of 1812, the attorneys contended, "nothing in the phraseology of Article III of the Jay Treaty or in the negotiations leading up to its adoption," suggested "Canadian Indians" maintained "a special right to immigrate to the United States without regard to the immigration laws of this country."[181] At the same time, "If the Indians in question are migrating permanently to the United States they are subject to all the immigration laws applicable to all aliens, since the treaty rights appear only to be applicable to admissions for temporary periods."[182] Therefore, Diabo's arrest and deportation

---

179 "The Jay Treaty of 1794: Article III" *The Avalon Project: Documents in Law History and Diplomacy, Yale Law School: Lillian Goldman Law Library*, British-American Diplomacy The Jay Treaty; November 19, 1794 http://avalon.law.yale.edu/18th_century/jay.asp#art3. Spruhan also explains how the verdict of Diabo came in conjunction with Congressional legislation designed to protect Canadian Indians' free passage. Specifically, that Congress passed a law stating, "The Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States," 307.

180 *John B. McCandless v. United States ex rel. Paul Diabo* "Brief of Appellant," October 22, 1927, 5.

181 Ibid., 7.

182 Ibid., 11.

aligned within legal parameters of the Jay Treaty, because no clause existed that indicated Indigenous peoples were not bound by the same immigration policies as other "aliens."

Anderson and Coles also believed that the power to deport rightfully belonged to the Immigration Bureau, or more specifically, the Secretary of Labor. Highlighting Section 19 of the Immigration Act of 1917, the attorneys explained, "The Secretary of Labor . . . is given final jurisdiction in matters involving deportation; that the Supreme Court has on numerous occasions held the deportation of immigrants to be a purely ministerial act and that the Secretary of Labor may not be deprived of final jurisdiction by the use of a writ of habeas corpus" . . . and accordingly a "District Court or any other Court of the United States cannot pass upon its sufficiency or insufficiency to support the order made by the Secretary of Labor."[183] Here McCandless' legal team showcased how the Court plainly held no authority over congressional law pertaining to immigration; rather, jurisdiction when it came to deportation lay exclusively with Secretary of Labor, as well as its subsidiary immigration commissioners and customs officials. For the Bureau of Immigration, this was not an informal endorsement of power, but a real political mechanism that granted them authority when dealing with the international border and U.S. security. In effect, the Court cannot strip the Secretary of Labor of its legal right to deport at will. This contention encapsulated a direct challenge the Court's sovereign rule over immigration policy.

Articulating the appellee's position, Bonnelly rebuffed Anderson and Coles' seemingly arbitrary rationalization of Diabo's arrest and deportation. In an effort to affirm Diabo's initial discharge at the district court, his argument rested firmly on the fact that Indigenous exclusion violated the basic tenants of the Jay Treaty of 1794. To provide proper context, Bonnelly narrated a brief history of how and why the Rotinohshonni people were included in the Treaty. Proceeding

[183] Ibid., 14.

the American Revolution, but before the Treaty's inception, the U.S. and Great Britain agreed to a boundary line that divided three great nations. Indeed, the demarcation of the United States and Canada not only established a U.S-Canadian geopolitical division but also severed Rotinohshonni territory, which remained on both sides of the developing border. Understandably upset and perhaps foreseeing mobility issues that may come to light, the Rotinohshonni raised protest in order to guarantee the right to free passage. Not long after, Article III "was incorporated in the Treaty," a right which "has never been abridge to this day by law."[184]

Bonnelly's unyielding counterpoint continued, as he expressed further that The U.S. and Great Britain did not create the right of free passage with the Jay Treaty but instead officially recognized an already existing right. Bonnelly provided the following:

> It was not within the purview of these two great powers to create rights which already had been inherent in the Indians . . . it belonged to the Indians before the existence of either nation. The Indians however insisted that that right which had been theirs should continue without molestation or interference from any White man. It was for this reason that these two great powers wrote into the Treaty, Article III so that it would be forever established and recognized that at no time must the Indians of North America be interfered with in their usual crossing and recrossing of the imaginary boundary line then made and drawn across this great continent by virtue of the Jay Treaty.[185]

Drawing parallels to judge O.B. Dickenson's opinion, Bonnelly explained that the Treaty never bestowed rights upon the Iroquois but identified them as inherent. Moreover, a foreign entity attempting to restrict such a right commits a blatant infringement on Indigenous sovereignty. So contrary to affording the right of free passage, Indigenous inclusion in the Treaty was to protect freedom of movement, and it became legally solidified through a promissory pact between the U.S., British, and Rotinohshonni.

---

184 *John B. McCandless v. United States ex rel. Paul Diabo* "Brief of Appellee," December 20, 1927, 6.

185 Ibid., 11.

The zenith of the appellee's brief, however, analyzed how subsequent treaties only strengthened Diabo's case. The Treaty of 1796, for instance, amplified Article III's Indigenous safeguard of free passage, stating, "No stipulations in any treaty subsequently concluded . . . can be understood to derogate in any manner from the rights of" His Majesty's subjects, U.S. citizens, and "Indians dwelling on either side of the boundary" to "freely pass and repass by land or inland navigation."[186] The Treaty of Ghent's Article IX recapitulated the rights Indigenous peoples held in the aforementioned treaties: "Immediately after the ratification of the present treaty [Ghent] . . . the U.S. will restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to . . . previous to such hostilities."[187] According to Bonnelly, the War of 1812 did not nullify the Jay Treaty as it persisted in ensuing agreements between the U.S. and foreign nations. Through established patterns of brokering peace and contracting terms, the U.S. set a precedent for how it viewed, and legally referred to, neighboring Native communities.

Next, Bonnelly dismissed any Indigenous classification of alien under the Immigration Act. He stated, "At no time have Indians been classified as aliens, nor has their right of domicile on any portion of the continent been questioned. As aboriginal inhabitants of America they have inherent right to such domicile on any part of the North American continent."[188] At the same time, while national security and militarizing the border—as well as implementing quotas and screening procedures—were of paramount concern for the Bureau of Immigration, it also targeted specific groups for exclusion. Bonnelly continued, "It may also be argued at this time, that the sole intent

---

[186] Ibid., 6.

[187] Ibid., 7.

[188] Ibid., 16.

of Congress in the passage of the Immigration Act was to restrict immigration from foreign countries, particularly those from Europe and Asia, and other countries of the Eastern Hemisphere and at no time was it intended to affect the American Indians."[189] As it happens, the U.S. did specifically bar select individuals and groups from distinct geo-ethnic locations.

Chief Justice Joseph Buffington patiently heard both sides before settling the matter of Diabo's discharge and right to free passage. Upholding the original decision of the U.S. District Court for the Eastern District in Philadelphia, Buffington remarked:

> Both Great Britain and the United Sates have resident in them the Indians of the Six Nations, both have reservations where members of this tribe live and toward them both countries hold the guardian relation pointed out by Chief Justice Marshall. So far as we are advised, neither Great Britain or the Dominion of Canada have denied to the Indians of the Six Nations resident in the United States passage across the boundary line, and if the Jay Treaty is in force, as we find it to be, good faith and the observance of the treaty calls for the same course of conduct by the United States. Finding no justification for the arrest and deportation of this man, the order of the Court below discharging him is affirmed.[190]

In essence, the Jay Treaty entitled Diabo and other Rotinohshonni to cross the international boundary without interference from U.S. custom officials. Unlike the appellant's legal counsel had hoped, the War of 1812 did not repeal or abridge the Treaty, nor did the Immigration Act conflict with or supersede it.

The verdict of *McCandless v. Diabo* ensured that all Indigenous peoples retained free passage rights to cross the U.S.-Canadian border unmolested. But the case also highlights the changing racial climate in the early twentieth century, as the U.S. and Canada attempted to halt the immigration of various groups of people based on racial categories of inferiority. Indigenous peoples who have a long history of being viewed as "childlike," "savage," and "uncivilized"—

---

[189] Ibid., 18.

[190] *John B. McCandless v. United States ex rel. Paul Diabo* "Opinion," March 9, 1928, 7.

stigmas that faded little over time—became swept up in this discriminatory immigration reform. Diabo's successful challenge prevented a whole community from being exiled off half their traditional homeland that had been divided by an imaginary line.

In Kahnawake, political activism swelled around the successful outcome of Diabo's initial court case. In 1927, the community hosted a Grand Council of the Confederacy as a means to discuss pertinent concerns surrounding Rotinohshonni sovereignty, treaty rights, and border-crossing issues.[191] The developments in Kahnawake during this time also strengthened the resolve of the band's Longhouse activists—a small but well-organized political body within the larger Kahnawake community. For the duration of the summer in 1927, Longhouse leaders submitted a series of incensed letters to Canadian officials expressing their universal dissatisfaction with how Indigenous peoples were treated. Further, as the Rotinohshonni people faced mounting threats to their political existence and cultural survival, the immigration case of Diabo served to ignite a larger Rotinohshonni sovereignty movement.[192] The Rotinohshonni responded to these threats of general assimilation policies, required citizenship, dismantlement of hereditary councils, land seizures, and state encroachments by gaining federal recognition of rights, fighting state's attempts at expansion into Iroquois territory, and reclaiming communal lands that had been illegally taken years before.[193]

Nevertheless, as political organizing increased and Native groups began to engage in land claims, the Canadian government amended the Indian Act. In the late 1920s, Parliament added Section 141 to the Act, which made the hiring of lawyers or legal counsel by Indians illegal,

---

191 Reid, *Illegal Alien?*, 74.

192 Ibid., 77.

193 Ibid., 77.

effectively blocking Native peoples from using the legal system to fight for their rights.[194] Although these laws presented a significant barrier to organized Indigenous resistance, it did not put an end to political mobilization. Groups such as the Nisga'a Land Committee and the Native Brotherhood of British Columbia continued to organize despite such repressive laws.[195] However, these codified measures, which denied Indigenous peoples access to legal council and rid them of communal landholdings, showcase Canada's logic of eliminating towards its native societies—because "land is necessary for life" and "contests for land" are "contests for life."[196]

Although Diabo's victory shielded an entire nation, Indigenous peoples still faced rigid barriers and unclear categorizations of "Indian," and the rights therefore granted. However, in their efforts to undermine immigration, the U.S. Board of Immigration Appeals (BIA) and Immigration and Naturalization Service (INS) failed to include a definitive definition of "Indian." Initially, the U.S. deferred to Canada's Indian Act when dealing with this question. The Act defined "Indian" as any "male person of Indian blood reputed to belong to a particular band;" any child of such person; and any "woman who is or was lawfully married to such person."[197] American Indian law, by comparison, interpreted "Indian" in different ways depending on the individual or group.

In 1942 the BIA officially adopted the Indian Act's political, and engendered, definition of "Indian." The BIA found that the INS should also follow the Canadian definition, which granted

---

194 "The Potlatch Law and Section 141," The University of British Columbia: Indigenous Foundations. UBC also recommends Sharon Helen Venne's *The Indian Act and Amendments 1868-1975* as an excellent resource to compare and contrast different versions of the Indian Act. http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act.html.

195 Ibid.

196 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native." Journal of Genocide Research, vol. 8, no 4, December 2006, 387.

197 Excerpt from the Indian Act, 1876 CHAP. 18. An Act to amend and consolidate the laws respecting Indians. [Assented to 12th April 1876.] University of British Columbia http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act/indian-status.html.

white wives of Indigenous males access to free passage across the border. In accordance with the Indian Act's enfranchisement policy, which stated, "Any Indian woman who marries any person other than an Indian, or a non-treaty Indian, shall cease to be an Indian in every respect within the meaning of this Act," the BIA ruled that Indigenous women lost their right to cross after marrying a non-Indian man.[198] Amidst two nations' need to categorize people and control their boundaries, Native peoples had political identifying markers thrust upon them. Such paternalistic, oppressive, and often incredibly vague policies show the precarious and pernicious consequences on peoples' lives—as rigid immigration legislation, which originally possessed no direct reference to North America's Indigenous inhabitants, continued to shape and reshape the social, cultural, political, and economic experience of most Native communities.

Over the years, however, the administrative definition of "Indian" shifted from a political status to a racial classification based on "blood." The case of *United States ex rel. Goodwin v. Karnuth* demonstrates this radical change in determining Indigenous peoples' identity and rights to cross the international border. Goodwin, after being arrested by the INS, claimed that her full-blooded status as a member of the Upper Cayuga Tribe of the Six Nations gave her the right to pass unrestricted. The INS, on the other hand, argued that in accordance with Section 14 of the 1927 Canadian Indian Act, Goodwin's marriage to "a native citizen of Canada of the white race" made her "enfranchised" and she therefore lost her Indian status.[199] The U.S. District Court,

---

198 "The Indian Act of 1927, Chapter 98, Section 14," *Library and Archives Canada: Electronic Collection*, http://epe.lac-bac.gc.ca/100/205/301/ic/cdc/aboriginaldocs/stat/pdf/1927-act.PDF. See also "Canada Passes the Indian Act," which explains how there a number of ways through which Indians could lose their "status" other than marriage such as "voluntary renunciation of their Indian status (enfranchisement), obtaining a college degree or becoming an ordained minister, having at the age of 21 a mother (or paternal grandmother) who did not have status before marriage, or being born out of wedlock to a mother with status and a father without." http://eugenicsarchive.ca/discover/timeline/54e158966fecf60000000001.

199 *United States ex rel. Goodwin v. Karnuth*, Civ. No. 3588 United States District Court for the Western District of New York, 74 F. Supp. 660, November 28, 1947.

however, found that the 1928 Indian Act's interpretation of "Indian" possessed discrete "racial connotations" citing that the "common understating" of federal language finds "Indian" to connote "one-half or more" of "Indian blood."[200] For the BIA and INS, the use of blood quantum became the standard for identifying tribal affiliation and an individual or groups' "Indianess." Although ostensibly beneficial for Indigenous peoples in securing their right to cross the border, it also displays the jurisdictional power of nations states over its Native population. Considerably the most dramatic aspect of such a decision was that it not only altered but also superseded traditional native practices of recognition to include blood quantum as a qualifier for tribal acceptance and citizenship. Furthermore, it trampled over individual bands' sense of sovereignty in deciding who is included or excluded from membership.

Against the backdrop of early twentieth-century legislation specifically designed to impede foreign immigration, dictate citizenship, and establish clear racial distinctions, Indigenous groups in Canada and the U.S. successfully repelled cultural erasure and the dismantlement of tribal sovereignty. Examples such as Diabo's showcase the triumph of Indigenous groups to carve out their place in the geopolitical realm, and reclaim their traditional space between newly formed international borders. As national projects, however, the U.S. and Canada enacted laws that reconsidered the nature of national territories as systems of repression that could stop movement, impose cultural identity markers, and silence people through force. These neocolonial measures legally justified the exclusion of "aliens" from white society, restrain Native advancement, and control the racial power imbalance—all of which severely limited Indigenous peoples' autonomy.

---

[200] Spruhan, 311. Paul Spurhan goes into great detail about the confusing definitions of "Indian" between the U.S. and Canada, and the attempts of officials to clarify how people of "mixed" status or marriage fit into the equation. See also UBC's information on Indian status that explains how a status Indian woman who married a non-status man would become enfranchised—meaning she would lose her Indian status and the rights it affords. http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act/indian-status.html.

Such paternalistic policies, which trivialize past and present violence against Native peoples, illustrate the continuation of the Indian removal process over time and space. But again, rather than becoming victims in the story, Indigenous groups in the U.S. and Canada cultivated a renewed sense of tribal heritage, a reorientation to their cultural roots, and reshaped their own definition of what it meant to be "Indian." As Diabo's experience reveals, the persistence of twentieth-century tribal connections and frequent multi-directional migration fostered a thriving, politically charged Indigenous population which would play a critical role in sequential decades of American Indian activism and self-determination.

Chapter III: The Landmark Decision of *Harrison v. Laveen*: Arizona Indians and the Right to Vote During the Mid-Twentieth Century

On a clear Saturday afternoon in 1947, two Yavapai members of Arizona's Fort McDowell Reservation walked into the Maricopa County registrar's office fully intent on registering to vote as Democrats for the upcoming election. World War II veteran Frank Harrison and tribal chairman Harry Austin, like so many other Americans, looked to the ballot box not only as a chance to participate in the political process but also as an opportunity to influence meaningful change in their everyday lives and the lives of fellow Indians on the reservation. Yet, Harrison and Austin's hopes were quickly dashed as the county recorder, Roger G. Laveen, rejected their application citing section 2, article 7, of the Arizona constitution, which stipulated American Indians were clearly "persons under guardianship" of the United States and therefore ineligible to vote.[201]

Unsatisfied, both men entered into a long legal battle in an effort to appeal such discriminatory legislation and rectify the disenfranchisement of American Indians in Arizona. The lawsuit eventually reached the Arizona Supreme Court where the plaintiffs won a substantial victory in favor of Indigenous civil rights. The case garnered national attention and support from myriad organizations. The National Congress on American Indians (NCAI), the American Civil Liberties Union (ACLU), and the U.S. assistant attorney general all offered amicus curiae in defense of both Indians right to vote and in opposition to the County's biased law. The significance of *Harrison v. Laveen* cannot be overemphasized as it reflects the prisms of race, status, and

---

201 *Harrison et al, v. Laveen*, 67 Ariz. 337; 196 P.2d 456; 1948 Ariz 5065 (Supreme Court of Arizona, Lexis Nexis Academic, July 15, 1948) 4. I want to provide a brief note on language and terminology used in this research. For the purpose of clarity and cohesion I collectively refer to the diverse ethnic population of native North Americans as "indigenous peoples, groups, or communities." I also use the terms "American Indian" and "Indian" interchangeably in the context of the sources. Nevertheless, whenever possible I employ specific tribal affiliations to denote individual and group identities. Although categorizing and imposing terms on a particular cultural community can be, in of itself, an incredibly problematic endeavor, I remain sensitive about the misrepresentation and misunderstandings language and certain phrases connote. Because language is dynamic and can hold multiple meanings I try to reference people in the most accurate and respectful way possible.

citizenship occurring during the late 1940s, and showcases the pivotal steps American Indians took in shaping their destiny through legal means.

Harrison and Austin's lawsuit emerged almost a quarter-century after the passage of the Indian Citizenship Act of 1924, which granted all Indigenous peoples across the continental United States full citizenship—including the right to vote. The act stated that "all non-citizen Indians born within the territorial limits of the United States" were to be "citizens of the United States: provided, that the granting of such citizenship shall not in any manner impair or otherwise affect the right to tribal or other property."[202] Its seemingly contradictory stipulations not only imparted American Indians with U.S. citizenship but also recognized the fact that Indigenous groups held a unique citizenship status. Unfortunately, the ambiguity of such legislation failed to specify which rights were granted to American Indians and thus allowed states to control whether they had the right to vote. As a result, the State of Arizona determined that because American Indians living on reservations resided outside state boundaries, and due to the fact that they were recognized as wards of the state, they possessed no right to engage as electorates at the local, state, and federal level.

The fact that Indigenous peoples faced such considerable state-level opposition to their right to vote is perhaps not all that surprising given how many American Indians lived in Arizona at the time. In the 1940s, Arizona was home to approximately one-sixth of all American Indians in the United States—24, 317 over twenty-one years of age and 11.5% of the state's total population.[203] Such voter numbers could potentially sway critical elections, allow Indigenous

---

202 National Archives, "Indian Citizenship Act of 1924" http://www.archives.gov/global-pages/larger-image.html?i=/historical-docs/doc-content/images/indian-citizenship-act-1924-l.jpg&c=/historical-docs/doc-content/images/indian-citizenship-act-1924.caption.html.

203 *Harrison v. Laveen*, 458.

peoples to position themselves into leadership positions, evoke political activism both on and off the reservation, and revitalize the collective recognition of American Indian sovereignty. Thus, the prospects of a strong native vote could endanger white dominance and fracture the existing power structures among Arizona's political elite. In order to maintain authority, state officials needed to undermine Indigenous voter eligibility through repressive laws that placed them as ineligible or incapable of voting. As a result, these discriminatory practices prevented thousands of U.S. citizens from exercising their rights as Americans.

Yet the case of *Harrison v. Laveen* has generally garnered limited scholarly attention over the years. The story of Frank Harrison and Harry Austin situates itself within larger discussions about American Indian voting rights and United States exclusionary policies, and highlights the fact that Arizona's rejection of Indigenous suffrage demonstrates the broader patterns of weaponized legislation used by local, state, and federal institutions; neocolonial measures—constitutions, bylaws, and edicts—intended to codify the exclusion of minorities from white society, restrain any attempt at advancement, and control the racial power imbalance. Moreover, Harrison and Austin's experience in Arizona's judicial system broaches perennial questions regarding Indigenous voting rights, race, and gender during the mid-twentieth century and reveals how the plaintiffs' attorneys employed notions of power, masculinity, manhood, and honor to acquire a favorable decision and win suffrage rights. Overall, the case of *Harrison v. Laveen* illustrates how Indigenous peoples in Arizona radically opposed exclusionary policies and challenged state authority in order to transform their overall status.[204]

---

[204] In a broad sense, American Indian voting rights have been rendered to the periphery of historical analysis. In 2007, however, Daniel McCool, Susan M Olson, and Jennifer L. Robinson's *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* examined the torrid history concerning indigenous peoples and the right to vote. But they only offer a brief overview of Harrison and Austin's landmark case, only mentioning in passing its significance in overcoming seemingly impossible odds, and successfully establishing suffrage for all Indians. The authors also clearly fall short of identifying how significant the case was as a stepping-stone towards

In the context of Jim Crow and the eugenics movement, notions of American Indians as racially inferior permeated white society and undoubtedly influenced Arizona's consideration of all Indigenous peoples as "persons under disability" and *no compos mentis* or "not of sound mind."[205] Yet racial conceptions and paternalistic language such as this were nothing new to North America's Indigenous population, as they already experienced a long history of being viewed as "childlike" and in need of the federal government's "paternal" protection. In the early twentieth century, American policy makers relied on theories of biological inferiority to position individuals of color as "others" and place them on the lower rung of an increasingly rigid racial hierarchy. Importantly, however, Indigenous disfranchisement was merely another step in a seemingly perpetual U.S.-colonial process of dispossession, displacement, and destabilization. For generations, Americans implemented racialized structures in order to maintain white dominance and control "outsiders." For Arizona officials, the opportunity for American Indians to secure equal voting rights severely threatened the continuity of a white homogenous society. Indigenous peoples experience with suffrage in Arizona represents a microcosm for the larger patterns of racialization and the exclusion towards marginalized groups living in the United States during the twentieth century.

In 1977, the American Indian Policy Review Commission's *Final Report* found that from 1820 to 1920 national and state entities continuously viewed Indigenous peoples as lacking

---

future indigenous activism. Finally, they fail to underscore the fact that the case overturned the paternal relationship between indigenous peoples and the Arizona government and, therefore, merits considerable academic exploration as a turning point for American Indian sovereignty. Published three years later, Laughlin McDonald's *American Indians and the Fight for Equal Voting Rights* investigated American Indians' struggle for suffrage during the first half of the twentieth century. Although monolithic in its analysis of indigenous people and voting rights in America, McDonald does not emphasize the *Harrison v. Laveen* case as forming the crucial foundation of political activism from which the later Voting rights Act of 1965 was built upon.

[205] *Harrison et al, v. Laveen*, 67 Ariz. 337.

"biological vigor" and the natural immunities required to "evade diseases."[206] Encouraged by eugenic theories that projected an image of minorities as inherently and biological inferior, these pseudo-scientific racial designations resonated within the dominant American consciousness and dramatically shaped coercive legislation directed at those deemed "unfit." Throughout the twentieth century, social reformers and politicians adopted eugenic philosophies as a way to justify the established racial hierarchy and ultimately create what they saw as a "better" society. The *Report* is a prime example of such eugenic mentality, suggesting that Indigenous peoples would naturally and gradually succumb to the abuse of alcohol and could never compete with the "rational ways" of the dominant—Western European descended—American society.[207] Perceived as scientific fact, Eugenic ideologies shaped the layered arguments and processes concerning citizenship rights, including the right to vote, and whether American Indians should enjoy such rights.[208]

Nevertheless, through various treatises, policy amendments, and new legislation—including the Dawes Act and Naturalization Act—by the 1920s almost two-thirds of America's Indigenous population had been, unsystematically, granted citizenship.[209] The passage of the Indian Citizenship in 1924 represented the final effort towards Indigenous inclusion as American citizens—at least ostensibly. Although championed by the Society of American Indians (SAI), which formed in 1911 with the goal of Indian education, Indian citizenship, and establishing a federal administration in charge of hearing Indian legal matters, the passage of the Citizenship Act

---

206 McDonald, 17.

207 Ibid., 17.

208 Although eugenic ideas infiltrated almost all levels of early twentieth-century intellectual thought, it was in no way a universal way of thinking.

209 McCool, 7.

found its greatest supporters in Progressive senators and non-Indian activists.[210] The consensus among many Indigenous communities on the issue of citizenship remained contentious at best. Some groups vehemently denied the pan-Indian and assimilationist message of the SAI, charging the organization with neglecting tribal individualism and the reservation's importance. Cahuilla leader Francisco Patencio, for example, rebuffed the SAI's platform, stating, "I and my people, we do not want citizenship, because we have already been citizens in this country always." [211] Others believed citizenship and the subsequent right of suffrage would severely compromise Indigenous peoples' sovereignty. Despite Indigenous peoples' mixed feelings on universal citizenship, the Act passed with little outward opposition.

Following the passage of the Citizenship Act, various states implemented decisive barriers to inhibit Indigenous suffrage under the guise of safeguarding the status quo. Echoing the disenfranchisement of blacks after the Fifteenth Amendment, these strategies included, but were not limited to: denying Indians were legal residents of the state; forcing individuals to relinquish their tribal affiliation and cultural identity in order to hold public office; excluding Indians based on the "Indians not taxed" clause of the U.S. Constitution; charging Indigenous peoples with being under the legal supervised control of the federal government; and requiring comprehensive literacy tests. States such as New Mexico, South Dakota, North Dakota, Utah, Arizona, Idaho, Maine, Mississippi, and Washington used one or more of these tactics—residency, self-termination, taxation, guardianship, and literacy—to restrict Indian entrance into the political realm.[212]

---

[210] McDonald, 18.

[211] Christian W. McMillen, "*Making Indian Law: The Hualapai Land Case and Birth of Ethnohistory*" (New Haven: Yale University Press, 2007), 19-20.

[212] McCool, 10-19.

The antecedent of Arizona's denial of Indigenous suffrage denial stood on the shoulders of a twenty-year-old court ruling—*Porter v. Hall*. In 1928, Peter H. Porter and Rudolph Johnson—two Akimel O'odham (Pima) Indians from the Gila River Reservation—attempted to register to vote in Pinal County, Arizona, but were immediately refused based on the grounds that they were "persons under guardianship" of the government and thus ineligible to vote.[213] Subsequently, Porter and Johnson filed a petition for a *writ of mandamus* instructing the county recorder to register them as voters, contending they had all the legal qualifications under the Arizona Constitution. The Pinal County recorder, Mattie M. Hall, argued that because their reservation did not rest within the geopolitical boundaries of Arizona, and due to the fact that Indigenous peoples were considered wards of the state, they were not entitled to vote. Chief Justice Henry D. Ross concurred, and ruled in favor of the defendant citing Section 2, article 7, of the Arizona Constitution, which stated, "No person under guardianship, *non compos mentis*, or insane shall be qualified to vote in any election."[214] C.J. Ross proceeded to elaborate:

> The prevailing opinion holds that these Indians are under guardianship of the United States, and therefore not entitled to be registered nor to vote. It is true that the decisions of the courts, both federal and state, beginning with *Cherokee v. Georgia*, 5 Pet. 1, 8L. Ed. 25, in which the opinion was written by the great Chief Justice Marshall, have described the status of the Indian as that of a ward of the United States . . . The status of guardianship disqualifying one to vote, in my opinion, is one arising under the laws proving for the establishment of that status after a hearing in court. It is not a status that "resembles" guardianship, but legal guardianship, authorized by law.[215]

The significance of *Porter v. Hall* set a legal paradigm for determining Indigenous-federal-state relations in the following decades. Defining a "person under guardianship" as "any person

---

[213] Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*, New York: Cambridge University Press, 2007, 15.

[214] *Porter v. Hall* (1928) 34 Ariz. 308, 331, 271 Pac. 411, 419. LexisNexis.

[215] Ibid.

who, by reason of personal inherent status, age, mental deficiency, or education, or lack of self-control, is deemed by the law to be incapable of handling his own affairs in the ordinary manner, and is therefore placed by that law under the control of a person or agency which has the right to regulate his actions or relations towards others in a manner differing from that by which the actions and relations of the ordinary citizen may be regulated." The court found that "all Indians are wards of the federal government, and as such are entitled to the care and protection due from a guardian to his ward."[216] According to Professor of History and Political Science at the University of Arizona, N. D. Houghton, "Any analytical study of the situation would appear, therefore, to involve at least brief treatment of the following phases of the subject: first, the evolution of Indian citizenship; second, Indians as 'wards of the national government;' third, "Indians as persons 'under guardianship' as meant by state constitutions containing that condition as a disqualification for voting; and finally, the disfranchisement of Indians on reservations by state action."[217] Houghton's knowledge of citizenship and law proved instrumental in later legal matters apropos to Indigenous suffrage in Arizona, and would be later cited as a legal specialist in the case of *Harrison v. Laveen*.

The court held that Indigenous peoples in Arizona did not hold the capacity to make proper decisions, and implied that American Indians, as a racial collective, were on the same level as the insane and criminal. In 1944, the attorney general of Arizona declared that the *Porter* judgment also applied to any Indian who migrated off the reservation and "goes on his own."[218] Such remarks

---

216 *United States v. Kagama*, supranote 6, and *Donnelly v. United States* (1913) 228 U. S. 243, 33 Sup. Ct. 449, Ann. Cas. 1913E 710.

217 N. D. Houghton, "The Legal Status of Indian Suffrage in the United States," (*California Law Review* 19, California Law Review, Inc.: 507–20, 1931). Houghton's article is mentioned specifically in Judge Levi Steward Udall's opinion regarding the *Harrison v. Laveen* case—Lexis Nexis, 5.

218 McCool, *Native Vote*, 16.

would mean that every Indigenous person living in Arizona, whether he or she lived far from the reservation, would still be excluded from the voting process. The opinion in *Porter v. Hall* persisted for twenty years and set a precedent for all legal matters concerning Arizona-Indian relations.

These early twentieth-century attitudes of white primacy clashed with nascent Congressional measures aimed at re-establishing tribal self-governance, ceasing allotment, and mending federal-Indian relationships. President Franklin D. Roosevelt's "New Deal" policies of the 1930s offered temporary reprieve for Americans Indians in what came to be known as the "Indian New Deal." The legislation materialized in large part from Lewis Meriam's scathing indictment of federal Indian policies and disastrous state of Indigenous communities across the U.S., entitled, *The Problem of Indian Administration*, later commonly referred to as the "Meriam Report." Meriam's survey pushed Roosevelt to appoint John Collier as Commissioner of Indian Affairs in 1933 who radically opposed U.S.-driven assimilation strategies such as allotment and boarding schools.[219] Collier, as it turned out, significantly influenced the passage of the Wheeler-Howard bill, or the Indian Reorganization Act of 1934 (IRA), which eliminated the legal practice of breaking up tribal lands, and promoted Indigenous self-government.[220] However, the variant of the IRA that Congress passed and Roosevelt approved was diluted from Collier's initial draft. Moreover, it continued the trust status of Indians under the federal government—as well as the recurring idea of tribal communities as "domestic nations" and Indigenous peoples as "wards" of

---

[219] Peter Iverson and Wade Davies, *"We Are Still Here:" American Indians Since 1890*, Second Edition (Wiley Blackwell Press, 2015), 79-80.

[220] Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States (Revisioning American History)*, Reprint ed. (Beacon Press, 2015), 171.

the state—and required tribal governments to seek approval from the Secretary of the Interior.[221] Nevertheless, by acknowledging Indigenous self-determination and collective cultural rights, the IRA shifted the political American paradigm and created a legal space from which Indigenous groups could challenge ongoing repressive, settler-colonial policies.[222]

Comprehending the obstacles of race in the American Southwest during the mid-twentieth century aids in understanding the unique and difficult sociopolitical position from which the Harrison and Austin argued. In 1947 William Zeh—a local Bureau of Indian Affairs (BIA) director—issued an evaluation of the Navajo reservation in Arizona, referring to its residents as "a primitive sort of individual," stuck in an uncivilized state of development.[223] He believed Navajos were fundamentally identical in their separation from modern life and needed "experts" to help them along the course of development.[224] Anthropologists, scientists, politicians, Indian officials, and many others at the local, regional, and national level perpetuated a worldview of Indigenous peoples as not only racially inferior, but also as requiring governmental protection and guidance in order to survive. This simultaneously solidified white society's perception of a biologically identifiable racial hierarchy.

Ideas of white supremacy also enabled the exclusion of Navajos from restoring reservation subsistence planning. William Warne once wrote to a colleague that, "We must guard against the possibility of undue delay which might result from referring to the Indians various administration

---

221 Deloria, ed. *American Indian Policy*, 93.

222 Ibid., 172, 173.

223 Andrew Needham, *Power Lines: Phoenix and the Making of the Modern Southwest* (New Jersey: Princeton University Press, 2014), 135.

224 Ibid., 135.

and operational decision and procedures which are properly the function of the government."[225] Warne's remarks reflect the broader cultural mindset and entrenched racial constructions that positioned Arizona's minorities within a lower social classification. Moreover, conceptions of white superiority tapped into a traditional pattern of stripping Indigenous peoples of sovereignty and inhibiting their ability to live without federal aid. As such, ideas of "guardianship" permeated ongoing debates concerning Indigenous rights, and overall government-to-government relations between American Indians and state officials.

In 1948, certain tribal leaders sought to rectify their impoverished reservation through reforms designed to infuse economic stability and self-reliance. The Navajo Tribal Council, for instance, endorsed a proposal by Max Drefkoff, an industrial consultant for the Department of Interior, who wanted to create "industrial villages" where Navajos could manufacture furniture, shoes, leather goods, and other products. Because of the sub-standard living conditions on the Navajo reservation—including hunger, disease, rampant unemployment, and dilapidated housing—Indigenous peoples were generally receptive to any assistance, especially programs that encouraged self-reliance and the chance of economic perseverance through establishing sustainable institutions. Although Drefkoff's proposal embraced paternalistic language, such as "teaching the Navajos to work," it also provided an opportunity for viable and enduring reservation institutions.[226]

Nevertheless, due to a strong public backlash—opposition which derived in no small part from white media—the Drefkoff proposition quickly lost momentum and the program ended before it began. Famed author and syndicated columnist, Robert C. Ruark wrote an article entitled

---

[225] Ibid., 135.

[226] Ibid., 136.

"Save your Tears," where he insisted, "By their own traditional standards, the Navajos are doing about as well as ever." Further stating, "He [the Navajo] is a nomad . . . he finds more sermons in solitude and stones that most of his Red relatives . . . which is why the Indians still laugh about all the fuss we make about the deplorable living conditions." Ruark also lamented at the fact that across the Southwest, "You couldn't pick up a periodical without being hit in the face by a page full of ragged Redskins."[227] Ruark's expression encapsulates the larger frustration of white America against minority groups such as the American Indian. Aside from the blatantly racist language and enraged sentiments, he also presents the situation as if the Navajo were proposing the Drefkoff plan through some arrogant sense of entitlement. That these "Redskin" efforts to better their living conditions were a ploy to extract more appropriations and government handouts. Intentionally or not, comments like Ruark's helped propel the stigmatization and structural subordination of Indigenous peoples across the American Southwest.[228]

Such racial exclusions had a direct impact on Indigenous peoples' ability to participate in the political process as both U.S. citizens and concerned American Indian communities. Although Indigenous peoples' participation in the Second World War did much to elevate the their overall public perception in post-war Arizona, most of white society still held an unfounded racial bias towards Navajos in particular, and American Indians in general. After returning home from World War II, Navajo Veteran, Sergeant Abner Jackson, explained his disappointment, "I am back in Arizona, but the medals I received at Salerno and in Germany are of little use to me as my people

---

[227] Robert C. Ruark. "Save Your Tears," Richard F. Harless Papers 1932- 1984, MSS-166, Arizona State University Libraries Arizona Collection, Arizona State University Libraries, Tempe, AZ, 4. (Indian Voting Law Suit: Richard F. Harless Maricopa County Attorney Documents and Legal Filing Publications and Materials, 1940-1948.) Box 9, Folder 1. Ruark also complained about staged photos of crying Navajo children, rejecting any notion that living conditions were as bad as the Navajo, Drefkoff, popular media, and BIA proposed.

[228] Tomas Almaguer, *Racial Fault Lines: the Historical Origins of White Supremacy in California*, With ed. (University of California Press, 2008), 6-7.

are still in utter darkness of the Navajo reservation and even I can't vote because I'm Navajo." He adds that, "I want to vote and 6000 other G.I. Indians in Arizona want to vote. We want to be Americans, not former reservation Indians . . . our people are not lazy, but are very tired and poorly nourished"[229] Moreover, he was incredibly upset that following his return from war, his sheep—his livelihood—were sold without his consent after being assured by the Indian agent at Window Rock of their safety.[230] Jackson's irritation stemmed from an inability to seek legal recourse, obtain justice, and voice his concern through proper political channels. As a columnist from the *New York Times* commented, those Indigenous men who had "carried out one of the highest duties of citizenship" by serving in the armed forces were "denied its most prized right because of his race"—the right to vote.[231]

However, amidst such racial segregation and notions of white supremacy, many non-Indians throughout the Southwest fought on behalf of Indigenous individuals like Harrison, Austin, and Jackson. In the late 1940s, religious institutions joined the struggle and began arguing in favor of Indigenous peoples' rights. Mr. Bolitho and The Board of Deacons belonging to The Covenant Presbyterian Church conveyed their deep-seated concern for Indian entitlements in a letter to Representative Richard F. Harless. The message voiced the church's worry about how the Arizona State Constitution classed Indians "with the insane and the criminal to deny them the right to vote." Further they stated that they "wish to see the Indian granted all the privileges of citizenship as soon

---

229 "Navajo Veteran Tells Plight," *Los Angeles Times*, Feb 23, 1948. http://0-search.proquest.com.lib.utep.edu/docview/165794079?accountid=7121.

230 Ibid.

231 "Indians As Voters," *New York Times*, August 5, 1948, ProQuest Historical Newspapers: The New York Times, 20.

as possible, and we ask your assistance."[232] The congregation made two suggestions on how the congressman may resolve the problem: first, an amendment to the Arizona Constitution through a general election; second, a lawsuit filed against the state. Although they clearly coveted meaningful change for Indigenous peoples, their motivation other than rectifying a political injustice remains elusive.

In a related correspondence, Representative Harless expressed his disapproval of excluding American Indians from voting based on race. Responding to Laird J. Dunbar's inquiry into his position on Indigenous rights, Harless insisted, "I personally will not relent in my efforts to establish full citizenship and personal rights for the Indians while I am in public office. I see no justification for denying suffrage to any qualified voter. I see less justification for doing so because of the individual's racial background." Additionally, he made it a point to convey his feelings about Indigenous peoples' treatment from federal and state polities, stating, "Our attitude and treatment of the Indians has been allowed to become outdated . . . the United States and of the various states must begin to face the facts now and correct a situation which has grown out of indifference toward the progress and development of our Indian citizenship."[233] Harless plainly recognized the unjust conduct toward American Indians deeply rooted in racial constructions. He pressed the need for transformation from the top down and understood that disenfranchising Indians was not only illegal, but also stemmed from an antiquated colonial mentality.

These are the circumstances in which Harrison and Austin fought a decisive effort to rectify their disenfranchisement. Understandably fed up with a state system of seemingly perpetually exclusion, the plaintiffs strove for a positive change in their legal status and wished to elucidate

---

[232] *Covenant Letter to Congressman Harless*, Harless Papers 1932-1984. MSS-166, 1.

[233] *Letter from Rep. Harless to Mr. Laird J. Dunbar*, Harless Papers 1932-1984.

what citizenship meant for Indigenous peoples throughout Arizona. As the case drew near, the two Yavapai likely felt both anxious and confident about their claim. Because, to be sure, the pair faced an uphill legal battle, one which had already been attempted and failed twenty years prior with *Porter*, and one which would require aid from myriad agencies. In the summer of 1948, the appellants' attorneys, U.S. assistant attorney general, and NCAI and ACLU, rallied behind the rights of Harrison and Austin and readied for a tense, episodic legal battle that would bear lasting significance for Arizona's Indigenous citizens.

The attorneys for Harrison and Austin—including Congressman Richard F. Harless, Lemuel P. Mathews, and Ben N. Mathews—filed an extensive opening brief that argued against the *Porter v. Hall* ruling, which concerned Indigenous peoples, their right to vote as U.S. citizens, and overall understanding of the term "guardianship." They put forward the notion that Indigenous peoples had never been in need of this so-called "guardianship" or the U.S. government as a paternal protector. They explained, "We do not think that the words 'under guardianship,' as used in the Arizona Constitution, were ever intended to apply in such a loose manner as to include persons whose competency had never been adjudicated by a court."[234] Clearly the fact that the Harrison possessed the mental capacity to file suit against an unjust law suggests he, as well as all other competent Indigenous peoples, never required a "guardian." Harrison and Austin's attorneys maintained that the "United States does not manage the Indian's estate," nor does it "take care of the Indian." They insisted, "He [the Indian] feeds and clothes himself and earns the money to buy such food and clothing."[235] Therefore, the attorneys concluded, there were no constitutional

---

234 Richard F. Harless, Lemuel P. Mathews, and Ben B Mathews, *Opening Brief of Appellants*, Harless Papers 1932-1984. MSS-166. "Indian Voting Law Suit," 16.

235 Ibid., 23.

grounds for considering Indigenous communities as wards of the state or denying them any and all of the civil rights they were entitled to.

The attorneys' arguments came on the heels of a recent executive order designed to evaluate the state of civil rights among Americans. In 1946, President Harry S. Truman issued Executive Order 9808, establishing the Committee on Civil Rights designed to "strengthen and safeguard the rights" of U.S. citizens.[236] In reference to Arizona Indians' right to vote, the Committee found that Arizona's constitutional exclusion of Indigenous peoples "from the ballot" as "persons under guardianship" may need "reinterpretation," because such a clause may no longer apply "to Indians." They further concluded, "If this is not possible, the Arizona constitution should be amended to remove it."[237] Following the verdict in the *Harrison* case, various news sources reported that, "President Truman's Committee on Civil Rights played no small part in upsetting the old Arizona ruling."[238]

In addition, by drawing clear connections to military service, Harrison and Austin's attorneys resisted the prohibiting of Indigenous voting rights. They noted that if Indigenous peoples were indeed "incapable of managing" their own affairs, or in need of "some special care from the state" that they were therefore not required to perform military duty under the Selective Training and Service Act of 1940.[239] However, as the attorneys noted, "It is well known that many

---

[236] Harry S. Truman Library and Museum, "Records of the President's Committee on Civil Rights Record Group 220," Harry S. Truman Library and Museum, http://www.trumanlibrary.org/hstpaper/pccr.htm.

[237] The President's Committee on Civil Rights, To Secure These Rights: The Report of the President's Committee on Civil Rights, Chapter IV, A Program of Action: The Committee's Recommendations, Section III, Part 5, Harry S. Truman Library and Museum, http://www.trumanlibrary.org/civilrights/srights4.

[238] "Arizona Indians May Vote: High Court of State Reverses 20-Year-Old Ruling." *New York Times*, July 16, 1948, ProQuest Historical Newspapers: The New York Times pg. 3.

[239] *Opening Brief of Appellants*, 19.

reservation Indians served their country faithfully in the late war."[240] Indeed, by the outbreak of World War II, an estimated 25,000 American Indian men and 700 women from various tribes either voluntary enlisted or were drafted to serve in the U.S. armed forces. They became soldiers, marines, and seaman, while approximately 40,000 Indigenous women and elderly men labored in wartime industries.[241] Furthermore, Indigenous peoples fought in every American war and have the highest ratio of military service per population of any ethic group.[242] In the context of World War II, Indigenous military service evoked widespread respect across the country—a growing admiration Harrison and Austin's attorneys hoped to capitalize on.

The plaintiffs' attorneys relied heavily upon Harrison's veteran status in order to emphasize themes of honor, manhood, and service to nation. They remarked on a notable story about an Indigenous veteran from Arizona who exemplified the "ideal" American Indian. Ira Hayes—a Pima Indian from Arizona—was one of the five soldiers who had famously raised the American flag on Mount Suribachi following the merciless fight against the Japanese at Iwo Jima in the Pacific.[243] When Hayes returned home from war, he arrived to thousands celebrating his triumph with cheers, speeches, and religious ceremonies.[244] For the attorneys, Hayes epitomized characteristics of the quintessential American citizen: the bravery to conquer a foreign land; the willingness to sacrifice one's own life in the line of duty; the mental fortitude to face violence

---

[240] Ibid., 29.

[241] Donald L. Fixico, *American Indians in a Modern World* (Lanham: AltaMira Press, 2008), 19.

[242] Ibid., 82.

[243] Ibid., 19.

[244] Kenneth William Townsend, *World War II and the American Indian*, Revised ed. (Albuquerque: University of New Mexico Press, 2002), 131. Townsend goes into further detail about the growing popularity and respect of American Indians who fought in the Second World War. Moreover, he compares the treatment of indigenous and African-American soldiers.

firsthand and not waiver; and the courage to defend his country as a true "patriot." These traits, as it turns out, greatly influenced the worldview of Americans in the mid-twentieth century. The attorneys used this to their advantage, modestly connecting Hayes' episode in Iwo Jima to Harrison's WWII military service, stating, "We go no further than to mention the reservation Indian at Iwo Jima." Although quite brief, the mentioning of Hayes presents a brilliant tactic to portray the plaintiffs as "all-American" heroes; brave and honorable men who risked their lives to defend the country and champion the nation.

The attorneys also approached the *Harrison* case through a lens of racial discrimination. Harless, Mathews, and Mathews argued the fact that "when an Indian leaves the reservation he ceases to be 'under guardianship," but when "he returns to the reservation he again becomes 'under guardianship."' Therefore, it must be that an Indian's "physical presence on a reservation," is what determines his eligibility to vote and "not the fact that he is an Indian, or incompetent, or is incapable of handling his own affairs." They further stated that, "Since such is the case, then why is a white man living on a reservation entitled to vote? This court recognizes the fact that Indian Agents and government employees are Caucasians and do vote."[245] Denial of Indigenous suffrage, the attorneys advanced, had its roots in the racial climate of the time. Prohibiting Indigenous voting rights in Arizona acted as a safeguard for perpetuating the white hegemony. Individuals with authority feared that American Indians' participation in the political process would threaten the power imbalance that insured their place on the top.

The United States government also joined the judicial fray in support of Arizona's Indigenous peoples' right to vote. Assistant Attorney General Thomas Vincent Quinn, U.S.

---

[245] Richard F. Harless, Lemuel P. Mathews, and Ben B Mathews, *Opening Brief of Appellants*, 26-27. The attorneys go into further detail about the appellee's argument that Congress had expressly terminated its with reservation Indians.

Attorney for the District of Arizona Frank E. Flynn, and Assistant U.S. Attorney for the District of Arizona, compiled a tactful memorandum in defense of the appellants, Frank Harrison and Harry Austin. The U.S. attorneys argued that the provision of Arizona's constitution, which excludes American Indians from voting eligibility on the grounds they are "persons under guardianship," contravenes "the Fourteenth and Fifteenth Amendments." Furthermore, such language "arbitrarily denies reservation Indians equal opportunity with other citizens to qualify as voters and denies to them the right to vote because of their race."[246] Quinn, Flynn, and McAlister carried on to investigate the three separate classes of persons disqualified to vote under Article 7, Section 2, of the Arizona Constitution—persons under guardianship, *non compos mentis*, and insane. Reservation Indians, they claimed, cannot be characterized as such, because the "framers of the Arizona Constitution had in mind situations where disabilities are established on an individual basis, and by a proper judicial determination."[247] The *Porter* case, therefore, which specifically targets and excludes all Indigenous peoples as a class, wrongly disenfranchised Arizona's Indigenous citizens under a facade of "guardianship" and should be reversed.

Perhaps no one individual or group aided in the *Harrison* case as greatly as the National Congress on American Indians (NCAI). The NCAI first formed in 1944 as a national pan-Indian organization that defended against emerging termination policies and fought to protect Indians' legal rights and cultural identity. After the Second World War, the NCAI and other Indian reform organizations embarked on an aggressive campaign to enforce voting rights in both Arizona and New Mexico. In the case of *Harrison v. Laveen*, the NCAI championed the petition by filing

---

[246] T. Vincent Quinn, Frank e. Flynn, and Charles B. McAlister, *Brief Amicus Curiae of the United States of America*, Richard F. Harless Papers, 1, 6.

[247] Ibid., 11-12.

amicus curiae briefs, in conjunction with the ACLU, and placed general counsel James E. Curry in charge of representing the plaintiffs.[248] Notable Indian leaders within the NCAI—D'Arcy McNickle, Archie Phinney, Charles Heacock, and others—"successfully bridged the gap between tribal and supratribal concerns," and secured momentous legislation in favor of granting Indigenous people full citizenship rights.[249] The NCAI and ACLU's comprehensive contribution to the *Harrison* case challenged white-dominant political structures and paternal legislation.

Proponents of Indigenous civil rights, the NCAI and ACLU directly questioned the gendered rhetoric of *Porter v. Hall* and its ideas of paternalism that denied Indigenous peoples the right to vote. They argued that the ambiguous phrase "persons under guardianship" did not apply to the plaintiffs Frank Harrison and Harry Austin. In fact, to categorize all Indigenous peoples as "*non sui juris*" or under any legal power of another without proper evidence, proof, or trial, would exclude them from "the most basic of their rights as American citizens."[250] Moreover, the "plaintiffs are not in the custody of any official on or off a reservation" and if they were held to Arizona's code of "persons under guardianship" it "would create serious injustice and confusion."[251] Arizona used its paternal authority over "childlike" Indigenous communities to exercise power and exclude others. They tapped into prevailing notions of "fatherhood" as being supreme among American social relationships, and placed Indigenous individuals on a lower rung of the U.S. political, racial, and gendered social ladder. Interestingly, Arizona evoked concepts of guardianship when only decades before they systematically murdered, dispossessed, and relocated

---

248 Thomas W. Cowger, *The National Congress of American Indians: The Founding Years* (University of Nebraska Press, 2001), 65.

249 Ibid., 151.

250 National Congress on American Indians, *Opening Brief of Amicus Curiae*, 7.

251 Ibid., 6.

Indigenous populations. Examining the NCAI and ACLU's opening briefs through a gendered perspective reveals the codified gender inequalities that existed in Arizona's Constitution during the mid-twentieth century.

The NCAI and ACLU's *amicus curiae* also echoed Harless, Mathews, and Mathews' claim of racial prejudice. They argued that the Indigenous communities' exclusion from the voting process was a gross violation of the Fifteenth Amendment to the Constitution of the United States. The amendment proscribes the denial of suffrage based on an individual's "race, color, or previous condition of servitude."[252] According to the brief, the withholding of Indigenous voting rights under the pretext of "guardianship" is in fact racial discrimination. They contended that other classes of citizens who are "under guardianship" in the same "extended or metaphorical sense in which Indians are 'under guardianship'" are not refused enfranchisement. Those affiliated with the "armed services, federal employees, veterans, beneficiaries of social security payments, and recipients of various other Federal payments have all been referred to loosely," and on occasion, "as wards of the government." They concluded that if "freedom from all such special government controls were a condition of voting in Arizona, very few Arizonans would be permitted to vote."[253] The NCAI and ACLU's analysis of Harrison and Austin's exclusion illuminates the illegal racial discrimination state polities enacted against American Indians.

Ultimately, those arguing on behalf of Harrison and Austin dismissed Arizona's refusal to grant Indigenous suffrage through arguments surrounding American citizenship. Specifically, that in accordance with the Nationality Act of 1940 "all Indians born in the United States are nationals

---

252 Library of Congress, Virtual Services Digital Reference Section, *Fifteenth Amendment to the Constitution of the United States*, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=379 .

253 National Congress on American Indians, *Opening Brief of Amicus Curiae*, 22-24.

and citizens."[254] Because the law never specifically excluded reservations, and due to the fact that reservations existed within the boundaries of the continental United States, Indigenous peoples born on a reservation are still "born in the United States."[255] The brief explained that only if the "Federal Government itself denied the right of citizenship" and the "right of naturalization to Indians" could a state "deny them the right to vote, and no appeal could be had" because Indigenous peoples were not recognized as citizens.[256] However, with the passage of the Indian Citizenship Act of 1924, Indigenous peoples across the nation were thereafter considered citizens and, therefore, completely eligible to vote. Indeed, Congress' extension of "citizenship to all Indians" essentially nullified "the only justifiable basis for the denial of the suffrage to Indians." The NCAI and ACLU concluded, "It is not within the authority of any state to set aside what Congress did" or "indented to do" with the passage of the Indian Citizenship Act.[257] It is likely the government possessed every design to have Indigenous peoples participate as electorates of the United States' citizenry. On the most basic level, Indigenous peoples were legally entitled to vote as citizens of the United States.

In contrast, the attorneys defending appellee Roger G. Laveen expressed how the language of paternalism and guardianship were inextricably tethered to the special relationship between the federal government and North America's Indigenous people. County Attorney, Francis J. Donofrio, and Deputy County Attorney, Warren L. McCarthy, brought forward a comprehensive, 64 page brief, which insisted, "Congress of the United States, in the exercise of its plenary power

---

254 Library of Congress: *To Amend the Nationality Act of 1940*, https://www.loc.gov/law/find/hearings/pdf/00107800591.pdf.

255 Richard F. Harless, Lemuel P. Mathews, and Ben B Mathews, *Opening Brief of Appellants*, 28.

256 National Congress on American Indians, *Opening Brief of amicus curiae*, 17.

257 Ibid., 19.

over Indians has always proceeded upon the political duty to care for and protect the reservation Indian and to maintain for itself exclusive jurisdiction as it sees fit over member of the Indian tribes on the Indian reservations."[258] The attorneys believed that "the Indian problem is unique and must be looked upon as such and not as a problem of a class, nationality or race of people."[259] Their defense asserted that Indigenous peoples were somehow different, unique, or special, and therefore needed to be dealt with in a particular way. Here, the attorneys for Laveen plainly "othered" the American Indian in order to retain the status quo of white dominance within Arizona.

Mirroring *Porter*, the keystone of the appellee's defense also rested on the Arizona State Constitution. Donofrio and McCarthy posited:

> It is well settled that a citizen's right to vote for both state and United States officers exists by reason of his being qualified and entitled to vote under the laws of the sate wherein he resides. This being the case, if the plaintiffs are not qualified to register and vote by provision of the Arizona State Constitution or laws, not in conflict with Article 15, Section 1, Constitution of the United States, no rights or privileges of citizenship and been denied to them.[260]

As such a statement reveals, Donofrio and McCarthy insinuated that the power to dictate whether an individual or community is qualified to vote lay with the state. Taking from to that of the *Porter* ruling, Arizona did not strip Harrison, Laveen, or any other Indigenous person of their citizenship, but instead managed whether said people held the capacity to participate in the political process. They also alleged that the relationship between Indigenous peoples and the federal government had not significantly changed for over a

---

[258] Francis Donofrio and Warren L. McCarthy, *Appellee's Reply Brief*, 9.

[259] Ibid., 12.

[260] Donofrio, *Appellee's Brief*, 2-3.

hundred years. For that reason, the *Porter* ruling stands as a mere continuation of traditional government-Indian relations.

The County's attorneys pressed on, implying that the responsibility to clearly define citizenship, and the rights thereof, for reservation Indians fell directly upon the federal government. For them, "Citizenship and the ward status of Indians are in no manner inconsistent." Delving into such ideas further, they added that "in asking the state to grant the right of suffrage to reservation Indians at this time, even though the federal government . . . still treats them as wards without the privileges or burdens of the state laws, it appears that they are putting the cart before the horse." Fundamentally, the attorneys maintained, "it is the province of Congress and not the state to place reservation Indians in the class of those qualified to vote.[261] In a simplistic demonstration of the state-federal power dichotomy, the County delicately conceded that U.S. law and policy trumped that of the state. Thus, the Indian Citizenship Act's obscurity, especially with reference to Indigenous rights, forced states such as Arizona to craft special laws for its "wards."

Carefully hearing both sides and taking each argument into consideration, the Arizona Supreme Court deliberated on *Harrison v. Laveen*. In the end, the Arizona Supreme Court reversed the *Porter* decision, finding in favor of the plaintiffs Frank Harrison and Harry Austin. Judge Levi Stewart Udall penned the rationale of the Court's majority opinion:

> We, have, however, no hesitance in re-examining and reconsidering the correctness of the legal principles involved because the civil liberties of our oldest and largest minority group (11.5% of State's population) of whom 24,317 are over twenty-one years of age (1940 U. S. census) are involved, and it has ever been one of the great responsibilities of supreme courts to protect the civil rights of the American people of whatever race or nationality, against encroachment . . . We have made an extensive search of the proceedings of the Arizona Constitutional Convention and are unable to find the slightest evidence that "persons under guardianship" (section 2, article 7) should be denied the right of franchise, thereby intended that his phrase be applied to Indians as such . . . In other words, the

[261] Harrison v. Laveen Appellee Brief page 62-63.

> legislative department of government has not set up this barrier; rather we feel, it is a tortious construction by the judicial branch of the simple phrase "under guardianship," accomplishing a purpose that was never designed by its framers . . . We hold that the term "persons under guardianship" has no application to the plaintiffs or to the Federal status of Indians in Arizona as a class.[262]

Udall's words left no confusion as to the logic behind disenfranchisement and made it abundantly clear that American Indians possessed every right to vote as citizens in Arizona. He continued to proclaim distaste in the stripping of rights that are guaranteed under the Constitution for citizens of the U.S. Quoting Felix Cohen, he states, "In a democracy suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality."[263]

In the immediate afterglow of the *Harrison* verdict, Udall received numerous endorsements and congratulatory remarks from various organizations. His decision particularly resonated with members of The Church of Jesus Christ of the Later-Day Saints. Spencer W. Kimball, Elder and civic leader at The Council of The Twelve in Salt Lake City, Utah, wrote a letter of praise regarding Udall's judgment. He commented, "87, I believe, of these Apaches were registered in [Graham County] this year. That is a good beginning." He proceeds further to explain, "The hundreds throughout the various counties who will vote in 1948 will be but a spearhead for thousands of other who will follow." He believed that after "ten or twenty thousand Indians are casing their votes legislators will make up and begin to cater to them."[264] In a shared manner, Silas Eugene

---

[262] *Harrison v. Laveen*, 196 P.2d 456, 458, 461, 463 (Ariz.1948).

[263] Ibid., 196 P.2d 456.

[264] Spencer W. Kimball to Judge Levi Stewart Udall, "Church of Jesus Christ of the Later-Day Saints, August 4, 1948. Levi Stewart Udall Papers, University of Arizona, Special Collections; azu-ms293-b1-f12. Note on terminology: many court records refer to Harrison and Austin as Mojave-Apache, while later records identify them as Yavapai.

Flake, Elder of the Church of Jesus Christ of the Later-Day Saints at the Navajo-Zuni Mission in Gallup, New Mexico, reveled in Udall's resolve. He wrote, "I only wish all our public servants, had the same good wholesome interest in the Indians. I'm sure tho [sic] that a few can make a decided ripple, that will eventually grown into a tidal wave. We can see the influence of the few who know what they are about, gradually swaying the public opinion."[265] Kimball and Flake's expression of appreciation, as well as their acknowledgment of the importance of suffrage, reveals the impact Indigenous electorates would make—both directly and indirectly—in reshaping the sociopolitical landscape of Arizona.

Leaders in academia also embraced Udall's decision as a correct reversal of misguided discrimination. Professor N.D. Houghton expressed his gratitude to Udall, stating, "Needless to say, I am please" with your "opinion in the case of *Harrison and Austin v. Laveen*." Indeed, the majority opinion in *Porter v. Hall* was blatantly "wrong." He goes on to affirm, [Your] "opinion," on the other hand, "is most effectively and excellently done," and "I am appreciative of your generous reference to one of my articles in the course of your opinion."[266] Professor of Law at the University of Arizona, C. Smith, concurred with Houghton, declaring his satisfaction in the fact that Udall "revisited the *Porter* case." Certainly, he continued, "it has always seemed 'far-fetched' to say an Indian who is intelligent, educated, owns, property, pays taxes, and lives off the reservation and lives like the rest of us is 'under guardianship.'"[267] For these scholars, concerned

---

[265] Silas Eugene Flake to Judge Levi Stewart Udall "Church of Jesus Christ of the Later-Day Saints, July 29, 1948. Levi Stewart Udall Papers, University of Arizona, Special Collections; azu-ms293-b1-f12.

[266] Houghton to Udall July 21, 1948. "University of Arizona, Tucson: College of Liberal Arts" Levi Stewart Udall Papers, University of Arizona, Special Collections; azu-ms293-b1-f12.

[267] C. Smith to Levi Udall July 29, 1948. "University of Arizona, Tucson: College of Law" Levi Stewart Udall Papers, University of Arizona, Special Collections; azu-ms293-b1-f12C. May refer to Chuck or Chaz but is unfortunately indecipherable in the text.

with the legalities of Indigenous suffrage and status, *Porter* represented the paradoxical inadequacies of the, often flawed and exclusionary, American legal system. Their admiration for Udall stemmed from a stern belief that the twenty-year-old *Porter* reinforced the disenfranchisement of Arizona's Indigenous citizens and should have, therefore, never existed.

Fellow legal professionals applauded Udall for adjudicating on behalf of Indigenous peoples across Arizona. Famed attorney-at-law Felix Cohen commended Udall's opinion:

> I hope you will not consider it a breach of the ethics of the profession—my own interest in the case was in no sense a material one—if I write to tell you that I have seldom read an opinion of any court which moved more lucidly or more logically from undeniable premises to inevitable conclusions, and, at the same time, expressed so well the basic sentiments of humanity, without which logic cannot move the judgment of mankind.[268]

Comparably, Superior Court Justice of Gila County, C.C. Faires, wrote, "I wanted you [Udall] to know that I believe it is in the same class of soundness as your train crew opinion, which called for such widespread commendation from members of our profession." Such fervent gratitude from esteemed colleagues, particularly Cohen, not only displays Udall's legal acumen and veracity but also how the boundaries of law can shift in an effort to create a more equitable, all-inclusive American society.

At the same time, however, Udall's monumental judgment faced a barrage of incendiary critiques. Most notably, the ruling called into question whether Indigenous peoples now possessed the right to receive Social Security benefits. A few years before to Harrison and Austin brought suit to Laveen, Ernest Victor, Chairman of the San Carlos Tribal Council, requested Governor Sidney Preston Osborn look into the matter of government aid for elderly American Indians. In response, the Governor contacted Senator Carl Hayden who expressed that "among the forty-eight

---

[268] Letter from Felix Chen to Udall, July 19, 1948. Levi Stewart Udall Papers, University of Arizona, Special Collections; azu-ms293-b1-f12.

states," Arizona alone had "thus far refused to pay old age assistance and other Social Security benefits to Indians because such Indians are not considered . . . to be part of the general population" of Arizona.[269]

The *Harrison* verdict only rekindled and exacerbated existing debates between officials and citizens over Indigenous peoples' eligibility to receive monetary assistance from the state. The newspaper column "The $64 Question" noted that "the recent decision of the Arizona Supreme Court . . . has opened a Pandora['s] box of problems for this state and [its] counties." Indeed, the State Welfare Department "may have to place 10,000 reservation Indians on the social security rolls. Where is that money to come from?"[270] According to the *Arizona Republic*, the state had "based its refusal" of Indigenous suffrage "squarely upon the premise that reservation Indians are wards of the government and under guardianship. Officials of the State Department of Social Security and Welfare expressed apprehension" that the Court's opinion "may have a tremendous effect upon the outcome of the dispute" concerning Indigenous peoples and their entitlement to Social Security.[271] The outcome of the *Harrison* case, therefore, played a central role in not only Indigenous peoples' right to vote but also their ability to receive federal assistance.

In a similar fashion, the *Arizona Daily Star* reported that the lawsuit between Harrison and Laveen represented a larger issue than just suffrage rights. The piece, entitled, "Arizona and the Indian" indicated "the problem on which the court did not rule, but which was placed squarely before the state administration and the legislature . . . is whether or not the present action of the

---

269 Carl Hayden to Sidney P. Osborn, letter, February 1, 1941, RG 1, Office of the Governor, SG 14, Governor Sidney P. Osborn, Arizona State Archives, Phoenix, AZ.

270 "The $64 Question," Levi Steward Udall Papers.

271 Claiborne Nuckolls, "Ruling Ends 20-Year-Old Judgment: Majority Still Barred by Requirements to Register," *Arizona Republic*, July 16, 1948.

Supreme Court will make the 50,000" (estimated) reservation Indians "eligible for state welfare payments such as old-age pensions, aid to dependent children, and aid to the blind."[272] Moreover, it brought to light the fact that there were "about 1255 cases of reservation Indians who [were in] need of benefits under one or another phase of the welfare laws" which had been "processed by the state, but which the state contends should be paid by the Indian service."[273] The article testifies that Arizona officials ignored the plight of over a thousand Indigenous individuals, not unlike Frank Harrison and Harry Austin, striving to make a positive change in their socioeconomic condition. Again, the state refused to recognize reservation Indians as legitimate citizens—despite federal legislation that decreed otherwise—leaving countless elderly unable to collect the benefits they not only needed, but were also legally entitled to. In an astute observation of the situation between Indigenous peoples and the state, the column predicted that "there will be many more cases" resembling *Harrison v. Laveen* in the near future.[274] As this article illustrates, such civil litigation brought against the state may be seen as a microcosm for the extensive patterns of exclusion directed at American Indian communities through unfair and unjust state policies.

Politicians, officials, lawyers, concerned citizens, and many others were also curious whether the Court's verdict would sway an almost identical case of voter discrimination occurring in the neighboring state of New Mexico. The ACLU, for instance, sent word to Richard Harless hoping "that the favorable decision secured" with *Harrison* "will have a similar effect on the proceeding which is pending in the New Mexico courts to secure suffrage for the Indians there."[275]

---

[272] "Arizona and the Indian," *The Arizona Daily Star*, July 17, 1948 Udall Papers.

[273] Ibid.

[274] Ibid.

[275] American Civil Liberties Union to Richard F. Harless, Harless Papers Arizona State University Special Collections, Arizona Collection, July 21, 1948.

The New Mexico Constitution held that reservation Indians were not subject to state taxes and, because of this, had no right to participate in state elections. In essence, the state predicated their argument on "no representation without taxation."[276] In June 1948, WWII veteran Miguel Trujillo—BIA schoolteacher and member of the Isleta Pueblo—elected to contest New Mexico's unjust and exclusionary law. Trujillo believed that as a U.S. citizen and military veteran, he had every right to place a vote in the ballot box. Yet when he went to register the county registrar, Eloy Garley, promptly refused his request. In response, Trujillo sued Garley in New Mexico's federal district court. A three-judge panel in Albuquerque heard *Trujillo v. Garley* and found that the "Indians not taxed" provision of New Mexico's Constitution violated the Fourteenth and Fifteenth Amendments of the United States.[277] Judge Phillips passionately opined:

> Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications to vote must have paid a tax. How you can escape the conclusion that makes a requirement with respect to an Indian as a qualification to exercise the elective franchise and does not make that requirement with respect to the member of any race is beyond me.[278]

Due to the much-publicized *Harrison* case and its similar legal nature, it is likely Judge Udall's decision markedly informed the three New Mexican judges to confess Indigenous peoples are no different than any other U.S. citizen and, therefore, should be granted the same rights and privileges as such.

---

276 Willard Hughes Rollings, "Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965," *Nevada Law Journal* (Volume 5: Issue 1, Article 8, Pp.126-140, 2004), 138.

277 Ibid.

278 Jeanette Wolfley, "Jim Crow, Indian Style: The Disenfranchisement of Native Americans," *American Indian Law Review* (Volume 16, Pp.167-202, 1991), 185-186.

Shortly following the verdict of *Harrison v. Laveen*, the first American Indians began to vote in Arizona. Amos L. Belone—a 34-year-old Navajo, WW II veteran, and husband and father of five—appeared at the Coconino County registrar's office "after the state Supreme Court granted reservation Indians the right to vote."[279] He was considered the first American Indian in Arizona to register. Yet contrary to the fear that many white officials possessed—apprehensions that Indigenous peoples would gain significant power through suffrage—the *New York Times* reported that although "reservation Indians voted in Arizona's primaries for the first time," they did not do so in "great numbers." In fact, the same source reported that the "registration of Indians" in Arizona did "not exceed 2500."[280] Yet low Indigenous voting turnout may have been indicative of the conflicted context from which many lived, as some Indigenous citizens eschewed the vote in order to promote tribal sovereignty, while others were apathetic to the same process that stripped their property, land, and treated them as inadequate. For many Indigenous people, the American political system was simply not their own. An even more straightforward explanation may lay in the voter restrictions placed upon Arizona's Indigenous voters. Disregarding those stipulations such as proper age, soundness of mind, and no felonies, the demand to read and write in English is what devastated Indigenous peoples' ability to register, as many could only write in their native language.[281]

By the end of 1948, only two states preserved the codified refusal of Indigenous suffrage—Utah and Maine. While Maine nullified Indigenous disenfranchisement in 1954 with its "Suffrage

---

279 "Navajo Veteran Signs As Voter," *The Arizona Republic*, July 17, 1948, Newspapers.com, https://www.newspapers.com/image/117600494/, 11.

280 "Indians Vote for First Time," *New York Times*, September 8, 1948, ProQuest Historical Newspapers: The New York Times, 33.

281 "Arizona and the Indian," *The Arizona Daily Star*, July 17, 1948 Udall papers

for Native Americans Referendum," also known as Proposed Constitutional Amendment No. 2, Utah would continue to deny suffrage until 1957. Akin to the origin story of *Porter* and *Harrison*, Preston Allen, a Ute member of the Uintah Reservation in Duchesne County, attempted to register to vote but county clerk Porter Merrell refused him. Merrell cited a Utah state law that withheld suffrage from Indigenous peoples living on the reservation, as they are not considered state residents. Allen subsequently sued where the Utah Supreme Court ruled in favor of Merrell. Allen appealed to the U.S. Supreme Court, which asked Utah to reconsider their opinion on the matter. Eventually, the Utah legislature rescinded the statute and Indigenous peoples on reservations were granted the right to vote.[282]

Despite the *Harrison* verdict representing a clear victory towards Indigenous enfranchisement in Arizona, American Indians across the country continued to face rigid barriers that impeded their eligibility as voters. Literacy tests, districting plans that diluted Indian votes, unfounded assertions of election fraud on reservations, shifting identification requirements, intimidation tactics, and the lack of language assistance materials underpinned the countless discriminatory practices designed to prevent Indigenous peoples' political participation.[283] In many instances, these exclusionary strategies were part of a larger concerted effort by those in power to retain their racial dominance and protect the status quo.[284] Until the Voting Rights Act of 1965, and the series of amendments that followed, Indigenous communities confronted a long, arduous struggle to obtain equal voting rights. Nevertheless, the success of the *Harrison* verdict created a space from which Indigenous office holding and political participation could grow and

---

[282] Rollings, "Citizenship and Suffrage," 138-139.

[283] McDonald, *American Indians*, xiv.

[284] Robinson, *Native Vote*, 19.

evolve. For the collective American Indian community, possessing the ability to vote remained one of the most important ways of protecting themselves. As Vine Deloria Jr. explains, "The efficacy of law ultimately depends on society's perception of its ability to provide justice."[285] In fact, the ability of Indigenous peoples advancement and security, but also an avenue of procuring particular forms of Indigenous justice and democracy.

Conceivably, the enduring legacy of *Harrison v. Laveen* and its achievement in dissolving Arizona's paternalism over Indigenous peoples rests on the reversal of their status as "persons under guardianship." But Harrison and Austin's case speaks to an even deeper meaning—a fight for American ideals of democracy and an aspiration to belong as Indian citizens in the United States. Aside from establishing the right of Indigenous groups to express a voice in politics and shape future elections, the *Harrison* case reveals how two Indians from Arizona actively challenged state authority, asserted their rights as U.S. citizens, and transformed the lives of Indigenous peoples in Arizona—particularly in regards to receiving governmental benefits in education, health, and social services. Frank Harrison expressed his feeling on the case and ideas of participating in the democratic process during a 2004 interview with the Inter Tribal Council of Arizona: "Well that's one thing we all look for, freedom. We don't think about fighting each other, from now on we know better. Well what I hope for is to help each other and get along."[286] Harrison's sound words reaffirm the importance of democratic principles, persistence of tribal connections, and power of wanting to belong in America.

---

[285] Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), xiii.

[286] Frank Harrison, "The History of Indian Voting in Arizona," (Inter Tribal Council of Arizona DVD, 2004).

Chapter IV: Fighting Wrongs and Restoring Rights: Mid-Twentieth Century Termination Policies and the Struggle for Tribal Recognition in California

In 1906, the United States Indian Office commissioned C.E. Kelsey, a San Jose attorney, to survey and document the living conditions of California's Indigenous population. Kelsey discovered Indians, after being forcefully removed from agriculturally productive territories, were living on desolate lands in distressing conditions. He advised the Commissioner of Indian Affairs to purchase ten-acre tracts of "good quality" land for individual Indian families in neighborhoods of their choosing. The Secretary of the Interior later submitted Kelsey's report to Congress where it found overwhelming approval and led to the Indian Office Appropriation Act of 1906. The Indian Appropriations Act provided $100,000 to the Bureau of Indian Affairs (BIA) to buy suitable parcels of land for those California Indians living in a landless, homeless, or poverty-stricken state. These numerous small Indian reservations or communities were called rancherias, a Spanish term for small Indian settlements. In total, some 54 rancherias, mainly located in Northern and Central California, had been established in the early twentieth century.[287]

By the mid-1940s, Congressional authorities began to question the overall effectiveness of the rancheria system. Government attitudes during this period reflected a desire to break up reservations, favoring a "termination" program with the goals of curtailing Indian services bureaucracy, integrating Indigenous people into mainstream society, and finally severing its obligatory relationship with tribal governments. In 1953, the eighty-third Congress passed House Concurrent Resolution 108 into law, which formally launched the era of termination. This Resolution, coupled with Public Law 280 and other efforts, aimed at enlarging the gap between

---

[287] *Duncan et al., v. Andrus et al.*, U.S. District Court for the Northern District of California, 517 F. Supp. 1 (N.D. Cal. March 22, 1977). Purchased lands were parceled out by the government to individual members of a band. A form of informal allotment with the government holding legal title in trust for Indigenous peoples. More information can be located in the background section of the case.

the federal government and Indian nations placed the realm of authority over Native affairs into the hands of individual states.[288] As a result of such political machinations, large masses of Indigenous peoples were shepherded into urban areas and their trust-status eliminated. The federal government terminated approximately 109 tribes, resulting in a minimum of 1,363,155 acres of homelands lost, and estimated 11,466 individuals directly affected.[289] Through this Act of Congress began a long, complicated, and devastating process of modern Indigenous displacement and cultural annihilation.

Nevertheless, many Native communities continued to assert their legal presence within U.S. borders as federally recognized nations, while others opposed the government to eventually have their tribal status restored—Robinson Rancheria of Lake County California is of the latter. Purchased by the government in 1909, but existing unofficially for generations beforehand, Robinson Rancheria was occupied by a California band of Pomo Indians who had its lands informally assigned to individual families.[290] With the passage of the Rancheria Act of 1958, the Pomo-speaking community quickly became swept up into the whirlwind of California termination. In exchange for terminating their federal benefits and services, the government granted Robinson Rancheria members legal title to individual lands as private property, and guaranteed installment of an up-to-date water and transportation system. The agreement also assured the Bureau of Indian Affairs would host educational programs, perform job trainings, and distribute relocation funds.

---

[288] According to the United States Department of Justice, the passage of Public Law 280 took away the federal government's authority to prosecute Indian Country crimes. Additionally, it authorized the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin to prosecute most crimes that occurred in Indian country.

[289] Troy R. Johnson, *The Occupation of Alcatraz Island: Indian Self-Determination and the Rise of Indian Activism* (Urbana: University of Illinois Press, 1996), 7.

[290] *Mabel Duncan et al. v. The United States,* 597 F.2d 1337 (United States Court of Claims, April 18, 1979).

Verging on duplicitous inaction, however, the government failed to uphold their end of the bargain and fell well short of its promise of inclusion, modernization, and economic prosperity for the rancheria.[291] Facing the brunt of twentieth-century tribal liquidation head-on, Mabel Duncan of Robinson Rancheria stood up and rejected the Secretary of the Interior's negligence in an effort to ensure her reservation received its contractually obligated benefits. In 1977, she successfully filed suit against the Secretary for breaking its pledged, and after several years worth of struggle, she successfully convinced the federal government to have her tribe's status re-recognized as a semi-sovereign Indigenous entity.[292]

Duncan's experience reveals much more than how a small reservation in northern California masterfully employed the American legal system in order to restore their special trust status with the federal government. It is an allegory for the shifting, myopic, and frequently turbulent nature of American imperialism. Steeped in the racial milieu of the time, mid-twentieth century assimilationist agendas permeated policymaker's social, political, and economic consciousness. Complete Indigenous integration through termination, they reasoned, would finally solve the "Indian problem" and ultimately prove beneficial for Indigenous communities. Resembling late nineteenth-century allotment strategies that systematically privatized communal landholdings and gutted tribal sovereignty, termination represented a settler-colonial process designed to satisfy an insatiable desire for more land and total cultural erasure of Indigenous identity.[293]

---

[291] *Duncan et al., v. Andrus et al.*

[292] Ibid.

[293] Roberta Ulrich, *American Indian Nations from Termination to Restoration, 1953-2006* (University of Nebraska Press, 2013), 7.

In an analogous way, America's proclivity for assimilationist partiality and procedure, which was entrenched in the conceptual conditions of settler-colonial societies, became dependent on a logical rationalization of cultural genocide.[294] Congressional artifice of "modernity" and "progress" projected an image of Native advancement through private ownership and a solely American identity. Displaying these "egalitarian credentials" became part of a pattern or process—while the dismantling of Indigenous cultural markers and semi-sovereign rights—wrapped up in the Native elimination dogma eternalized by the state.[295]

Although control over Indigenous lands remained critical for solidifying the power of the United States, at the same time, having semi-sovereign bodies operate within the larger demarcated boundary of the United States sat uneasy with leaders wishing to maintain total authority. But the same legal apparatus that denied, oppressed, and rejected tribal cultures, also became an important tool to chip away at the behemoth of colonial power. With the help of adept attorneys, and through absolute resilience, Duncan repudiated the rising tide of insidious termination submerging her community. This push for termination did not originate wholly from the government, however, as an avalanche of support came from white citizens, developers, city polities, and other outside forces driving Congressional action.

Broadly speaking, however, only a few scholarly studies have critically examined the large-scale impact of termination policies on Indigenous communities. Published in 1986, Donald Fixico's informative survey, *Termination and Relocation: Federal Indian Policy, 1945-1960*, laid the intellectual groundwork from which later historians would build. Focusing heavily upon the

---

294 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (*Journal of Genocidal Research*, vol. 8, issue 4, December 21, 2006), 403.

295 Ibid., 403.

origins of mid-twentieth century tribal liquidation and coerced assimilation, Fixico suggests that termination evolved from the Bureau of Indian Affairs' (BIA) attempts to rekindle older assimilationist strategies of the nineteenth century—allotment to break tribal communities and boarding schools to destroy tribal identity. Couched in the traditional rhetoric of cutting paternal ties and providing more opportunities for Indigenous peoples, Fixico shows how deliberation on termination absolutely engulfed Congressional policies during the 1950s and 1960s. Leaving little room for debate, Fixico carefully reconciles Truman-era politics with the changing social paradigm in postwar America. He delves deep into the republican leadership and assimilationist-led BIA that fomented impetuous decision-making on the congressional floor. This "crucible of proassimilationist ingredients," he argues, dramatically altered the course of federal-Indian law and set the stage for devastating termination and relocation procedures of the mid-twentieth century.[296]

Almost a decade-and-a-half later, Kenneth Philp's *Termination Revisited: American Indians on the Trail to Self-Determination, 1933-1953* reconsiders the context from which termination arose. Written as an apologia, Philp's suggests assimilation policies took shape through a logical sequence of federal-Indian policies and circumstances over the long nineteenth century. He claims termination was largely a social based movement to assimilate Indigenous peoples and finally break the paternal oversight of the United States. Overall, he contends that termination "reflected the conservative and nationalist mood of the Cold War era that resonated with ideologies of individualism and capitalism."[297] Indeed, the years between 1945 and 1949

---

296 Donald Lee Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986)., xiv.

297 Kenneth R. Philp, *Termination Revisited: American Indians on the Trail to Self-Determination, 1933-1953* (University of Nebraska Press, 1999), xii.

"marked a turning point in Indian history comparable to the end of treaty making, land allotment, and tribal organization under the Indian Reorganization Act."[298] At this time, Philip considers the varied responses from Indigenous communities, including those advocating for termination and those vehemently opposing it—most notably the National Congress of American Indians (NCAI), Navajo, and Montana Blackfeet. He presents a detailed and balanced narrative that showcases the conflicting, parallel, and often overlapping opinions on what termination meant for the federal government and Indigenous tribes. Although this sociopolitical phase brought about ethnocide of Native cultures through extreme legislation—against their will, and through one-sided philosophies—Philp notes that termination somewhat predictably spawned a reaction in the form of a sweeping spirit of self-determination and tangible sense of autonomy through supra-tribal organizations epitomized in Red Power.[299]

After some three years, Warren Metcalf's *Termination's Legacy: The Discarded Indians of Utah* set out to do exactly what his title suggests—trace the legacy of termination on Utah's Indigenous peoples in the mid-twentieth century. His interpretation explores the ideological reasoning, as well as situational circumstances, from which termination policies came into fruition. However, he focuses less on the termination's impact on Indigenous communities as a whole, and instead narrows his analysis onto the Utes of the Unitah-Ouray reservation in Utah. Metcalf argues the manifestation of termination policies had more to do with the context of the Cold War and necessity of unity than division among Americans.[300] Instead of social forces moving men and women into certain directions, he insists termination arose not as a logical next step, but from

---

[298] Ibid., 68.

[299] Philip, 2.

[300] R. Warren Metcalf, *Termination's Legacy: The Discarded Indians of Utah* (University of Nebraska Press, 2002), 5.

contingency—termination, as a policy, grew from "unplanned, unexpected, and even irrational elements of causation," and a "rational evolution of federal Indian policy."[301] A subtext to his speculation laid in the religious context of Mormonism that permeated Utah's sociopolitical realm, and which heavily influenced mainstream perspectives and opinions on Indian status. In Mormonism, Native peoples are the fallen and degraded descendants of enlightened ancient Americans. Metcalf cites Arthur V. Watkins, as many do, as Utah's primary architect of termination who swayed popular opinions over Indigenous identity and their connection to the government. But as Metcalf sagaciously indicates, termination—as a matter of policy—emerged as one of the most divisive episodes in federal-Indian history.[302]

Termination's controversial mid-twentieth century inception coincided with two major national currents: postwar political posturing and organized social reform movements. Sparking more conflict than compromise, it disengaged with the cultural pluralism of the Roosevelt-Collier era and Indian Reorganization Act (IRA) and highlighted President Harry Truman's embrace of integration and federal retrenchment.[303] It became a battle of ideologies at varying levels of government and among inter-and intra-tribal communities. Indians and non-Indians alike found common ground on ending government paternalism over tribal affairs, yet broke sharply over the methods and objectives of federal withdrawal and guarantees of Indigenous welfare. Without a clear definition or plan of execution, termination—at its most basic level—meant different things to different people.[304]

---

[301] Ibid., 10.

[302] Metcalf, *Termination's Legacy*, 2.

[303] Ulrich, *American Indian Nations*, 7.

[304] Philip, *Termination Revisited*, 32.

But as these scholars so shrewdly expose, termination's unequivocal legacy—though brief, inconsistent, and contested until its reversal—underlies an abysmal truth; United States history is one of settler-colonial impositions, which sought to decimate Indigenous autonomy and identity through weaponzied legislation, masqueraded in rhetoric of freedom and modernity. Deserving additional exploration, however, are the stories of fear, pain, and strength that humanize the Indigenous individuals and communities who mobilized against such surging mid-twentieth century assimilationist policies. The American legal system became a prudent and potent channel to voice civil discord and, if successful, repeal or nullify wrongful laws in the name of Indigenous justice. Duncan's battle for her tribe's legal presence within the nation affirms this fact. Her case carried immeasurable weight because the outcome would restore both a tangible and abstract status of belonging as dual citizens of both American and Native nations.

By 1950, the Truman administration drew no clear consensus on how or why termination policies should be implemented. Missing the chance to elect a Native professional to head the BIA, the President replaced commissioner William A. Brophy with assimilationist-minded, and termination sympathizer, Dillon S. Myer.[305] Although Myer had little experience in the realm of federal-Indian politics, he possessed a clear idea of how to reorganize the Indian affairs administration with a goal of swift Indigenous assimilation. Shortly after accepting the position, he began removing seasoned personnel at the BIA, including those who held long track records of dealing with the diverse Indigenous populace such as Associate Commissioner Zimmerman. He later attacked Indigenous peoples' constitutional right to independent counsel under a guise of

[305] From 1942 to 1946, Dillion S. Myer oversaw the War Relocation Authority (WRA), the government agency in charge of removing and resettling Japanese Americans during the Second World War.

"protection" from unethical lawyers. In reality, he tried to make it more difficult for tribes to contest the government, tribal claims, and his questionable decisions.[306] Myer's efforts crystalized in myriad withdrawal programs meant to eliminate tribes who he believed were shrouded in federal paternalism. However, he found obstacles at every turn because IRA charters empowered tribes with certain rights and privileges that prevented dispossession of property or trust termination without specific acts of congress.[307] Over the course of Myer's stint as commissioner, a persistent level of discord characterized termination discourse and polarized its supporters and critics.

For non-Indian proponents deeply entrenched in the termination debate, dissolving reservations appeared to be the next logical step for Indigenous communities that no longer needed, wanted, or benefitted from a complicated federal relationship. Eliminating the federal-Indian trust status, some insisted, would break up the remaining tribal structures, beliefs, cultures, and religious practices that hampered successful incorporation and assimilation into mainstream American society.[308] Officials such as staunch termination advocate Senator Arthur V. Watkins of Utah, thought it was America's duty, as well as the only democratic recourse, to cut ties with its Indigenous counterparts. Watkins vehemently proclaimed "freeing Indians" was a necessary and just action. As head of the Senate Subcommittee on Indian Affairs, he "constantly talked of, 'taking off the shackles' and making 'free men' of the Indians."[309] In an article exuding ethnocentric prose, he pleaded his case for the end of federal supervision, claiming the "matter of freeing the Indians

---

306 Philp, *Termination*, 79, 107.

307 Ibid., 154, 160.

308 Johnson, *The Occupation* 6.

309 Wilcomb E. Washburn, *Red Man's Land White Man's Law: The Past and Present Status of the American Indian, 2nd ed*. (Norman: University of Oklahoma Press, 1995), 91. See also R. Warren Metcalf's *Termination's Legacy: The Discarded Indians of Utah*, University of Nebraska Press, 2002), 3-6.

from wardship status is not rightfully a subject to debate in academic fashion, with facts marshalled here and there to be maneuvered and counter-manuevered in a vast battle of words and ideas," but rather as a "universal truth, to which all men subscribe."[310] Apparently for Watkins, intellectual discussions concerning termination were wholly unnecessary—there was no need to explore the vast lexicon associated with cultural liquidation because Indigenous peoples were already bound by fate to be absorbed into the dominant society.

However, Watkins' religious background stained his worldview of North America's Indigenous peoples. Race, as it turns out, powerfully swayed Watkins perspective on Indigenous peoples and their place within U.S. society. As a devout Mormon, he followed the Latter-Day Saints' belief that Lamanites (Indians) and Nephites (non-Indians) both carried noble or "chosen" ancestry. Despite Lamanites being part of a chosen people, their unrighteous past evoked generational misery and maltreatment. Only after assimilating into the dominant society and becoming neophytes of the "true faith" can Lamanites shed the pathos of previous transgressions and "blossom like a rose."[311] Watkins references this assimilationist disposition when he argued that termination would propel Indians into levels of equal opportunity and freedom never before seen—termination was actually an "Indian freedom program."[312] His persistent assaults on tribal sovereignty and calculated assimilationist rhetoric shaped Congressional debates on the issue of severing federal-trust relationships. He greatly persuaded representatives to lean towards top-level

---

[310] Arthur V. Watkins, "Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person," *The Annals of the American Academy of Political and Social Science*, vol. 311, (May, 1957), 47.

[311] Thomas W. Cowger, *The National Congress of American Indians: The Founding Years* (University of Nebraska Press, 1999), 106-107.

[312] Watkins, "Termination of Federal Supervision," 47-55.

termination policies and became the quintessential reflection of mid-twentieth century, racially-driven legislation that called for the forced incorporation of Native peoples.[313]

At the same time, supporters of termination policies had hoped nullifying tribal associations and relocating Native peoples into seemingly thriving urban centers would subsequently equip them with an array of socioeconomic opportunities and advantages not available on the reservation. This drive towards ending Indian "segregation" and endowing all tribal communities with a sense of equal footing, some believed, would help them participate in a thriving market-capitalist economy. Given the Cold War sociopolitical atmosphere, termination also offered an avenue to escape federal supervision and expose the conservative and nationalist attitude that emphasized individualism and capitalism—Americanism.[314] Native communities became engulfed in the context of "incorporation" underpinning social justice reform movements of the time. Unfortunately, many of these proponents of federal withdrawal failed to see the nuances of the Indigenous plight versus the racial segregation plaguing people of color.[315]

Ignoring past treaty obligations and rationales for existing federal services, some advocates of termination believed that relinquishing federal commitments to reservations would notably lessen their financial burden upon the nation. Economic concerns surrounding Indigenous reservations stood as one of the government's chief justification for relocation and termination. According to the Department of Interior, practically $40 million was spent annually on the BIA

---

313 Ulrich, *American Indian Nations*, 29, 120-121.

314 Philp, *Termination*, xii.

315 Charles F. Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (W.W. Norton & Company, New York, 2005), 129-132. Wilkinson notes Vine Deloria, quoting, "In the minds of most people in 1963, legal equality and cultural conformity were identical." He also delves into the black populaces desire to eliminate segregation, while Indigenous peoples wished to reverse forced assimilation.

during the 1940s.[316] If projected expenditures for the following years were equal or greater, terminating federal responsibility for Natives across the continental U.S. would, in fact, save a substantial amount of money. And because tribal communities were exempt from particular federal excises, the government saw termination, relocation, and expected assimilation as a means to fully integrate Indigenous groups into the broader tax-paying system.[317] In fact, termination was seen as a pragmatic endeavor for states and counties to get Indian land on their tax rolls. In 1947, counties in Oregon, Arizona, Montana, Utah, California, and other western states organized to try and end tax exemptions on Indigenous lands. In the 1950s, sixteen states formed the Governors Interstate Council on Indian Affairs, which declared brining "an early end to federal warship" as one of its essential goals.[318]

While much of the financial aspect remained at the heart of contention, part of the incentive to liquidate reservations lay with the chronic mismanagement and alleged corruption of the BIA. The roots of such inefficiencies are articulated as early as an 1878 *New York Times* article that accused the BIA of wrong doing, arguing, "The condition of the Indian service is simply shameful . . . it now appears that a ring has long existed in the Indian Bureau at Washington for the express purpose of covering up these frauds and facilitating others."[319] Over a century later, similar claims were lodged against the government agency. A 1992 report from a House committee found "an appalling array of management and accountability failures" and a "dismal history of inaction and

---

316 "Appropriations for Bureau of Indian Affairs, 1933-1945 Inclusive, From Treasury Funds and Tribal Funds," http://www.doi.gov/ost/tribal_doc_archive/upload/T-0283.pdf.

317 The complexity of the American tax system regarding Indigenous peoples differs by tribe and treaty. However, as citizens, Native peoples pay federal income tax, state sales tax, and off-reservation duties. That said, the semi-sovereign entity recognized as a tribe or Indian community does earn certain tax immunities.

318 Ulrich, *American Indian* Nations, 13.

319 "A Great Official Scandal," *New York Times*, 8 January 1878, 4.

incompetence" at the BIA.[320] As a result of the BIA's consistent inability to function adequately and demonstrations of spurious actions compelled many to reconsider the value of such an organization, as well as the institutions it supposedly controlled. It also cultivated a palpable sense of distrust with Indigenous communities, as the entity that supposedly safeguarded their best interests was fraught with horrendous allegations. This led to conflicts and unease on reservations between BIA officials and Native peoples. The BIA, a supposed salient matrix trusted to expertly manage Indigenous livelihoods and growth, often reflected a major bureaucratic misstep that fostered distrust among those it served.

To some Alaskan Indians, Mescalero Apaches, Paiutes, and Blackfeet, the initial understanding of termination appeared to fulfill a guarantee of tribal self-rule first introduced by the IRA. The Navajo similarly saw termination as a chance to rid themselves of unpopular New Deal policies that community members found ineffective or obscene. While still others in California and Oklahoma invited the chance to disrupt federal wardship, which plagued their lives and subjected them to BIA decisions on spending, education, health, land, and housing.[321] Although holding communal lands in federal trust protected Indigenous groups, it concurrently shackled tribes who wished to sell off parcels and use the capital for investing and development.[322] Fundamentally, non-traditionalists loathed being under the thumb of the BIA and wanted respite from the relentless federal supervision besieged their daily lives. In the 1940s, outmoded policies such as alcohol restriction and, in some states and anti-miscegenation laws assailed any semblance

---

320 "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," House Report 102-499, April 22,1992, http://www.justice.gov/jmd/ls/legislative_histories/pl103-412/houserept-102-499-1992.pdf.

321 Philp, *Termination*, xi.

322 Fixico, *Termination*, 98.

of Indigenous freedoms.[323] As seen with the case of *Harrison v. Laveen*, some states also refused the right to vote. Termination, therefore, may be the remedy to finally solve the woes on the reservation. Although ambiguous at best, termination may have seemed like a blessing to finally draw the curtains on a wretched federal-ward relationship.

Leaders of the Mission Indian Federation (MIF) in California also fell into the terminationists' ideological camp. Adam Castillo, MIF President, considered tribal restructuring under the IRA inadequately met the needs of Indigenous communities with less than two hundred members. Furthermore, he believed that termination introduced a special chance for claims settlements and per capita distributions of tribal assets once termination wrestled power away from the government.[324] Non-Indian counselor to the MIF, Purl Willis, likewise championed federal withdrawal, suggesting the MIF longed for "immediate freedom from federal authority and funds." According to Willis, tribes must break free from former Indian commissioner John Collier's "conspiracy to communize America" as the contemporary "voice of Russian communism."[325] Riddled with an irrational fear of Soviet intervention, Willis' hyperbolic battle cry against communism also hints at the general public's vision of Native lifestyles. During the Cold War, Indian reservation's communal culture loomed incompatible with the individualism so inextricably tied to American capitalism.[326]

---

[323] Ulrich, *American Indian Nations*, 6.

[324] Philp, *Termination*, 156, 171.

[325] Ulrich, *American Indian Nations*, 126.

[326] Daniel M. Cobb, *Native Activism in Cold War America: The Struggle for Sovereignty* (University Press of Kansas, Lawrence KS, 2008), 13. Cobb points to the era's widespread ideology of reservations perpetrating communist activity, and how politicians and others worked tirelessly to rid themselves of Indians' anti-modern ways—a capitalist economic system of "prosperity" and "progress."

Critics of termination responded with less optimism and more suspicion of terminationists' motives and objectives. Former Indian Commissioner John Collier suggested that Myer and Watkins failed to engage with the far-reaching and special relationship tribes had with the U.S. government. As the chief architect of the IRA, Collier understood the issue of termination as far more philosophical than practical. Liquidating tribes ignored the underlying bilateralism that existed between sovereign entities. This bilateralism "implied mutual consent in policy formulation," and ending government obligations to a tribe requires both parties to reach an agreement.[327] To Collier, termination, or more specifically the federal government's denial of Native people to exist as functioning, independent, and diverse societies, represented the primary "lethal tool of the white man against the Indian."[328] Indirectly, he demonstrated the cultural expunging of Indigenous tribes was a jingoistic endeavor to enhance federal power: "Destroying the tribal and community organizations of the Indians, driving their religions into hiding, and shattering or disorientating their family life—in other words atomizing them—necessitated an intense and very complicated development of dictatorial and bureaucratic controls."[329] In other words, because Native ways did not perfectly fit the ideal American scheme, terminationists envisioned liquidation and assimilation to only means to rectify the situation and preserve the prevailing cultural hierarchy.

Fellow termination dissident and steadfast tribal attorney, Felix Cohen, illustrated an ideological stance akin to Collier's. In his essay entitled "Americanizing the White Man," Cohen attempted to promote a deeper understanding of cultural pluralism to help bridge the gap between

---

[327] Metcalf, 7.

[328] John Collier, "United States Indian Administration as a Laboratory of Ethnic Relations" (*Social Research* Vol. 12, No. 3 (September, 1945), 270.

[329] Ibid., 272.

Indigenous-Anglo worldviews. Underscoring the wealth of untapped Indigenous wisdom still in existence, he argues that until the "last golden grain of knowledge" is gathered "from the harvest of Indian summer," it is best to stop efforts at "Americanizing the Indian."[330] He believed Native groups deserved increased autonomy from the paternal bonds of federal oversight—particularly the explicit incompetence of BIA officials. Yet, in contrast to those promoting termination, he believed the only way to improve circumstances was to place Native people in prominent positions of authority at the BIA. Doing so would, in effect, open a clear lane from which self-determination could develop.[331] For Cohen, termination policies endured because of a profound disconnect between ideas on Indigenous cultural adaption (acculturation) and federal conceptions of "saving" (assimilating) the Indian. Moreover, the flurry of coercive assimilation tactics had been long tainted by a palpable, ethnic-centered sense of "Anglo-Saxon pride," which called for the destruction of a culture perceived different than its own.[332]

Acknowledging the national trend of forced termination permeating the country, the National Congress of American Indians (NCAI) orchestrated an unprecedented defense of Indigenous welfare and identity during the 1940s and 1950s. From its onset, termination erupted as a multifaceted and complex issue within the NCAI and never resulted in a clear-cut decision whether to accept or reject the intended legislation. Initially, more acculturated leaders agreed that assimilation and increased access to equal opportunities benefitted Indians, but they were concerned with how the process would unfold.[333] NCAI President and Oklahoma Supreme Court

---

330 Felix S. Cohen, "Americanizing the White Man" (*The American Scholar* Vol. 21, No. 2: 177-91, Spring 1952), 190.

331 Metcalf, 7-8.

332 Cohen, "Americanizing," 177.

333 Cowger, *The National Congress*, 101-102.

Justice, Napoleon Bonaparte Johnson, for instance, supported a methodical federal withdrawal program that emphasized full integration into the dominant social strata—but on a volunteer basis. He even endorsed Myer's assimilationist approach of self-determination.[334] Similarly, NCAI executive director Heather Peterson apprehensively approved of termination on a volunteer basis in exchange for a federal guarantee of greater educational opportunities, health services, and professional training prior to tribal liquidation.[335] Other NCAI leaders were less willing to accept even gradual termination for fear it would leave tribes vulnerable to state power, especially regarding land and taxation. Apart from this, the dreaded unintended consequences from any paternalistic legislation compounded existing problems of reaching a unified front within the NCAI. Nonetheless, the NCAI continued to represent a legal mechanism that surpassed IRA tribal councils and allowed intertribal networking across the country[336]

Despite the articulate rebuttals from termination opponents, any vestige of IRA support had been virtually abandoned following Dwight D. Eisenhower's election as president in 1953. Drawing conclusions from the 1949 Hoover Commission recommendation of total integration, the new federal policy directed at Indigenous peoples called for "termination." Because the Hoover report alleged termination would serve the interest of each participant involved—Indigenous communities and the federal government—Congressional leaders moved to eliminate the government's longstanding trust relationship with its tribal citizens. Unanimously adopting House Concurrent Resolution No. 108 (HCR 108), Congress proclaimed an end to tribal benefits and

---

[334] Ibid., 102.

[335] Ibid., 102.

[336] Philp, *Termination*, xiii.

services, dissolved tribal governments, and mandated each tribe allocate land and property to its members:[337]

> It is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians.[338]

In conjunction with HCR 108, Congress instituted Public Law 83-280 (P.L.280) with the goal of reducing its financial commitment to tribes still in trust. The law bestowed Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, with jurisdictional rights over Indian reservations, and permitted state officials to legally enter reservations in order to arrest and later prosecute tribal members in state courts. Accordingly, the government relieved the burden of ensuring federal protections and upholding criminal law on those reservations.[339] Yet it also created major problems for states that were woefully unprepared for the influx of responsibility. These state governments often lacked the resolve, knowledge, and resources required for suitable handling of Indian issues. Placing Indians in the lap of the state, the law also created new and confusing jurisdictional logistics Native peoples now needed to navigate.[340]

---

337 Stephen L. Pevar, *The Rights of Indians and Tribes* (Oxford University Press, 2012), 11-12.

338 Charles J. Kappler, "U.S. House of Representatives Resolution 108, 83rd Congress, 1953" Indian Affairs: Laws and Treaties (U.S. Statutes at Large, 67: B132.) https://dc.library.okstate.edu/digital/collection/kapplers. The terminology used actually did not contain any reference to "termination." That being said, the government also planned to terminate tribes in Montana, Oregon, Wisconsin, Kansas, Nebraska, and North Dakota.

339 Pevar, *The Rights of Indians*, 12.

340 Samuel H. Herley, "*The Coming Tide: Viewpoints on the Formation of U.S. Federal Indian Termination Policy, 1945-1954*," (University of Nebraska at Lincoln, Department of History), 8 https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1029&context=historydiss.

In the decade leading to HCR 108, the BIA devised a series of plans to dissolve tribal status and sell off Indigenous lands in California. The first came attached to a 1947 bill transferring the charge of Indian responsibility to the state. California's political elites, however, were not keen on supplanting federal authority over its Indian populace. Earlier that year, the California State Assembly adopted a resolution encouraging the state's Indian population to be freed from the "virtual political and economic slavery in which vast numbers of them" were then held. It also requested communal land holdings parceled out and sold, allocating the returns to individual Indians.[341] This plan harkens back to the allotment stratagy so heavily utilized in the late nineteenth century to privatize Indigenous lands, rupture tribal connections, and impel assimilation. While the Assembly's political maneuvering found support from some state officials, particularly those who backed termination under the pretext of "free the Indians" sentiment that swept the country, Indians receiving federal guardianship generally rejected the idea. Ultimately the BIA's plan to substitute state power over tribal affairs failed to garner the endorsement needed to fully materialize.[342]

Two years later the BIA adopted a similar plan to thrust termination agendas onto California Indians. It called for the contracting out of Indigenous healthcare, welfare, law enforcement, and road maintenance to corresponding state authorities. The proposal also sketched out new regulations for tribal timberlands, an overhaul of the existing transportation systems, and completion of ongoing water projects. If so enacted, California's Indigenous peoples would

---

[341] Joint Resolution 7, California State Assembly, read in the United States Senate, February 19, 1947, Congressional Record 93, pt. 1, 1156.

[342] Ulrich, *American Indian Nations*, 112-114.

supplant one political entity for another, and not gain much, if any, liberty in the process. But like its predecessor, the plan did not curry much favor with the state's Indigenous population.[343]

Over time, the government made repeated and concerted efforts to shift obligations of California's Indians over to the state and terminate its federal-trust relationship. These waves of termination began to shape legislative ideas at the local, regional, and state level. By 1952, the Commissioner of Indian Affairs, Dillon S. Myer, ended Indian boarding school admissions of California Natives and pushed for the immediate enrollment of Indigenous students into public schools. This despite the fact that most Indigenous children at this period already attended public schools under contacts between the BIA and various school districts.[344] The same year, Myer spearheaded legislation that withdrew federal supervision and trust responsibility over California tribes. The bill, S.R. 3005, made it Congressional policy to immediately cease federal recognition of, and services for, California's Indigenous peoples.[345] Rather than gradual indoctrination and assimilation into mainstream American culture, Myer's withdrawal program introduced a sudden and violent erasure of Indigenous identity for California Indians.

Nevertheless, the majority of individuals living on Californian rancherias, public domain allotments, and reservations objected to Myer's tribal purge. The commissioner faced serious opposition from the Indians of California Inc., the NCAI, and certain state senators. Admittedly he persisted, continuing to push for federal withdrawal without the consent of tribes. But without tribal approval, his programs were typically dead on arrival. Spawning more quarrels than results,

---

[343] Ibid., 113.

[344] Dillon S. Myer, memo to area directors, superintendents, school super-intendants, and principals, June 17, 1952, folder Indian Bureau, July 1, 1951 to June 30, 1952, Box 4, Correspondence Misc. and Misc. Washington, 1951-52, PAO Classified files, area director correspondence and reports, National Archives, Seattle.

[345] Philp, *Termination*, 161.

and facing a barrage of criticism from all sides, Myer alienated most of his high-ranking government allies. After years of heavy scrutiny, he became a liability for a growing bipartisan Congress moving towards a different approach on Indian affairs. Following President Eisenhower's election, Myer was asked to resign.[346]

But Myer's goal of ending federal oversight in California was, at least in part, still realized with the passage of HCR 108 and subsequent state-specific termination bills. The first of California's terminations occurred on March 26, 1956 in the form of Public Law 443, which targeted the Koi Nation of the Lower Lake Rancheria. The Lake County Board of Supervisors purchased the tribal lands at a "fair market value" from the Secretary of the Interior in order to construct an airport.[347] Enacted on July 10, 1957, the second termination, Public Law 85-91, displaced the Coyote Valley Band of Pomo Indians and transferred their lands from the Secretary of the Interior to the Secretary of the Army for the appraised amount of $54,000. The Secretary then used the Pomo lands to complete California's Russian River Basin project and build the Coyote Valley Dam.[348] Both of these terminations went into effect the same year they were implemented.[349]

Eschewing long-held federal promises and responsibilities for California's Indigenous population, the government's final termination effort came in sweeping fashion with the California Rancheria Termination Act of 1958. This legislation blanketed 41 of the state's rancherias,

---

346 Metcalf, 81.

347 Oklahoma State University Library. "Indian Affairs: Laws and Treaties. Vol. 6, Laws." digital.library.okstate.edu. Retrieved 21 March 2019, 721. Ensuing funds were later transferred to the Treasury of the United States to be held for tribal disbursement. Also reference Public Law 751 [H. R. 11163)] 70 Stat. 595, which changed the legal characterization of property being described in the termination proceedings, 749.

348 Ibid., 782.

349 Ulrich, *American Indian Nations*, 127.

eliminating federal-trust status and distributing communal lands, water rights, mineral rights, and other assets to individual tribal members. It called for an arrangement between the Indians who held formal or informal assignments on each rancheria, and the Secretary to develop a plan for distribution:

> The Indians . . . or the Secretary of the Interior after consultation with such Indians, shall prepare a plan for distributing to individual Indians the assets of the reservation or rancheria, including the assigned and the unassigned lands, or for selling such assets and distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common.[350]

A key provision in the Act, however, required that the government properly survey rancheria lands, improve their transportation systems, and "install or rehabilitate irrigation, sanitation, and domestic water networks" prior to conveyance.[351] This crucial contingency created a legal space for rebuttal if the government failed in its contractual obligations. Unlike previous termination laws (Pub. L. 443 and Pub. L. 85-91), the California Rancheria Termination Act took years to execute on a tribe-by-tribe basis. And in 1964 an amendment to the Act increased the total of terminated rancherias from 43 to 46, only exacerbating the delicate complexity of the process.

On the ground level, California's rancherias became engulfed in a termination firestorm. Chairman of Table Bluff Rancheria and member of Wiyot Tribe of Loleta, Cheryl Seidner, recounted her story after accepting the government's terms of termination. She believed her tribe had done the right thing, "But they didn't," she explained. According to Seidner, the Wiyot Tribe received "the land deeds, but the government didn't do what it promised: bring the houses up to

---

[350] California Rancheria Termination Act, Pub. L. No. 85-671, § 3,72 Stat. 619, 620 (1958) (as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964).

[351] *Williams v. Gover*, No. 04-17482 (United State Court of Appeals for the Ninth Circuit, 2007). See also *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1574 (Fed. Cir. 1988).

code, build a safe water supply, bring the sewer system in. They never did any of it." Leona Wilkinson, Seidner's sister and member of the Tribal Council, reiterated the sentiment, adding, "The only reason tribal members signed was they were promised so many things."[352] This became a recurrent theme across terminated tribes, and a pattern most Native people were all too familiar with—broken promises.

Mabel Duncan, member of the Robinson Rancheria and the Lake County Indians of California, experienced a similar situation to that of Seidner and Wilkinson. Like so many others, on August 18, 1958, her tribe signed away their communal holdings in exchange for improved living conditions. At the time of termination, Duncan resided between Lakeport and Upper Lake, California, raising four grandchildren with a fifth on the way. According to Stephanie Rodriguez, Human Services Assistant for the Lake County Tribal Health Consortium and Duncan's maternal granddaughter, the rancheria loosely consisted of individuals connected by blood relations. She explains, "There really wasn't any substantial structure to our tribe then . . . no organization, no formal recognition of this small group of Native people by any specific name with any specific leader. The families living in the area were dealt with as individuals. Each family spoke for themselves." During the course of Robinson Rancheria's termination, Rodriguez notes that "Each resident was offered the deed to the land they occupied upon signing an 'agreement.' They all took the deeds and the relocation funds."[353] These agreements guaranteed certain provisions such as road services, water treatment, job training, and relocation funds, which insured the community's expectations to modernize their homelands and secure a better life.

---

[352] Ulrich, *American Indian Nations*, 127.

[353] Stephanie Rodriguez, "Oral History on Mabel Duncan," Interview conducted by Kevin T. Guay on March 27, 2019.

In 1968, disaster struck the Duncan family when two of Mabel's grandchildren became deathly ill after drinking contaminated water. At six years old, Rodriguez became hospitalized for over a month after ingesting harmful bacteria from untreated water. Miraculously, she survived only to hear her cousin, Flint Timmons, had contracted identical ailments from drinking the same disease-ridden water. Timmons thankfully also survived his bout with this unspecified waterborne bacteria.[354] As it turns out, a critical component of the agreement between the Pomo and federal government demanded the Secretary of the Interior and BIA provide clean water for the rancheria's newly parceled-out lands. But several years after official termination and signing away their ancestral lands, Robinson Rancheria had still not received the modernized sanitation and water filtration facilities. Despite health services saving her grandchildren, Duncan could not sit idle as the government's ineptitude threatened the safety of her people.

In 1970, Duncan initiated a long and onerous legal process to rectify her community's dangerous situation. She took her complaint to the local California Indian Legal Services (CILS) office to discuss possible legal avenues of recourse. Guided by the counsel of James F. King Jr. and George Forman, both attorneys at law, she decided to file suit against the Secretary of the Interior for failing to uphold its contractual obligations. Because although the residents of Robinson Rancheria "agreed" to terminate their trust status, they did so with the understanding that, in exchange, the government would establish a safe and modern living environment. In 1971, the plaintiffs filed two separate complaints urging the Secretary of Interior and United States Department of Health, Education, and Welfare (HEW) to construct proper water and sanitation systems on the rancheria.[355] As a result, Hew carried out a test-drilling program to determine

---

354 Rodriguez, "Oral History."

355 *Mabel Duncan et al v. Thomas Kleppe* "Opening Brief," 1.

whether "development of alternative water sources" were viable. The test proved negative and plaintiffs were "given leave to file a First Amendment Complaint," which they did.[356]

On July 26, 1976, King, Duncan, and the CILS submitted an extensive, ninety-one page opening brief to the United States District Court of the Northern District of California. The bedrock of the plaintiff's case, *Mabel Duncan, et al. v. Thomas S. Kleppe*, rested on four fundamental claims for relief: The first claim, and crux of the attorneys' argument seeking "untermination," was based on Section three, part (c) of the 1958 Rancheria Act, which—by its own terms—required the Secretary of the Interior to install or rehabilitate domestic water systems adequate to meet the reasonable needs of Robinson Rancheria residents. The Secretary's incapacity to do so constituted an "*ultra vires*" action, or abuse of discretionary power.[357] In the event the Court refused said claim, the plaintiffs advanced a second point that called for HEW uphold the original agreement and build suitable water and sanitation facilities. The third claim, which reiterated the first, asked the government to nullify the "termination proclamation, restore trust status to the rancheria, treat plaintiffs as unterminated Indians," and "secure adequate sanitation facilities for the rancheria.[358] The fourth, and final claim, called for "vested tax immunity" to rancheria lands, and asked to inhibit the Lake County Tax Collector from imposing taxes on property still in Indian ownership, and cease selling tax-delinquent lands at auction.[359]

In September of 1976, King and Forman filed a supplemental brief that magnified the scope of the plaintiffs' second and third claims. Challenging the veracity of government termination

---

[356] Ibid., 1

[357] Ibid., 3.

[358] Ibid., 3.

[359] Ibid., 4.

policies, the second claim asserted the Secretary of the Interior illegally published and implemented a termination notice for Robinson Rancheria without first ascertaining whether a water agreement had been reached between the Indians and HEW. Complicating matters, HEW did in fact install a sanitation system in 1963-4 under the Act's initial guidelines, but failed to furnish an updated water system. Since the rancheria's indoor plumbing dated back to the 1950s, it lacked the ability to keep up with the community's rising water demands. And because a properly functioning sanitation system requires an adequate water system, King and Forman contended that the Interior and HEW should have contracted terms that included both water and sanitation prior to the rancheria's final termination.[360] Ancillary to the second claim, the third claim for relief alleges the sanitation system HEW erected had caused a back-flowage issue amid heavy rain. The plaintiffs' attorneys maintained, "The Secretary of HEW had a statutory duty" to deliver a "satisfactory waste-disposal system for the rancheria."[361] These arguments culminated in the fact that the BIA had a fiduciary commitment to ensure the people of Robinson Rancheria understood the repercussions of termination in their totality—whether patent or latent.

Quick to respond, United States Attorney, James L. Browning Jr. and Assistant United States Attorney, David E. Golay submitted a succinct, seven-page brief on December 2, 1976. Expeditiously, the attorneys acknowledged the fault of the Interior Department and agreed that the court "may set aside or void the Robinson Rancheria distribution plan" and all other agreements directly related to termination.[362] According to Browning and Golay, restoring the plaintiffs to their trust or guardianship status, or *status quo ante*, presented no problem. For them, the issue lay

---

360 *Mabel Duncan et al v. Thomas Kleppe*, "Supplemental Brief," 2.

361 Ibid., 2-3.

362 *Mabel Duncan et al v. Thomas Kleppe* Defendants' Brief in Response, Browning and Golay, 3.

with how to reverse the damage—revest property deeded to individual distributees and the conveyed water system. Because some individuals may not wish to sell lands to third-party non-Indians, and others already have, they suggested the court "permit" rather than "mandate" the decree of revestment.[363] In regards to the rancheria's water system, or lack thereof, the attorneys asked the court to disavow the plaintiffs second and third claims pursuant to Section 3(c) of the Rancheria Act. Browning and Golay posited that Section 3(c) may only come into play if new termination proceedings commenced, and an appropriate agreement made between all parties concerning "facilities."[364]

Meticulously weighing the legal prospect of each interpretation, United States District Judge, William W. Schwarzer, gave the formal opinion of the court for *Mabel Duncan v. Cecil Andrus* on March 21, 1977.[365] Having found no dispute between sides on the Rancheria Act's Section 3(c) provision that Congress mandated acceptable water facilities as a "*condition precedent* to termination," the judge declared his ruling:

> Judged according to the principles stated above, the Secretary has fallen far short of his obligations in this case. The Indians of the Robinson Rancheria were not represented by counsel in negotiating and approving the termination agreement. There is no evidence that the Secretary ever evaluated or considered the water system; the system today is inadequate. The Secretary has ensured neither fairness of procedure nor fairness of result in the Robinson Rancheria water system; therefore, equitable relief is appropriate."[366] Page 10

---

[363] Ibid., 5. Revest is a transitive verb. To invest/revest (someone) again with power or ownership; reinstate.

[364] Ibid., 7.

[365] For unspecified reasons, Cecil D. Andrus was substituted in place of Thomas S. Kleppe as Secretary of the Interior for the official decision. See Memorandum phone exchange between James F. King, Attorney at Law, and Tony J. Tanke, Law Clerk to Judge Schwarzer. *Duncan v. Andrus* National Archives Kansas City, Missouri.

[366] *Duncan v. Andrus*, "Opinion Order Granting Judgment," 8-10.

With respect to recompense for the plaintiffs, both parties agreed on the core issue at hand: that Robinson Rancheria must be promptly ordered "unterminated," and its distributees, and their families, permitted to collect federal benefits that had been lost through termination.[367] Although this judgment reinstated federal-trust status upon Robinson Rancheria members, the physical, emotional, and financial trauma could not be so easily reversed.

Seeking monetary relief for Robinson Rancheria's irrevocable land loss during the termination ordeal, Duncan and company hoped to settle the matter before the United States Court of Claims. According to King and Forman, the damage caused by invalid termination represented a "breach of trust and rendered the federal government responsible" for pecuniary recovery.[368] Duncan and company presented three main claims for compensation: the first sought $100,000 for each plaintiff for a series of injuries caused by property taxes, expropriation of federal services, partial destruction of Pomo culture, and emotional and physical injury; the second asked for $10,000 based on the deprivation and harm of an absent water and sanitation system; while the third and final claim requested $5,000 for the Interior's negligence in creating a "right-of-way easement" to the community woodlot.[369] The defendants conceded that Robinson Rancheria was unlawfully terminated because the Interior's spurious action in supplying the required water and sanitation systems, but cross-motioned to dismiss the case due to court's lack of jurisdiction and the apparent statute of limitations for the plaintiffs. Denying the defendants claims, the honorable

---

[367] Ibid, 10.

[368] *Duncan v. United States*.

[369] Ibid.

judges Oscar Hirsh Davis, Shiro Kashiwa, and Robert Lowe Kunzig found no jurisdictional limits to bar the plaintiffs' suit and their claim for monetary relief clearly recoverable.[370]

On that premise, the judges struggled with how to award the Pomo for provable damages while, at the same time, navigating the pitfalls of jurisprudence. The opinion of Davis, Kashiwa, and Kunzig, found some of the plaintiffs' damage claims rested on "unusual theories" that were seemingly "nebulous and remote," and due to a lack of precedent in past proceedings, the court found it troublesome to grant compensation based on these facts.[371] The judges continued: "At least two of plaintiffs' bases for claimed damage—injury to Pomo culture and consequential emotional and psychological injuries—go far beyond" any established judicial metric to gauge such violence, and "we cannot find any express or implied congressional authorization for such a recovery. These demands are very close kin to charges of destruction of Indian peoplehood which even the broad rubrics of the Indian Claims Commission Act did not cover."[372] That notwithstanding, the judges did rule in the plaintiffs' favor on three significant accounts; first, the government's mismanagement—either through misfeasance or nonfeasance—of Robinson Rancheria land or physical property; second, the value of federal services unlawfully denied; and finally the money lost from imposed taxes while terminated.[373] Although measuring Pomo peoples' pathos fell outside the purview of the court, Davis, Kashiwa, and Kunzig did recognize the dreadful impact termination wreaked, as well as the government's liability to indemnify for wrongdoing.

---

[370] Ibid.

[371] Ibid.

[372] Ibid.

[373] Ibid.

Mabel Duncan's landmark case of restoration became a catalyst for California's Indigenous peoples to wield increased sovereignty. Intrinsically creating their own self-determination era by employing the American legal system, neighboring tribes also wrestled in U.S. courts to overturn unlawful termination and recoup pecuniary losses. Over the next half-decade, several communities incrementally fought to have their federal-trust status reinstated, including Hopland Rancheria, Table Bluff Rancheria, Big Sandy Rancheria, and Table Mountain Rancheria. Arguably the apex of this re-recognition watershed moment, however, came in with 1983 verdict of *Tillie Hardwick et al v. United States*. Member of the Pinoleville Rancheria, Tillie Hardwick, together with CILS and 17 unlawfully terminated tribes, filed a class action suit that accused the Secretary of the Interior of botching its legal pledge to improve the rancherias.[374] On the testimony of Hardwick and her attorneys, the Secretary's blunder in modernizing facilities, implementing educational trainings, disclosing consequential taxation after termination, and presenting termination as mandatory, drove her and others to seek justice in the courts.[375] The *Hardwick* decision led to the restoration of all 17 tribes presented in the case. The success of this class action suit must pay homage to Duncan's far-reaching victory, as it laid a judicial precedent from which Hardwick and company could build winnable cases and hold the government responsible for its carelessness during the termination fiasco.

Struggling to rectify her tribe's unjust termination, Duncan ran the gamut of legal obstacles while unwittingly transforming the lives of California's Indigenous peoples forever. Rodriguez

---

[374] Tribes associated with the class action suit against the Secretary of the Interior, listed in no particular order: Big Valley Rancheria, Blue Lake Rancheria, Buena Vista Rancheria, Chicken Ranch Rancheria, Cloverdale Rancheria, Elk Valley Rancheria, Greenville Rancheria, Mooretown Rancheria, North Fork Rancheria, Picayune Rancheria, Pinoleville Rancheria, Potter Valley Rancheria, Quartz Valley Rancheria, Redding Rancheria, Redwood Valley Rancheria, Rohnerville Rancheria and Smith River Rancheria.

[375] *Tillie Hardwick et al. v. United States et al.*, United States District Court for the Northern District of California, No. C-79-1710-SW, 1983.

recounts some memories about the woman she so endearing called "Grama," and her David versus Goliath-like fight against the federal government:

> I'm sure she was glad the whole process of the lawsuit was over. Having to attend meetings and go to court. That had to be so hard for her. This I know because going out away from home was a very big deal to her. She would take all morning getting ready. She always had to be freshly bathed, her clothes were starched and ironed, hair neat and always covered with a scarf tied securely under her chin. This was her ritual even for a weekly trip to the grocery store. So I know those other matters were taken very seriously and wore her out both physically and emotionally. But she obviously determined this [restoration] was so important it had to be done. I will say what drove her was pure love, for us. I am positive she had no idea of the impact her pursuit of justice, and ultimate success, would have on the Native population of California.[376]

As Rodriguez so aptly reveals, her Grama's suit emerged not as an ideological challenge to federal authority, but rather as a means to remedy a terrible situation and safeguard her family. During the intense back-and-forth rhetoric in *Duncan v. Andrus*, the defense attorneys once mentioned, almost offhandedly, the Rancheria Act was a "termination" statute "pure and simple."[377] Yet Duncan's case is indicative of the on-ground intricacies that termination's wide-ranging legislation wrought as it trickled down from the Congressional level. No such purity or simplicity existed for the residents of Robinson Rancheria. For them, the termination process became a torrid affair, riddled with hurdles and obstructions that put tribal members at risk and threatened their existence beyond "recognition."

To a large extent, the era of termination paradoxically imbued Indians with a revived sense of community and power. However, the strength that many Native American tribes wield today was in no way inevitable—it was contingent on circumstance, and only developed through

---

[376] Rodriguez, "Oral History."

[377] *Mabel Duncan et al v. Thomas Kleppe*, "Defendants' Brief in Response," Browning and Golay, 4.

sequential decades of hardship and resolution. By employing the holistic legal efforts of Indigenous groups and their allies, a new paradigm of tribal sovereignty unfolded in California. Throughout the remainder of the twentieth century and into the twenty-first, tribes continue to fight an uphill battle to restore status and protect people across the United States. For California Indians, Duncan's case reflected a new age in federal-Indian relations and embodied the self-determination era emerging in the 1970s. But irrefutably, it also demonstrates the resilience and determination of a grandmother who would triumph over anything to save her family.

Passing of heart illness in 1984, Mabel Duncan never witnessed the monumental changes her lawsuit brought to the Native people of California. On the rancheria, Duncan's breakthrough case sparked a renewed urgency to organize an official tribal government and gave birth a now thriving, politically active, and federally recognized Indigenous community—the Robinson Rancheria of Pomo Indians of California. Rodriguez knows that her Grama was happy that she and her cousin survived the painful experience, but also infuriated that it occurred in the first place. Indeed, the broken promises and negligence on behalf of the Secretary of the Interior nearly cost Duncan her grandchildren. The scars and trauma clearly ran deep as Rodriguez remembers her Grama lugging purified drinking water home in one-gallon milk jugs for the rest of her days.[378]

[378] Rodriguez, "Oral History."

Chapter V: The Culvert Case: Saving Salmon and the Power of Treaties

At the turn of the twenty-first century, tribes in the Pacific Northwest stood at a precarious legal crossroad, caught between long-established treaty rights and the unyielding jurisdiction of Washington State. In 1997, the Washington Department of Fish and Wildlife reported that hundreds of culverts located under state roadways had, over a period of time, severely disturbed, degraded, and destroyed fish habitats and populations—primarily salmonid. Washington constructed and managed these culverts as a means to redirect stream and storm runoff through shielded drainage pipes beneath the state's roads and highways.[379] However, most culverts were not built, or even designed, to accommodate the natural migratory patterns of fish, while others had been gradually lifted above streams, or "perched," due to a combination of silt, debris, and decay below the structure's base. Because culverts created impassible barriers for travel, as well as diminished space for spawning, anadromous fish runs in Washington declined at meteoric and consistent rates.[380]

Concerned with the striking decrease in salmon yields and the swelling threat of unsustainability, twenty-one Northwest tribes (hereafter, "the Tribes"), together with the United States, filed a Request for Determination against the state of Washington in 2001.[381] The Request

---

[379] Mason D. Morisset and Carly A. Summers, "Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation," *The Seattle Journal of Environmental Law and Policy*, Vol. 1, (2009), 48.

[380] Ibid. 49. Fish runs refer to the seasonal migratory journey of salmonid from the ocean to streams, to spawning, and back. Anadromous fish typically reside in saltwater until swimming up freshwater streams to spawn. Although the focus of the Tribes' case examines blockage and space, improperly designed or built culverts may also cause excessive water velocities and poor water quality.

[381] "The Tribes:" The Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, Muckleshoot Indian Tribe, and Swinomish Tribal Community. The "culvert case" is an offshoot of *United States v. Washington,* known more commonly as the Boldt decision.

represented an official complaint on behalf of the state's Indigenous community who believed Washington possessed a contractual duty under the Stevens Treaties to maintain fish runs so the Tribes could earn a "modest living."[382] The Tribes hoped that court intervention would spur Washington into retrofitting or removing obstructive culverts and help mitigate the environmental damage done to traditional fishing areas. Washington, in opposition, argued it shouldered an inordinate amount of the blame, and that a greater portion—if not all—of the relief should actually fall upon the federal government for mismanaging its own lands and unfairly burdening the state.[383] Treaties negotiated between the U.S. and various tribes, furthermore, did not specifically require the state to protect animal habitats or ensure a healthy fish supply.[384] For almost two decades, the culvert case meandered its way through the American court system, eventually finding itself under the gavel of the U.S. Supreme Court. After a vigorous legal battle, the Court formally settled the matter in 2018, ruling in favor of the Tribes and ordering Washington to repair or replace state-owned culverts that hindered salmonid migration and that endangered Indigenous livelihoods.[385] In doing so, the Supreme Court upheld the rights articulated in the 1855 treaties and thereby strengthened the tribal economies and cultural traditions of tribes throughout the state.

Washington's unwavering defiance towards its treaty-based responsibilities unveils the relentless and invasive settler-colonial structures still quite present in twenty-first century

---

382 *U.S. v. Washington*: *Subproceeding*: C70-9213, 2. Stevens Treaties will be examined later in this chapter.

383 Ibid., 2. Washington also claimed the federal government should be forced to remove federal-built culverts, and recognize the requirements put upon the state in constructing such culverts.

384 *United States v. Washington*, United States District Court Western District of Washington at Seattle, Mar 29, 2013. No. CV 70-9213.

385 *Washington v. United States*, Supreme Court of the United States No. 17-269, June 11, 2018. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

America. With crooked apathy, the state passively ignored and rejected its own departmental reports, which chronicled the severe detriment that fish-blocking culverts levied onto Northwest tribes, thereby actively engaging in a violent erosion of Indigenous occupancy, possession, and peoplehood.[386] In equal measure, however, the state took issue with what it claimed was the unjust and superseding nature of tribal entities and the federal government—in particular, the legal power of treaties. In various awkward iterations, the state claimed supremacy over tribes and the legal weight of treaties, which both it and the federal government were bound to respect, while it simultaneously claimed victimhood as it buckled under the weight of federal law, treaties, and Native sovereignty. Washington State tried using the law to its advantage but it also ignored the law as an unjust expression of tribal grievances and "federal overreach." Law as an expression of sovereignty and as a mechanism by which a governing body asserts power over a state, region, or community, became enmeshed in treaty rights and competing claims of governance—an unequal clash of manifold sovereignties.[387] As a binding diplomatic covenant between self-governing parties that promised tranquility, accommodations, and commerce in exchange for the relinquishment of certain controls, treaties solidified a legal foundation from which Native peoples

---

[386] Reports by the Washington Department of Fish and Wildlife (1994-97), and Kaczynski and Palmisano's (1993), indicated, "prior to development, within the Washington portion of the Columbia River Basin, an estimated 4550 stream miles were accessible to salmonids. Today in that same area [1990s], primarily due to blockage by dams, only 3791 stream miles remain." Barbara Young Welke, in her work *Law and the Borders of Belonging in the Long Twentieth Century*, describes how the liberal state can use law, constructed in social and cultural ways, to grant or deny personhood and define belonging, 2-3. The settler-state, using the same legal constructions, manipulates personhood to include those that advantage the governing state body. Since 1991, the state did have programs in place to resolve salmon-blocking culverts but actually replaced very few in the decade leading to the subproceeding to *U.S. v. Washingto*n. Holly Armstrong, Governor Christine Gregoire's spokeswoman said, "There's a good culvert program" in place. Gene Johnson, "Longview Daily News" August 23, 2007. Would have taken over one hundred years to replace damaged or obstructing culverts.

[387] Catherine L. Fisk and Robert W. Gordon, '"Law As . . .': Theory and Method in Legal History," *University of California, Irvine Law Review*, vol. 1, issue 3 (2001), 535-538.

affirmed sovereign legitimacy.[388] Refusing to acquiesce, the Tribes employed the rhetoric and meaning of the Sevens Treaties to launch a stalwart defense of their right to subsist, trade, and ultimately belong in Washington. But a critical examination of the culvert case uncovers much more, as it highlights the enduring legacy of treaties as living documents that contain contemporary, although highly disputed, importance.[389]

For a little over a decade, a developing body of scholarship has begun to unravel the far-reaching implications of nineteenth-century treaties on modern Northwest tribes. Leading the charge for a better understanding of these treaties is Alexandra Harmon's carefully crafted compendium, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*. Edited in 2008, Harmon's anthology contains eleven essays by notable historians, legal experts, and anthropologists who cast a wide analytical net over diverse issues such as Indigenous political rights, property, access to resources, and cultural identity in the U.S. and Canada. Centering the intellectual debate on the Stevens, Palmer, and Douglass treaties, the work collectively interrogates the fundamental power struggles between Indigenous and non-Indigenous peoples, as well as the unexpected and ongoing social changes that arose from Northwest treaties' inception.[390] A common thread throughout *The Power of Promises*, for instance, explores the unintended and unexpected consequences of signing treaties to safeguard natural resources such as fish and water. According to ethnohistorian Russel Lawrence Barsh, because Coast Salish leaders bought into the federal legal system that segmented and hardened geopolitically divergent "tribes," customary

---

388 Alexandra Harmon, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*, (Seattle WA: University of Washington Press, 2008), 10-11.

389 Ibid, 16-17.

390 Ibid., 177, 262.

kinship ties and localized social classes slowly broke down.[391] Andrew H. Fisher's article—much like his insightful monograph *Shadow Tribe*—mirrors Barsh, suggesting treaties acted as a tool of colonialism that manifested "legal fictions" and pressured many Native peoples to upend their time-honored property regimes and legal cultures to appease the conquering society.[392]

Breaking from the dimensions set by reservation boundaries, and expanding on the theme of treaty-constructed identities, Fisher's insightful monograph, *Shadow Tribe: The Making of Columbia River Indian Identity* narrows the focus onto Columbia River Indians of the Pacific Northwest. Formed through a multilayered process, either by choice or circumstance, Columbia River Indian identity developed from a dynamic mixture of unrecognized status, perpetuation of cultural values, and refusal to accept colonial designs.[393] Using this "shadow tribe" as a case study, Fisher reveals the active role Indigenous and non-Indigenous peoples played in the ethnogenesis of "Indian" and "tribe" even when that tribe lacked official recognition from the federal government. He then interweaves how salmon etched itself on the heart of contention between official and unofficial tribes, market capitalists, the state, and federal government from the long nineteenth century onward.[394] This erupted into competitive confrontations; while whites assumed Euro-American property rights logically eclipsed their Indigenous counterparts, river Indians and reservation tribes also vied for "legitimate" claim to ancestral fishing areas. Eventually these skirmishes bled into federal court proceedings, where formally recognized tribes typically made

---

391 Ibid., 216.

392 Ibid., 187.

393 Andrew H. Fisher, *Shadow Tribe: The Making of Columbia River Identity*, (Seattle WA: University of Washington Press, 2010), 5-9.

394 Ibid., 156-157.

appreciable, positive, and exclusive inroads into securing salmon access.[395] In the end, Indigenous groups skillfully adapted to changing social conditions—formulating myriad methods to fuse colonial conceptions of "tribe" and "Indian" with their own—as a way to generate disparate, impermanent, and ever-evolving identities in relationship to colonial legal systems that generally disadvantaged them.[396]

Effectively problematizing the incipient nineteenth-century canning industry and subsequent effects on the environment, Lissa K. Wadewitz's *The Nature of Borders: Salmon, Boundaries, and Bandits on the Salish Sea* offers a necessary contribution to the scholarly discussion of fishing culture and ecological history in the Pacific Northwest. Wadewitz's study primarily concerns itself with the imaginary lines Canadians, Americans, and Indigenous groups drew across the Salish Sea—the body of water comprised of the Strait of Juan de Fuca, Georgia Strait, and Puget Sound—while probing how the nature of these political boundaries shaped regional fishing practices over the centuries.[397] She contends that the geographical demarcation of the U.S.-Canadian border came to not only mark national jurisdictions but also foment ethnic, class, and international tensions regarding salmon fishing and commercial canning.[398] Prior to Euro-American infiltration, however, Indigenous groups retained irrefutable control over fishing in the Salish Sea and its adjoining waterways.[399] Although Native peoples had economic motive

---

[395] Ibid., 158-162.

[396] Ibid., 249-250. These identity formations became imperative for tribal fishing rights (officially recognized treaty tribes).

[397] Lissa K. Wadewitz, *The Nature of Borders: Salmon, Boundaries, and Bandits on the Salish Sea*, (Seattle WA: University of Washington Press, 2012), 6.

[398] Ibid., 7.

[399] Ibid., 41-42.

for catching and selling fish, Wadewitz recognizes that salmon had a special place in the Indigenous worldview, including honoring and protecting the fish to guarantee their yearly return.[400] The advent of late nineteenth-century industrial methods of fishing, remapping of Indigenous space through the reservation system, and one-sided treaties made it increasingly difficult for tribes to sustain power.[401]

As these authors so adeptly show, the process and outcome of treaty making was never neat or clean. Unforeseen circumstances and repercussions plagued each of its participants and, almost always, aggressively altered the physical, political, and economic landscape of its reluctant Indigenous contributors. Yet, despite being partisan, unbalanced, damaging to traditional social values and, at times, simply broken or unrecognized, treaties became the primary conduit for Indigenous entrance into the scheme of American legal doctrine.[402] In their own way, Indigenous communities used their treaty-recognized status to maneuverer within the boundaries of U.S. legal geography and challenge the assumed plenary power of the settler-state and nation. Although, as a political tool, treaties attempted to reify the physical and abstract boundaries of colonial rule, Indigenous communities nevertheless labored on and across these fundamentally contingent

---

[400] Ibid., 45.

[401] Wadewitz's work pairs well with Kornel Chang's *Pacific Connections* as immigration study of the Pacific Northwest, as well as Joseph E. Taylor's environmental history of the region, *Making Salmon*. Given the recent nature of the culvert case, few comprehensive studies have examined its historical significance. That said, Mason Morisset and Carly A. Summers' "Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation" do a superb job from a legal standpoint. Unpacking the long and difficult litigation connected to fishing rights and recognized tribes in the Pacific Northwest. See also, Michael C. Blumm and Jane Steadman's "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation" for an initial understanding of the 2007 culvert case.

[402] Morisset and Summers go into the time varied defenses, such as the legal doctrine of laches, which do not apply to tribes. Tribes may make a legal claim at any time, including a reinterpretation of the Stevens Treaties some hundred years after the fact like in *U.S. v. Washington*. 32

boundaries to empower tribal identity, demonstrate political influence, and encourage social autonomy.[403] The culvert case is a twenty-first-century example of this effort.

But the case's contemporaneous significance cannot be fully understood without properly contextualizing the zeitgeist of nineteenth-century Indigenous-U.S. treaty making, which frequently encompassed violent conquest, forced removal, and—paradoxically—pensive guardianship. Fashioned as non-foreign aliens in U.S. policy, Native communities were enveloped by overlapping institutional ventures that sought to demarcate and define America's domestic space, including federal and state jurisdictions, land, and philosophies predicated on republican nationalism.[404] For some time, federal officials had come to observe native polities as residing "within" the U.S.'s territorial imaginary, a status that would legally affirm their relative dominion over the lands they called home. With this in mind, American treaty-making operated as a "lawful" means to absorb Native lands through what some scholars argue was a façade of consent, fostering a harmonious marriage between colonial subjugation and republican idealism.[405] From 1789 to 1871, the U.S. negotiated and ratified over 370 treaties with Indigenous governments, all of which served as the basis for an inherently recognized sovereignty—at least, ostensibly, to the degree

---

403 Kevin Bruyneel, *The Third Space of Sovereignty: The Post-Colonial Politics of U.S.-Indigenous Relations*, (Minneapolis MN: University of Minnesota Press, 2007), 6. Reading the U.S.-Indigenous relationship as binary of Native peoples being "inside or outside is a false choice. Rather than an inclusive or exclusive dilemma for Indigenous groups, they exist on the fringes of colonial power structures. There, in this third space of sovereignty they push back against colonial attempts to solidify contingent boundaries.

404 Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space*, (Oxford University Press, 2009), 38. Although he specifically mentions republicanism, which the founding fathers and most officials—elected or otherwise—did adhere to and often emphasize both during and after the Revolution, it became mixed with philosophies on democracy that extended beyond the scope of "who" should rule. The democratic ideas of "how" leaders rule also permeated American political discourse and impacted the legal relationships that developed between the federal government and myriad recognized tribes.

405 Ibid., 9-10.

that tribes were capable of brokering "consensual" contracts that relinquished vast tracts of land and precious resources.[406]

In the mid-nineteenth century, this modus operandi of American treaty-making besieged Pacific Northwest Indigenous communities. At this time, the region had become a hotbed for white migration, due in large part to the Oregon Land Donation Act of 1850 that stimulated homestead settlement in Oregon Territory.[407] Disregarding the normative federal procedure of removing Native peoples prior to issuance of land titles and settler encroachment, by 1853 the Act had hundreds of people applying for domicile close to greater Puget Sound and immigrant populations swelled to over two thousand.[408] Less than a decade after drawing the British-American boundary line of 1846 (49th Parallel), which separated the competing national projects of the U.S. and Canada, Congress chiseled away Washington Territory from Oregon Territory and positioned Isaac Ingalls Stevens as the territory's first governor and ex-officio superintendent of Indian affairs. The rapid growth of white settlers in the vicinity—comprising of Idaho, western Montana, and Washington State—the need to survey the best lines for roads and railways, and the pressure to install a government to ensure political stability for Anglo expansion, all strongly motivated Stevens to mediate the purchase of Indigenous land holdings and relocate tribal communities without delay.[409]

Between 1854 and 1856, Stevens and handful of consultants gathered in nine councils to negotiate the "peaceful" relinquishment of Indian lands. The result was a number of coercive

---

406 Bruyneel, *The Third Space*, 15.

407 Wadewitz, *The Nature of Borders*, 55.

408 Ibid., 55.

409 Kent Richards, "The Stevens Treaties" *Oregon Historical Quarterly*, vol. 106, No. 3, (Fall, 2005), 345. Wadewitz, 56.

treaties that bullied Native peoples into selling more than sixty-four million acres, transplanted them onto eight reservations stationed along the periphery of Puget Sound, and necessitated they follow all future criterion set forth by U.S. officials.[410] Such obligatory demands highlight the American impulse to open land for white migrants and set sociopolitical boundaries that Indigenous peoples were expected to recognize and respect.[411] Because of the dramatic influx of settlers, their ability to organize quickly, and their predisposition to use lethal force, most Indigenous groups likely saw no form of recourse other than to listen to Stevens and company, trusting they would keep their contractual pledge. That said, several Indigenous leaders chose not to sign treaties, refused to move to reservations, and even joined the 1855-56 Indian war.[412] To further assuage concerns and expedite treaty signings, Stevens also vowed that giving up Native lands did not mean letting go of time-honored fishing grounds, work sites, or other outlets of monetary gain or subsistence.[413] The governor and his advisors concluded ten treaties in total, each containing text practically identical to one another. The Treaty with the Yakamas reflects this fact:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for

---

410 Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities in Puget Sound*, (University of California Press, 2000), 82 and Wadewitz' The Nature of Borders, 56. Stevens originally wanted three reservations but the diversity of tribes and bands did not facilitate such as desire. The reserve system was part of the larger civilizing (assimilation) project of the United States directed at Indigenous peoples. Strongly pressured agricultural practices on and around reservations.

411 Harmon, *Indians in the Making*, 82.

412 Wadewitz, *The Nature of Borders*, 58.

413 Harmon, *Indians in the Making*, 84. According to Harmon, council gathering were not always met with Indigenous hostility. In fact, some groups found the sessions discussing treaty terms reinforced bonds of friendship between powerful representatives.

> curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.[414]

The language of the Steven Treaties therein cemented legal ambiguity on the subject of Indigenous peoples' "right of taking fish at all usual and accustomed places," and would shape courtroom discourse regarding fishing rights for the next century-and-a-half. With striking similarity in rhetoric and corresponding provisions—deviating only in reference to Indigenous lands ceded or reserved—a judicial inquiry determining the meaning of one treaty also had to consider its impact on the other nine.[415] While hoping for a speedy resolution to the Indian situation in Washington Territory, Stevens inadvertently triggered future quarrels between state, federal, and tribal officials over who controlled fishing under the treaties.[416] The implications of these legal ambiguities revealed over time that tribes laid claim to a vast spatial domain of millions of acres beyond the recognized boundaries of their reservations.

With the passage of time, white encroachment on Native lands intensified, testing the limits of Indigenous peoples' patience and faith in the federal government's treaty-bound promises. In 1860, western Washington Indian agent, Michael Simmons, filed a passionate complaint with his superintendent of Indian affairs detailing the absence of supplies and monetary installments owed

---

414 Treaty with the Yakamas, art. Ill, para. 2, 12 Stat. 951, 953 (June 9,1855). See Treaty with Nisquallys (Treaty of Medicine Creek), art. Ill, 10 Stat. 1132,1133 (December 26,1854); Treaty with the Dwámish Indians (Treaty of Point El liott), art.V, 12 Stat. 927,928 (January22,1855) Treaty with the S'Klallams (Treaty of Point No Point), art. IV, 12 Stat. 933, 934 (January 26, 1855); Treaty with the Makah Tribe (Treaty of Neah Bay), art. IV, 12 Stat. 939, 940 (January 31,1855); Treaty with the Walla-Wallas, art. I, 12 Stat. 945,946 (June 9,1855); Treaty with the Nez Perc?s, art. Ill, para. 2, 12 Stat. 957, 958 (June 11,1855); Treaty with the Tribes of Middle Oregon, art. I, para. 3,12 Stat. 963, 964 (June 25,1855); Treaty with the Qui-Nai-Elts (Treaty of Olympia), art. Ill, 12 Stat. 971, 972 (July 1, 1855); Treaty with the Flatheads (Treaty of Hell Gate), art. Ill, para. 2,12 Stat. 975,976 (July 16, 1855). An eleventh Stevens treaty, Treaty with the Blackfoot Indians, 11 Stat. 657 (October 17, 1855) was not a treaty of cession.

415 Harmon, *The Power of Promises*, 9.

416 Fronda Woods, "Who's in Charge of Fishing," *Oregon Historical Quarterly*, (Vol. 106, No. 3, The Isaac I. Stevens and Joel Palmer Treaties, 1855-2005; Fall, 2005), 413.

to the region's Indigenous communities, lamenting, "I am indeed at a loss how to give satisfaction, or even to do common justice to the Indians. The government has violated the treaty by the inadequacy of the amount appropriated that the Indians should take up and defend their rights would be perfectly justifiable."[417] On August 22, 1861 an unidentified republican man from Port Townsend reported a similar grievance to his local newspaper: "Our Indians here are disaffected at the long delay in paying for their lands; the northern Indians are a constant source of fear with our people." While another correspondent rebuked, "The Nez Perces are discontented about the miners coming on to the Reserve to dig for gold, and other Indians are clamorous for the observance of the treaties of 1855."[418] Insufficient federal support and unabated settler incursions caused Indian agents to feel helpless, exposed, and frustrated. Meanwhile, tribes waiting for treaty-guaranteed compensation grew steadily disillusioned as white migrants stormed their communal lands and pilfered precious resources. These mounting tensions generated a palpable sense of anxiety that an imminent Native reprisal would threaten the white populace.[419]

On a macro scale, the post-treaty treatment of Northwest tribes mimicked a national trend in U.S.-Indigenous political relations emerging after the Civil War. During this era the limits of American sovereignty crystallized as it expanded, pulling Indigenous peoples deeper within the physical and conceptual confines of the U.S. without completely integrating them into mainstream

---

[417] M.T. Simmons to Edward Geary, September 9, 1860, MR 9, RG 75, Washington Superintendency of Indian Affairs (WASIA), 1853-1874, University of Washington Library. See also The Edward R. Geary papers, 1840-1978, located at the Oregon Historical Society, Davies Family Research Library, also contain detailed expenditure reports from the Oregon Office of Indian Affairs, corroborating Simmons expression of frustration at the lack of federal accommodations for Indians during this period. As cited by Wadewitz, 60, 193.

[418] "How it is Received," *Washington Standard*, Saturday, August 31, 1861. Column notes public opposition to newly appointed superintendent of Indian affairs in Territory of Washington, B. F. Kendall Esq., and his capacity to effectively handle the growing tensions building in the Northwest.

[419] Article provides sufficient evidence that both whites and Indians possessed anxiety about the situation at hand.

society.[420] Many political leaders surmised that although Indigenous communities became progressively subsumed and domesticated by the "civilized" American state, they also remained in a "savage" condition that prevented adequate reasoning or self-rule.[421] In 1869, for instance, Indian Commissioner Ely S. Parker argued that the U.S. practice of treaty-making "falsely impressed" Indigenous tribes and nations "with the notion of national independence." Furthermore, he expressed how Native peoples were essentially incapable of making treaties "as none of them have an organized government of such strength as would secure a faithful obedience of its people."[422] Undeterred by the veracity of his message, as the Cherokee Nation elegantly belied such a presumption, Parker's words exemplify the shift in direction of U.S. Indian policy—a firm belief that Indigenous nations lacked the capacity to legitimately enter into legal dealings with the U.S. as sovereign political bodies. This turning point also underscores the civilized-savage dualism blanketing American perspectives on Native identity, as Indigenous groups were seen as racially unfit for organized governance and consequently ill-equipped to manage complex political tasks, marking a serious blow to tribal power.[423]

Over the years, these theoretic political conversations surrounding U.S.-Indigenous treaty making morphed into actual congressional policy. On March 3, 1871, Congress adopted an appropriations bill for the civil administration of Indian affairs, which enclosed a deceptively understated yet monumentally impactful rider stipulating:

---

[420] Bruyneel, *The Third Space*, 65.

[421] Ibid., 69.

[422] Ely S. Parker, "Indian Commissioner Parker on the Treaty System," extract from *Annual Report of the Commissioner of Indian Affairs*, December 3 1869. See Bruyneel, *Third Space of Sovereignty*, 68.

[423] Bruyneel, *The Third Space*, 68-69. Bruyneel explores the civilized-savage dichotomy in the context of modern (postcolonial) American expansion.

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*; That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[424]

Thus, with the passing of this provision, Congress officially and systemically ended the treaty-making process between Native peoples and the United States. To be sure, its approval signifies the recognition that Indigenous autonomy no longer fit relative to the "progress" of American political advancement.[425] Moreover, this colonial imposition reinforced the subordinate status of Indigenous people in the eyes of the federal government and opened the door to accelerated assimilation tactics, such as the ruinous allotment policies that began shattering tribal communities sixteen years later.[426] Yet, to another degree, its prudent phrasing also verified the legitimacy of past treaties and political independence of those tribes and nations. The language chosen also constructed a genuine legal space from which said tribes and nations may reinterpret treaties and retort infringements on observed rights—case in point, the right to fish.

Northwest tribes first cut their teeth on the legal meaning of the Stevens Treaties' fishing clause in 1884 when Frank Taylor, a non-Indian land owner living adjacent to the Columbian River, decided to erect a fence around his property, impeding several Yakama fishers from reaching their accustomed fishing ground. In response, the Yakama Nation and federal Indian agent R. H. Milroy, submitted an injunction with the District Court of the Fourth Judicial District of the Territory of Washington to request Taylor remove his fence. To the dismay of the Yakama

---

424 *U.S. Statutes at Large*, 16: 566, excerpted in Bruyneel (emphasis in original).

425 Bruyneel, *The Third Space*, 75. More about the American imaginary and nation building conceptions than about Indian tribes.

426 Ibid., 94. Colonial imposition reified American boundaries of sovereignty but left space for Indigenous challenge against it. Detailed on page xvii.

fishers, the court denied their motion and instead ruled in favor of the defendant's private property rights.[427] Undaunted, the plaintiffs appealed to the Supreme Court of the Territory of Washington to overturn the lower court's decision, which it did. In *United States v. Taylor*, the Court found that the easement condition embedded within the Yakama Treaty protected tribal access to "certain ancient fisheries which had for generations been used as such," and the transfer of land to private-party ownership did not dissolve this reserved right.[428] Although superficially settling the matter on whether a treaty clause surpasses private property rights, the Yakama victory would be short-lived.

Less than a decade later, the Yakama found themselves filing another injunction to protect their right to fish. This time, however, their opponents were the Salmon barons, Lineas and Audubon Winans. The Winans brothers owned a stretch of homestead land on the Washington side of the Columbia River, where they operated a number of high-yielding, state-licensed, river-channel monopolizing fish wheels at customary Yakama, Umatilla, and Nez Perce fishing sites.[429] Because these fish wheels worked so exceedingly well, ensnaring salmon by the ton without the need of human supervision, the Yakama lodged a formal complaint with federal officials about

---

427 Vincent Mulier, "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest," *American Indian Law Review 31*, (no. 1 2006), 44-45.

428 *United States v. Taylor*, 13 P. 333 (Wash. 1887). Once Washington obtained statehood in 1889, Taylor's son built a new fence arguing the new circuit court was not a successor and could not uphold the previous court's injunction. He lost but it showcases the difficulties Native peoples had accessing ancestral fishing locations due to private party interference: *United States v. Taylor*, 44 F. 2, 3 (C.C.S.D. Wash. 1890).

429 Mulier, "Recognizing the Full Scope," 46. Fishing wheels were predominantly used in the late nineteenth and early twentieth centuries. Also know as salmon wheels, these large mechanical contraptions caught masses of fish traveling upstream in a short amount of time. So much fish, in fact, that—in the name of conservation—they were effectively banned in Oregon and Washington by the mid-twentieth century.

their exhausted fish supply.[430] In collaboration with the United States, the tribe sued the Winans operation to enforce the "fishing rights guaranteed to the Indians of the Yakama Nation" and, with hope, stop strategies of exclusion based on "private property," and curb non-Indian overfishing practices.[431] The circuit court, however, rejected the injunction with the reasoning that "Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights" and therefore, "all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations" are the same rights afforded to the general public.[432] In spite of this unsettling verdict, the Yakama petitioned the Supreme Court to reevaluate the subject.

In 1905, the U.S. Supreme Court considered in *United State v. Winans* whether the fish-wheel license issued by Washington State breached the terms of the Stevens Treaties by barring Indigenous access to traditional, off-reservation waters.[433] Justice Joseph McKenna penned the Court's definitive opinion, which reaffirmed the lawfulness of federal concessions made to the Yakama and other tribes reserved through the Treaties.[434] He explained that fishing at accustomed places "was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the

---

[430] David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law*, (University of Oklahoma Press, 2001), 125.

[431] *United States v. Winans*, United States Circuit Court for the District of Washington. 73 F. 72 March 31, 1896.

[432] Ibid.

[433] Morisset and Summers, "Clear Passage," 36.

[434] Mulier, "Recognizing the Full Scope," 50-51.

Indians than the atmosphere they breathed."[435] McKenna also made clear that the burden of preserving Indigenous rights to fish lay not only with the federal government, but its grantees like states and private landowners as well.[436] Put differently, the reserved treaty fishing right affirmed a piscary *profit à prendre*—"the right to go on another's property and take and remove a natural resource."[437] In doing so, the Court concluded that treaty tribe members could now freely pass over private lands, without obstruction, to access accustomed fishing sites for the purpose of taking and curing fish.[438]

But the case also set a precedent in the interpretation and implication of the state's authority to regulate fishing. While the Court endorsed the federal government's power to dictate the extent of a treaty, it also, somewhat ambiguously, confirmed the state's authority to regulate fishing, as long as it remained within the margins of treaty discourse. Justice McKenna opined:

> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.[439]

---

435 *United States v. Winans*, United States Supreme Court.198 U.S. 371 May 15, 1905. McKenna made it clear that fishing was an inherent and natural practice that must be retained despite private complaints or burden upon the state—reserved rights doctrine.

436 Michael C. Blumm and Jane Steadman, "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation," *Lewis and Clark Law School Research Paper Series*, Social Science Research Network Electronic Paper Collection (2009), 13.

437 Ibid., 14.

438 See also the case of *Seufert Brothers Co. v. United States* that extended the geographical scope of the rights recognized in "usual and accustomed" fishing locations to all those "historically" recognized.

439 *United States v. Winans* 198 U.S. 371 (1905).

Even if inadvertently, the decision informed state policy and provided a legal basis for Indigenous exclusion under a guise of "regulation." Many state officials, such as Attorney General Patrick Henry Wilson, were of the mindset that "no Indian treaty interferes with the right of the state to protect game or fish of any kind."[440] Indeed, the Court's observance of the state's power to regulate said rights laid the groundwork for a sixty-year struggle over who was in charge of fishing in Washington: the state, the federal government, or the tribes.

Despite the fact that *Winans* preserved Indigenous fishing rights both legally and theoretically, Northwest tribes continued to face serious opposition in the first half of the twentieth century. As salmon runs declined, due in no small part to non-Indian logging, pollution, water diversion, dams, and the burgeoning commercial canning industry, the state of Washington implemented regional guidelines in the name of conservation. Laws were passed to prohibit fishing gear that encumbered upstream salmon migration and seasonal closures of certain water passages to encourage spawning.[441] In an effort to stimulate revenue and catalog how much gear was strewn across the waters, new state regulations also required commercial fishers to obtain a license to operate.[442] For many non-Indians, the impact of white sports fishing, mechanized trapping, and hydroelectric energy plants, appeared far less damaging compared to Indigenous peoples' treaty-guaranteed exemption of conservation efforts. Traditional fishing practices, including their methods, tools, and locations, came under heavy scrutiny—labeled special treatment and unconstitutional by disgruntled whites—and were used to rationalize the rapid decline in salmon

---

[440] Woods, "Who's in Charge of Fishing," 415.

[441] Ibid., 415. Concerns arose from in the mid-to-late nineteenth century from the gradual decrease in salmon yields and grew exponentially worse as mechanized commercial canning, fish wheels, and general overfishing zapped the natural resource faster than it can replenish itself.

[442] Ibid., 415.

stocks.[443] Although clearly scapegoated in this emerging environmental crisis, Indian fishers also became engrossed in a much larger fight for cultural supremacy in Washington.[444]

In the ensuing decades, non-Indian resentment escalated, leading to a seemingly ceaseless cycle of conflict and litigation. On May 6, 1939, Sampson Tulee was arrested for catching salmon without a state license at Celilo Falls on the Columbia River. Following the same pattern as previous cases brought at the county or state level, the Klickat County jury and Washington Supreme Court found Indians must abide by state fishing laws, upholding Tulee's guilt.[445] He appealed, and in the 1942 case of *Washington v. Tulee* the Supreme Court held that the state of Washington could not force tribal fishers to pay a license fee, but stipulated it *may* "impose on the Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish."[446] Though outwardly a win for Indigenous communities, *Tulee* actually bolstered state control of fishing regulations by suppressing Indigenous peoples' access under the idea of "conservation." Moreover, *Tulee* negatively altered the outcome for treaty-tribes of other ongoing fishing cases, and indirectly sparked the 1960s "Fish Wars" in Washington.[447] Because the State of Washington believed it held unilateral sovereignty over fishing regulation, it led the state to assume it also

---

[443] Ibid., 416. The state largely ignored the human impact on the environment at the time, typically assuming an endless supply the natural resource, salmon. The state also argued that Indians as U.S. citizens should not be afforded any special rights. For the state, Indians should fish "in common" with other citizens and abide by the regulations set forth by their local, regional, and state governments.

[444] In the long process of advancing the "civilized" and liberal American state, Indigenous peoples incrementally fell into a racially subordinate category across the country. Bruyneel, *The Third Space*, 44.

[445] Woods, "Who's in Charge of Fishing," 418.

[446] *Tulee v. Washington* 315 U.S. 681 (1942).

[447] *Makah Indian Tribe v. McCauly*, 39 F. Supp. 75 (W.D. Wash. 1941). Acted in concert with the case of *Washington v. McCoy* that reinforced state authority to regulate fishing, specifically concerning tribal rights.

possessed plenary power over game or fish of any kind, and no treaty could supersede said power. Tribal harvests would remain subject to discriminatory "conservation" regulation until the Court reactively began striking them down in the Puyallup trilogy decisions.[448]

In 1964, the state courts shut down Indigenous fishers' access to the Nisqually River, grossly violating the sixty-year-old precedent of *Winans*. In opposition, tribal members formed the Survival of American Indian Association (SAIA) with the aim of creating social awareness and preserving their treaty-bound right to fish. Defying unfair and unjust state laws directed at Indigenous fishers, the SAIA organized several events of civil disobedience known as "fish-ins" at Frank's Landing on the Nisqually River. Household names like Marlon Brando, Jane Fonda, and Dick Gregory offered support at these fish-ins, which captured the attention of mainstream media and tapped into the collective spirit of civil rights movements occurring across the country.[449]

Despite the materialization of an incipient fishing-rights movement, the state of Washington proceeded to blatantly ignore the treaty protections guaranteed to many Northwest tribes. In 1965, state and local enforcement officials carried out a large-scale raid on Frank's landing, destroying Indian fishing boats, confiscating equipment, slashing nets, attacking men, women, and children, and making multiple arrests.[450] Billy Frank Jr., Nisqually tribal member and prominent activist and leader during the fishing rights struggle, recalled a similar event on

---

[448] Michael C. Blumm and Jane Steadman's "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation," Natural Resource Journal, Issue 49, vol. 653 (2009), 14. The Puyallup cases ruled that the state could only regulate tribal harvests but only for neutral conservation purposes, and only if they do not unjustly single out Indigenous peoples for exclusion.

[449] Paul C. Rosier, *Native American Issues*, (Westport CT: Greedwood Press, 2003), 34.

[450] Troy Johnson et al., *American Indian Activism: Alcatraz to the Longest Walk*, (University of Illinois, 1997), 15.

September 9, 1970: "We had a fish camp under the Puyallup River Bridge near Tacoma. The state of Washington came down on us that day . . . gassed us Indians and threw us all in jail."[451] Likely unknown to fish and game enforcement officers, however, among the bystanders that came to watch the protest take place was U.S. Attorney for the Western District of Washington, Stan Pitkin. Witnessing firsthand the disturbing abuse towards Indian and non-Indian protestors, as well as the duplicitous legal barriers the state erected to stonewall Indigenous peoples' ability to fairly harvest in accustomed fishing sites, Pitkin quickly moved to file *U.S v. Wa*shington—more commonly referred to as the Boldt Decision.[452]

Pretrial and trial proceedings for the first phase of *U.S. v. Washington* lasted approximately three years. Plaintiffs and defendants offered comprehensive evidence on Indigenous cultural traditions, historical territories, fishing practices, treaty interpretations, as well as state regulations, relevant case law, and biological needs of salmon fisheries.[453] On February 12, 1974, after years of deliberation, District Judge for the Western District of Washington, George Hugo Boldt, presented an exhaustive ninety-three page ruling on treaty fishing rights in Washington. In short, he interpreted original treaty language—specifically "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory"—to signify that treaty tribes were entitled to fifty percent of the harvestable salmon

---

451 Billy Frank Jr., "Understanding Tribal Treaty Rights in Western Washington" Northwest Indian Fisheries Commission (NWIFC), https://nwifc.org/w/wp-content/uploads/downloads/2014/10/understanding-treaty-rights-final.pdf (accessed Summer 2019).

452 Frank, "Understanding Tribal Treaty Rights."

453 *United States v. Washington* (Phase I), 384 F. Supp. 312, 334-39, 350-99, 406-08 (W.D. Wash. 1974). See also, Mulier, "Recognizing the Full Scope," 59. Plaintiffs in the case were the Hoh Tribe, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Puyallup Tribe, Quileute Tribe, Skokomish Tribe, Lummi Tribe, Quinault Tribe, Sauk-Suiattl Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit River Tribe, and the Yakama Nation.

and steelhead trout returning to or passing through Northwest treaty tribes' "usual and accustomed" fishing sites.[454] He further determined that tribes were empowered to exercise self-regulation of their own fisheries and contribute to the conservation of salmon resources in concert with the state.[455] However, the issue of habitat destruction and implied responsibility of the state was bifurcated into a future hearing that became a second phase of the case.[456]

In *Phase II*, U.S. District Court Judge William Orrick of the Western District of Washington ruled on whether the state would bear the onus of protecting fish runs. On September 26, 1980, Judge Orrick found the fishing clause guaranteed the Tribes a "right to have the fishery habitat protected from man-made despoliation."[457] He went on: "[The] most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken . . . [and] the paramount purposes of the treaties [were] to reserve to the tribes the right to continue fishing as an economic and cultural way of life."[458] Yet upon appeal, the Ninth Circuit Court departed from Orrick's opinion, finding the allegation of human-made environmental ruination and salmon atrophy against the state was far too vague.[459] Although the Ninth Circuit's verdict *did* reverse Washington's culpability in the degradation of regional fisheries, it *also* stressed that there may

---

454 Stevens Treaties: Medicine Creek Treaty; *U.S. v. Washington I* at 343-346; NWIFC: "The Boldt Decision." Judge Boldt interpreted "in common with" to mean an equal share of harvestable fish.

455 *U.S. v. Washington I* at 340-341. Case went to the Supreme Court in 1979, where the fifty-percent allocation was modified to an ambiguous "moderate standard of living."

456 Morisett and Summers, "Clear Passage," 46.

457 Unit*ed States v. Washington* (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980).

458 Ibid., at 203-205.

459 *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985), see also Morisett and Summers, "Clear Passage," 48. Ninth Circuit specifically stated the District Court's declaratory judgment had been "imprecise in definition and uncertain in dimension." Some legal scholars refer to this case as *Washington Phase III*.

exist an implied habitat servitude for state officials under the fishing clause of the Treaties.[460] Therefore, in order for the United States and Tribes to reach a victorious outcome in litigation, they would have to articulate—unequivocally—the state's role in the environmental deterioration of salmon habitats.[461] Fortunately, the court's purposeful rhetoric created an opportune legal space to hold the state accountable.

By the early 1990s, the Washington State Salmon and Steelhead Stock Inventory (SASSI) identified 135 salmon and steelhead stocks as either extinct, depressed, or in critical condition—less than twenty percent of the historic number.[462] In 1991, the federal government listed seventeen species of Pacific Salmon, including Snake River Sockeye, as endangered or threatened under the Endangered Species Act (ESA).[463] A variety of Washington agencies were mobilized to shed light on the man-made environmental pressures overwhelming the state's salmon reproduction. In 1997, the Washington State Department of Fish and Wildlife (WDFW) and Washington State Department of Transportation (WSDOT) reported some 2,400 "barrier culverts" spread across the state blocked salmon's access to thousands of miles of spawning and rearing habitat.[464] The WDFW listed five common circumstances that result in migration impediments of culverts: excess

---

460 Orrick decided that the Treaties contained an "implied environmental right" to protect fish from human destruction. Morisset and Summers go into depth on this topic in their article, "Clear Passage," 47.

461 Ryan Hickey, "Highway Culverts, Salmon Runs, and the Stevens Treaties: A Century of Litigating Pacific Northwest Tribal Fishing Rights," *Public Land and Resources Law Review*, Vol. 39, Article 7, (2018), 259-260.

462 Washington Department of Fish and Wildlife, "Fish Passage Task Force: Report to Legislature," December 1997
https://wdfw.wa.gov/sites/default/files/publications/01627/wdfw01627.pdf (accessed Summer 2019), 6. Estimates of sixteen million annual salmon yields in late nineteenth century.

463 Results Washington, "Archived: ESA-Listed Salmon and Steelhead Populations;" 77% of the state was covered by federal listings of at-risk salmon, https://results.wa.gov/archived-esa-listed-salmon-and-steelhead-populations (accessed summer 2019).

464 Ibid.

slope at culvert outlet; high velocity within culvert barrel; insufficient water level within culvert barrel; turbulence within the culvert; and debris buildup at culvert inlet.[465] The fact that so many culverts restricted, or completely obstructed, fish passage is of great significance given the migratory life pattern of anadromous salmon. Although anadromous fish begin their lives in freshwater streams, they later migrate to the ocean and eventually return to home to spawn.[466] Culverts plainly posed a serious detriment to fish populations in Washington.

On January 17, 2001, the U.S. Department of Justice and twenty-one Northwest treaty tribes (the Tribes) submitted a Request for Determination as a sub-proceeding to *U.S. v. Washington*, Phase II. Rather than taking a broad stance on the state's treaty obligation to protect the environmental factors associated with fishing, the lawsuit explicitly targeted state-owned culverts as an ecological disaster that played a key role in the drastic decline of salmon and trout populations throughout the Pacific Northwest.[467] The lawsuit was a potentially more effective tool than the ESA because it could impact streams and rivers across Washington and restore the fish habitat to the level of sustaining commercial, cultural, and subsistence fishing, for both Indians and non-Indians.[468] By its own admission, the state documented "complete barriers block the use of the upper watershed, often the most productive spawning habitat in the watershed," while "temporal barriers block migration some of the time and result in loss of production," and "partial

---

[465] Washington Department of Fish and Wildlife Habitat and Lands Program Environmental Engineering Division, "Fish Passage Design at Road Culverts: A Design Manual for Fish Passage at Road Crossings," Columbian Basin Fish and Wildlife Library, March 3, 1999, http://docs.streamnetlibrary.org/Protocols/103.pdf (accessed summer 2019), 2.

[466] Blumm and Steadman, "Indian Treaty Fishing," 32.

[467] Ibid., 38. Culverts, designed as a less expensive alternative to bridges that allowed water to flow under roads and railways without causing road erosion or floods, were initially implemented at a time of careless abandon. Few, if any, worried or even fully understood the environmental devastation to fish runs and possible extinction of salmon in the area. Oregon also faced the ecological crisis wrought by obstructive culverts.

[468] Lynda V. Mapes, "Another Potential Lightning Boldt," *The Seattle Times*, Jan. 17, 2001.

barriers block smaller or weaker fish of a population and limit the genetic diversity that is essential for a robust population."[469] The Tribes understood the importance of rectifying the dire situation as quickly as possible, as delays not only increased the appearance of at-risk and endangered wild salmon and steelhead trout but also hindered ongoing resource recovery plans.[470]

The Tribes' injunction emerged after a number of failed negotiations between tribal and state officials over fixing pervasive culverts that stymied fish migration and salmon harvests. According to a virulent *Seattle Times*' editorial "Unplug the Culverts," there had been "three major attempts to settle" the culvert dispute, but the state remained "hung up on budgeting particulars." The state stood steadfast despite the fact that "identifying troublesome culverts in sensitive, productive watersheds" proved to be an efficient and "effective investment in salmon restoration. The state's own research had shown this to be true. Naturally, the state will find the money to fight the tribes in court, but will pinch pennies to clean up the problem."[471] Billy Frank Jr., Chairman of the Northwest Indian Fisheries Commission (NWIFC), echoed the sentiment, explaining, "Common sense would tell you to allow the salmon passage. We need to start fixing them now. That's all we're asking—fix the culverts."[472] At the time, the WSDOT and WDFW estimated at least 363 culverts were in dire need of repair, and it could take between 20 to 100 years to restore

---

469 WDFW: "Fish Passage Design," 2.

470 Billy Frank Jr., "Fixing the Culverts is Good for Everyone," NWIFC, May 6, 2013. https://nwifc.org/fixing-the-culverts-is-good-for-everyone/ (accessed summer 2019).

471 Editorial, "Unplug the Culverts," *The Seattle Times*, March 4, 2001, https://archive.seattletimes.com/archive/?date=20010304&slug=culverted05 (accessed summer 2019).

472 The Associated Press, "Tribes Target State Road Culverts in Salmon Lawsuit," *Longview Daily News* Longview, Washington, January 17, 2001, 2.

or replace faulty culverts with current state funding.[473] The NWIFC clarified the reasoning and urgency for the suit, stating, "Neither the salmon resource nor the tribes can wait that long. The salmon resource, the treaty-reserved rights of the tribes, and tribal economies will be lost long before the state gets around to dealing with the problem."[474]

Meanwhile, Washington's governor Gary Locke shamed the Tribes for pursuing the lawsuit, saying the 20-100 year timeline was "good enough."[475] In a joint statement with state Attorney General Christine Gregoire, Locke expressed his disappointment "that the tribes feel litigation is necessary" as it would only "serve to siphon valuable time, money and energy away from the vital task of saving salmon."[476] In addition, "A favorable ruling for the tribes could impose a duty that may affect other public roadways, public facilities and lands, and even the regulation of land-use and water."[477] Framing the Tribes' suit as an unwarranted encumbrance to ongoing state conservation and recovery efforts, and using scare tactics to motivate the public into opposition, both the governor and attorney general fallaciously equated the exercise of tribal sovereignty as an assault on the state. The two further remarked, "We don't believe that the treaties were intended to displace the state's authority" and we are "prepared to defend its . . . decision-

---

[473] Northwest Treaty Tribes: Protecting Natural Resources for Everyone, "Questions and Answers Regarding the Tribal Culvert Case," affiliate site of the NWIFC (Northwest Indian Fisheries Commission January 16, 2001). Other sources point to 449 blocking culverts in 2001, but no true consensus. https://nwtreatytribes.org/questions-and-answers-regarding-the-tribal-culvert-case/ (accessed summer 2019).

[474] Ibid.

[475] The Associated Press, "Tribes Target State Road Culverts."

[476] Joint statement from Gov. Locke and Attorney General Gregoire–Response to filing of Boldt Phase II Lawsuit, Office of Governor Gary Locke: News Room, January 16, 2001. https://www.digitalarchives.wa.gov/GovernorLocke/press/press-view.asp?pressRelease=231&newsType=1 (accessed fall 2019).

[477] Christopher Dunagan, "Salmon Passage: Tribes File Lawsuit to Force Culvert Operation," Kitsap Sun January 18, 2001. https://products.kitsapsun.com/archive/2001/01-18/0043_salmon_passage__tribes_file_lawsu.html (accessed fall 2019).

making authority."[478] Evidently the state concerned itself more with the meaning behind treaties than the immeasurable environmental damage caused by its own inaction.

Curt Smitch, the governor's top salmon negotiator, broached the topic with a similar stance. He claimed, "If this is about culverts, we can fix the problem. But if it's not about culverts and the tribes continue, then it will go all the way to the Supreme Court. The state is not going to give up its *sovereignty*."[479] With this affirmation, Smitch exposed the true nature of the state and its legal characterization of the culvert dispute—an assumed preservation of political power. Smitch and Gregoire were apparently convinced the tribes sought statewide veto power over policies that impacted salmon. Smitch argued, "When you talk about a duty to avoid impacting the environment that fish spawn in and are reared in, then you're talking about land-use practices and water. The state is simply not going to relinquish its authority over those issues."[480] Phil Katzen, attorney for the NWIFC and 11 of the tribes filing suit rebutted such notions, suggesting the tribes are trying to establish that "the state has duties under the treaties." While the state "is trying to make it sound that if we win the culvert case the state won't be able to do anything without the tribe's OK." Although "I'm sure the tribes would love that, but that's not what we think would happen. That's not even what we're asking for."[481]

---

[478] Joint statement from Gov. Locke and Attorney General Gregoire (2001).

[479] Dunagan, "Salmon Passage." Emphasis added.

[480] Andrew Engelson, "Tribes Fight to Clear the Roads for Salmon: Washington Fears Lawsuit Could Give Tribes Sweeping Control of Salmon Habitat, July 2, 2001 High Country News. https://www.hcn.org/issues/206/10611 (accessed fall 2019).

[481] Dunagan, "Salmon Passage." Other in the community demonstrated opposition to the tribes. Barbara Lindsay of the group United Property Owners of Washington, which fought the shellfish case, said her group is extremely concerned about the potential of the culvert case on private property. Referring to the Ninth Circuit ruling in 1985 in comparison to the culvert case, she stated, "They (the Tribes) couldn't get it going in the front door, so now they're going around to the back." As if the tribes were doing something underhanded.

In their opening brief, the Tribes accused the state of abandoning its legal responsibility to preserve salmon habitats, which subsequently impinged on Indigenous peoples' capacity to ensure a moderate standard of living. Specifically, they charged the state with building and maintaining obstructive culverts that caused a sharp decline in harvestable fish.[482] Furthermore, the Tribes and United States contended previous court rulings long held that "degradation of or construction in salmon habitat" infringed upon treaty-protected fishing rights.[483] Indeed, these state-owned culverts helped to create a "loss of hundreds of miles of fish habitat that would otherwise produce fish, a portion of which would have been available for Tribal treaty harvest."[484] Because Washington's own agencies reported these facts, the state's lack of initiative in prioritizing culverts knowingly jeopardized Northwest tribes' ability to make a moderate living. As a form of relief, the plaintiffs requested the court to recognize the "right to take fish" as guaranteed by the Stevens Treaties "imposes a duty upon the State of Washington" to abstain from "diminishing the amount of fish" by "improperly constructing or maintaining" defective culverts; second, they asked for an injunction prohibiting the state from producing new, and sustaining old, salmon-blocking culverts; finally, they sought a permanent injunction demanding Washington "identify, within eighteen months, the location of all culverts . . . that diminish the number of fish . . . and fix, within five years after judgment . . . all culverts built or maintained by any State agency."[485]

---

[482] Brief of Plaintiff Tribes in Opposition to State's Motion for Summary Judgment at 22, *United States v. Washington*, 2007 WL 2437166 Western District of Washington, 2007; (No. 70-9213), 174.

[483] Ibid. See also Blumm and Steadman, "Indian Treaty Fishing," 41; *No Oilport! v. Carter*; *Umatilla v. Alexander*; *Muckleshoot v. Hall*; *Nw. Sea Farms v. Army Corps of Eng'rs*.

[484] Brief of Plaintiff Tribes in Opposition, 174.

[485] *United States v. Was*hington, 2007 WL 24371166, (United States District Court for the Western District of Washington, August 22, 2007) Order on Cross-Motions for Summary Judgment: No. 70-9213, 174. (hereafter the *Martinez Decision*).

Washington objected to the plaintiffs' allegations, suggesting the Tribes were more interested in establishing an "environmental servitude" and veto power over state decisions than dealing with problematic culverts.[486] The state also made a series of arguments that went against the Tribes' legal position. First, it opposed the notion of holding a treaty-based mandate to preserve the fish habitat for Northwest tribes. Second, the culverts in question were partially financed by the federal government, as well as "designed according to standards set or approved" by the Federal Highway Administration, and therefore complying with the Treaties. Additionally, the Tribes could not supply evidence that culverts "affirmatively diminish the number of fish available for harvest."[487] Next, Washington and is defendant state agencies pointed to the myriad culverts that blocked salmon passage operated under the United States' control; if the U.S. did not have to comply with the Treaties, they reasoned, than neither should the state.[488] Lastly, and as a cross-request (counterclaim), the state demanded the U.S. repair or replace its own dysfunctional culverts in a timely manner.[489]

On August 22, 2007, Chief District Judge for the Western District of Washington, Ricardo S. Martinez, heard the culvert case and ruled in favor of the Tribes and federal government. Adhering to the precedent of prior court cases and the accepted judiciary canon of Indigenous treaty interpretation, he determined the Treaties to mean the Tribes possessed "the right to *take* fish, not just the right to fish." He further found this right to "function as an incentive for the

---

[486] Brief of State of Washington Opposing Motion for Partial Summary Judgment at 1, *United States v. Washington*, 2007, 15-20. See also Blumm and Steadman's discussion on the Pacific Salmon Treaty and its impact on tribal harvests, 43.

[487] *Martinez Decision*, 5.

[488] *United States v. Washington*, Ninth Circuit Court of Appeals, June 27, 2016. 827 F.3d 836 (No. 13-35474).

[489] Ibid.

Indians to sign the treaties, and the Tribes' reliance on the unchanging nature of that right." Citing historian Richard White, who had "researched the history of the Stevens Treaties, including the intentions, expectations, and understandings of the negotiators on both sides," it was "the government's intent, and the Tribes' understanding, that they would be able to meet their own subsistence needs forever, and not become a burden on the treasury."[490] Judge Martinez declared:

> In light of these affirmative assurances given the Tribes as an inducement to sign the Treaties, together with the Tribes' understanding of the reach of those assurances, as set forth by the Supreme Court . . . this court finds that the Treaties *do* impose a duty upon the State to refrain from building or maintaining culverts in such a manner as to block the passage of fish upstream or down, to or from the Tribes' usual and accustomed fishing places. This is not a broad "environmental servitude" or the imposition of an affirmative duty to take all possible steps to protect fish runs as the State protests, but rather a narrow directive to refrain from impeding fish runs in one specific manner.[491]

Although the judge scheduled a trial on August 29, 2007 to solve the issue indefinitely, all parties asked to postpone in an effort to remedy the situation outside of court. [492] Martinez noted that months of negotiations between the state and Tribes prior to his ruling had only ended in a stalemate, therefore he requested both sides "work diligently toward an agreement" and "check in with the court every two months to report on their progress."[493]

After nearly two years of settlement discussions, talks broke down and the parties reached an impasse shrouded in confidentiality. Statements to the media, however, indicated the state remained primarily concerned with the time, money, and scale of repairing culverts. Assistant

---

[490] *Martinez Decision*, Declaration of Richard White, Docket no. 296, 10.

[491] *Martinez Decision*, 12. Emphasis added.

[492] Ibid. See also Blumm and Steadman, 47.

[493] Lynda V. Mapes, "Culverts: State, Tribes to Negotiate," *The Seattle Times* August 30, 2007. https://www.seattletimes.com/seattle-news/culverts-state-tribes-to-negotiate/ (accessed fall 2019).

Attorney General, Rene D. Tomisser referred to the district court's verdict as a "distraction" from the "collaborative efforts among state agencies, tribal bodies, and private interest groups that focus on other habitat restoration projects." Despite agreeing that the culverts must be fixed, he bellowed, "You don't just send a couple of maintenance workers out with a shovel and bag of cement. The budget is a constraint the court simply has to take into account."[494] The state appeared to implement a strategy of delay, either hoping to stretch the timeframe of repairs or lower the expectations of how many culverts would be tackled each given year. With an average cost of $2.3 million to fix each barrier culvert, and at least 807 problematic culverts under the state Transportation Department, the biennium spending on repairs swelled to roughly $185 million.[495] In the meantime, tribes continued to bear the brunt of the environmental crisis on their ability to make a living. Charlene Krise of the Squaxin Island reservation near Shelton, and Lorainne Loomis of the Swinomish reservation near La Conner, lamented that their communities had been "hard-hit spiritually as well as economically by the depletion of salmon runs that is at least partly the result of bad culverts."[496]

Due to unsuccessful out-of-court mediation, the Tribes found themselves once again seeking judicial injunction to force Washington into action. "We prefer to collaborate with the state to restore and protect salmon and their habitat," NWIFC Chairman Frank Jr. said, but "the state's unwillingness to work together and solve the problems of these salmon-blocking culverts in a timely manner left us with no alternative except the courts. The salmon needs our help now,"

---

494 Tim Klass, "Tribes Seek Speedier Culvert Repairs," Spokesman Review, Spokane Washington, October 14, 2009, page 3.

495 Ibid. Other estimates are much lower, even suggesting the cost would be half the amount reported by Tomisser.

496 Ibid.

the regional habitat "continues to be damaged and destroyed faster than we can repair it, and the trend is not improving."[497] Buoyed by the inaction of Washington State since his 2007 judgment, Martinez concurred with Frank. On March 29, 2013 he ordered a permanent injunction mandating the state repair more than 600 state-owned fish-blocking culverts by the fall of 2016 on state recreational lands, and by 2030 on highways administered by WSDOT.[498] For Martinez, such measures were necessary to "ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty promises. The reduced effort by the State over the past three years, resulting in a net increase in the number of barrier culverts in the Case Area, demonstrates that injunctive relief is required at this time to remedy Treaty violations."[499] Frank rejoiced in Martinez's resolution: "This ruling isn't only good for the resource, but for all of us who live here. It will result in more salmon for everyone. This is a great victory for all who have worked so hard to recover wild salmon."[500]

But as the Tribes and their allies celebrated Martinez's decision to preserve Indigenous treaty rights, radical anti-Indian groups mobilized in disdain. On April 6, 2013, a little over two weeks after the decision, Citizens Equal Rights Alliance (CERA) and Citizens Equal Rights Foundation (CERF)—both closely-linked national anti-Indian groups—gathered inside at the Lakeway Inn Best Western conference room in Bellingham, Washington to foment outrage at the

---

497 Tony Meyer, "Federal Court Upholds Tribal Treaty Rights in Culvert Case," Northwest Indian Fisheries Commission, April 1, 2013. https://nwifc.org/federal-court-upholds-tribal-treaty-rights-in-culvert-case/ (accessed fall 2019).

498 Ibid.

499 *United States v. Washington*, United States District Court Western District of Washington at Seattle, Mar 29, 2013. No. CV 70-9213.

500 Meyer, "Federal Court Upholds Tribal Treaty."

court's recent recognition of Indigenous sovereignty and tribal nationhood.[501] CERA, CERF, and their acolytes hoped the meeting would excite local anxieties over Indian rights and revitalize anti-tribal activism in the state of Washington. Tom Williams, a Lynden, Washington-based businessman and event coordinator set the stage by propagating a special form of exclusionary hate speech: "The federal government, through federal Indian policy, and Washington State . . . have created rights and governance authority for the federal government and for tribal governments that does not exist. And this fake governance authority and rights create a situation where they can violate individuals' civil rights."[502] Williams urged his listeners not to buy into the "fantasy" of tribal sovereignty and treaty rights, suggesting that doing so undermines the "real" rights of American citizens.

CERA's legal counsel, Lana Marcussen, paralleled Williams' off-kilter pandering of a "federally constructed" tribal sovereignty to the public. With anti-Indian vigor and venom, she clamored, "Here in Washington State, in particular, this is an issue that is a mess. Part of that's the way the Boldt decision happened and part of that is the way your state has bought into this legal fiction . . . I realize Washington State has absolutely bought into this idea that there's this real thing called tribal sovereignty and there's this overriding federal trust. It's garbage. What the hell is the State of Washington doing?" In order to combat these federally created, and state perpetuated, "illusions" of tribal power, Marcussen called for the addition of more lawyers into the allied anti-tribal movement: "I think there needs to be a consortium of attorneys starting to put together, figuring out how we're going to make a lot of money for CERA." By adding specialists in the field

---

501 Chuck Tanner, "'Take These Tribes Down:' The Anti-Indian Movement Comes to Washington," Institute for Research and Education on Human Rights (April 26, 2013) https://www.irehr.org/2013/04/26/take-these-tribes-down/ (accessed fall 2019).

502 Ibid. See also "Idle No More," video that depicts the Indian and non-Indian protests of CERA and CERF in Bellingham. https://www.youtube.com/watch?v=s5InM3GXECA (accessed fall 2019).

of Indian law, as well as partnering with like-minded political officials, she hoped her syndicate could petition the courts in Washington—and elsewhere—to legally nullify the treaty-backed rights and privileges of tribal nations.

Possibly the most scornful tirade against Indigenous autonomy, however, came from Elaine Willman, Director of Community Development and Tribal Affairs for the Village of Hobart, Wisconsin, active CERA member, and author of *Going to Pieces: The Dismantling of the United States of America*. As a major proponent of white nationalism, Willman stood highly critical of tribes existing as separate, semi-autonomous political bodies within the U.S., and worked tirelessly to contest Native power across the country. While referencing the culvert case at CERA's Bellingham protest, she ineloquently detailed an Indigenous conspiracy to conquer Washington: "Twenty-nine tribal governments that serve about 75,000 enrolled tribal members . . . have hijacked Washington State. These twenty-nine tribes are literally consuming and overpowering and now controlling that fixed land base of Washington State."[503] Her anti-Indian screed continued:

> The real Trail of Tears here for Washington state, is Governor [Mike] Lowery, Governor [Gary] Locke, Governor [Christine] Gregoire, and now Governor [Jay] Inslee. That is the real Trail of Tears. They have placed Washington State sovereignty subservient to the sovereignty of twenty-nine tribes here.[504]

Through a warped juxtaposition of two vastly different historical contexts, she falsely compared the violent and forced removal of Indigenous peoples in the nineteenth century to the failed efforts of contemporary Washington officials to thwart tribal treaty rights in the courts. For Willman,

---

[503] Ibid.

[504] Ibid.

CERNA and CERF, Native nations did not, and could not, fit within the white-American identity of "true" citizenship.

Leaving the extremist rhetoric to CERA and CERF, the state of Washington appealed to the Ninth Circuit Court of Appeals in 2016. According to the state, the lower court grossly misinterpreted the Treaties to mean Washington possessed a contractual duty to preserve fish habitats. In fact, the state even contended it had "the right, consistent with the Treaties, to block every salmon-bearing stream feeding into Puget Sound."[505] The court disagreed. Following the legal canon set forth by previous cases involving tribal fishing rights, and rejecting all of the appellant's arguments, Circuit Judge William A. Fletcher affirmed the district court's verdict:

> We [the courts] have long construed treaties between the United States and Indian tribes in favor of the Indians. [W]e conclude that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.[506]

Having lost at the district and circuit level, Washington's options for legal recourse waned. Nevertheless, the state's obstinate denial of treaty responsibility persisted as it submitted a Petition for Writ of Certiorari to the United States Supreme Court on August 17, 2017. The next year, January 12, 2018, the Supreme Court accepted Washington's petition, adding yet another sequence of briefs, evidence, and theories to this perennial conflict.[507]

---

505 *U.S. v. Washington* (2016), United States Court of Appeals: Ninth Circuit No. 13-35474 2016, 827 F.3d 836, June 26, 2016.

506 Ibid.

507 Hickey, "Highway Culverts," 267. But it begs the question: why did the state feel it necessary to appeal *again*? Their own reports explained the issues involved with habitat protection and need of sustainability. Was the

The Supreme Court soon received a flood of requisite motions, responses, and replies in support of Washington State. The case docket steadily grew as amici curiae from the Pacific Legal Foundation, Modoc Point Irrigation District, American Forest and Paper Association, National Mining Association, CERA, and others arrived for review.[508] Perhaps unsurprisingly, the fellow settler-states of Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Montana, Nebraska, Oklahoma, Wisconsin, and Wyoming seized the opportunity to rally behind Washington's cause. In a collaborative, thirty-seven page amicus brief, the states asserted "a fundamental sovereign interest in treaty or statutory provisions affecting natural resources."[509] They believed the Ninth Circuit ruling treaded on judicial overreach:

> The Ninth Circuit opinion breaks ground by interpreting the Stevens treaties' fishing clause to prohibit States or presumably other local governmental entities from taking land use or other regulatory actions, or to compel such entities to undo past actions, that may adversely affect the amount of the harvestable fish—i.e., imposing an "environmental servitude."[510]

With utter empathy, each state fully understood the breadth of the culvert decision and its potential repercussions on their own autonomy. When dealing with Indigenous peoples, treaties, and the federal government, the states feared successful lawsuits—such as those dealing with fishing rights in Washington—would not only reduce the decision-making ability of top state officials, but also coerce statewide policy changes that may have otherwise be deemed unnecessary, unwanted, or

---

issue money, or perhaps something more indicative of the modern settler-state? Presumably, it evolves from a deep-seated belief that Indigenous peoples' treaty-rights could never supersede the state.

[508] Ibid., 267.

[509] Brief of Amici Curiae States of Idaho, et al., in Support of Petitioner, *Washington v. United States* (No. 17-269, March 2018) On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit. https://www.supremecourt.gov/DocketPDF/17/17-269/37322/20180302110659312_17-269%20tsac%20Idaho%20and%2010%20Other%20States%20Brief.pdf (accessed fall 2019), 3.

[510] Ibid., 3.

simply fiscally impossible. The trajectory of Washington court rulings, including *Winans*, *Boldt*, and now the culvert case, unleashed a wave panic among states to act in defense.[511]

On the respondent's side, the Tribes also garnered amicus briefs of public endorsement and legal affirmation. The Confederated Tribes of the Warm Springs Reservation of Oregon, National Congress of American Indians, Pacific Coast Federation of Fishermen's Associations, and a number of university law professors offered in-depth statements arguing for the Court's confirmation of the Ninth Circuit's decision. Former Washington Governor and U.S. Senator, Daniel J. Evans, wrote a markedly persuasive brief in the favor of holding the state accountable:

> The State of Washington has a stewardship responsibility to its citizens—Indian and non-Indian alike—to protect and conserve its natural resources for the benefit of future generations. There is no question under the facts of this case that the current condition of the State's road culverts is causing serious harm to its salmon resources. The State's position in this case is inconsistent with its stewardship responsibility.[512]

Although once an agent of Washington State, Evans took a particularly critical position regarding its duty to protect both Indigenous and non-Indigenous citizens from environmental hazards. Peppered with sharp criticism, he also found it astounding that the state balked from its obvious, and treaty-bound, obligation given the amount of state-produced research identifying culverts as a symptomatic problem for salmon protection and recovery.[513]

---

511 States felt the need to assail the legitimacy of treaties, tribal sovereignty, and federal impunity to ensure a hierarchy of power in relation to Indian nations and the federal government.

512 Brief Amicus Curiae of Honorable Daniel J. Evans in Support of Respondents, *Washington v. United States* (No. 17-269 April 2, 2018) On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. https://www.supremecourt.gov/DocketPDF/17/17-269/42647/20180406144512824_17-269bsacHon.DanielJ.Evans.pdf (accessed fall 2019), 9.

513 Ibid., 6.

After almost two decades of back-and-forth arguments, briefs, injunctions, and appeals, the Supreme Court finally settled the culvert case on June 11, 2018. In the end, the Justices affirmed the Ninth Circuit's verdict by an evenly divided Court (4-4), and—as customary when the court splits—did not provide a written opinion, precedential weight, or bar on future reconsideration.[514] Instead, all those involved or concerned with the case received a lackluster one-sentence ruling: "The judgment is affirmed by an equally divided Court."[515] Despite a Court ruling that severely lacked any form of expected pageantry, it nevertheless formally acknowledged the lower court's decision, which held Washington fully responsible for fixing or retrofitting obstructive culverts in a timely manner—by 2030.

Northwest tribes were understandably thrilled with the Supreme Court's preservation of Indigenous treaty rights. Lorraine Loomis, chair of the NWIFC, commented, "Today's ruling shows that our treaties are living documents [and that] they are just as valid today as the day they were signed."[516] Swinomish tribal community chairman, Brian Cladoosby, reiterated the feeling: "This ruling gives us hope that the treaty we signed was not meaningless, and the state does have a duty to protect this most beautiful resource."[517] The longstanding dispute had others, such as Fawn Sharp of the Quinault Indian Nation, voice similar delight at the enduring power of treaties:

---

514 Hickey, "Highway Culverts," 274. Justice Anthony Kennedy recused himself.

515 *Washington v. United States*, Supreme Court of the United States No. 17-269, June 11, 2018. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. https://www.supremecourt.gov/opinions/17pdf/17-269_3eb4.pdf (accessed fall 2019).

516 Terri Hansen, "Supreme Court Affirms Native American Treaty Rights to Harvest Salmon," *Yes Magazine: Journalism for People Building a Better World*, June 11, 2018. https://www.yesmagazine.org/peace-justice/supreme-court-affirms-native-american-treaty-rights-to-harvest-salmon-20180611 (accessed fall 2019).

517 John Eligon, "'This Ruling Gives Us Hope': Supreme Court Sides With Tribe in Salmon Case," *The New York Times* (June 11, 2018). https://www.nytimes.com/2018/06/11/us/washington-salmon-culverts-supreme-court.html (accessed fall 2019).

"Today's decision marks seven generations of conflict in our struggle to fully exercise and protect the Pacific Northwest salmon resource the way our ancestors envisioned when they signed the treaties and ceded millions of acres of land across Washington." She continued, noting, "It is my prayer and sincere hope we can now rise above a century-and-a-half of conflict, litigation, bloodshed, and heartbreak toward a new chapter of political, cultural, and environmental justice and reconciliation for the benefit of all of Washington."[518]

State officials, on the other hand, processed the outcome quite differently. Washington's Attorney General, Bob Ferguson, released a statement assailing the federal government and county authorities for contributing to the epidemic but not being held accountable: "It is unfortunate that Washington state taxpayers will be shouldering all the responsibility for the federal government's faulty culvert design. . . . King County alone owns several thousand more culverts than are contained in the entire state highway system. The federal government owns even more than that in Washington. These culverts will continue to block salmon from reaching the state's culverts, regardless of the condition of the state's culverts"[519] With a fatalist posture, Ferguson deflected blame away from the state and reassured the public that almost nothing would change in terms of salmon recovery unless other owners bear a portion of the liability.

By way of contrast, Governor Jay Inslee approached the matter with a more diplomatic demeanor. Wholly accepting the Court's judgment, the governor wished to pave a new and positive pathway for the state's oversight in regards to habitat protection, salmon recovery, and culvert restoration: "This is a matter of urgency . . . [t]he fate of our salmon is intrinsically tied to our

---

[518] Hansen, "Supreme Court Affirms."

[519] Brionna Aho, "AG Ferguson Statement on Culvert Decision," Washington State: Office of the Attorney General, June 11, 2018. https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-culverts-decision (accessed fall 2019).

tribes, our orca, our economy and our very identity." When referencing a $275 million biennium bump in culvert repair spending, he elaborated on the need of his administration, in concert with the state legislation, to stay the course: "This is just a one-time down payment on the multibillion-dollar tab legislators left unpaid. Let me be crystal clear: this does not solve the problem. This does not get us off the hook. We need to get this fixed next year."[520] At long last, it appeared that Washington finally accepted its treaty-bound duty to ensure Native peoples have fish to catch.

However, the fact that the U.S. designed and enforced the use of barrier culverts across Washington but expected the state to assume all responsibility leads one to believe the nation acted upon its own interest while also defending its Indigenous peoples of the Northwest. It is also useful to think about how the same settler-nation that once sought to destabilize, dispossess, and even eradicate tribal communities became the greatest defender of their semi-sovereign status and rights. Of course, as an ever-developing project of nation-building, the federal government needed to assert its authority over its semi-independent, subsidiary states in order to enhance its dominance. But in all conceivability, the United States' advocacy of Indigenous treaty rights could very well lead to another lawsuit. Indeed, the environmental precedent set by the Ninth Circuit, and reinforced by the Supreme Court's affirmation, opens a door for the Tribes to contest federally owned and managed culverts in the Puget Sound region and pursue an injunction. This would place the government in an interesting position, having just fought against Washington over the negative impact of culverts on salmon's free passage.[521]

---

[520] Washington Forest Protection Association, "Governor Inslee Increases Culvert Removal Investments, July 3, 2019, http://www.wfpa.org/news-resources/blog/gov-inslee-increases-culvert-removal-investments/ (accessed fall 2019).

[521] Hickey, "Highway Culverts," 275.

Ultimately, the culvert case brilliantly captures the disparity of intent, as well as the shifting value, of modern U.S.-Indigenous treaties while also revealing the nuanced ethos of tribal sovereignty in twenty-first-century America. Through the signing of treaties, Indigenous peoples retained a unique spatial and temporal right to exist as semi-sovereign bodies within the solidifying borders of the United States. Treaties guaranteed particular provisions and protections that guided political relationships for well over a century, and allowed certain tribes the ability to break from the shackles of prescribed colonial boundaries and defy the state's wrongdoing through the American legal system.[522] Washington's defense of barrier culverts, even after learning of their destruction to salmon reproduction, constituted a form of eco-terrorism that—intentionally or not—eviscerated Indigenous livelihoods in the Pacific Northwest. Losing the culvert battle forced the state to not only honor promises of the past, but also accept the limits of its own sovereignty.

[522] Bruyneel, *The Third Space*, 9.

Conclusion

Over the past century, North America's Indigenous communities encountered, braved, and survived myriad attempts at their cultural evisceration by local, state, and federal agencies. As the case studies in this dissertation prove, Native peoples prevailed against a racially stratified system of exclusion and legal control through decisive use of the courts. With varying degrees of success, Indigenous peoples collectively challenged the numerous treaties, codes, edicts, bylaws and other forms of jurisdiction that displaced, diminished, and dispossessed tribal bodies for generations. In wide latitude, and with the aid of non-Indian allies, Native people reimagined their unique legal presence in twentieth-century America by testing the conceptual limits of national citizenship, status, and belonging. Interspersed throughout the chapters are specific examples of these efforts: free movement across traditional homelands, participation in the political realm, self-governance, and equal access to modernity. By employing the same legal apparatus that so often eroded tribal sovereignty through capricious and coercive laws and legislation, Native communities made enduring and favorable transformations to their collective wellbeing.

While the first chapter supplied a brief but succinct contextual foundation for the reader to fully grasp the long history of repressive settler-colonial policies aimed at eliminating the American Native, each subsequent section offered an explicit instance of Indigenous fortitude and resilience across space and time. The second chapter saw Rotinohshonni member Paul K. Diabo go to great lengths, even being arrested and deported, in order to gauge his treaty-guaranteed freedom of travel between Canada and the United States. The following chapter examined how two Yavapai members of Arizona's Fort McDowell reservation, Frank Harrison and Harry Austin, fought against state-justified disenfranchisement to have their right to vote as American, and Indian, citizens recognized. Chapter four investigated termination's impact on a small Indigenous

community in California, Robinson Rancheria, and the determination of Mabel Duncan to take on the federal government and have her tribe's status restored. The final chapter analyzed the story of twenty-one tribes in Washington, joined by the United States Attorney General, who sued the state to preserve their treaty-protected right to fish. Taken together, and tethered by the conceptual framework of "belonging," these four particular case studies have shed important light on the temporal and spatial dynamics of American law and its tendency to exclude Native peoples from the national body politic.

In an effort to reconsider the dominant historical narrative surrounding Indigenous peoples' contemporary fight to obtain full legal personhood in the United States, this project uncovered, and on diverging levels emphasized, the collective persistence and power of North America's Native population. By working on and around the contours of the American legal system, Indigenous communities repudiated subjective, situational, inconsistent, and contradictory laws intended to categorize, marginalize, and erase their geopolitical existence and legitimacy. As a result, the United States' legal geography became the crucible from which American Indians executed resistance against machinations designed to erode Indigenous autonomy and identity. This refusal to comply with U.S. colonial impositions, as it turns out, also revealed how settler-state boundaries were malleable and limited in nature, allowing a possible alternative relationship to political power in twentieth-century Indigenous North America—a third space of sovereignty. Although law became a mechanism to execute violent repressive and exclusionary policies, Indian tribes and nations show it could also be a potentially effective tool for safeguarding traditional, albeit diverging, notions of Native autonomy and identity. And this is where the argument of this study rests, the American legal system's incongruous implementation and understanding opened important space for Indigenous peoples to create positive change in their everyday existence.

At its core, this work sought to engage with disparate schools of thought and join ongoing discussions among specialists in the fields of Indian law, Native history, Indigenous studies, immigration history, United States history, and borderlands studies. Using the four case studies as microcosms, it tracked the dynamic methodological shifts within such analytical frameworks, and reconsidered contemporary matters of Indigenous identity, citizenship, status, and sovereignty. Moreover, it attempted to identify common scholarly threads regarding the aggressive, unfair, erratic, ambiguous, and frequently contradictory federal-Indian policies of the nineteenth and twentieth centuries. From recognizing many tribes as autonomous nations, to terminating reservations and tribal governments, litigation and judicial decisions have shaped Indigenous peoples' worlds since America's inception. Acknowledging, contradicting, and reinforcing these diverse interpretations has provided a logistical means of addressing the multitude of overlapping, intersecting, and, at times, opposing ideological conversations existing between preeminent scholars. Finally, these case studies—whether probing immigration, race, citizenship, status, or treaty rights—have been given little to no scholarly attention over the years, especially in conjunction with each other or through an interdisciplinary analysis.

But this study has also successfully answered a series of questions tied to human intrigue. First, each chapter quite persuasively demonstrated the extent to which intersecting U.S. policies both directly and indirectly shaped the quotidian lives of Indigenous communities throughout North America. Second, it showcased how a multitude of Native tribes and nations survived, and in some cases thrived, amidst violent and repressive settler-colonial regimes. Third, each story of resistance, particularly through their engagement with the American legal system, illustrated the capacity and fortitude of Indigenous peoples to triumph over seemingly omnipotent political entities. Fourth, it brought to light the movement of Indigenous peoples across literal and figurative

borderlands, which bolstered Native agency and activism throughout the twentieth century and encouraged civil disobedience through the American court system. Lastly, through a survey of multiple modes and registers of citizenship, status, treaty entitlements, and membership in a tribe, band, and nation, this dissertation—as a whole—has communicated the complex histories and competing notions of "belonging" Native peoples encountered during the long twentieth century in North America.

Serving as a potential springboard for nuanced studies of belonging and Native resistance in North America, this work proposes two research cases that deserve future scholarly attention and scrutiny. The first involves ongoing litigation between the Standing Rock Sioux Tribe and Dakota Access Pipeline (DAPL). The Standing Rock Sioux, as well as other Indigenous and non-Indigenous allies, are seeking a court intervention to halt the pipeline's scheduled expansion and eventually shut it down completely. This case touches on the rights of sovereignty, as opponents not only question the pipeline's safety, which threatens water supplies and sacred lands, but also breaches Article II of the Fort Laramie Treaty that legally assures tribes may live on and use their lands in peace. The second centers on the case of *Washington State Department of Licensing v. Cougar Den, Inc*. In 2017, the State of Washington argued that the Yakama Treaty of 1855 should not exempt Cougar Den, a Yakama-owned wholesale fuel distributor, from paying state taxes on commercial activities that use public highways. Decided on March 19, 2019, the Supreme Court of the United States affirmed the "right to travel" clause in the Yakama Treaty and preempts contemporary state tax codes. Both of these instances model a pattern of non-Indian entities attempting to circumnavigate Indigenous rights and define the power of belonging on their terms. And once again, courtrooms act as critical outlets for Indigenous resilience, providing space to work on and around the boundaries of law.

As these prospective and provocative cases evince, contemporary issues over sovereignty, jurisdiction, and legitimacy will undoubtedly persist well into the twenty-first century between Indigenous-federal-state polities. But as Native peoples confront new settler-colonial challenges in the form of laws structured to dispossess, destabilize, and destroy their lives, state and federal agencies will also continue to face—with increasing precedent and efficiency—a coalition of Indians and non-Indians ready and able to resist. These defining battles will likely be waged in the courtroom, where subjective laws are decidedly put to the test as opponents seize the opportunity to capitalize on an incredibly fluid American legal system. In the end, if Indigenous peoples and their allies carry on as advocates of treaty rights, while concurrently defending the importance of maintaining cultural traditions and identity, uplifting tribal status may occur with more frequency and intensity. Yet entering this realm of expectancy will ultimately depend on a number of contingent factors and require significant measures of professional-Indigenous approbation while working on and around geopolitical boundaries of Indian policy.

Bibliography

BOOKS AND ARTICLES

Anderson, Gary Clayton. *The Conquest of Texas: Ethnic Cleansing in the Promised Land, 1820-1875*. Norman: University of Oklahoma Press, 2005.

Almaguer, Tomas. *Racial Fault Lines: the Historical Origins of White Supremacy in California*. University of California Press, 2008.

Banner, Stuart. *How the Indians Lost Their Land: Law and Power On the Frontier*. Cambridge: Belknap Press, 2007.

Bannister, Jerry. "Settler Colonialism and the Future of Canadian History." https://earlycanadianhistory.ca/2016/04/18/settler-colonialism-and-the-future-of-canadian-history/

Blumm, Michael C. and Jane Steadman. "Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation." *Lewis and Clark Law School Research Paper Series*, Social Science Research Network Electronic Paper Collection (2009).

Bruyneel, Kevin. *The Third Space of Sovereignty: the Postcolonial Politics of U.S.-Indigenous Relations*. Minneapolis: University of Minnesota Press, 2007.

Calloway, Colin G. *First Peoples: A Documentary Survey of American Indian History*. Boston, MA: Bedford/St. Martin's, 1999.

——. Calloway, Colin G. *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities*. Cambridge: Cambridge University Press, 1995.

Chang, David A. *The Color of the Land: Race, Nation, and the Politics of Landownership in Oklahoma, 1832-1929*. Chapel Hill, NC: The University of North Carolina Press, 2010.

Chang, Kornel S. *Pacific Connections: The Making of the U.S.-Canadian Borderlands*. Berkeley: University of California Press, 2012.

Chávez, Ernesto. *The U.S. War with Mexico: a Brief History with Documents*. Boston, MA: Bedford/St. Martin's, 2007.

Cobb, Daniel M. Native *Activism in Cold War America: The Struggle for Sovereignty*. University Press of Kansas, Lawrence KS, 2008.

Cohen, Felix S. "Americanizing the White Man." *The American Scholar* Vol. 21, No. 2: 177-91, (Spring 1952).

Collier, John. "United States Indian Administration as a Laboratory of Ethnic Relations," *Social Research* Vol. 12, No. 3 (September, 1945).

Cornell, Stephen E. *The Return of the Native: American Indian Political Resurgence*. New York: Oxford University Press, 1988.

Cowger, Thomas W. *The National Congress of American Indians: The Founding Years*. University of Nebraska Press, 2001.

DeLay, Brian. *War of a Thousand Deserts: Indian Raids and the U.S.-Mexican War (The Lamar Series in Western History)*. New Haven & London: Yale University Press, 2009.

Deloria, Jr., Vine and Clifford M. Lytle. *American Indians, American Justice*. Austin: University of Texas Press, 1983.

——. Deloria Jr. Vine. *American Indian Policy in the Twentieth Century*. Norman, OK: University of Oklahoma Press, 1985.

Dunbar-Ortiz, Roxanne. *An Indigenous Peoples' History of the United States (Revisioning American History)*. Reprint ed. Beacon Press, 2015.

DuVal, Kathleen. *Independence Lost: Lives On the Edge of the American Revolution*. Random House Trade Paperbacks, 2016.

Fabian, Ann. *The Skull Collectors: Race, Science, and America's Unburied Dead*. Chicago: University Of Chicago Press, 2010.

Fisk, Catherine L. and Robert W. Gordon, '"Law As . . .': Theory and Method in Legal History." *University of California, Irvine Law Review*. vol. 1, issue 3 (2001).

Fisher, Andrew H. *Shadow Tribe: The Making of Columbia River Identity*, Seattle WA: University of Washington Press, 2010.

Fixico, Donald Lee. *American Indians in a Modern World*. AltaMira Press, 2008.

——.Fixico, Donald Lee. *Termination and Relocation: Federal Indian Policy, 1945-1960*. Albuquerque: University of New Mexico Press, 1986.

Foucault, Michel. *The History of Sexuality Volume 1: An Introduction*. New York: Vintage, 1980.

Garroutte, Eva Marie. *Real Indians: Identity and the Survival of Native America*. Berkeley: University of California Press, 2003.

Hamalainen, Pekka. *The Comanche Empire (The Lamar Series in Western History)*. New Haven: Yale University Press, 2009.

Harmon, Alexandra. *Indians in the Making: Ethnic Relations and Indian Identities in Puget Sound*. University of California Press, 2000.
——.Harmon, Alexandra. *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest*. Seattle WA: University of Washington Press, 2008.

Hickey, Ryan. "Highway Culverts, Salmon Runs, and the Stevens Treaties: A Century of Litigating Pacific Northwest Tribal Fishing Rights." *Public Land and Resources Law Review*, Vol. 39, Article 7, (2018).

Hixson, W. *American Settler Colonialism: A History*. Palgrave Macmillan, 2013.

Houghton, N. D. "The Legal Status of Indian Suffrage in the United States" California Law Review 19, *California Law Review*, Inc.: 507–20, (1931).

Iverson, Peter and Wade Davies, "*We Are Still Here": American Indians Since 1890, 2 ed*. Wiley-Blackwell, (2014).

Jagodinsky, Katrina. *Legal Codes and Talking Trees: Indigenous Women's Sovereignty in the Sonoran and Puget Sound Borderlands, 1854-1946*. Yale University Press, 2016.

Johnson, Troy R. *The Occupation of Alcatraz Island: Indian Self-Determination and the Rise of Indian Activism*. Urbana: University of Illinois Press, 1996.
——. Johnson, Troy R., Joane Nagel, and Duane Champagne. *American Indian Activism: Alcatraz to the Longest Walk*. Urbana: University of Illinois Press, 1997.

Kevles, Daniel J. *In the Name of Eugenics: Genetics and the Uses of Human Heredity*. Cambridge, MA: Harvard University Press, 1998.

Lindsay, Brendan C. *Murder State: California's Native American Genocide, 1846-1873*. University of Nebraska Press, 2015.

Lombardo, Paul. "Eugenic Laws Against Racial Mixing" *Image Archive on the American Eugenics Movement*, Dolan DNA Learning Center, Cold Spring Harbor Laboratory http://www.eugenicsarchive.org/eugenics/.

McCool, Daniel, Susan M. Olson, and Jennifer L. Robinson. *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*. Cambridge University Press, 2007.

McLaren, Angus. *Our Own Master Race: Eugenics in Canada, 1885-1945*. University of Toronto Press, 2015.

Meeks, Eric V. *Border Citizens: the Making of Indians, Mexicans, and Anglos in Arizona*. Austin: University of Texas Press, 2007.

Metcalf, R. Warren. *Termination's Legacy: The Discarded Indians of Utah*. University of Nebraska Press, 2002.

Morisset, Mason D. and Carly A. Summers, "Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation." *The Seattle Journal of Environmental Law and Policy*. Vol. 1, (2009).

Mulier, Vincent. "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest." *American Indian Law Review 31*, no. 1 (2006).

Needham, Andrew. *Power Lines: Phoenix and the Making of the Modern Southwest (Politics and Society in Twentieth-Century America)*. Princeton University Press, 2014.

Nichols, Roger L. *Indians in the United States and Canada: A Comparative History*. University of Nebraska Press, 1999.

Pevar, Stephen L. *The Rights of Indians and Tribes*. Oxford University Press, 2012.

Philp, Kenneth R. *Termination Revisited: American Indians on the Trail to Self-Determination, 1933-1953*. University of Nebraska Press, 1999.

Raibmon, Paige. *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast*. Durham: Duke University Press, 2005.

Reid, Gerald. "Illegal Alien? The Immigration Case of Mohawk Ironworker Paul K. Diabo." *Proceedings of the American Philosophical Society*, vol. 151, no. 1, (March 2007).

Richards, Kent. "The Stevens Treaties" *Oregon Historical Quarterly*. vol. 106, No. 3, (Fall, 2005).

Rifkin, Mark. *Manifesting America: the Imperial Construction of U.S. National Space*. Oxford University Press, 2012.

Robertson, Lindsay G. *Conquest By Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*. Oxford University Press, 2007.

Rollings, Willard Hughes. "Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965," Nevada Law Journal: Volume. 5: Issue. 1. Article 8. (2004).

Rosen, Deborah A. *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880*. University of Nebraska Press, 2009.

Rosier, Paul C. *Serving Their Country: American Indian Politics and Patriotism in the Twentieth Century*. Harvard University Press, 2012.

——.Rosier, Paul C. *Native American Issues*. Westport CT: Greedwood Press, 2003.

Schmidt, Regin. *Red Scare: FBI and the Origins of Anticommunism in the United States, 1919-1943*. Copenhagen: Museum Tusculanum Press, 2000.

Smith, Marian. "The INS and the Singular Status of North American Indians" *American Indian Culture and Research Journal*, vol. 21, no. 1, (1997).

Spruhan, Paul. "The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law." *North Dakota Law Review*, vol. 85, p. 301-328, (2009).

Stepan, Nancy Leys. *The Hour of Eugenics: Race, Gender, and Nation in Latin America*. Ithaca: Cornell University Press, 1996.

Stern, Alexandra Minna. *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America*. University of California Press, 2005.

Stryker, Susan. "Biopolitics" *Transgender Studies Quarterly*. Duke University Press, vol. 2, no 4. http://tsq.dukejournals.org/content/1/1-2/38.full.

Tanner, Chuck, '"Take These Tribes Down:' The Anti-Indian Movement Comes to Washington." Institute for Research and Education on Human Rights (April 26, 2013).

Townsend, Kenneth William. *World War II and the American Indian*. Revised ed. Albuquerque: University of New Mexico Press, 2002.

Ulrich, Roberta. *American Indian Nations from termination to Restoration, 1953-2006*. University of Nebraska Press, 2013.

Veracini, Lorenzo. *Settler Colonialism: A Theoretical Overview*. New York: Palgrave Macmillan, 2010.

Wadewitz, Lissa K. *The Nature of Borders: Salmon, Boundaries, and Bandits on the Salish Sea*. Seattle WA: University of Washington Press, 2012.

Watkins, Arthur V. "Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person." *The Annals of the American Academy of Political and Social Science*, vol. 311, (May 1957).

Washburn, Wilcomb E. *Red Man's Land/white Man's Law: The Past and Present Status of the American Indian*, 2nd ed. Norman: University of Oklahoma Press, 1995.

Welke, Barbara Young. *Law and the Borders of Belonging in the Long Nineteenth Century United States*. Cambridge University Press, 2010.

Wildenthal, Bryan H. *Native American Sovereignty On Trial: A Handbook with Cases, Laws, and Documents, The On Trial Series*. Santa Barbara, California: ABC-CLIO, 2003.

Wilkins, David E. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*. Austin: University of Texas Press, 1997.
——. Wilkins David E. and K. Tsianina Lomawaima. *Uneven Ground: American Indian Sovereignty and Federal Law*. University of Oklahoma Press, 2002.

Wilkinson, Charles F. *Blood Struggle: The Rise of Modern Indian Nations*. W.W. Norton & Company, New York, 2005.

Williams Jr., Robert A. *The American Indian in Western Legal Thought: The Discourses of Conquest*. Oxford University Press, 1992.

Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research*, vol. 8, no 4, p. 287-409, (December 2006).

Wolfley, Jeanette. "Jim Crow, Indian Style: The Disenfranchisement of Native Americans" American Indian Law Review: Volume 16, p.167-202, (1991).

Woods, Fronda. "Who's in Charge of Fishing," *Oregon Historical Quarterly*. Vol. 106, No. 3, The Isaac I. Stevens and Joel Palmer Treaties, 1855-2005 (Fall, 2005).

GOVERNMENT ACTS AND LEGISLATION

California Rancheria Termination Act, Pub. L. No. 85-671, § 3,72 Stat. 619, 620 (1958) (as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964).

Canadian Indian Act

Charles J. Kappler. "U.S. House of Representatives Resolution 108, 83rd Congress, 1953." Indian Affairs: Laws and Treaties. U.S. Statutes at Large, 67: B132.

Constitution of the United States, Amendment XV. Archives.gov

The Treaty Amity, Commerce, and Navigation of 1794

Immigration Act of 1924

Indian Citizenship Act of 1924. 68 P.L. 175; 68 Cong. Ch. 233; 43 Stat. 253. June 2, 1924.

Joint Resolution 7, California State Assembly. Read in the United States Senate, February 19, 1947, Congressional Record 93, pt. 1, 1156.

Medicine Creek Treaty

Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund." House Report 102-499,April 22,1992.

Mission Indian Federation Constitution of 1922

Nationality Act of 1940. 76 P.L. 853; 76 Cong. Ch. 876; 54 Stat. 1137. October 14, 1940.

Racial Integrity Act of 1924

Selective Training and Service Act of 1940, P.L.17 Cong. Ch. 76–783, 54 Stat. 885. September 16, 1940.

Sexual Sterilization Act of 1928

Stevens Treaties

Treaty of Ghent

Treaty with the Yakamas

PERSONAL PAPERS, CORRESPONDENCES, AND COURT CASES

Duncan et al., v. Andrus et al., U.S. District Court for the Northern District of California, 517 F. Supp. 1 (N.D. Cal. March 22, 1977). 71-1713 is in transfer 021-96-007 box 131, Record Group: 21, U.S. District Court for the Southern Division of the Northern District of California. Civil Case Files, 1912-1996. NAID: 585707, National Archives, San Francisco.

Edward R. Geary papers, 1840-1978. Oregon Historical Society, Davies Family Research Library.

Harrison et al. v. Laveen. 67 Ariz. 337; 196 P.2d 456; 1948 Ariz.*; Harrison et al. v. Laveen*. No. 5065 (Supreme Court of Arizona, Case Number 5065, Lexis Nexis Academic July 15, 1948.)

Hayden, Carl. *Letter to Sidney P. Osborn*. February 1, 1941, RG 1. Office of the Governor, SG 14. *Governor Sidney P. Osborn*. Arizona State Archives, Phoenix, AZ.

John B. McCandless v. United States ex rel. Paul Diabo. No. 3672. Circuit Court of Appeals, Third Circuit, Philadelphia. 25 F.2d 71. March 9, 1928.

Levi Stewart Udall Papers 1842-1974. MS-293, "Correspondence: General, 1921-1959." Box 1, Folder 12. University of Arizona Special Collections. University of Arizona Library Archive.

Mabel Duncan et al. v. The United States. 597 F.2d 1337 (United States Court of Claims, April 18, 1979).

Mabel Duncan et al v. Thomas Kleppe. U.S. District Court for the Northern District of California. No. 71-1572 is in transfer 021-96-007 box 122 Record Group: 21, U.S. District Court for the Southern Division of the Northern District of California. Civil Case Files, 1912-1996. NAID: 585707, National Archives, San Francisco.

Makah Indian Tribe v. McCauly, 39 F. Supp. 75 (W.D. Wash. 1941).

M.T. Simmons to Edward Geary, September 9, 1860, MR 9, RG 75, Washington Superintendency of Indian Affairs, 1853-1874, University of Washington Library.

Myer, Dillon S. "Memo to Area Directors, Superintendents, School Super-Intendants, and Principals." June 17, 1952, folder Indian Bureau, July 1, 1951 to June 30, 1952, Box 4, Correspondence Misc. and Misc. Washington, 1951-52, PAO Classified files, area director correspondence and reports, National Archives, Seattle.

Peter H. Porter and Rudolph Johnson Plaintiffs, v. Mattie M. Hall. 34 Ariz. 308; 271 P. 411; 1928 Ariz.; *Peter H. Porter and Rudolph Johnson Plaintiffs, v. Mattie M. Hall*. Civil No. 2793 (Supreme Court of Arizona, Lexis Nexis Academic November 2, 1928).

Richard F. Harless Papers 1932-1984. MSS-166. "Indian Voting Law Suit: Richard F. Harless Maricopa County Attorney Documents and Legal Filing Publications and Materials, 1940-1948." Box 9, Folder 1. Arizona State University Libraries Arizona Collection. Arizona State University Libraries, Tempe, AZ.

Tillie Hardwick et al. v. United States et al., United States District Court for the Northern District of California, No. C-79-1710-SW, 1983.

Tulee v. Washington 315 U.S. 681 (1942).

United States ex rel. Goodwin v. Karnuth. Civ No. 3588. United States District Court for the Western Disrtict of New York. 74 F. Supp. 660; 1947 U.S. District Court for the Western District of New York - 74 F. Supp. 660. November 28, 1947.

United States v. Kagama, supranote 6, and Donnelly v. United States (1913) 228 U. S. 243, 33 Sup. Ct. 449, Ann. Cas. 1913E 710.

United States ex rel. Paul Diabo v. John B. McCandless. No. M-54 United States District Court for the Eastern District of Pennsylvania.18 F.2d 282 March 19 1927.

United States v. Taylor, 13 P. 333 (Wash. 1887).

United States v. Washington (Phase I), 384 F. Supp. 312, 334-39, 350-99, 406-08 (W.D. Wash. 1974).

Unit*ed States v. Washington* (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980).

United States v. Washington, 759 F.2d 1353 (9th Cir. 1985)

U.S. v. Washington: *Subproceeding* C70-9213 (2001)

*United States v. Was*hington, 2007 WL 24371166, (United States District Court for the Western District of Washington, August 22, 2007)

United States v. Washington, United States District Court Western District of Washington at Seattle. No. CV 70-9213. Mar 29, 2013.

United States v. Washington, Ninth Circuit Court of Appeals, June 27, 2016

United States v. Winans, United States Circuit Court for the District of Washington. 73 F. 72 March 31, 1896

United States v. Winans, United States Supreme Court.198 U.S. 371 May 15, 1905

Washington v. United States, Supreme Court of the United States No. 17-269. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. June 11, 2018

Williams v. Gover. United State Court of Appeals for the Ninth Circuit. No. 04-17482 2007. See also *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1574. Fed. Cir. 1988.

NEWSPAPERS

Arizona Daily Star

Arizona Republic

Berkeley Daily Gazette

High Country News

Kingsport Times

Longview Daily News

Los Angeles Times

Rochester Democrat and Chronicle

Spokesman Review

The Anaconda Standard

The New York Times

The Seattle Times

Washington Standard

Yes Magazine

DISSERTATIONS, THESES, AND STUDENT RESEARCH

Samuel H. Herley, "*The Coming Tide: Viewpoints on the Formation of U.S. Federal Indian Termination Policy, 1945-1954*," (University of Nebraska at Lincoln, Department of History).

INTERVIEWS AND FILMS

Duncan Pete, Colleen. "Oral History on Mabel Duncan." interview conducted by Kevin T. Guay on March 23, 2019.

Rodriguez, Stephanie. "Oral History on Mabel Duncan," interview conducted by Kevin T. Guay on March 27, 2019.

The History of Indian Voting in Arizona. DVD. Produced by Inter Tribal Council of Arizona, Inc. 2004.

ONLINE RESOURCES AND DATABASES

Agua Caliente Cultural Museum
http://www.accmuseum.org/Nukil-MIF

Canadian Council for Refugee Website
http://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999.

Cold Spring Harbor Laboratory, Image Archive on American Eugenics Movement
http://eugenicsarchive.ca/discover/timeline/54e158966fecf60000000001.

Documented Rights: National Archive Records of District Courts of the United States
http://www.archives.gov/exhibits/documented-rights/exhibit/section3/detail/mif-constitution.html

Harry S. Truman Library and Museum: http://www.trumanlibrary.org.

Hidden from History: The Canadian Holocaust
http://canadiangenocide.nativeweb.org/genocide.pdf.

Institute for Research and Education on Human Rights: https://www.irehr.org

Juaneño Band of Mission Indians: Acjacheman Nation
http://www.juaneno.com/index.php/history/mif-articles

Kitsap Sun: https://products.kitsapsun.com

Library and Archives Canada: Electronic Collection
http://epe.lac-bac.gc.ca/100/205/301/ic/cdc/aboriginaldocs/stat/pdf/1927-act.PDF.

Library of Congress: http://www.loc.gov.

National Library and Archives of Canada
http://www.collectionscanada.gc.ca/obj/021017/f1/nlc011078-v6.jpg.

Newspaper.com: https://www.newspapers.com

Newspaperarchive.com:
http://newspaperarchive.com/login/?gclid=CLOvuoHiuM4CFQFnfgodnD0PoA

Northwest Indian Fisheries Commission: https://nwifc.org/

Northwest Treaty Tribes: https://nwtreatytribes.org

Our Future, Our Past: The Alberta Heritage Digitization Project
http://www.ourfutureourpast.ca/law/page.aspx?id=2906151

ProQuest Historical Newspapers: http://www.proquest.com/products-services/pq-hist-news.html

Results Washington: https://results.wa.gov

The Avalon Project: Documents in Law History and Diplomacy
http://avalon.law.yale.edu/

United States National Archives: http://archives.gov.

University of British Columbia: Indigenous Foundations
http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-indian-act/indian-status.html.

U.S. National Archives
http://www.archives.gov/

Washington Department of Fish and Wildlife: https://wdfw.wa.gov

Washington Forest Protection Association: http://www.wfpa.org

YouTube: https://www.youtube.com

Vita

Prior to becoming a doctoral candidate at the University of Texas at El Paso, Kevin Thomas Guay earned his B.A. and M.A. in history at California State University, Northridge. He has worked in the educational realm for a number of years, and in various capacities, as a tutor, middle school teacher, high school teacher, supplemental instructor, teacher's assistant, assistant instructor, and lecturer. Specializing in American history, Borderlands history, and Indigenous history, his scholarly interests center on social justice and law. He recently delivered a presentation at Princeton University's American Indian Studies Graduate Conference, and will have an article entitled "American Indians and the Struggle for Voting Rights" published in the Journal of the Southwest, spring 2020. Kevin recently submitted a monograph for consideration to the Pacific Northwest Quarterly, which received promising comments. Kevin is happily married to Courtney Guay, and is the proud father of Killian Guay.

Contact Information: ktguay@miners.utep.edu