Law & Society REVIEW

From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements

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This article examines how the conservative legal movement's successful countermobilization of the politics of rights enables U.S. Supreme Court outcomes that exacerbate racial and ethnic inequities while solidifying the privileged position of others in the name of equality. A comparison of two pivotal Supreme Court cases involving native entitlements—*Morton v. Mancari* (1974) and *Rice v. Cayetano* (2000)—illustrates how appeals to formal, as opposed to substantive, equality work in effect to support existing hierarchies. At the same time, the conservative legal movement's success provides progressive social actors with opportunities to reframe the discourse. We suggest that a critical questioning of strategies predicated on appeals for equal rights may be necessary to advance the interests of native populations in the current environment, and we identify an alternative way of working for native interests, one that escapes the constraints of equality doctrine by appealing to broader claims of social justice.

The dynamics of contemporary American race politics revolve primarily around conceptions of equality. The most recent public debates on race—affirmative action policies, the aftermath of Hurricane Katrina, and Barack Obama's presidential candidacy—have focused largely on whether or not the United States has become a color-blind society, its citizens' life chances exist on a level playing field, and its institutions operate on the basis of race-neutral policies. While the actual extent to which racial equality has been realized remains fiercely contested, the precepts of equality continue to provide the most common means of addressing the nation's race issues.[1]

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[1] While our article makes frequent use of the terms "race" and "racism," we are mindful of the ways in which "race"—in spite of its concrete effects and consequences—exists as an artificial and contested concept. We understand that our evocation of "race"

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The emphasis on equality doctrine as the means to resolving allegations of discrimination reflects the civil rights movement's success in utilizing a strategy based on claims of equal rights to mobilize individuals and advance their interests in the legal and legislative arenas. In response to the civil rights movement's legal victories, a countermovement led by conservative activists developed an alternative conception of equality that emphasizes neutrality and prohibits the consideration of race or ethnicity in public policy. In recent years, the conservative legal movement has successfully challenged policies that provide for race-based preferences.

This article examines the change in rhetoric from the substantive equal rights of the civil rights movement to the formal equal rights of the conservative legal movement and investigates how these rhetorical strategies have manifested themselves in Supreme Court decisions involving native entitlements.[2] Specifically, we are interested in examining how conservative activists have reframed equality to support their claim that affirmative action and native entitlements bestow special rights on the basis of racial categorization,[3] an act they allege is unconstitutional. We find that one of the most significant outcomes to emerge from this transformation has been a reframing of civil rights, from an institutional corrective designed to mitigate historic and enduring wrongs to a formal conception of equality that presumes the existence of a level playing field. The myth of a single level playing field, however, ignores that the field is more level for some groups than for others—real-world inequities remain for racial and ethnic minorities—and implicitly legitimates existing hierarchies.

can be regarded as antithetical to our project given the centrality of the discourse of race in the colonization, marginalization, and depoliticization of America's Others. That said, we have elected to incorporate these notions of "race," albeit cautiously, to refer to means by which indigenous subjects have been racialized (marked as racial rather than political bodies) in both legal and popular discourses. We hope that readers find in our work a critical disposition toward, rather than a blanket normalization of, the tricky signifier that is "race."

[2] By "native entitlements," we are referring to the protections, rights, and services guaranteed through the government's treaty obligations and legislative enactments such as the Indian Reorganization Act of 1934 and Indian Self-Determination and Education Assistance Act of 1975 in the case of Native Americans, and the 1920 Hawaiian Homes Commission Act and the 1959 Hawai'i Statehood Admissions Act for Native Hawaiians.

[3] Litigation surrounding the rights of native peoples raises questions about the intersection of race and sovereignty. Conservative legal activists often challenge native entitlement programs as illegal race preferences, whereas the proponents of these programs argue that native entitlements are based on political classifications derived from the current or former sovereign status of these communities. Many natives reject attempts to classify them as a single racial group in favor of their own definitions and standards regarding tribal membership.

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The result has been the ascendancy of the latest form of race politics, one that uses the law to solidify a racially coded stratification of wealth, power, and opportunity while simultaneously disavowing the very existence of race-based differentiations.[4] To this end, the once-progressive call for color blindness has been appropriated as a conservative edict in which opposition to racial preferences is cloaked by evocations of Dr. Martin Luther King Jr.'s 1963 dream of a race-neutral meritocracy.[5] Given that this line of reasoning has garnered widespread support throughout the legal and public domains, conservative activists presently appear well positioned to advance their interests in the federal courts and procure rulings that dismantle the wide range of policies and programs designed to assist America's marginalized and historically embattled populations, with Native American and Native Hawaiian communities standing apart as particularly vulnerable.[6]

Yet conservative legal victories also provide progressive social movements with new opportunities for countermobilization. The cogency of conservatives' argumentation and their subsequent legal victories, however, suggest that the usefulness of rights-based strategies and the opportunities for progressive social movements to deliver on rights claims may be decreasing. Sociolegal scholars need to investigate if and how progressive social movements are responding to these changes in the contextual and institutional "structures of opportunity" (McCann 1994:93). To date, however, scholars have not adequately addressed these challenges to "the rights revolution" (Epp 1998). Notably absent has been a critical questioning of equality itself and the continued relevance of legal strategies based on equal rights. While progressive activists likely will balk at a wholesale surrender of equality, as they rightly should, our analysis indicates that the battleground for civil rights has shifted out of their favor. Thus, we contend that in order to regain a foothold in American race politics, it has become necessary for progressive activists to adopt a critical disposition toward, and provisional distancing from, equality.[7] We conclude that the success

[4] Conservative activists employ this same logic to attack a full range of civil rights policies and programs. For example, they have argued that laws designed to prevent discrimination against gays and lesbians are legally problematic because they grant special, as opposed to equal, rights.

[5] An example of this can be found on the Center for Individual Rights' Web site, which prominently displays the King quote: "I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today" (Center for Individual Rights 2008: n.p.).

[6] Throughout the article, "native" and "native peoples" will refer broadly to indigenous peoples, whereas "Native American," "Native Hawaiian," and "Hawaiian" are used to signify government-recognized categories/subjectivities.

[7] The dynamism of American race politics is such that we cannot subscribe fully to either an adoption or rejection of any position. Just as equality was open to appropriation

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of the conservative legal movement and subsequent changes in equality doctrine require progressive activists interested in combating institutional racism to retool their strategies in order to garner public support and achieve their policy goals. The discourse of social justice appears to be a viable tool for mobilizing individuals and the law in response to the rise of formal equality.

This article proceeds as follows. We begin by tracing the emergence of conservative legal activism and unpacking the logic that undergirds its position. We then examine how these efforts have been manifested in law, illustrating how the conservative retooling of equality has had a material impact on legal outcomes in native entitlement cases at the U.S. Supreme Court.[8] Finally, we identify an alternative way of working for native and minority rights, one that escapes the narrow constraints of formal equality by appealing to broader claims of social justice.[9]

The core of our analysis examines the legal reasoning employed in two landmark U.S. Supreme Court cases. The first, *Morton v. Mancari* (1974), is exemplary because the justices ruled that the Bureau of Indian Affairs *could* grant preferences to Native Americans in its hiring and promotion process without running afoul of the Fifth Amendment's due process clause or Title VII of the 1964 Civil Rights Act. The second, *Rice v. Cayetano* (2000), is significant because the Court ruled that the state of Hawai'i *could not* limit voting for the Office of Hawaiian Affairs' Board of Trustees to Native Hawaiians because this violated the Fifteenth Amend-

by conservative activists, so too can any alternative we might propose. In this regard, resistance to institutional racism can only be viable insofar as it is characterized by persistent attentiveness, creativity, and mobility.

[8] Our use of "indigenous subjects" is thorny, as it evokes the divide between efforts to refashion the current system as more just versus striving toward full sovereignty. While we acknowledge native communities' concerns that an emphasis on race may displace the movement for sovereignty, the focus of this particular project is to examine how Native Americans and Native Hawaiians, as American political subjects, have been racialized and depoliticized in the legal institutions of the United States. We proceed with this tactic cautiously, as we are aware of the ways in which discussions of "racial" or "minority rights" have been used to displace native claims to sovereignty (see Kauanui 2002).

[9] While our case studies focus on rulings involving Native Americans and Native Hawaiians, neither of us is formally trained in Indian Law. Understanding that this kind of trespass is routinely problematic, we proceed nevertheless with caution. We do so because it is within cases involving native populations where conservative legal activists have achieved some of their most notable successes. This can be explained in part by the fact that the American judicial system has proven to be unreceptive, if not hostile, to native interests. As Getches noted in his 2002 testimony to the Senate Committee on Indian Affairs, "In the last ten terms, Indian tribal interests have lost 77% of all their cases in the Supreme Court" (Getches 2002:3). He continued, "It is difficult to find another class of cases or type of litigant that has fared worse in the Supreme Court," adding that even criminals seeking to reverse their convictions have met with higher rates of success (Getches 2002:3). Thus, while our examination could have been couched equally in other contexts, the potentially devastating implications surrounding the targeting of native-specific legal provisions has compelled us to focus first on the Supreme Court's engagement with indigenous subjects.

ment. When paired together, these cases demonstrate the mutually constitutive relationship between society and law, and we contend that they reveal a dramatic shift in contemporary legal mobilization and discourse surrounding equal rights and the Court's approach to equality and indigenous rights. Our findings highlight the need for research examining progressive social movements' responses to the changing opportunity structures that result from cases such as *Rice*. To begin, however, it is necessary to address the ontological premise of the conservative position: that socioeconomic opportunity already exists on a level playing field.

Benign Racism and the Level Playing Field

In a testament to the cultural impact of the civil rights movement, overt acts of racism are no longer deemed acceptable in the public domain. This is not to suggest that naked acts of discrimination no longer permeate American society. Nevertheless, when overt antagonisms do arise, particularly when expressed by public figures, they are portrayed as "gaffes" of career-ending potential and are instantly condemned by liberals and conservatives alike. To this end, the American public seems to have grown intolerant of prejudice, forcing interethnic antagonisms to assume the form of "benign racism," whereby seemingly innocent interactions rehearse cruder racisms, albeit "in a muted way that is difficult to notice until the effects of many small-scale discriminations have been totaled up" (Ackerman 1996:42).

The present climate of benign racism has forced conservative legal activists working to eliminate racial preferences to repackage their politics and challenge the doctrine of equality as previously constructed by progressive legal activists working to advance civil rights. As a result, the explicit exclusions previously enacted through legislation (i.e., Jim Crow) currently appear as magnanimous enforcements of a color-blind meritocracy. Taking as fact that post–civil rights de jure equality is commensurate with de facto equality, organizations such as the Institute for Justice, the Center for Individual Rights, the Center for Equal Opportunity, and the American Center for Law & Justice[10] work to justify their politics by amplifying anecdotal confirmations of a level playing field. Whether in the form of individual success stories (i.e., Oprah Winfrey, Colin Powell, Condoleezza Rice, and most recently President Barack Obama) or in terms of group advancement (i.e., Asian

[10] For an in-depth analysis of the development of conservative advocacy legal organizations, see Southworth (2008).

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Americans as the "model minority," the growth of the black middle class, and financial gains from Indian gaming), conservative activists attempt to substantiate the notion of barrier-free social mobility in order to impart the belief that individuals' successes and failures are strictly a matter of individual talent and effort (Duggan 2003; Giroux 2001).

Despite the fact that individual achievements do exist and group gains have been made, federal statistics continue to evince a society deeply structured by race and ethnicity. While socioeconomic disparities can be found amongst all of America's marginalized communities, a 2003 study by the U.S. Commission on Civil Rights reported that native communities "continue to rank at or near the bottom of nearly every social, health, and economic indicator" (U.S. Commission on Civil Rights 2003:ix). These findings were substantiated by the U.S. Census Bureau, which reported in 2005 that Native Americans and Alaska Natives held the nation's highest rate of poverty (25.3 percent in comparison to 8.3 percent for non-Hispanic whites) as well as the nation's second lowest real median household income ($33,627 in comparison to $50,784 for non-Hispanic white households) (U.S. Bureau of the Census 2006:5). Similarly, the Office of Hawaiian Affairs reported in 1999 that 14.1 percent of Native Hawaiian–headed families and 16 percent of all Native Hawaiians residing in Hawai'i lived in poverty (Office of Hawaiian Affairs 2006:114). A recent analysis of high school and college graduation rates found that Native Americans are surpassed by all other racial and ethnic groups with the exception of Hispanics (Commission on Professionals in Science and Technology 2005:2).[11] Moreover, in 2003, only 11.5 percent of Native Americans 25 years and older had acquired a bachelor's degree in comparison to 27.6 percent of whites (Commission on Professionals in Science and Technology 2005:2) and, according to data collected in 2000, only 9.4 percent of Native Hawaiians 25 years and older living in Hawai'i had completed a bachelor's degree, with just 43.2 percent having completed high school (Office of Hawaiian Affairs 2006:48).

These discrepancies are equally evident in indexes measuring health conditions. In 2005, 29.9 percent of Native Americans and Alaska Natives and 21.8 percent of Native Hawaiians and Pacific Islanders lived without medical insurance, in comparison to 11.3 percent of non-Hispanic whites (U.S. Bureau of the Census 2006:21). Along similar lines, "Native Americans have a lower life expectancy—nearly six years less—and higher disease occurrence than other racial/ethnic groups," and approximately "13 percent of Native

[11] Native Hawaiians were not included in this analysis.

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American deaths occur among those under the age of 25, a rate three times more than that of the total U.S. population" (U.S. Commission on Civil Rights 2003:34–5). Furthermore, Native Americans are "650 percent more likely to die from tuberculosis, 318 percent more likely to die from diabetes, and 204 percent more likely to suffer accidental death when compared with other groups" (U.S. Commission on Civil Rights 2003:34–5).

Research pertaining to the criminal justice system exposes similar discrepancies. Despite comprising just 21 percent of Hawai'i's total population, Native Hawaiians account for approximately 40 percent of adult inmates and 36 percent of juveniles within the justice system (Office of Hawaiian Affairs 2006:169). Likewise, "American Indians are incarcerated at a rate 38 percent higher than the national per capita rate" with Alaska Natives "incarcerated at nearly twice the rate of their representation in the state population" (U.S. Commission on Civil Rights 2003:68). Natives are more likely to be victims of crime and are even more likely to be victims of violent crimes perpetrated by other racial and ethnic groups than non-natives, with native women in particular experiencing significantly higher rates of victimization (U.S. Commission on Civil Rights 2003:68).

These disparities suggest that the American playing field remains anything but level, with native populations standing out as one of the most marginalized segments of society. Evidence of the continued existence of race-based stratification requires skepticism of conservative activists' insistence on defending an in situ level playing field and highlights the need for progressive social movements committed to advancing the interests of marginalized groups. The actual desires that animate conservative legal activism may be beyond our reach, but much can be gained by examining the conditions of its emergence and the logic that undergirds its position.

The Emergence of Conservative Legal Activism

As intimated above, conservative legal activism emerged in response to gains made during the civil rights era. The politics of the civil rights movement worked, albeit in diverse and uneven ways, to contest the gender, racial, and sexual divisions that had sustained the monopolization of resources, privilege, and opportunity in the United States. Propelled by the emergence of identity-based politics (i.e., black nationalism, the women's rights movement, the American Indian movement, the gay rights movement, and the Native Hawaiian Renaissance), these struggles compelled the nation at-large to not only confront but also address past and endur-

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ing forms of discrimination. Progressive activists placed demands on the political and legal systems and convinced legislatures and the courts that laws allowing for the differential treatment of individuals on the basis of race, ethnicity, or sex ran afoul of equal protection guarantees. What followed, at least until the Reagan Administration, was the implementation of federal programs and policies that encouraged a downward redistribution of wealth, resources, and opportunity (Duggan 2003:9) and court decisions upholding affirmative action, school busing, and native entitlements designed to overcome decades of institutionalized racism. The civil rights movement's politicization of rights and identities allowed for the establishment of a limited welfare state, the questioning of unrestrained capitalism, and the implementation of programs designed to combat centuries of racial discrimination (Duggan 2003:xi).

The recent wave of conservative legal activism, therefore, is part of a countermovement that has fought since the 1970s to dismantle these civil rights era policies (Duggan 2003:ix). This countermovement has increasingly employed the discourse of rights in hopes of re-securing the primary institutions of the state and rerouting federal funds from social issues towards individual or private interests (Duggan 2003:xi). Conservative activists have offered an alternative understanding of equal rights that emphasizes formal equality and opposition to racial preferences. To fully appreciate the means by which conservatives have capitalized on the discourse of rights, it is instructive to turn to Scheingold's seminal text, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974).

Influential to a generation of public law and sociolegal scholars, Scheingold's work outlines what he deems the "myth of rights" and "politics of rights." The myth of rights is notable for the way it closely associates litigation, rights, and remedies with broader appeals for social change. Its salience has led groups and individuals to understand legal action as a primary means of achieving rights and recognition (Scheingold 1974:5). Nevertheless, in spite of its hold on the popular imagination, Scheingold suggests that the myth of rights is limited, particularly due to the courts' inabilities to enforce their holdings (Scheingold 1974:7–8). However, if the myth of rights alone is incapable of achieving social change, then its symbolic power remains significant in that it provokes individuals to act and allows movements to coalesce. Scheingold refers to this facilitation as the "politics of rights" and contends that "since rights carry with them connotations of entitlement, a declaration of rights tends to politicize needs by changing the way people think about their discontents" (Scheingold 1974:131). As a result, the politics of rights may bring private problems into public view, thereby encouraging individuals to join a movement, and it may

work to introduce new social movements into the political arena, prompting a realignment of political forces with significant ramifications for public policy (Scheingold 1974:131–2).

Within the context of the civil rights movement, litigation and judicial decisions proved vital to identity-based movements. Not only did they draw public attention to the concerns of the marginalized, but they also strengthened identification, mobilization, and perhaps the validation for political change. Since the publication of *The Politics of Rights,* scholars have explored how the myth of rights has mobilized individuals and social movements in pursuit of legal change before the courts (Epp 1998; McCann 1994; Silverstein 1996), the courts' abilities to produce social change (Feeley 1992; McCann 1992, 1994, 1996; Rosenberg 1991, 1992, 1996); and the constitutive relationship between rights, identity, and the law (Brigham 1988, 1996; Engel & Munger 2003; Ewick & Silbey 1998). McCann's *Rights at Work* (1994), for instance, examines how legal mobilization played an instrumental role in the development of the women's pay equity reform movement during the late 1970s to the 1990s. McCann explains that pay equity litigation served to increase women's awareness of their legal rights, which facilitated an expansion of the movement. Similar treatments have focused on the legal mobilization of racial minorities, the disabled, and the poor, as well as on behalf of environmental and animal rights. This body of research has foregrounded the ways in which the law has effectively mobilized historically disenfranchised groups that held little hope of finding recourse through the political system.

Yet as early as 1974, Scheingold noted that the myth of rights "seeks to be all things to all people—or at least as many things to as many people as possible" (Scheingold 1974:17). Put differently, the law's mobilizing effect is not exclusive to politically marginalized groups and, as more recent political science research has disclosed, the myth of rights has served as the basis for the backlash against civil rights (e.g., Dudas 2005, 2008; Gerstmann 1999; Goldberg-Hiller 2002; Goldberg-Hiller & Milner 2003; McCann & Dudas 2006). This "politics of resentment" draws equally upon the myth of rights to formulate a "counter-language of rights," one that accuses minorities of pursuing special rights to further their extra-Constitutional interests (Dudas 2005:725). Special rights, here, are those rights and recognitions granted to marginalized groups in an effort to address past and present forms of institutional discrimination. As noted by Dudas, "Such special-rights claims are, according to [conservative] activists, unfair because they threaten the core American values, especially, of individual merit and equality of opportunity" (Dudas 2005:725). Thus, to combat the perceived threat posed by special rights, as well as the supposedly preferential advantages they authorize, conservative legal activists

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have commandeered the position of equal rights to argue that each subject must be treated equally before the law, irrespective of racial, historical, or socioeconomic differences.

It would be a mistake to understand this countermovement as a wholesale restriction of rights. As Goldberg-Hiller and Milner (2003) note, "Opposition to rights involves a form of rights mobilization: It draws legitimate and appropriate boundaries of rights use, thereby affirming some rights at the same time that it opposes others" (1076). Politics, in this regard, becomes a matter of framing, whereby certain policies are celebrated for being equal, universal, and just, and others are derided for being special, preferential, and unfair. Recent treatments, whether centered on gay rights activism (Gerstmann 1999; Goldberg-Hiller 2002; Goldberg-Hiller & Milner 2003; Keen & Goldberg 1998) or indigenous sovereignty and treaty rights (Dudas 2005, 2008; Goldberg-Hiller & Milner 2003), have shown how the conservative countermovement has been sustained primarily by its opposition to special rights. It is a somewhat bitter irony that progressives struggled for decades to establish the legal merit of equal rights only to now have it used as the primary attack against them. At the same time, however, the conservative movement's appropriation of equal rights is an acknowledgment of the civil rights movement's success. Rights-based litigation is currently being deployed by conservatives and progressives alike, with both sides appealing to a discourse of equality in their pursuit of direct and indirect policy goals. Yet while conservative and progressive activists may base their politics on similar-sounding appeals to equality, their conceptions of equality are in fact qualitatively different.

Couched within a discourse of merit and egalitarianism, the conservative reformulation of equality operates by smoothing over those racial and historical differences that have been used to warrant so-called special rights. This concept of smoothing should not be confused with related concepts such as color-blindness, as it entails more of an enactment of force than a simple discounting of racial or historical differences. To elaborate upon this as-of-yet underutilized concept, we draw upon Bogard's (2000) work to suggest that smoothing, in spite of its seemingly innocuous disposition, is in fact a violent act of inscription whereby the surfaces of subjects (i.e., bodies) are "worked-over" until individual differences no longer exceed the limits of a seamless social assemblage (279). At a conceptual level, then, smoothing entails a dual process of cutting and coating or, rather, extraction and deposition. Cutting and extraction refer to the removal of aberrant or incongruous surface effects, whereas coating and deposition entail the introduction of a veneer or gloss to facilitate the blending, concealment, or disappearance of individual distinctions (Bogard 2000:280, 288). At a societal level, then, the

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conservative belief supposes that once this smoothing process is complete and all subjects have been sufficiently blended in, society will finally become "geared to efficiency, speed, utility, function, appearances, increases in power, rationalization, and refinement of tasks" (Bogard 2000:277, 278). For the purposes of our project, the cutting refers to the removal of those native distinctions that disrupt the conservative ideology of America-as-level-playing-field, and the coating stands as the casting of native peoples as undifferentiated subjects who are entitled to nothing more than the rest of the American citizenry, as protected by the Constitution. Bogard's (2000) treatment of smoothing is instructive for the way it frames every mark inscribed on the surface of a body as "a scene of violence —an impact, a division, a wound" (282). Therefore, we are interested in how the racial and historical distinctiveness of native bodies has been smoothed over by conservative legal activists.

While they are perhaps more palatable than prior regimes of overt subordination, these seemingly inclusive forms of racism continue to produce harm. Their privileging of formal over substantive equality locates the blame and burden of America's problems on those historically marginalized groups who are unwilling to "move beyond" the injuries incurred by conquest and discrimination. In this regard, conservative legal activism can be read as an effort to conceal asymmetric power relations with an ahistorical, antiracial flatness. The efficacy of this strategy relies wholly on the presumed actualization of a level playing field, whereby long-standing claims of injustice have already, somehow, been settled and forgotten. When cast in this light, the impact of conservative legal activism extends beyond juridical manifestation of resentment; it works to preserve the status quo through a minimization of public responsibility.

To evaluate the efficacy of the conservative movement's legal strategy and to elucidate the constitutive relationships among social movements, public and legal discourses and institutions, we examined two U.S. Supreme Court cases that bookend the modern era of antidiscrimination law. *Morton v. Mancari* (1974) was decided in the twilight of the civil rights movement and reflects the public discourse and progressive social movements' mobilization of the politics of rights in support of affirmative action and native entitlements as tools for advancing equal rights and achieving substantive equality for the historically marginalized. By contrast, *Rice v. Cayetano* (2000) was decided in the era of conservative countermobilization and reflects the conservative legal movement's successful deployment of the politics of rights and the changing public discourse: Race-neutral policies are required to protect the rights of all citizens, consistent with formal equality.

Using interpretive methods, our content analysis of the Court's decisions in *Morton* and *Rice* demonstrates how discursive

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strategies, such as appeals to equal rights, are translated into law. On its surface, formal equality requires individuals to be treated the same under the law, but our analysis demonstrates that formal equality as constituted by the conservative legal movement and operationalized into law via court decisions works in effect to preserve existing power arrangements at the expense of native communities by ignoring institutionalized hegemony in favor of ahistorical legal reasoning. These findings suggest the need for an alternative discourse for those interested in challenging the myth of the level playing field and advancing native rights. While this type of research may be a departure for *Law & Society Review,* our analysis demonstrates that the dominant paradigm for studying and understanding social movement legal mobilization—the politics of rights—may no longer be viable for progressive movements seeking to pursue social change in the current environment.

Morton v. Mancari (1974)

In 1934, Congress passed the Indian Reorganization Act (IRA) to enhance tribal self-government. In 1972, four non-native Bureau of Indian Affairs (BIA) employees challenged the IRA's employment preferences for Native Americans[12] at the BIA. They argued that the preferential treatment of Native Americans in hiring and promotion violated the 1972 Equal Employment Opportunity Act (EEOA), which extends Title VII of the 1964 Civil Rights Act's prohibition on racial discrimination in the workplace to federal government employees, as well as the Fifth Amendment's Due Process Clause, which guarantees equal protection of the law at the national level. In federal district court, a three-judge panel ruled that Title VII as applied to the federal government via the EEOA prohibited all racial classifications, including the BIA employment preference (*Mancari v. Morton*, 359 F. Supp. 585, (D.N.M. 1973)).[13] The BIA appealed to the Supreme Court, and in *Morton v. Mancari* (1974), a unanimous Court upheld the BIA employment preference as a political, and not a racial, classification (*Morton v. Mancari* 1974:553–4).

[12] The IRA defined Native Americans as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood" (25 U.S.C. § 479).

[13] BIA regulations required that eligible Native Americans be "one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe" (*Morton v. Mancari* 1974:553). The Supreme Court's decision in *Morton* utilized the BIA regulation as opposed to the IRA definition.

Historical Context

The history of the U.S. government's mistreatment of Native Americans is well documented: forced relocation and exploitation; deprivation of life, liberty, and property; government policies that oscillated between mandatory assimilation and separation. It is important, however, to reiterate that the historical relationship between the BIA—created in 1824 to manage Indian services and affairs—and native tribes has been contentious at best. During the latter half of the nineteenth century, the U.S. government segregated Native Americans on reservations and simultaneously increased BIA involvement and interference with tribal activities (Goldberg 2008:239). This practice was consistent with the quasi-sovereignty afforded to tribal governments in the United States, which worked to put "tribes and their members at the mercy of the will of Congress" (Dudas 2008:20). By the 1920s, it was clear that BIA involvement in native affairs often worked to the detriment of native communities (Dudas 2008:20). As a result, Congress passed the IRA in 1934 to increase tribal self-government as well as native representation among the ranks of BIA employees (*Morton v. Mancari* 1974:542–3).

During the 1940s and 1950s, however, the U.S. government changed course and began to push policies designed to assimilate Native Americans into American society (Dudas 2008). These termination policies sought to end the U.S. government's obligations to tribal entities and resulted in a variety of negative developments. A backlash among native individuals intersected with the political and structural opportunities provided by the civil rights movement of the 1960s to prompt a Native American rights movement that emphasized self-determination and decreased government involvement in native affairs (Dudas 2008). Building on the successes of the African American civil rights movement, a variety of organizations committed to advancing the rights of native peoples developed in the 1960s and 1970s. These groups included the American Indian Movement and the Native American Rights Fund, which sought to mobilize the law and utilize legal advocacy to advance native interests (Dudas 2008:24–5). As Dudas explains:

> that the activities of the civil rights movement so successfully challenged taken-for-granted racialized practices was important for the goals of the Indian activism because such challenges ensured that Indians would also benefit from attempts to remedy racialized inequality . . . the gains of the civil rights movement . . . had indirect impacts on Indian activism in that they helped make whites sensitive to the pervasive structures of racism that shaped American life. The civil rights movement helped to alter the national consciousness in ways that encouraged structural changes in the name of equal rights, thus creating a context that was more

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> open to the participation of long-excluded racial groups in general (2008:32).

In this context, Native Americans began to question the government's commitment to the employment preferences required by the IRA (Goldberg 2008). Political protests and litigation were launched to force the BIA to abide by the IRA, and in 1972 the Secretary of the Interior announced "the Bureau's new policy to extend the Indian preference to training and filled vacancies by initial appointment, reinstatement, and promotions whenever two or more available candidates 'meet the established requirements' " (Goldberg 2008:242). In response to this policy, non-native BIA employees initiated litigation challenging the employment preferences.

The legal challenge to the IRA was initiated by four non-native employees of the BIA who feared that their jobs or future opportunities for advancement were jeopardized by the employment preferences (Goldberg 2008). Mancari et al. won their case in the federal district court, which held that the EEOA implicitly repealed the IRA's employment preference. The U.S. government and Amerind—an organization representing native BIA employees—appealed to the Supreme Court. Three amicus curiae briefs were submitted at the Supreme Court: the National Congress of American Indians (NCAI) and other intertribal groups supported the preferences, the Mexican American Legal Defense and Educational Fund defended the preferences, and the National Federation of Federal Employees filed a brief supporting the IRA's hiring preferences but opposing promotion preferences (Goldberg 2008:255–6). Notably, the two briefs supporting the native entitlement were drafted by organizations—NCAI and the Mexican American Legal Defense and Education Fund—committed to advancing the civil rights of marginalized individuals. No briefs were filed by conservative legal organizations.

Morton v. Mancari (1974) reached the Supreme Court as the civil rights movement was placing regular and often successful demands on the courts to address discrimination against marginalized groups.[14] In addition, during the 1960s and 1970s the federal government produced numerous policies designed to advance the civil rights of racial and ethnic minorities.[15] From the 1964 Civil Rights Act to the implementation of affirmative

[14] See, e.g., *Green v. County School Board of New Kent County* (1967), *Loving v. Virginia* (1967), *Griggs v. Duke Power Company* (1971), *Reed v. Reed* (1971), *Swann v. Charlotte-Mecklenburg Board of Education* (1971), *Alexander v. Louisiana* (1972), *Frontiero v. Richardson* (1973), *Ham v. South Carolina* (1973), *Keyes v. School District No. 1, Denver* (1973), and *Craig v. Boren* (1976).

[15] See, e.g., Executive Orders 10925 (1961), 11063 (1962), and 11246 (1965); 1964 Civil Rights Act; 1965 Voting Rights Act; 1968 Civil Rights Act; 1972 Equal Employment

action programs and support for tribal self-determination, Presidents John F. Kennedy, Lyndon B. Johnson, and Richard M. Nixon worked with Congress to end discrimination against marginalized groups. It is within this context that the Supreme Court was asked to evaluate the BIA's employment preferences.

The Court's Legal Reasoning

The Justices determined that the 1972 EEOA did not render the IRA's employment preferences moot and ruled that the differential treatment of eligible Native Americans—individuals with "one-fourth or more Indian blood" and "a member of a Federally-recognized tribe"—did not amount to invidious racial discrimination in violation of the Fifth Amendment Due Process Clause (*Morton v. Mancari* 1974:553). Instead, the Court concluded that the employment preference was a political classification because "it applies only to members of 'federally recognized' tribes" (*Morton v. Mancari* 1974:553). The Court's opinion emphasized the historical and legal relationship that the federal government has with Native American tribes and relied on "Congress' unique obligation toward the Indians" and the "unique legal status" of Native Americans to reach its conclusion (*Morton v. Mancari* 1974:555). The Court's opinion went to great lengths to highlight the distinctive sociopolitical context that pervades the relationship between Congress and Native American tribes, and the Court explicitly relied on these particularities in its decision.

The Court acknowledged that upholding employment preferences for Native Americans amounted to differential treatment, but explained that the very point of the disputed section of the IRA was to distinguish native populations from non-natives in employment at the BIA (*Morton v. Mancari* 1974:544). The Justices cited testimony offered by Congressman Edgar Howard (D, Nebraska) at the time he sponsored the IRA to support their conclusion:

> The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs.... It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions (*Morton v. Mancari* 1974:543–4).

Congress intended for the legislation to increase the hiring of Native Americans specifically, as opposed to remedying racial

Opportunity Act; 1974 Housing and Community Development Act; and 1975 Indian Self-Determination and Education Assistance Act.

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discrimination broadly defined. The historically volatile relationship between the federal government and native peoples motivated Congress to "modify the then existing situation whereby the primarily non-Indian-staffed BIA had plenary control . . . over the lives and destinies of federally recognized tribes" (*Morton v. Mancari* 1974:542). Thus, native preferences are a deliberate attempt to increase the representation of the constituent population, and only that population, at the BIA. The Supreme Court explained that a decision declaring BIA hiring preferences to be invidious racial discrimination would hamper the government's ability to assist native populations and remedy past wrongs (*Morton v. Mancari* 1974:552–3).

The justices also differentiated the BIA preference from the types of invidious discrimination that civil rights legislation intended to eliminate. The EEOA was passed to prevent discrimination on the basis of race, color, religion, sex, or national origin, not eliminate a preference for native populations: "The [Native American] preference is a longstanding, important component of the Government's Indian program. The antidiscrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with *an entirely different and, indeed, opposite problem*" (*Morton v. Mancari* 1974: 550; emphasis added). This statement reflects the extent to which the justices were willing to tease out the distinctions among Americans and conclude that preferences in and of themselves do not necessarily run afoul of the doctrine of equality. In effect, prohibitions on employment discrimination on the basis of race as embodied in the EEOA did not require the justices to apply a universal impartial definition of equality that prohibits ancestral distinctions.

For example, the Court emphasized that Native American preferences in a variety of areas historically had been treated as exceptions to federal antidiscrimination policies because these distinctions were different from racial discrimination (*Morton v. Mancari* 1974:548–9). As a result, the Court applied the rational basis test, as opposed to strict scrutiny triggered by invidious racial discrimination, and stated, "As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed" (*Morton v. Mancari* 1974:555). The Court concluded that Congress was not seeking to advance a racial preference, but rather had a legitimate interest in increasing Native American self-government and providing tribal communities with "greater control over their own destinies" (*Morton v. Mancari* 1974:553). The hiring preference was "an employment criterion reasonably designed to further the cause of Indian self-government" and was

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not a "racial preference" or "racial discrimination" (*Morton v. Mancari* 1974:554).

The Court's unanimous opinion in *Morton* identified Native Americans as a distinctive population with a "unique legal status" that Congress could single out for "special treatment," as long as the preferences were rationally related to a legitimate legislative purpose (*Morton v. Mancari* 1974:555). The Court accepted that Congress's interest in enhancing opportunities for Native American self-government and self-determination was a legitimate reason for treating native populations differently from other Americans.

The Court's opinion explicitly recognized the unique plight of Native Americans, intranational differences among Americans, and the different legal remedies that may be necessary to remedy the lengthy history of discrimination against native peoples. By incorporating an evaluation of the sociopolitical context into its decision, the Court was able to account for the circumstances that led Congress to single out native populations for preferential treatment. Congress's legislative response accounts for the history of domination and oppression inflicted on native populations and the long-term "negative effect of having non-Indians administer matters that affect Indian tribal life," and the Court accepted this subjective evaluation and incorporated it into its own legal reasoning (*Morton v. Mancari* 1974:542).

Implications

According to Goldberg's (2008) research, the Supreme Court was hesitant to address the question of native entitlements as reverse discrimination in the *Morton* case. The justices had just avoided addressing the legitimacy of affirmative action programs in *DeFunis v. Odegaard* (1974) and seemed inclined to defer the legal issue for the time being.[16] This may explain the Court's decision to determine that the classification at issue in *Morton* was a political and not a race-based determination, a finding that enabled the justices to apply the rational basis test to uphold the BIA preference (Goldberg 2008). That this decision was unanimous is noteworthy. Conservative justices who would declare racial preferences in higher education admissions to be unconstitutional a few years later in *Bakke* (1978) voted to uphold the native preference in *Morton*.

The impact of the Court's decision in *Morton* was profound because it implicitly recognized the legitimacy of other federal

[16] In *Regents of the University of California v. Bakke* (1978), the Supreme Court found unconstitutional the University of California-Davis's affirmative action program, but in a complicated and splintered opinion left open avenues for more narrow affirmative action programs in educational contexts.

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statutes that provided native entitlements and authorized Congress to continue crafting policies that promoted tribal self-determination (Goldberg 2008:237). As a result, the Court's decision set the stage for the continuation and expansion of policies designed to advance the civil rights of native communities.

In doing so, however, the Court's decision aided in the development of a conservative countermovement. Conservative activists were frustrated with the Court's support for native preferences because they believed that these programs violated the rights of non-natives. As a result, conservatives created a countermovement modeled on the civil rights movement: They appropriated the language of rights and developed public interest law firms and interest groups to appeal for public support and place demands on the political and legal systems (Southworth 2008; Teles 2008).

Rice v. Cayetano (2000)

In 1978, the Hawaiian Constitution was amended to provide for the creation of the Office of Hawaiian Affairs (OHA), an agency charged with administering programs for the benefit of peoples of Hawaiian descent.[17] In 1996, Harold "Freddy" Rice, a non-native, sued the state of Hawai'i on the grounds that OHA used race-based criteria to determine voter eligibility for its Board of Trustees elections in violation of the Fourteenth and Fifteenth Amendments and the 1965 Voting Rights Act. That OHA's "Hawaiian only" clause came as a result of a 1978 state constitutional amendment whereby Hawai'i's non-native residents elected to opt themselves out of OHA's affairs was inconsequential to Rice. Rice lost his case in the federal district court and the Ninth U.S. Circuit Court of Appeals, but the U.S. Supreme Court ruled that the restriction of OHA's electorate to the descendants of the 1778 inhabitants of the Hawaiian Islands "used ancestry as a racial definition and for a racial purpose" (*Rice v. Cayetano* 2000:515) and effectively "fenc[ed] out whole classes of its citizens from decisionmaking in critical state affairs" (*Rice v. Cayetano* 2000:522) in violation of the Fifteenth Amendment.

Historical Context

In the aftermath of the Supreme Court's decision in *Morton,* native civil rights groups continued to lobby for laws providing for

[17] This comprises two subclasses: "Native Hawaiians" and "Hawaiians." "Native Hawaiians" refer to those descendants who are "not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778," while "Hawaiians" represent a larger group (including "Native Hawaiians") consisting of "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands . . . in1778" (*Rice v. Cayetano* 2000:509–10).

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greater self-determination that often treated natives differently than non-natives. In Hawai'i, for example, the Hawaiian Renaissance of the 1970s, which developed as a result of the civil rights movement and Native American Rights movement, played an instrumental role in the establishment of OHA (Yamamoto & Betts 2008:548). OHA was created as a "'public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race'" (*Rice v. Cayetano* 2000:508).

The creation of OHA was a significant victory for the Native Hawaiian movement and reflected the citizenry of Hawai'i's commitment to the state's indigenous population. This support acknowledged that centuries of conquest and imperialism—including the U.S. role in the 1893 overthrow of the Hawaiian monarchy and its annexation of Hawai'i in 1898 (of which the government has since admitted culpability via the 1993 Apology Resolution)—worked to destroy Hawaiian sovereignty, led to the foreign ownership and control of nearly three-quarters of Hawai'i's arable land by the end of the nineteenth century (Trask 1999:6–7), and devastated the Native Hawaiian population (Kauanui 2008; Silva 2004).

By the time the Supreme Court heard oral arguments in *Rice,* the makeup of the Court had changed substantially—Presidents Ronald Reagan and George H. W. Bush had appointed five of the Court's nine Justices and Justice William Rehnquist, the most conservative member of the *Morton* Court, had been elevated to Chief Justice—and the conservative movement had established itself as a formidable political and legal force (Keck 2004; Southworth 2008; Teles 2008). As Yamamoto and Betts explain, "By the time the Supreme Court considered Rice's challenge in 1999, it had banned claims of institutional discrimination, invalidated federal and state affirmative action programs, limited federal court powers over school desegregation, rejected claims of discrimination in death-penalty sentencing, scuttled state hate crimes legislation, and allowed the Boy Scouts to ban gay troop leaders" (2008:553–4). In addition, years of conservative legal efforts had reframed the debate surrounding native entitlement programs and racial preferences as a contest between equal and special rights. Conservative legal activists such as Ward Connerly, cofounder of the American Civil Rights Institute (an organization opposed to all race and gender preferences), successfully lobbied for the passage of state initiatives that prohibited all considerations of race, sex, and ethnicity in state hiring and education admissions. Proposition 209, approved in California in 1996, is the best example of this type

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of policy. Emboldened by this countermovement, Rice initiated litigation. His lawsuit "was designed to fire conservative enmity by characterizing programs for indigenous Hawaiians as simply 'racial preferences' and to ignite a rash of new 'civil rights' lawsuits to dismantle Hawaiian health care, education, housing, and cultural programs" (Yamamoto & Betts 2008:545).

Rice lost his case at the district and appellate courts. The federal district court concluded that the classification at issue was political, as opposed to racial, and applied the rational basis test to uphold the voting requirements. The U.S. Court of Appeals affirmed. These decisions were consistent with the Supreme Court's *Morton* holding that the BIA employment preferences were a political classification. Rice appealed to the Supreme Court, where he was represented by Theodore Olson, who had previously assisted the Center for Individual Rights in challenging affirmative action in Texas's higher education institutions; this resulted in *Hopwood v. Texas* (1996), which banned the use of such policies in the Fifth Circuit (Yamamoto & Betts 2008:556).

Twelve amicus curiae briefs were filed in *Rice,* a significant increase from the three filed in *Morton*. Of the 12 briefs, eight defended the native preference and three opposed it. Among those defending the preference were a broad variety of interests including the U.S. government; Attorneys General for various U.S. states; a variety of Native Hawaiian civic, public interest, and civil rights organizations; the Kamehameha Schools Bishop Estate Trust; the Hawai'i congressional delegation; the National Congress of American Indians; the Alaska Federation of Natives and Cook Inlet Region; and various Hawaiian homestead associations. By contrast, the three opposition briefs were all filed by conservative activists and organizations that opposed racial preferences in favor of a color-blind society: the Pacific Legal Foundation, the Center for Equal Opportunity, the New York Civil Rights Coalition, Abigail Thernstrom [Vice Chair of the U.S. Commission on Civil Rights; Adjunct Scholar, American Enterprise Institute], the Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the U.S. Justice Foundation.[18]

These amicus curiae reflect the significant changes that occurred in the political and legal environment between the Court's *Morton* decision and its consideration of *Rice*. While a variety of Hawaiian local and state organizations filed briefs in support of OHA's voting requirements, the NCAI was the only national civil rights group to participate in the litigation. By contrast, national conservative organizations were well represented—a signifi-

[18] The one exception is the participation of Carl Cohen, a former member of the Board of Directors of the American Civil Liberties Union.

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cant change from 1974, when not a single conservative group participated as amicus curiae in *Morton*. As Yamamoto and Betts explain, "The *Rice* case connected many seemingly unrelated individuals and groups in a complex web of conservative attorneys, think tanks, advocacy organizations, judges and politicians. Although *Rice* started as one white rancher's attempt to vote on Hawaiian affairs, the case created a national backlash against all Native Hawaiian programs" (2008:555).

The Court's Legal Reasoning

The linchpin for the *Rice* decision was the legal designation of Native Hawaiians as a "race." Despite the state of Hawai'i's argument that *Rice* ought to be placed beyond the ambit of the Fifteenth Amendment because OHA's voting scheme involved a non-suspect, political classification (as opposed to a forbidden racial one), the majority opinion maintained that Hawai'i defined OHA's electorate in terms of race (through the proxy of "ancestry") consistent with the legal argument advanced by Rice's attorneys and the conservative amicus curiae (*Rice v. Cayetano* 2000:514). As a result, the Court, convinced that racial classifications never exist benignly, found the absence of invidious intentions to be immaterial to *Rice*'s constitutional inquiry (Katz 2000). Central to the Court's analysis was a review of previous Supreme Court cases in which the justices declared grandfather clauses, white primaries, registration challenges, racial gerrymandering, and interpretation tests to be in violation of the Fifteenth Amendment because they were designed to systematically disenfranchise black Americans (*Rice v. Cayetano* 2000:512–14). The *Rice* decision held that Hawai'i, similar to the various state legislatures that approved the aforementioned laws, employed racial classifications to segregate voters (*Rice v. Cayetano* 2000:515). The fact that Hawai'i's sociopolitical context differed from the historical circumstances of the black disenfranchisement cases bore little significance. Yet in Hawai'i it was the non-native majority that opted to fence itself out of the electorate for the newly formed OHA via its support of an amendment to the state's 1978 constitution, whereas in the earlier cases an empowered white majority targeted a racial minority for discriminatory treatment. The majority opinion, however, ignored these distinctions and the unique history of Hawai'i in favor of a universal and normative conception of equality that was self-standing and ahistorical. Quoting the Supreme Court's previous decision in *Hirabayashi v. United States* (1943), Justice Anthony Kennedy explained, "'Distinctions between citizens solely because of ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'" (*Rice v. Cayetano* 2000:517). This statement reflects the Court's commitment

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to a formal understanding of equality that did not account for prior discrimination against native populations or allow for differential treatment in order to remedy past wrongs.[19]

Furthermore, the Court determined that when used in the administrative practices of state and federal programs, the "Hawaiian-only" designation demeaned the "dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities" (*Rice v. Cayetano* 2000:517). Justice Kennedy stated that OHA's criterion of ancestral lines "is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens" (*Rice v. Cayetano* 2000:517). These statements are indicative of the egalitarianism and social atomism that characterize formal equality, and they imply that all individuals operate on the same level playing field. As a result, the majority opinion smoothed over the differences that exist among the people of Hawai'i in favor of the equality of an undifferentiated citizenry. In this sense, the institutionalization of "Native Hawaiian" as a racial classification discursively elided questions of aboriginal claims to land and resources by overcoding the active processes of domination and exclusion with an unsituated, antiracial flatness. As the rhetoric of racial equality elevated the ideal of "merit and essential qualities," there was a move toward a meritocracy that would assume an objective measurement of qualifications and performance, independent of cultural and normative attributes (*Rice v. Cayetano* 2000:517). However, because social competency cannot be separated from hegemonic values and norms, the objectivity attributed to such measures failed to exist. In other words, Kennedy's opinion moved Hawai'i toward a universal ideal that could not exist independent of the exclusionary social structures that produced it.

The *Rice* example illustrates how an emphasis on formal equality foregoes the specificities of sociopolitical contexts. This critical distance endows the Court with an understanding of equal rights that is self-standing, universal, and beyond the influence of socially

[19] By contrast, Justice John Paul Stevens' dissenting opinion criticized the majority for rendering a decision based "on the repetition of glittering generalities that have little, if any application to the compelling history of the State of Hawai'i" (*Rice v. Cayetano* 2000:527). Stevens focused instead on the historical exploitation of Native Hawaiians by non-natives and the politics behind the decision to limit the OHA electorate to "Hawaiians." He explained that the ancestral classification "is based on the permissible assumption in this context that families with 'any' ancestor who lived in Hawai'i in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawai'i to recognize that deep reality is not to demean their own interests but to honor those of others" (*Rice v. Cayetano* 2000:545). Stevens concluded that the restrictions on OHA's electorate were not tantamount to invidious racial discrimination, but rather were an attempt to "see that indigenous people are compensated for past wrongs, and to preserve a distinct and vibrant culture" (*Rice v. Cayetano* 2000:529).

specific prejudices or self-interested claims of power (Young 1990:2). By transporting the particularities of Hawaii's history to the level playing field, the Court turned a blind eye to the particular institutional context by recasting the given (that racial discrimination is wrong) as both necessary and universally applicable.

Implications

Rice v. Cayetano (2000) was a 7–2 decision and reflects the change in the ideological balance of the Court from 1974 to 2000 as previously noted. In *Rice*, a majority of the justices agreed that native preferences are racial classifications that run afoul of the guarantees of formal equality. This determination was a victory for conservative activists because it validated their contention that differential treatment of indigenous populations is tantamount to racial discrimination, a finding that will trigger strict scrutiny in equal protection cases and likely lead to the end of native entitlements in future litigation.[20] At the same time, the change in the Court's ideological balance reflects the conservative movement's success in reshaping the political and legal landscape (Keck 2004; Teles 2008). Thus, this decision affirmed the ascendancy of the conservative movement, signaled that native entitlement programs are in jeopardy, and advanced a legal doctrine that preserves existing hierarchies under the guise of equal rights.

Reconceiving Social Justice

As previously noted, litigation and judicial decisions historically have worked to mobilize proponents and opponents of civil rights and validate movements for political change (Scheingold 1974). Just as the Court's decision in *Morton* precipitated the conservative legal movement, the changing sociolegal environment as exemplified by *Rice* likely will act as a catalyst for those interested in defending native rights. While conservative activists have framed the debate over native entitlements as a quest by native peoples to gain special rights beyond those of the average American, progressive legal activists now have an opportunity to make their case anew to the American public and elites. Acknowledging the mutually constitutive relationship between law and society, progressive activists will need to recognize that the institutional context and public perception regarding equal rights have changed. Because "public reactions to

[20] While strict scrutiny analysis provides for the consideration of historical context and instances of prior discrimination, the conservative argument in favor of formal equality is grounded in the assumption of a level playing field that seems to be at cross-purposes with considerations of institutionalized racism as a justification for race-based preferences.

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equal opportunity programs are affected by their presentation" (Fine 1992:4), appeals to equality likely will not prove to be as effective in a sociopolitical environment where equal rights are synonymous with formal equality. To the extent that the rhetoric of equal rights has been co-opted by conservatives, progressives will need to devise new rhetorical devices and strategies that respond to the allegation that native communities are asking for special rights.

These environmental and institutional changes provide sociolegal scholars with new opportunities to study the politics of legal mobilization. To date, sociolegal scholarship has focused significant resources on the study of rights-based activism and illustrated how both progressive and conservative social movements have mobilized the law and capitalized on the politics of rights in order to advance their interests in the American legal and political systems. Based on this research, it is logical to expect that progressives will respond to conservatives' successful mobilization of the politics of rights. We suggest that the politics of social justice may provide the next rhetorical and legal battlegrounds for native entitlements. In much the same way that the myth of rights carries symbolic power capable of mobilizing individuals and movements to advocate for legal and political change, appeals to social justice have symbolic power as well. In addition, social justice has the added benefit of providing an effective response to formal equality.

Our conception of social justice draws heavily on Young's critique of distributive justice and her corrective social justice (Young 1990). Young argues that distributive models of justice are characterized by their inability to articulate the interrelations that exist amongst social members; this atomization is problematic because it obscures the forms of injustice that are sanctioned by social structures and institutions (Young 1990:15, 20, 21). In this sense, claims of impartiality (and, we would suggest, formal equality) can "feed cultural imperialism by allowing the particular experience and perspective of privileged groups to parade as universal" (Young 1990:10).[21] To use the words of Williams, "The law thus becomes a shield behind which to avoid responsibility for the human repercussions of both governmental and publicly harmful private activity" (1987:134). Thus, while Young offers social justice as a corrective to distributive justice, we reconceive social justice as a strategic alternative to formal equality. Formal equality negates the

[21] Fraser contends that Young's call for a "politics of difference" is "quintessentially American" in that it privileges ethnicity over class (1997:196–7); is primarily suited to ethnic issues as opposed to gender, sexuality, or class (1997:196); and therefore is less "globally applicable than Young thinks" (1997:200). She ultimately concludes that "glib and global endorsements of the politics of difference" do little to intercede in those cases "in which both redistribution and recognition are required to overcome a complex of oppression that is multiple and multiply rooted" (1997:202).

differences that exist amongst American subjects and sustains the conservatives' framing of an undifferentiated citizenry, whereas social justice begins with the recognition of difference and acknowledges that substantive equality has not been achieved because institutionalized racism abounds in order to offer an alternative discourse to the conservative rhetoric that individual merit is sufficient for achieving success in American society. Social justice allows for those communities that have been historically oppressed to place claims on the political and legal systems to overcome a legacy of discrimination and institutionalized racism. Introducing social justice into the public discourse and emphasizing the historical, legal, and socioeconomic injustices incurred in order to legitimate native claims to structural adjustments may change the terms of the debate surrounding native entitlements as a precursor to achieving political and legal change. Thus constituted, the legal battle is composed of two divergent claims: formal equality and the universality of a color-blind society versus social justice and an acknowledgment of the racial and historical particularities of the native peoples.[22]

Appeals to social justice—compensating and remedying real wrongs and inequities—may resonate with many Americans and create new opportunities to mobilize movements in favor of progressive change. According to Fine's research (1992), when programs are perceived as a violation of egalitarian ideals there is strong public opposition. This likely explains the conservative legal movement's success in framing entitlement programs as preferential treatment in opposition to equal rights. But existing research suggests that the public is amenable to, and prefers, compensatory action over preferential treatment (Fine 1992:19). Recent public opinion surveys indicate that the majority of Americans support affirmative action programs intended to "overcome past discrimination," but they oppose giving minority groups "preferential treatment" (Pew Research Center 2009).[23] These differences illustrate how public understanding and support of the law are socially constructed. For example, when survey researchers asked respondents, "In order to overcome past discrimination do you favor or oppose affirmative action programs *designed to help* blacks, women and other minorities get better jobs and education?" 63 percent favored such programs, including 58 percent of whites. By

[22] Again, we want to restate that our use of "racial particularities" refers not to some essentialized construct of a unique "native race," but rather to the ways in which indigenous subjects have been racialized as Others through their interactions with American legal and political systems.

[23] Sixty-five percent of Americans oppose giving minorities preferential treatment, but 70 percent of Americans support affirmative action programs intended to "overcome past discrimination" (Pew Research Center 2009).

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contrast, when the same respondents were asked, "In order to overcome past discrimination, do you favor or oppose affirmative action programs which *give special preferences* to qualified blacks, women and other minorities in hiring and education?" (emphasis added) only 57 percent favored such programs, including 49 percent of white respondents (Pew Research Center 2003). These data indicate that it is possible to gain, and perhaps mobilize, public support for affirmative action and native entitlements if the issues are framed in a way that is amenable to the public.

While progressive legal arguments in favor of equal rights used to be persuasive, our case studies document how conservative legal activists have reshaped equality doctrine to support their desired outcomes. Yet survey research suggests that opposition to special rights should not be read as a wholesale rejection of native entitlements or affirmative action. Instead, progressive activists can appeal to the public's support for policies designed to help racial and ethnic minorities and that remedy past discrimination. By shifting the legal terrain away from the debate about equal versus special rights in favor of social justice, progressive legal activists may be able to frame the issues in ways that are advantageous to their cause.

Our comparative analysis of *Morton* and *Rice* is demonstrative of how judicial consideration of the unique historical circumstances and sociopolitical particularities that informed the creation of legislation will produce different legal outcomes than cases in which the justices presume the existence of a level playing field. Thus, our analysis hints at the legal outcomes that may result from the politics of social justice. For example, social justice imposes obligations on lawmakers and attempts to increase the opportunities for the marginalized relative to the privileged, and it enables activists to ask the courts to use the law to compensate for previous acts of discrimination in the interest of crafting solutions that are morally and ethically just. By acknowledging "concepts of domination and oppression"—the unique historical and legal plight of tribal communities—in its *Morton* decision, the Court was able to render an opinion consistent with the concept of social justice as opposed to a decision emphasizing formal equality (i.e., non-natives are losing opportunities to tribe members) (Young 1990:16). Even though non-natives suffered a material deprivation when tribe members were given employment preferences at the BIA, this was not sufficient to trump Congress's interest in remedying the long-term "exploitative and destructive" and "overly paternalistic" government approach to native communities (*Morton v. Mancari* 1974:553). In fact, the justices stated, "Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians" (*Morton v. Mancari*

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1974:550). Thus, the Court's *Morton* decision is demonstrative of how social justice claims may be evaluated in a legal context.

By contrast, an emphasis on formal equality, as exemplified by *Rice,* removes lawmakers' commitments to those that the government has oppressed by imposing the myth of a level playing field to eliminate the special rights that have accrued to native individuals without giving them actual access to the many privileges that others procured as a result of the oppression of natives. Thus, the Supreme Court's emphasis on formal equality as a mechanism to protect and advance the rights of non-native Hawaiians in *Rice* is noteworthy because the justices elected to uphold an atomized conception of equality rather than acknowledge the extent to which Native Hawaiians were deprived of their material land, wealth, and resources by the U.S. government and non-natives. In *Rice,* an appeal for equal rights was relevant to rectify differential treatment of non-native populations in the present day, but it was not a legitimate mechanism for continuing to provide benefits and entitlements to native populations in order to compensate them for a vast material deprivation that occurred in the past.

Legal reasoning informed by social justice reflects the United States' ethical and moral obligations to native populations and enables policies and court decisions that further substantive equality under the law commensurate with these commitments. Thus, proponents of native rights should be troubled not simply by the outcome of *Rice,* but also by the mode of legal reasoning that smoothes over a long and sordid history of discrimination and replaces it with an ahistorical flatness where all individuals are suddenly equal. The use of formal equality in Supreme Court decisionmaking has worked to relieve the government from its ethical and moral obligations to indigenous people and allows for the continued marginalization of natives with real socioeconomic consequences for future generations.

A second benefit associated with utilizing the language of social justice is that appeals to equal rights imply that equality is achievable and quantifiable: we can get to a place and time where everyone will be equal. While it remains a worthwhile endeavor to strive for a world in which equality is understood as an equal distribution of power, in the contemporary American legal system equality is conceptualized as the guarantee that there are no legal obstacles to one's opportunities, as exemplified by *Rice*. Thus, when progressive activists utilize a legal strategy predicated on equal rights they run the risk that judges will declare that equality has been achieved, thereby solidifying existing inequities.

To suggest that programs that provide benefits to indigenous populations violate universal principles of equality by singling out certain populations for preferential treatment requires the justices

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to argue that all individuals operate on a level playing field. Yet throughout much of U.S. history native peoples have been deprived of their lives, liberty, and property, and the legacy of these practices continues to impact native communities. As previously noted, the socioeconomic status of native groups is significantly lower than that of white Americans, and when the justices ignore these facts they allow inequities to continue unchecked with real consequences for native communities while simultaneously ensuring the continued privileged position of many Americans in the name of equal rights.

By contrast, social justice is not a quantifiable, finite good. Justice is something that we may strive to accomplish or provide, but there is no clear definition or metric that indicates when social justice is achieved. In this sense, the quest for social justice serves as a long-term contract with the future; judges may take proactive steps to remedy previous injustices and their ramifications for present and future generations. Furthermore, appeals to social justice enable one to challenge who has the power, whereas appeals to equality increasingly result in legal decisions that preserve the status quo, consistent with *Rice*. Legal decisions and policies informed by considerations of social justice may address the real and tangible inequities that pervade American society by acknowledging how historical developments worked to privilege some and marginalize others and devising solutions that work to resolve power inequities. The social justice model recognizes that challenging and reconfiguring existing power arrangements is a long-term endeavor, and progress toward social justice will be measured in a number of ways including qualitative indicators. Thus, while *Morton* highlighted racial and historical distinctions as a mechanism to uphold racial preferences and remedy old wounds, *Rice* ignored the sociopolitical context in order to strike down racial preferences identified as problematic precisely because they stood as obstacles to the healing of old wounds.

Conclusion

From early studies of liberal and progressive social movements' mobilization of the politics of rights to more recent examinations of the rise of the conservative legal movement and the countermobilization of rights or resentment, sociolegal scholars have documented the existence of "the rights revolution" (Epp 1998). While much of the conversation remains focused on the mobilization of rights, the conservative legal movement's appropriation of the politics of rights raises questions about the continued efficacy of progressive strategies predicated on equal rights. Quite

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simply, rights-based claims may no longer carry the same political potential for progressive social movements that they did in previous decades. To that end, our analysis suggests that the discourse of equal rights has been co-opted by conservative legal activists, resulting in court decisions emphasizing formal equality such as *Rice*—a legal doctrine that is the antithesis of the civil rights movement's goal of achieving substantive equality, as exemplified by *Morton*.

Our case studies illustrate that the conservative movement's legal victories reflect something more than the ascendancy of the politics of resentment, as previously documented. Instead, the Supreme Court's decision to retool equality doctrine in favor of formal equality enables legal outcomes that erase the nation's commitment to native peoples by smoothing over intranational differences in favor of an undifferentiated citizenry. This smoothing ignores the history and continued legacy of discrimination in the United States and the fact that native entitlement programs are intended to fulfill the government's unique obligations to the native peoples. Additional research is needed to elucidate the tangible and material consequences that result from the eradication of native entitlements, for it is within these communities that the seeds of a resurgent progressive social movement are currently being sown.

Yet the cyclical relationship between law and social change provides progressive activists with an opportunity to appeal to the public and members of marginalized groups to take action to defend native interests in an increasingly hostile environment. As the "structures of opportunity" change, one would expect progressive social activists to respond with alternative discursive strategies for advancing their interests in the political and legal systems (McCann 1994:93). To date, however, there has been little scholarly discussion of alternative paradigms for mobilizing the law in response to the rhetoric of special rights. To that end, we suggest that the politics of social justice may be the next logical legal battleground for native entitlements and minority rights. Our research suggests that the discourse of social justice may be a viable tool for mobilizing in response to the politics of formal equality, but additional research is needed to see if progressive social movements are actually utilizing this strategy. As recently as July 2009, NAACP President Benjamin Todd Jealous utilized the language of social justice to describe the organization's future in his remarks celebrating the NAACP's centennial year:

> As we prepare, let us recognize the nature of the battles that we are fighting have shifted. We'll always be at the swimming pool, we will always be there to enforce basic civil rights, we will always be there at the firehouse. But the big battles, the battles for good schools, the battles for good jobs, the battles for health care for all, the battles for safe communities and a justice system that works for everybody in this country are human rights battles. You see, a

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> civil rights battle is a battle to enforce the Constitution or the law as it stands. Well, there's no right to an education in the U.S. Constitution, let alone to a good education. There's no right to a job, let alone a good job. There's no right to health care, let alone good health care. There is no right for anything in the criminal justice system than what we have right now (Jealous 2009).

Commenting on Jealous's speech, Kai Wright, a senior writer for the online publication "The Root," stated that "his message . . . is . . . cutting edge . . . what he is saying is that the future of the NAACP is not about rights, which is the way we have focused our conversation around race for so long, it's about justice" (Wright 2009: n.p.). Thus, future research will need to engage the politics of social justice and focus attention on these new developments: Are progressive social movements deploying the discourse of social justice? If so, can the myth of justice be harnessed to a politics of justice? Will appeals to social justice work to mobilize constituents and the public? How will political and legal elites respond? Will law change to reflect this new emphasis?

In conclusion, it is a strange thing arguing against equality. Nevertheless, the conservative challenge to native entitlements illustrates that an institutional blindness to racial and historical distinctions works to perpetuate rather than rectify the political disqualification of America's most marginalized populations. The success of the conservative movement's rhetorical and legal strategies is predicated on the belief that racial and ethnic minorities operate from the same level playing field as white Americans. But in light of recent conservative victories, progressive actors are likely to reconceive the debate in order to draw the public's attention to the socioeconomic injustices that continue to confront native communities. In doing so, they may seek to change the rhetorical terrain from a focus on equal versus special rights to a discussion of formal equality versus social justice. Regardless of the strategies they employ, the *Rice* decision provides progressive activists with an opportunity to challenge the existing discourse in order to mobilize the public and the law. Future research will be necessary to evaluate if and how they respond and the resulting changes to the legal discourse and outcomes.

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