

MANIFESTING A BETTER DESTINY: INTEREST CONVERGENCE AND THE INDIAN CLAIMS COMMISSION

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As debates continue over whether the United States should consider, let alone how it might implement, a reparations plan for the descendants of enslaved people, the conversation often proceeds without recognizing that this country has already administered a similar program: The Indian Claims Commission (“ICC”). However, the fact that the ICC has been largely relegated to the dustbin of history a relatively short time after it finished its work—the Commission disbanded in 1978 and its last case was resolved in late 2006—suggests limitations on the political willpower necessary to implement the ICC’s program, and thus to its effectiveness of the ICC. This Note assesses the history of the ICC through the lens of interest convergence theory, as originally expounded by Professor Derrick Bell. In brief, interest convergence is the notion that marginalized groups will experience advancements, whether an expansion of rights, compensation for a past wrong, or some other benefit, when their interests align with—indeed, because their interests align with—those of the majoritarian groups that control policymaking. This Note applies interest convergence theory to Native issues, filling a gap in an area that has received limited attention in existing literature. I argue that two factors largely motivated Congress to create the ICC: First, the extraordinary patriotism of Native servicemembers in World War II, and second, the rising tide of postcolonial sentiments in the Cold War era. Together, these developments provided the impetus to create the ICC, while simultaneously limiting the extent to which it could redress the past wrongs visited on Native peoples and individuals.

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I.

INTRODUCTION

While the United States was founded in response to the colonial injustices suffered under British rule, upon achieving independence, it almost instantly assumed the role of a centralized exploitative colonial power itself, visiting bloody violence on Native peoples. As policy-makers reconsider their approach to racial justice after 2020,¹ prior efforts to redress historical wrongs against marginalized peoples have resurfaced, including compensation for Native peoples who were dis-

1. See, e.g., Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Ashley Hackett, *Four Things Congress Is Doing Right Now that Address Racial Justice in the U.S.*, MINN. POST (Apr. 16, 2021), <https://www.minnpost.com/national/2021/04/four-things-congress-is-doing-right-now-that-address-racial-justice-in-the-u-s/>; SB-17, Cal. Leg. 2021-2022 Reg. Sess. (2021).

possessed of their lands in the first centuries of European colonization.²

For three decades after World War II, the United States federal government operated a tribunal to hear, adjudicate, and compensate claims by Native peoples for the takings of their homelands, ostensibly settling such claims. The Indian Claims Commission (“ICC” or “the Commission”) sat from 1946 until 1978, though its final case was only resolved in 2006.³ The purpose of the ICC was twofold: first, “to dispose of the Indian claims problem with finality,” and second, “to transfer from Congress . . . the responsibility for determining the merits of native American claims.”⁴ The Commission was authorized to hear suits from “any identifiable group of Indian claimants” over “claims arising from the taking by the United States,” in addition to new rights of action under treaty and contractual theories.⁵ The goals of the ICC read like a direct response to the United States’ history of colonialism and erasure aimed at Native peoples. Indeed, after World War II, “Third World” countries—those aligned with neither the United States nor the Soviet Union—were an emerging power bloc, and citizens of these former colonies shared an interest in decolonization and self-determination with North America’s Native peoples. The United States needed to thread the needle between its domestic prerogatives of assimilation and the foreign policy exigencies of courting Third World countries. In this context, the ICC can be understood as an attempt to do just this.

This Note explores why the ICC was ultimately incapable of achieving its stated goals and suggests that interest convergence theory has broad explanatory power over the history of federal-Native relations. Interest convergence theory posits that marginalized groups experience progress when their interests align with majoritarian interest in the context of the United States’ attempts to address its colonial past. Part I provides a brief overview of interest convergence theory. Part II looks at the broad contours of the shared history between the

2. Tenzin Shakya & Anthony Rivas, *To Native Americans, Reparations Can Vary from Having Sovereignty to Just Being Heard*, ABC NEWS (Sept. 25, 2020, 4:15 PM), <https://abcnews.go.com/US/native-americans-reparations-vary-sovereignty-heard/story?id=73178740>.

3. *Lead Up to the Indian Claims Commission Act of 1946*, U.S. DEP’T OF JUST. (Dec. 20, 2020), <https://www.justice.gov/enrd/lead-indian-claims-commission-act-1946>.

4. *United States v. Dann*, 470 U.S. 39, 45 (1985) (internal quotation marks omitted) (quoting H.R. Rep. No. 1466, at 10 (1945)).

5. INDIAN CLAIMS COMM’N, FINAL REPORT OF THE INDIAN CLAIMS COMMISSION 7 (1978) [hereinafter FINAL REPORT].

United States federal government and Native peoples, emphasizing the colonial aspects of that relationship. Part III looks at the structure of the ICC and the history of its application, analyzing structural and systematic failures that prevented it from adequately compensating Native peoples for their losses. Part IV looks at the ICC through the lens of interest convergence theory to explain the Commission's ineffectiveness. To conclude, I look at lessons from the ICC and limitations on interest convergence that are apparent from the Commission's shortcomings and failures.⁶

II.

THE INTEREST CONVERGENCE FRAMEWORK

Interest convergence theory posits that the interests of marginalized communities will be advanced when they align with the interests of the groups or communities who wield social and political power. Though it has been applied in numerous settings,⁷ interest convergence theory arose in the context of race relations after World War II, with Professor Derrick Bell observing that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”⁸ For Professor Bell, who originated the term “interest convergence,” the key to understanding *Brown v. Board of Education* was Cold War tension with the Soviet Union, whose leaders weaponized American anti-Black racism in the

6. Following conventions promoted by Native organizations, among others, I capitalize the words “Black,” “Native,” and “Indigenous” when they are used to describe people and societies. See, e.g., Sarah Scire, *AP Style Is Now to Capitalize Black (and Indigenous)*, NIEMAN LAB (June 22, 2020), <https://www.niemanlab.org/2020/06/ap-style-is-now-to-capitalize-black-and-indigenous/>; TRIBAL COLL. J., *STYLE GUIDE 2019-20*, at 5 (last visited Apr. 26, 2021), <https://tribalcollegejournal.org/pdfs/TCJ-STYLEGUIDE-2019-2020.pdf>. Further, taking cues from Black scholars, namely Drs. Eve Ewing and Nell Irvin Painter, I capitalize “White” in the same contexts. See Nell Irvin Painter, *Opinion, Why ‘White’ Should Be Capitalized, Too*, WASH. POST (July 22, 2020, 10:57 AM), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/>; Eve L. Ewing, *I’m a Black Scholar Who Studies Race. Here’s Why I Capitalize ‘White’*, ZORA (July 2, 2020), <https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3>. However, I leave direct quotations intact to preserve the historical, social, and racial contexts in which they were originally written. Further, because Native social organizations do not always align to the expectations or impositions placed on them by White society—the distinction between bands, tribes, and other groupings is murky and subject to colonial revisionism—I refer to these groups as “Native peoples,” distinct from “Native individuals,” which I use to refer to people *qua* people.

7. See *infra* note 15.

8. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) [hereinafter Bell, *Interest-Convergence*].

propaganda battles of the 1940s and 1950s.⁹ Compounding this was active, globally visible opposition to segregation by Black Americans, including at the United Nations.¹⁰ One front on which the federal government fought this battle against segregation—and implicitly against the USSR—was in the courts. Beginning in the late 1940s, the Department of State filed amicus briefs in critical racial equality cases, most famously *Brown* and *Shelley v. Kraemer*.¹¹ In each of these cases, the government specifically pointed to the implications for the United States in the international sphere. Concern for international relations and reputation was not cabined to the American foreign policy apparatus; mainstream domestic media outlets like *Time* magazine expressed concerns over segregation’s impacts abroad, while the foreign press relayed negative domestic coverage of Jim Crow.¹² Further, the desegregation agenda provided an outlet for White Americans to address racial inequalities without risking Black veterans’ faith in the American system of government.¹³

The interest convergence theory rests on a somewhat pessimistic view of human nature and incentives. At base, it suggests that the advancement of minority interests is largely or entirely contingent on majority interests and how those different interests interact at a given point in time. In this way, the framework may account for slow and uneven progress for minority groups.¹⁴

While Bell’s original formulation was developed in reference to Black Americans, it has been subsequently applied to the rights of Latino and Hispanic communities, Asian-Americans, religious minorities, and to a limited extent, Native peoples.¹⁵ This suggests a broad

9. See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61, 89 (1988) (“By 1949, according to the U.S. Embassy in Moscow, the ‘Negro question’ was one of the principal Soviet propaganda themes regarding the United States”) (cleaned up).

10. *Id.* at 96–97 (“In 1951, the Civil Rights Congress filed a petition in the United Nations charging that the U.S. government had committed genocide against American blacks [including] 153 killings, 344 other crimes of violence against blacks, and other human rights abuses committed in the United States from 1945 to 1951”).

11. *Id.* at 104 n.249, 105–06; 334 U.S. 1 (1950).

12. Bell, *Interest-Convergence*, *supra* note 8, at 524; Dudziak, *supra* note 9, at 83 (quoting Sri Lankan journalist Lakshman Seneviratne’s reference to earlier *Time* coverage of Jim Crow laws).

13. Bell, *Interest-Convergence*, *supra* note 8, at 524–25.

14. See, e.g., Bell, *Interest-Convergence*, *supra* note 8, at 526–29 (discussing early efforts by White Americans in the wake of *Brown* to forestall, or even reverse, school integration, which “would not come easily or soon”).

15. Justin Driver, *Rethinking the Interest-Convergence Thesis*, 104 *Nw. L. REV.* 149, 153 n.18, 155, 176–77 n.143 (2011). Among Professor Driver’s primary concerns is that interest convergence theory may imply that Black Americans are simply “bystanders to the events of American history, [or] individuals who occasionally get

applicability of the framework, which should invite further scrutiny and refinement. Bell recognized the underlying tension between respecting the dignity and agency of marginalized peoples and suggesting that their advancement came about by express subordination to majority interests. In the immediate aftermath of *Brown*, fierce Southern resistance to mandatory integration reignited the flames of secession; many feared that opposition to *Brown*'s implementation posed a threat to the American federal system, and Bell suggested that preserving the Union "provided courts with an independent basis for supporting school desegregation efforts."¹⁶ The Court soon noted in *Cooper v. Aaron* that enforcing desegregation in Little Rock, "raise[d] questions of the highest importance to the maintenance of our federal system of government," facilitating Black advancement when doing otherwise meant risking the stability of American democracy.¹⁷ While the courts were interested in advancing Black Americans' interests, they seemed to believe that doing so assertively, disrupting White Americans' social expectations, would threaten national harmony enough to justify a sort of judicial pumping of the brakes.

However, by 1980—the year Bell first publicly used the term "interest-convergence"—the tide of Supreme Court opinion had turned against Black rights. While the Court upheld busing as a means to integrate schools in *Swann v. Charlotte-Mecklenburg Board of Education*, Chief Justice Warren Burger declined to set any standard for anti-segregation measures, writing that "[n]o per se rule can adequately embrace all the difficulties of reconciling the competing interests involved."¹⁸ Bell later posited that "[i]f there was any doubt that 'competing values' referred to the conflicting interests of blacks seeking desegregation and whites who prefer to retain existing school policies, then the uncertainty was dispelled by *Milliken v. Bradley*, and by *Dayton Board of Education v. Brinkman*."¹⁹ These cases both limited the extent to which authorities could enforce school desegregation and how they could achieve it,²⁰ enshrining this "local autonomy" as a

swept up in the current of world affairs but have a negligible role in shaping those affairs," and the risk that it minimizes the decades-long struggle of Black attorneys, activists, and citizens of all stripes. *Id.* at 157, 177.

16. Bell, *Interest-Convergence*, *supra* note 8, at 529–30.

17. *Id.* at 529 (quoting *Cooper v. Aaron*, 358 U.S. 1, 4 (1958)).

18. *Swann v. Charlotte-Mecklenburg Board of Educ.* 402 U.S. 1, 26 (1971).

19. Bell, *Interest-Convergence*, *supra* note 8, at 526 (quoting *Swann*, 402 U.S. at 31) (footnotes omitted).

20. *Id.* at 526 nn.44–45.

lodestar of federal equal protection jurisprudence and a “vital national tradition.”²¹

This should not be taken to imply that Black Americans are “by-standers to the events of American history” or to minimize the struggles of Black attorneys, activists, and citizens of all stripes.²² Bell wrote that favorable decisions “are seldom society’s gifts . . . litigation is usually carefully planned and intelligently executed.”²³ Later scholarship, however, has often discussed the *Brown* decision as a nearly inevitable result of world events.²⁴ In 2008, Professor Kenji Yoshino, a prolific scholar of marginalized peoples and their struggles with the law, cast Bell’s argument as saying that *Brown* “happened *because* it provided immediate credibility to America’s struggle with Communist countries.”²⁵ Yoshino discusses the beneficiaries of interest convergence in passive terms,²⁶ providing an example of the theory’s pitfalls, as described by Professor Adam Driver.²⁷ While Driver’s criticism is perhaps overstated—it is hard to imagine that the legal academy has truly lost sight of Black advocates’ agency, and Driver may be cherry-picking examples²⁸—there is nevertheless a risk of discussing the beneficiaries of interest convergence in passive terms.²⁹ If interest convergence theory focuses on the whims and desires of White, majoritarian decision makers at the expense of the agency and actions of Black advocates (or members of other marginalized minorities), then one

21. *Id.* at 526 (quoting *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977) and *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974)).

22. Driver, *supra* note 15, at 177.

23. Derrick A. Bell, Jr., Lectures, *Racial Remediation: An Historical Perspective on Current Condition*, 52 NOTRE DAME L. REV. 5, 14 (1976).

24. See, e.g., Dudziak, *supra* note 9, at 64.

25. Kenji Yoshino, *Marriage Partners*, N.Y. TIMES MAG. (June 1, 2008), <https://www.nytimes.com/2008/06/01/magazine/01wwln-idealab-t.html> (emphasis added).

26. See, e.g., *infra* note 28 and accompanying text.

27. Driver, *supra* note 15, at 156.

28. As an example of how agency in interest convergence theory has been “watered down,” Professor Driver cites an argument about animal rights that “sounds almost satirical.” Driver, *supra* note 15 at 176–77 n.143. However, it hardly seems fair to pin the shortcomings of a widely respected theory on one student Note, to wit, Joseph Lubinski’s *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, Note, 4 J. L. Soc’y 377, 379 (2003).

29. Elsewhere in his *New York Times* piece, Professor Yoshino states that the failure of an Arizona constitutional amendment that would have banned same-sex marriage “has been attributed to the impact it would have had on unmarried straight couples.” Yoshino, *supra* note 25 (emphasis added). This passive language is pervasive. In one of the few applications of interest convergence to Native issues, Professor Kevin Washburn cast Bell’s argument as “members of minority groups will receive favorable treatment only when their interests align with the interests of the majority.” Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 286 (2004) (emphasis added).

might reasonably be concerned about unduly centering White, majoritarian perspectives on the stories of marginalized peoples. Centering White perspectives is not the desired outcome here, and was clearly not Professor Bell's intent. Rather, interest convergence theory should be seen as recognizing inherited power structures and working to weaken or dismantle them while remaining aware of their implications. So, rather than a reason to abandon Professor Bell's framework, the possibility that we may inadvertently center Whiteness is a cautionary point with respect to interest convergence analysis and reminds us of the systems and structures that Bell and others have worked to undermine.

As part of his explication of the interaction between marginalized Black interests and those of the White majority, Professor Bell also recognized "intraracial cleavages that divide the interests of black people and white people."³⁰ Bell noted that racialized interests are divergent, particularly with regard to poorer Whites who "relied . . . on the expectation that white elites would maintain lower class whites in a societal status superior to that designated for blacks,"³¹ adding that racially progressive judicial decisions "will secure, advance, or at least not harm societal interests deemed important by *middle and upper class* whites."³² In other words, the relevant "White interests" are those of the White "elite," the decision-makers in American governance. *Grutter v. Bollinger*, which upheld the constitutionality of the "plus" factor the University of Michigan Law School gave to applicants of underrepresented ethnic and racial backgrounds, illustrates this point.³³ The Court contrasted this program with the University's undergraduate plan, which it struck down. "[T]he Law School," Justice O'Connor wrote, "awards no mechanical, predetermined diversity 'bonuses,'"³⁴ and its plan was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of

30. Driver, *supra* note 15, at 165. While Professor Driver does not think that Professor Bell took sufficient notice of these "cleavages," Bell nevertheless discussed and was plainly aware of them.

31. Bell, *Interest-Convergence*, *supra* note 8, at 525–26 (footnote omitted).

32. *Id.* at 523 (emphasis added).

33. *Grutter v. Bollinger*, 539 U.S. 306, 321 (2003). The term "plus" refers to admissions officials' qualitative assessment, giving "greater weight to race than to some other factors, in order to achieve student body diversity." *Id.* at 335 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317–18 (1978) (Powell, J., concurring)).

34. *Id.* at 337 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003)). The undergraduate plan associated a specific point value to race or ethnicity, alongside factors like GPA, test scores, and class rank. These point values fed directly into a "selection index," which had specific point ranges for different outcomes. *Gratz*, 539 U.S. at 254–55.

each applicant.”³⁵ To use Bell’s language, the Court felt that by not quantifying—and thus reifying—the value of diversity, the Law School system did “not harm societal interests deemed important by middle and upper class whites.” By contrast, the undergraduate plan went too far, ultimately “threaten[ing] the[ir] superior social status.”³⁶ Asked to endorse the Law School’s remedial system, which moderately challenged the social order and provided clear benefits to the majority, the Court was happy to permit a modicum of advancement to minority rights.

While Professor Bell’s work is ultimately best-known for its distillation that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites,”³⁷ he prefaced this thesis with a sobering observation on the limits of the White imagination. “Whites,” Bell wrote, “simply cannot envision the personal responsibility and the potential sacrifice inherent in Professor [Charles L.] Black’s conclusion that true equality for blacks will require the surrender of racism-granted privileges for whites.”³⁸ Concluding that “segregation is inequality,” and thus provided a sound basis in the Fourteenth Amendment for school segregation cases, Professor Black subsequently observed that “[w]hen the directive of equality cannot be followed without displeasing the white, then something that can be called a ‘freedom’ of the white must be impaired.”³⁹ With American culture’s intense focus on property ownership and territorial expansion, there may be no greater “freedom of the white man” than the ability to claim land for the United States, a freedom that is at odds with—or at least in tension with—repatriation or compensation for Native title.

Though the framework has been in circulation for more than forty years, the literature applying interest convergence theory to Native issues is limited.⁴⁰ In order to address this gap in the literature, this Note looks at the history of the relationship between the United States federal government and Native peoples, in particular White

35. *Id.* (citing *Bakke*, 438 U.S. at 317 (Powell, J., concurring)).

36. Bell, *Interest-Convergence*, *supra* note 8, at 523.

37. *Id.*

38. *Id.* at 522–23 (citing Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 425 (1960)). Professor Black was a member of Thurgood Marshall’s legal team on *Brown v. Board of Education*, and his work was a major precedent for Professor Bell’s. Robert D. McFadden, *Charles L. Black, Jr., 85, Constitutional Law Expert Who Wrote on Impeachment, Dies*, *N.Y. TIMES* (May 8, 2001), <https://www.nytimes.com/2001/05/08/nyregion/charles-l-black-jr-85-constitutional-law-expert-who-wrote-on-impeachment-dies.html>.

39. Black, *supra* note 38, at 428–29.

40. *See, e.g.*, Washburn, *supra* note 29, at 286.

American colonialism, before examining the structure and history of the Indian Claims Commission and applying the interest convergence framework to the ICC. In doing so, I hope to illuminate the extent to which interest convergence explains—and perhaps even predicts—the ICC’s limitations in its ability to advance Native interests and the nature of those limitations.

III.

A HISTORY OF FEDERAL-NATIVE RELATIONS

The United States’ history with this continent’s Native peoples has for centuries been characterized by oppression, subterfuge, and death visited upon the latter group. Much as slavery and its successor institutions have functioned to erase Black lives and history, so too has the colonization of Native spaces and life worked to erase those cultures and regulate Native Peoples out of existence.⁴¹ This Section provides a brief history of White interests in colonization and elimination, which often occurred by way of assimilation of Native histories and identities. Subsection II.a discusses the early decades of federal-Native relations. Subsection II.b looks at legal developments contemporaneous with World War I and World War II, in particular allotment and the Dawes Act, the Indian Citizenship Act of 1924, and the Indian Reorganization Act of 1934 (also known as the Indian New Deal).⁴² Finally, Subsection II.c sets the stage for the Indian Claims Commission, looking at the impact of World War II and the Cold War on federal-Native relations.

A. *The Beginnings of American Colonization*

The subsumption of Native land title, culture, and identity has been central to the narrative that descendants of European colonizers are the rightful possessors of North America, a narrative central to

41. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793–94 nn.14–15 (“A survey of canonical texts reveals a state of near erasure of Native Nations and indigenous peoples.”). For example, “blood lines,” which provide the legal basis for tribal citizenship to this day, “were established in much the same way as pedigree animals, and selective breeding was even advocated as means to hasten [American Indians’] assimilation.” Desi Rodriguez-Lonebear, *The Blood Line: Racialized Boundary Making and Citizenship among Native Nations*, 7 SOCIO. OF RACE AND ETHNICITY 527, 529 (2021), <https://journals.sagepub.com/doi/10.1177/2332649220981589> (citing Robert E. Bieder, *Scientific Attitudes Toward Indian Mixed-Bloods in Early Nineteenth Century America*, 8 J. OF ETHNIC STUD. 17 (1980)); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 2 (2006).

42. See, e.g., Jessie Kratz, *Indian New Deal*, NAT’L ARCHIVES: PIECES OF HISTORY (Nov. 30, 2015), <https://prologue.blogs.archives.gov/2015/11/30/indian-new-deal/>.

furthering elite White interests. In its early stages, the relationship between settler-colonists of European descent and the Native inhabitants of North America is best described as one of control and erasure or, to borrow from historian Robert Williams, “conquest.”⁴³ One of the earliest milestones in this colonization was the English settlement of what is now southeastern Massachusetts starting in 1620. Far from stepping into the Edenic landscape that popular Thanksgiving stories suggest, the Pilgrims introduced themselves into complex intertribal conflict and politics, which had already been impacted by European settlement, enslavement, and disease. Earlier groups of English “explorers” had already sought to enslave Native peoples from the region; according to historian David Silverman, “[a]t least two and maybe more Wampanoags, when the Pilgrims arrived, spoke English, had already been to Europe and back and knew the very organizers of the Pilgrims’ venture.”⁴⁴ Not content with merely living alongside the Wampanoag in present-day Plymouth, colonists leveraged their substantial resources to coerce the Wampanoag into selling the English their ancestral lands, “forc[ing] holdout Natives to release their claims and resign themselves to the English interpretation of these sales.”⁴⁵ Bringing “trumped-up criminal fines and lawsuits” against the Wampanoag, the English thus initiated the American tradition of ousting Native peoples from their land by force while claiming that land as a divine right.⁴⁶ What makes this pattern especially pernicious is its continued vitality in popular retellings of American history. This gauzy myth did not come to be by accident but was encouraged as a form of nation-building at such pivotal moments as the Civil War and the Great Depression.⁴⁷ The notion that the first Thanksgiving was a

43. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 6 (1990) (“This superiority [of Western over non-Western civilization], in turn, is the redemptive source of the West’s presumed mandate to impose its vision of truth on non-Western peoples.”).

44. See, e.g., Claire Bugos, *The Myths of the Thanksgiving Story and the Lasting Damage They Imbue*, *SMITHSONIAN MAG.* (Nov. 26, 2019), <https://www.smithsonianmag.com/history/thanksgiving-myth-and-what-we-should-be-teaching-kids-180973655/>; see also Lisa Kahaleole Hall, *Strategies of Erasure: U.S. Colonialism and Native Hawaiian Feminism*, 60 *AM. Q.* 273, 275 (2008) (“The myth of a (mostly) empty North American continent waiting for (European) settlement and ‘development’ is foundational to the origin story of the United States as a ‘nation of immigrants’”).

45. David J. Silverman, *Ungrateful Children and Days of Mourning: Two Wampanoag Interpretations of the “First Thanksgiving” and Colonialism Through the Centuries*, 93 *NEW ENG. Q.* 608, 613 (2020).

46. *Id.*

47. Maya Salam, *Everything You Learned About Thanksgiving Is Wrong*, *N.Y. TIMES* (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/thanksgiving-myths->

celebration of friendship between the English and the Wampanoag, rather than “an opportunity to fend off [their] tribal rivals,”⁴⁸ is a tool to imply the acquiescence of Native peoples to their colonizers, and thereby erase Native history.

Plymouth was merely the beginning. In ensuing centuries, “white Americans did everything they could to make that supposedly God-given process occur, including reducing Indians to romantic bit parts in the country’s history.”⁴⁹ Thus, the United States shored up its White, Protestant origins in the face of later Catholic and Jewish immigration, pointing to the myth of friendly, assimilationist Wampanoags,⁵⁰ and ignoring the English role in exterminating Indigenous peoples. The “first Thanksgiving” story, then, demonstrates “the denial of more than five hundred years of contrary facts” to justify the erasure of Native history and culture.⁵¹

The encoding of Native erasure did not disappear in the Founding era. During the Constitutional Convention, one contentious question among the delegates was whether the federal government would have centralized control over relationships with Native peoples, as the English had.⁵² The result is the inclusion of “Indian Tribes” in the Commerce Clause, granting Congress plenary powers over dealings between Native peoples and White settlers.⁵³ Other structural vestiges of the drive for conquest and erasure are typified by the history of the Bureau of Indian Affairs. The Bureau presently sits in the Department of the Interior, as it has since 1849.⁵⁴ Initially, however, the Bureau was situated in the Department of War, and until 1824, the Secretary of War *personally* oversaw the federal-Native relationship.⁵⁵ Against a history of armed conflict and destruction, the Founding generation saw it fit to cite this authority in a body designed for battle. These are the means by which erasure is reified and achieved.

fact-check.html; *Ronald G. Shafer*, Franklin Roosevelt Moved Thanksgiving Up a Week to Goose the Economy. Chaos Ensued., *Wash. Post* (Nov. 24, 2021), <https://www.washingtonpost.com/history/2021/11/24/fransksgiving-fdr-moved-thanksgiving/>.

48. Bugos, *supra* note 44.

49. Silverman, *supra* note 45, at 627–28.

50. *Id.* at 628.

51. Hall, *supra* note 44, at 275; *see also* Blackhawk, *supra* note 41, at 1794.

52. WILLIAMS, *supra* note 43, at 215, 230–31.

53. U.S. CONST. art. I, § 8, cl. 3.

54. BUREAU OF INDIAN AFFS., <https://www.bia.gov/bia> (last visited Apr. 21, 2021).

55. *Id.*; Act of June 27, 1789, ch. 6, 1 Stat. 49, 50 (establishing an executive Department of War).

B. Federal-Native Relations in the Nineteenth and Early Twentieth Centuries

This Subsection addresses broken treaties—among the most infamous examples of the federal government’s mistreatment of Native peoples—and how those legal structures informed future decades of policy. The assimilation and erasure of Native societies is an ongoing project, “an organizing principal of settler-colonial society.”⁵⁶ Though one could fill entire libraries with examples of European efforts to assimilate or extirpate Native peoples, the end of treaties between the federal government and individual tribes, followed by Dawes Act allotment (discussed *infra*), merits particular discussion for how it worked to dismantle Native land ownership and codify its expropriation.

Between 1778 and 1871, the federal government signed 370 treaties with tribes across the United States,⁵⁷ initially recognizing them as sovereigns and even leaving open the possibility of participation in the United States as co-equals to the states.⁵⁸ Ironically, the very first of these treaties was in part predicated on designs by “the enemies of the United States . . . to extirpate the Indians and take possession of their country.”⁵⁹ Of course, the United States famously reneged on its treaties, and by the middle of the Nineteenth Century, “Indian removal” policies transferred some 450 million acres from tribes to the federal government by way of treaty.⁶⁰ The Treaties of Payne’s Landing and Fort Gibson are paradigmatic examples of this treachery. The former required Florida’s Seminole tribe, or at least some contingent thereof, to travel to present-day Arkansas; “inspect” lands held by their enemies, the Creek people; and assess whether those lands were fit for Seminole occupation.⁶¹ Once representatives of the Seminole reached their destination, White settlers coerced them into signing the Treaty

56. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

57. NAT’L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 18 (2020) [hereinafter NCAI].

58. Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1027–28 (1981).

59. Articles of Agreement and Confederation, U.S.-Del. Nation, art. VI, Sept. 17, 1778, 7 Stat. 13.

60. Note, *Systemic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs*, 57 IOWA L. REV. 1300, 1302 (1972) [hereinafter *Systemic Discrimination in the ICC*].

61. John K. Mahon, *Two Seminole Treaties: Payne’s Landing, 1832, and Ft. Gibson, 1833*, 21 FLA. HIST. Q. 1, 8, 10–11 (1962); *Systemic Discrimination in the ICC*, *supra* note 60, at 1302 n.31.

of Fort Gibson, formalizing a Creek-Seminole merger.⁶² It is not clear that the Seminole chiefs were apprised of the document, in part because the Treaty of Fort Gibson resolved earlier ambiguities in favor of the settlers, whose representatives conveniently failed to keep notes.⁶³ Undeterred, the United States Senate ratified the treaties, leading to the Second Seminole War.⁶⁴

Contemporaneous with the Seminole debacle, the Supreme Court decided two cases that would be critical to shifting federal-Native relations toward a more brutal colonialism. In 1831, the Court in *Cherokee Nation v. Georgia* declined original jurisdiction on the grounds that the Cherokee Nation and other tribes were not “foreign states” but “domestic dependent nations . . . occupy[ing] a territory to which we [the United States] assert title independent of their will.”⁶⁵ Rather than equal sovereignty, the Court announced that the relationship between the federal government and tribes “resemble[d] that of a ward to his guardian,” a view that would swiftly come to predominate.⁶⁶ The following year, *Worcester v. Georgia* would attempt to place strict limits on both federal and state dominion over Native lands.⁶⁷ The federal government had to recognize the Cherokees’ sovereignty over their own lands,⁶⁸ but the Court held that “the laws of Georgia have no force” on Cherokee lands and proceeded to place all authority over Native affairs within Congress’s delegated powers.⁶⁹ However, *Worcester* was to no avail; both President Andrew Jackson and the state of Georgia infamously refused to enforce it, withdrawing federal

62. Mahon, *supra* note 61, at 11, 16–17.

In addition—and startling to see in print—the treaty stipulated that the Seminoles would become a part of the Creek Nation, would occupy land assigned to the Creeks in the west, and draw their annuities from the lump sum appropriated by Congress for the Creeks. They were thereby in effect surrendering their separate entity. To make so radical a departure they had to be hard pressed indeed. It is not unreasonable to infer that nothing but coercion could have obliged them to be swallowed up by their enemies.

63. *Id.* at 9, 17.

64. *Systemic Discrimination in the ICC*, *supra* note 60, at 1302 n.31; Treaties of Camp Moultrie, Payne’s Landing, and Fort Gibson, MICH. STATE UNIV.: YOUNG AM. REPUBLIC, <http://projects.leadr.msu.edu/youngamerica/exhibits/show/seminolewar/treaties> (last visited Apr. 24, 2021).

65. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

66. *Id.*

67. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

68. *Id.* at 561.

69. *Id.* at 559, 561 (holding that Congress’s Article I powers “comprehend all that is required for the regulation of our intercourse with the Indians”).

military presence in the state and keeping Worcester in prison.⁷⁰ Although the short-term effect of *Worcester* was to devolve power over White-Native relations, as the Executive Branch was perfectly happy to ignore the ruling and let the states continue to regulate, in the longer term *Worcester* centralized federal power and granted the political branches effectively unlimited and unreviewable control.⁷¹ This centralization not only gave the federal government powers and rights on par with European royalty, but it also made the federal government more efficient and more effective in wiping Native cultures from North America. Congress, for its part, waited 40 years before formally declaring in 1871 that “no Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”⁷² With that formalization, it became much more efficient for the federal government to shape Native lives and cultures from afar, handing down laws and other policy from the Capitol that would impact life for Native individuals across the country.

The Dawes Act, enacted in 1887, further encouraged assimilation and westward expansion.⁷³ By its terms, the Act allowed Native families to register with the Office (now Bureau) of Indian Affairs and have a small portion of their tribe’s land—which in most cases had been held in common—designated for their own agricultural use, which would force family units into a specifically White American way of agrarian life.⁷⁴ Furthering assimilationist goals, the government held out American citizenship to Indian families as a reward for accepting these grants.⁷⁵ To the extent there was “surplus” land, White settlers could gain title to the residual, and by 1906, Congress allowed outright sale of the land to White settlers.⁷⁶ This led to 90 million

70. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 520–21, 530 (1969). Samuel Worcester was a missionary who had been arrested for violating a Georgia law that forbade Whites from living on Cherokee lands without receiving a license from the state’s governor. *Id.* at 500, 517.

71. *See, e.g.*, *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846) (holding that federal-Native relations were “a question for the law-making and political department of the government, and not for the judicial”).

72. Indian Appropriations Act of 1871, ch. 120, 16 Stat. 544, 566.

73. NCAI, *supra* note 57, at 14. The Dawes Act was formally known as the “General Allotment Act of 1887.” *Id.*

74. *Id.* *See also* Clinton, *supra* note 58, at 1020–21 (“The government tried to force unwilling Indian families to accept allotments and to live separate on them, rather than in the village communities to which they were accustomed”).

75. On *This Day*, All Indians Made United States Citizens, NAT’L CONST. CTR.: CONST. DAILY (June 2, 2021), <https://constitutioncenter.org/blog/on-this-day-in-1924-all-indians-made-united-states-citizens>.

76. Burke Act, ch. 2348, Pub. L. No. 1149, 34 Stat. 182, 182–83.

acres being permanently removed from Native control across the United States.⁷⁷ While Dawes Act lands were ostensibly to be used to build intergenerational wealth through agriculture, new landholders “often left it idle or leased it at bargain rentals to non-Indians.”⁷⁸ Further, “[s]ponsors of the allotment acts included homesteaders, land companies, and perhaps railroads,” White interests that stood to benefit from the destruction of tribal structures.⁷⁹

C. *Federal-Native Relations from World War I Through the Cold War*

If the federal-Native relationship in the Nineteenth and early Twentieth Centuries was defined largely by the end of treaty-making and the Dawes Act, the most important legal structures of the following decades were the Snyder Act of 1924, granting American citizenship, and 1934’s Indian Reorganization Act (“IRA”), which formally ended allotment in favor of encouraging—and approving—formal tribal government structures.⁸⁰ Both presented distinct benefits to elite White interests; the Snyder Act furthered assimilation by granting American citizenship unilaterally and minimizing the role of tribal membership, while the IRA assimilated tribes into a form of Western representative democracy. I discuss each policy in turn.

i. *The Snyder Act and Indian Citizenship*

Prior to the Snyder Act, tribal members existed in a state of limbo with regards to their citizenship. While a federal district court first recognized a Native individual as a United States citizen in 1879,⁸¹ it was only five years later that the Supreme Court denied Native peoples the protection of the 15th Amendment right to vote.⁸² Justice Horace Gray wrote that the tribes “were alien nations, distinct political communities [M]embers of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the

77. *The Dawes Act*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/dawes-act.htm> (last updated July 9, 2021).

78. Clinton, *supra* note 58, at 1021.

79. Blackhawk, *supra* note 41, at 1832 (citation omitted) (internal quotation marks omitted).

80. NCAI, *supra* note 57, at 14, 24, 34–35.

81. Jennifer Davis, *Chief Standing Bear and His Landmark Civil Rights Case*, LIBR. OF CONG.: IN CUSTODIA LEGIS (Nov. 21, 2019), <https://blogs.loc.gov/law/2019/11/chief-standing-bear-and-his-landmark-civil-rights-case/>. While the federal government argued that Standing Bear was “neither a citizen[] nor a person,” Judge Elmer Dundy held “[t]hat an *Indian* is a PERSON within the meaning of the laws of the United States.” *Id.* (emphasis in original).

82. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

United States.”⁸³ In this era, citizenship was granted to Native individuals in a piecemeal fashion, including through the Dawes Act, intermarriage between a Native individual and a White U.S. citizen, and service in World War I,⁸⁴ but the Snyder Act extended American citizenship to the remaining 125,000 Native individuals who did not yet have it, accounting for approximately 42% of the national population.⁸⁵

However, the Snyder Act did not itself grant any person the right to vote. Voting qualifications remained a question of state law, the franchise was not extended consistently, and even after the last states granted Native people the right to vote, poll taxes, literacy tests, and other standbys of the Jim Crow era remained for years.⁸⁶ Further, Native peoples did not universally seek or even welcome American citizenship. For example, the Onondaga Nation of Central New York continues to oppose American citizenship on the grounds that acceding to it would abridge various treaties between the United States and member tribes of the Haudenosaunee (Iroquois) Confederacy.⁸⁷ However, this was not the sole perspective of Native peoples or advocates. One leader, Carlos Montezuma, “opposed the drafting of noncitizen Indians, but he supported American involvement in the war [i.e., World War I] in part because it would further the rights of American Indians at home” by involving them in national affairs and moving them toward American citizenship.⁸⁸ Finally, the Act “conferred U.S. citizenship on indigenous people *unilaterally*,” meaning that, for the first time, Native individuals did not have to apply for United States citizenship, nor could they choose to refuse it.⁸⁹ There are, of course, benefits to American citizenship, but the federal government’s paternalism was nevertheless reflected in *how* it was conferred on Native communities leading up to 1924. This attitude is part and parcel with the colonial project of Native erasure; granting United States citizen-

83. *Id.* at 99.

84. Theodore H. Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 16 (1957).

85. NAT’L CONST. CTR., *supra* note 75.

86. *Voting Rights for Native Americans*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/> (last visited Feb. 28, 2022).

87. *The Citizenship Act of 1924*, Onondaga Nation (June 7, 2018), <https://www.onondaganation.org/news/2018/the-citizenship-act-of-1924/>.

88. PAUL C. ROSIER, *SERVING THEIR COUNTRY* 58 (2009).

89. Kevin Bruyneel, *Challenging American Boundaries: Indigenous People and the “Gift” of U.S. Citizenship*, 18 STUD. AM. POL. DEV. 30, 31–32 (2004) (emphasis in original). Further, there appears to have been little to no input from Native individuals in the development of this policy. *Id.* at 32.

ship meant that such citizenship conferred fewer rights and responsibilities, thus consigning it to lesser importance and further encouraging assimilation into the American mainstream.

ii. The Indian Reorganization Act and the End of Allotment

Moving further into the Twentieth Century, not every federal program would prove quite so insidious as the Dawes and Snyder Acts. To wit, the Indian Reorganization Act (“IRA”) addressed many of the problems that arose from the Dawes Act, formally ending the practice of allotment and providing for the creation of new tribal governments. This law also presaged the later aid-based relationship between the federal government and Native peoples and its echoes in the Cold War.⁹⁰ The road to the IRA began in 1928 when anthropologist Lewis Meriam released *The Problem of Indian Administration*, a detailed inquiry into the living conditions of Native peoples and how federal policy impacted them. This document, more commonly known as the Meriam Report, was a product of the Institute for Government Research (now the Brookings Institution), and was commissioned at the suggestion of then-Secretary of the Interior Hubert Work.⁹¹ The Report’s primary goal was expressly assimilationist, namely “fit[ting Native individuals] either to merge into the social and economic life of the prevailing civilization as developed by the whites or to live in the presence of that civilization at least in accordance with a minimum standard of health and decency.”⁹² The Meriam Report galvanized the federal government to improve Native welfare, and Congress—partially as a result of the Report—finally brought the allotment era to an end in 1934.⁹³ By then, the Commissioner of Indian Affairs was John Collier, who was known prior to his appointment for drawing stark comparisons between White Americans’ treatment of Native peoples and Europeans’ oppression of their colonies.⁹⁴ Whereas the Snyder Act was passed with disregard to Native dissenters, Collier strove to build support for the IRA among Native peoples.⁹⁵ John Collier’s

90. *Infra* note 285 and accompanying text.

91. LEWIS MERIAM, RAY A. BROWN, HENRY ROE CLOUD, EDWARD EVERETT DALE, EMMA DUKE, HERBERT R. EDWARDS, FAYETTE AVERY MCKENZIE, MARY LOUISE MARK, W. CARSON RYAN JR. & WILLIAM J. SPILLMAN, INST. FOR GOV’T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION vii, ix (1928).

92. *Id.* at 86.

93. *Today in History - June 2*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/june-02> (last visited Feb. 25, 2022).

94. ROSIER, *supra* note 88, at 65.

95. ROSIER, *supra* note 88, at 66–68. Collier took the proverbial show on the road and engendered enough support that one member of the Stockbridge tribe was quoted as saying “[m]y heart tells me John Collier is an Indian.” Within two weeks of the

groundbreaking outreach was the first time that the federal government actively sought out Native input, and thus a critical turning point that would lead to a more fulsome consideration of Native peoples' needs, and an early step on the path to the Indian Claims Commission.

The IRA allowed for significant Native self-governance. In ending allotment, the IRA provided for the return of some 9 million acres back into trust status with the federal government.⁹⁶ Further, the IRA placed more of the "surplus" lands from the allotment era under Native control, allowed tribes to obtain charters to manage their own finances, and set up a system by which tribes could adopt constitutional forms of self-government.⁹⁷ However, in order to qualify for any of the IRA's benefits, tribes and individuals had to be "'recognized' tribes, descendants of recognized tribes residing on a reservation in 1934, [or] other persons of one-half or more Indian blood."⁹⁸ The Act itself listed some 258 tribes, although some apparently eligible groups "simply fell through the cracks."⁹⁹ For groups left off the initial list, petitioning Congress or the Department of the Interior provided the only means of redress, and in that process, "internal political organization became more important than ethnographic history."¹⁰⁰ That is, the tribes had to "look" like states or state-like entities in the eyes of the federal government, suggesting further that Indian progress had to come on terms amenable to colonial assimilation interests,¹⁰¹ and it is quite possible that by legitimizing Native governments and promoting their relative independence, these policies set up the terminationist backlash—i.e., the literal destruction of tribes and their lands—of the 1950s.¹⁰²

bill's introduction into the House and Senate, "[t]ribal representatives of Plains Indians gathered . . . to hear Collier himself delineate the important facets of his program promoting Indian self-determination." *Id.*

96. NCAI, *supra* note 57, at 27. "Trust" here refers to the federal government's responsibility to "protect tribal property and assets" and "guarantee tribal lands and resources, as a base for distinct tribal cultures." *Id.* at 23.

97. ROSIER, *supra* note 88, at 69; Clinton, *supra* note 58, at 1053. To this day, 60% of tribes in the United States have governments based on IRA constitutions. NCAI, *supra* note 57, at 24.

98. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1075 (2012).

99. *Id.*

100. *Id.* at 1076.

101. See generally Stephen J. Kunitz, *The Social Philosophy of John Collier*, 18 ETHNOHISTORY 213, 217 (1971) (discussing Collier's personal biases and how they may have impacted the development of the IRA).

102. See Section IV.b *infra*; see generally Kenneth R. Philp, *Termination: A Legacy of the Indian New Deal*, 14 W. HIST. Q. 165, 166 (1983).

D. World War II and Beyond

Prior to the Indian Claims Commission Act, the United States Court of Claims had jurisdiction over tribal suits against the federal government, which largely arose out of treaty disputes.¹⁰³ However, in 1863, Congress passed a law requiring tribes to obtain special permission from Congress to sue, giving them the same standing as foreign sovereigns.¹⁰⁴ Fifteen years later, a tribe gained access to the court for the first time through such an act of Congress.¹⁰⁵ Suing in the Court of Claims was a time- and labor-intensive process with no guarantee of success, requiring extensive research in an era when doing so often required traveling extraordinary distances.¹⁰⁶ Even if a tribe was successful in court, Congress had to approve the suit. Congressional procedure meant costly delays, and in many cases, a single Member could delay or torpedo claims.¹⁰⁷ In the 65 years that Congress served as a clearinghouse, nearly 200 claims were filed, but only 29 were litigated to the point of awarded damages.¹⁰⁸ For the longer-term benefits of tribes and Native peoples, this procedure would need to change. Beginning in 1930, Congress repeatedly tried to create a permanent, dedicated structure to adjudicate tribal land claims, and such a tribunal ranked highly among John Collier's priorities.¹⁰⁹

The Indian Reorganization Act was not immune to the existential political concerns dominating the political landscape of the 1930s. Against a backdrop of Nazi propaganda that tried to pit Native peoples against American colonialism,¹¹⁰ Collier made overtures to officials

103. Caroline L. Orlando, *Aboriginal Title Claims in the Indian Claims Commission: United States v. Dann and Its Due Process Implications*, B.C. ENVTL. L. AFF. L. REV. 241, 251 (1986); see also *Lead Up to the Indian Claims Commission Act of 1946*, U.S. DEP'T OF JUST., <https://www.justice.gov/enrd/lead-indian-claims-commission-act-1946> (last updated Dec. 22, 2020).

104. John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 327 (1969); Orlando, *supra* note 103, at 251 n.93 ("When Indians obtained citizenship status in 1924 . . . this prohibition became a serious violation of Indians' constitutional rights of due process.").

105. FINAL REPORT, *supra* note 5, at 2 ("By a special act of March 1881 the tenacious Choctaws were granted access to the Court of Claims for resolution of their 50-year-old claims.").

106. MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 54 (Okla. Univ. Press 1999) (1997).

107. *Id.* at 54–56 ("To minimize debate on bills that got committee approval, both houses began putting them on the consent calendar. This meant that the bill was passed if no member objected to it when it was called for consideration.").

108. U.S. DEP'T OF JUST., *supra* note 103.

109. *Id.*

110. See generally, ROSIER, *supra* note 88, at 77–80. German and Spanish fascists alike highlighted the "despoiling" of North America's environment, violence perpetrated against Native peoples, and the economic exploitation of Latin American coun-

and Native peoples in North and South America, framing the issue of Indigenous rights as one of solidarity against European fascism.¹¹¹ He also focused on Indian contributions to the war effort, and over the course of World War II, American propaganda placed Native soldiers and other servicemembers front and center,¹¹² such that “the increase in public awareness of Indian patriotism . . . heightened the willingness in Congress to pass the jurisdictional acts opening the Court to the Indians.”¹¹³

Faced with an enemy looking to take advantage of the colonial history of the federal-Native relationship, the Indian welfare apparatus of the Franklin Roosevelt Administration had to tacitly recognize the history of White colonization of Native peoples across the Western Hemisphere and reorient both domestic and foreign policies toward fixing the government’s relationship with these societies.¹¹⁴ Thus, the increasing convergence between Native interests and those of elite Whites becomes clearer. These shifts, combined with the increasing strain of tribal land suits on Congress, set the stage for the creation of the Indian Claims Commission in 1946.

IV.

THE INDIAN CLAIMS COMMISSION

Part IV now turns to the creation and implementation of the Indian Claims Commission. Subsection IV.a takes a closer look at the legislative process that brought the ICC from an item on a wish list to a Commission; Subsection IV.b examines the structure and powers of the Commission; and Subsection IV.c looks at how the ICC operated once it came time to adjudicate real claims. In analyzing the ICC in this manner, this Part aims to confront the realities of the Commission and place it in an interest convergence framework, in particular as the United States tried to come to terms with its history as a colonial power in a world increasingly defined by postcolonial forces.

A. *Passing the Indian Claims Commission Act of 1946*

The ICC was a successor to a series of proposals, dating back to about 1930, for a permanent judicial or quasi-judicial body to manage and dispatch with tribal claims against the United States federal gov-

tries in this quest. They even went so far as to try and assign Aryan and “Teutonic” characteristics to Native peoples and leaders.

111. *Id.* at 82–83.

112. *Id.* at 89–90.

113. FINAL REPORT, *supra* note 5, at 3.

114. *See, e.g.*, ROSIER, *supra* note 88, at 83, 143–44.

ernment.¹¹⁵ In December 1930, the United States Senate Subcommittee on Indian Affairs received a proposal—commissioned after the release of the Meriam Report—from attorney Nathan Margold that recommended a six-member commission to resolve Native land claims.¹¹⁶ Nothing came of this proposal.¹¹⁷ Later in 1930, Scott Leavitt, a Montana Congressman and Chair of the House Committee on Indian Affairs, introduced the first bill supporting a *court* for Indian claims; after the failure of this proposal, and two successor bills in 1934 and 1935, Congress largely abandoned the idea of a court as inapposite to the problems of settling Native claims.¹¹⁸ In this period, Congress moved away from the idea of a court, for its lack of enforcement authority, while many government officials evidenced a serious reluctance to open up the coffers of the United States to tribal claims, whether through legislative, administrative, or judicial action.¹¹⁹ One opponent, in a 1937 debate on the House floor, charged that “[i]f there ever was a bill introduced since I have been here that opens up the floodgates to siphon money out of the United States Treasury, this is it,” while another was so skeptical that any commission could be fiscally sound that he told colleagues to “disregard millions [of dollars in claims] and think of billions if the Indian claims ever gets in the hands of this commission and the right to offset the claims by the Government is denied.”¹²⁰

From the second half of the 1930s, bills in support of a special adjudicative body began to feature two critical components. First, beginning in 1935, the faster, more efficacious template of a commission emerged as the preferred vehicle for dealing with the complex historical questions behind tribal claims.¹²¹ This nuanced distinction turned out to be important. In the 1930s and 1940s, “a commission was typically conceived as a fact-finding body that referred its recommendations to some other body . . . for decision or action,” as contrasted with a court’s power to hear and decide arguments, but not to engage in its own investigation.¹²² One early version of the Commission proposed in this era would have had *only* the authority to investigate claims, for

115. See Subsection II.d, *supra*.

116. FINAL REPORT, *supra* note 5, at 3.

117. *Id.*

118. *Id.* at 3–4. See also Vance, *supra* note 104, at 327.

119. *Id.*; LIEDER & PAGE, *supra* note 106, at 59–60. See also U.S. DEP’T OF JUST., *supra* note 103 (“By 1946, nearly 200 claims had been filed under special jurisdictional acts, but the Court of Claims had awarded damages on only 29 of these claims.”).

120. 81 CONG. REC. 6058, 6243 (1937) (statements of Reps. Cochran and Pierce).

121. FINAL REPORT, *supra* note 5, at 4.

122. LIEDER & PAGE, *supra* note 106, at 88.

the explicit purpose of expediting the process of tribes, Congress, and the Court of Claims.¹²³ Indeed, during early negotiations, Secretary of the Interior Harold Ickes preferred an investigation-only model on the grounds that the delays in the Court of Claims process arose less from the court itself than from inaction by the political branches.¹²⁴ In addition to the ICC's considerable judgment power, Native rights advocate and attorney Felix Cohen persuaded Congress to vest the Commission with investigatory powers; the Act as signed into law "required that the Commission create an Investigation Division that would . . . uncover facts relating to claims and present them."¹²⁵ Additionally, some in the federal government "felt that a commission rather than an adversary proceeding could better 'cut through' the red tape of Government agencies charged with the preparation of Indian cases."¹²⁶ The second development of the 1930s pertains to the finality of ICC decisions. One of the primary sticking points under the prior regime was the need for Congress to approve not only the initial tribal claim to title, but any award to the tribe, as a matter of the statutory authority granted to the Court of Claims.¹²⁷ In August of 1940, the first bill was introduced in the Senate that would have created a commission authorized to make final determinations on questions of both fact and of law, making it a "self-contained agency able to conduct its own investigations, determine the facts, adjudicate the legal issues, and make a final determination," with appeal possible to the Court of Claims, although this commission would still have had to report its findings to Congress and await appropriation.¹²⁸ Later in 1940, the Department of the Interior proposed its own bill that would have granted full settlement authority to the still-hypothetical commission, which Collier saw as "key to Government acceptance of any claims format."¹²⁹ Nevertheless, Congress passed bills that would have withheld such authority from the commission, and President Franklin Roosevelt vetoed the one bill that made it to his desk in 1941, citing the lack of true finality.¹³⁰

123. Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 368–69 (1973).

124. Vance, *supra* note 104, at 327–28.

125. LIEDER & PAGE, *supra* note 106, at 88.

126. FINAL REPORT, *supra* note 5, at 4.

127. U.S. CT. OF FED. CLAIMS, UNITED STATES COURT OF FEDERAL CLAIMS: THE PEOPLE'S COURT 10 (2018). Because the Court of Claims was not elevated to Article III status until 1953, this structure presented no constitutional issues. Act of July 28, 1953, Pub. L. No. 83-158, 67 Stat. 226.

128. FINAL REPORT, *supra* note 5, at 4.

129. *Id.*

130. LIEDER & PAGE, *supra* note 106, at 60.

Once Congress agreed on the ultimate form of the ICC, around the end of World War II, the ICC Act progressed rapidly from committee, through both houses of Congress, and onto President Truman's desk. Over four months in 1945, Scoop Jackson, then a Congressman from Washington State and Chairman of the House Committee on Indian Affairs, held five hearings on the matter before introducing H.R. 4497, the Indian Claims Commission Act, that October.¹³¹ This bill was notable for providing that tribes could bring actions against the United States under theories of "unconscionable consideration" and "fair and honorable dealings that are not recognized by any existing rule of law or equity," claims that exist on the outskirts of cognizable rights under contract law.¹³² Jackson's committee report on the bill continued in this vein, saying that it was written "to right a continuing wrong to our Indian citizens for which no possible justification can be asserted."¹³³ War service also played a role. Americans of Native descent joined the armed services during World War II, including the fabled Navajo Code Talkers, at a higher rate than any other ethnic minority.¹³⁴ Returning to the committee report for the Act, Jackson said that giving tribes their day in court was "only fitting" in the wake of their members' military service.¹³⁵ Structurally, the 1946 Act granted the Commission both judicial and factfinding powers, although Congress used open-ended language that "left [it] to the Commission to decide within what confines it would function as a court and to what extent it would serve as an investigator."¹³⁶

While the lofty rhetoric surrounding the ICC suggests that its drafters and early proponents had Native peoples' best interests in mind, the Commission's structure, the language of the ICC Act, and decisions by the ICC's early leadership, in tandem with the Commission's outcomes, betray the more complex set of factors defining the ICC's operation. Moreover, Jackson and his allies in Congress "made

131. FINAL REPORT, *supra* note 5, at 4.

132. Indian Claims Commission Act, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050 (1946); *see also* LIEDER & PAGE, *supra* note 106, at 67 ("Congress in effect said that the Commission could not duck any moral claim. The Commission had to impose liability against the government if it had harmed the tribes by acting unfairly or dishonorably.").

133. FINAL REPORT, *supra* note 5, at 4.

134. LIEDER & PAGE, *supra* note 106, at 60–61. Though Navajo Code Talkers are the most well-known, the United States Armed Forces also employed Code Talkers, primarily from the Choctaw Nation, in World War I, *see, e.g., Code Talkers, CHOCTAW NATION*, <https://www.choctawnation.com/history-culture/people/code-talkers> (last visited Mar. 11, 2021).

135. FINAL REPORT, *supra* note 5, at 4.

136. Danforth, *supra* note 123, at 370.

little effort to consider the views of the Indians . . . [f]or those groups who reacted negatively to this policy, cooperation with the Commission was more capitulation than redress.”¹³⁷ Further suggesting the predominance of reputational concerns in a decolonizing world, President Truman’s signing statement ominously claimed that “[i]nstead of confiscating Indian lands, we have purchased from the tribes that once owned this continent.”¹³⁸ For Truman, the question was not whether the federal government had improperly wrested away lands of incalculable value from their first inhabitants but whether the United States had “made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements.”¹³⁹ This was not a promising start.

B. *The Powers and Structure of the Indian Claims Commission*

This Section proceeds in two subsections. In Subsection IV.b.i, I analyze the substantive provisions of the Indian Claims Commission Act (the “Act”), including both the Commission’s powers and its jurisdiction. Then, in Subsection IV.b.ii, I turn to the structure, procedure, and decisions that shaped the Commission’s work over its lifespan.

i. *Substantive Provisions*

The single biggest limitation on the ICC was that it possessed only the authority to provide monetary relief to tribal groups and could not restore title to their lands.¹⁴⁰ While the ICC represented the first time that an ethnically European power opened itself up to suits by the Indigenous peoples it dispossessed,¹⁴¹ it nevertheless foreclosed the possibility of equitable remedy in the form of returned land, water rights, or any ongoing relief.¹⁴² This is to say that even when tribes

137. *Id.* at 371. There was never a monolithic Native opinion on these questions, but the framers of the ICC do not seem to have addressed the diversity of viewpoints. For instance, “the Seminole Indians . . . were not interested in monetary compensation One group of Seminoles remained intransigent and threatened to go to the United Nations with their grievance, wanting their land back, not money.” *Id.* at 371 n.37.

138. Harry S. Truman, *Statement by the President Upon Signing Bill Creating the Indian Claims Commission*, THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-creating-the-indian-claims-commission> (last visited Mar. 11, 2021).

139. *Id.*

140. FINAL REPORT, *supra* note 5, at 8.

141. LIEDER & PAGE, *supra* note 106, at 83.

142. See, e.g., Sam Levin, ‘This Is All Stolen Land’: Native Americans Want More than California’s Apology, THE GUARDIAN (June 21, 2019), <https://www.theguardian.com/us-news/2019/jun/20/california-native-americans-governor-apology-reparations>; Laurie Goering, In Los Angeles ‘Water Colony,’ Tribes Fear a

got an unprecedented avenue for relief, Congress constrained that relief on the basis of what elite, White interests were willing to accede to in 1946.¹⁴³ While the primary motivation for the ICC was to adjudicate tribal land claims, the Act provided for five distinct categories of claims available to any “tribe, band, or other identifiable group of American Indians”:¹⁴⁴

- (1) [C]laims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
- (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
- (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
- (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
- (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.¹⁴⁵

The first, second, and fourth causes of action, which pertained to treaties and familiar questions of suits between sovereigns, were the core of the ICC’s authority, and the fourth in particular turned out to be the basis for a large number of claims brought before the ICC.¹⁴⁶ By including “treaties” among the sources of law under which tribal groups could bring cases, the United States explicitly opened itself up to suits under the 370 treaties signed with tribes between 1778 and 1871, which often contained provisions for “government responsibility to provide necessities of life, and the equipment necessary for making a living such as education and health facilities.”¹⁴⁷ More significant—and potentially groundbreaking—were the third and fifth causes of action within the Commission’s jurisdiction, which would

Parched Future, REUTERS (June 4, 2019, 5:38 AM), <https://www.reuters.com/article/us-water-california/in-los-angeles-water-colony-tribes-fear-a-parched-future-idUSKCNIT512S>. See also *supra* note 137.

143. Again, this structure was created with little to no input from actual Native individuals.

144. The use of collective language in this provision would later prove to be critical in some claims, see *infra* Section III.c, note 252 and accompanying text; see also LIEDER & PAGE, *supra* note 106, at 107–13.

145. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050.

146. FINAL REPORT, *supra* note 5, at 8.

147. NCAI, *supra* note 57, at 18; Danforth, *supra* note 123, at 397.

allow for suits based on theoretical revised contracts, and those based on fair and honorable dealings. By their terms, these causes of action allowed the ICC to expand its jurisdiction beyond the confines of American courts' precedent by "allow[ing] the Commission to 'go behind' or treat the Indian treaties *as if* revised [on the grounds enumerated in the third clause, *supra*], and [giving] cognizance to the broad concept of moral claims."¹⁴⁸ Such claims of unconscionability and "fair and honorable dealings" are well outside the ambit of normal legal disputes under the Anglo-American tradition, so much so that this "set off alarm bells in the Justice Department" for the potentially broad liability it created.¹⁴⁹ According to the Act's supporters, though, such authority was necessary given the history of federal-Native relations.¹⁵⁰ "Indians depended on the United States to protect them, and the United States repeatedly claimed it was acting in the tribes' best interest. Any unfair behavior by the government violated the trust that the United States forced the tribes to place in it."¹⁵¹ Taken to its logical conclusions, this language would have effectively precluded the United States from absolving itself of responsibility for tribes' decisions made under the duress of power imbalances and allowed recovery for a broad range of social injuries that were largely foreign to United States courts.¹⁵²

The Act further provided that the Commission could hear and determine all permissible claims "notwithstanding any statute of limitations or laches."¹⁵³ This, too, was potentially transformative, and should be understood in the context of the Act's overall time constraints on suits. Recognizing the unfairness that would result if it declined to grant relief on the basis of the United States government's own delay, Congress appears to have been swayed by testimony from Felix Cohen, who in turn quoted a tribal leader as saying that "[i]f settlement with us has been delayed, it has been due to your own fault. Will you take advantage of your own fault? Will you say . . . now

148. FINAL REPORT, *supra* note 5, at 7 (emphasis in original).

149. LIEDER & PAGE, *supra* note 106, at 67.

150. *See, e.g., supra* Part II.

151. LIEDER & PAGE, *supra* note 106, at 67 (paraphrasing the Indian Claims Commission Act and collected statements from the Congressional Record on the Act's legislative purpose).

152. That the ICC did not live up to this promise will not surprise the informed observer. *See, e.g., infra* Section III.c.

153. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050. *Cf. Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 114, 117–18 (2d Cir. 2010) (affirming dismissal of "possessory" claims for ancestral Oneida lands in Central New York on the grounds that such claims were time-barred under laches doctrine).

because I delayed so long I will not settle with [us] at all?”¹⁵⁴ Hence, the government had no right to raise laches or of statutes of limitations. This constraint, however, was offset by two stringent requirements on the timing of claims and their resolution. First, the Commission was off-limits for any “claim accruing after the date of the approval of this Act,” making for a deadline of August 13, 1946.¹⁵⁵ This led to an imbalance in the ICC’s docket. Based on the rate of filing in the ICC’s first two years, in 1948 the Commission anticipated that some 200 to 500 claims would ultimately be filed. However, it seems “that many of the Indian attorneys held off on filing to await the outcome of the early decisions,”¹⁵⁶ and in the last six weeks before the filing window closed, twice as many claims were filed as in the previous four-and-a-half years, for a total of 370 petitions, which the ICC considered on 600 individual dockets.¹⁵⁷ While the impact of this provision might seem limited—after all, the government got out of the business of tribal treaty-making well over a century ago—it is still a limitation. By its terms, the Act “broaden[ed] the Government’s consent to suit and as such is in derogation of its sovereignty.”¹⁵⁸ This waiver of sovereign immunity is an extraordinary posture for the federal government to have taken, but the Act severely limits its applicability by closing off most future claims. Second, the Act had a (theoretical) self-termination mechanism, providing that “the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-year period . . . as the Commission shall have made its final report to Congress.”¹⁵⁹ This was written into the bill to cement Congressional support, given the preference for “restrict[ing] a too-liberal grant of power and life to ‘quasi-judicial’ agencies.”¹⁶⁰ This timeline proved too optimistic, and Congress extended the life of the ICC in 1956, 1961, 1967, 1972, and 1976, until the Commission finally terminated in 1978.¹⁶¹ Even then, the Commission handed off 65 pending

154. LIEDER & PAGE, *supra* note 106, at 66.

155. §2, 60 Stat. at 1050.

156. FINAL REPORT, *supra* note 5, at 5.

157. *Id.* That the number of Eighteenth and Nineteenth Century treaties and the number of petitions filed with the ICC both amount to 370 seems to be merely a poetic coincidence.

158. *Otoe & Missouri Tribe v. United States*, 131 F. Supp. 265, 271 (Ct. Cl. 1955).

159. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 23, 60 Stat. 1049, 1055.

160. FINAL REPORT, *supra* note 5, at 12.

161. *Id.* at iii.

suits to the Court of Claims,¹⁶² the last of which was not resolved until the mid-2000s.¹⁶³

The final set of provisions delimiting the ICC's jurisdiction and function pertained to "offsets" that the Commission was directed to make: "[T]he Commission shall make appropriate deductions for all payments made by the United States on the claim" to the extent that they would be allowable in a standard suit before the Court of Claims.¹⁶⁴ The ICC was also permitted to "consider all money or property given to or funds expended gratuitously for the benefit of the claimant" and deduct from awards accordingly.¹⁶⁵ These provisions allowed, and in some instances required, the Commission to reduce awards made to claimant groups on the basis of government spending on their behalf. The only statutory limit on this accounting was that the Commission had to exclude costs incurred in removing the claimant group from its land, spending on administration, health, education, and infrastructure, and expenditures predating the law or treaty under which the claim arose.¹⁶⁶ This represented the "flip side" to the unconscionability and fair and honest dealings provisions in the Act: to the extent that the Commission found the federal government had comported itself appropriately in dealing with a tribe, it could reduce the remedy accordingly.¹⁶⁷ However, both the novel causes of action and the offsets were statutorily indefinite, and so "[t]he Commission [or a court on appeal] would have to formulate the standards."¹⁶⁸ As will be seen below, these standards often did not favor claimant groups.

ii. Operationalizing the Indian Claims Commission

Much of the text of the Act was dedicated to outlining technical details of the ICC's membership and operations. Although such minutiae may seem less important than the Commission's substantive powers and limitations, structure impacts function, and function is inherently a statement about policy. In the case of the ICC, the Act stated that the Commission was to comprise three members, appointed

162. LIEDER & PAGE, *supra* note 106, at 65.

163. U.S. DEP'T OF JUST., *supra* note 3; *see also* Pueblo of San Ildefonso Claims Settlement Act of 2005, Pub. L. No. 109-286, 120 Stat. 1218, 1218 (2006).

164. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1050.

165. *Id.*

166. *Id.*

167. LIEDER & PAGE, *supra* note 106, at 67-68.

168. *Id.* at 68; *see also* Danforth, *supra* note 123, at 370 ("Congress left ambiguities concerning the way the Commission was to function . . . [and] did not state how the Commission was to arrive at these decisions.").

by the President and confirmed by the Senate, holding their offices “during their good behavior.”¹⁶⁹ This language indicates that ICC Commissioners were primary officers of the United States, whose selection is governed by the terms in the Appointments Clause¹⁷⁰ and who “exercise the most ‘significant’ authority in disposing of liability questions,” rendering final decisions on these questions.¹⁷¹ Such a designation, which created a direct link between the President and ICC Commissioners, is further evidence of the extensive powers and finality that Congress intended to grant to the Commission and its decisions resolving tribal claims. The only limitations on who could serve as a member of the Commission were that at least two had to be “members of the bar Supreme Court of the United States,” and no more than two could be members of the same political party.¹⁷² President Truman thus enjoyed broad latitude in selecting members of the Commission. However, the composition of the ICC was not inevitable. Earlier drafts of the Act would have required Native representation on the Commission, though this was eventually watered down to a non-binding recommendation in the committee report, supposedly out of concern that no attorneys of Native descent would want to serve on the ICC.¹⁷³ Even then, advocates pressed Truman to appoint an attorney “steeped in a tribe’s oral traditions and history,” someone who would have a deeper and more nuanced appreciation of the understandings, misunderstandings, and pressures inherent in federal dealings with tribal leadership.¹⁷⁴ Failing that, a White advocate for Native rights who possessed “sensitivity to the Indian perspective, an unparalleled knowledge of Indian law, and the trust of tribal leaders” would have been a fitting appointment to the first panel of Commis-

169. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1050–51.

170. U.S. CONST. art. II, § 2, cl. 2.

171. *Tucker v. Comm’r*, 676 F.3d 1129, 1132 (D.C. Cir. 2012) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976)).

172. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1051. Of course, even if Commissioners came from different political parties and disagreed on some issues, they were likely to agree on—and benefit from—the power structures that undergird federal-Native relations. Further, the “bar of the Supreme Court” provision is a lower standard than it may appear to be, as “virtually any lawyer admitted to the bar of any state for at least three years could, and still can, become a member of the bar of the Supreme Court by applying and paying a small fee.” LIEDER & PAGE, *supra* note 106, at 84.

173. LIEDER & PAGE, *supra* note 106, at 84.

174. *Id.* at 84–85.

sioners.¹⁷⁵ In March of 1947, Truman announced his appointment of three White Commissioners, none with any particular expertise or experience in Indian law, a decision he made in pursuit of making the Commission a truly neutral arbiter.¹⁷⁶ It is questionable as to whether this goal was achievable, given the vast difference in social and legal structures between the United States and tribal leadership, but it is hard to dispute that a White Commissioner without experience in Native history and customs “might be more likely to interpret a decades-old agreement for the conveyance of land from a tribe to the government in the same manner that he would regard an agreement between two white men.”¹⁷⁷ Given the opportunity to shape the ICC’s work at its outset, President Truman stuck to safe, politically expeditious choices for the first three Commissioners. After considering and rejecting several Native candidates, including multiple judges,¹⁷⁸ Truman appointed Edgar Witt, an ally of powerful House Speaker Sam Rayburn, as Chief Commissioner.¹⁷⁹ For the other two positions, Truman turned to William Holt, an undistinguished Nebraska attorney recommended by the chair of the Senate Committee on Public Lands, and Louis O’Marr, Wyoming’s attorney general and the preferred choice of the Public Lands Committee’s *second*-ranking Democrat.¹⁸⁰ Thus, with his inaugural appointments to the Indian Claims Commission, Truman projected his own politics and alliances onto the Commission’s membership. The adjudication of post-colonial land claims was to be overseen by descendants of the colonizers.

What most clearly separated the ICC from the Court of Claims and the purely judicial bodies that had been proposed in earlier versions of the Act was its authority to independently investigate claims.¹⁸¹ The Commission, operating through its Investigation Division, was to have access to all government documents and other infor-

175. *Id.* at 85. If that sounded like Felix Cohen, it was not by accident. Several tribal leaders and Members of Congress campaigned for his appointment to the ICC, to no avail. *Id.*

176. *Id.* In the entire history of the Indian Claims Commission, only one Commissioner was of Native descent. Brantley Blue, a Republican attorney from North Carolina and member of the federally unrecognized Lumbee tribe, was the last person ever appointed to the ICC, in 1969. *Id.*; Maureen Joyce, *Brantley Blue, Judge, GOP Indian Official, Dies*, WASH. POST (Aug. 5, 1979), <https://www.washingtonpost.com/archive/local/1979/08/05/brantley-blue-judge-gop-indian-official-dies/9d42424e-800e-4fcc-a8a3-a8588d992a2e/>; FINAL REPORT, *supra* note 5, at ii.

177. LIEDER & PAGE, *supra* note 106, at 85.

178. *Id.*

179. *Id.* at 86.

180. *Id.* at 86–87.

181. 60 Stat. at 1052.

mation pertinent to the cases before it.¹⁸² Buttressing these provisions, the Act also provided broad latitude for ICC Commissioners and designated employees to depose witnesses and subpoena “the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States or Alaska.”¹⁸³ The inclusion of this discovery authority would turn out to be providential, as investigations would—much later—drive some of the ICC’s most pro-Native decisions.¹⁸⁴ As with the membership of the Commission, however, it was up to the earliest members and staff of the ICC to set a precedent as to what “investigation” would look like.¹⁸⁵ Again, the results were less than impressive. At the outset, the Commissioners merely designated one staff member as the Director of the Investigation Division for clerical purposes, and the Division seems not to have performed *any* independent investigation, as the ICC “assigned no staff to the Division and a search of the files and records of the Commission indicate that at no time did the Director do more than send out inquiries by mail to the various tribes.”¹⁸⁶ This arrangement persisted despite Congress’s explicit directive to constitute the ICC as an investigative body as well as a quasi-judicial one. Indeed, granting explicit power to an Investigative Division “appeared necessary for the fair resolution of decades-old, if not centuries-old, claims, where any documentary evidence was generated exclusively by, and generally was solely in the possession of, the government.”¹⁸⁷ At the beginning, the ICC seems to have acted as little more than a traditional adjudicatory body in the adversary Anglo-American system.¹⁸⁸ In its first decade, the Commission “generally let the adversaries establish the facts, and the opinions . . . rested on the record rather than on the findings of an independent investigation.”¹⁸⁹ The ICC’s staff, and its initial slow growth, reflect the Commission’s ambivalence toward its official goals. By 1957, the ICC employed only fourteen staff members on a

182. *Id.*

183. *Id.* at 1054; *see also* John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 333 (1969) (describing this statutory language as “an apparent attempt to facilitate the work of the Investigation Division”).

184. *See infra*, Subsection III.c.i.

185. *See* Danforth, *supra* note 123, at 370.

186. Vance, *supra* note 104, at 333.

187. LIEDER & PAGE, *supra* note 106, at 88–89.

188. Vance, *supra* note 104, at 333 (“[T]he Commission . . . wait[ed] for the claimants’ attorneys and the lawyers for the Department of Justice to present the issues and the evidence”). *See also* LIEDER & PAGE, *supra* note 106, at 83.

189. Thomas Le Duc, *The Work of the Indian Claims Commission under the Act of 1946*, 26 PAC. HIST. REV. 1, 3 (1957).

budget of \$132,000.¹⁹⁰ Declaring its own staffing “adequate,” the Commission added just three employees and \$73,000 to the budget over the next four years.¹⁹¹ Only with the third extension of the ICC’s statutory lifespan in 1967 did Congress and the Commission realize that “more Commissioners and a larger staff would result in more work being done”; Congress subsequently authorized two more Commissioners.¹⁹² And only in the last decade of the Commission’s existence did the staffing and budget grow at a pace commensurate with the work the ICC had left to do. In 1969—twelve years after the Commission was supposed to have obviated its own existence—only fifty-one percent of the Commission’s work had been completed with a staff including five Commissioners and eleven attorneys.¹⁹³ Within two years, the legal staff had doubled.¹⁹⁴ Two years after *that*, the accounting staff at the ICC increased from 2 to 103, and by 1975, the legal staff increased to 44, on a budget north of \$1.3 million.¹⁹⁵ To be sure, Congress and the Commission responded to the exigencies of the ICC’s docket, even as tribal response far exceeded their initial expectations.¹⁹⁶ However, neither body was prepared or fully willing to anticipate the resources needed to adequately and timely address the obligations of the ICC. This hampered the Commission’s function and limited the extent to which Native peoples were able to seek redress for their historical marginalization.

C. *The Function of the Indian Claims Commission*

By the time it disbanded, the Indian Claims Commission had made determinations on some 546 dockets, of which nearly two-thirds resulted in awards, totaling nearly \$820 million.¹⁹⁷ This represents a major victory for tribes and Native interests over the course of the ICC’s operations. Nevertheless, the functioning of the Commission over its life suggests shortcomings and failures that should influence our assessment of the ICC’s place in the history of federal-Native relations. These failures can be grouped into three primary categories.

190. FINAL REPORT, *supra* note 5, at 12.

191. *Id.* at 13.

192. *Id.* at 15.

193. *Id.* at 17.

194. *Id.*

195. *Id.* at 19–20.

196. FINAL REPORT, *supra* note 5, at 5; *see also supra* notes 156–157 and accompanying text (discussing the crush of claims filed in 1950 and 1951).

197. FINAL REPORT, *supra* note 5, at 125. These figures do not appear to be adjusted for inflation, even between the first award in 1951 and the last in 1978, and thus may overstate disparities in awards over the ICC’s lifespan.

First, there are the failures of the ICC's investigative functions, which slowed down adjudication of claims and reduced their accuracy. Second, the Commission did not adequately address many of the traditional legal claims that formed the backbone of the Commission's jurisdiction. Third, the ICC failed to deliver on any of the novel claims it was specifically constituted to address, rejecting the small handful of suits brought under the ICC Act. In the following three Subsections, I address each of these failures in turn.

i. Investigative Failures

First, the Commission established its Investigation Division only "on paper," as a perfunctory matter to satisfy the congressional mandate.¹⁹⁸ This was in spite of Congress's explicit intent that the ICC be granted with investigatory powers that go beyond the normal factfinding of an adversarial court. The disconnect was not lost on the Court of Claims. In one infamous decision, that court treated the Commission as little more than an administrative agency, giving the Court of Claims "quasi-original jurisdiction" in dramatically augmenting the ICC's factual determinations and overruling their findings below.¹⁹⁹ Judge Benjamin Littleton wrote that, even though the Act required the Commission to form an Investigation Division, "[f]rom the papers contained in the record on appeal, it appears that no such investigation was made or, if it was, that the material developed was not considered by the Commission in reaching its decision."²⁰⁰ In total, the fact-bound decision fills more than forty dense pages of the Federal Supplement.

The sources of proof in ICC cases were novel and at times difficult for the Commission and litigants alike. While "the legal theories underlying the claims . . . were well established in Anglo-American law," matters like the takings doctrine quickly ran into enormous evidentiary and judicial complexities.²⁰¹ While it is normally straightforward to apply the Fifth Amendment in a case involving eminent domain or other forms of government taking, tribal groups had no county assessor's office to serve as a repository for their land claims and, for the most part, did not keep records of who used a given piece of land, when they used it, or what the metes and bounds of that land were.²⁰² Further, "the early recordkeeping system of the Republic was

198. See *supra* notes 124–134 and accompanying text.

199. Le Duc, *supra* note 189, at 3–4.

200. *Osage Nation v. United States*, 97 F. Supp. 381, 393 (Ct. Cl. 1951).

201. LIEDER & PAGE, *supra* note 106, at 90.

202. *Id.* at 117.

[also] inadequate.”²⁰³ Compounding the disconnect, most Native conceptions of land ownership differ significantly from those prevalent in the Anglo-American system, and any system for calculating the monetary value of land necessarily has to assign a dollar figure to cross-cultural intangibles.²⁰⁴ Even though the burden of “establishing ‘exclusive use and occupancy’ of a definable area” to a preponderance of the evidence rested on the claimant tribe,²⁰⁵ “[t]he absence of written tribal records normally mean[t] that reliance must be put on contemporary accounts by explorers, missionaries, traders, and government officials.”²⁰⁶ But Native peoples were routinely in adversarial relationships with these groups, and those conflicts were replicated in these suits. Further, relying on the written word of White colonizers limited the ICC to “an ethnocentric mental framework seriously lacking in Indian perspective.”²⁰⁷ Despite the vestigial nature of the Commission’s investigatory operation, litigants on both sides of the bench figured out how to develop their records, and may have come to prefer the control this gave parties over their factual narratives.²⁰⁸ Even this development merits a cautionary note. Though the law did not strictly require that most tribes seek approval when hiring legal representation, the political branches “insisted that all attorneys for the tribes go through the complicated procedure of having their contracts [with attorneys] approved by the Secretary [of the Interior] and the Commissioner [of Indian Affairs].”²⁰⁹ This is yet another dimension on which the ICC’s remunerative mission was carried out on colonial terms. Given all these limitations, it is unsurprising that “anthropological and historical analyses began to play an important part in claims litigation,” as tribes and the federal government alike began to rely on expert testimony.²¹⁰ Making full use of the Commission’s broad powers to elicit testimony, tribes hired historians, anthropologists, and archaeologists to serve as expert witnesses, even though the Court of Claims had only ever heard three prior cases involving anthropological testi-

203. Le Duc, *supra* note 189, at 9; *Systemic Discrimination in the ICC*, *supra* note 60 at 1310.

204. “How much,” Lieder and Page ask, “was a Chiricahua Apache mountain god worth?” LIEDER & PAGE, *supra* note 106 at 117. Even on a more mundane level, it is impossible to assign a number to the cultural and historical value of land, even if, say, the agricultural or mineral value can be assessed with reasonable accuracy.

205. *Systemic Discrimination in the ICC*, *supra* note 60 at 1309.

206. Le Duc, *supra* note 189, at 9.

207. *Systemic Discrimination in the ICC*, *supra* note 60, at 1311.

208. LIEDER & PAGE, *supra* note 106, at 89.

209. Vance, *supra* note 104, at 334.

210. Nancy Oestreich Lurie, *The Indian Claims Commission Act*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 59 (1957).

mony and had established no precedents.²¹¹ While such evidence often worked in Native claimants' favor, the difficulty of marshaling these resources should not be underestimated.²¹² That is, the challenges of building a sufficiently compelling case to present to the ICC seriously limited the extent to which Native groups could avail themselves of the Commission and its promise of compensation.

A brief overview of the experience of the Pawnee Tribe of Oklahoma demonstrates how these challenges could stymie tribal claims. Over the course of about 60 years in the Nineteenth Century, the Pawnees were reduced from hunting and farming over a large swathe of the Great Plains to occupying a sliver of allotted land in Oklahoma.²¹³ The Pawnees brought suit, entering testimony from tribal elders aged well into their 80s; imprecise excerpts of contemporaneous accounts; and expert witness Dr. Waldo Wedel,²¹⁴ an archaeologist employed by the federal government. Wedel's noncommittal testimony was instrumental in the Commission's ruling against the Pawnee on all claims in July of 1950.²¹⁵ The Court of Claims, again taking on the mantle of "quasi-original jurisdiction," reversed the ICC in a ferocious opinion. *Pawnee Indian Tribes of Oklahoma v. United States* took the Commission to task for dereliction of duty: "[T]he record physically before the Indian Claims Commission was *entirely inadequate* to form the basis for the just, equitable, and final disposition of the first five claims." The court went on to summarize its own findings.²¹⁶ Although she is not credited in the decision, Margaret, a law clerk for the Court of Claims, seems to have done most of the heavy lifting.²¹⁷ At the National Archives, Pierce located records more than sufficient to establish an adequate baseline for the ICC on

211. *Id.* at 59–60. Even these experts were sometimes insufficient to overcome the ICC's biases. In *Yakima Tribe v. United States*, the treaty at issue did not actually describe the land in dispute, including the critical issue of where a particular river mouth happened to be. Undaunted, the Commission simply redrew the lines to the Yakimas' disadvantage. *Systemic Discrimination in the ICC*, *supra* note 60, at 1311.

212. See generally Lynn Price, *Proving Aboriginal Title Via Expert Testimony: Lessons from the Indian Claims Commission*, 7 AM. INDIAN J. 16 (1981) (surveying the state of expert testimony before the ICC and describing the complexity and difficulty of tribal claims).

213. LIEDER & PAGE, *supra* note 106 at 126. The rest of the land had been sold as putative surplus.

214. *Id.* at 126–27.

215. *Id.*

216. *Pawnee Indian Tribe v. United States*, 109 F. Supp. 860, 870 (Ct. Cl. 1953) (emphasis added).

217. LIEDER & PAGE, *supra* note 106, at 128.

remand.²¹⁸ The *Pawnee Indian Tribes* decision makes repeated reference to these documents.²¹⁹ The Pawnees were ultimately victorious, although their \$7.3 million award was not finalized until 1962, almost twelve years after their initial loss in front of the Commission.²²⁰ In 1968, President Nixon appointed Pierce as a member of the ICC, who became the only woman Commissioner and the first Commissioner to have actual experience litigating Native land claims.²²¹ The Commission's final report mentioned Pierce—who was largely responsible for the intellectual gravitas behind the ICC's decisions—only in passing and failed to recognize her status as the only woman to serve on the Commission.²²² Thus, while some Native groups were eventually able to marshal the resources and evidence to prove their cases, their victories came only after jumping over the procedural hurdles placed in their way to the benefit of elite White interests. In many cases, justice came only after years of delay and the intervention of an activist Court of Claims,²²³ and only on terms amenable to—and largely dictated by—colonizers' interests.

ii. *Shortcoming Under Traditional Legal Claims*

In spite of the novel injury claims available to tribal claimants under the Act,²²⁴ the large majority of cases brought before the ICC were far more pedestrian. The biggest single group of claims were those arising out of “tribal land cessions to the United States,” in particular, suits looking to obtain additional compensation after the land was initially ceded under insufficient or unfair treaty terms.²²⁵ Apart from the difficult questions of land valuation, these claims were relatively straightforward applications of eminent domain suits where the plaintiff seeks fair market value plus interest.²²⁶ The other common type of claim in front of the ICC was for breach of trustee responsibilities, a relationship that was announced by the Supreme Court in *Cherokee Nation v. Georgia*.²²⁷ Over the intervening century, “[t]he

218. *Id.* Evidently, the Pawnees' lawyer had only spent *one hour* combing through the Archives, and the government's lawyers made no effort to disabuse him of any misconceptions.

219. *See Pawnee Indian Tribe*, 109 F. Supp. 860.

220. FINAL REPORT, *supra* note 5, at 67–68.

221. LIEDER & PAGE, *supra* note 106, at 204.

222. FINAL REPORT, *supra* note 5, at 17.

223. For example, more than six years elapsed from the Osage Nation's filing with the ICC to an award that amounted to all of \$864,107.55. *Id.* at 62–63.

224. *See supra* notes 145–149 and accompanying text.

225. FINAL REPORT, *supra* note 5, at 8.

226. LIEDER & PAGE, *supra* note 106, at 90.

227. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

Government, as legal guardian for the tribes, became accountable for its management of tribal funds [M]ismanagement, misfeasance, or mishandling of such funds constituted a major source of Indian claims.”²²⁸ As discussed above,²²⁹ many of the Commission’s failures flowed directly from the intense factfinding required to determine Native land claims and the difficulty in parsing out an inconsistent historical record, compounded by the ICC’s inadequate investigations. However, though the Court of Claims often came to tribes’ rescue with regard to issues of factfinding under territorial disputes,²³⁰ its intervention did not favor Native claims brought under causes of action pertaining to the federal government’s management of tribal lands and funds. Dating back to 1831, these claims demonstrate the limited benefits that accrued to Native peoples under the ICC’s White-driven framework. At the outset, the records in these cases “usually covered many decades and involved thousands of financial transactions” between tribes and the government.²³¹ In order to calculate offsets, the Department of Justice began to request extensive reporting for all claims in 1946. The backlog was so extensive that the Commission did not start to process these claims until September of 1970 and did not finish its *preparatory* work until a year later.²³² Once those claims finally started working their way through the claims process, however, the Commission by and large passed decisions that were favorable to tribes.

In the next few years, however, it became clear that the Court of Claims could stymie Native efforts on substantive grounds just as much as it could assist them with respect to procedure. The experiences of two Southwestern groups, the Mescalero and the Te Moak, are illustrative. In the early 1970s, the Commission relied on clear statutory language, established precedent, and simple mathematical determinations to decide claims in favor of both groups, who had been denied interest payments for nearly fifty years’ worth of investments.²³³ More stunning is the fact that the Commission awarded them compound interest, and did so over a dissent urging simple interest, a method that would have reduced the awards by an order of magnitude, approximately tenfold.²³⁴ Mere weeks later, the ICC granted a similar award to the Blackfeet and Gros Ventre tribes of the upper

228. FINAL REPORT, *supra* note 5, at 8.

229. *See supra*, Subsection III.c.i.

230. *See, e.g., supra* notes 217–220 and accompanying text.

231. FINAL REPORT, *supra* note 5, at 18.

232. *Id.*; LIEDER & PAGE, *supra* note 106 at 234.

233. *Id.* at 235–36.

234. *Id.* at 236–37.

Great Plains.²³⁵ Two years later, however, the Court of Claims reversed the Mescalero and Te Moak awards, with virtually no reference to the Act itself.²³⁶ Even in a case where the Commission was simply applying settled precepts of Anglo-American common law to jurisdiction created by the Indian Claims Commission Act, the Court of Claims chided the ICC for ruling “in direct conflict with the decision[] of the . . . Supreme Court in the *Angarica* case.”²³⁷ Not only did *Angarica* predate the Commission by nearly 60 years, but the proposition the Court of Claims used it for is not especially on point in *Mescalero*.²³⁸ Further, the decision in that case does not contemplate the circumstances of the Indian Claims Commission. “[I]nterest is not allowed” on claims against the federal government, wrote the Court, “whether such claims originate in *contract or in tort*, and whether they arise in the *ordinary business of administration* or under *private acts of relief*.”²³⁹ The Court recognized exceptions to this “general rule” only where the federal government has promised to pay interest, or where Congress has explicitly so provided, “either by the name of interest or by that of damages.”²⁴⁰ Further, the Court of Claims in *Mescalero Apache* explicitly turned to an understanding of federal-Native relations frozen in the Nineteenth Century. On appeal to the Court of Claims in the 1970s, the Mescalero Apaches relied in part on an 1841 statute directing Congress’s investment of certain funds under its control.²⁴¹ In dismissing this claim alongside the ICC judgment, the Court of Claims turned to earlier stages in the *Angarica* case to hold that Native peoples were explicitly excluded from the earlier law’s coverage.²⁴² In short, the majority opinion in *Mescalero Apache* completely sidestepped the question of whether to allow non-traditional damages and awards in the expressly non-traditional setting of an ICC claim. Rather than a “technical” disagreement on accounting or factfinding, it was a matter of whether “certain tribal rights (granted

235. *Id.* at 237, 239–40.

236. *United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1333–1334 (Ct. Cl. 1975).

237. *Id.* at 1327 (citing *United States ex rel. Angarica v. Bayard*, 127 U.S. 251 (1888)).

238. The question in *Angarica* was whether the United States owed *Angarica*’s widow interest on a fee stemming from claims against the Spanish government. *Angarica*, 127 U.S. at 254.

239. *Id.* at 260 (emphasis added).

240. *Id.*

241. *See Mescalero Apache Tribe*, 518 F.2d at 1324.

242. *Id.* at 1326 (citing *United States ex rel. Angarica De La Rua v. Bayard*, 15 D.C. (4 Mackey) 310, 324 (1885), *aff’d*, 127 U.S. 251 (1888)).

by statute) have been ignored by the United States.”²⁴³ Even where the Commission itself set the stage for a legal victory, such decisions would run headlong into a system—typified by the Court of Claims—that was unwilling to look past ingrained colonial precedent in favor of more expansive Native rights.

iii. Failures Under Novel and More Expansive Claims

While the “fair and honorable dealings” and “unconscionable consideration” provisions of the Indian Claims Commission Act were groundbreaking in their contemplation of moral claims against the United States federal government, the experience of the Commission itself suggests they were used to only limited effect. By 1957, it appeared that the ICC would look to such claims as a primarily evidentiary matter: “Indians’ attorneys . . . found it expedient to base claims for restitution on tangible and measurable considerations.”²⁴⁴ Even then, however, the Commission was parsimonious, declining to award interest in cases brought under the “fair and honorable dealings” provision beginning in the early 1950s.²⁴⁵ Within about twenty years, it was clear that the Commission would use this provision only as a “last resort” if a claim failed under every other category set forth in the Act.²⁴⁶ Indeed, the ICC came out of the gate trying to circumvent the concept of “fair and honorable dealings.” In the Commission’s first case, the Western Cherokee band brought a claim under the provision alleging that, through mutual or unilateral mistake, the tribe had been denied lands equal in size and utility to their former territory, which Thomas Jefferson himself had promised them.²⁴⁷ The Commission rejected this claim under *res judicata*, and the Court of Claims affirmed, holding that the Western Cherokee had their day in court in 1891, and their claims had been fully adjudicated at that time.²⁴⁸

243. *Id.* at 1334 (Davis, J., dissenting in part).

244. Lurie, *supra* note 210, at 65.

245. FINAL REPORT, *supra* note 5, at 11.

246. Danforth, *supra* note 123, at 400–01.

247. Western (Old Settler) Cherokee *ex rel.* Owen v. United States, 86 F. Supp. 981, 982 (Ct. Cl. 1949).

248. FINAL REPORT, *supra* note 5, at 9–10; Western (Old Settler) Cherokee *ex rel.* Owen v. United States, 89 F. Supp. 1006, 1008–09, 1012 (Ct. Cl. 1950). After discussing the outcome of the 1891 case—in which millions of dollars were disbursed to various Cherokee bands—the court justified its decision by saying:

A study of the history of the Act . . . shows that it was not the intention of the Act to permit Indian tribes or bands . . . to re-litigate before the Commission any claim with respect to which such tribes, bands or groups, had had their day in court.

“Unconscionable consideration” did not fare any better for tribes where the disparity between the fair value and what was offered was not “very gross,” which was the Commission’s standard until 1961,²⁴⁹ or “so large as to shock the conscience,” in a particularly literal moment of statutory interpretation.²⁵⁰ The ICC used this category as something of a residual when it was politically thorny to declare a treaty unfair or dishonorable.²⁵¹ Over time, the definition of “unconscionable” centered on an estimate of half the fair value of the land, albeit with inconsistencies, given the desire to put an end to Indian claims without perpetuating any obvious injustices that would lead to new legislation.²⁵² This meant that tribes might not have been granted any relief “simply because they unfortunately were paid some small amount for their land at the time of taking,” even though “impos[ing] such a requirement is entirely inconsistent with the intent of the policy to compensate *all* proved claims.”²⁵³

Finally, even when presented with the opportunity to do so, the ICC often specifically declined to grant relief for claims brought under the Act’s third and fifth causes of action:²⁵⁴ “Although [American] courts have granted judgments for ‘mental anguish’ and similar grounds, these have been individual claims and have thus apparently influenced the thinking of the Commissioners.”²⁵⁵ A particularly appalling case is that of a group of Geronimo’s surviving compatriots, who were exiled from the desert Southwest to Florida for more than twenty years after a failed uprising against federal forces in which many of the prisoners of war materially assisted the United States government.²⁵⁶ The Fort Sill Apaches’ claim for relief was based on unjust imprisonment—a common law tort—and the Commission dismissed it on purely jurisdictional grounds, as the Act applies specifically to group or tribal claims, not individual ones.²⁵⁷ This case is revealing, as it cast an action for imprisonment, even when it affected

249. FINAL REPORT, *supra* note 5, at 15.

250. Danforth, *supra* note 123 at 395–96 (quoting *Sioux Tribe of Indians v. United States*, 146 F. Supp. 229, 234 (Ct. Cl. 1956)) (internal quotation marks omitted).

251. LIEDER & PAGE, *supra* note 106, at 145–46.

252. *Id.*; FINAL REPORT, *supra* note 5, at 15.

253. Danforth, *supra* note 123, at 396.

254. *See supra* Section IV.b.i.

255. Lurie, *supra* note 210, at 65. *See also supra*, notes 145–49 and accompanying text.

256. Yes, *that* Geronimo. The warrior whose name would be immortalized by paratroopers and Bugs Bunny alike was, at one point, “probably the most feared man in the United States,” and a key participant in Native resistance against White Americans’ westward incursions. LIEDER & PAGE, *supra* note 106, at 28–29.

257. Lurie, *supra* note 210, at 65.

an entire band, as nothing more than “the Anglo-American concept that a person who is falsely imprisoned . . . may sue for those [personal] injuries.”²⁵⁸ Squarely presented with the opportunity to live up to its promise of instituting causes of action “not recognized by any existing rule of law or equity,”²⁵⁹ the Commission reverted to centuries of rote precedent. In an unusual turn of events, however, the ICC—and the Fort Sill Apaches—got a second bite at the proverbial apple. Armed with a world-class legal team, the claimants were able to replead their case to the ICC, surviving a motion to dismiss by contending that the imprisonment harmed the Fort Sill Apache by “preventing *the tribe* from functioning *as a tribe*.”²⁶⁰ While the outcome was ultimately favorable, it was only through extraordinary luck, effort, and talent that the Fort Sill Apaches were able to reverse their fortunes, and only as far as avoiding dismissal. The Commission did not follow this precedent for other groups’ claims, and it appears that the Fort Sill Apache litigants lost their case on the merits.²⁶¹ Encouraged by this outcome, subsequent litigants sought to address individual claims to allotted land only to have their claims dismissed on the grounds that the federal government only waived sovereign immunity with respect to tribes, not individuals.²⁶² Thus, in more ways than one, the Indian Claims Commission Act stood alone, not as the vanguard of evolving federal-Native relations, but rather as a solitary, insufficient favor from the government.

V.

INTEREST CONVERGENCE THEORY AND FEDERAL-NATIVE RELATIONS

Against the backdrop of a frequently violent, deeply fraught, and perpetually unequal history, the state of the federal-Native relationship in the postwar United States exhibits clear markers of interest convergence as conceived by Professor Derrick Bell and others.²⁶³ In this Part, I begin in Subsection V.a by applying the interest convergence framework to the specifics of federal-Native relations, as expressed

258. LIEDER & PAGE, *supra* note 106, at 107.

259. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1050, 1050.

260. LIEDER & PAGE, *supra* note 106, at 111–12 (emphasis added). The specific nature of this injury was left strategically vague.

261. *Id.* at 112; FINAL REPORT, *supra* note 5, at 25. An appendix to the ICC’s Final Report lists all claims by the Fort Sill Apaches as dismissed but cites to no further evidence.

262. LIEDER & PAGE, *supra* note 106, at 113.

263. *See supra* Part I.

through the Act, the ICC, and its historical context. In Subsection V.b, I then look to the contemporaneous context of the ICC and argue that, by working in its own jurisdictional silo, the Commission failed to stand against the prevailing winds of Indian termination policy, and arguably worked as an unwitting accomplice to the terminationist agenda. “Termination,” in brief, sought to assimilate Native people and tribes to the point of erasing Native identity. This outcome served the White, majoritarian interests of the United States federal government by “terminating federal obligations to tribes” and increasing the pace of assimilation while eliminating tribes’ “special” treatment under United States law.²⁶⁴ In buttressing this policy, the ICC affirmatively demonstrated the limiting corollary implicit in Professor Bell’s theory: if minority rights depend upon convergence with majority—i.e., elite, White, and colonial—interests for their vindication, the former will be addressed only to the extent that they do not impinge upon the latter.

A. *The Interplay of Native and White Interests*

The ICC’s failures regarding Native peoples are paradigmatic of White decisionmakers’ inability to “envision the personal responsibility and the potential sacrifice” necessary for true equality. In other words, it is the “surrender . . . of privileges” that Professor Bell referenced and is critical to understanding his interest convergence thesis as expressed through the Indian Claims Commission and its history.²⁶⁵ In spite of the ICC’s self-evident importance as a groundbreaking admission of responsibility from an ethnically European power,²⁶⁶ its efficacy was limited by the boundaries of elite White interests.

The most immediately relevant convergence involved military service during World War II.²⁶⁷ Noting that the Snyder Act—unilaterally conferring American citizenship—followed Native individuals’ service in World War I, Congress believed “it was ‘only fitting’ that this same quality was again rewarded” by granting tribes a venue for their claims against the federal government.²⁶⁸ In addition to the intrinsic value of military service, this interest might also be cast as one of domestic propaganda: Ira Hayes, one of the Marines photo-

264. Federal Indian Law for Alaska Tribes: Termination Era, the 1950s, Public Law 280, UNIV. OF ALASKA FAIRBANKS, https://www.uaf.edu/tribal/112/unit_2/terminationerathe1950spubliclaw280.php (last visited Feb. 28, 2022).

265. See *supra* note 39 and accompanying text.

266. See *supra* note 145 and accompanying text.

267. See *supra* note 138 and accompanying text.

268. FINAL REPORT, *supra* note 5, at 4; see also *supra* note 131 and accompanying text.

graphed raising the flag on Iwo Jima, was an enrolled member of the Pima tribe.²⁶⁹ This picture, of course, was one of the defining images of World War II and a centerpiece of American public relations efforts during the War.²⁷⁰ The veneer of patriotism, however, may hide a more complex, entrenched set of White interests: integration of Native peoples into mainstream American society and the completion of the colonial assimilation project while maintaining delicate relationships with *other* post-colonial societies. Even the earliest rhetoric supporting Native participation in American war efforts was often couched in terms amenable to an assimilationist mindset. “In asserting the spiritual values of Indians against the values of white civilization . . . , [Dr. Charles] Eastman claimed that ‘the Indian will save this country.’”²⁷¹ In that same address, Eastman clarified that this did not mean “tak[ing] this people back to the woods and the teepees,” but rather embracing contemporary (White) American life, subordinating their own values,²⁷² and adopting “the best qualities of the larger society.”²⁷³ In other words, encouraging Native identity in the service of White American identity. If soldiers of Native descent were pivotal in the American war effort, then it was no great leap for policymakers to complete their assimilation into broader American life, erasing Native culture. The grand irony, of course, is that Native veterans had fought a war *on behalf of* their colonizers, accentuating the deep rhetorical and policy divides between the federal government’s treatment of Native peoples at home and its treatment of less industrialized peoples abroad.

These patterns—Native peoples and individuals being given rights, recognition, and recompense, but only after adequately serving elite, White interests—have repeated throughout the past two centuries, defining the contours of elite White interests in relation to Native

269. ROSIER, *supra* note 88, at 116.

270. *Id.* That the flag itself was just out of Hayes’s reach may have been a little too on-the-nose for Congress’s comfort. The government would probably also prefer to gloss over how Hayes died a decade later: drunk after a poker game, he fell into a ditch and died of exposure at the age of 32. There may be no more bitterly ironic an encapsulation of how the United States has treated its first inhabitants. Chelsea Curtis, *Ira Hayes Raised the Flag on Iwo Jima. 75 Years Later, He Still Inspires this Indian Community*, USA TODAY (Feb. 23, 2020), <https://www.usatoday.com/story/news/nation/2020/02/23/ira-hayes-inspires-gila-river-indian-community-75-years-iwo-jima/4851039002/>.

271. ROSIER, *supra* note 88, at 44–45 (quoting Charles A. Eastman, *Opening Address by Dr. Charles A. Eastman*, 7 AM. INDIAN MAG. 145, 148 (1919)).

272. *Id.*

273. HAZEL W. HERTZBERG, *THE SEARCH FOR AN AMERICAN INDIAN IDENTITY: MODERN PAN-INDIAN MOVEMENTS* 308 (1971).

interests in the United States. With the Dawes Act²⁷⁴ and allotment, the interests of White settlers and westward expansion took front and center. Native peoples, with their “socialist” notions of communal land ownership, were to become private owners, to bring them in concordance with American social mores, but simultaneously in service of advancing White interests (i.e., the building of a capitalist empire in explicit opposition to European socialism and Communism). Subsequently, the Indian boarding school system—in which Native children were forcibly removed from their homes, stripped of their cultures, and routinely abused—was an especially violent expression of the same interests.²⁷⁵ In this system, Native cultural identities were explicitly suppressed with the goal of replacing them with the European, Christian identities favored by the White majority. Again, this was supposedly to the benefit of Indian pupils but also served White interests by “us[ing] public and patriotic holidays such as Memorial Day and Fourth of July to schedule their feast days and ceremonies,” promoting a vision of Native citizenship that was deemed “appropriate” by agents of the federal government.²⁷⁶ In the Twentieth Century, the Snyder Act was concededly far more benign in its origins and its aims of granting universal citizenship to Native peoples.²⁷⁷ However, the Act set up an implicit quid pro quo, providing compensation only after—and largely as a response to—Native military service and became law over the explicit protests of major tribes who did not want to see their history swept up in an assimilationist gambit.²⁷⁸ Finally, the Indian New Deal,²⁷⁹ although again objectively better for Native peoples than most earlier policies, conditioned Indian advancement on the interests of an elite White majority. Passed against the backdrop of intensifying foreign threats and interference, the Indian Reorganization Act buttressed the federal government in its propaganda battles against fascist powers abroad. Further, to the extent that the IRA provided for more robust Native self-governance, it did so while actively encouraging government structures based on American democracy, diverse tribal traditions notwithstanding.

274. *Supra* Section II.b.

275. See Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR MORNING EDITION (May 12, 2008, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=16516865>.

276. Barbara Prillaman, *Indian Boarding Schools: A Case Study of Assimilation, Resistance, and Resilience*, YALE NAT'L INITIATIVE (2016), https://teachers.yale.edu/curriculum/viewer/initiative_16.01.09_u. See also Salam, *supra* note 47 and accompanying text.

277. *Supra* Section II.c.i.

278. See Bruyneel, *supra* note 89 and accompanying text.

279. *Supra* Section II.c.ii.

The Indian Claims Commission fits neatly into this pattern of accession to elite White interests followed by marginal social progress. Where tribes wanted to recover lost lands, Congress provided a venue for monetary damages alone. Those damages, further, were subject to offsets based on government spending. When President Truman had the opportunity to appoint Native Commissioners, or at least Commissioners who would be sympathetic to Native concerns, he made politically expedient appointments of all White men. With two exceptions—the appointments of Margaret Pierce²⁸⁰ and Brantley Blue²⁸¹—his successors followed suit. While the Indian Claims Commission Act called for an Investigation Division, the ICC nevertheless relied on adversarial factfinding in the Anglo-American tradition, never mind the fact that the Commission was established *specifically because* that tradition had worked to the systematic disadvantage of Native claimants. Although this was sometimes remedied on appeal, the Court of Claims, which had a measure of control over the ICC, was more likely to align itself with government interests, especially when ICC decisions reached the outer limits of the Commission's jurisdiction. As to that jurisdiction, the Commission never lived up to the promise of its enabling statute about "fair and honorable dealings" or "unconscionable consideration," other than as shortcuts in traditional Fifth Amendment claims where the ICC was looking "to arrange things so the tribes recovered *something*, [although] the most important goal was putting an end to Indian claims."²⁸² By its own terms, the Commission was time-limited, excluded whole classes of claims and litigants from its jurisdiction, and was entirely bound to its own facts. The Indian Claims Commission was a convergence of Native interests in compensation for their lands and elite White interests in courting the Third World without dedicating resources to fully redressing past treatment of Native peoples. This convergence extended as far as elite White interests were served, and no further. When that was no longer the case, the United States moved into the era of Indian termination.

*B. Indian Termination, Decolonization, and the Limits of
Convergence*

In 1953, just as the Indian Claims Commission was kicking into high gear, Congress passed House Concurrent Resolution 108 ("HCR 108"), declaring it Congress's policy to "as rapidly as possible . . .

280. *Supra* note 217 and accompanying text.

281. *See supra* note 176.

282. LIEDER & PAGE, *supra* note 106, at 146 (emphasis in original).

make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.”²⁸³ If there was any doubt as to what this entailed, the House, with the Senate concurring, proceeded to declare that the Flathead, Klamath, Menominee, and Potawatomie tribes, along with those Chippewas living on the Turtle Mountain Reservation in North Dakota, should be “freed from Federal supervision and control,” and that provisions should be made to end other tribes’ status as legal entities.²⁸⁴ This euphemistic language ultimately meant that Native tribes would lose federal support and protection. Thus began the era of “termination,” which aimed to radically integrate Native peoples into White American society by depriving tribes the privilege of existence.²⁸⁵ While the motives of termination and the ICC are at odds with one another—the latter sought to ameliorate past wrongs, while the former imposed new forms of oppression—that tension reflects an underlying tension the United States has faced for centuries between its dark past as a colonial power and its attempts to navigate the currents of postwar international politics. As the United States was working to assert itself as a dominant global power and beacon of freedom, these two policies operated in the background, complicating the diplomatic math. In the wake of World War II, “Third World” countries—those aligned with neither the United States nor the Soviet Union—were an emerging power bloc, and it did not go unnoticed that citizens of these newly freed former colonies shared certain interests with Native peoples in the United States.²⁸⁶ The needle that the federal government needed to thread was between its domestic prerogatives of assimilation of Native peoples—in other words, termination and the colonialist erasure of their cultures—and the foreign policy exigencies of courting Third World countries before the Soviet Union could.

Postwar America’s fraught relationship with colonialism can be traced to the “vigorous and persistent opposition” that Franklin Roosevelt displayed against the system in dealing with the United

283. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132, B132 (1953).

284. *Id.*

285. See, e.g., Alys Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/harry-s-truman-beginning-of-indian-termination-era> (“Billed as vehicles to integrate Indians into the wider nation and protect them from racial discrimination in the post-World War II era, termination policies dismantled trust relationships, relocated Indians to urban centers and stripped tribes of land and sovereignty.”).

286. See, e.g., Hall, *supra* note 44, at 276; see also ROSIER, *supra* note 88, at 184–85 (discussing American overtures to India, China, and other Third World countries in the 1950s).

Kingdom.²⁸⁷ As early as 1941, Roosevelt personally confronted Winston Churchill to push for the tenets of global self-determination that would become the Atlantic Charter.²⁸⁸ Given the deep historical importance of the American-British alliance, it seems Roosevelt was sincere about this view, if perhaps myopic with respect to its application to the United States. His successor, Harry Truman, seems to have continued in this approach, committing in his 1949 inaugural address to provide aid to “underdeveloped” foreign countries, in particular those in Africa and Asia.²⁸⁹ In promising assistance to these former colonies, Truman and his State Department specifically linked the promise of development to the promise of civil rights.²⁹⁰ Activists in the United States were quick to capitalize on this connection.

Contemporaneously with Truman’s election, the National Congress of American Indians (“NCAI”) and other activist groups took note of the shifting geopolitical winds and began to demand more direct aid from the federal government on the grounds that economic development at home should be no less important than economic development abroad.²⁹¹ The NCAI’s agitation was to some avail; in 1950, Truman signed a \$90 million relief bill on behalf of the Navajo and Hopi nations in the southwestern United States.²⁹² This package came together largely as a result of intense public attention to these tribes’ plight, from organizations as diverse as *Time* magazine and the American Red Cross, and resulting pressure on the federal government.²⁹³ However, particular varieties of anticommunist politicians had leveraged the gyre of postwar diplomacy against the Navajo-Hopi relief bill. These legislators claimed, among other things, that Russian

287. Foster Rhea Dulles & Gerald E. Ridinger, *The Anti-Colonialism of Franklin D. Roosevelt*, 70 *POL. SCI. Q.* 1, 5–6 (1955).

288. *Id.*

289. ROSIER, *supra* note 88, at 138–39.

290. *Id.*

291. *Id.* at 134–35.

292. Act of Apr. 19, 1950, ch. 92, 64 Stat. 44, 45. The Act itemized how the \$88.57 million was to be spent, including tens of millions of dollars on irrigation and roads, \$25 million on schools, and, tellingly, \$9.25 million to “[d]evelopment of opportunities for off-reservation employment” and “[r]elocation and resettlement.” *Id.*

293. ROSIER, *supra* note 88, at 125, 138. No less a figure than Eleanor Roosevelt rallied to the defense of the Navajo and Hopi tribes, partially on the grounds that “Soviet attacks on the democracies, particularly the United States, centers on our racial policies So, the question of what we do about our Indians, important as it used to be for the sake of justice, is enhanced in importance.” Eleanor Roosevelt, *My Day by Eleanor Roosevelt, October 5, 1949*, THE ELEANOR ROOSEVELT PAPERS PROJ. (last updated Feb. 17, 2021), https://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1949&_f=md001402. While anti-Communism was a distinct project in mid-Twentieth Century America, the connections to anti-colonialism are quite apparent.

forces were working to persuade Native peoples to ally with them, or that the relief bill—to make no mention of the Indian Reorganization Act of the prior decade—would only encourage a socialist or communist system of landholding.²⁹⁴ These forces would collide over the question of Section 9, a proposed amendment to the relief bill that would have granted the state of New Mexico jurisdiction over both Navajo and Hopi lands, kicking off the federal government’s campaign of Indian termination.²⁹⁵ Eleanor Roosevelt weighed in on the matter, saying that Section 9 would “interfere with all the things that are important to them – their religion, their art, their self-governing arrangements,” and she urged President Truman to veto the bill if it included such provisions.²⁹⁶ The connection between Section 9 and the post-war order was evident, and at least one academic observer alerted Truman to the direct connection between Section 9 and European oppression of African and Asian peoples, emphatically demonstrating that “the boundaries between domestic affairs and international affairs had been . . . erased.”²⁹⁷ Truman knew that Section 9 would be seen as an indisputable link between the United States and the colonial yokes that Third World countries had just thrown off.²⁹⁸ Ultimately, the public backlash over Section 9 proved to be too much even for Congress, which excluded it from the final version of the relief bill.²⁹⁹ The battle over Section 9 is the clearest representation of the conflict in postwar America’s relationship with its Native peoples. Supporters of the provision represent the colonial imperative in United States history, working to centralize power over Native peoples and thereby effectuate their erasure via assimilation into the American mainstream. Section 9’s opponents, on the other hand, sought to promote self-determination at home and abroad, even if concerns about international reputation were at or near the core of that goal.³⁰⁰

This conflict between colonialism and pluralistic democracy was driven home when Republican Dwight Eisenhower took presidential office and the tenor of the federal-Native relationship shifted dramati-

294. ROSIER, *supra* note 88 at 132–33.

295. *Id.* at 135.

296. Roosevelt, *supra* note 293.

297. ROSIER, *supra* note 88, at 137.

298. *Id.* See *supra* Section I, defining “third world countries” as “those aligned with neither the United States nor the Soviet Union” following World War II.

299. *Id.* at 138.

300. However, the long-term winner of this disagreement was clear, as no other tribe would benefit from the forms of relief accorded to the Navajo and Hopi peoples. *Id.* at 144.

cally. Shortly after HCR 108 passed in 1953 and made termination official federal policy,³⁰¹ Public Law 280 (“PL 280”) came into effect, codifying the provisions of Section 9 for a large swath of the country.³⁰² Passed “during the dog days of August,” a month when Congress is infamously disengaged from its legislative duties, and with only tepid pushback from the Oval Office, PL 280 conferred to the state *civil and criminal* jurisdiction over all Native lands in California, Nebraska, and Wisconsin, and over much of that same territory in Alaska, Minnesota, and Oregon.³⁰³ To this day, PL 280 remains good law, in spite of its derogation of tribal sovereignty, the fact that no Native interests were consulted, and the fact that Native peoples certainly did not consent.³⁰⁴

In 1956, Congress passed the Indian Relocation Act, euphemistically referred to as “[an act r]elative to employment for certain adult Indians,” appropriating \$3.5 million per fiscal year to provide transportation and other living costs to working-age Indians living on or near reservations such that they could be transported to a city with more job opportunities.³⁰⁵ Even apart from the deeply regrettable echoes of the Trail of Tears, the Indian Relocation Program was, for most participants, little more than “a one-way bus ticket from rural to urban poverty.”³⁰⁶ The plan did not achieve its stated goals. While the official statistics are that 25% of relocated individuals returned, estimates from outside groups and scholars range from 30% up to as many as 90%.³⁰⁷ In a different way, however, this assimilationist program worked: by 2018, 70% of American Indians and Alaska Natives—2.2 million people, roughly equivalent to the population of Houston—lived in urban areas.³⁰⁸ As a result, reservations withered, and to this

301. See *supra* note 283 and accompanying text.

302. *Tribal Crime and Justice: Public Law 280*, NAT’L INST. OF JUST. (May 19, 2008), <https://nij.ojp.gov/topics/articles/tribal-crime-and-justice-public-law-280>.

303. ROSIER, *supra* note 88, at 163; 18 U.S.C. § 1162; 28 U.S.C. § 1360.

304. *Tribal Crime and Justice: Public Law 280*, *supra* note 302.

305. Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986.

306. Tara Kenjockety, *Indigenous Tribes of Chicago*, AM. LIBR. ASSOC., <http://www.ala.org/aboutala/offices/diversity/chicago-indigenous> (last visited Mar. 16, 2021) (citing BRIAN C. HOSMER, *NATIVE AMERICANS AND THE LEGACY OF HARRY S. TRUMAN* (2010)).

307. Philp, *supra* note 102, at 166 (“Approximately 30 percent of the Indian relocatees would eventually return to their reservations.”); see also Max Nesterak, *Uprooted: The 1950s Plan to Erase Indian Country*, APMREPORTS (Nov. 1, 2019), <https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country> (“The BIA reported the return rate being around 25 percent, although Native groups believed the rate to be as high as 90 percent.”).

308. *Urban Indian Health Program*, INDIAN HEALTH SERV. (Oct. 2018), <https://www.ihs.gov/newsroom/factsheets/uihp/>.

day, both urban and rural Native peoples continue to have some of the worst health and economic outcomes of anyone in the United States.³⁰⁹ The federal government eventually abandoned a formal termination policy in much the way it began it—through a nonbinding, unilateral declaration. This time it was President Richard Nixon who finally declared self-determination the official policy of the federal government, citing, among other things, that “the practical results have been clearly harmful in the few instances in which termination actually has been tried.”³¹⁰ By then, however, these “harmful results” had already made their permanent mark.

Through all of this, the Indian Claims Commission simply stayed the course. Through its action—or, more frequently, inaction—the ICC functioned as a veneer on termination policy, papering over the very real tensions and conflicts in the halls of American government. While termination was the official policy of the federal government, the Commission did the bare minimum,³¹¹ demonstrating that the United States was willing to accede to Native interests in recompense for stolen land only to the extent that it did not interfere with termination. If anything, the ICC *helped* termination in that it finalized land claim disputes and thereby relieved the federal government of substantial duties to tribal groups, providing a sort of plausible deniability with respect to the federal government’s motives. That the two policies co-existed, in spite of their self-evident incompatibility, likely says more about the endlessly capacious bureaucracy of the United States federal government than anything else. That is, though no one likely *intended* the convergence between the ICC and terminationist goals, no one cared enough about the former to make any effort to address the matter. Finally, it is telling that funding and staffing for the Commission caught up with demand for adjudication only as the United States formally ended the termination policy during the Nixon Administration.³¹² By about 1970, the balance of interests for White America had shifted squarely toward the anti-colonial agenda, as domestic opposition to segregation and the Vietnam War, coupled with revitalized Native activism, aligned with foreign policy interests

309. See, e.g., Nesterak, *supra* note 307 (“One way the Hoover Commission recommended the government help Native people was to encourage ‘young employable Indians and the better cultured families’ to leave reservations for cities The BIA ensured a higher success rate, in part, by deliberately choosing relocation cities far away from reservations”).

310. Richard M. Nixon, President of the United States, Special Message on Indian Affairs (July 8, 1970).

311. See *supra* Sections III.b–III.c.

312. See *supra* notes 195–200 and accompanying text.

abroad.³¹³ Only then, and only in the harried procedure of a bureaucracy on a tight deadline, was justice granted to any number of tribal groups. Thus, if the Indian Claims Commission was ever a beacon for improved federal-Native relations, and if it was ever an example of achievement through interest convergence, its benefits were severely limited by its inability or unwillingness to handle the contemporaneous problems of Indian termination policy. More broadly, the Commission and its shortcomings demonstrate the extent to which majority interests can—and do—limit minority advancements as viewed through interest convergence theory.

VI.

CONCLUSION

What next? If Professor Bell was correct in his interest convergence thesis, and the only reliable way for marginalized groups in the United States to achieve legal victories is by aligning their interests with those of their oppressors, the experience of the Indian Claims Commission and its historical context demonstrates several pitfalls for advocates and policymakers alike. First, it is difficult to ascertain what the majority interest is. While this can generally be done by reference to the public statements of those in positions of power, the question nevertheless must be asked, analyzed, and answered sufficiently. Second, there is no guarantee that interests will align beyond the point of primary utility. That is, White elites may care about desegregation as far as it impacts foreign opinion of the United States, or cis het³¹⁴ elites may favor LGBTQ+ rights as far as they want their gay and lesbian friends to be able to get married. Beyond that, the coalition falls apart, and may even be counterproductive. Third, interests are not necessarily stable over time. The same voting bloc that is motivated by economic concerns in one election may cast their votes based on gun control in the next election, and on pandemic relief in a third; it is far from certain that the same candidates—let alone the same marginalized groups—will benefit in each of these scenarios. For example, to the extent that the conviction of former Minneapolis police officer Derek Chauvin³¹⁵ provides a veneer of law enforcement accountabil-

313. ROSIER, *supra* note 88, at 224–25.

314. I.e., cisgender—identifying as the gender one is assigned at birth, as distinct from transgender—and heterosexual.

315. Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021, 12:13 PM), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html>.

ity, it is clearly in the interest of police departments and the power structures surrounding them.³¹⁶ Finally, shifting alliances may place minority groups in tension with one another, particularly if there is a sense that resources or allyship are in some way limited.

Thankfully, while interest convergence is a powerful tool for both understanding and shaping social change, it is not the only tool, and it does not need to be approached in the same way as in the past, purely in courtrooms and legislative chambers. First, with decades of experience and observational data to draw on, it is more feasible for attorneys and other advocates to see the traps of past generations, whether it is the Southern backlash to *Brown v. Board of Education*, the sui generis nature of the ICC and the Navajo-Hopi relief program, or the prioritization of same-sex marriage over employment nondiscrimination or transgender rights. Having seen these problems, advocates can tailor their strategies to obtain buy-in from affected majoritarian interests and minimize blowback. Second, opportunities for progress and for taking advantage of converging interests to promote such progress are ample. Indeed, regardless of the context, interest convergence is an eminently useful framework for understanding how diverse individuals and interest groups can come together and fight for change. In recent years, corporations have come to influence policy and conversations around voting rights,³¹⁷ hate crimes,³¹⁸ and transgender rights.³¹⁹ At the same time, the soft power of public media figures has been leveraged in support of vaccine distribution to devel-

316. See, e.g., Zoe Christen Jones, Tyler Kendall & Cassidy McDonald, *What Derek Chauvin's Guilty Verdict Means for the Future of Policing*, CBS NEWS (Apr. 24, 2021, 7:11 AM), <https://www.cbsnews.com/news/derek-chauvin-guilty-verdict-policing-future/>.

[Community activists] are also wary that Chauvin's guilty verdict could lull people into becoming complacent, and potentially waste the nation's current momentum Even as reform bills are introduced in state and national legislature, [civil rights activist Rashad] Robinson said police unions and Republican lawmakers are pushing back against potential progress, which could end sweeping policy reform before it even starts.

317. Josephine Harvey, *Coca-Cola and Home Depot Oppose Georgia Push to Restrict Voting*, HUFFINGTON POST (Mar. 15, 2021, 11:04 PM), https://www.huffpost.com/entry/coca-cola-home-depot-georgia-voting_n_605006e8c5b685610fd1dcf0.

318. Danielle Holloway, *Disney Plus Expresses Support for AAPI Orgs Amid Rising Violence Against Asian Americans*, VARIETY (Feb. 24, 2021, 5:50 PM), <https://variety.com/2021/tv/news/disney-plus-aapi-orgs-asian-americans-violence-1234914713/>.

319. Mark Berman, *North Carolina's Bathroom Bill Cost the State at Least \$3.7 Billion, New Analysis Finds*, WASH. POST (Mar. 27, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/27/north-carolinas-bathroom-bill-cost-the-state-at-least-3-7-billion-new-analysis-finds/>.

oping countries³²⁰ and reparations in the music industry.³²¹ To be clear, these are all examples of interest convergence in practice, and they demonstrate the possible future avenues for progress through such convergence, just as the Indian Claims Commission and its historical context vividly and painfully demonstrates its limits. Just as humankind's capacity for oppression often seems bottomless, so too is our capacity to unite and overcome that oppression.

320. *Ghana's Excitement at Getting Covax Vaccines*, BBC (Feb. 24, 2021), <https://www.bbc.com/news/av/world-africa-56184533>.

321. *Wilco Frontman Jeff Tweedy Begins Donating 5% of Royalties to Social Justice Causes*, CBS NEWS (Mar. 15, 2021, 10:04 AM), <https://www.cbsnews.com/video/wilcos-jeff-tweedy-calls-for-music-industry-reparations/>.