Reconciling Competing Claims to Equality Relating to Tribal Governments and Native and Non-Native Individuals

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Bethany Berger, *Savage Equalities*, 94 **Wash. L. Rev.** 583 (2019).

Bethany Berger's article *Savage Equalities* is an excellent exploration of the importance and varied meaning of equality in the context of tribal rights and Federal Indian Law. Berger carefully evaluates the various types of equality claims that are levied in relation to tribes, including the idea that recognition of tribal sovereignty creates special rights for tribes that denigrate the equality rights of non-Indians (or even, according to some formulations, Indians), the idea that recognition of tribal sovereignty is necessary to foster equal treatment of tribes and tribal citizens, and finally the concern that Indian tribes' governmental actions sometimes violate their own citizens' rights to equality. She traces the prevalence and deployment of these ideas through the tortuous history of the federal government's relationship to tribes, showing how, for example, the idea of unfair "special rights" for tribes was used during particularly dark periods of federal-tribal relations such as the allotment period, when the idea purportedly justified harming tribes by unlawfully taking their property. The taking of tribal property at the time was deemed necessary to level the playing field for individual non-Indians who were seen as unfairly lacking these special rights.

Berger similarly traces the understanding of the right to tribal sovereignty as rooted in, and necessary for, equality through more positive periods of history, and she additionally identifies instances where individuals under tribal jurisdiction have been denied their rights to equality at the hands of tribal governments.

In some ways, Berger's work builds on previous scholarship about the distrust of tribal governance rights resulting from strict adherence to a liberalist worldview.[1] However, Berger's article is unique in her comprehensive focus on the various and often contradictory visions of equality that are brought to bear in the tribal context and in her proposal for an innovative framework to help us evaluate these claims in a reasoned way.

Her framework consists of a threefold evaluation of competing claims to equality: "First by taking seriously the idea of tribal governmental equality. Second, by considering how history and context affect the present meaning of these claims. And, finally, third, by evaluating how challenged measures will affect the least well off." (P. 319.) Her framework provides much-needed tools to rigorously evaluate competing claims to equality in the context of tribal governance and individual rights and to identify spurious equality arguments that are rooted in a coopting of equality language, such as the idea that the Termination Period, during which the federal government ended its special relationship to many Indian tribes, actually effected an emancipation of those tribes who were affected by the policy, similar to the abolition of slavery for African-Americans. (P. 611.) Although the approach and structure of the framework are different, Berger's concept reminded me of another very valuable test in the equality arena, namely Davina Cooper's examination of whether an alleged form of oppression constitutes an "organising principle of inequality."[2]

Another extremely valuable part of Berger's work is her evaluation of the utilization of these equality arguments in the context of three culturally salient examples—the contention that the Indian Child Welfare Act (ICWA) violates the equal protection rights of Indian children, the argument that the equal protection rights of Cherokee Freedmen were being violated by the Cherokee Nation is in its efforts to exclude them from the Tribe, and, finally, the argument that tribal treaty fishing rights in the Pacific Northwest and the Midwest create special rights for tribal citizens that unfairly put non-Indian fishers in an unequal position. Because federal Indian law scholars and practitioners are very familiar with all three of these arguments, Berger's application of her framework to them helps us understand how the framework works and highlights its usefulness.

In the context of ICWA, for example, Berger uses the second principle of her framework to reinforce the need to take into account the long history of state and federal removal of Indian children, often to further assimilationist goals, when evaluating current claims that the law violates equality principles. (P. 623.) With regard to the third principle, the effect of the challenged measures on the least well off, Berger explores an instance in an important recent Supreme Court case, *Adoptive Couple v. Baby Girl*, where the wealth of the white adoptive couple was used as ammunition by the guardian ad litem and others to support the idea that the adoptive couple had a superior claim to the child to that of her biological father, whose general fitness as a parent was not disputed. (P. 630.) Thus, Berger notes that, "in protecting the children of less well-off parents and communities against more powerful ones trying to take them away, ICWA in fact helps remedy inequitable power imbalances in child custody cases." (P. 630.)

Finally, *Savage Equalities* provides a rich historical recapitulation of the use of equality arguments in relation to tribes from the sixteenth century on. History is distinctively important in federal Indian law—almost to the point that every article in the field can be judged by how well it explains the portions of history that are relevant to the points it is making—and Berger's historical overview is particularly fascinating and meaningful. Her article traverses the birth of international law in the sixteenth century, when Francisco de Vitoria and others critiqued the justice of European sovereigns' claims that they gained power over portions of the New World and the indigenous people inhabiting those areas by virtue of having "discovered" them (P. 598-601), the flip-flopping views of the American Founders as to tribal rights, and the background of the seminal case, *Morton v. Mancari*, in the 1970s. (P. 616.)

One of her most interesting notes is her observation that early abolitionists were often inspired to end, not just the evils of slavery, but also unfair denials of tribal sovereignty, 606, thus demonstrating a longstanding synergy between individual civil rights and the sovereignty rights of tribal governments. Berger uses her evocative historical overview to demonstrate key points in her argument, such as the idea that past "policies built on the insistence that Native people were entitled only to individual equality [rather than also to protection of their tribal governments and cultures] are today recognized as among the most inegalitarian in the long, sad history of federal Indian policy." (P. 602.)

Savage Equalities is a wise and engaging work that will make you think in new ways about old wrongs. Even more importantly, it provides indispensable tools to evaluate competing equality claims pertaining to tribal governments. By blazing a trail for rejection of baseless claims and acceptance of legitimate ones, it furthers justice in this important area.

1. *See, e.g.,* Ann Tweedy, The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty 18 **Buff. Pub. Int. L. J.** 147, 199-216 (1999); *see generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 **Cal. L. Rev.** 799 (2007); Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 **Notre Dame L. Rev.** 333 (2004).
2. Davina Cooper, *Challenging Diversity: Rethinking Equality & the Vale of Difference* 63 (2004).

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