In the Name of Equal Rights: "Special" Rights and the Politics of Resentment in Post–Civil Rights America

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This article explores the character of conservative legal activism in post–civil rights America, arguing that this activism is motivated by two related factors: (1) resentment over the increased political participation of historically marginalized Americans and (2) principled allegations that these historically marginalized Americans are making illegitimate claims for "special," not equal, rights. I argue that the allegation of special rights is tied to the activists' resentment in multiple and complex ways. On the one hand, the allegation that the rights claims of the historically marginalized are illegitimate claims for special rights is itself an expression of resentment. Like arguments that oppose redistributive social change by relying upon discourses of color blindness, states' rights, evangelical Christianity, and community harmony, special rights talk channels resentment into recognizable and intelligible forms. But, on the other hand, the use of special rights talk is not simply cover for an underlying, fully formed resentment. Instead, the allegation of special rights propels and amplifies activists' resentment, transforming it from one that is based primarily upon competing self-interests into one that is concerned with values, morality, and national identity. Special rights talk thus partially constitutes resentment; it hardens the resolve of opponents of redistributive social change, encouraging them to understand themselves as defenders not only of their own self-interests but also, primarily even, as defenders of the core American values and ideals that are promoted by equal rights and assaulted by special rights. Thus convinced that their opposition is authorized by American tradition, conservative legal activists redouble their counter-mobilization efforts, leading to an exacerbation of already tense conflicts. A case study of the nationwide anti-treaty-rights movement grounds this analysis.

> There is an important sense in which language constructs the people who use it.
>
> (Murray Edelman, *Constructing the Political Spectacle*)

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Introduction

Mr. John J. Benson, an ordinary American citizen, is troubled by the spread of "special" rights. "Special rights?" he asks:

> Since when did America have special rights? I thought all of us were supposed to be equal before the law? It is supposed to be equal rights.
>
> Today we have all kinds of rights. Special rights based on gender, based on race, based on disability, based on sexual preference and so on and so forth.
>
> Today it seems everyone has rights except for white males. In fact, we (white men) are the biggest victims of a society that blames us for all the wrongs in the world and denies us our individual rights at the expense of special rights for others. (Benson 2002:14)

Hardly exceptional, Benson's formulation illustrates a general resentment that consumes America's political culture in contemporary times. That this resentment is so often expressed through the condemnation of supposedly deviant rights-claims is, moreover, significant. For at the intersection of rights and resentment, I shall argue here, emerges the political vision of an increasingly large segment of the American populace. But to understand how the political visions of Americans are constructed by the sort of special rights talk proffered by Benson, we must attend, first, to the nature of the claims that he condemns and, second, to the character of those condemnations themselves. Each task, we will see, leads us to consider the constitutive power of language in general and of rights discourse in particular.

The allegation that certain populations are seeking special rights is, in fact, a reaction to the political activism of women, African Americans, the physically and mentally disabled, Native Americans, and gays and lesbians over the last 50 years. That activism was characterized by a willingness to mobilize constitutional and other rights as resources for social change. Initiating a "rights revolution," their legal mobilizations helped remake the social order so that it was more open to egalitarian reform (Zemans 1983; Edsall & Edsall 1992; Epp 1998).

Yet the changes in American society prompted by these rights mobilizations were, and continue to be, accompanied by hostility and resistance. Threatened by the activism of historically marginalized peoples, many resentful Americans responded with an activism of their own, a "backlash" against the social changes of the last half of the twentieth century. And their resentment, propelled by an overwhelming sense of injury that portrays egalitarian social change as not only damaging to their interests but also fundamentally unfair, has itself reshaped the contours of American politics. Scrambling the class, race, and regional alliances that

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underlay the New Deal coalition, broad-based resentment over the gains of historically powerless Americans is a pillar of the contemporary American polity (Wills 1970; Edsall & Edsall 1992; Carter 1995; Hardisty 2000; Perlstein 2001; McCann & Dudas, forthcoming).

Not only has the mobilization of rights triggered resentment. For resentment *itself* has often been expressed in a counter-language of rights. This resentment appears, for example, in the public languages of grassroots conservative activists—languages that, like Benson's, are full of accusations that out-groups are irresponsibly claiming "special" rights in order to pursue their interests (Schacter 1994; Herman 1997; Goldberg-Hiller & Milner 2003). Such special-rights claims are, according to the activists, unfair because they threaten the core American values, especially, of individual merit and equality of opportunity. Claims for special rights, unlike those for "equal" rights, are said to assault the body politic.

Indeed, such counter-mobilizations of rights express the resentment that animates American public discourse; but they also *propel* and *shape* that resentment. I argue that the discourse of special rights infuses conservative political action with nationalistic ardor. Stigmatizing egalitarian politics as subversive and validating defenses of hierarchy as patriotic, activists' rights talk inflates their resentment; it convinces them that their opposition is necessary for protecting the American way of life. Accordingly, the special rights talk employed by conservative activists constructs their political visions and, thus, their behaviors in important ways. Sanctifying relative privilege, on the one hand, and relative deprivation, on the other hand, their special rights talk simultaneously legitimizes and motivates opposition to egalitarian social change.

Part one of this article sketches some conceptual relations between resentment and the discourse of special rights. I argue that the contemporary American politics of resentment is shaped by a widely shared understanding: that the civil rights movement of the 1950s and 1960s realized the good polity, one that is organized according to the prerogatives of equal rights. But according to one strand of this conventional wisdom, the continuing rights mobilizations of the historically marginalized are no longer consistent with the core terms of American democracy. As evidence, many Americans point to the ways in which the legitimate equal rights of deserving citizens are increasingly ignored precisely so that the illegitimate special rights of others can be recognized.

Part two grounds the analysis, investigating an instance of special rights talk. I explore the dominant political vision of grassroots activists who have counter-mobilized against the treaty-rights claims of Native American tribal nations. It is a political vision,

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I will argue, that is at once specific and general, local and national. Interpreting individual treaty-rights claims as special and, thus, injurious to the interests of "ordinary" Americans, it portrays treaty rights *in general* as corrosive of America's moral foundations.

Accordingly, I will argue that the anti-treaty-rights movement is propelled by a distinction that activists make between equal rights and the allegedly special treaty rights of Native Americans. And this special rights talk provides activists with a principled, moral discourse that works in multiple directions. On the one hand, the discourse of special rights effectively broadcasts to a wide audience activists' warnings of a declining America, generating empathy for their efforts. On the other hand, it amplifies their resentment of treaty rights, which, they assert, damage both their own interests and broader national prerogatives. Lacking reliable evidence that would corroborate their claims of personal and national injury, but armed with the certainty that special treaty rights are both unfair and un-American, activists entrench themselves against further native claims. Activists' special rights talk thus registers in instrumental and ideological domains; it is simultaneously a resource for mobilizing their own and others' resentment *and* an engine of resentment, one that channels their claims of injustice into distinctively nationalistic forms.

The Politics of Resentment

Scholars agree that the resentment that accompanied the rights revolutions of the twentieth century was motivated by self-interested concerns that egalitarian social change threatened existing patterns of privilege. Yet scholars also note that these concerns were often cast as matters of *principle,* with many relatively fortunate Americans explaining how their privilege was earned with hard work and merit, making it unfair *and* un-American to force them to bear the weight of society's duty to redistribute its largesse (Wills 1970; Connolly 1991; Edsall & Edsall 1992; Fish 1994; Carter 1995, 1996; Bobo 1999; Klinkner & Smith 1999; Perlstein 2001). For example, the disruption of ingrained forms of privilege often prompted defenses of one's "way of life"—the collective material and cultural arrangements that reflected and legitimized one's privileged status. Anxieties over disappearing ways of life were thus motivated by widespread, though rarely articulated, resentment over the perceived loss of one's privileged place within the status quo (Greenhouse et al. 1994).

Such resentment, Klinkner and Smith argue, has been a common feature of the politics of egalitarian reform throughout American history (Klinkner & Smith 1999:7). Indeed, those Americans

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whose privileged status is threatened by higher levels of participation in American institutions have typically "looked for reasons" to "confine and condemn" that participation. But if resentment over threats to personal or group privilege is, as they claim, "perfectly normal and human," "understandable," and even "predictable," the reasons and rationales for it—the principles in whose name resentment is expressed—are historically specific. In this way, the politics of resentment is socially constructed and, thus, dependent for much of its content and direction on the understandings of the world that prevail in any one period (Berger & Luckmann 1966).

Recognizing the socially constructed nature of the politics of resentment leads directly to two insights. First, the languages and logics by which resentment is expressed are central, not incidental, to resentment itself. And these languages and logics tend to be neutral and persuasive, often obscuring the specific interests that resentment bolsters. Implicit in the politics of resentment is thus a moment of transformation, in which conflicts come to be popularly understood less for the material interests that they oppose against one another and more for the abstract principles at stake in them; as conflicts made up less of opposing claims for goods and services and more of competing value-claims (Fish 1994:4–5). Accordingly, one consequence of its socially constructed nature is that a politics of resentment injects into conflicts an element of the abstract and the value-based, potentially hardening the resolve of the participants and heightening the intensity of those conflicts.[1]

Second, its socially constructed nature suggests that the politics of resentment is *not* fixed in time and place, to be relied upon only by those who oppose egalitarian social changes. Instead, resentment is a general feature of modern life; the impressions of unfairness, violation, and victimization to which it gives voice make intelligible and meaningful a whole array of potential experiences and behaviors. And although Klinkner and Smith (1999), for example, focus only upon how resentment has motivated reactionary movements in American history, the politics of resentment has been a driving force in many of America's major upheavals, from the American Revolution to the Populist and Granger movements of the late nineteenth century to the reforms accomplished by New Deal policies (Wood 1969; Watkins 1993:79–107; Cashman 1993:313–32).[2] Confining the politics of resentment to responses

[1] And, as Aubert argued, the legalization of a conflict, such as through the use of rights talk, hastens the conversion to a value-based conflict (1963).

[2] This should not, of course, obscure the centrality of the politics of resentment to contemporary conservative politics. Indeed, as I argue here, contemporary American politics operates against a cultural backdrop that sanctifies the interests of relatively privileged Americans, elevating ordinary concerns over their grievances into rituals of national anxiety. It is clear, moreover, that the GOP has consistently tapped this "generalized

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to egalitarian social change thus makes poor epistemological *and* historical sense, missing how resentment has often worked to spur activism against, not simply on behalf of, entrenched configurations of power.[3]

This understanding of the politics of resentment—resentment is a persistent feature of American life, one that is accessible through neutral vocabularies that themselves work to transform interest-based causes into abstract, value-based struggles—is illustrated by Wills's account of American life in the late 1960s and early 1970s. During this time, Wills writes, Americans of all persuasions (anti-war protestors, George Wallace enthusiasts, Black Power advocates, "law and order" disciples, etc.) were "vomiting resentment" (Wills 1970:61–76). Indeed, many of the logics that animate contemporary American resentment date from this era; they emerged from a collective worldview that represents the egalitarian changes of the latter half of the twentieth century as confirmation of America's historic commitment to the prerogatives of *nondiscrimination* and *equal rights*.

This worldview emphasizes that "post civil-rights" America has repudiated and, for the most part, overcome the injustices that for so long made a mockery of the nation's egalitarian pretensions (Schacter 1997).[4] The results of a November 2003 public opinion poll regarding the necessity of new civil rights laws for reducing discrimination against African Americans are suggestive of the broad appeal of this post–civil rights worldview. In that poll, 69% of those surveyed by the Gallup Organization claimed that new civil rights laws were "not needed" (AARP 2004).[5] While one should of course take care when interpreting the results of such polls, this finding seems to illustrate a widespread, though ultimately prob-

resentment," parlaying it into electoral gain and governing authority (Connolly 1991; Carter 1995; Frank 2004). Nevertheless, as an ingrained, general feature of the American landscape, the politics of resentment has driven both egalitarian and reactionary movements. The current association of resentment with defenses of ingrained hierarchy is thus historical, not essential.

[3] Phillips's history of wealth in America (2002) illustrates how Americans have typically interpreted entrenched, multigenerational wealth resentfully, emphasizing how its presence grates harshly against the more egalitarian aspects of the nation's political culture. Indeed, each of the most notable periods of wealth redistribution in American history were underwritten by widespread convictions that immense concentrations of wealth were both unfair to the victims of the extreme inequality prompted by such concentrations *and* affronts to the core American values of hard work, success, and, especially, equal opportunity (Phillips 2002).

[4] I have in mind here what Schacter (1997) refers to as the "liberal" version of a more general "cultural skepticism" of civil rights law. The liberal version of this skepticism, she notes, emphasizes how contemporary rights claims undermine the values of merit and equal opportunity that underlie American individualism (Schacter 1997, generally).

[5] An earlier Gallup poll, from June 2003, made similar findings. In that poll, 70% of respondents claimed that no new civil rights laws were needed in order to combat discrimination against African Americans (Gallup 2003).

lematic, conviction: because African Americans and whites are now guaranteed equal rights and, thus, equal opportunities to succeed, there is no further need for coordinated attacks on racial inequality. Indirectly, this understanding of contemporary American politics leads to a preferred explanation for why African Americans, for example, disproportionately work at lower-paying jobs, live in worse housing conditions, and possess less income than whites: they have refused or otherwise failed to take advantage of the equal opportunities afforded them.[6] As an August 2000 survey found, the majority of those polled (54%) claimed that inequality was the product not of past and present racial discrimination but rather the consequence of African American irresponsibility (Pew Research Center 2000; see also *Los Angeles Times*, "Los Angeles Times Poll, September 1991," *http://roperweb.ropercenter.uconn.edu* [accessed April 16, 2004]).

It is true that in contemporary times the essentialist logics that formerly underwrote hierarchy have lost much of their footing (Berkhofer 1978; Fish 1994; Bordewich 1996; Herman 1997; Smith 1997; Harding 1999; Gerstle 2001). Indeed, open and uncomplicated celebrations of heterosexual white male supremacy have been, for the most part, replaced in mainstream American political culture with understandings that race, gender, and sexual orientation are illegitimate grounds upon which to grant or deny benefits. Although it is not warranted to conclude from these changes that material outcomes are now entirely the consequence of one's merit and are, therefore, legitimate, many Americans reach exactly that conclusion.

And so this post–civil rights worldview, even as it trumpets the principles of nondiscrimination and equal rights, accommodates the resentment that informs contemporary backlash. For the principle of nondiscrimination, in practice, admits of the conviction that *any* consciousness of race, gender, and/or sexual orientation in the

[6] The collective works of Steele (1998), McWhorter (2000), and the Thernstroms (1997) propose a related explanation, one that especially vilifies affirmative action policies. They argue that African Americans are encouraged to understand themselves as victims, both by centuries of oppression and by well-meaning, but misguided and guilt-ridden, whites. This identity, when internalized, discourages African Americans from self-sufficiency and hard work and, more generally, from exercising individual responsibility. Continuing inequality is thus explained more in terms of the effects of an inferiority complex that plagues African Americans and less in terms of ingrained, structural forms of racism. Allowing that "racism and white supremacy are still the order of the day," hooks, for example, nevertheless argues that improved self-esteem—overcoming the "addiction to suffering" that grips African Americans—is the key to progress (hooks 2003:xi, 211). Relying upon this turn inward toward spiritual health, McWhorter argues that further attempts to attack persistent forms of racial inequality, such as by the use of affirmative action in university admissions, risk reinforcing the white guilt and, thereby, the "cult of victimology" that is already impeding African American achievement (McWhorter 2000:229–38). Schacter (1997) notes that the logic of victimology also pervades many anti-gay-rights arguments (Schacter 1997:710–3).

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drafting and administration of public policy is not only inappropriate, but also inconsistent with the legitimate interests of others (of white men especially) (Lawrence 1987; Crenshaw 1988; Fish 1994).[7] And, as we see here, the rights claims of the historically marginalized are frequently interpreted as claims for special rights that subvert, rather than honor, the struggle for equal rights.[8] In each of these scenarios the post–civil rights worldview asserts a new process of victimization. No longer powerless, the historically marginalized are now seeking, and being granted, benefits and advantages beyond those that their achievements merit; their successes are thus interpreted as assaults, both against the interests of those Americans who lack membership in a historically disadvantaged group and against core American values (Williams 1991; Herman 1997; Schacter 1997; Gerstmann 1999:109–10; Goldberg-Hiller & Milner 2003).[9]

Accordingly, contemporary resentment is intimately linked to a worldview that at once celebrates certain rights claims and assails others, insisting that the former (equal rights) are legitimate claims for nondiscrimination while the latter (special rights) are illegitimate claims for "reverse" discrimination. But the language of rights is not simply discursive cover for a fully formed, underlying resentment. Instead, the expression of resentment in the princi-

[7] Crenshaw describes how the principle of nondiscrimination can be appropriated in order to oppose attempts to overcome the continuing legacies of racism. Because its goal "is fundamentally ambiguous," she writes, the doctrine of nondiscrimination "can accommodate conservative as well as liberal views" (Crenshaw 1988:1335). Crenshaw argues that this ambiguity is reflected in contrasting popular understandings of the nature and requirements of nondiscrimination: a "restrictive" and an "expansive" understanding. Unlike the expansive vision, which emphasizes that discrimination is the product of ingrained social conditions, the restrictive vision holds that discrimination is the result of individual malice. The restrictive vision thus suggests that efforts to remedy inequality must not overburden the interests of those people who, while they may have historically benefited from inequality, are nevertheless innocent of past misdeeds (Crenshaw 1988:1341–6). It is this restrictive understanding of the nature of, and appropriate remedies for, discrimination that resonates most clearly with the resentful Americans whose legal activism I explore here. In fact, a nightmare scenario that they consistently evoke, that in the zeal to correct historic injustice some people have become the victims of "reverse discrimination," articulates with the terms of this restrictive understanding of nondiscrimination (see also Schacter 1994).

[8] In his 1996 presidential bid, Bob Dole joined the two considerations, explaining how American glory relied upon the nondiscrimination guaranteed by equal rights. In a particularly revealing formulation, he opposed a virtuous social order organized by equal rights and nondiscrimination to a corrupt one in which special rights and reverse discrimination held sway. Implying that such perversions violated America's meritocratic way of life, Dole argued that "rights ought not be based on gender or ethnicity or color or disability. This is America. There ought to be equal [rights] and opportunity. Discrimination ought to be punished. But I don't favor creating special rights for any group. We cannot guarantee equal results in America" (*The New York Times*, 17 Oct. 1996, p. B10).

[9] Anti-treaty-rights activists, for example, frequently lament how the exercise of treaty rights turns Indians into "super citizens" and "super Americans with special privileges" (United States Commission on Civil Rights [USCCR] 1977).

pled language of rights transforms its character: it converts local conflicts of interest into broad-based struggles over the core values that animate American culture. It is a conversion, moreover, that ultimately inflates the sense of injury that underlies resentment, amplifying opponents' perceptions of harm beyond the point at which they can be verified even as it hardens their resolve to counter-mobilize. Foregrounding this constitutive power of rights talk thus helps us appreciate how and why it matters that contemporary resentment is so infused with rights.

Resentment and "Rights Talk"

Observers have long held that rights are at the center of American political culture. Sociolegal scholars, for example, have established that rights talk is a primary method by which we at once perceive our interests, communicate them to each other, and negotiate disputes that are based upon those interests. These scholars have traced how our relations with each other often proceed according to the deeply entrenched logic and language of rights (Scheingold 1974, 1989; Milner 1986; Brigham 1988, 1996; Crenshaw 1988; Williams 1991; McCann 1994; Silverstein 1996).

Rights discourse was, in fact, vital to the egalitarian social changes of the latter half of the twentieth century. On the one hand, the mobilization of constitutional rights served valuable *strategic* purposes for progressive activists. Internally, the appeal to rights helped both radicalize the constituent base and maintain the cohesion necessary for successful social movement activity. Externally, activists found that the expression of their grievances in the language of rights was an often persuasive way to spotlight attention on their long-neglected interests. On the other hand, the appeal to rights served a related, but more obviously *cultural* purpose: the claim that historic and contemporary mistreatment violated one's constitutional rights altered participants' conception of self, validating it in new ways, *and* challenged the ingrained and disabling perceptions that members of marginalized groups were less able and less deserving than their white male counterparts. Its strategic utility enhanced by its cultural resonance, the mobilization of rights thus worked in two directions simultaneously: it provided a relatively conscious platform on which to pursue one's interests and a relatively unconscious, indirect method for perceiving those interests in the first place (Scheingold 1974, 1989; Milner 1986; Brigham 1988; McCann 1994; Silverstein 1996).

But, like the politics of resentment, there is nothing inherent about rights talk that limits its utility to egalitarian politics. Instead, the instability of language—its inability to harbor fixed and determinate meanings—combines with the salience of rights in America

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to make rights talk an ambiguous resource for redistributive social change (McCann 1994; Gilliom 2001). The "disorderly conduct" and cultural resonance of rights talk—the capacity and willingness of Americans to make sense of diverse experiences according to its dictates, to sanctify our interests by interpreting them not as wants or needs but instead as entitlements—make it available for a variety of potential agendas (Carter & Burke 2002:23–4).

In form, rights talk thus displays the qualities of what Edelman calls "hortatory" political language. Precisely because its content is at once highly salient and "notoriously unstable and ambiguous"—all sorts of interests, after all, can be convincingly depicted as a function of one's rights—rights talk is an authoritative language form that is commonly used to "persuade a mass public . . . that the policies that (it) espouses should be accepted generally" (Edelman 1964:134). Simultaneously "appealing to everyone's sense of fairness" and offering itself as a "medium of self-expression, a rite which helps the individual to reflect in action [his or her] own [identity]," rights talk exhorts audiences to action even as it affirms and constitutes the moral worth of the speaker herself (Edelman 1964:137; see also Passavant 2002). Rights talk is an open-textured language form that offers strategic and psychic resources to listener and speaker alike.

It is, in fact, precisely this hortatory character that made rights talk such a useful political resource in the pursuit of redistributive social change a generation ago. And it is also why the resentment that accompanied that social change can itself be coherently expressed according to a discourse of rights. Just as historically marginalized groups turned to rights talk to provide cultural grounding and political stability to their efforts to transform the American status quo, so too have those who feel displaced by those efforts turned to it for support (Schacter 1994; Herman 1997; Goldberg-Hiller & Milner 2003).

To be sure, scholars of resentment in post–civil rights America have interrogated the cultural resonances of backlash. They have explained how resentful Americans have made sense of, and condemned, redistributive social change by appealing to such ingrained values as states' rights, anti-communism, color blindness, traditional racial and gender stereotypes, evangelical Christianity, free market ideology, and nostalgia for allegedly harmonious communities (Wills 1970, 1987; Edsall & Edsall 1992; Greenhouse et al. 1994; Carter 1995, 1996; Herman 1997; Hardisty 2000; Gerstle 2001; Perlstein 2001; Goldberg-Hiller 2002; Goldberg-Hiller & Milner 2003). Some scholars have also noted the proclivity of Americans to express their outrage over such changes in the language of rights itself. Both Perlstein (2001) and Carter (1995), for example, observe that the theme of the majority's neglected rights

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had by the mid-1960s become a central part of the New Right political vision.

But because neither Perlstein nor Carter explores its constitutive dimensions, they each underestimate the importance of rights talk to, and for, conservative activism. Hardisty (2000) does recognize the advantages gained by framing resentment within rights discourse; but she targets only its instrumental utility, ignoring how rights talk constitutes political interests and identities. The scholarship on resentment thus largely fails to appreciate the starring role that rights play in traditional conceptions of American national identity, and in so doing it also misses the ways that rights talk *shapes conflict* by conditioning perceptions and providing standards for the conduct of our relations with each other (Brigham 1988; Passavant 2002).

Sociolegal scholars, of course, have been far more attentive to the constitutive dimensions of legal language generally, and of rights discourse specifically. But, with notable exceptions, rights scholars have been more interested in how rights claims potentially empower *egalitarian* politics, not the sort of reactionary politics with which I am concerned here (Herman 1997:111–2; Goldberg-Hiller 2002:34). Given this focus, it is unsurprising that rights scholars have, for the most part, failed to interrogate conservative forms of rights talk, including the resentful allegation of special rights (however, see Hatcher, forthcoming).[10]

Accordingly, neither those who study the politics of resentment nor those who study the politics of rights have been particularly interested in theorizing their points of intersection. Resentment, though, is often inflected with the principle of right. And the appeal to rights discourse is itself often motivated by the feelings of grievance and victimization associated with resentment.[11] As we

[10] But, as I discuss below, the allegation of special rights has received attention from scholars (Schacter 1994; Herman 1997; Gerstmann 1999; Goldberg-Hiller 2002; Goldberg-Hiller & Milner 2003). Evan Gerstmann, in fact, shows that supporters of Colorado's Amendment 2 were able to gain broad popular support for repealing Colorado's gay and lesbian anti-discrimination ordinances by framing the issue in the language of special rights. As he argues, this special rights argument was significantly more appealing to Colorado voters than were the arguments of other Amendment 2 supporters, who resorted to traditional condemnations of the "gay lifestyle" (Gerstmann 1999:91–114). Both Gerstmann and Herman thus follow Schacter's analysis, emphasizing the instrumental effects of what Herman calls the "rights pragmatism" of Amendment 2 supporters (Herman 1997). Special rights talk has also worked instrumentally in the case of the anti-treaty-rights movement, spreading activists' hostility to a wide audience. None of these analyses, however, shares my additional concern about the constitutive effects of special rights talk on the identities and political imaginations of those who engage in it.

[11] Engel and Munger (2003), for example, emphasize that perceptions of unfairness and maltreatment are often central to the development of rights consciousness (Engel & Munger 2003:50–69; see also McCann 1994:227–77).

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will see below in the case of the anti-treaty-rights movement, much conservative activism, for example, is explicable by attending to precisely these intersections between rights and resentment. Indeed, activists have increasingly channeled their resentment over the uncertainty introduced by the participation of historically marginalized people by interpreting their rights claims as claims for illegitimate special rights that threaten core American values, not for legitimate equal rights that reflect and protect those values.

(Special) Rights Talk and Resentment

Goldberg-Hiller and Milner's important (2003) account emphasizes just this aspect of special-rights allegations. As they note, the accusation of special rights relies upon an implicit and idealized version of equal rights. The claim of special rights, they note, expresses a binary logic that opposes legitimate and virtuous equal rights to illegitimate and corrosive special rights. Thus accomplishing an inversion "in which the rights claimants become transgressors and everyone else victims of (their claims)," the accusation of special rights portrays claimants as "morally dangerous, irrational, or profligate people whose very rights claims become indicators of their general unseemliness" (Goldberg-Hiller & Milner 2003:1078–9; see also Schacter 1994:302–6; Herman 1997).

Accordingly, as Goldberg-Hiller and Milner suggest, the allegation of special rights works as a defense against the rights claims of those who challenge particular infrastructures of privilege. The rhetorical transformation of a right into a special right, they note, is simultaneously a degradation of the rights claim and, implicitly, a defense of the cultural and material arrangements that are under attack from that rights claim in the first place. Special rights politics is therefore a method of fortifying particular institutional configurations without engaging in explicit justification of those configurations.

Though it offers itself as one of Edelman's unstable, hortatory discourses, there is nonetheless a deep logic to the special rights accusation that gives its usage some relative predictability. First, a rights claim is pronounced special if it is understood to be exclusive—if it asks for the claimant to be treated differently by government than are other similarly situated citizens. Second, a right is deemed special if it is understood to generate for its recipient unearned privilege. The differential treatment secured by special rights thus sets aside the claimant as the "special favorite" of government, as the recipient of benefits that are unfair because they are not available to the majority of American citizens. Claims for special rights are claims for benefits in *excess* of those that would be

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granted by a just social order—one orchestrated according to the practice of equal rights (Goldberg-Hiller & Milner 2003; see also Nesper 2002:97).[12]

Goldberg-Hiller and Milner's theorization of the politics of special rights, which builds on the earlier theorizations of Schacter (1994) and Herman (1997), is illuminating. My interest here, though, is somewhat different. In emphasizing how the special rights allegation is mobilized in order to defend particular arrangements of power, they focus, first, on the instrumental effects of the special rights allegation (how it expands the "scope of conflict" by appealing to otherwise disinterested audiences (Schattschneider 1960) and, second, on how the targets of the allegation respond to it. Conversely, I focus here primarily on how special rights talk constructs the political visions of those who employ it. That is, I explore not only how special rights talk mobilizes resentment, but also how it propels and shapes resentment, casting it in a distinctively nationalistic form that ultimately encourages activists to entrench themselves against the participation of historically subordinated Americans.

Foregrounding these constitutive relations thus reveals that special rights talk is not simply a misleading rhetorical tactic or a clever, but bad faith, tool for shoring up hierarchy. It may sometimes be this, but it is also the expression of deeply felt fears and anxieties over perceived erosions of both personal privilege and national prerogatives. Heeding the intersections between resentment and special rights talk thus exposes how conservative rights discourse, for example, is both a resource for counter-mobilization and a desperate attempt to calm perceived ruptures in the collective normative universe.

The next section of this article, which explores the contemporary anti-treaty-rights movement, attends to these considerations. We see that its rights talk, which depicts treaty rights as illegitimate special rights, infuses the movement's efforts with nationalistic ardor; it makes activists' opposition to treaty rights not only a defense of personal interests, but also a heroic, virtuous defense of the nation's core values and ideals. The special rights discourse thus

[12] Not that those rights that are frequently alleged to be special actually conform to this logic. Herman's (1997) account of the Christian right's anti-gay-rights agenda reveals, in fact, that the allegation of special rights is not so much a description as it is an epithet. As she notes, gay and lesbian activists typically argue not to be treated differently but rather to be treated the same, or at least similarly, as are other citizens. Nor does different treatment itself necessarily lead to improper advantages. There is, for example, little evidence to support the claims made by anti-treaty-rights activists that the differences in treatment mandated by treaty rights are responsible for destroying the well-being of ordinary Americans and their communities. In each case, opposition to rights claims is based less on rigorous logic or dispassionate analysis and more on widespread resentment of how those claims are thought to undermine personal privileges and core American values.

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amplifies activists' resentment, shaping it in distinctive and important ways.

Indeed, the activists' inflated sense of injury encourages them to offer overblown assessments of the dangers of treaty rights, even as it leads to misdiagnoses of the pressures that most threaten their livelihoods. There is, we will see, often little dispassionate evidence that supports activists' claims of injury. And when injuries can be corroborated, the most reliable evidence tends to exonerate from responsibility the treaty-rights claims of Native Americans.[13] But by interpreting treaty-rights claims as special and, thereby, as attacks on both personal and national prerogatives, the activists are motivated to redouble their counter-mobilization efforts; they thus entrench themselves against forms of participation that are, according to the most reliable evidence, relatively un-harmful to their interests.[14]

Accordingly, the special rights talk with which anti-treaty-rights activists diagnose their situations is not simply a persuasive way to appeal to otherwise disinterested audiences. The activists' rights talk also works *ideologically;* it "conditions [their] perceptions, establishes [their] role expectations, [and] provides [their] standards of legitimacy" (Scheingold 1974:xi). Indeed, because it evokes a virtuous, but endangered, way of life based upon the values of *individual merit* and *equality of opportunity*, their special rights discourse is partially constitutive of activists' resentment itself; it transforms the interest-based conflicts at the center of their resentment into value conflicts that stigmatize the political participation of Native Americans, viewing that participation as an "all encompassing . . . danger to national identity" (Rogin 1987:55; see also Aubert 1963). Attending to these effects of rights discourse, which play out in instrumental and ideological registers, helps us understand how special rights talk propels and shapes the politics of resentment, as that resentment animates both the anti-treaty-rights movement and, as I shall suggest in conclusion, conservative activism writ large.

"This Is Not Equal Rights": Exploring the Anti-Treaty-Rights Movement

The contemporary anti-treaty-rights movement began in the late 1960s. It grew, specifically, from the popular and elite backlash

[13] Indeed, rather than implicating treaty rights as its causes, this evidence typically points out instead how impersonal, long-term shifts in economic and political processes have led to increasing uncertainty and hard times.

[14] Such a displacement of blame is not unique to the politics of special rights. It is instead, as Edelman argues, a pervasive feature of modern political discourse (1988:78).

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to the fishing-rights mobilizations of Puget Sound tribal nations in western Washington State. Indeed, the fishing rights movement's biggest victory—the *United States v. Washington* District Court case of 1974 (aka the Boldt decision, after its author, Judge George Boldt)—spawned also a zealous counter-mobilization movement that resented what it called the "special" treaty rights of Native Americans (Bruun 1982; Cohen 1986). The decision, because it allocated to treaty tribes 50% of Washington's lucrative salmon and steelhead trout catch at those tribes' "usual and accustomed," but off-reservation, grounds, was both highly visible and highly controversial. The fishing-rights activism that culminated in Boldt's decision, on the one hand, inspired other tribal nations throughout the United States to mobilize their own treaty rights on behalf of social change (a trend most visible, perhaps, in the casino-building movement of the last 20 years). But, on the other hand, the Boldt decision was also a flashpoint for anti-treaty-rights activists. And their counter-activism soon surpassed its regional focus and went national, "moving from the Pacific Northwest to the Northern Great Plains, the Upper Midwest, the Southwest, East Coast, and Canada" (Grossman 1992:5).

Given the central importance of opposition to the Boldt decision to the emergence of the nationwide anti-treaty-rights movement, it is appropriate to here give a brief account of that opposition. We will see that the defense of equal rights, and the core American values commonly thought to be symbolized by them, provided the underlying rationale—the sensibility—not only for the counter-mobilization to the Boldt decision but also for the subsequent nationwide movement. Perceiving that the equal rights of non-Native Americans had been neglected by Judge Boldt precisely so that the special treaty rights of area tribes could be affirmed, the counter-mobilization to the Boldt decision sensitized a whole segment of Americans to the alleged dangers of treaty-rights activism. In so doing, the opponents' mobilization of special rights talk transformed the grievances that it voices from local and interest-based to national and cosmic. Opposition to treaty rights is thus not simply a defense of threatened patterns of self- and group privilege; it is also a rousing defense of the American way of life itself.

"Where Are My Equal Rights, Judge Boldt?"

The implementation of *United States v. Washington* did, in fact, initiate a massive transfer of fish and wealth to tribal fishers. Although native peoples had traditionally occupied a central place in the Puget Sound's fish trade, by the middle of the twentieth century they had become increasingly marginal participants. Their

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increasing marginality proceeded in step with Washington State's century-long effort to establish generally applicable laws for the regulation of the fish trade. Solidly in place by the 1950s, these laws refused tribal authority over traditional, off-reservation fishing grounds, in spite of a series of treaties from the 1850s that had arguably secured such authority.[15]

Moreover, the state's facially neutral regulations, in conjunction with a variety of economic and environmental factors, disproportionately impacted tribal fishers.[16] By the time of the Boldt litigation, in fact, tribal fishing accounted for barely 1% of the Washington fishing industry (Washington State Department of Fisheries 1951–1990). Given tribes' historic reliance on salmon for subsistence, cultural, and commercial purposes, the impoverishment of native fisheries took a major toll on the life-chances of the area's indigenous peoples (Cohen 1986; Fernando 1986; Wilkinson 2000).

In the early 1960s, however, a generation of Native American activists who were inspired by the civil rights movement began to mobilize their long-neglected treaty fishing rights, both in and out of court. Their direct action tactics culminated in the mid-1960s in a series of "fish-ins" in which activists flouted state regulations, fishing at traditional off-reservation grounds in accord with their treaty rights (American Friends Service Committee 1970; Deloria 1977; Thompson 1979:378–83; Wilkinson 2000). Meanwhile, the activists' tribal governments pursued fishing rights in court, filing a series of suits against Washington State's Departments of Game and Fisheries (the agencies that oversaw the state's wildlife resources). Judge Boldt's opinion in *United States v. Washington* (1974)—which, in addition to the 50% allocation, invalidated Game's and Fisheries' regulations of off-reservation tribal fishing—was thus a successful culmination of more than a decade of fishing-rights activism. When

[15] See, for example, the treaties of Medicine Creek (1854), Point Elliot (1855), Point No Point (1855), Neah Bay (1855), Olympia (1856), and Yakima (1855). All treaties can be accessed at *http://www.nwifc.org/tribes/index.asp*, except for The Treaty of Yakima (accessible at *http://www.ccrh.org/comm/moses/primary/yaktreaty.html*).

[16] The impact of regulations that eliminated fixed fishing gear, such as weirs and set nets, is illustrative. Such fixed gear—which was durable, widely available, and efficient—was traditionally favored by area natives. Yet Washington State policy makers, relying mostly on anecdotal evidence, concluded that the use of fixed gear indiscriminately trapped massive numbers of fish, inhibiting their migration to saltwater bodies and their instinctive return to freshwater spawning grounds. The elimination of fixed gear, in favor of more expensive and transitory but allegedly more resource-friendly methods such as the gill net and the hook and line, was thus justified in the name of resource conservation and stewardship. Although these regulations (the first of which was instituted in 1934) were generally applicable to all fishers, they disproportionately impacted native fishers, who were less well economically positioned and, accordingly, less able to adapt to the more expensive and inefficient fishing methods that were mandated by the state (Washington State Department of Fisheries, U.S. Fish and Wildlife Service, and Washington Department of Game 1973; USCCR 1981; Cohen 1986).

fully implemented in the mid-1980s, in fact, the Boldt decision resulted in treaty fishers taking a little more than 50% of the state's *total* commercial salmon catch, not just the catch at traditional off-reservation fishing grounds (Washington State Department of Fisheries 1951–1990).

But although Judge Boldt was initially confident that "the residents of (Washington) State, whether of Indian heritage or otherwise, and regardless of personal interest in fishing are fair, reasonable, and law-abiding people (who) will abide by (this) decision even if adverse to (their) interests" (*United States v. Washington 1974*, 384 F. Supp. 312: 330), his opinion instead prompted resentment and resistance. Resentment crystallized around Boldt's interpretation of a key provision common to treaties signed between Puget Sound–area tribes and the U.S. government in 1854 and 1855. This provision held that the "(T)he right of taking fish, at all usual and accustomed grounds and stations, is . . . secured to said Indians in common with all other citizens of the Territory" (*Treaty of Medicine Creek* 1854:n.p.).[17]

According to the Departments of Game and Fisheries, sport fishers, and other nontreaty commercial fishers, this provision required only that tribal fishers not be legally excluded by Washington State from fishing at traditional off-reservation sites (at their "usual and accustomed grounds"). On this interpretation, the phrase "in common with all other citizens of the Territory" provided to tribal fishers an *equal opportunity* to take as much fish as possible. But treaty fishers had no claim to an affirmative, or "special," capacity to take fish; treaties guaranteed the opportunity, not the assurance, of catching salmon and trout. At stake in any more expansive reading of treaty rights, argued this side, was the ability of nontreaty fishers to effectively compete with tribal fishers at off-reservation sites. Fidelity to the core American values of individual merit and equal opportunity thus required that treaty and nontreaty fishers have equal rights to the state's fish resource. And the promotion and protection of equal rights demanded Washington State's continuing oversight of tribal fishing at off-reservation sites.

Tribal leaders, however, claimed that their treaty rights guaranteed more than an equal opportunity to fish at traditional off-reservation sites. They argued that their fishing rights had been *reserved*, not granted, by the U.S. government. The various treaties, tribes explained, recognized the importance of tribal fishing for subsistence, cultural, and commercial purposes. Consequently, the treaties expressly affirmed the capacity of tribes to take fish in perpetuity at their usual and accustomed sites, and to do so free of

[17] Please see *http://www.nwifc.org/tribes/index.asp* for further information on the Treaty of Medicine Creek.

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Washington State regulations. Judge Boldt accepted this tribal understanding of the original intent of the treaty-right, rejected the equal rights/opportunity argument, and, accordingly, set off massive governmental and nongovernmental resistance to his decision.

Thus, at the center of the resentment over Judge Boldt's decision was a widely shared conviction that the tribes were receiving an illegitimate special right that gave their fisheries privileges that no other fishery had. Tribal fisheries were both free of Washington State regulation and guaranteed a specific percentage of the annual catch of fish at their off-reservation sites—advantages not available to others. As one grassroots leader summarized the popular interpretation of the Boldt decision, "This is not equal rights" (Gray 1977:13).

Opponents' use of special rights talk to make sense of, and express, their resentment of Judge Boldt's decision was undoubtedly influenced by the strategies of fishing-rights activists. Specifically, the mobilization of treaty rights by native activists and tribes seems to have encouraged opponents of those rights to also turn to the treaty language, to invest that language with a distinct set of meanings that emphasized the ambiguity of the "in common with" phrase. Steinberg argues that this sort of discursive call and response amounts to a "dialogism," in which the languages that animate collective action are the products of both actors' own understandings of their situations and the more general "discursive fields" (the widely shared, favored forms of rhetoric) that envelop a conflict (Steinberg 1999). Compelled to defend the interests that they felt that Judge Boldt had slighted, opponents sought to re-signify the treaty right itself, noting how it guaranteed the fishing rights of non-natives as well. For the treaties, they argued, implicitly recognized that the fish resource would support both treaty and nontreaty populations, "in common with" one another. According to this perspective, it would not make sense for either group to enjoy a prior claim on the resource, since such a differential capacity would subvert the plain moral logic of the treaties—a moral logic that was itself consistent with the traditional American values of equal opportunity and individual merit.[18]

[18] Activist Ken McLeod so instructed the U.S. Supreme Court in 1976 after its members refused to hear Washington State's appeal of the Boldt decision. In his "open letter" to the justices, McLeod argued that

> "the right of taking fish" [guaranteed by treaty] is a prepositional verbal phrase modified by the additional words "in common with all citizens." How could any sane mind distort these treaty words to mean . . . the supremacy of Indian rights over those of "citizens of the territory" or vice versa? Boldt has created a special class of citizen against all others and he [has] denied the non-Indian citizen equal protection. [His] malodorous decision . . . flagrantly discriminates against more than 99 percent of all citizens. Your refusal to hear the legitimate appeal of the State of Washington [has] robbed the Nation's citizens of their equal

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Thus motivated by the conviction that they were defending not only their own material interests but also a whole tangle of core American values, opponents of the Boldt decision resisted its implementation. Organizing themselves into such groups as the Interstate Congress for Equal Rights and Responsibilities (ICERR), Equality for All, and, later, the Washington State Political Action Committees (WSPAC), opponents tirelessly pursued an insider/outsider political strategy. Convinced of the multiple dangers of special treaty rights, they worked to ensure that the Boldt decision would come to be identified as an affront to America's long-standing commitment to equal rights.

The counter-mobilization was, in fact, particularly invested in setting the terms of public debate about the Boldt decision specifically, and about treaty-rights activism generally. Its members ran paid advertisements in regional and national publications, wrote countless letters to the editor, staged regular street protests, and committed acts of civil disobedience (including coordinated illegal fishing on days and in waters that had been reserved for treaty fishers[19]). Closer examination of one of these efforts—the use of paid advertisements—reveals the centrality of rights talk, and the equal rights/special rights binary logic that it expressed, to the political visions of Boldt decision opponents.[20]

> rights guaranteed by the 14th Amendment; [it is] a ruthless mockery of our Constitution. (Kenneth McLeod Papers, box 1, folder 6)

[19] Illegal fishing both hampered implementation of the Boldt decision and had a considerable economic impact (USCCR 1978:350–2; Cohen 1986:93). In 1977 alone, nontreaty fishers illegally caught 183,000 salmon at a catch value of approximately $1.4 million (or about 20% of the legal nontreaty commercial catch value from that year) (Cohen 1986:100; Washington State Department of Fisheries 1951–1990). This number was actually an improvement from the previous year, when illegal fishing accounted for an estimated 34% of the total nontreaty catch in Puget Sound (USCCR 1978:6).

[20] The discussion that follows is based on Dudas 2003, which explores in much greater detail the anti-treaty-rights movement, both in its initial manifestation as a counter-mobilization against the Boldt decision and in its subsequent, nationwide incarnation. That work assembles a wide array of data culled from primary sources, including movement literature, public and private correspondence between government officials and movement participants, the personal memoirs and papers of important activists, interviews with activists and government officials, reports from governmental and nongovernmental agencies and committees, court proceedings and opinions, and newspaper coverage of select conflicts. My focus there, as here, is on the language that pervades and constitutes the anti-treaty-rights movement; I interrogate the manners in which activists represent their grievances, their ambitions, and their general understandings of their worlds and the ways that those representations shape their counter-mobilizations, inflecting them with cosmic significance. I find content analyses of activists' language and case studies of particularly salient conflicts to be appropriate empirical methods for such an interpretive approach to the study of law and politics (C. Taylor 1987; Yin 1994; McCann 1996).

"Screw Judge Boldt!"

Indeed, opponents sought to influence public understanding of the fishing rights issue by running paid advertisements in local and regional outlets. These paid advertisements typically emphasized how the Boldt decision (and, later, treaty-rights claims in general) was inconsistent with the 14th Amendment's guarantee of equal treatment and thus subverted the civil rights of non-Native Americans.[21] One popular advertisement took the form of an FBI most-wanted poster. It featured a picture of a dour and stern Judge Boldt and offered this inscription: "Wanted: Federal Judge George H. Boldt for Robbery of The Civil Rights of All Non-Indian Citizens!!" (Kenneth McLeod Papers, box 3, folder 13).

Humorous plays on Boldt's last name were a common feature of the advertisements. Bumper stickers and buttons were produced bearing such slogans as "Nuts to Boldt" and "Screw Judge Boldt." An ad that ran in sportsmen's bulletins featured a picture of a man with a full salmon stuffed in his mouth and the text "Screw Judge Boldt—The Indians won't get this one!!" (Kenneth McLeod Papers, box 3, folder 13).

Opponents also produced petitions, sometimes sarcastic, that ran in local newspapers and civic publications. An example of this sarcasm can be seen in an official-looking legal contract with a heading note that implored the reader to "sign this document . . . and end the . . . staggering . . . guilt trip [under which white people operate] . . . due to past suppression of Indians by non-Indians" (Kenneth McLeod Papers, box 3, folder 14). The contract read in part:

> To Whom It May Concern:
> Whereas I believe the White Man in the past has committed many crimes against the Indians, and
> Whereas I consider Judge Boldt's decision to be a good ruling which at least partially restores to the Indians that which is rightfully theirs, and

[21] This understanding of the 14th Amendment's equal protection clause (as well as similar guarantees construed to exist within the 5th Amendment) has been consistently rejected by the U.S. Supreme Court, at least with respect to its application toward Native Americans. Citing Congress's long-standing trust relationship with tribes, as well as its unique plenary power to legislate on behalf of the interests of tribal members (interests that are tied less to membership in a racial group and more to membership in a distinct political entity), the Court's holding in *Morton v. Mancari* (1974), for example, approved of Native American preference programs. Writing for a unanimous Court, Justice Harry Blackmun concluded that "as long as the special treatment [in question] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed" (417 U.S. 535:555). Although defenders of Boldt's decision occasionally chided its opponents for their legal myopia (see, for example, USCCR 1981:5–6), such arguments made little impact, either on the opponents themselves or on the wider audiences to whom they appealed.

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> Whereas past mistakes were committed not by only Non-Indian fishermen but rather by the White Man per se, and
> Whereas I am a fair-minded consistent individual, I believe the brunt of the Boldt decision should be borne by ALL Non-Indians equally–not just the fishing industry.
> I therefore do agree to donate 50% of my net income starting from Feb. 12, 1974 and for the rest of my life to the Indian people.
> Signed
>
> — (Kenneth McLeod Papers, box 3, folder 14)

Frequently the petitions implored the reader to get involved with the counter-mobilization effort directly, drawing on widespread fears of economic and political dislocation. Further, as the above contract's identification of "white guilt" suggests, these fears were often inflected with, and expressed according to, racialized logics. For example, the WSPAC, a Seattle-based interest group that formed in the wake of the Boldt decision and which was "dedicated to the restoration of integrity in Congress" (Kenneth McLeod Papers, box 1, folder 26), ran a petition in many Washington State newspapers in 1977 that called on Judge Boldt to resign his post as federal judge because his "narrow advocacy of 'Indian Rights' makes it impossible for (him) to be impartial." Such partiality, the petition read, had "decimated the steelhead runs, created bigotry among our people . . . and created chaos in our entire fishing industry." The text surrounding the petition called on readers to "act now . . . (and) help to spread the word" that Boldt must resign (Kenneth McLeod Papers, box 1, folder 26).

But the petition also told of how Judge Boldt's "unconstitutional" decision was simply another example of how liberal judges and politicians were willing to sacrifice the civil rights of the majority of Americans in order to assuage the guilt that they felt over contributing to the historical marginalization of America's less-fortunate racial groups. For "the issue is not just Indian treaties and Fish Conservation. The real issue to be resolved is the usurpation of power by Federal Judges. Whether it's *Bussing in Boston* or *Fishing in Puget Sound*, the principle remains unchanged" (Kenneth McLeod Papers, box 1, folder 26). Persuaded readers would thus send their petition and (hopefully) a financial contribution to the Freedom From Federal Judges Fund set up by WSPAC (Kenneth McLeod Papers, box 1, folder 26).[22]

[22] The counter-mobilization reveled in attacking Judge Boldt. The hanging of Judge Boldt in effigy, often in front of his own Tacoma courthouse, was, in fact, a hallmark of the opponents' many street protests. And, as with other agenda-setting efforts, their protests were imbued with the familiar message that the Boldt decision was a victory for the special treaty-rights of area tribes at the expense of the equal rights of non-Native American fishers. Signs with inscriptions such as "Equal Rights for All, Special Rights for None" and

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Paid advertisements were also one of the primary ways by which the national anti-treaty-rights organization that formed in the aftermath of *United States v. Washington* (1974), the ICERR, sought to influence public opinion. And, as in the ads produced by the local counter-mobilization movement, treaty rights were typically associated in these ads with other forms of political action that were perceived to threaten American life. Indeed, ICERR advertisements focused specifically on the evils of treaty rights. But ICERR's anti-treaty-rights message drew from a larger hostility toward the increasing political participation of America's historically marginalized populations, not just toward Native American insurgency.

Two ICERR ads illustrate the point. One, with the headline "Must We Give America Back to the Indians?" stated that "Only one voice, Interstate Congress for Equal Rights and Responsibilities ... opposes current Indian policy which infringes on the property and civil rights of citizens. Only a national effort can turn this trend around. We need your help and support!" (Kenneth McLeod Papers, box 3, folder 11). A second ad exposed the broader logic underlying ICERR's efforts. Entitled "Support ICERR," the ad claimed, "[t]he liberal treatment of minorities at the expense of taxpayers has reached astronomical proportions. At the same time, legislation is continuously introduced in Congress which would take away your constitutional rights and enlarge the power of racial groups. Only continued support and concerted efforts by citizen groups such as ICERR can turn the trend around" (Kenneth McLeod Papers, box 3, folder 11).

Opponents' efforts to influence public understanding paid off. By 1976, and then at least as late as the mid 1980s, the counter-mobilization movement was able to accurately claim that the majority of Washingtonians agreed that Judge Boldt's decision, and the treaty-rights activism that it seemed to endorse, was unfair; it was, as conventional wisdom held, just another example of elite liberal judges engaging in unprincipled social engineering, sacrificing the equal rights of ordinary Americans in a misguided attempt to atone for past sins. As a comprehensive survey found in 1979, five years after the release of *United States v. Washington* (1974), more than 60% of area residents continued to oppose the Boldt decision, with only 37.8% of respondents agreeing that "All in all, the (Boldt) decision is a fair one" (Gaasholt & Cohen 1980:12–5).

"Where are my Equal Rights, Judge Boldt?" were commonplace at the protests (Wilkinson 2000:59–60). Typically given prominent attention by local media, the protests were useful for drawing attention to the counter-mobilization's cause (see, for example, *The Seattle Times* ("Angry Fishermen Protest During Ford's Visit," 25 Oct. 1976, p. A1); *The Sportsmen News Letter* ("Eat an Elephant—A Bite at a Time Does It!" Nov. 1977, pp. 26–7); Cohen 1986:89).

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That the Boldt decision was popularly understood to be a violation of rights, not just an inconvenience to interests, was of vital importance. Indeed, the successful labeling of the fishing rights established by Judge Boldt as special rights was a major victory for the counter-mobilization. Defining the terms of conflict in this way delegitimized treaty rights as threatening, unfair, and un-American. This special rights talk drew on the salience of rights in America in a strategic fashion, converting opponents' reactionary defenses of the status quo distribution of fish into claims exercised from the mantle of democratic authority. Boldt opponents were thus able to generate substantial public support by framing the fishing rights conflict according to the equal rights/special rights binary logic; they successfully traded on the hortatory quality of rights talk to persuade a solid majority of Puget Sound residents that treaty-fishing rights were illegitimate.[23]

But this framing of the fishing rights conflict was hortatory also in the sense that the opponents' rights discourse was partially constitutive of the counter-mobilization movement itself. It shaped the movement in two ways. First, the allegation that tribes were asking for un-American, special rights worked to convince opponents that their resistance to equalizing the balance of power in the fishing industry was a resistance that was authorized, compelled even, by long-standing American values. Not simply protecting opponents' own places within the existing pattern of privilege, they were also protecting America from inappropriate and subversive exercises of rights. Their rights discourse thus kept members of the counter-mobilization movement invigorated because indignant (Morris 1983; Richendifer 1977).

Second, opponents' understanding that treaty rights were subverting the core American values of equal opportunity and individual merit worked to inflate their sense of injury; it amplified their perceptions of personal harm, eventually leading them to misdiagnose the causes of their flagging economic fortunes. Indeed, as the fishing rights conflict progressed, opponents' claims

[23] Indeed, as Steinman's analysis in this volume suggests, tribal leaders were not as concerned with public agenda-setting activities as was the counter-mobilization. While they did occasionally coordinate high-visibility events, tribal leaders developed nothing like the comprehensive publicity campaign of their opponents. Rather than courting public opinion, tribal leaders instead focused upon creating more favorable relationships with state officials at various levels—a form of political action that Steinman calls "institutional entrepreneurship" (Steinman 2005). It is true that this strategy, which sought to entrench a "government-to-government" relationship in political practice, eventually led to more stable and cooperative relationships with Washington State. But the decision to not engage the counter-mobilization's agenda-setting efforts meant also that their identification of treaty rights as special rights went mostly unchallenged. The institutional entrepreneurship of tribal leaders thus left undisturbed a logic that was crucially important, for both fostering resistance to the Boldt decision and helping the anti-treaty-rights movement to go national.

that the Boldt decision was responsible for their hard times became increasingly less tenable. To be sure, the Washington State fishing industry suffered a downturn beginning in the early 1970s, but in spite of frequent claims to the contrary, the Boldt decision had little to do with the decline. The long-term effects of chronic habitat degradation and incompetent, short-sighted state management of the resource were, in fact, much more damaging influences than was treaty fishing.[24] And even with this decline, evidence suggests that the fishing industry continued to be very profitable for many nontribal fishers, even after the implementation of the Boldt decision (Washington State Department of Fisheries 1951–1990).[25] As the final report of the Presidential Task Force (appointed by Jimmy Carter with the [unrealized] goal of brokering a solution to the fishing rights conflict) observed in 1978, "It is interesting to note that among the complaints of financial hardship [allegedly brought on by the Boldt decision] we find no documentation supporting the claim. In fact, the actual financial impact might be quite small" (cited in USCCR 1978:685). But the common sentiment, as in commercial fisher George Johansen's formulation, held that "the Boldt ruling is the root cause of the trouble we are facing in the fisheries today. Fishermen look at the [Boldt decision] as both unfair and discriminatory" (Kenneth McLeod Papers, box 3, folder 30).

At the center of this stigmatization of treaty rights was the equal rights/special rights logic. Encouraged by the associations and organizations to which they belonged, vocal members of the sport fishing community, and even some state and national officials (see below) to view the failing Washington State fishery as a product of the handiwork of activist federal judges and militant Indian activists

[24] Extensive logging along streams and rivers (which elevates water temperatures by eliminating the shade provided by trees) and the common practice of floating logs in freshwater bodies (which destroys the stream beds in which salmon spawn) were particularly destructive of the delicate ecological conditions needed for salmon propagation. But rather than dedicating its conservation efforts to habitat restoration, Washington State instead devoted vast resources to the unproven science of "fish culture" (the engineering and release of salmon in hatcheries), which did little to restore salmon runs that, by the 1970s, were badly depleted. And in spite of decreasing salmon landings, the state refused to limit the issuance of commercial fishing licenses, actually increasing the number that it granted between 1954 and 1973 by three-fold. The results of these destructive practices and state management schemes—fewer fish and more fishers—are more responsible for the long-term decline in salmon productivity than is treaty fishing (the vast majority of which has taken place *after* the critical period of salmon decline) (USCCR 1977, 1978, 1981; Cohen 1986; Joseph Taylor 1999).

[25] According to the *Fisheries Statistical Report*, the nontribal salmon catch value actually peaked *during* the 1970s (including the years following the Boldt decision) at $327,845,537. Following the full implementation of *U.S. v. Washington* (1974) in the early 1980s, the nontribal salmon catch value did fall to $235,294,505 (while the tribal catch value spiked from $87,821,178 during the 1970s to $281,943,590 during the 1980s). However, even this depressed value was roughly consistent, adjusting for inflation, with the nontribal catch value of the 1950s, a period that both officials and fishers considered the industry's heyday (Washington State Department of Fisheries 1951–1990).

who were peddling white guilt to liberal elites, commercial fishers overlooked the ways in which the state had neglected the fish resource for 100 years and instead proclaimed that special rights were responsible for their unstable economic position. The terms by which they came to understand their material interests (terms that emphasized the abuse of rights) thus inflated their sense of resentment over the activism of area tribes, attributing to it a much greater threat than it actually presented. In so doing, opponents wholeheartedly participated in a counter-mobilization movement that directed its outrage at the treaty rights of Puget Sound tribes, rather than at the near-sighted stewardship of the state.

Perhaps unsurprisingly, most Washington State officials were receptive to the counter-mobilization's activism, and especially to its interpretation of the perils of special treaty rights. Relying upon the sensibility provided by the equal rights/special rights distinction, state officials initiated and supported a wave of legal and political attacks on the Boldt decision. High-ranking elected officials joined countless numbers of local elected officials in speaking out against *United States v. Washington* (1974). Some of these officials introduced national and state legislation that would have substantially curtailed the scope of treaty rights in the name of equal rights. Meanwhile, the State Attorney General's Office (led by future U.S. Senator Slade Gorton) and the State Supreme Court attacked the Boldt decision, the one filing a variety of appeals in both state and federal court and the other issuing two unanimous opinions that explicitly contradicted the holding of *United States v. Washington*.[26]

All told, unofficial and official efforts succeeded in delaying the implementation of *United States v. Washington* for nine years. It was only after (1) the U.S. Supreme Court's 1979 decision in *Washington, et al. v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, in which six frustrated justices placed authority for implementation into the hands of Judge Boldt's district court, and (2) the political will of Washington State officials began to wither that cooperative relationships between Washington State and local tribes emerged. Accordingly, as Steinman's thorough analysis indicates, by the early 1980s state officials had belatedly dedicated themselves to co-managing the fisheries with treaty tribes (Steinman 2005; see also Brown 1994).

But newfound cooperation between treaty tribes and state officials was not the only long-term consequence of the Puget Sound "fish wars." Indeed, while the Boldt decision, and the politics surrounding it, affected major changes in Washington State's fishing economy (it increased the annual total indigenous salmon take by

[26] See *Puget Sound Gillnetters Association v. Donald Moos* (1976) and *Washington State Commercial Passenger Fishing Vessel Association v. Thor Tollefson* (1977).

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almost 350%), it also catalyzed a zealous opposition that resented the exercise of what it perceived as the special rights of Native Americans. That is, it produced a backlash that successfully appropriated one of the core legitimizing symbols of American democracy—equal rights—in order to oppose the legal mobilizations not only of Puget Sound–area tribes, but also of tribal nations throughout the United States. Indeed, members of the Boldt countermobilization were sufficiently encouraged by their successes in Washington State to pursue similar activities nationally.

Going National

The editorial page of *Outdoor Life* (a wildlife magazine that took up the fight against treaty rights with particular zeal) announced the anti-treaty-rights movement's national coming out. A 1984 editorial entitled "The Threatening Indian Problem" is illustrative of the way that the movement had by the early 1980s pulled together the general themes of preferential treatment of minority populations, the majority's neglected interests, white guilt, and affronts to cherished American values. Funneling these themes through the equal rights/special rights binary logic, and applying them specifically to native rights-mobilizations, *Outdoor Life* proselytized:

> "The Great American Guilty Conscience," actively kept alive by Indians, has stripped the American people of their ability to deal logically with the rampant Indian excesses that are becoming more flagrant every day. Make no mistake. The tribes are on the move. They aim to lay claim to as much land–your land–as they can get. **Sixty million outdoor sportspeople, countless nature lovers, and the American people in general can go to hell**.
>
> At this time, the problems are mostly in the Northern and Western states, but no state is safe. [Since] the Boldt decision in Washington State, the problem has exploded everywhere.
>
> **It is time to end our treaties with the Indians**. Indians should just be Americans like everyone else, not super Americans with special privileges. It's up to you. Now is the time to unite. Otherwise, we might yet give this country back to the Indians. (*Outdoor Life* 1984:2; emphasis in original)

With such efforts to set the national agenda on the issue of treaty rights, the opposition to the Boldt decision had by the early 1980s reached out beyond its core participants in the Pacific Northwest and transformed itself into a trans-regional movement. Joseph De La Cruz, in 1984 the president of the National Congress of American Indians, summarized the counter-mobilization's achievements:

> During the last three and one-half years . . . the small, organized opposition we faced in the 1970's has become better organized and well-financed. They have begun to successfully infect the

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> views and opinions of larger numbers of middle-American citizens–taking advantage of the Reagan "New Right" movement . . . with sentiments that Indians and Native peoples should be "equal to all other Americans," and that we should not enjoy what they call "special rights" or the benefits of treaties signed by our grandfathers. (De La Cruz 1984:2)

Treaty-rights backlash has, in fact, followed a more or less predictable pattern as it spread throughout the nation during the 1980s and 1990s. Typically, judicial affirmations of a tribe's (or multiple tribes') treaty-rights to various resources (usually land, water, and/or wildlife) have been particularly important catalysts. Court decisions have thus worked, in part, to generate a vigorous and focused opposition drawn mostly from those individuals whose lives were perceived to be most impacted by implementation of the treaty right in question (see, for example, USCCR 1989; Grossman 1992; Johansen 2000; Biolsi 2001; Nesper 2002).

Indeed, the post-Boldt era is marked by the emergence of a wide range of anti-treaty-rights organizations throughout the western, midwestern, and eastern parts of the United States. The understanding that treaty rights are illegitimate special rights is central to the political visions of these organizations. Special treaty rights, their members argue, not only make a mockery of America's formal commitment to equality; they also make it impossible for natives and non-natives to compete with each other on a level playing field and thus forfeit America's long-standing faith in meritocracy. The names of these anti-treaty-rights organizations are illustrative: the Citizens' Equal Rights Alliance, All Citizens Equal, Totally Equal Americans, Protect Americans' Rights and Resources, Citizens' Rights Organization, Upstate Citizens for Equality, One Nation United, and United Property Owners of America. Each of these groups, like the Citizens' Equal Rights Alliance (a national umbrella group), is dedicated to "promoting equal protection of the law for all citizens of the United States." In addition, these groups consider their anti-treaty-rights message to be consistent with that of other grassroots organizations that struggle against the exercise of similar kinds of special rights—groups such as Linda Chavez's Center for Equal Opportunity, Americans Against Discrimination and Preferences, Proposition 209 sponsor Ward Connerly's American Civil Rights Institute, America's Future, and the Alliance for America.

These organizations have garnered support from local, state, and national politicians who proclaim themselves sympathetic to the interests that they represent. For example, the anti-treaty-rights movement has been bolstered by the introduction of legislation designed to curtail treaty rights by Congressional representatives from Washington State, New York, Pennsylvania,

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Connecticut, and Montana (USCCR 1981; Bruun 1982; Cohen 1986; Grossman 1992; Johansen 2000). Similarly, countless local and state actions, from the regular assertion of jurisdiction over the activities of tribal governments to the appealing of court decisions that promote the interests of tribes, have been justified by appeal to the equal rights/special rights logic voiced by the activists. And while the wholesale changes in U.S.-tribal relations for which opposition groups call—which typically ask for the abrogation of treaties—have not occurred, the saturation of the public sphere with warnings of the dangers that treaty rights present for both ordinary Americans and the nation has had its effect, as the anti-treaty-rights movement now operates in a majority of the states in the union (Johansen 2000).

Nor, as we have seen, are these warnings about the dangers of special treaty rights just cover for the pursuit of activists' objective economic interests. The allegation of special rights is not simply the expression of a fully formed resentment that is disconnected from the method of its expression; the logic and language of special rights also propels and inflates—it partially constitutes—that resentment, casting it in a nationalistic mold. The cause of the anti-treaty-rights movement, like that of other contemporary anti-rights organizations, is a national one—it is a struggle for the American way of life.

Again, confirmation of this constitutive role of special rights talk can be seen by examining activists' overwrought allegations of personal injury. While at first blush there is some veracity to claims that tribal participation threatens local economies and environmental prerogatives, closer examination reveals that typically tribal participation strengthens local economies and at least maintains existing environmental prerogatives (sometimes exceeding them) (Cornell & Kalt 1995; Henson & Taylor 2002:177–9, 199–208). Further, in the case of the well-known tribal casino-building movement, a case that shows a similar pattern of resentment and counter-mobilization, study after study has found that the impact of tribal casinos on local and state economies has been generally very positive, in spite of the fact that tribal casinos are immune from most forms of state regulation (Reeves and Associates 1996; Carstensen et al. 2000; National Indian Gaming Association 2001; Evans 2002; King & Kanzler 2002; Jonathan Taylor et al. 2002).[27]

In short, few dispassionate analyses confirm the extent of the injuries that treaty-rights opponents assert. And when they do

[27] Immunity from most forms of state regulation stems from a unique legal status that defines tribal governments as "quasi-sovereign." National courts have traditionally held that treaties at once preserved tribal authority over "internal" affairs and ceded all authority over "external" affairs to the United States. Dudas (2001) and Wilkins (2002) explore the possibilities and limits of such quasi-sovereign tribal authority.

confirm a general pattern of injury and decline, as they did in the Washington State fishing industry, they typically exonerate the exercise of treaty rights from responsibility for it. But the language in which activists express their grievances—a language that emphasizes the harmful and un-American tendencies of special treaty rights—leads them to posit a fundamental contradiction between their interests and those of their Native American neighbors. Special rights talk not only exacerbates the sense of injury and violation that activists feel; it also assigns responsibility for those injuries to the increased political participation of tribes (in spite of evidence to the contrary). The activists' resentment is thus driven by a mostly unverifiable perception that they are losing their grip on the relative privilege that they have for so long taken for granted, and that Native Americans, who unfairly mobilize special treaty rights, are primarily responsible for this erosion.

Conclusion

> When more established groups respond to rights claims by less powerful groups, their own unarticulated but taken-for-granted rights often become visible. In deploying their own rights, (established) groups deny any legitimacy to contrary claims of entitlement. This is a process that tends to protect and reproduce hierarchy, in spite of a language of rights that would seem to preclude hierarchies.
> (Carol Greenhouse, Barbara Yngvesson, & David Engel, *Law and Community in Three American Towns*)

I have here explored the intersection of special rights talk and the politics of resentment in the contemporary United States. I have argued that the resentful political visions of conservative activists are constructed in part by an equal rights/special rights distinction that itself delegitimizes the participation of historically marginalized Americans. A brief exploration of popular interpretations of the treaty rights of Native American tribal nations, which portray treaty rights as special rights, has grounded my analysis.

We have seen that this special rights talk, because it imports the ingrained values of individual merit and equal opportunity into the culturally salient rights form, has hortatory qualities. It at once works instrumentally, mobilizing and broadcasting activists' resentment to an otherwise disinterested audience, and ideologically, providing a means by which activists both make sense of the legal participation of the marginalized and ascribe to it powerfully corrosive effects. Their special rights talk thus portrays the legal activism of the marginalized as threatening to both personal and

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national prerogatives, marking it as simultaneously unfair and un-American.

And it is in the conversion of activists' grievances from local and interest-based to national and value-based that the constitutive impacts of special rights talk are revealed. The allegation of special rights converts what would otherwise be bald defenses of personal interests and ingrained privilege into rituals of nationalistic and patriotic fervor. Love of self and love of country converge, as the protection of the body politic requires the vigilant monitoring, and shoring up, of existing hierarchies. In this way, the special rights talk employed by conservative activists inflects their reactionary efforts with cosmic significance; it inflates and sanctifies their resentment, at once motivating them to redouble their counter-mobilization activities and to exaggerate the threats of the rights-claims that they oppose.

Such a conversion from interest-based to value-based—or, rather, such absorption of interests and values into an all-consuming conflict—creates, according to Aubert, a "dissensus" in which dispute resolution efforts "often meet with normative obstacles and psychological impediments" (Aubert 1963:32). And this consequence of special rights talk, wherein activists fail to recognize that their material interests and those of the people whose efforts they vilify are often in harmony, is of primary importance. Encouraging them to displace blame for their hard times away from various responsible, impersonal economic and political processes and onto the much less harmful participation of the marginalized, activists' special rights talk misdirects their rancor, erects barriers between potential allies, and, accordingly, discourages common efforts to confront an increasingly hostile world. Special in name but ordinary in effect, the rights discourse of resentful Americans thus revives a national tradition: it deflects popular scrutiny from unresponsive political and economic institutions and instead covers those institutions in the reassuring sheen of Americana. Indeed, this displacement of blame may well be the most meaningful of the many constitutive effects of special rights talk in post–civil rights America.

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