# The Difficulties of Combating Inequality in Time

*Jane Jenson, Francesca Polletta & Paige Raibmon*

*Abstract: Scholars have argued that disadvantaged groups face an impossible choice in their efforts to win policies capable of diminishing inequality: whether to emphasize their sameness to or difference from the advantaged group. We analyze three cases from the 1980s and 1990s in which reformers sought to avoid that dilemma and assert groups' sameness and difference in novel ways: in U.S. policy on biomedical research, in the European Union's initiatives on gender equality, and in Canadian law on Indigenous rights. In each case, however, the reforms adopted ultimately reproduced the sameness/difference dilemma rather than transcended it. To explain why, we show how profound disagreements about both the histories of the groups included in the policy and the place of the policy in a longer historical trajectory of reform either went unrecognized or were actively obscured. Targeted groups came to be attributed a biological or timeless essence, not because this was inevitable, we argue, but because of these failures to historicize inequality.*

JANE JENSON is Professor Emerita of Political Science at the Université de Montréal.

FRANCESCA POLLETTA is Professor of Sociology at the University of California, Irvine.

PAIGE RAIBMON is Professor of History at the University of British Columbia.

*(Complete author biographies appear at the end of the essay.)*

Efforts to legislate or judicially confirm rights to equality often prove disappointing, even for those with clear-eyed aspirations. There are many reasons for the gap between the aspiration and the result, but a deceptively simple one is that political actors define equality in ways that restrict its scope and substance. On some accounts, the problem can be characterized in terms of the sameness/difference dilemma.[1] Equality sometimes has been defined as meaning that members of the disadvantaged group should be treated the same as members of the advantaged group. Yet disadvantaged group members *are* different. They have different needs and priorities. To treat them the same as members of the advantaged group takes as universal the needs and priorities of the advantaged. However, when policy does recognize different needs and priorities, pitfalls emerge. Categories meant to ameliorate inequalities may become the

basis for evaluating group members in ways far beyond the arena originally targeted.[2] Whether or not group members are stigmatized, they may be essentialized: expected to have the same needs, abilities, and priorities, now and forever.[3]

The problem for political actors – activists and policy-makers alike – is to define equality without succumbing to the deforming effects of the sameness/difference dilemma. This essay analyzes three cases in the 1980s and 1990s in which political actors appeared to have solved the problem. That is, they put forth policies that accommodated various forms of difference as they promoted equality. In the United States, reformers sought both to eliminate the barriers that excluded women and racial and ethnic minorities from clinical research, and to require that researchers analyze differences in findings across groups. They sought to treat members of diverse groups both as the same as white male research subjects, and as having different characteristics and needs. In the European Union (EU), feminists developed a discourse of equal opportunities in order to claim that real gender equality required some special opportunities for women. Simple equal treatment was inadequate. In Canada, Indigenous activists critiqued state promises to treat all individuals equally and asserted equal status as nations. Their points of reference for equality were the collective rights of peoples, not the human rights of individuals.

In each case, political actors used novel combinations of sameness and difference to pursue equality. However, the results, while hailed as victories by many participants and observers, fell short. Each reform ultimately reproduced rather than surmounted tensions between sameness and difference. The puzzle is why.

The answer, we argue, is not that equality and difference are inevitably at odds;

that one cannot have equality with difference. Rather, the answer lies in the ways that reformers situated difference and equality in time. Key actors differed over how to account historically for the origins and perpetuation of inequality. Multiple historical narratives vied to become the departure point for policy. These contests over history were sometimes unacknowledged by, and even invisible to, key actors. Yet their stakes for equality were high. In each of our cases, deeply historical understandings of difference were replaced or sidelined by ones that set difference against a shorter-term horizon. In Braudelian terms, *longue durée* explanations of inequality conflicted with, and eventually lost ground to, "event-ish" ones.[4] Transformative, equality-producing change required policy that took account of the former; yet forces both pragmatic and ideological strengthened the latter's gravitational pull. What we term *dehistoricized* understandings of difference and inequality won out.

Simply calling the problem one of dehistoricization, however, risks missing the complex ways in which history was invoked and obscured, unrecognized and misrecognized. We identify two dehistoricizing dynamics: one linking past to present, the other linking past to future. In the first, political actors were ultimately unable or unwilling to recognize the histories built into the categories on which policy was based: racial and ethnic minorities, women, Indians. They failed to recognize inequality as a process sustained through informal norms as much as formal policies, often by mechanisms distinct from those that created inequality in the first place. They likewise failed to discern the very different histories of groups that were included in the same categories. They either presented membership in the category as natural or treated it as the result of implicit societal

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consensus. This simplification flattened differences of need and priority *among* groups. Advocates for particular groups then found themselves having to protest, often futilely, that the multiple groups lumped into the disadvantaged category were different both from each other *and* from the advantaged group in consequential ways.

In the second dehistoricizing dynamic, political actors made conflicting assumptions about how past inequality would yield to future equality. Apparent consensus about the prospects for remedying inequality through reform sometimes concealed real differences about *how* that would happen *over time*. Again, activists and policy-makers arrived at negotiations with each other via distinct historical trajectories. Accordingly, they situated the resulting policy in distinct ways. Policies that policy-makers saw as the capstone to reform were often only a first step for activists. Such differences did not prevent policy from being made in the moment, but they did lead to conflicting assessments of what the reform represented, what it could accomplish, and what to do next. In another version of this problem, reformers took up essentialist (and thus ahistorical) conceptions of difference strategically – and sometimes, they believed, temporarily – to advance future equality for the group they represented. In the end, however, these actors underestimated the inertia of essentialist conceptions, especially when those conceptions coincided with long-held stereotypes.

Admittedly, the self-interest of powerful groups aligned with these dehistoricized understandings of difference. In the case of American biomedical reform, pharmaceutical companies had a stake in defining racial differences as biological and therefore pharmaceutically treatable. In the EU, policy-makers in a period of neoliberal reform preferred approaches to gender inequalities that justified their reluctance to intervene in "private" life. In Canada, a government that faced land claims and international pressure to consult Indigenous peoples resisted dynamic definitions of the collective rights of Indigenous peoples in favor of frozen bundles of individual rights. The surprise is not that those with power acted in ways consistent with their interests. The surprise is that reformers were either unable to prevent or actively acquiesced to the rise of dehistoricized – and sometimes essentialist – understandings.

The conflicts we describe took different forms. In Canada, the conflict was between diverse Indigenous activists and various levels of government actors; in the EU, it was among activists ostensibly on the same side; and in the United States, there was little conflict among political actors at all. Yet we see continuities across the cases with respect to how inequality, equality, and difference were represented in time. After providing somewhat schematic accounts of each case, we highlight these parallels. In so doing, we point to obstacles that characterize efforts to combat inequality more generally.

We consider first the reform of biomedical research in the United States. In the early 1990s, a group of advocates, politicians, bureaucrats, and scientists mobilized to combat inequalities in Americans' health by transforming the practice of biomedical science. Along the lines of an equality-as-sameness argument, reformers demanded that women and racial and ethnic minorities be included as subjects in biomedical research. At the same time, and along the lines of an equality-as-difference argument, reformers demanded that researchers measure differences among groups before generalizing findings. They challenged what they

saw as the false universalism of medical research: the assumption that findings from the study of adult white men could be generalized to the population at large.[5]

Reformers were, by some measures, extraordinarily successful. Beginning in 1993, a series of federal laws, policies, and guidelines were created to transform the paradigm of biomedical research, currently a $94 billion industry in the United States. Scientists came to see the inclusion of diverse populations in clinical research as both ethically important and as good science.[6] The reforms encouraged the new science of genomics, which initially refused to recognize racial difference, to energetically commit to remedying racial disparities in health.[7] And they led pharmaceutical companies, which had vehemently opposed the reforms on the grounds of their cost, to eventually embrace race-, ethnicity-, and gender-based medicine.[8]

And yet, the reforms were also responsible for the development of expensive drugs targeted, variously, to African Americans, certain ethnic groups, and women on the basis of questionable science.[9] And they ended up producing distinctively individualized understandings of group inequalities, even by genomic scientists who were committed to the notion that health disparities reflected social conditions.[10] In these respects, the reforms failed to lessen inequalities in health.

What explains these paradoxical results? When reformers called on medical researchers to compare drug effects and biological processes across racial groups, they did not intend it to be the end point of analysis, with the differences attributed to putative racial biologies, rather than to experiences of poverty, stress, discrimination, and poor medical care that combined and persisted over generations. Medical researchers

themselves recognized that differences in populations were, at most, averages and therefore not easily translated into treatment for individuals. So why were those views sidelined in favor of essentialist and reductionist explanations that made biological difference the source of health disparities? Timing is part of the answer. The fields of genomics and of ethnic and racial health disparities emerged at the same time, and the former energetically and effectively staked a claim to the latter.[11] Pharmaceutical companies' economic interest in biologically reductionist conceptions of difference is another part of the answer.

But we focus on yet another development. Reformers and researchers knew the federal categories – American Indian or Alaskan Native, Asian or Pacific Islander, Black, White, and so on – were administrative, not biological. They justified using these categories in research nonetheless because of how they fit them into a longer history of reform. As researchers and reformers saw it, treating race *as if* it were a discrete biological category was part of the effort to bring about a racially egalitarian society, and it was temporary: the development of "personalized medicine" would make reliance on group categories as proxies for genetic variation obsolete.

However, those justifications for using race as a research category had the effect of keeping in circulation folk understandings of race as discrete groups whose biological traits matched their physical appearance and were passed across generations intact. These folk understandings persisted alongside newer nontypological understandings of race, even after the much-vaunted individualized treatments became available. Moreover, insofar as cutting-edge genomicists pushed beyond stereotyped understandings to view race in terms of statistical continuities in

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gene frequencies, the individualizing approach that came with that view – again, enabled by a narrative that race would become obsolete – made it more difficult to recognize difference as the result of group inequalities. Paying attention to the ways in which reformers and researchers historicized the reform, and the categories that made it up, thus helps to explain the otherwise surprising embrace of essentialism by people who were sensitive to its dangers.

*The policy process.* To call efforts to reform biomedical research a "movement" risks overstating its grassroots character. While grassroots AIDS, feminist, and disease advocacy groups both raised public consciousness and served as models for how to bring publicity to bear on legislators, the key actors in pressing for reform were professionalized advocacy organizations and establishment insiders: staffers at the National Institutes for Health (NIH), the world's largest funder of biomedical research, and the Food and Drug Administration (FDA), which licenses new therapies for sale.[12]

Women's health advocates' first wins were a 1985 Department of Health and Human Services report calling for more research on women's health, and a 1986 policy encouraging NIH-funded clinical trials to include women.[13] When the report and the policy were largely ignored by researchers, a new advocacy organization, the Society for the Advancement of Women's Health Research, joined with the Congressional Women's Caucus to push for reform. Advocates took advantage of the fact that the NIH was up for reauthorization to include provisions in the bill for women's inclusion in health research.[14]

The text of the reauthorization bill initially referred only to women. However, the Black Congressional Caucus had focused on racial disparities in health outcomes since a federal task force in the mid-1980s cited sixty thousand annual "excess deaths" among African Americans.[15] The Caucus called for the inclusion of racial and ethnic minorities in the bill to combat those disparities. Accordingly, reformers added "and minorities" to the reauthorization bill.[16]

The NIH Reauthorization Act passed in 1993. The FDA followed suit, eliminating barriers against the inclusion of women in testing in 1993 and, in subsequent years, issuing guidelines that called for the inclusion of women and minorities in testing, the assessment of drugs' safety and efficacy across subpopulations, and the reporting of race and ethnicity information in applications for FDA drug approval. In 2001, the NIH mandated the use of federal categories in reporting race and ethnicity: American Indian or Alaskan Native, Asian or Pacific Islander, Black, White, Hispanic origin, and not of Hispanic origin.[17] From that point on, what sociologist Steven Epstein calls "the inclusion and difference paradigm" diffused through other federal bureaucracies, the pharmaceutical industry, and biomedicine generally.[18] Researchers should seek to include diverse groups in their studies and they should compare biological processes and treatment effects across those groups.

*Historicizing equality.* If one's concern were with racial disparities in health outcomes, why focus on differences in how blacks and whites metabolized a protein or responded to a diabetes medication? No one was claiming that race as a variable impacted, say, the progression of heart disease more than income or insurance status did. And insofar as race was associated with patterns in heart disease, was that not likely to be as a result of poverty, stress, discrimination, and other social factors? Viewing health disparities in terms of biological difference risked

raising one dimension of difference into the sum total of the explanation for those disparities. It risked shifting attention away from the social and economic causes of health disparities.[19] There was another risk. Often, the subgroup comparisons that the reforms required did lead to the identification of differences, but these were in group averages. For example, one meta-analysis of clinical trials of antihypertensive drugs found that although whites on average responded better to beta blockers than blacks did, and blacks on average responded better to diuretics than whites did, 80 to 95 percent of blacks and whites had similar responses to both treatments.[20] Treating the average differences as categories might lead to improper treatment for any one individual. Moreover, even if the reason for a documented difference was unclear or spurious (often, subsequent studies revealed no difference at all), pharmaceutical companies could then market the treatment to the group.[21] As we will show, this ended up being more than an abstract risk.

That women's advocates were relatively indifferent to the risks of emphasizing biological differences is perhaps not surprising. The Society for the Advancement of Women's Health Research, which led the reform effort, was firmly committed to the project of sex-based medicine, which it pursued into the 2000s.[22] The greater surprise is that concerns about biological reductionism were not voiced by advocates for people of color. Like women's health reformers, minority health reformers were mainly medical professionals who favored a biomedical rather than a public health perspective on minority health generally.[23] Still, after World War II, scientists had largely abandoned biological conceptions of race and accepted social scientists' view of race as a social construct.[24] Why did researchers and

reformers now embrace the inclusion and difference paradigm's reliance on ostensibly biological categories of race? And why was the use of racial categories not criticized more forcefully as the paradigm diffused across science, pharmaceutical development, and medicine?

To be sure, there were some critics. Otis Brawley, who headed an office of "special populations" at the NIH, opposed the Revitalization Act for "foster[ing] the racism that its creators want to abrogate" by relying on essentialist conceptions of race.[25] Later, especially with the introduction of race-targeted medicine, charges of "racial profiling" in medicine began to surface.[26] Still, the fact that medical researchers, pharmaceutical executives, policy-makers, and advocates for racial and ethnic minorities so enthusiastically embraced the use of racial and ethnic categories in medical research and drug testing deserves explanation.

The explanation lies, in part, in two accounts of the place of race in biomedical research that circulated during this period. Both accounts were historical, although one was about the future more than the past, and the other was embedded in the very categories themselves rather than recounted explicitly. Invoked by advocates, policy-makers, administrators, researchers, and pharmaceutical executives, these accounts defended essentialist conceptions of race against critique.

In one account, subgroup comparisons were harnessed to the cause of racial justice. The categories themselves were a legacy of the civil rights movement: they were first used by the Equal Employment Opportunity Commission, which was created by the 1964 Civil Rights Act to combat workplace inequality. The categories were thus not only administratively familiar, but also associated with the cause of racial equality. The categories' political past and purpose thus

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legitimated their use in biomedical research. Leaders of the Human Genome Project, for example, initially rejected race as a valid biological category, insisting that all DNA was "equal" and relying on DNA samples of convenience from around the world. After the institutionalization of the federal standards, however, project leaders began to claim that genomics could combat racial and ethnic health disparities.[27] Genomicists abandoned their earlier unwillingness to recognize genetically meaningful racial categories as they promised to identify the racial and ethnic basis of disease susceptibility. They used the language of "social justice," according to sociologist Catherine Bliss, "a kind of health-focused Affirmative Action."[28]

At the same time, and this was the second historical account, the use of race in medicine was treated as a "way station," a "step," a "phase," a "temporary stage" between a past of one-size-fits-all medicine and a future of treatment tailored to each individual's genetic makeup. As an official at the FDA put it, to treat race as biological was a "stepping stone" to "target treatment."[29] Even researchers who criticized the concept of race wrote: "There is potential utility in using race labels as a surrogate for genetic information, as a means to the ultimate goal of individualized therapy."[30] In this account, researchers justified treating race as a bounded concept because it was only for the short term.

*Race-based medicine.* Accounts connecting the use of biological concepts of race and ethnicity to the past of civil rights activism and the future of individualized medicine were evident in the announcement of the first of several race-specific drugs. The FDA proudly hailed BiDil, a treatment for congestive heart failure in self-identified black Americans, as "a step toward the promise of personalized medicine."[31] The National Association for the Advancement of Colored People (NAACP), the oldest American civil rights organization, partnered with the drug's manufacturer to help company representatives promote it in black communities.[32] For the NAACP, as for the federal government, BiDil was an advance for the cause of individualized medicine and an advance toward a society characterized by racial equality.[33]

In fact, it was neither. When researchers first came up with the drug, which combined two generic vasodilators, they sought approval for it from the FDA for general, not race-specific, use.[34] Because the study they cited had been conducted for purposes other than testing the drug and lacked proper statistical controls, however, the drug was not approved. But at that point, researchers noticed that the small number of African Americans enrolled in the study seemed to have benefited more from the drug than others. (As we noted earlier, it is not uncommon to see subgroup differences that turn out to be spurious.) Researchers sought a patent for the drug and conducted a larger study, enrolling only African Americans. The drug showed such benefit to subjects relative to a placebo that the study was ended early and BiDil was approved in a dramatically shortened review for self-identified blacks suffering from congestive heart failure. The drug was priced at six times the price of the two generic drugs that made it up and Wall Street analysts predicted sales of $1 billion by 2010.[35]

Despite the FDA's bold proclamation that BiDil was an advance for personalized medicine, no genetic mechanism accounting for BiDil's effectiveness was identified. Rather, self-identified race was accepted as a proxy for unexplained genetic variation. This was true even though the study provided no evidence that there *was* genetic variation.

After all, the study included only African Americans.

Although BiDil's profitability did not live up to expectations, drug companies developed and marketed other ethnic- and gender-targeted drugs to capitalize on the potential for niche-based marketing that BiDil revealed.[36] There was certainly a financial motivation to believe genetic differences caused racial health disparities. However, BiDil was embraced not only by pharmaceutical companies, but also by federal government officials, medical professionals, scientists, and advocacy groups. Again, an essentialist conception of race became acceptable, both in the development of BiDil and, more broadly, because it seemed to be a temporary measure on the way to a postracial science in a postracial society.

Yet these essentialist understandings of race were not temporary. Even when genetic information became available that made individualized medicine possible, medical researchers still relied on racial categories. For example, in establishing the proper dosing for Warfarin, an anticoagulant, researchers found that once patients' genetic factors were taken into account, race was irrelevant to the drug's efficacy. Yet they still advised physicians to use a race-based dosing regimen.[37]

What legal scholar Jonathan Kahn calls the "inertial" power of race is also evident in interviews with primary care physicians in the 2010s about their views of genomics. Physicians talked frequently and confidently about personalized medicine being "just down the road" or "coming down the pike": again the story of future promise.[38] None of the fifty-eight physicians who were interviewed actually used genetic testing. But they did pay attention to family ancestry – when the patients were white. When the patients self-identified as Black, Asian, and/or Latino, they paid attention to racial and ethnic group

physical markers. Physicians took racial appearance as a proxy for genetic variation in people of color. As one physician explained:

> The Human Genome Project has proved beyond a doubt that African American males get prostate cancer at younger ages, African American hypertensive patients respond better to certain classes of medications. So to operate blindly, literally, blind to the ethnic and racial is, I think, ridiculous. Because the medical science is there now to say, "No you have to consider it." … You know, "You happen to be Black so we should put you on this."[39]

The Human Genome Project showed none of this. But the story of individualized medicine on the horizon justified physicians' folk understandings of race in the meantime.

Indeed, when the researchers asked physicians what would make genetic science more useful to their clinical practice, fully 20 percent of respondents skipped personalized medicine altogether and asked for more guidance on how to treat people differently by race. One commented, "When they develop drugs, if they could tell us how the drugs react with different races. We already know that some diseases are more prevalent in different races. So to know the effects that drugs have on different races would be quite useful."[40] In other words, the notion of a future of personalized, "precision" medicine made acceptable the use of racial categories in the present, but it also sat comfortably alongside the assumption that such categories were not historical but biological, and thus timeless. Because race is still so deeply embedded in American institutions, it remains, as anthropologist Claude Lévi-Strauss would have put it, good to think with.[41] Stories of the categories' history and their provisional status in medicine

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accompanied rather than undermined beliefs about their naturalness.

*Genomicists construct race*. By the early 2000s, many genomicists had broken decisively with a view of races as discrete categories.[42] And contrary to early predictions that they would ignore the social causes of health disparities, genomicists have sought to capture the interplay of genetic and social factors in accounting for disease and disease disparities. However, genomics research has still given short shrift to the social, economic, and political realities of race, whether because genomicists have the upper hand in collaborations with social scientists or because efforts to understand gene/environment interactions define and operationalize "environment" in ways akin to a gene: an individual attribute that produces health risks at the molecular level.[43]

Interesting, in this regard, are genomicists' relationship to the classifications created by the NIH reform. The researchers interviewed by sociologist Janet Shim and colleagues used the NIH categories for the sake of convenience.[44] But they also criticized the categories for arbitrarily lumping together people of diverse ancestries and experiences. Researchers were more excited about the use of Ancestry Identity Markers (AIMs) to classify subjects. AIMs identify proportions of an individual's genetic ancestry originating in different geographical regions. Researchers' excitement stemmed not from the immediate utility of AIMs (which have not yet provided clues to disease risk), but from the prospect of a classification system that reflected the precise and unique genetic makeup of individuals in a world, they said repeatedly, that was becoming more ethnically diverse and multiracial. AIMs had social and ethical value because they captured the complex mix of ancestries in any one individual. They had value, in other words,

insofar as they described a future world, a world that researchers referred to admiringly, in which individual differences would eclipse group-based ones. For Shim and her colleagues, the danger was that researchers' valorization of a measure capturing the ancestral complexity of an individual *as an individual* made it easy to skip over the disease risks that people confronted as members of *groups*, risks that arose from discrimination, poverty, environmental toxicity, and so on. Once again, difference was dehistoricized; made into a characteristic of individuals rather than the outcome of unequal relationships. And once again, that dehistoricizing tendency was made possible by a story that was told about a future free of group-based inequalities.

*Difference and history.* Scholars have argued that efforts to alleviate inequality by recognizing disadvantaged groups' difference from advantaged groups inevitably stigmatizes that difference. But in this case, as in the two others, that denouement was not inevitable. Rather, it owed to the ways in which the emphasis on difference was accounted for historically. Scientists, policy-makers, and advocates knew race was a historical and political category, but they believed they could treat it as a fixed and biological one because doing so would help advance a racially just society, and because they would only do so temporarily. However, these understandings of what it was that they were doing, and how long they would be doing it for, made it difficult to challenge those who believed race was a "natural" category.[45] When genomicists later rejected the notion of race as a discrete category, their ability to develop classificatory tools that prefigured a world in which individuals were equally diverse made it easy to ignore the continuing salience of race as a group category. In both cases, the stories that reformers and researchers

told about the past and especially the future of race and inequality made it more difficult to combat racial inequalities in the present.

Varied understandings of historical cause and ideal future likewise impacted gender policy in the European Union. The European Union paid precocious attention to equality between women and men; the 1957 Treaty of Rome included Article 119, a commitment to "maintain the application of the principle that men and women should receive equal pay for equal work." But the constitutional treaty said nothing about how to achieve equality, and the sameness/difference dilemma confounded policy actions over decades.[46]

Should women be treated the same way as men via equal treatment or did historically generated gender inequalities require different treatment to achieve equal opportunities? This second position eventually became a call for "positive action" in the form of preferential treatment (quotas on company boards or political party lists, for example) or neutral treatment that would benefit women most (childcare available to all employees, for example).[47]

Each of these positions historicized claims and actions differently. The temporal horizon was short for those embracing the equal-treatment strategy. The relevant difference was essentially the sex of individual workers, and the source of inequalities was discrimination against women in the employment office or workplace. The horizon of those calling for positive action was longer. They identified recurring cultural and socioeconomic processes as the causes and perpetuators of unequal gender norms and relations. To remedy inequality, then, would require intervening in that range of processes. For them, antidiscrimination policy efforts could be only part of a much larger agenda of necessary interventions.

In the first decades of the European project from the late 1950s through the 1970s, feminists claimed and policy-makers addressed inequality via equal treatment. But then over the following decades, feminists pushed the EU to institute programs to advance their vision of equal opportunities, which was derived from second-wave feminists' use of the concept of difference in theorizing gender inequality.[48] And they were quite successful. Feminists worked for several years to prepare important policy changes.[49] Programming and funds followed.[50] Through the 1990s, the broader agenda and its understanding of the historical roots of gender difference and inequality seemed to predominate, but it was ultimately pushed aside in favor of a return to an antidiscrimination approach.

*The policy process – stretching history.* The 1970s was the era of equal treatment.[51] Direct discrimination could supposedly be overcome with legislation requiring equal treatment; five EU directives between 1975 and 1986 sought to do this.[52] But feminists and some EU institutions knew that discrimination did not have to be direct to have real effects. By the early 1980s, the European Court recognized the possibility of indirect discrimination and propounded the concept of "disparate impact" on women and men, measured statistically, while the European Commission came to understand that apparently neutral measures could have a "preponderant effect on workers of a given sex."[53]

These measures shared the goal of ensuring that women could function in the labor market in the same ways and under the same conditions as men. In order to achieve the capacity to function like men, they might require some recognition of bodily difference (pregnancy, childbirth,

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size and strength standards for jobs, and so on). But the overriding goal was to reach similar levels and kinds of labor force participation by eliminating discrimination against the category "woman." The general strategy was to limit corrective actions to employment. The presumption was that women arrived at the employment office or the workplace unencumbered, and that discrimination arose from inappropriate actions of employers or coworkers. These actions could be discouraged by making discrimination – direct and indirect – illegal.

There were, however, feminists already working in the Commission and elected to the European Parliament who promoted other views on the sources of gender differences and inequality. Already by the late 1970s, they were working with feminists outside the European institutions to develop policies in line with a more historicized understanding of women's inequality. They understood that "equal treatment of unequals only reproduced the existing inequality between women and men."[54] Changing such norms and practices required positive actions that recognized, and could ultimately overturn, the historical positioning of women as unequal because of the gender roles assigned to them.

Ironically, even as the Commission authorized only a narrow view of the sources of women's inequality, it provided institutional support for Eurocrats within EU institutions and in alliance with civil society feminist groups to promote actions that were more ambitious. In line with usual practice, the existence of directives required that the European bureaucracy engage in institutional stabilization of its approach.[55] A first step was the creation of a Women's Bureau (later the Equal Opportunities Unit) to monitor member state compliance. That unit developed close ties with the increasingly feminized European Parliament and its Committee on Women's Rights and Gender Equality (FEMM). It also had strong connections with social movement organizations, particularly those based in national women's movements or fostered (or at least supported) by the EU itself.[56] In search of legitimation strategies to overcome the widely evoked "democratic deficit," the EU provided plentiful funding for transnational organizations, including the European Network of Women, the European Expert Network on Women in Decision-Making, and the European Women's Lobby (EWL), which was created and funded by the EU in 1989 as an umbrella organization for national-level women's groups and an active intervener in policy discussion and design.[57] Generous research grants also went to academics studying gender relations, whose results circulated back to the Equal Opportunities Unit and the EWL via conferences and meetings organized by the Commission. The Equal Opportunities Unit policy machinery also included several European networks on equal opportunities funded by the Commission to recruit outside expertise.[58] The outcome was a dense network of activists, advocates, elected officials, and feminist Eurocrats that stood behind an agenda of equal opportunities.

Many in this network identified a historical source of gender inequality that reached well beyond discriminatory practices in the labor market. They argued that by the time women approached the factory or office door, historically powerful social and cultural effects already situated them in a position of "difference" that made formal commitments to equal treatment far too limited a tool to create equality. Commitments to human rights, important as they were, were insufficient to overcome the conditions of women's and men's lives, including

the cultural norms about care and parenting and male superiority that underlay the social construction of gender relations. They adopted the by-then standard feminist position that the unequal distribution of responsibilities for care – for children, vulnerable family members, the house – needed to change, as did cultural values that diminished women and their contributions to work and society, which were in turn often made through care work. Women needed access to political and cultural as well as economic power. For example, pressed by FEMM and the Parliament more generally, the Commission's Action Programme (1991–1995) asserted that the member states needed to go beyond attention to equal pay to promote the active participation of women in decision-making.

A network of collaborating feminists sought to move the agenda out of the narrow realm of jobs (pay, benefits, and working conditions) and called for a broader understanding of the many spaces where inequality was socially constructed.[59] This understanding of the historical nature of inequality led to policy demands for childcare support, parental and maternity leaves, as well as protection from sexual harassment, overcoming cultural stereotypes and stigma, and increasing women's involvement in decision-making. All of these policy demands were significant themes in the Action Programmes through the 1990s.[60] Such changes could, feminists claimed, alter the behavior of men and male-dominated institutions so as to provoke a cultural revolution in practices, within families and civil society alike.[61] Feminists targeted the distribution of care work, particularly the "double day," and claimed "sharing" of care was an essential outcome they could promote through good policy design.[62] They pushed, for example, for parental leaves that gave fathers

incentives to take time off from work to care and thereby develop more responsibility for children. They argued for gender quotas in elected and civil-society decision-making, and they pressed for more women in leadership positions in business and science. For these feminists, meaningful equality required overcoming long-standing differences between the lives of women and men.

Feminists in these networks kept up pressure to harness the influence and power of Europe to make cultural change; at the start of the 1990s, EU institutions responded.[63] Much of the EU institutional machinery and several member states nonetheless continued to reject any historical narrative of the inequality-generating norms and consequences of family relations and care work. Thus, even as the network concerned with gender equality grew more dense, proposed directives (legislation) were weakened and "often turned into much less potent recommendations and resolutions."[64]

The preference for an ahistorical understanding of inequality was strong. For example, because the European Court of Justice saw its jurisdiction as covering only work, and therefore only workers, it refused "to resolve questions relative to the organization of family life or to modify the distribution of responsibilities within the couple."[65] The Commission and Council seemed to agree with the Court about not crossing the public-private divide. In the context of rising neoliberalism that turned individual rights and market fundamentalism into the new common sense, proposals that involved social engineering to change gender relations in the private family or private sector provoked skepticism. EU enlargement did not help: a more diverse set of member states made finding consensus even more difficult. It was easier to maintain a short temporal horizon

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focused on employment offers and hiring than to tackle concerns about the conditions under which women might undertake an employment search, or about the type of job they might consider desirable given their circumstances. This horizon ensured families' decisions about reconciliation of work and care responsibilities stayed in the "private sphere." At the same time, however, and in line with the goal of making women workers more like men, increasing support for childcare was justified as removing a barrier to employment. In this policy pirouette, the treatment of gender inequalities was assimilated into other hindrances to employment, for men as well as women, that required various kinds of policy tools, such as training, human capital investments, and other actions designed to overcome blockages to the EU's economic development. Policies to improve reconciliation of family and work appeared as "an element contributing to a good working environment for all."[66] This sidelined other norms and relations that shaped women's lives before they appeared at work or during their double day of care for family and home.

*Other movements, other times.* By the late 1990s, childcare and practices to promote equal opportunities had become policy tools that enabled rates of female employment to rise significantly but were stripped of broader goals to alter cultural and social norms. Or rather, the focus was on changing women workers' behavior, not changing male workers' behavior. By then, moreover, member states were generally disgruntled about overly ambitious social goals pursued by the Commission.[67] Therefore, less ambitious actions to promote gender equality conformed to the EU's concentration on market-building and ensuring the labor force needed for it.

The EU's formal commitment to equality between men and women was never jettisoned, however; indeed, major attention to preventing violence against women was added in 1997 and continues today. There was also a reinforcement of the reliance on equal treatment as the policy solution.[68] This return was not only because of retrenchment in the social domain, but also because from the late 1990s into the new century, multiple social movements that focused on structured inequalities and claims for inclusion had joined the conversation about sameness and difference. Movements for sexual rights, antiracist movements, and movements of immigrants and Roma all mobilized around claims for antidiscrimination protections and equal treatment in the labor market and beyond (for example, in family law about marriage and adoption). Moreover, activists had made intersectionality a common theme, as they argued for the multiplication effects of cross-cutting and reinforcing inequalities. For many activists, social categories were fluid, rooted not in social structures but in identity, whether of gender, sexual orientation, ethnicity, or race. These movements also demanded recognition and inclusion as proponents and protectors of equality for numerous categories of individuals, and they began to gain political space (and funding) in the European institutions.[69]

As social movements' approaches to identity and equality diversified, the feminist movement itself divided. Some feminists resisted this shifting focus toward a multiplicity of diversities and their intersections. Instead, they adopted a "parity" stance, in which they essentialized difference when making claims to equal numbers of women and men in political representation. This position was announced in the Athens Declaration of 1992, a document signed by twenty prominent feminists after a summit organized by the European Women's Lobby, the Expert

Network on Women in Decision-Making, and the European Commission.[70] The parity movement that emerged after Athens argued that gender difference was biological and binary. In this way, adherents of the parity position made a significant change; they dehistoricized where previously they had insisted on historically constructed gender inequalities. For them, the world was divided into two sexes, a division they took as fundamental to humankind. It thus merited unique treatment in representation.[71] The parity movement embraced one difference as different from all others, and based claims for equal access to political power on that difference. Other social movements contested this narrative that elevated biology to primordial status, even when its application was limited to elections. These social movement organizations disputed the very binary of female and male. In their own claims-making, these movements sought equal civil rights for their chosen identities and protections against discrimination.

In other words, by the late 1990s, there was no standard social movement narrative motivating claims for gender equality and equal treatment.[72] For some, the problem remained inequalities in the gender division of labor, both in employment and in the family, and positive actions were required. For others, the problem was racism, and antidiscrimination measures were needed. For yet others, it was antipathies to sexual difference and respect for sexual orientation, and equal rights was the solution. And even for some, the issue was the cultural embeddedness of certain religions in European history, and greater willingness to accept cultural difference was needed.

This variety enabled EU institutions to continue to drive toward bundling multiple differences together under a diagnosis of the need for equal treatment. In the mid-1990s, Article 13 of the 1997 Treaty of Amsterdam confirmed the constitutional competence of European institutions to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Although Article 2 of the same treaty insisted on one form of inequality ("In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women"), inequalities between women and men quickly became one of several forms of inequality, rather than the priority. The EU assumed a "similarity of inequalities."[73]

In its policy actions, EU institutions dusted off the antidiscrimination equal-treatment stance initially developed for women in the 1970s in order to apply, elaborate, and institutionalize it with respect to race and ethnic origin. In 2000, two directives legislated the requirement for member states to implement more stringent equal treatment with respect to race and ethnicity than had previously been done for gender; in effect, the requirement, for the first time, reached well beyond labor market considerations. Four years later, a matching directive for gender discrimination narrowed down broad feminist demands, thereby revealing "that anti-discrimination had become the driving area at the European level and that gender equality policy had to conform to this anti-discrimination model."[74] All used an equal-treatment approach.[75]

With these actions, the EU moved back to "a rights-based, anti-discrimination approach [that] necessarily involves an individualist approach in the EU context."[76] This position avoided conflict with many social movements, for which intersectionality and the fluidity of difference were to be celebrated. They defined lived experience as fluid and

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identities as multiple, generating claims of the right to be different in multiple ways. Gender equality had been folded into ongoing, well-rehearsed antidiscrimination discourse that relied on rights-based frames to achieve "sameness" of rights. While "history" had a place in each narrative, it was not the same history. Each located the source of women's disadvantage along a different historical trajectory; in turn this oriented them toward a distinct future horizon.

Our third case study of the process through which Canada constitutionalized "Aboriginal and treaty rights" complicates our story in interesting ways. Here, the sameness/difference dilemma was mapped out not simply onto the binary of individual/group rights, but onto plural sovereignties. Although Indigenous actors eschewed the vocabulary of equality, they sought a kind of equality among nations. Arguments for plural sovereignties challenged the federal government's foundational assumptions about the basis of the nation's legitimacy. This was – and remains – a big ask.

In the early 1980s, many observers saw Canada at the global forefront of efforts to reconcile difference and equality within its legal order. Canada was the first country to constitutionally protect multiculturalism and its wide-ranging bill of rights incorporated language, education, Indigenous peoples, and gender equality.[77] Its Constitution Act (1982) comprised the Charter of Rights and Freedoms, which guaranteed equal rights to individuals, and also section 35 (s.35), which constitutionally entrenched the group rights of Indigenous peoples. This was, in the words of political scientist Kiera Ladner, a "monumental achievement" for Indigenous peoples.[78] The prophylactic outcome alone was important: combined with section 25, s.35 prevented

diminishment of Indigenous rights under the Canadian legal order.[79] More expansively, s.35 was considered by many at the time to be a "box of treasures" poised to advance legal pluralism and decolonization.[80] On several counts, s.35 appeared a victory. The government squared group rights with its commitment to individual equal rights. Indigenous peoples spoke up and prevented diminishment of their rights. All this was a full quarter of a century before the United Nations Declaration on the Rights of Indigenous Peoples.

Yet s.35 has fallen short of these anticipated gains. Since 1982, Indigenous peoples have had relatively little success attaining self-government or acquiring jurisdiction over their territories. Facing profound limitations and inertia at government negotiating tables, Indigenous peoples have pursued their rights incrementally through the courts. Scholars debate whether s.35 has done harm or good. For some, it is an "empty box"; for others, it is "another colonial disaster" that limited Indigenous freedom.[81] Thus, Ladner sees it not only as a "monumental achievement," but also as a "monumental defeat"; in other words, "an Indigenous constitutional paradox."[82]

We can unlock this paradox if we situate it in time. Careful attention to what came before and after the constitutional struggles shows that Indigenous leaders and federal politicians did not simply have competing policy agendas. They engaged, rather, in fundamentally distinct historical projects. Every side (and there were more than two) sought to implement its own concept of sovereignty rooted in its own constitutional order, an order whose primacy each side took for granted. They came together from different places; having met, they headed again toward different destinations.

This divergence results from Canada's settler colonial status. Any democratic

settler state in pursuit of equal rights for citizens confronts a contradiction: its existence as a nation that champions equality depends upon abrogation of Indigenous rights and occupation of Indigenous lands. In settler states, serious friction exists between equal individual rights and the rights of original peoples. Like citizens of other settler states, Canadians have been slow to acknowledge this friction.[83] Conflicts between group and individual rights are not unique to Indigenous struggles: in Canada, feminists and Québécois nationalists likewise have challenged individualized definitions of equality in favor of collective conceptions of historical disadvantage and contemporary rights. Yet the stakes of Indigenous struggles remain distinct because they question the settler nation's claim on democratic values in any form, individual or collective.

The constitutional conversations of the 1980s became a way station – albeit an important one – that failed to divert any of the parties from its own historical pathway onto that of another. Each subsequently resumed course on a distinct time line that stretched forward to its own anticipated horizon: Canada toward a multicultural nation rooted in singular sovereignty; Indigenous peoples toward self-determination embedded in plural sovereignties.

*The reform effort: Converging and diverging time lines.* Prior to 1982, only the British Parliament could alter the Canadian Constitution. In the late 1970s, Prime Minister Pierre Trudeau sought to change this. The Constitution was a double-sided plank in Trudeau's equality agenda: with it he sought to guarantee equal rights and to sever residual colonial ties to Great Britain. In Trudeau's terms, the former task advanced equality among individuals; the latter equality among nations.

For Trudeau, Confederation (1867), the Bill of Rights (1960), and the Human Rights Act (1977) were signposts along the way to the human rights–based legal order that he sought to institutionalize.[84] Patriation was the necessary next step. His anticipated obstacles lay in Quebec and the Western provinces; Indigenous peoples were not on his radar.[85]

Indigenous activists and leaders traveled a different road to the constitutional discussions and protests of the late 1970s. For Indigenous peoples, treaties, declarations of alliance, wampum belts, territorially based practices – in short, their own legal and constitutional orders – marked the time line that led to the present moment. Moreover, activists and leaders of the 1970s were the first in a generation to grow up when political organizing was not illegal. Their generation had first mobilized to defeat the 1969 White Paper, another of Trudeau's equality proposals. The White Paper proposed to eliminate legal distinctions – including treaties and reserves – between Indigenous and non-Indigenous people. The White Paper was the liberal tradition's "equality as sameness" par excellence, and Indigenous activists resoundingly rejected it. For these leaders and activists, the source of Indigenous inequality lay neither simply with disregard for the human rights of Indigenous individuals, nor with the existence of their collective differences. It lay with the settler state's denial of their collective rights and order as Indigenous *peoples*. The White Paper's individualizing impulse toward sameness, they argued, would not render them equal to Canadians, but would instead culminate longstanding assimilation efforts.

And so, in Trudeau's efforts to patriate the Constitution, Indigenous activists perceived a new threat to an ongoing movement.[86] But in addition to a threat, they saw opportunity. They seized upon the national interest in Trudeau's agenda to attract publicity and international

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attention to their cause. Indigenous leaders astutely turned the trajectory of their long-term self-determination project to intersect with the federal constitutional program. Thus, the constitutional protests and negotiations prior to 1982 became moments of convergence engineered by Indigenous strategists between distinct historical time lines.

Indigenous leaders and activists who turned to engage the federal patriation agenda were diverse; there was no single "Indigenous movement." Multiple Indigenous agendas intersected with the federal one, each grounded in its distinct historical trajectory. Coalitions formed, dissolved, and re-formed multiple times over the course of the constitutional debates and protests.[87]

Indigenous diversity – political, cultural, economic, linguistic – predated European arrival. Nineteenth- and twentieth-century colonial and state powers drew new distinctions (and thereby new differences) among Indigenous peoples based on factors ranging across an individual's gender, marital status, place of residence, education, and treaty status. By the 1970s, such legal distinctions were generations-old lived experience. By this time, an Indigenous individual might find that Canada understood her to be a "status Indian" (under the Indian Act), an Inuit (an "Indian" under the British North America Act of 1867, but not under the Indian Act), or, if the state denied her indigeneity altogether, a "non-status Indian" or Métis.

These historically produced categories carried material implications. The stakes of what stood to be lost or gained varied by one's historical experience. Accordingly, many who sought to make their voices heard used these categories as their basis for political organization. Three nationwide Indigenous organizations existed in the late 1970s: the National Indian Brotherhood (NIB) represented status Indians; the Native Council of Canada represented off-reserve, non-status, and Métis people; and the Inuit Committee on National Issues represented the Inuit.[88] Provincial- and tribal-level organizations also played important roles, as did the Native Women's Association of Canada.

Each organization's position shifted over time, as did relations between membership and leadership. All organizations shared at least one thing in common: a claim to differential treatment as the remedy for present-day legacies of injustice. They rejected the antidiscrimination tenet that being treated the same as other individuals within the Canadian polity would generate equality for them. They demanded instead to be treated in ways that were the same as, or at least analogous to, other nations. While Canada sought national maturity by cutting its colonial ties to Great Britain, Indigenous peoples brandished their historic ties to the British Crown as evidence of their jurisdictional and self-government powers.[89]

Beyond this commonality, the path forward was unclear and contested. Some organizations believed constitutional entrenchment of their rights would preserve nation-to-nation status; others believed it would be its death knell. Leadership struggled to stay aligned with shifting views among members, many of whom engaged in large direct-action campaigns and street protests. If we situate Indigenous peoples in time, these shifting positions are unsurprising. But government actors held an ahistorical orientation that branded such differences as factionalism; they expected Indigenous organizations to work in concert. This was only sometimes possible.

For example, the NIB was the first organization to intervene. In 1978, it demanded entrenchment of Aboriginal and

treaty rights and a seat at the negotiating table. The federal government responded with an invitation for all three nation-wide organizations to attend upcoming first ministers' meetings as observers.[90] To the extent that it conceded a measure of Indigenous participation in the process, the federal government sought a single solution for distinct Indigenous groups where none existed.

Each organization responded to opportunities to engage with government in its own way. The NIB launched a campaign that put its nation-to-nation claim into practice. In July 1979, it led several hundred delegates to London to petition the Queen to block patriation. At its 1980 general meeting, it adopted the "Declaration of First *Nations.*" And in 1982, it re-formed into the "Assembly of First Nations."[91]

The NIB allied with the Union of British Columbia Indian Chiefs (UBCIC), an organization of nations with unceded, untreatied territories. The UBCIC was adept at mobilizing direct action and attracting media attention. They launched the "Constitution Express" train that gathered protesters as it traveled from Vancouver to Ottawa. Like the NIB, they developed tactics that enacted their self-conception as nations. They strategized a British court action and sent delegations and petitions to the United Nations in New York, the International Court of Justice in the Hague, the Fourth Russell Tribunal on the Rights of Indians of the Americas in Rotterdam, and the World Council of Indigenous Peoples in Canberra.[92]

Colonialism rendered it less straightforward for non-status peoples to demand and exercise nation-to-nation status. Recognition as a "status Indian" was a form of discrimination, but nevertheless it was a position from which "Indians" might argue for their due as

members of Indigenous nations. Métis and non-status people, on the other hand, started from a different place: one in which government was reluctant to admit they were Indigenous at all. For example, where status Indians lived on reserves – tiny, remote, and barren as these were – Métis communities resided on the road allowances that the Crown set aside for road construction.[93] Whether they conceived of themselves as members of sovereign nations – as many did – the initial step for Métis and non-status people was necessarily different than for status Indians. They were a long way from equality with status Indians, let alone non-Indigenous Canadians. When opportunity arose to communicate with a Special Joint Committee of the House of Commons and Senate, the non-status organizations, as well as several tribal-level, status-Indian organizations, participated; the NIB and the UBCIC boycotted.

Indigenous organizations did not reach a lasting consensus. Nor did their efforts to halt patriation in the British courts succeed. But their direct action and legal efforts put serious pressure on federal and provincial governments.[94] Forced to respond, the government turned to constitutional entrenchment, an option that most Indigenous organizations opposed. The alternative route to nation-to-nation status, the one favored by most Indigenous organizations – halting patriation altogether – would have derailed Trudeau's ambitions. In turning their struggle to intersect with Trudeau's, Indigenous peoples had done more than cross paths; they created a roadblock.

Faced with this roadblock, the government took up the position of the minority of organizations that supported entrenchment. Other federal parties got behind it, too. The progressive federal party, the New Democratic Party (NDP), analogized across women, ethnic

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minorities, and Indigenous peoples and assumed that entrenchment would serve them all, even though each group was disadvantaged in historically distinct ways. The federal "equality as sameness" proposal that sought social justice for everyone through a single policy – rights guaranteed under the Constitution – relied upon a synchronic snapshot of inequality. But inequality existed in time; a diachronic perspective was necessary to make headway. Because groups were unequal for different historical reasons, they required different future solutions.

NDP MP Ian Waddell and the Aboriginal rights lawyer Jack Woodward helped draft the clause that became s.35.[95] Indigenous leaders and activists did not. The NDP expended its political capital for an Aboriginal rights clause that ultimately satisfied almost none of the Indigenous stakeholders; the Métis Association of Alberta was s.35's sole Indigenous supporter in the end. When the Constitution Act passed, the NIB declared a day of mourning. The UBCIC branded Indigenous participation in patriation celebrations a "treasonous act against the Indian nations and their citizens."[96]

Deeply contested, the victory of entrenchment was also inherently incomplete. S.35 created a new legal category called "Aboriginal and treaty rights." It did not, however, specify their nature or scope. This vagueness was intentional. Greater specificity would have forced to the fore the divergent worldviews, assumptions, and interests of the federal government, provinces, and Indigenous peoples that s.35 papered over. Greater specificity would likely have scuttled the clause entirely. The chosen wording shielded existing rights from erosion until agreement on the nature of "Aboriginal and treaty rights" could be reached. Section 37 of the Act mandated a series of conferences between Indigenous

representatives, the prime minister, and the provincial first ministers for this purpose. These conferences – four of which were eventually held in 1982, 1984, 1985, and 1987 – failed to significantly specify s.35's scope.

*Horizons of equality – and possibility.* The late 1970s through the final constitutional conference in 1987 was a historical moment when distinct nation-building projects intersected. A problem of scale characterized the meeting of Indigenous and government actors at this crossroads. For Trudeau, pressured by successful Indigenous lobbying and media tactics to somehow accommodate Indigenous leaders, s.35 became a necessary part of a larger whole: the effort to patriate the Constitution and pass the Charter of Rights and Freedoms. In so doing, he sought to concede to Indigenous peoples the minimum necessary to allow his own agenda to proceed. For Trudeau, the major goal – patriation – was achieved in 1982; the conferences were a formality.

For Indigenous peoples, the inverse was true. The battle over patriation was no end in itself. It was an installment in a centuries-long sovereignty struggle. For them, there was real work to do at these mandated conferences, the work of reconciling a multiplicity of Indigenous constitutional and legal orders with that of the Canadian state. These conferences were the moment when the potential promise of s.35 – unsatisfying on its own – might be realized.

Nowhere were the unequal temporal horizons and different historical trajectories more apparent than during these conferences. Participants' vastly different orientations toward the substance and stakes of the agenda doomed the meetings to failure. After passing the Constitution Act, the federal government had little political incentive to elaborate the definition of "Aboriginal and treaty

rights" in the thorough, transformative fashion that Indigenous leaders wanted. The conferences became an elaborate show in which the federal government's minimal tolerance for the exercise of Indigenous constitutional order – self-determination in the language of the day – was on display. It was easy for each side to view the other's position as unreasonable, ill-mannered, and overreaching because each side saw something different when it looked back over its shoulder, and each had its gaze fixed on a fundamentally different endpoint.

*Consequences*. After the failure of the constitutional conferences, Indigenous peoples looked to a different, more adversarial policy-making body to define s.35: the judicial system. In this setting, as in 1982, it is still not Indigenous people, but mostly non-Indigenous actors – notably, Supreme Court of Canada judges – who define the scope of Aboriginal and treaty rights. The results so far have been disturbingly restrictive and ahistorical. The Supreme Court's 1996 *Van der Peet* decision introduced a test to identify s.35 rights.[97] The test requires demonstrated continuity with precontact practices that are "integral to a distinctive culture." Consistent with other rights-based jurisprudence, *Van der Peet* defines Aboriginal rights in piecemeal fashion through protection of specific practices conducted by *individuals*.[98] It does not recognize these individuals as members of sovereign collectives. Moreover, to meet the test, the claimed rights must be found in the past. This follows an "originalist" approach that is common in the United States but infrequent in Canada where "living-tree" interpretations dominate constitutional law *except* in the area of Aboriginal rights.[99] *Van der Peet*'s precedent-setting "frozen rights" or "permafrost" approach relies upon outdated, ahistorical stereotypes of primitive,

authentic cultures. It defines the Indigenous differences that matter as belonging inexorably to the past. In so doing, it dehistoricizes Indigenous people and peoples by fetishizing their history, effectively placing them *out* of time.

The s.35 jurisprudence since *Van der Peet* has produced increasingly racially based, culturalist definitions of Indigenousness as a bundle of traits that inhere within the individual. The Supreme Court of Canada rejects the assertions of living Indigenous people that their difference inheres instead in the exercise of collective political rights. This approach is discriminatory in multiple ways and scholars have critiqued it heavily.[100] From the vantage point of today, the results of s.35 jurisprudence appear to have been foretold in 1981 by Chief George Manuel, former president of the UBCIC and the NIB, who wrote: "When the Government talks about Aboriginal Rights it means no more than our cultural rights to perform Indian dances and songs, and to make bannock."[101]

As long-time Indigenous rights activist Mildred Poplar put it, s.35 set diverse Indigenous peoples along a path not of their own making: "In some ways, s.35 has diverted our people, and the new leadership instead of fighting for our rights, is negotiating to help Canada and the provinces define them."[102] This work of definition has incorporated diverse Indigenous peoples into settler institutions that set the terms to which Indigenous people must adhere if they are to be legible to the state. S.35's affirmation of Aboriginal and treaty rights set in motion several counterintuitive maneuvers that have defined group rights in an individualizing manner; dehistoricized Indigenous peoples by relegating them to the past; and lessened rather than increased Indigenous access to freedoms enjoyed by Canadian citizens at large. As Poplar urged people to remember in 2003, "We were never

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fighting for s.35, we were fighting to preserve our Nation-to-Nation relationship, for recognition as Sovereign Nations, and to re-build and Decolonize Our People."[103] But the story is not over yet. S.35 lies within the Constitution like an "encrypted code" for realizing decolonization, thus far "the road not taken."[104]

Taken together, the reform efforts we describe differ in many ways, yet nevertheless share some instructive features. Each effort initially seemed to avoid the sameness/difference dilemma. And each ultimately fell prey to it. Our analysis shows that this outcome was not a foregone conclusion. It derived from historically contingent processes, from the ways in which political actors understood inequality in time – in relation to past, present, and future.

At a minimum, history mattered here in the familiar sense of chronology or timing. In the case of biomedical reform in the United States, the field of genomics emerged as new federal standards encouraged researchers to take up the question of race. The field of genomics, in turn, powerfully shaped the way researchers used and understood racial categories. In the case of gender policies in the EU, the sidelining of ambitions for "social Europe" and the rise of neoliberal commitments made policy-makers less likely to adopt solutions that they castigated as social engineering. In the case of constitutional reform in Canada, the federal government's rights-based liberalism generated political conditions that failed to take Indigenous peoples specifically into account, and that nevertheless provided them the opportunity to enter the national stage. In each case, the historical timing of the reform partly accounted for its effects.[105]

We have focused, however, on a more substantive, less well-recognized way that history mattered: not as a set of facts about the past, but as contested, or contestable, stories or schemas.[106] These understandings of the past shaped actors' views of the viability, necessity, and desirability of present-day actions and future outcomes. One such set of understandings identified the sources of the inequality somewhere in the past, and a second placed the reform in a future-oriented trajectory of efforts to remedy inequality. Together, they shaped and limited the practical possibilities that accompanied the reform.

In each of the cases, activists and sometimes policy-makers recognized that the unequal status of the disadvantaged group or groups had been socially produced over a long historical duration. Minority health advocates in the United States firmly believed that differences in group responses to treatment were more likely to lie in history than in biology: that is, in long-term experiences of discrimination, poverty, and associated stresses. Problems like these required reform outside the field of medical research and were unlikely to draw pharmaceutical companies as partners. That such an agenda was overshadowed in some respects by a focus on the putatively biological causes of health disparities was not activists' or policy-makers' intent. In Europe, the pursuit of a "difference" agenda by feminists in the 1980s and 1990s included significant efforts to stretch the temporal horizon of policy analysis and policy-making. They argued that longstanding social relations of gender not only placed women in social and political positions unequal to men as they sought employment and political office, but that these ongoing and historically rooted structures of inequality had to be changed by interventions that addressed power relations in a wide variety of realms before women could achieve

full equality. This history required what they called an equal opportunities policy treatment rather than simple protection against workplace and other discriminations. Indigenous activists in Canada likewise referenced centuries-long inequality-producing processes. In their case, colonialism had undermined their distinct status as self-governing nations. They sought "equality" – though they did not use that term – through a major reallocation of authority that would entail recognition of plural sovereignties within the Canadian state.

These deeply historicized arguments for recognizing difference would have changed the circumstances of the advantaged groups and disadvantaged groups alike. In all three cases, the "haves" would have been required to give something up in order to advance equality for the "have-nots." These historicized perspectives understood resources such as time and land to be finite, rather than ever-expanding. Asserting the group's difference was one way to draw attention to the deeper roots of the problem at hand and highlight the need for more thoroughgoing reforms. In this sense, demands for recognition and redistribution were fundamentally connected: to recognize the group's difference was to recognize the historical processes that produced and sustained that difference.

Yet in each case, assertions of historically produced difference either evolved into or were sidelined by essentialist claims. In the United States, the new federal standards were appropriated by medical researchers and pharmaceutical companies in the drive to identify and treat racial and ethnic diseases. The fact that all actors – reformers as much as pharmaceutical executives – embraced an account in which the identification of group-based genetic differences was a stopgap measure on the way to individualized medicine made it difficult for anyone to challenge the use of biologically reductionist and essentialist explanations for health inequalities. In the EU, feminists called for systemic change in deeply rooted and socially produced historical patterns. Antidiscrimination measures were insufficient; creating equality required interventions in private life. This stretch of public action was resisted both by institutions under the influence of neoliberalism, with a short time horizon about the source of inequalities, and by activists who rejected binary difference in gender and sexual identity and norms. This new political coalition sidelined the more ambitious reform agenda. The policy world preferred short temporal horizons and "rights fixes" matched well with fluid, cultural conceptions of identity. Indigenous activists in Canada, for their part, staked claims to dynamic, collective forms of political power and membership by invoking treaties, covenants, and proclamations from previous centuries. This activist pressure resulted – albeit unsatisfactorily and somewhat inadvertently – in constitutionally protected "Aboriginal rights." Yet when it fell to the Supreme Court of Canada to define these rights, it did so in essentialist ways that fixed those rights in a primordial past, severely limiting their material bearing on present and future configurations of Canadian jurisdiction and sovereignty.

Interestingly, of the cases at hand, Indigenous peoples alone staked a claim for permanent recognition of difference. In the other two cases, actors placed a time limit on the need to recognize difference. In the United States, differential treatment of racialized groups was meant to be a stepping stone to a future in which everyone enjoyed the benefits of individualized medicine. In Europe, the goal was to achieve the same equality for women

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and men, by means of an equal-opportunities strategy of different treatment.

In every instance, policies and/or practices were eventually based on dehistoricized – prejudicial, partial, or otherwise imperfect – understandings of the source of inequality. Each policy "victory" failed in the end to account for the processual nature of the originating and ongoing causes of inequality.[107] Each was dually myopic: in how it looked back and in how it projected forward. This was despite many activists understanding the deep historical roots of the problem and offering concrete policy solutions that could have been enacted.

What are the implications of our cases for efforts to reduce inequalities by way of government action? Our cases call for greater scrutiny of the stories circulating among reformers that link present inequalities to their past causes and future remedies. Such stories or schemas shape the reform effort's trajectory and likelihood of success, yet they are rarely laid out in full. This may be, in part, because to do so would reveal that the processes targeting some groups for remedy and excluding others are political rather than natural or consensual. Or it may reveal that members of the reform coalition in fact work from quite different stories and histories about the place of their efforts in a longer trajectory. Or it may simply be that the stories mesh with widespread, seemingly commonsensical ideas about the inevitability of progress. Whatever the explanation, our cases show that disadvantaged groups lost the most from the

failure to confront the historical assumptions embedded in these distinct stories.

Our cases also suggest the utility of reframing the so-called sameness/difference dilemma. The challenge is not so much to decide between an emphasis on sameness or difference. Rather, the challenge is to gain recognition – in policy as well as public discourse – for historically produced differences, without allowing recognition to remake those differences into a biological or otherwise timeless essence.

Finally, our cases demonstrate the risks of basing long-term, often costly policy decisions on dehistoricized explanations for inequality. Such explanations gain traction for many reasons, and often appear to point toward expedient or useful policy solutions. But as these cases show, apparent victories can fall short in startlingly disappointing ways. If inequality is recognized as a process – or better, as multiple processes – then efforts to remedy it must attend to the deeply rooted, ongoing character of those processes. Policy must combine temporal horizons: combatting discrimination in the here and now while taking account of the continuing effects of earlier exclusionary histories. Short-term policy time lines may be politically inevitable, but it does not follow that the policy, in its conception, must be tethered to short-term horizons. We insist instead that policy can accommodate deeply historicized understandings of difference; indeed, that it must do so if it is to advance equality fully, over the long term.

JANE JENSON is Professor Emerita of Political Science at the Université de Montréal. She is the author of *Defining and Measuring Social Cohesion* (2010) and *Who Cares? Women's Work, Child Care and Welfare State Redesign* (with Mariette Sineau, 2001) and editor of *Reassembling Motherhood: Procreation and Care in a Globalized World* (with Yasmine Ergas and Sonya Michel, 2017).

FRANCESCA POLLETTA is Professor of Sociology at the University of California, Irvine. She is the author of *It Was like a Fever: Storytelling in Protest and Politics* (2006) and *Freedom Is an Endless Meeting: Democracy in American Social Movements* (2002) and editor of *Passionate Politics: Emotions and Social Movements* (with Jeff Goodwin and James M. Jasper, 2001).

PAIGE RAIBMON is Professor of History at the University of British Columbia. She is the author of *As I Remember It: Teachings (ʔəms taʔaw) from the Life of a Sliammon Elder* (with Elsie Paul, Davis McKenzie, and Harmony Johnson, 2019), *Written as I Remember It: Teachings (ʔəms taʔaw) from the Life of a Sliammon Elder* (with Elsie Paul and Harmony Johnson, 2014), and *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (2005).

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