

# INEXTRICABLY POLITICAL: RACE, MEMBERSHIP, AND TRIBAL SOVEREIGNTY

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*Abstract:* Courts address equal protection questions about the distinct legal treatment of American Indian tribes in the following dichotomous way: are classifications concerning American Indians “racial or political?” If the classification is political (i.e., based on federally recognized tribal status or membership in a federally recognized tribe) then courts will not subject it to heightened scrutiny. If the classification is racial rather than political, then courts may apply heightened scrutiny. This Article challenges the dichotomy itself. The legal categories “tribe” and “tribal member” are themselves political, and reflect the ways in which tribes and tribal members have been racialized by U.S. laws and policies.

First, the Article traces the evolution of tribes from pre-contact independent sovereigns to their current status as “federally recognized tribes.” This history reveals that the federal government’s objective of minimizing the tribal land base entailed a racial logic that was reflected in decisions about when and how to recognize tribal status. The logic was that of elimination: Indian people had to disappear in order to free territory for non-Indian settlement. The Article then examines two very distinct tribal places, the Colorado River Indian Tribes’ (CRIT) reservation and the former Dakota (Sioux) Nation of the Great Plains. The United States’ policies had different effects on the CRIT (where four distinct ethnic and linguistic groups were consolidated into one tribe) and the Sioux (where related ethnic and linguistic groups were scattered apart), but the causal structures were the same. Indian people stood in the way of non-Indian possession of land and resources, and federal policies defined tribes and their land base with the goal of shrinking both. Despite these goals, the CRIT and Sioux Tribes have exercised their powers of self-governance and created homelands that foster cultural survival for their people. Like other federally recognized tribes, they have used the given legal structure to perpetuate their own forms of indigenous governance, notwithstanding the law’s darker origins.

The legal histories of CRIT and the Sioux Tribes reveal that unraveling the logic of racism in American Indian law has less to do with tinkering with current equal protection doctrine than it does with recognizing the workings of power, politics, and law in the context of the United States’ unique brand of settler colonialism. The way to counter much of the prior racial discrimination against American Indians is to support laws that perpetuate the sovereign political status of tribes, rather than to dismantle tribes by subjecting them to judicial scrutiny in a futile attempt to disentangle the racial from the political.

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## INTRODUCTION

Courts address equal protection questions about the distinct legal treatment of American Indian tribes in the following dichotomous way: are classifications concerning American Indians “racial or political?” If the classification is political (i.e., based on federally recognized tribal status or membership in a federally recognized tribe), then courts will not subject the classification to heightened scrutiny. If the classification is racial rather than political, then courts may apply heightened scrutiny. This Article challenges the dichotomy itself.

The legal categories “tribe” and “tribal member” reflect the ways that tribes and tribal members have been racialized by U.S. laws and policies. The racialization of American Indians, which served the purposes of justifying expropriation of their lands and imposing policies of forced assimilation, is today embedded in their separate political status. The political and the racial are therefore hopelessly intermingled in current legal definitions of tribes in ways that nonetheless point to the same deferential conclusion that courts currently reach. In general, courts uphold laws and policies that further the separate, and constitutionally based, political status of American Indian tribes. The upshot of this Article is that this is the best that courts can do, and to the extent they are tempted to untangle the racial from the political with respect to the status of American Indian tribes, they tread well beyond their competence and risk perpetuating the very policies that have discriminated against American Indians, and that, in general, the political branches have abandoned. To illustrate and excavate the “racial and political” conclusion, the Article visits two very distinct tribal places, the Colorado River Indian Tribes’ (CRIT) reservation and the former Dakota (Sioux) Nation of the Great Plains.

The CRIT reservation straddles the Colorado River several hours west of Phoenix, Arizona. The CRIT is a single federally recognized American Indian tribe whose members include people of Mojave,

Chemehuevi, Navajo, and Hopi descent. Today the CRIT is a successful Indian nation, with established water rights, a model riparian restoration project, and a well-functioning tribal government.<sup>1</sup> But at the time of its founding in 1865, the multi-ethnic composition of the CRIT and the idea that it could one day constitute a coherent polity was an afterthought at best. The federal government's intent in establishing the CRIT reservation was to clear the surrounding area for white settlement.<sup>2</sup> The government's objective was a political one—to gather the many tribes that called the Colorado River basin home and concentrate them in a single place. Doing so, federal officials hoped, would quiet non-Indian concerns about coming to the region. With the Indian threat removed, the southwest desert, and in particular the areas proximate to the only major water source, could be open for white business.<sup>3</sup>

In the Plains, the many bands and groups that once comprised the Great Dakota (Sioux) Nation<sup>4</sup> are today concentrated into ten federally recognized tribes in North and South Dakota.<sup>5</sup> Unlike the CRIT, who

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1. See *About the Mohave, Chemehuevi, Hopi and Navajo Tribes*, COLO. RIVER INDIAN TRIBES, [http://www.crit-nsn.gov/crit\\_contents/about/](http://www.crit-nsn.gov/crit_contents/about/) (last visited June 30, 2012).

2. See UNIV. OF ARIZ. BUREAU OF ETHNIC RESEARCH, DEP'T OF ANTHROPOLOGY, SOCIAL AND ECONOMIC STUDIES, COLORADO RIVER RESERVATION; REPORT NO. TWO: HISTORY OF THE COLORADO RIVER RESERVATION 7 (1958) [hereinafter HISTORY OF THE COLORADO RIVER RESERVATION].

3. See *infra* Part II.A.

4. Europeans derived the name "Sioux" from the Ojibwa name for the tribes to their west, *na-towe-ssiwa*, which has been variously translated to mean: "people of an alien tribe," GUY GIBBON, *THE SIOUX: THE DAKOTA AND LAKOTA NATIONS* 2 (2003); "rattlesnake," HERBERT T. HOOVER, *THE YANKTON SIOUX* 13 (Frank W. Porter III ed., 1988); "a diminutive of snakes, adders, and, by extension, enemies," ROY W. MEYER, *HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL* 5 (rev. ed. 1993); and "the Lesser Adders," ROYAL B. HASSRICK, *THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY* 6 (1964). Some scholars have criticized these translations as misconstruing the "actual historical etymology of the name," asserting instead that *na-towe-ssiwa* was used by Ojibwa in reference to the Sioux as a purely "ethnic designation" to mean "speaker of a foreign language" or "member of an alien tribe," and only later developed a secondary meaning connoting snakes. See Douglas R. Parks & Raymond J. DeMallie, *Sioux, Assiniboine, and Stoney Dialects: A Classification*, 34 *ANTHROPOLOGICAL LINGUISTICS* 233, 234 (1992). Many Sioux people (and most anthropologists) prefer to use the term Dakota, see Stephen A. Feraca & James H. Howard, *The Identity and Demography of the Dakota or Sioux Tribe*, 8 *PLAINS ANTHROPOLOGIST* 80, 81 (1963), or the native word OCeti Sakawin, see JESSICA DAWN PALMER, *THE DAKOTA PEOPLES: A HISTORY OF THE DAKOTA, LAKOTA AND NAKOTA THROUGH 1863*, at 41 (2008). This Article uses both Sioux and Dakota because most tribes still use Sioux in their official, federally recognized tribal names.

5. There are Sioux Tribes and First Nations (Canada) outside of the Dakotas as well. In Canada, there are nine reserves in Manitoba and Saskatchewan, and in the United States there are tribes in Montana (Ft. Peck), Minnesota (Upper Sioux, Lower Sioux, Prior Lake, and Prairie Island), and Nebraska (Santee). See MICHAEL JOHNSON, *TRIBES OF THE SIOUX NATION* 9 (2001). The history, *infra* Part II.B, refers to the Sioux's larger geographical presence, but information about current tribal enrollment and demographics was collected only for the ten tribes in North and South Dakota.

were forced together despite their distinct linguistic and ethnic backgrounds, the Dakota share a common linguistic and ethnic heritage and were, in some instances, scattered apart and in others mixed together. Today, an individual Sioux Indian is likely to simultaneously identify with the greater Dakota Nation; with one of the three subdivisions of the nation (Santee, Yankton, or Teton); with one of the language dialects associated with each subdivision (Dakota, Lakota, or Nakota); with one of the seven “Council Fires” (bands) under those subdivisions; with the geography and culture of her band; and, finally, with her tribe.<sup>6</sup> This self-identification occurs regardless of the federally recognized tribe in which the Dakota/Sioux Indian happens to be enrolled.

The United States’ laws and policies with respect to establishing reservations and designating which Indian peoples would reside on them had different effects on the CRIT (consolidating) and the Sioux (scattering and concentrating), but the causal structures were the same.<sup>7</sup> Indian people stood in the way of non-Indian settlement, and U.S. policies constructed tribes themselves, as well as their rights to land, consistent with the political objectives of minimizing tribal presence and claims. The laws with respect to the treatment of Native peoples in these two regions, and throughout the country, followed what Patrick Wolfe has termed “the logic of elimination.”<sup>8</sup> Understanding this logic, and the legal forms it generated, is necessary for a clear assessment of contemporary legal doctrines affecting American Indians, in particular equal protection analysis as applied to tribes and Indian people. An important body of scholarship on racism and American Indian law makes the point that the racialization of American Indians has taken different forms, and sometimes requires different remedies, than the

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6. See PALMER, *supra* note 4, at 41; see generally JAMES SATTERLEE & VERNON D. MALAN, U.S.D.A. REPORT #SD-PAM-126: HISTORY AND ACCULTURATION OF DAKOTA INDIANS (1972) (recounting history of the Dakota groups from historical times to the present and including discussion of the three subdivisions, language groupings, and bands).

7. This Article focuses on the CRIT and the Sioux Tribes of the Dakotas, but similar policies of concentrating and consolidating are evident in many tribal histories. See, e.g., Matthew L.M. Fletcher, *Politics, History and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502–03 (2006) (describing attempts to bind all of the Ottawa and Chippewa Bands with a single treaty). Professor Fletcher concludes, “The purpose for combining the various disparate and discrete bands was to allow the American negotiators to bind all the Ottawa and Chippewa bands at one time—and to manipulate the negotiations in a divide and conquer strategy.” *Id.* at 503.

8. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 387 (2006) (citing Patrick Wolfe, *Nation and miscegeNation: Discursive Continuity in the Post-Mabo Era*, SOC. ANALYSIS, Oct. 1994, at 93–152; PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY* (1999) [hereinafter WOLFE, *SETTLER COLONIALISM*]).

racialization of African-Americans, Latinos, and other subordinated groups.<sup>9</sup> This Article furthers the project by examining how federal Indian policies constructed the federally recognized tribe consistent with the government's eliminationist agenda (including its racial logic) and thereby entangled the racial and the political within tribal communities in ways that defy ahistorical formulations, like color-blindness, as a means of redress.<sup>10</sup>

The eliminationist construction of the Indian "race" has crucial, yet poorly understood, implications for equal protection doctrine in particular. In *Morton v. Mancari*,<sup>11</sup> the U.S. Supreme Court held that federal classifications singling out American Indians for "particular and special" treatment should be upheld so long as "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ."<sup>12</sup> The Court's adoption of a modified form of rational basis review rests, at least in part, on the justification that tribal membership is a political category rather than an ethnic or racial one.<sup>13</sup> While this ruling has so far stood the test of time, questions have arisen about *Mancari*'s underpinnings and its future.<sup>14</sup> The Court has indicated that the incorporation of blood quantum and lineage into tribal membership criteria makes the "political versus racial distinction" less than convincing,<sup>15</sup> and scholars have suggested that the dichotomy

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9. See VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 171 (Univ. Okla. Press 1988) (1969); Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009); Addie Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011); see also ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (arguing that all of American Indian law, even its doctrine of tribal sovereignty, is tainted with its racist origins). Other scholars have made similar arguments in the context of explaining why American Indian law and race law should continue to be viewed and analyzed distinctly. See Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 155 (2008) (acknowledging racist origins of much of American Indian policy, but arguing that "virtually all elements of Indian affairs can be traced to the decision of the United States to recognize Indian tribes as political entities").

10. For a recent example of the Supreme Court's embrace of a color-blind approach to remedying discrimination, see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

11. 417 U.S. 535 (1974).

12. *Id.* at 555.

13. See *id.* at 553 n.24.

14. A federal district court recently openly criticized *Mancari*'s approach and outlined how it would have approached classifications based on tribal status had it been freed from precedent to do so. See *KG Urban Enters., LLC v. Patrick*, 839 F. Supp. 2d 388 (D. Mass.), *aff'd in part, vacated and remanded in part*, 693 F.3d 1 (1st Cir. 2012).

15. See *Rice v. Cayetano*, 528 U.S. 495, 519–20 (2000) (noting that the *Mancari* Court found it

unnecessarily entrenches a racially exceptionalist understanding of American Indians.<sup>16</sup> In terms of *Mancari*'s future, the Court has hinted that legislation treating tribal members as a class in ways that are distinct from non-tribal members could raise at least colorable equal protection concerns, even when the congressional action furthers tribal self-government.<sup>17</sup>

If the federal courts reassess *Mancari*, they are unlikely to do so consistent with an anti-subordination agenda.<sup>18</sup> To the contrary, the Court's increasingly strong embrace of a colorblind jurisprudence, which views all current racial categorization in the same light irrespective of ongoing and historically distinct structural effects of racial subordination,<sup>19</sup> is likelier to lead to heightened judicial scrutiny of many forms of distinctive treatment of American Indian tribes. Courts might then second-guess even laws and policies rooted in the long-standing, constitutionally based commitment to tribes' separate political existence.<sup>20</sup> Striking down classifications that support tribal self-

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"important" that a preference was "not directed towards a 'racial' group consisting of 'Indians,'" but rather, "only to members of 'federally recognized' tribes") (quoting *Mancari*, 417 U.S. at 553 n.24); cf. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) (questioning the continuing vitality of *Mancari*).

16. See Rolnick, *supra* note 9. Professor Rolnick's argument is a nuanced one. She does not urge courts to abandon the *Mancari* rule. Rather, she contends that *Mancari* stands for a rift between civil rights approaches to equality and Indian law approaches to equality, and urges a contextualized and historicized understanding of the ways that Indians have been racialized. Rolnick's aims are compatible with those of this Article, though to some extent the diagnoses and prescriptions diverge. Other scholars simply conflate classifications designed to redress the unique forms of discrimination against American Indians with other kinds of racial classifications and criticize them on that basis. See, e.g., RICHARD T. FORD, *RACIAL CULTURE* 86 (2005); RANDALL KENNEDY, *INTERRACIAL INTIMACIES* 499 (2003) (both criticizing the Indian Child Welfare Act based on misplaced race-matching concerns).

17. See *United States v. Lara*, 541 U.S. 193, 208–10 (2004) (refusing to consider improperly raised equal protection challenge, but inviting future litigants to raise the issue).

18. Scholars have urged such a reinterpretation. See Rolnick, *supra* note 9, at 967, 1036; Rose Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801 (2008). In general, an anti-subordinationist approach toward racial and ethnic classifications interrogates whether the classifications perpetuate historical structural forms of subordination that hinder substantive equality today, whereas a color-blind formalist approach simply asks whether the classifications check people off by race, irrespective of the law's purpose to correct or remedy racial inequality.

19. See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (reviewing and critiquing earlier development of the color-blind paradigm in equal protection analysis); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197 (2010) (canvassing recent cases embracing a color-blind approach to discrimination cases).

20. For a compelling argument in support of the constitutional legitimacy of the political relationship doctrine, see Fletcher, *supra* note 9, at 165–71.

determination would be very harmful to tribes and their members. There are, therefore, practical reasons to support the current doctrinal formulation, despite its conceptual flaws.

In addition to the pragmatic benefits of the *Mancari* doctrine, *Mancari* was right, even if for reasons not appreciated by the Court. The legal categories “federally recognized tribe” and “tribal member” are inextricably political. The federal government’s policies with respect to creating Indian reservations and establishing federally recognized tribes included the following actions: forcing distinct linguistic, ethnic, and political groupings of indigenous peoples onto the same reservation; dispersing cohesive groups apart on separate reservations; and requiring that these politically-assembled groups become a single political entity in order to retain their pre-constitutional, pre-contact sovereignty. Some or all of these practices are evident in the legal histories of the two tribal groups examined here. The histories of the CRIT and the ten federally recognized tribes of the Great Sioux Nation that are now located in the Dakotas reveal the disjunction between pre-contact ethnic, linguistic, cultural, and territorial affiliation on the one hand and legal status as a federally recognized tribe on the other.

The legal categories of tribe and tribal member are therefore political in both a negative and positive sense. They are products of the politics of subordinating indigenous peoples and accessing their land and resources.<sup>21</sup> Yet they derive from tribes’ pre-contact inherent sovereignty, a political status that has been recognized since the founding of the United States.<sup>22</sup> Throughout history, and particularly in recent times, tribes have used their political status as sovereigns to protect their land, livelihood, and culture.<sup>23</sup> Tribal membership gives important legal and political protection for ethnic, cultural, and linguistic affiliation, even if those categories do not track perfectly along the lines of the particular federally recognized tribe.<sup>24</sup> But even if American Indian tribes and tribal members, as agents of their own political and legal fate, have made the best possible use of a legal construct, the

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21. See *infra* Part III.

22. See Fletcher, *supra* note 9, at 164–72 (documenting the original understanding, embraced by the framers in the Constitution, of the federal government’s political relationship with Indian tribes).

23. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1195 (2004) (concluding that tribes are enacting sovereignty on the ground in ways that foster and protect unique group identity that stems from place-based wisdom and culture). “The Navajo Nation experience indicates that domesticating federal Indian law, warts and all, can be part of the process of enacting tribal sovereignty.” *Id.*

24. See *infra* text accompanying notes 337–47 (discussing CRIT today).

darker aspects of its origins remain.<sup>25</sup>

This Article unearths the inherently political construction of the legal categories “federally recognized tribe” and “tribal member” in the following way. Part I provides legal background in equal protection doctrine and in the history of federal recognition of tribal status, including how federal recognition became a prerequisite for tribes’ retention of their political and legal sovereignty. Part II examines the legal history of federal recognition and membership composition of the CRIT and the Sioux tribes of the Dakotas.

Part III locates these histories in theories about racial formation and colonialism in the American Indian context. Specifically, it examines the social construction of the American Indian “race” according to the approach developed by Michael Omi and Howard Winant.<sup>26</sup> Omi and Winant’s racial formation theory “emphasizes the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, the conflictual character of race at both the ‘micro-’ and ‘macro-social’ levels, and the irreducible political aspect of racial dynamics.”<sup>27</sup> Patrick Wolfe, applying a similar theoretical approach to the context of indigenous peoples, has documented the ways that racial regimes are deployed to achieve distinctive ends in settler-colonialist societies, like the United States and Australia.<sup>28</sup> The object of settler colonialism is to separate indigenous

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25. Understanding those origins sheds necessary light on structures that, to this day, constrain American Indian law and civil rights law from achieving their promise of self-determination and anti-subordination. Some scholars argue this point more strenuously than others. See WILLIAMS, *supra* note 9 (arguing that federal Indian law will never result in true self-determination for tribes unless the foundational cases, which rely on racialized understandings of tribes, are reversed); Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 303 (2011) (“In sum, federal Indian law is both about race and not about race.”); see also Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize American Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1998) (arguing that core aspects of federal Indian law are infected with the subordinating process of colonization and therefore require thorough revision).

26. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. ed. 2006) (analyzing the role of law in the formation of racial hierarchies in the United States); Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395 (2002) (extending racial formation theory to territorial New Mexico).

27. OMI & WINANT, *supra* note 26, at 4.

28. See Patrick Wolfe, *Land, Labor, and Difference: Elementary Structures of Race*, 106 AM. HIST. REV. 866, 867 (2001) [hereinafter Wolfe, *Land, Labor, and Difference*] (“[R]ace is but one among various regimes of difference that have served to distinguish dominant groups from groups whom they initially encountered in colonial contexts . . . American Indians and Aboriginal people in Australia share much more than the quality of attracting assimilation policies. Above all, they are both sets of peoples whose territorial expropriation was foundational to the colonial formations into

peoples from their land, rather than to extract labor from them.<sup>29</sup> The racial formation of American Indians was therefore very different from that of African-American slaves.<sup>30</sup> With respect to the former, the racial logic followed the path of elimination: the fewer indigenous peoples standing between settler colonists and claims to land, the better.<sup>31</sup> With respect to the latter, the racial logic was that of proliferation: “one drop” of African blood resulted in blackness, because the more slaves (or, post-slavery, legally disenfranchised blacks), the larger the labor force.<sup>32</sup> As Part III discusses, the legal histories of the CRIT and the Great Sioux Nation support the settler colonialist theory in various uncanny ways, in that tribes were constructed and racialized consistent with the agenda of clearing the territory for non-Indians.

Part IV applies the insights from the previous sections to contemporary equal protection issues. Federal policies defining tribal status and limiting tribal territory furthered the political goals of fixing tribes in time and space in order to effectuate non-Indian settlement. Each “federally recognized tribe” still reflects that eliminationist policy, even though each tribe also has legitimate pre-contact claims to an inherent sovereignty that was never relinquished. Recently, some federal

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which Europeans incorporated them.”). Settler-colonialism, the term for the type of colonization that occurred in North and South America, Australia, and New Zealand, is characterized primarily by a population of settlers who came to stay and who, in relatively short order, outnumbered the aboriginal inhabitants of the land. *See generally* PATRICK WOLFE, *SETTLER COLONIALISM*, *supra* note 8; *see also* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 12–13 (2010) (defining settler empire and describing key features and consequences of that status).

29. *See* Wolfe, *Land, Labor, and Difference*, *supra* note 28, at 868 (“As opposed to franchise-colonial relationships (such as the British Raj, the Netherlands East Indies), settler colonialism seeks to replace the natives on their land rather than extract surplus value by mixing their labor with a colony’s natural resources.”).

30. *See id.* at 866–67, 881.

31. *See id.* at 867–68.

32. *See* WOLFE, *SETTLER COLONIALISM*, *supra* note 8, at 2. As Wolfe explains, settler colonialism establishes a logic of race for indigenous peoples that differs from that of other colonial societies, and also differs from the logic applied to African slaves. This is because settler colonialist societies, including the United States and Australia, were faced with the problem of a minority aboriginal population from whom the settlers desired, foremost, to extract land. By contrast, African slaves were racialized in ways that comported with the primary goal of extracting labor:

The relationship between Native and African Americans illustrates the distinction particularly well. In the main, Native (North) Americans were cleared from their land rather than exploited for their labour, their place being taken by displaced Africans who provided the labour to be mixed with the expropriated land. . . . The ramifications of this distinction flow through, particularly in so far as they affect the different constructions of ‘miscegenation’ that have been applied to the two communities. Briefly, whilst the one-drop rule has meant that the category ‘black’ can withstand unlimited admixture, the category ‘red’ has been highly vulnerable to dilution.

*Id.* at 1–2.

courts have indicated that they would rethink *Mancari*'s rational basis approach if they were not constrained by precedent.<sup>33</sup> For example, a federal district court in Massachusetts recently upheld a state gaming law against an equal protection challenge, but only because *Mancari* required that outcome.<sup>34</sup> If the court could have started from scratch, it would have adopted a tiered approach, subjecting classifications "relating to native land, tribal status or Indian culture" to "minimal review," but subjecting "[l]aws granting gratuitous Indian preferences divorced from those interests, [such as] a law granting tribes a quasi-monopoly on casino gaming . . . to more searching scrutiny."<sup>35</sup>

Judicial attempts to untangle the racial from the political by deferring to policies that the courts think are consistent with traditional Indian affairs (land, status, culture), but scrutinizing those that the courts deem "gratuitous preferences," such as regulations of economic activity that treat tribes as sovereign governments (as the gaming laws do), are more likely to perpetuate the racialized agenda of eliminating tribes than to reverse it. Tools already exist for federal courts interested in scrutinizing federal laws and classifications that *harm* tribes and tribal members by exceeding the bounds of the trust relationship.<sup>36</sup> Dismantling *Mancari*'s rational basis approach to classifications that recognize tribal self-governance and allow tribes to move beyond stereotypical assumptions about Indian status and culture would put the federal courts, to paraphrase Professor Phil Frickey, in the role of modern-day colonizer.<sup>37</sup>

The legal histories of the CRIT and the Sioux Tribes, analyzed in the context of race, sovereignty, and tribal membership, reveal that unraveling the logic of racism in American Indian law has much less to do with tinkering with the *Mancari* rule than it does with facing squarely the workings of power, politics, and law in the context of the United States' unique brand of settler colonialism. The way to counter the logic of elimination is to support laws and policies that perpetuate the separate

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33. See *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005); *KG Urban Enters., LLC v. Patrick*, 839 F. Supp. 2d 388 (D. Mass.), *aff'd in part, vacated and remanded in part*, 693 F.3d 1 (1st Cir. 2012), discussed *infra* Part IV.A.

34. See *KG Urban Enters.*, 839 F. Supp. 2d 388.

35. *Id.* at 404.

36. See Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1187 (2010) (making a similar argument about *Mancari*, and describing the failure of subsequent cases to "explain [*Mancari*'s] rationale or build on its potential."); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 279 (1984) (arguing that there is room, under the existing *Mancari* formulation, for courts to scrutinize legislation that harms tribal rights).

37. Philip P. Frickey, *A Common Law for Our Age of Colonialism*, 109 YALE L.J. 1, 76 (1999).

sovereign political status of tribes as peoples, rather than to dismantle tribes by subjecting them to judicial scrutiny in a futile attempt to disentangle the racial from the political.

## I. LEGAL BACKGROUND OF EQUAL PROTECTION, TRIBAL RECOGNITION, AND TRIBAL MEMBERSHIP

According to a number of indicia, the United States is well on its way to becoming a “post-racial” society.<sup>38</sup> Yet the considerable legal and political machinery devoted, since the Civil Rights era, to stamping out racial discrimination has nonetheless failed to eliminate the structures that legalized forms of racism set in motion.<sup>39</sup> The structures themselves are complicated, taking root in law, culture, and politics in ways that require deep and sustained attention to arrive at approaches that may finally deliver on the promise of equality.<sup>40</sup> Furthermore, the very definition of equality may vary depending on the origins and forms of prior subordination.<sup>41</sup> For Native people in the U.S., equality encompasses the right to continue as members of their own sovereign Indian nations, as well as the right to be free from racial discrimination perpetrated by state or federal actors.<sup>42</sup>

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38. For example, the U.S. Census Bureau announced recently that, for the first time, there were more minority children under the age of one than there were white children. *See Most Children Younger Than Age 1 are Minorities, Census Bureau Reports*, U.S. CENSUS BUREAU (May 17, 2012), <http://www.census.gov/newsroom/releases/archives/population/cb12-90.html>. California, Hawaii, New Mexico, and Texas have majority-minority populations. *See Census Bureau Releases State and County Data Depicting Nation's Population Ahead of 2010 Census*, U.S. CENSUS BUREAU (May 14, 2009), <http://www.census.gov/newsroom/releases/archives/population/cb09-76.html>.

39. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010); THOMAS J. SUGRUE, *NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE* (2010); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 449, 450 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY*].

40. *See generally* ALEXANDER, *supra* note 39; SUGRUE, *supra* note 39; *see also* WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2009) (attributing the persistence of poverty for urban African-Americans to the legacies of legalized racism, race-neutral changes in the economy that disproportionately affected black urban areas, as well as to cultural factors that were inevitable adaptations to legal and de facto isolation).

41. *See* Berger, *supra* note 9; Fletcher, *supra* note 25; Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 *UCLA L. REV.* 943 (2002); Juan Perea, *The Black/White Binary Paradigm of Race: Exploring the “Normal Science” of American Racial Thought*, 85 *CALIF. L. REV.* 1213 (1997); Rolnick, *supra* note 9.

42. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][a], at 918–19 (Nell Jessup Newton et al. eds., 2005) [hereinafter *COHEN*] (“Federal constitutional protections for individual rights against state or federal action do not differentiate Indians from other claimants . . . Yet Indians, especially when they are invoking tribal interests, continue to fit uneasily into the

From a certain (perhaps naïve) vantage point, one might expect that the complicated and varied manifestations of inequality would have resulted in more nuanced forms of legal redress. The federal courts, however, have followed a steady course away from recognizing broad structural forms of discrimination and their varied effects. Instead, the courts have adopted a model of individualized harm, which requires showings of individual racist intent.<sup>43</sup> This is true even in the context of remedies for historical patterns of intentional discrimination. The trajectory of equal protection analysis in school desegregation cases is illustrative. In the years following *Brown v. Board of Education*,<sup>44</sup> federal courts enforced a wide variety of remedies aimed at desegregating school districts where intentional racial discrimination had been found. Gradually, remedies that reached beyond the school districts themselves, or that aimed prophylactically to achieve racial integration, were rejected by the courts.<sup>45</sup> As the federal judiciary's heroic civil rights era receded into the past, the notion that courts should resolve societal harms caused by structures of racial discrimination receded with it.<sup>46</sup>

In parallel with the courts' withdrawal from implementing broad remedies to racial discrimination, the judiciary imposed increasingly exacting scrutiny on voluntary programs aimed at increasing representation of racial minorities. White plaintiffs successfully challenged affirmative action programs in the contexts of employment, education, and other state or federal benefits.<sup>47</sup> While to date the

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constitutional framework for protection of individual rights.”).

43. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES* 710 (3d ed. 2006); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009 (2002); Norton, *supra* note 19; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1473 (2004) (“[E]qual protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.”).

44. 347 U.S. 483 (1954).

45. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down a school district's use of race as a tiebreaker in magnet school applications in order to achieve racial balance); *Milliken v. Bradley*, 418 U.S. 717 (1974) (rejecting inter-district bussing as a remedy for segregation within an inner-city school district, even when “white flight” was a consequence of the intra-city desegregation remedy).

46. See Norton, *supra* note 19.

47. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding policy of racial preference in admissions at state law school); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down policy of racial preference for undergraduate admissions at state university); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (striking down affirmative action program in city contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down school board's policy of extending preferential protection against layoffs to some employees because of their race); *Regents of Univ. of*

Supreme Court has not foreclosed the possibility that achieving racial and ethnic diversity can be a constitutional objective in certain narrow contexts, the circumstances that justify race-conscious programs have little to do with the history of the legally sanctioned racial caste system that constructed our past.<sup>48</sup> In today's doctrinal landscape, discrimination on the basis of race is not a claim made against the backdrop of history but in the context of an individual encounter, independent of time and space. Yet it is impossible to understand American Indian law without knowing its history.<sup>49</sup> The entirety of the constitutionally based government-to-government relationship between Indian nations and the United States rests on that history.<sup>50</sup> Equal protection challenges to laws and programs that benefit American Indian tribes and tribal members lie at this crossroads of ahistorical doctrine and historically-dependent context.

A. *The Mancari Equal Protection Framework*

In *Morton v. Mancari*, the Supreme Court upheld a Bureau of Indian Affairs (BIA) employment preference against a challenge brought by non-Indian plaintiffs.<sup>51</sup> The Court held that federal classifications that benefit American Indians should be upheld so long as they can be tied to Congress's "unique obligations toward the Indians."<sup>52</sup> To put this in the context of equal protection doctrine generally, the Supreme Court has settled on a three-tier system for the judicial review of equal protection challenges to federal or state actions that burden or benefit particular groups.<sup>53</sup> First, the Court subjects most classifications to rational basis

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Cal. v. Bakke, 438 U.S. 265 (1978) (striking down quantitative means to achieve racial diversity in state medical school).

48. See *Grutter*, 539 U.S. at 323–33 (reaffirming *Bakke*'s rejection of remedying past or societal discrimination as compelling interest but affirming limited use of race as a factor to enhance educational environment).

49. See COHEN, *supra* note 42, § 1.01, at 6–7 (describing the centrality of history to American Indian law); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1 (1983) ("It is impossible to understand American Indians in their contemporary setting without first gaining some knowledge of their history as it has been formed and shaped by the Indian experience with Western civilization."); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 4–5 (1987) (describing commitment to historical promises and relationships as the key recurring theme in modern Indian law).

50. See COHEN, *supra* note 42, § 1.01, at 8 ("The centuries-old relationship between the United States and Indian nations is founded upon historic government-to-government dealings and a long-held recognition of Indians' special legal status.").

51. 417 U.S. 535 (1974).

52. *Id.* at 555.

53. Equal protection challenges to federal action are brought under the Due Process Clause of the

review, meaning that if the legal distinction is based on any facially plausible rationale, the Court will not second-guess the legislative decision.<sup>54</sup> Second, a middle-tier of review (known as “intermediate scrutiny”), applied most commonly to classifications based on sex, asks whether the distinction is reasonably related to an important governmental objective.<sup>55</sup> And third, classifications based on race or ethnicity are subject to the Court’s most exacting review (“strict scrutiny”), which asks whether there is a compelling state interest that supports the classification and whether the government’s means of achieving that interest are narrowly tailored to the government’s objective.<sup>56</sup> Overtly discriminatory classifications—those that deprive racial or ethnic groups of access to programs or benefits because of their racial or ethnic status—nearly automatically fail strict scrutiny.<sup>57</sup> The harder cases, alluded to above, involve either actions that do not overtly sort people based on race or ethnicity, but that nonetheless result in disparate effects on minority racial or ethnic groups, or actions that sort people by race or ethnicity with the benign purpose of either remedying past discrimination or promoting diversity.<sup>58</sup> Challenges to affirmative

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Fifth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment, which applies only to states, but the “Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” *Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981) (citing *Weinberger v. Salfi*, 422 U.S. 749, 768–70 (1975); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)).

54. *See* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (upholding state law requiring police officers to retire at age fifty); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding school funding system that discriminated against poor districts); *see also* CHEMERINSKY, *supra* note 43, at 669–74 (summarizing tiers of judicial review). *But see* *Romer v. Evans*, 517 U.S. 620 (1996) (applying strengthened version of rational basis review to equal protection challenge involving distinctions based on sexual orientation).

55. *See* *United States v. Virginia*, 518 U.S. 515 (1996), for the latest articulation of the gender standard of intermediate scrutiny. On very rare occasions, the Supreme Court has applied heightened review based on an ad-hoc mix of factors. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (factors warranting heightened scrutiny included childhood, education, and minority status).

56. *See, e.g., Johnson v. California*, 543 U.S. 499 (2005) (strict scrutiny must be used in evaluating the routine racial segregation of new intake prisoners); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (federal affirmative action programs must meet strict scrutiny); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down school board’s policy of extending preferential protection against layoffs to some employees because of their race); CHEMERINSKY, *supra* note 43, at 694–95.

57. *See* *Palmore v. Sidoti*, 466 U.S. 429 (1984) (state court acted unconstitutionally by taking into account a stepfather’s race in child custody case); *Loving v. Virginia*, 388 U.S. 1 (1967) (state miscegenation statute unconstitutional); *Anderson v. Martin*, 375 U.S. 399 (1964) (striking down statute requiring the race of candidates for office to be listed on ballots); CHEMERINSKY, *supra* note 43, at 671 (“Strict scrutiny is virtually always fatal to the challenged law.”).

58. *See* *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand*, 515 U.S. 200; *City of Richmond v. Croson*, 488 U.S. 469 (1989); *McKlesky v. Kemp*, 481

action programs in education and employment fall into the latter category.<sup>59</sup>

In *Mancari*, the Court adopted a form of the first type of review—rational basis review—for federal classifications singling out members of American Indian tribes for distinctive treatment. According to *Mancari*, if the classification is based on tribal members' political affiliation with a recognized American Indian tribe<sup>60</sup> and furthers Congress's "unique obligation" to American Indians, then the Court will not subject it to a heightened form of judicial review.<sup>61</sup> For a host of practical and legal reasons, the *Mancari* rule makes sense. As the *Mancari* Court noted, the federal government has been treating American Indian tribes and their members distinctively since the country's founding.<sup>62</sup> License for distinctive treatment exists in the Constitution,<sup>63</sup> in the history of federal-tribal legal relations,<sup>64</sup> and in international law norms that formed the basis for domestic federal Indian law.<sup>65</sup> Further, if the Court had held otherwise, federal courts could be subjecting scores of treaties, statutes, and policies to heightened judicial scrutiny.<sup>66</sup> Professor Carole Goldberg has argued that the federal courts' institutional limitations and biases make it at least plausible that much of federal Indian law would fail to survive this more exacting form of review.<sup>67</sup> As she put it, "it seems unmanageable and unpredictable to rely on strict scrutiny survival as the basis for a response to the current

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U.S. 279 (1987) (proof of racially disproportionate impact in administration of death penalty did not constitute equal protection violation); *Washington v. Davis*, 426 U.S. 229 (1976) (upholding police department's use of a test that disproportionately disadvantaged African-American applicants).

59. See *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469.

60. 417 U.S. 535, 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes.").

61. *Id.* at 555.

62. See *id.* at 551-53; see also *Fletcher*, *supra* note 9, at 164-72.

63. See U.S. CONST. art. I, § 8, cl. 3 (Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes").

64. See William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 338-47 (1990).

65. See ROBERT WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 218 (1990); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (relying on the discovery doctrine, including its origins in international law, as basis for U.S. relations with tribes).

66. See *Mancari*, 417 U.S. at 552.

67. See Goldberg, *supra* note 41, at 955-57.

challenges to federal Indian law.”<sup>68</sup>

Of course, *Mancari*'s practicality cannot constitute its sole defense. Scholars and courts have struggled with *Mancari*'s political-versus-racial distinction for reasons that are, on the surface, understandable. For example, what does it mean for a classification to be based on tribal membership, as opposed to race or ethnicity? *Mancari* involved a challenge by four non-Indian BIA employees to a Bureau policy implementing a long-standing statutory preference for Indian employment in the agency.<sup>69</sup> The preference, included in the Indian Reorganization Act of 1934 (IRA),<sup>70</sup> was a small part of a larger legislative program aimed at restoring self-governance to tribes.<sup>71</sup> The connection in the IRA between membership in a political entity (an Indian tribe) and the employment preference was all but self-evident, given the overriding statutory scheme.<sup>72</sup> Nonetheless, the IRA's goal of improving tribal participation in the federal agency that oversees tribal affairs was largely neglected in the following decades. When the BIA, prompted by a lawsuit brought by tribal members in the 1970s,<sup>73</sup> implemented a policy to enforce the IRA's mandate, it supplied the following definition of Indian: “To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.”<sup>74</sup> The *Mancari* Court described this categorization as political, not racial:

Contrary to the characterization made by appellees, this preference does not constitute “racial discrimination.” Indeed, it is not even a “racial” preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.<sup>75</sup>

The Court's distinction was not unjustified. As the Court explained,

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68. *Id.* at 957.

69. *See* 417 U.S. at 538–39. For a detailed history of *Mancari*, see Carole Goldberg, *What's Race Got to Do With It? The Story of Morton v. Mancari*, in *INDIAN LAW STORIES* 389 (Carole Goldberg et al. eds., 2011).

70. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (2006)).

71. *See Mancari*, 417 U.S. at 542.

72. *See id.*

73. *See* Goldberg, *supra* note 69, at 389.

74. *Mancari*, 417 U.S. at 553 n.24 (quoting 44 Bureau of Indian Affairs Manual 335, 3.1).

75. *Id.* at 553–54.

people who are Indian by descent (i.e., “racially” Indian), but not members of recognized tribes, are not eligible for the preference. What triggers the preference is the political status of being a tribal member.<sup>76</sup> The rub, however, was that the BIA guidelines required, in addition to tribal membership, one-fourth or more “Indian blood.”<sup>77</sup> The BIA narrowed the political category (tribal members) further with the blood quantum requirement. And this mixing of membership and blood quantum has caused courts, especially those lacking background in American Indian law, to question *Mancari*’s neat distinction between political membership and racial/ethnic category.<sup>78</sup>

Courts and scholars have also struggled with what it means for Congress to act in furtherance of its “unique obligation” to American Indians. As Carole Goldberg and Addie Rolnick have pointed out, *Mancari* has failed to fulfill its promise as an equal protection approach that upholds the political relationship between tribes and the United States but still scrutinizes federal actions that imposed unique burdens on American Indians.<sup>79</sup> Instead, courts have applied *Mancari*’s rational basis analysis regardless of whether the distinctive treatment of American Indians furthered the political relationship between tribes and the federal government or not. For example, in *United States v. Antelope*,<sup>80</sup> the Court rejected an equal protection challenge to the Major Crimes Act,<sup>81</sup> which subjects Indian defendants to federal prosecution for crimes occurring on tribal lands and often results in harsher convictions and sentences than would be meted out in state courts.<sup>82</sup> The Court cited and quoted *Mancari*, but failed to provide any analysis of why a federal jurisdictional scheme for crimes by and against Native people fell within the government’s unique obligations to tribes.<sup>83</sup>

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76. *See id.* at 553 n.24.

77. The archaic use of the term “blood quantum” has become naturalized, but itself is a racialized term. *See, e.g.*, ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

78. *See infra* Part IV (discussing cases questioning *Mancari*’s distinction).

79. *See* Goldberg, *supra* note 41, at 950, 959; Rolnick, *supra* note 9, at 993; *see also* Berger, *supra* note 36, at 1187 (reviewing post-*Mancari* cases and concluding that “these cases recite the language of *Mancari* while utterly failing to explain its rationale or build on its potential”).

80. 430 U.S. 641 (1977).

81. 18 U.S.C. § 1153 (2006).

82. *Antelope*, 430 U.S. at 648–50.

83. *See id.* at 644–47. The precise issue in *Antelope* was whether subjecting two Indian defendants to a felony-murder prosecution under the Major Crimes Act violated the Equal Protection Clause when the state in which the crime occurred had no felony-murder provision. Under state law, the prosecution would have had to prove premeditation and deliberation, which are

Instead of applying *Mancari* in a way that distinguished between the federal government's discriminatory or baseless actions toward American Indians on the one hand and actions that furthered the political and trust relationship with tribes on the other, the Court collapsed the analysis into a simple one-line formula: if the distinction is based on tribes or tribal membership, it will be upheld.<sup>84</sup> *Mancari* has therefore become an extension of Congress's plenary power over Indian affairs rather than a way to thoughtfully plumb the distinctions between oppressive federal treatment of Indians and treatment that furthers tribal sovereignty and self-determination.<sup>85</sup>

Finally, *Mancari* unwittingly furthers a dichotomy between race/ethnicity and tribal membership that obscures the political nature of race and ethnicity themselves. Blackness, as scholars have argued, is a politico-legal category, as is whiteness.<sup>86</sup> The legal constructions of race have served political ends, and in this sense all racial categories are also political categories. Thus while it is true that federal classifications based on tribes and tribal membership are "political," it does not necessarily follow that they are *not* racial, as that term is defined to include the processes by which society has sorted people into racial castes.<sup>87</sup>

Legal doctrine flattens and obscures the politics that inhere in racial categories, and tends, therefore, to perpetuate misconceptions about how to redress discrimination across groups. Because racial categories have unique histories, however, the legal implications that flow from them are necessarily distinct.<sup>88</sup> By extension, strategies to address the ongoing structures of discrimination and subordination embedded in those legal categories are likewise distinct. Unearthing the racialization of American Indians that lies beneath the surface of the political classifications of

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not elements under the federal felony-murder statute. *See id.* at 644.

84. *See, e.g.,* *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 501–02 (1979); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977) (rejecting equal protection challenge to congressional action distributing judgment award to Delaware descendants that excluded Kansas Delawares); *see also* Berger, *supra* note 36, at 1187 (canvassing the cases).

85. The formulaic application of *Mancari*'s rule is part of what has led some courts astray in more recent applications of equal protection analysis. These cases are discussed *infra* Part IV.

86. *See* LÓPEZ, *supra* note 26; OMI & WINANT, *supra* note 26; Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499–1504 (2005) (describing socio-legal process of designation, delineation, and assignment of meaning of racial categories).

87. *See* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d rev. ed. 1966).

88. *See* Wolfe, *Land, Labor, and Difference*, *supra* note 28.

tribes and tribal members, therefore, serves at least two purposes. First, it aligns American Indians more clearly with all other groups that have been subordinated by race. Second, it clarifies that each group's path to anti-subordination must be as distinctive as the form of the racialization itself.

Law plays a starring role in the construction of racial categories and in how they are interpreted through the lens of equal protection today. What it means to be African-American in the United States includes the history of slavery, reconstruction, the dismantling of reconstruction, Jim Crow, and the Civil Rights era.<sup>89</sup> Likewise, what it means to be American Indian, and even more obviously a member of a "federally recognized tribe," is a product of the legal history of the United States' interaction with and policies toward indigenous peoples. Therefore, to understand *Mancari's* rule and where it fits in the larger socio-legal landscape it is necessary to review the evolution of the "federally recognized tribe."

### B. *From Independent Sovereigns to Federally Recognized Tribes*

Today, the Department of the Interior maintains a list of tribes that are recognized as political sovereigns by the federal government.<sup>90</sup> This status places American Indian tribes and their members in a different legal category (for certain purposes, and with important exceptions) from other racial and ethnic groups.<sup>91</sup> To understand *Mancari's* political relationship doctrine one must understand the history of how the federal government arrived at the list of federally recognized tribes as well as what does and does not flow from being on the list. With respect to the former, the historical record reveals that the need for increasingly formal definitions of tribes often (though not always) coincided with federal policies aimed at one or more of the following goals: consolidating the

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89. See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY, *supra* note 39, at 103, 112–16 (summarizing history of legal, social and economic forms of constructing blackness as subordinate).

90. See 25 C.F.R. § 83.5(a) (2012) (requiring the Department of the Interior to publish a list of all federally recognized tribes no less frequently than once every three years); Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010) (most recently published list).

91. Members of unacknowledged and terminated tribes are, in some instances, entitled to similar programs and benefits as federally recognized tribes. See Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1470–76 (1991). At the same time, Native Americans are also eligible, as members of underrepresented minority groups, for federal programs aimed at remedying past discrimination on similar terms as other minority groups. See *id.* at 1488–89.

federal government's authority over Indian affairs, pushing tribes onto well-defined (and smaller) territories, and assimilating tribes and tribal members into the majority society. With respect to what does and does not flow from federal recognition, the most significant implications are acknowledgement of tribal self-government and inherent sovereign powers (and all of the legal implications, including freedom from state laws, that result from that status),<sup>92</sup> and the federal government's trust obligation (as troubled as the trust relationship may be).<sup>93</sup> In addition, with federal recognition comes eligibility for federal programs that benefit tribal members.<sup>94</sup>

### 1. *History of Federal Recognition*

Legal scholars point to several key judicial, legislative, and executive decisions when they describe the criteria and definitions for federally recognized tribes. With respect to case law, the Supreme Court's definitions in *Montoya v. United States*,<sup>95</sup> *United States v. Sandoval*,<sup>96</sup> and the First Circuit's in *Passamaquoddy Tribe v. Morton*<sup>97</sup> provided the basic framework for the common law definition of a recognized Indian tribe. In terms of legislation, the IRA purported to sort tribes into two groups, those eligible for the federal government's services and trust relationship, and those not. And finally, in 1978 the Executive Branch, responding to a wave of litigation over land claims and the attendant issue of federal recognition, promulgated regulations requiring a list of all federally recognized tribes and criteria for unrecognized tribal groups

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92. See generally COHEN, *supra* note 42, at ch.4–ch.7 (providing a detailed overview of these areas of American Indian law).

93. The trust relationship includes specific legal and fiduciary obligations as well as a general duty to protect and safeguard tribes as separate governments. But the trust obligations are also amorphous and difficult to enforce, and have sometimes been used against tribes due to a formulation that imports the dated understandings of dependency and subordination. See Alex Tallchief Skibine, *Towards a Trust We Can Trust: The Role of the Trust Doctrine in the Management of Tribal Natural Resources*, in TRIBES, LAND, AND THE ENVIRONMENT 7 (Sarah Krakoff & Ezra Rosser eds., 2012).

94. Though, some federal programs are available to Indians who are not members of federally recognized tribes, and in the case of federal criminal jurisdiction, "membership" is defined more expansively than in other contexts. The varied definitions for eligibility for programs and criminal prosecution hint at the difficulty of cabining the federal government's obligations to indigenous peoples to the formally defined list of recognized tribes. It is, nonetheless, an important starting point for excavating the inextricably political relationship between tribes and the federal government.

95. 180 U.S. 261 (1901).

96. 231 U.S. 28 (1913).

97. 528 F.2d 370 (1st Cir. 1975).

to obtain recognition through an administrative process.<sup>98</sup> These legal moments and definitions are embedded in the gradual historical process of tribes evolving from free and independent sovereigns that predated European settlement into entities locked, by legal and extralegal acts, into an exclusive relationship with the United States.

*a. 1783–1871: Sorting “Friends” from “Enemies”*

Given the United States’ early and recurring interest in resolving indigenous land and resource claims, one might expect the early appearance of some sort of legal definition of an Indian tribe. Yet according to legal historian William W. Quinn, “In fact, the historical record reveals a consistent uncertainty and even confusion on the part of the several branches of government of the United States about its relations with and legal responsibilities toward certain Indian tribes throughout the nineteenth and early twentieth centuries.”<sup>99</sup> Quinn divides the history into three phases prior to 1978, when the federal acknowledgment criteria were promulgated.<sup>100</sup> The first phase, from 1783–1871, was characterized largely by what Quinn labels the “cognitive” type, meaning that the use of the terms “recognized” and “acknowledged” did not have a jurisdictional meaning but rather indicated that the federal government knew of the tribe’s existence.<sup>101</sup>

Within this cognitive type, the federal government had several categories. The fifth iteration of the Trade and Intercourse Act,<sup>102</sup> for example, included the following designations for Indians and Indian tribes:

[T]hose whose lands were “secured by treaty with the United States” (as against those whose lands were not); those “in amity with” the United States; “friendly Indian tribes”; and “Indians

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98. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39361 (Aug. 24, 1978) (codified as amended at 25 C.F.R. pt. 83 (2012)).

99. Quinn, *supra* note 64, at 332.

100. See *id.* A necessary precursor to the first phase is the colonial recognition of American Indian sovereignty. See *id.* at 336–38 (summarizing the legacy of the colonial period as “a heritage that recognized, albeit sometimes grudgingly, the sovereignty of Indian tribes relative to the continent”). Quinn’s three phases are 1783–1871, 1871–1934, and 1934–1978. See *id.* This Article uses the same dates to organize the discussion here, but emphasize different aspects of the United States’ developing definition of “federally recognized tribes.” Quinn emphasizes the increasing formality of the definition, in largely descriptive fashion. The analysis here takes a more critical look at the components of the evolving definition of tribes and the forces behind the need for formalization.

101. See *id.* at 339.

102. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states.”<sup>103</sup>

As the nineteenth century proceeded and the United States gradually expanded its territory across the continent, the need arose for a more precise accounting of which indigenous peoples might stand in the way of western settlement. To meet this need, in 1822, Jedidiah Morse published a report commissioned by the Secretary of War that undertook to list and categorize all tribes as well as report on their conditions.<sup>104</sup> Morse distinguished so-called civilized from uncivilized tribes, the former being those on the western edge of American settlement and the latter the New England tribes, whose earlier encounter with colonists and settlers had resulted in their subjugation and assimilation. For example, Morse described the Osage as being in “moral darkness” with no knowledge of god,<sup>105</sup> prone to “mischievous and atrocious expedition[s],”<sup>106</sup> and having little hope for improvement without the influence of religious instruction.<sup>107</sup> By contrast, the Passamaquoddy of Maine were described favorably, under the care of the Catholics, and with a governor who is “pious, and well disposed to receive instruction.”<sup>108</sup> This same alignment of negative characteristics (uncivilized, wild, lacking god, etc.) with persistent tribal affiliation, and positive characteristics (pious, receptive to instruction, etc.) with assimilation, was relied on in the 1860 Census to sort Indians into the categories of “civilized” or “retaining their tribal character.”<sup>109</sup> This dichotomy, which reflects the distinct ways in which Indians were racialized,<sup>110</sup> would also emerge and recur later as the federal government attempted to impose greater juridical meaning on the distinction between “tribes” and groups of assimilated Indians.<sup>111</sup>

In the 1830s, the United States’ removal policies heightened the need

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103. *Id.* at 341 (quoting Act of Mar. 30, 1802, ch. 13, § 12, 2 Stat. 139).

104. JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS (1822), available at <http://hdl.handle.net/2027/hvd.32044014221147>.

105. *Id.* at 233.

106. *Id.* at 234.

107. *Id.* at 235.

108. *Id.* at 65.

109. See O’Brien, *supra* note 91, at 1464 n.8 (citing CENSUS OFFICE, U.S. DEP’T OF INTERIOR, REPORT ON INDIANS TAXED AND INDIANS NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH CENSUS: 1890, at 15 (1894)).

110. See Berger, *supra* note 9, at 606.

111. See *infra* notes 155–63 and 174–80 and accompanying text (discussing *United States v. Joseph*, 94 U.S. 614 (1876) and *United States v. Sandoval*, 231 U.S. 28 (1913)).

to label and categorize Indian tribes.<sup>112</sup> Removal of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole from their homelands in the Southeast required, at a minimum, the identification of which tribes still had possessory interests in their lands.<sup>113</sup> Similarly, the removal and consolidation of tribes throughout the west onto smaller homelands necessitated categorizing tribes into those that would be provided federal services and Indian agents and those that would not.<sup>114</sup> During this period, Chief Justice Marshall decided the last two cases in his Indian law trilogy, *Cherokee Nation v. Georgia*<sup>115</sup> and *Worcester v. Georgia*.<sup>116</sup> *Cherokee Nation*, which held that Indian tribes were “domestic dependent nations” retaining aspects of their pre-contact sovereignty but implicitly divested of their powers over foreign affairs, took steps toward defining the jurisdictional implications of *being* a tribe but did not otherwise shed light on the criteria necessary to achieve that status.<sup>117</sup> Likewise, *Worcester*, which held that state laws had no force or effect within the boundaries of the Cherokee Nation even in the midst of the Removal era, shed significant light on the legal effects of tribal sovereign status.<sup>118</sup> Yet *Worcester*, like *Cherokee Nation*, had no need to address the criteria for *being* a tribe because the Cherokee had entered into treaties with the United States.<sup>119</sup>

In the decades following the Civil War, all three branches of government began to use “acknowledged” and “recognized” in ways that accord with the present jurisdictional meaning, rather than in the cognitive sense that predominated previously.<sup>120</sup> In *The Kansas Indians*,<sup>121</sup> the Supreme Court made the first foray into defining tribes for jurisdictional purposes. The case involved whether Kansas could tax lands owned by individual Indians from the Shawnee, Wea, and Miami tribes.<sup>122</sup> In rejecting Kansas’ imposition of the tax, the Court explained

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112. See COHEN, *supra* note 42, § 1.03[4].

113. See Quinn, *supra* note 64, at 342–43.

114. *Id.* at 343–44 (discussing the Indian Removal Act, Act of May 28, 1830, ch. 148, 4 Stat. 411; the Act establishing the post of Commissioner of Indian Affairs, Act of July 9, 1832, ch. 174, § 4, 4 Stat. 564; and the final Trade and Intercourse Act, Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729).

115. 30 U.S. (5 Pet.) 1 (1831).

116. 31 U.S. (6 Pet.) 515 (1832).

117. 30 U.S. (5 Pet.) at 17.

118. See 31 U.S. (6 Pet.) at 561.

119. See *id.* at 551–52 (describing Treaty terms).

120. See Quinn, *supra* note 64, at 347.

121. 72 U.S. (5 Wall.) 737 (1866).

122. *Id.* at 737.

that if each tribe's political organizations were preserved intact and "recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union."<sup>123</sup> The Court's conclusion rested on the tribes' treaty with the United States as well as on the tribes' degree of political and legal organization:

The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their dependence on the National government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offences, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed.<sup>124</sup>

The Court's language, while occasionally exhibiting the assumption of Indian inferiority endemic to the times,<sup>125</sup> nonetheless embraced a political understanding of the definition of an Indian tribe. The Court concluded that "the action of the political department of the government settles, beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization."<sup>126</sup>

*b. 1871–1934: Assimilation of the Individual and Racialization of the Tribe*

Most Indian law scholars define the years from 1887–1928 as the Allotment and Assimilation period in federal Indian policy.<sup>127</sup> Like most

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123. *Id.* at 755.

124. *Id.* at 756.

125. *See id.* The Court's language is disparaging, yet it is also embedded in an overall recognition of the tribes' well-functioning governmental status and structures.

Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. Their machinery of government, though simple, is adapted to their intelligence and wants, and effective, with faithful agents to watch over them.

*Id.* Both its content and tone are therefore far less overtly discriminatory than in *United States v. Joseph*, 94 U.S. 614 (1876), and *Montoya v. United States*, 180 U.S. 261 (1901), discussed below.

126. *The Kansas Indians*, 72 U.S. (5 Wall.) at 756.

127. *See* ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 105 (2d ed. 2010); DELORIA & LYTTLE, *supra* note 49, at 8.

historical periodization, there is an arbitrary quality to the dates. Some Allotment and Assimilation policies predated 1887.<sup>128</sup> In addition, in 1871, Congress enacted a statute purporting to limit the President's power to enter into treaties with tribes.<sup>129</sup> For the topic at hand, the 1871 date is an appropriate starting point. It marks the beginning of a period that necessitated definitions of tribes in order to freeze their numbers and, eventually, eliminate them. Similarly, 1934 is the better ending point, because it marks the official end of allotment with the passage of the IRA, which also included the first attempt to list all federally recognized tribes.<sup>130</sup>

The 1871 Act announced that “hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty.”<sup>131</sup> The legislation was initiated by members of the House of Representatives who resented that treaties ratified by the Senate repeatedly forced the House's hand with respect to appropriations.<sup>132</sup> Yet declaring that the government would no longer enter into treaties did nothing to alter the fact that there were many Indian tribes remaining with valid claims to territory and self-governance: “The BIA, if not Congress, was acutely aware of the existence of numerous Indian Tribes in the western states with no treaty relations between them and the United States. Some new criterion or criteria would have to be adopted to determine from henceforth which tribes would be provided services.”<sup>133</sup> Congress's attempt to end treaty making with tribes did not, in other words, erase the existence of tribes themselves. The 1871 Act, therefore, begged the question of some further way to define and take account of those tribes. In 1872, a year after the legislation was enacted, Commissioner of Indian Affairs Francis Walker “asked this rhetorical question: ‘How are Indians, never

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128. See DELORIA & LYTTLE, *supra* note 49, at 8 (describing pre-1887 allotment policies and laws).

129. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified in part at 25 U.S.C. § 71 (2006)). While the statute appeared to bring an end to treaty making, in reality, the federal government continued to enter into various agreements, carried out through executive order or legislation, with Indian tribes as political bodies. See ANDERSON ET AL., *supra* note 127, at 90–91. Furthermore, scholars and at least one Justice have raised questions about the constitutionality of the provision. See *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment); David P. Currie, *Indian Treaties*, 10 GREEN BAG 2D 445 (2007).

130. See *infra* notes 181–96 and accompanying text (discussing the Indian Reorganization Act).

131. 16 Stat. at 566.

132. See Currie, *supra* note 129, at 447.

133. See Quinn, *supra* note 64, at 347.

yet treated with, but having every way as good and as complete rights to portions of our territory as had the Cherokees, Creeks, Choctaws, and Chickasaws, for instance . . . to establish their rights?"<sup>134</sup> Solving the perennial "Indian problem" by revoking the treaty power created a new one: how otherwise to address and resolve outstanding Indian claims.

Most scholars describe Allotment as beginning in 1887 because this was the year that the Dawes Act, or General Allotment Act,<sup>135</sup> was passed. East Coast organizations and Western politicians agitated for the break-up of tribal governments and, in particular, the tribal land base that made tribal cultural and political life possible.<sup>136</sup> According to these constituencies, tribes' separate status, which allowed them to perpetuate their traditions and culture, had to be destroyed in order to allow individual Indians to assimilate successfully in to American society. As Professor Berger has described, during this period "[f]ederal Indian policy, which previously vacillated between sovereign and racialized views of tribes, moved decisively toward the latter."<sup>137</sup> E.P. Smith, Commissioner of Indian Affairs during 1874–1876, opined that "the difficulty of Indian 'civilization' is [n]ot so inherent in the race-character and disposition of the Indian . . . as in his anomalous relation to the Government."<sup>138</sup> The racialized tribe was seen as the locus of Indian backwardness and inferiority. Destruction of the tribe was therefore prerequisite to liberating the individual Indian.<sup>139</sup>

The Dawes Act's primary means for accomplishing the goal of tribal destruction was to shatter the tribally held land base. The Act authorized the break-up of tribal land into individually held allotments for tribal members and the declaration of any surplus lands as open for non-Indian settlement.<sup>140</sup> In order to allot the lands, the Act and related allotment statutes required many tribes to develop membership rolls.<sup>141</sup> As one of

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134. *Id.* (quoting ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 83 (1872)).

135. Indian General Allotment Act, chs. 105, 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358 (2006)).

136. *See* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN": 1880–1900 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS] (collected writings and speeches by the Friends of the Indian in support of allotment and assimilation); DELORIA & LYTLE, *supra* note 49, at 8–9.

137. Berger, *supra* note 9, at 629.

138. Quinn, *supra* note 64, at 347 (quoting ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 374 (1874)).

139. *See id.* at 347 (describing attitudes of federal officials towards tribes during allotment).

140. 24 Stat. 388.

141. *See* Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645 (authorizing the Dawes commission

the Friends of the Indians put it at their annual gathering in Mohonk, New York, the Allotment policy was “a mighty pulverizing engine for breaking up the tribal mass.”<sup>142</sup> Much of this work would be accomplished through allotment, as well as the subsequent process of releasing individual Indian allotments from restrictions on alienability.<sup>143</sup> As Paul Spruhan has documented, the criteria for determining who should be released from restrictions on alienation was based on intricate and byzantine rules about blood quantum, particularly for the Cherokee, Creek, Choctaw, and Chickasaw of Oklahoma.<sup>144</sup>

The process of developing tribal rolls, and then using those rolls to disburse land as individual allotments in order to eliminate their trust status, has had lingering harmful effects on tribes and individual Indians.<sup>145</sup> In some instances, people of unquestionable tribal affiliation were omitted from the rolls simply by oversight or unseemly bureaucratic delay. Professor Eva Marie Garrouette has described how “[t]he compilation of some tribal rolls . . . took so long that a significant number of registrants died before the paperwork was completed. . . . Even when an applicant did manage to live long enough to complete the entire process of enrollment, she frequently found herself denied.”<sup>146</sup> In other cases, tribal people refused to be listed on the government’s rolls as acts of protest against the allotment process: “For instance, among Oklahoma Creeks, Cherokees, Chickasaws, and Choctaws conservative traditionalists or ‘irreconcilables’ fought a hard fight against registration with the Dawes commission.”<sup>147</sup> The tragic

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to establish tribal membership for Five Civilized Tribes); *see also* Spruhan, *supra* note 77, at 40–41 (discussing the Dawes Commission’s process for these tribes).

142. AMERICANIZING THE AMERICAN INDIANS, *supra* note 136, at 342.

143. *See* Spruhan, *supra* note 77, at 40–41.

144. *See id.* at 41 (“With each group accounted for, Congress moved to make lands alienable based on the race and blood quantum of the allottees. First, Congress released whites and freedmen in 1904, called ‘Indians who are not of Indian blood’ in the statute, from restrictions on the sale of all their allotted land except their homesteads. In 1906 Congress extended the time for restrictions for full bloods, and required that the Secretary of Interior approve full-blood leases, sales, and wills devising allotments. In 1908 Congress released Indians from restrictions on the sale of their allotments by their amount of Indian blood. Those Indians of less than one-half Indian blood, along with intermarried citizens and freedmen, were released from all restrictions. Those of one-half or more Indian blood, but less than three-quarters Indian blood, were released from restrictions on all their land but their homestead. Those of three-quarters or more Indian blood retained restrictions on all their land.”) (citations omitted).

145. *See* EVA MARIE GARROUETTE, REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA 21–22 (2003); Spruhan, *supra* note 77, at 41 n.352 (describing freedmen litigation).

146. GARROUETTE, *supra* note 145, at 21.

147. *Id.*

irony is that “the descendants of those traditionalists find themselves worse off, in the modern, legal context,” because today they cannot be enrolled members of their tribes.<sup>148</sup>

Sometimes tribal rolls were constructed explicitly to facilitate tribal approval of land cessions to the federal government. According to Professor Garroutte, “Prior to 1892, agents of American government had judged mixed bloods more cooperative than full bloods on a variety of issues, particularly in the signing of legal documents allowing for land cessions. The agents had therefore specifically sought them out for such purposes.”<sup>149</sup> Garroutte quotes the Annual Report of Thomas J. Morgan, Commissioner of Indian Affairs, which urged the recognition of mixed bloods as tribal members for just this purpose:

Where by treaty or law it has been required that three-fourths of an Indian tribe shall sign any subsequent agreement to give it validity, we have accepted the signature of mixed bloods as sufficient, and have treated said agreements as valid for the purpose of relinquishment of the rights of the tribe. . . . *To decide at this time that such mixed bloods are not Indian . . . would unsettle or endanger the titles to much of the lands that have been relinquished by Indian tribes and patented to citizens of the United States.*<sup>150</sup>

Taking this approach a step further, David H. Jerome, Commissioner of Indian Affairs in 1892, advocated including non-Indians on the tribal rolls in order to increase the chances of a vote in support of allotting the Kiowa Tribe’s reservation.<sup>151</sup>

Given the aims and assumptions of the 1871 Act and the Dawes Act, it is not surprising that their contributions to defining American Indian *tribes* were indirect. The 1871 Act aimed to freeze the definition in time, notwithstanding the existence of many tribes with obvious claims to territory still outstanding. The Dawes Act (and accompanying laws) defined *members* of tribes only in order to eventually extinguish the tribes through the process of eliminating tribal land and culture. The goals of both were to eliminate the federal government’s obligations to

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148. *Id.* at 22.

149. *Id.* at 36.

150. *Id.* (omission in original) (emphasis added) (quoting THOMAS J. MORGAN, U.S. COMMISSIONER OF INDIAN AFFAIRS, SIXTY FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 36 (1892)).

151. See ANDERSON ET AL., *supra* note 127, at 116 (quoting Ann Laquer Estlin, Lone Wolf v. Hitchcock: *The Long Shadow*, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880’S 215, 216 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984)).

treat tribes and their members as distinct peoples, with rights and statuses separate from those of ordinary U.S. citizens. As such, the fewer tribes the better, and likewise the fewer individuals affiliated with tribes the better. During this period, the inverse racial logic that applied to Indians as opposed to African-Americans was at its height.<sup>152</sup> At the same time that the federal government was eliminating special protections for Indian individuals on the basis of their *insufficient* blood quantum (and sometimes constructing tribal rolls deliberately in order to diminish the number of “full blood” Indians), the Supreme Court sanctioned the “one drop” approach to defining black identity in *Plessy v. Ferguson*.<sup>153</sup> Elimination of Indians as a “race” would result in more land held as private property by non-Indians, whereas strict and purportedly biological *separation* between whiteness and blackness, as determined by blood quantum even in minute degrees, served the ends of maintaining free and low-wage labor even after the Civil War.<sup>154</sup>

During this same historical period, the Supreme Court decided several cases that necessitated some working definition of what constituted a tribe. In *United States v. Joseph*,<sup>155</sup> the Court considered the question of whether the Pueblo of Taos was a “tribe” under the Nonintercourse Act,<sup>156</sup> which prohibited non-Indian settlement on Indian lands and subjected violators to fines.<sup>157</sup> The Court determined that the Pueblo was not a tribe under the Act because the Pueblo people were too civilized to

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152. See Wolfe, *Land, Labor, and Difference*, *supra* note 28, at 881–82, 887.

153. 163 U.S. 537 (1896). See also Wolfe, *Land, Labor, and Difference*, *supra* note 28, at 882 (noting that the trend after *Plessy* “was steadily in the direction of what came to be known as the ‘one-drop rule,’ in which any evidence of any African ancestry whatsoever, no matter how far back or remote, meant that one was classified as black”); Cheryl Harris, *Whiteness as Property*, in *CRITICAL RACE THEORY*, *supra* note 39, at 283–85 (describing rules of hypodescent and other blood quantum approaches to determining blackness). As Harris notes, “The standards were designed to accomplish what mere observation could not: ‘That even Blacks who did not look Black were kept in their place.’” *Id.* at 284 (quoting R.T. Diamond & R.J. Cottrol, *Codifying Caste: Louisiana’s Racial Classification Scheme and the Fourteenth Amendment*, 29 *LOY. L. REV.* 255, 281 (1983)).

154. See Harris, *supra* note 39, at 284–86; Wolfe, *Land, Labor, and Difference*, *supra* note 28, at 879–84, 886–88. The intensification of both forms of racialization is no coincidence. As Patrick Wolfe notes, “Despite [the] fundamental discrepancy between the racialization of Indians and of blacks, in either case we find race intensifying when social space becomes, or threatens to become, shared.” Wolfe, *Land, Labor, and Difference*, *supra* note 28, at 887.

155. 94 U.S. 614 (1876), *abrogated by* *United States v. Candelaria*, 271 U.S. 432 (1926).

156. 25 U.S.C. § 177 (2006).

157. See 94 U.S. at 615 (citing to various provisions prohibiting settlement on Indian lands in the Territories of New Mexico and Utah). The 1834 Act declared it illegal for anyone to settle on lands “belonging, secured, or granted by treaty with the United States to any Indian tribe.” *Id.* The 1851 amendment extended the Act to the Territories of New Mexico and Utah. *Id.*

require the ward-guardian relationship that warranted protection from non-Indian settlement.<sup>158</sup> Quoting the lower court, the Court stated:

For centuries, . . . the pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. . . . They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. . . . In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. *They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.*<sup>159</sup>

The tribes protected by the Act, according to the Court, were “the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government.”<sup>160</sup> The Court concluded that the Pueblo was not a tribe under the Act because their stability, degree of assimilation, and history of integration into the former Mexican government rendered them no different from other communally-oriented non-Indian communities:

If the pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes of whom we have been speaking.<sup>161</sup>

*Joseph*'s definition, limited as it was to the Nonintercourse Act, nonetheless reflected the evolving idea that inferiority and incapacity inhered in the meaning of the word “tribe.” The Pueblo's “superior” social organization, habits, and degree of assimilation rendered them, ironically, less protected in their lands than the “semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or

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158. *Joseph*'s holding with respect to whether Pueblos are tribes and Pueblo lands are Indian country has since been rejected. See, e.g., *Candelaria*, 271 U.S. 432.

159. *Joseph*, 94 U.S. at 616–17 (emphasis added).

160. *Id.* at 617.

161. *Id.* at 617–18.

Territory.”<sup>162</sup> Despite *Joseph’s* degraded view of the tribes warranting Nonintercourse Act protection, the Court nonetheless recognized that political and legal independence were key elements of the definition of a tribe: tribes were “in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, not as individuals.”<sup>163</sup>

In *Montoya v. United States*, decided in 1901, the question was whether a claim could be sustained against the United States under an act that provided compensation for depredations committed by “Indians belonging to any band, tribe, or nation in amity with the United States.”<sup>164</sup> The alleged depredations had been committed by members of the Mescalero Apache Tribe, who had joined with a band of Chiricahua Apache Indians led by Victoria.<sup>165</sup> The Court determined that these actions were not covered by the act because Victoria’s band, far from being “in amity with” the United States, had defied attempts to be settled and relocated, fled to Mexico, and been pursued by U.S. troops throughout the Southwest, all the while defying federal authority.<sup>166</sup> While the decision could have been confined to the question of what it meant to be “in amity” with the United States, the Court nonetheless gave considerable attention to the distinctions between the terms “nation,” “tribe,” and “band.”

Despite the clear language of the Act, which included the term “nation” as a possible descriptor for a collection of Indian people, the *Montoya* Court was disdainful: “The North American Indians do not, and never have, constituted ‘nations’ as that word is used by writers upon international law, although in a great number of treaties they are designated as ‘nations’ as well as tribes.”<sup>167</sup> The Court’s first basis for rejecting the term “nation” was purely formalistic.<sup>168</sup> However, *Montoya*

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162. *Id.* at 617.

163. *Id.*

164. 180 U.S. 261, 264 (1901) (citing Act of Mar. 3, 1891, ch. 538, 26 Stat. 851).

165. *Id.* at 270.

166. *See id.* at 269.

167. *Id.* at 265.

168. *See id.* According to *Montoya*, “The word ‘nation’ as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations.” *Id.* Rejecting nationhood for Native peoples on this basis reinforced a self-referential imperialism, but it at least resonated with federal Indian law’s “domestic dependent nation” formula.

did not rest there. According to the Court, their “natural” inferiority prevented Indians from *forming* nations:

Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word.<sup>169</sup>

These disparaging and uninformed generalizations were not unique to *Montoya*. Chief Justice Marshall relied on similar ones in *Johnson v. M'Intosh*.<sup>170</sup> Yet the heightened rhetoric is a contrast to *The Kansas Indians*, decided thirty-five years earlier, which at least recognized the tribes' well-established governmental and legal structures.<sup>171</sup> The *Montoya* Court's much more debased description of Indian political and legal organization, at the height of the Allotment period, served and reflected the policy priorities of the times.

Consistent with those goals, after *Montoya* rejected the label “nation,” the opinion turned to the question of how to define “tribes,” and included the criterion of racial similarity: “By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . .”<sup>172</sup> Having concluded that Indians lacked the sophistication necessary to form governing structures that would allow for membership to be defined in ways other than by race, the Court inevitably defined “tribes” in racial terms. As William Quinn has correctly observed, *Montoya* is known in Indian law circles as the first case to articulate a set of criteria for defining a federally recognized tribe.<sup>173</sup> It is therefore noteworthy that embedded in this early definition is a racialized understanding, rooted in the dogma of the times and departing from earlier articulations, that assumed Indian inferiority and lack of civilization.

*United States v. Sandoval*, decided twelve years later, sounded a similar note.<sup>174</sup> Like *United States v. Joseph*, the question involved the application of a federal law to one of the Pueblos of New Mexico. By its

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169. *Id.*

170. 21 U.S. (8 Wheat.) 543, 590 (1823).

171. See *supra* discussion at notes 121–26 and accompanying text (discussing *The Kansas Indians*).

172. *Montoya*, 180 U.S. at 266.

173. See Quinn, *supra* note 64, at 352.

174. 231 U.S. 28 (1913).

own terms, the law in *Sandoval*, which banned the introduction of alcohol into Indian country, applied to the Pueblos. The Court therefore addressed the prior question, which was the extent to which Congress could declare unilaterally that a group was an Indian tribe. The Court concluded that Congress had wide latitude in this arena, so long as its designation was not arbitrary.<sup>175</sup> To act within its broad powers, Congress had to legislate with respect to “distinctly Indian communities.”<sup>176</sup> *Sandoval*’s rough criteria included (1) whether the legislative and executive branches consistently treated the Pueblos as “dependent communities entitled to [their] aid and protection,” and (2) whether the Pueblos’ “Indian lineage, isolated and communal life, primitive customs and limited civilization,” rendered Congress’s decision well within its broad discretion.<sup>177</sup> *Sandoval*’s definition, like *Montoya*’s, therefore included both some idea of lineage (dubbed “race” in *Montoya*)<sup>178</sup> and separateness, but in both cases separateness was defined by inferiority and the need for the federal government’s paternalistic protection.<sup>179</sup> Indeed, in an interesting reversal from *Joseph*, which relied on the Pueblos’ relative civilization to support the conclusion that their lands should not be covered by the Nonintercourse Act, the *Sandoval* Court referred at length to various Indian Commissioners’ reports that described the Pueblos as not ready for civilization, the main evidence of which was their refusal to abandon their traditional religious and political practices (described disparagingly as pagan and autocratic).<sup>180</sup>

To summarize, at the dawn of the twentieth century, which was also the height of the Allotment era, the judicial and legislative definitions of tribes and tribal members reflected both the crushing and paternalistic versions of the federal government’s “ward-guardian” relationship with tribes (pursuant to *Montoya* and *Sandoval*) and the hardening of descent-based understandings of tribal membership (under Allotment statutes and associated policies). Both served the larger political goals of, on the one hand, narrowing the federal government’s obligations to tribes to actions that would ready them for assimilation, and on the other, shrinking the tribal land base through allotment to individual tribal members. Politics were therefore entangled in these emerging

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175. *Id.* at 46.

176. *Id.*

177. *See id.* at 47.

178. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

179. *See Sandoval*, 231 U.S. at 47; *Montoya*, 180 U.S. at 256–66.

180. *See Sandoval*, 231 U.S. at 40–45.

jurisdictional definitions of the federally recognized tribe and its members, which simultaneously relied on and constructed racialized (and racially discriminatory) depictions of Indians.

*c. 1934–1978: The Indian Reorganization Act and the Formalization of Federal Recognition*

From 1913, when *Sandoval* was decided, until the end of the allotment era, there was relatively little activity with respect to defining tribes or tribal members.<sup>181</sup> In 1934, the IRA swept aside Allotment policies, instituted the “Indian New Deal,” and for the first time standardized federal tribal status. The IRA listed three classifications of Indians authorized to form tribal governments and receive government services: “‘recognized’ tribes, descendants of recognized tribes residing on a reservation in 1934, and other persons of one-half or more Indian blood.”<sup>182</sup> According to William Quinn, “[r]ecognition had become, at last, a declaration, and its usage had shifted from a cognitive sense to a wholly jurisdictional sense.”<sup>183</sup> The IRA authorized a list of 258 tribes as eligible to participate in voting on the question of whether to reorganize under the Act or not. While not heralded as such, this was the first constructive list of federally recognized tribes.<sup>184</sup>

The formalization of tribal status inevitably raised questions about how to gain that status. Many tribes were left off of the IRA’s initial list, and the question for them was how to obtain formal federal recognition, and what criteria would apply. Two groups, Alaska and Oklahoma Natives, were covered by subsequent IRA-style legislation.<sup>185</sup> But for the many tribes that simply fell through the cracks, some additional process was required. The job of considering whether groups omitted from the list could be considered tribes fell to the Department of the Interior. Fortunately for the petitioning tribal groups, the post-IRA period

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181. In 1916, the Ione Band of Miwok Indians submitted the first request for tribal recognition to the BIA. See Quinn, *supra* note 64, at 354. But in the absence of any standard policy, process or criteria for recognition, granting federal recognition was both arbitrary and uncertain in terms of its enduring effect. See ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 22 (2000).

182. MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 28 (2004) (citing the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 934 (1934) (codified as amended at 25 U.S.C. § 461 (2006)).

183. Quinn, *supra* note 64, at 356.

184. *Id.*

185. See *id.* at 356–57 (citing to the Alaska Reorganization Act of 1936, Act of May 1, 1936, ch. 254, 49 Stat. 1250, and the Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501–509 (2006)).

coincided with Felix Cohen's tenure at the Department of the Interior, during which he authored many of the Solicitor's opinions concerning recognition. During that period, Cohen also compiled his masterful *Handbook of Federal Indian Law*, which outlined the criteria for determining which tribes could be federally recognized. Factors that favored recognition included: (1) "[t]hat the group has had treaty relations with the United States;" (2) "[t]hat the group has been denominated a tribe by act of Congress or Executive Order;" (3) "[t]hat the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;" (4) "[t]hat the group has been treated as a tribe or band by other Indian tribes;" and (5) "[t]hat the group has exercised political authority over its members, through a tribal council or other governmental forms."<sup>186</sup> Notably, Cohen's definition dropped the racial aspects of the common law tests from *Montoya* and *Sandoval* (both in their emphasis on race and lineage, as well as in their discriminatory assignment of inferior characteristics) and emphasized instead the federal government and other tribes' de facto treatment of the group as a tribe as well as the group's own internal political organization.<sup>187</sup>

The IRA and its aftermath thus added a further dimension to the political nature of the federally recognized tribe. In the process of formalizing the list of tribes and articulating the criteria for getting on the list, internal political organization became more important than ethnographic history. Groups that were unquestionably lineal descendants of aboriginal peoples were nonetheless sometimes ineligible for federal recognition. For example, in an opinion rejecting tribal status for the St. Croix Chippewa, the Solicitor noted that the St. Croix had not retained a distinct political structure, as compared to other bands such as Mole Lake.<sup>188</sup> Similarly, in interpreting the Oklahoma Indian Welfare Act,<sup>189</sup> the Solicitor opined that:

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186. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 271 (1942); see also COHEN, *supra* note 42, § 3.02; see generally DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007).

187. See Quinn, *supra* note 64, at 359 (describing ascendance, in Solicitor's Opinions during the 1930s, of criterion of internal political organization for tribal recognition).

188. *Id.* ("While the St. Croix Indians . . . might have been recognized as a separate band at the time of the 1854 treaty, they now present no characteristics entitling them to recognition as a band, particularly as there exists no form of band organization, as there does in the Mole Lake group.") (omission in original) (quoting Nathan R. Margold, Memorandum to the Commissioner of Indian Affairs (Feb. 8, 1937), in 1 *OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974*, 724, 725 (1974) [hereinafter *OPINIONS OF THE SOLICITOR*]).

189. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501-509 (2006)).

It is not enough that the ethnographic history [of the tribes in question] shows them in the past to have been distinct and well-recognized tribes or bands. . . . There must be a currently existing group distinct and functioning as a group in certain respects and recognition of such activity must have been shown by [the U.S. government].<sup>190</sup>

In the years following the IRA's passage, questions about tribes that were omitted from the list arose periodically, and were decided according to the Cohen criteria described above.<sup>191</sup> The recognition process slowed in the late 1930s, and then paused abruptly after World War II, when the federal government adopted policies aimed at eliminating the federal status of tribes. The Termination era, as it is known,<sup>192</sup> included congressional action terminating the federal/tribal government-to-government relationship with 109 tribes.<sup>193</sup> Termination decisions were based in part on a 1953 study commissioned by the House Committee on Interior and Insular Affairs, which purported to assess tribes for their suitability to be set free from federal superintendence. The House Report relied on the IRA list for its definition of an existing federally recognized tribe.<sup>194</sup> Ironically, it was therefore this anti-tribal initiative that formalized an administrative list and definition of tribes that persisted until 1978.<sup>195</sup> The Termination era ended almost as suddenly as it began. The Secretary of the Interior declared, in 1959, that "no Indian tribe or group should end its relationship with the Federal Government unless . . . the tribe or group affected concurs in and supports the plan proposed."<sup>196</sup> In the early 1960s, federal officials resumed the process of recognizing tribes that had been omitted from the IRA list.

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190. *Id.* (quoting Nathan R. Margold, Memorandum for the Commissioner of Indian Affairs (Dec. 13, 1938), in *OPINIONS OF THE SOLICITOR supra* note 188, at 864, 864).

191. The more complex cases are compiled in 1 *OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974* (1974). *See also* Quinn, *supra* note 64, at 358.

192. *See* ANDERSON ET AL., *supra* note 127, at 142 (summarizing termination era and policies).

193. *See id.* at 144.

194. *See* Quinn, *supra* note 64, at 360-61 (citing H.R. REP. NO. 82-2503, at 139 (1953)).

195. *See id.* at 361.

196. COHEN, *supra* note 42, § 1.07, at 99 (quoting 105 CONG. REC. 3105 (1959) (remarks of Sec'y of the Interior Fred A. Seaton)).

d. *1978–Present: Litigation to Prove Tribal Status and the Federal Acknowledgment Process*

The federal acknowledgment criteria and processes came under new scrutiny in the 1970s. Tribes and tribal members, invigorated by self-determination policies, sought enforcement of long-neglected treaty rights as well as redress for the federal government's many failures to support tribal communities.<sup>197</sup> Responding to the surge of Indian activism, Congress established the American Indian Policy Review Commission, which examined a wide range of issues affecting Indian tribes and people, including the number and status of tribes that had never received federal recognition.<sup>198</sup> The Commission's Task Force on Terminated and Nonfederally Recognized Indians found that hundreds of tribes had been overlooked for federal status due to the absence of a uniform acknowledgement process, as well as the arbitrary interpretations and actions of federal officials.<sup>199</sup> The Commission concluded that:

The results of "non-recognition" . . . has [sic] been devastating, [including] the continued erosion of tribal lands, or the complete loss thereof; the deterioration of cohesive, effective tribal governments and social organizations; and the elimination of special federal services, through the continued denial of such services which the Indian communities in general appear to desperately need.<sup>200</sup>

The Commission recommended an overhaul of the federal government's acknowledgement criteria and processes to facilitate a resolution for the many tribes unfairly overlooked or terminated from recognition.

During the same period, tribes and tribal members litigated a range of issues related to long-neglected treaty and statutory rights. In the Pacific Northwest, tribes with treaty rights to fish at traditional off-reservation sites won the right to take up to half of the commercial fish catch.<sup>201</sup> The

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197. See generally CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005) (recounting tribes' activism during the 1960s and 1970s to revive their legal rights and invigorate tribal communities).

198. See 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 457–84 (1977).

199. See *id.*; see also TASK FORCE TEN: TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION (1976) [hereinafter TASK FORCE TEN].

200. TASK FORCE TEN, *supra* note 199, at 1695.

201. See *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

outcome raised questions about whether unrecognized tribes had the same rights.<sup>202</sup> In the Northeast, tribes whose land bases had been eroded by violations of the Nonintercourse Act sought long overdue redress. The Passamaquoddy Tribe of Maine, pursuing claims against Maine and Massachusetts for wrongful taking of Passamaquoddy property, requested representation from the United States.<sup>203</sup> The Department of the Interior refused, arguing that the Passamaquoddy Tribe did not have a trust relationship with the United States, and that the Tribe was not entitled to protection under the Nonintercourse Act.<sup>204</sup> To secure the federal government's representation, and therefore, be able to pursue its claims against Maine, the Passamaquoddy first had to prevail on the question of whether it was a "tribe" under the Nonintercourse Act.<sup>205</sup> The First Circuit affirmed the District Court's decision that the Passamaquoddy Tribe was a "tribe" within the meaning of the Act, notwithstanding the absence of a federal treaty and the disavowal of federal acknowledgement. The Passamaquoddy Tribe's obvious distinctive political organization, its long history of treatment as a tribe by the state of Maine, as well as early acknowledgement by federal officials that the Tribe was entitled to federal protection, persuaded the court that the Tribe "plainly fit[]" the definition of an Indian tribe outlined in *Montoya*.<sup>206</sup>

Other tribal status questions were not so easily resolved, however. Claims brought by the Mashpee Tribe of Indians raised difficult questions about the extent to which a tribe could adopt assimilative measures and still retain its status as a distinct political entity entitled to

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202. See *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975) (affirming tribal treaty rights to up to one half of the commercial catch in Washington, but limiting eligibility to treaty signatories and federally recognized tribes). The plight of unrecognized tribes whose fishing rights were never acknowledged persists. See GARROUTTE, *supra* note 145, at 27 (describing Samish Tribe's plight with respect to access to traditional fishing grounds and rights to catch salmon for ceremonies).

203. See *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 372 (1st Cir. 1975).

204. See *id.* at 372–73 (describing how the Tribe sought a declaratory judgment that it was entitled to federal protection under the Indian Nonintercourse Act after the federal government refused to represent the Tribe in its claims against Maine based on an opinion by the Acting Solicitor that the Tribe had no treaty with the United States and no other evidence of a trust relationship).

205. See *id.* at 376.

206. *Id.* at 377 n.8. The court quoted *Montoya's* interpretation of "tribe" under the Act "to mean 'a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory.'" *Id.*; see also *supra* notes 153–61 and accompanying text (discussing *Montoya*).

federal protection.<sup>207</sup> The Mashpee, who recently achieved federal recognition through the acknowledgement process,<sup>208</sup> initially lost their case in the courts.<sup>209</sup>

*Passamaquoddy, Mashpee Tribe v. Town of Mashpee*,<sup>210</sup> and other contemporary legal battles over tribal recognition necessarily confront the problematic role that race has historically played in defining tribal status. Built into early attempts to distinguish Indian tribes from everyone else was a consistent, if protean, conception of inferiority. The mark of separateness was “separate because not civilized,” or “separate because not sophisticated.” Thus while the most disparaging racialized language from *Montoya* and *Sandoval* is excised in *Passamaquoddy*, the idea of dependence, inferiority, and absence of assimilation remains:

The cases do, it is true, suggest that the Act’s coverage is limited to tribes consisting of “simple, uninformed people,” an interpretation understandable in light of the Act’s protective purpose. But it is not claimed that the Tribe and its members are so sophisticated or assimilated as to be other than those entitled to protection.<sup>211</sup>

In *Mashpee*, the particular racialized expectations about tribal status were even more prominent. The Mashpee Tribe survived through colonial and post-revolutionary times (unlike many other Northeast tribes that were utterly destroyed) by engaging in various assimilative adaptations. Their success at doing so, which included their ability to maintain what they believed to be superior rights to their ancestral lands, was held against them in the legal determination of whether they had

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207. See *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978). The *Mashpee* case was high profile for a number of reasons. The idea of an Indian tribe persisting in the crowded Northeast took many by surprise. The location of the Mashpee’s land claim—stunning beach front property on Cape Cod—caused consternation. And the mixed race appearance, and strong Massachusetts accents, of many Mashpee did not accord with stereotypical expectations about Indians. See Jo Carrillo, *Identity as Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 511, 544 (1995); Gerald Torres & Kathryn Milun, *Translating ‘Yonnonidio’ by Precedent and Evidence: The Mashpee Indian Case*, in CRITICAL RACE THEORY, *supra* note 39 at 177, 185–87 (describing Mashpee racial integration, political structure, and land claims). For an in-depth examination of the case and its meanings, see generally JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 277–346 (1988).

208. See Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007, 8007 (Feb. 22, 2007) (effective May 23, 2007).

209. See *Mashpee Tribe*, 447 F. Supp. 940.

210. *Id.*

211. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 378 (1st Cir. 1975).

remained a tribe.<sup>212</sup> These cases heightened the need for a uniform way of addressing tribal recognition claims according to criteria that did not perpetuate the cycles of racialized paternalism embedded in the early recognition cases.

The Commission's recommendations, together with the increase in litigation over tribal status exemplified by *Passamaquoddy* and *Mashpee*, ultimately prompted regulatory action. The BIA, flooded with acknowledgment petitions, began the process of instituting uniform criteria and clear procedures for tribes to petition for federal recognition.<sup>213</sup> It took yet another lawsuit, however, before the BIA promulgated the final regulations for federal acknowledgement and mandated publication of a list of all federally recognized tribes in 1978.<sup>214</sup> The regulations, most recently amended in 1994,<sup>215</sup> establish seven criteria for tribal recognition. Tribes must show: (1) continuous existence since 1900; (2) that a predominant portion of their membership comes from a "distinct community"; (3) that the tribe has maintained political influence over the community; (4) that the group has membership criteria; (5) that they descend from a historical Indian tribe and have functioned as a single autonomous political entity; (6) that the membership does not comprise members of a current federally recognized tribe; and (7) that the group petitioning for acknowledgement was not terminated by Congress.<sup>216</sup>

The federal acknowledgment criteria and processes have provided a bureaucratic forum for resolution of the many claims by tribes that were overlooked, inadvertently or otherwise. Yet, despite the BIA's stated intention of removing both the politics and the caprice from the federal acknowledgement process, scholars have argued that the process remains rife with both.<sup>217</sup> Furthermore, as Professor Cramer has argued, a tribe's pursuit of recognition often stirs up racialized, and racist,

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212. See Carrillo, *supra* note 207, at 544.

213. See Quinn, *supra* note 64, at 363.

214. See *id.* (describing lawsuit brought by the Stillaguamish Tribe, whose acknowledgement petition was caught up in the BIA's moratorium on decision-making while it developed a system for federal recognition). The criteria were published in the Federal Register in 1978. Procedure for Establishing that an American Indian Group Exits as an Indian Tribe, 43 Fed. Reg. 23,743 (June 1, 1978). The first list of federally recognized tribes was published in 1979. See Indian Tribal Entities that Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979).

215. See 25 C.F.R. pt 83 (2012).

216. See *id.* § 83.7(a)–(g).

217. See generally RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2005); MILLER, *supra* note 182.

reactions to tribes and Indian people.<sup>218</sup> The public and the media, lacking the historical understanding of how federal policies both forced tribes to assimilate and arbitrarily excluded tribes from federal recognition, often assume or infer that “fake” Indians are pursuing gaming money.<sup>219</sup> Public reactions reflect the unique ways that tribes have been racialized and stereotyped; the harshest accusations often come in the form of questioning of tribal authenticity because tribal members look either too white or too black.<sup>220</sup>

The recognition criteria themselves entangle lineage with politics. Tribes petitioning for acknowledgment must show that they “descend from a historical Indian tribe.”<sup>221</sup> Proof of “blood,” even if traceable by descent, is therefore built into the legal foundation for being recognized as a tribe in the political sense. Furthermore, this criterion might be required by the Constitution. Indian tribes are referred to twice in the Constitution in ways that advert to their separate political status.<sup>222</sup> If any other group of U.S. citizens demanded a similar status, along with a direct government-to-government relationship with the United States, it would be called secession.<sup>223</sup> While “lineage” is not the same as the socio-political construct of race, it is not at all clear that members of the Supreme Court accept that distinction.<sup>224</sup> Yet if the Justices impose their colorblind understanding of racial discrimination on lineage requirements, they may find themselves subjecting the Constitution itself to strict scrutiny.

There is a better way. Leave the historical origins of tribes’ separate

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218. See generally CRAMER, *supra* note 217.

219. See *id.* at 97–102 (describing some non-Indian reactions to tribes’ pursuit of recognition).

220. See *id.* at 106, 124, 153.

221. See 25 C.F.R. § 83.7(e) (2012).

222. See U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. II, § 2, cl. 2 (Treaty Clause); see also Fletcher, *supra* note 9, at 164. The Treaty Clause does not refer in the text to Indian tribes, but there is no serious doubt that the Treaty power was intended to extend to tribes, and it was widely exercised as such.

223. See, e.g., *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, reprinted in JOHN AMASA MAY & JOAN REYNOLDS FAUNT, *SOUTH CAROLINA SECEDES* 76, 76 (1960), available at <http://sunsite.utk.edu/civil-war/reasons.html>. “And now the State of South Carolina having resumed her separate and equal place among nations, deems it due to herself, to the remaining United States of America, and to the nations of the world, that she should declare the immediate causes which have led to this act.” *Id.*

224. See *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (“Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification.”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

political existence intact. History makes distinctions based on pre-contact descent for this purpose the right thing, as well as the constitutionally defensible thing. Beyond this point of origin, courts and the federal government should allow tribes to determine their membership criteria as they see fit, with or without blood quantum or lineal descent.<sup>225</sup> The origins of a separate political existence need not trap American Indian tribes in time and space with respect to developing meaningful, post-colonial understandings of themselves and their people.

## 2. *Meanings and Effects of Tribal Membership*

The story of how the United States arrived at a list of “federally recognized tribes” is complicated enough, but the messy legal classifications that apply to Native people do not end there. Different programs and benefits depend on how membership in a federally recognized tribe is defined. Further, sometimes benefits and programs apply to Native people regardless of whether they are members of federally recognized tribes, however defined.<sup>226</sup>

### a. *BIA Employment Preferences*

The BIA employment preference, the very classification at issue in *Mancari*, is a fair place to start mapping the role that tribal membership and descent play in federal Indian programs. When *Mancari* was decided, the BIA employment preference applied to members of federally recognized tribes with a quarter or more Indian blood.<sup>227</sup> Three years after *Mancari* was decided, the BIA modified its employment preference criteria “to conform to the definition of ‘Indian’ in the IRA, which had created the preference.”<sup>228</sup> The IRA definition provides:

The term “Indian” . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such

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225. For a compelling proposal to tribes along these lines, see Matthew Fletcher, *Tribal Membership and Indian Nationhood*, \_\_ AM. INDIAN L. REV. \_\_ (forthcoming 2012–2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2129813](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129813) (suggesting that tribes should, to express fully their status as sovereigns, move toward membership criteria rooted in affiliation and territory rather than blood quantum and descent).

226. See O’Brien, *supra* note 91, at 1478 (describing eligibility of Native Hawaiians for certain federal programs notwithstanding lack of federally recognized tribal status).

227. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

228. Wayne R. Farnsworth, *Bureau of Indian Affairs Hiring Preferences After Adarand Constructors, Inc. v. Peña*, 1996 BYU L. REV. 503, 513 (1996).

members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.<sup>229</sup>

The BIA continues to base its hiring preference criteria on the IRA's definition of Indian. BIA applicants have the option to fill out a form that establishes preference based on whether the applicant: (1) is a member of a federally-recognized tribe, band or community; (2) is a descendant of enrolled members of federally-recognized tribes who were residing on a reservation on June 1, 1934; (3) possesses at least one-half degree Indian blood; or (4) is "a member of an Alaska Native Tribe; or, an individual whose name appears on the roll of Alaska Natives prior to July 31, 1981, and not subsequently disenrolled; or, an individual who was issued stock in a Native corporation pursuant to 43 U.S.C. § 1606(g)(1)(B)(i)."<sup>230</sup> The change from *Mancari* allows the BIA to apply the preference to all tribal members, rather than just tribal members who also possess one-quarter or more Indian blood, and also to non-tribal members who possess one-half or more Indian blood.

*b. Statutory Benefits and Services*

Although the IRA itself defined "Indian" to include tribal members and Indians with one-half blood quantum, today most federal programs that provide services to individual Indians make eligibility contingent on membership in a federally recognized tribe.<sup>231</sup> The Tribally Controlled Community College Assistance Act defines Indians as members of federally recognized tribes.<sup>232</sup> Similarly, Indians are defined by federally recognized tribal membership under the BIA's Job Placement and Training Program,<sup>233</sup> and the Food Stamp Program.<sup>234</sup>

Within programs that apply tribal enrollment as the main criteria,

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229. 25 U.S.C. § 479 (2006).

230. VERIFICATION OF INDIAN PREFERENCE FOR EMPLOYMENT IN THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN HEALTH SERVICE, FORM BIA-4432 (expires Nov. 30, 2014), available at <http://www.bia.gov/cs/groups/public/documents/text/idc015598.pdf>.

231. See Fletcher, *supra* note 25, at 302.

232. See 25 U.S.C. § 1801(a)(1), (2); see also 25 C.F.R. § 41.3(h) (2012) (implementing regulations).

233. 25 C.F.R. § 26.1 (2012).

234. 7 C.F.R. § 273.4(a)(3)(ii) (2012); see also USDA, AMERICAN INDIANS AND ALASKA NATIVE: A GUIDE TO USDA PROGRAMS 78-79 (2007), available at [http://www.rurdev.usda.gov/supportdocuments/AmerIndianNativeAlaskGuide\\_07-11-07.pdf](http://www.rurdev.usda.gov/supportdocuments/AmerIndianNativeAlaskGuide_07-11-07.pdf).

there are sometimes understandable expansions. For example, in the Tribally Controlled Community College Assistance Act, the definition of “Indian student” includes a member of a tribe, and also a “biological child of a member of an Indian tribe, living or deceased.”<sup>235</sup> The Indian Child Welfare Act (ICWA),<sup>236</sup> which imposes limits on state authority to remove Indian children from their families,<sup>237</sup> defines an Indian as “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.”<sup>238</sup> The ICWA defines an Indian child as “any unmarried person who is under age 18 and is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>239</sup>

The Indian Health Service (IHS) defines Indian even more broadly. An individual is eligible for IHS treatment if she is “of Indian and/or Alaska Native descent as evidenced by:” (1) the community regarding her as Indian or Alaska Native; (2) her membership—“enrolled or otherwise”—in an Indian or Alaska Native Tribe; (3) her residence on tax-exempt land or ownership of restricted property; (4) her active participation in tribal affairs; or (5) “any other reasonable factor indicative of Indian descent.”<sup>240</sup> Indians of Canadian or Mexican origin also qualify for IHS as long as they are considered members of an Indian tribe that is served by IHS.<sup>241</sup> Non-Indian women pregnant with the child of an eligible Indian also qualify, but only for the duration of the pregnancy plus six weeks.<sup>242</sup> Last, non-Indians living in an Indian’s household may be eligible if they pose a threat to the public health, as determined by the medical officer in charge.<sup>243</sup>

*c. Federal Criminal Jurisdiction*

Given the emphasis, for equal protection purposes, that *Mancari*

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235. See 25 U.S.C. § 1801(7)(B) (Supp. II 2009).

236. 25 U.S.C. §§ 1901–63 (2006).

237. 25 U.S.C. §§ 1901(4)–(5), 1902.

238. 25 C.F.R. § 23.2 (2012).

239. *Id.*

240. *Indian Health Manual § 2-1.2 Persons to Whom Services May be Provided*, INDIAN HEALTH SERV., [http://www.ihs.gov/ihtm/index.cfm?module=dsp\\_ihm\\_pc\\_p2c1](http://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_pc_p2c1) (last visited June 21, 2012).

241. *Id.*

242. *Id.*

243. *Id.*

placed on the political distinction between members of federally recognized tribes versus non-members (whether American Indian or not), one might expect that distinctive federal treatment for criminal prosecution would likewise rest on enrollment in a federally recognized tribe. But it does not. The Major Crimes Act, passed in 1885 at the dawn of the Allotment era, subjects “Indians” to federal prosecution for listed felonies.<sup>244</sup> The Act itself does not define “Indian.” Instead, courts rely on a definition that dates back to a case decided several decades before the passage of the Major Crimes Act. In 1846, in *United States v. Rogers*,<sup>245</sup> the Court considered whether Rogers, a white man who had been adopted as a Cherokee citizen, was an “Indian” under federal statutes exempting Indian-on-Indian crimes from federal jurisdiction.<sup>246</sup> The Court held that Rogers (and the white man whom he was accused of murdering) could not be considered Indian because Indian tribes lacked power to naturalize anyone not of their “race.”<sup>247</sup> The definition of Indian that emerged, and was later grafted onto prosecutions under the Major Crimes Act, required that the person (1) have some degree of Indian blood, and (2) be recognized within his or her community or by the federal government as an Indian.<sup>248</sup>

Notwithstanding the distant and racist origins of the *Rogers* formulation, it persists in contemporary doctrine. When a defendant is prosecuted either under the Major Crimes Act or the Indian Country Crimes Act (ICCA),<sup>249</sup> prosecutors and defense attorneys do battle over whether the defendant (or victim) has the requisite degree of “Indian

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244. See 18 U.S.C. § 1153 (2006). The Major Crimes Act was part of the larger assimilative agenda. Seizing on public dismay after the Supreme Court’s decision in *Ex parte Kang-Gi-Shun-Ca (Crow Dog)*, 109 U.S. 556 (1883), which held that the federal government lacked the power to prosecute a crime committed by a tribal member against another tribal member, Congress hastily passed a statute extending its powers of criminal prosecution to Indian defendants in Indian country. See SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 101, 134–38 (1994); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 770 (2006); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 803 (2006).

245. 45 U.S. (1 How.) 567 (1846).

246. *Id.*

247. See *id.* at 572–73. For an illuminating history of the case, see Bethany R. Berger, “*Power Over This Unfortunate Race*”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004).

248. See *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (describing two-part test and noting that it has been adopted by other circuits); Weston Meyring, “*I’m an Indian Outlaw, Half Cherokee and Choctaw*”: *Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 186 (2006).

249. 18 U.S.C. § 1152.

blood.”<sup>250</sup> With respect to the former, courts have varied in their conclusions about how *much* blood is required.<sup>251</sup> Some courts require “some” Indian blood.<sup>252</sup> Others look for a “significant” degree of Indian blood,<sup>253</sup> others a “substantial” degree,<sup>254</sup> and for others still, a “sufficient” degree will do.<sup>255</sup> Even courts that have adopted the same terminology do not apply it uniformly, nor do they provide explanations regarding why certain percentages meet, or fail to meet, the threshold.<sup>256</sup>

The second element of defining “Indian” for purposes of criminal jurisdiction under the Major Crimes Act and the Indian Country Crimes Act—recognition as an Indian by the community or the federal government—has a similarly confusing array of interpretations.<sup>257</sup> Most courts use the same language: the person must be “recognized as an Indian by a tribe or the federal government.”<sup>258</sup> Beyond this, the consensus dwindles.<sup>259</sup> In *St. Cloud v. United States*,<sup>260</sup> the federal

250. Under the ICCA, the federal government has jurisdiction over crimes in which the defendant is a non-Indian and the victim is Indian, and pursuant to the ICCA in combination with the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, also over most misdemeanors involving and Indian defendant and non-Indian victims. *See* 18 U.S.C. § 1152; COHEN, *supra* note 42, § 9.02[1][b], at 731–34 (describing ICCA and ACA jurisdiction, and noting that while courts assume the ACA applies in Indian country, the Supreme Court has never addressed the question directly).

251. *See* Meyring, *supra* note 248, at 190–93 (canvassing the cases concerning the degree of blood requirement); Katharine C. Oakley, Comment, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 184–85 (2011).

252. *See, e.g.*, *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (holding that someone having 3/32ds of Indian blood met the “some” requirement); *United States v. Torres*, 733 F.2d 449, 455–56 (7th Cir. 1984) (holding that someone with 25/64ths and someone with 11/32ds Indian blood met the “some” requirement); *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (holding that someone with 15/32ds of Indian blood met the “some” requirement).

253. This degree has mostly been adopted by state courts. *See, e.g.*, *State v. LaPier*, 790 P.2d 983, 986–87 (Mont. 1990) (holding that an individual with 165/512ths of Indian blood met the “significant” requirement); *Goforth v. State*, 644 P.2d 114, 116 (Okla. Crim. App. 1982) (holding that a little less than 1/4th met the “significant” requirement); *State v. Reber*, 171 P.3d 406, 410–11 (Utah 2007) (holding that an individual with 1/16th Indian blood did not meet the “significant” requirement).

254. *See, e.g.*, *Ex parte Pero v. Pero*, 99 F.2d 28, 31 (7th Cir. 1938) (holding that someone with 3/4ths Indian blood met the “substantial” requirement); *Vialpando v. State*, 640 P.2d 77, 80 (Wyo. 1982) (holding that someone with 1/8th Indian blood did not meet the “substantial” requirement).

255. *See, e.g.*, *United States v. Cruz*, 554 F.3d 840, 843, 845–46 (9th Cir. 2009) (holding that an individual with 29/128th Indian blood met the “sufficient” requirement).

256. *See* Meyring, *supra* note 248, at 190–92; Oakley, *supra* note 251, at 185–87.

257. Meyring, *supra* note 248, at 193; Oakley, *supra* note 251, at 191.

258. Oakley, *supra* note 251, at 187 (quoting *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009); *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984); *State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990)).

259. *Id.*

district court in South Dakota listed, “in declining order of importance,” the following factors:

- 1) enrollment in a tribe;
- 2) government recognition formally and informally through providing the person assistance reserved only to Indians;
- 3) enjoying benefits of tribal affiliation; and
- 4) social recognition as an Indian through living on a reservation and participating in Indian social life.<sup>261</sup>

Although many courts have adopted the *St. Cloud* factors, they vary with respect to how they apply them.<sup>262</sup> Most courts do not view tribal enrollment in a federally recognized tribe as necessary.<sup>263</sup> Some courts, however, have required that the *tribe* that recognizes the person as a member (whether formally enrolled or not) be federally recognized.<sup>264</sup> Other courts do not use the *St. Cloud* factors at all, and instead analyze all of the facts collectively and determine the second prong on a case-by-case basis.<sup>265</sup> Yet another approach is to assess the defendant’s recognition of his or her tribal status, rather than the tribe’s acceptance or recognition.<sup>266</sup>

Where, in all of this parsing of blood and membership, is the language embraced in *Mancari* and *Antelope* distinguishing political affiliation from race?<sup>267</sup> *Antelope* did not address the “Indian by blood” portion of the *Rogers* test, presumably because the criminal defendants in that case were enrolled members of the Coeur d’Alene Tribe. They challenged the Major Crimes Act distinction, and its unequal effects in their case, but

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260. 702 F. Supp. 1456 (D.S.D. 1988).

261. *Id.* at 1461.

262. Oakley, *supra* note 251, at 188; *see, e.g.*, United States v. Cruz, 554 F.3d 840, 846–48 (9th Cir. 2009) (holding that the defendant did not meet the requirement of the second prong despite living on the reservation, going to the Indian school, and being eligible for tribal benefits); *Stymiest*, 581 F.3d at 766 (holding that the defendant met the requirement of the second prong by satisfying only the third and fourth *St. Cloud* factors); United States v. Bruce, 394 F.3d 1215, 1227 (9th Cir. 2005) (holding that the defendant met the requirement of the second prong because she lived on the reservation, obtained Indian assistance, and was arrested under tribal authority); United States v. Driver, 755 F. Supp. 885, 888–89 (D.S.D. 1991), *aff’d*, 945 F.2d 1410 (8th Cir. 1991) (holding that the defendant did not have Indian status because he was not an enrolled member, had not received assistance, and had limited affiliation with the tribe).

263. Meyring, *supra* note 248, at 197; Oakley, *supra* note 251, at 188.

264. LaPier v. McCormick, 986 F.2d 303, 304–05 (9th Cir. 1993); *see also* Meyring, *supra* note 248, at 221, 224.

265. Oakley, *supra* note 251, at 192–93.

266. *See* United States v. Pemberton, 405 F.3d 656 (8th Cir. 2005).

267. *See supra* Part I.A (discussing *Mancari* and *Antelope*).

did not distinguish between the Indian political status aspects of *Mancari* and the *Rogers* requirement of Indian blood.<sup>268</sup>

The federal criminal jurisdiction cases beg the question of how the *Rogers* requirement has survived in contemporary jurisprudence. If the federal judiciary's color-blind adherents were to begin scrutinizing federal classifications that affect American Indians, this would be the place to start. The "Indian by blood" criteria adds nothing but an overlay of dated biological notions of race to the requirement that the person be a political, social, or other kind of "member" of a federally recognized tribe. And the varying definitions of "membership" for the purposes of federal criminal prosecution embrace a more expansive understanding than *Mancari* seemed to endorse. Cases addressing equal protection challenges in the civil context rarely advert to this unruly body of law, and perhaps understandably so. It leads much more readily to a condemnation of the structure of federal criminal prosecution of Indians than it does to judicial second-guessing of economic or social legislation that benefits political sovereigns.

*d. Tribal Criminal Jurisdiction*

The question of who is a "member" of a tribe for purposes of criminal prosecution also arises in the context of tribal criminal jurisdiction. Tribes have inherent sovereign authority to prosecute their own members.<sup>269</sup> In *Duro v. Reina*,<sup>270</sup> the Supreme Court held that tribes had been "implicitly divested" of their inherent authority over Indians who were members of other tribes (nonmember Indians).<sup>271</sup> Congress, at the urging of tribes, reversed the *Duro* ruling by amending the Indian Civil Rights Act<sup>272</sup> to recognize inherent tribal authority over nonmember Indians.<sup>273</sup> Tribal courts can therefore prosecute Indians who are members of their own and other tribes. While tribal courts are not bound by the definition of "Indian" in the federal cases, including the *Rogers* criteria of Indian "by blood," their decisions may be reviewed under the

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268. See *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) ("[T]he prosecution in this case offered proof that respondents are enrolled members of the Coeur d'Alene Tribe and thus not emancipated from tribal relations. Moreover, members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act.").

269. See *United States v. Wheeler*, 435 U.S. 313 (1978).

270. 495 U.S. 676 (1990).

271. See *id.* at 699.

272. See 25 U.S.C. §§ 1301–03 (2006) (amended in 2010).

273. See *id.*

habeas corpus provisions of the Indian Civil Rights Act and federal courts might then employ the same tests they use to determine Major Crimes Act jurisdiction (discussed above) to assess whether the tribal courts have exceeded their inherent authority.<sup>274</sup>

### C. *Concluding Thoughts About Recognition and Membership*

For American Indian tribes, the journey from pre-contact independent sovereigns to “federally recognized tribes” was a political one. The colonial process of absorbing aboriginal peoples into the United States included reformatting tribes’ independent sovereign status to fit within the domestic legal regime. The politics often included subordination through a complicated process of assigning certain inferior characteristics to tribes in order to justify the federal government’s unilateral imposition of authority. At the same time, the process imposed tribal membership definitions that foreclosed the pre-colonial fluidity of tribal identity. The racial and the political became inextricably linked as a result, imposing on tribes a lineal-descent framework that today both protects tribal ties to their aboriginal origins, but also renders them vulnerable to charges of defining membership by “race,” and consequent questioning of their separate political status on equal protection grounds.

## II. LEGAL HISTORIES OF RECOGNITION, MEMBERSHIP, AND RACE

The foregoing describes the general history of how indigenous nations within U.S. borders became folded into the domestic legal order and denominated “federally recognized tribes.” Each of the 566 tribes with that status also has its own unique history. The two histories discussed below represent different aspects of the project of transforming free and independent peoples into juridical entities subject to U.S. law. The CRIT reservation was a spot on a map, selected by federal agents and politicians who hoped that “if you designate it, they will come.” “They” included virtually all of the many distinct peoples that lived near the lower Colorado River valley. The aim was to consolidate many peoples into one geo-political unit for the purpose of clearing the land and facilitating control. By contrast, the Great Dakota Nation, comprised of bands and sub-groups with common origins and

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274. *See Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005) (affirming tribal court conviction from equal protection challenge under habeas provisions of the ICRA), analyzed *infra* at notes 520–28.

language, occupied a vast territory that initially seemed unimportant to the U.S. and, therefore, acceptable to concede to the Indians. As U.S. interest in the territory grew for a variety of economic and ideological reasons, the affiliated peoples of the Great Dakota Nation were dispersed and divided into many different federally recognized tribes. While these are only two of the many hundreds of stories that could be told, they echo and reinforce the larger narrative of the politics and law inherent in constructing federally recognized tribes.

A. *The Colorado River Indian Tribes*

The CRIT's reservation straddles the Arizona–California border as well as the Colorado River. Mohave and Chemehuevi people, who historically were adversaries, have occupied the CRIT reservation since 1865, when it was established for “Indians of [the Colorado River] and its tributaries.”<sup>275</sup> In 1945, the federal government persuaded the CRIT government to accept Navajo and Hopi tribal members onto the reservation, and a short-lived relocation program resulted in a small influx of Navajo and Hopi people who relinquished their political affiliations with those tribes and became members of the CRIT. According to CRIT tribal member Michael Tsosie:

The reason that [Chemehuevi, Navajo and Hopi] were placed on the reservation was that the Federal government decided that Mohaves had too much land and not enough people, and the other tribes, had too many people and not enough land. . . . Unfortunately this situation has created more problems than it ever resolved for the tribes involved.<sup>276</sup>

Tsosie describes his own tribal identity in the following way: “[R]acially I am identified by others as Native American, racially I am identified by other Native Americans as Mohave, Navajo, and Laguna, politically I am identified as a member of the Colorado River Indian Tribes, socially and culturally I am a Mohave.”<sup>277</sup>

Tsosie's succinct summary of his own identity is a fitting synecdoche for the CRIT's situation as a whole. Several distinct ethnic, linguistic, and political groups were ushered onto a single reservation and identified as a single tribe, not because it was consistent with their own cultures or priorities, but because it was expedient for the federal

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275. Act of Mar. 3, 1865, ch. 127, 13 Stat. 541, 559.

276. MICHAEL TSOSIE, PRESERVATION OF MOHAVE HISTORY AND CULTURE 1 (Dec. 1993), available at <http://www.eric.ed.gov/PDFS/ED379115.pdf>.

277. *Id.* at 2.

government. Further, the history of the CRIT, while singular in many respects, nonetheless reflects the general process by which independent aboriginal peoples became today's federally recognized American Indian tribes, and how the racial and the political are hopelessly entangled by that process.

*1. Establishing the CRIT Reservation: For Whom and How Many?*

Historically, many tribes occupied and used the Colorado River Valley between Yuma and Fort Mohave, including the Mohave, Chemehuevi, Yuma, Yavapai, and Hualapai. In the mid-1800s, interest grew, due to non-Indian settlement and desire for land and access to the River, in addressing Indian land claims, settling the many tribes in one place, and quieting the frontier.<sup>278</sup> The CRIT reservation was established by an Act of Congress in 1865, with no mention of negotiations with the many tribes in the region nor even a single name of any tribe that had agreed to settle there. The full text of the statute, which was embedded in a long list of other provisions affecting Indian affairs, reads:

All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.<sup>279</sup>

The intent was to recognize several different tribes' aboriginal claims to the territory, but also to concentrate the many Indian peoples who lived on or near the Colorado River into a single place in order to alleviate conflict with whites. The report of Charles D. Poston, the first Superintendent of Indian Affairs for Arizona, makes both of these aims clear:

It is proposed to colonize some ten thousand Indians within . . . [the proposed reservation site's] boundaries. . . . By a fiction of law, founded on neither reason nor justice, the Indian title is ignored in all the territory acquired from Mexico, because the Spanish Conquerors and Mexicans did them this injustice. It is difficult for the Indians to understand this sophistry, and the absurdity of the action under it needs no argument. . . .

The rapid influx of population in this region renders it necessary that some provision should be made for the original

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278. Charles D. Poston, *Arizona Superintendency: No. 53*, in REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1864, at 150, 157 (1865).

279. 13 Stat. at 559.

inhabitants. The plan of establishing them on a reservation, and providing them the great desideratum of water to aid their cultivation, will no doubt meet your approval. . . .

Difficulties are already growing up between the Indians and whites in that vicinity on account of the occupation of the Indian land, and unless prompt action is taken to regulate differences, by providing the Indians a home, the consequences will be painful.<sup>280</sup>

The absence of any negotiation process, such as would have occurred prior to a treaty, meant that no tribes, not even the Mohave who had inhabited the majority of the area designated as the reservation, had promised to go or stay there. Not surprisingly, the years following the CRIT reservation's establishment were, therefore, ones of uncertainty with respect to which tribes would actually make it home, let alone concede to giving up their broader territorial claims.<sup>281</sup> In September 1865, Mohaves, Yumas, and Yavapai engaged in skirmishes with the Chemehuevi and the Pintahs for claims to the reservation.<sup>282</sup> The Mohave and their allies were determined to drive the Chemehuevi from the area, even though the Mohave and Chemehuevi were the only year-round residents of the reservation at that time.<sup>283</sup> When the fighting ended in 1867, an estimated 750 Mohave occupied the reservation.<sup>284</sup> Initially, some Yavapai also settled at the CRIT reservation.<sup>285</sup> According to an annual report, 2000 "Yavapais or Apache-Mohaves" were living on the reservation in 1868.<sup>286</sup> Nonetheless, in the same 1868 report, Acting Commissioner of Indian Affairs Charles E. Mix admitted that:

The Colorado river reservation has not so far been very successful, yet it is believed, with additional aid from Congress, it can be made a suitable home for many of the tribes. It will not do, however, to withdraw the Indians from their hunting grounds unless adequate provision is made for them on the reservation.<sup>287</sup>

Despite hopes that more tribes and greater numbers of Indian people

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280. Poston, *supra* note 278, at 157.

281. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 8–11.

282. *Id.* at 10.

283. *Id.* at 10–11.

284. *Id.* at 14.

285. See *id.* at 11.

286. *Id.* at 14–15.

287. Charles E. Mix, *Annual Report on Indian Affairs by the Acting Commissioner, in* REPORT ON INDIAN AFFAIRS, BY THE ACTING COMMISSIONER, FOR THE YEAR 1867, at 1, 10 (1868).

would settle at the CRIT reservation, initially only the Mohave and a much smaller number of Chemehuevi could be induced to stay. The other tribes who had been targeted for the CRIT reservation, including some Mohave, established their own reservations in the region between 1876 and 1917.<sup>288</sup> As a result, the CRIT reservation remained much more sparsely populated than the government had planned. Instead of Poston's aspiration of 10,000, the number, largely composed of Mohave, reached barely over 800. Among the many reasons for the low numbers was the recurring failure to deliver irrigation water to the reservation. Repeatedly, the Indian agents expressed optimism that if the canal and irrigation infrastructure were completed, more Indians could be induced to stay and farm. Yet, appropriations to complete the project were perennially insufficient.<sup>289</sup> To keep the Indians within the reservation boundaries, the Indian agents alternated between pleading for more provisions and demanding troops to "keep the Indians intimidated."<sup>290</sup>

As late as 1890, after the Pima and Maricopa, Tohono O'odham (then Papago), Yuma, Hualapai, Navajo, Havasupai, and Hopi had their own reservations recognized, the Indian agent for the region, George Allen, remained optimistic that more Indians would move to CRIT if the irrigation infrastructure were completed:

[T]here is no reason in the world why the present state of affairs should continue on this reservation. With the expenditure of a few thousand dollars in a 6-horse-power boiler and two vacuum irrigating pumps, a perpetual supply of water can be had (the ditch already being constructed), and all the Mohaves, Hualapais, and Chimehuevi [sic] made self-sustaining. Besides there is land enough to support the Yumas, the Apache-Mohaves, and Apache-Yumas.<sup>291</sup>

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288. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 21–22.

289. See *id.* at 15 ("The most important news was the beginning of the canal. . . . On December 16th the canal was started with the Indian as willing laborers. Five miles of the canal had been completed, but, because of funds running out, the work had stopped."); *id.* at 16 ("During the year the head-gate of the canal had been completed. . . . Very little needed to be done to complete the work, and admit water from the Colorado River. The Indians were very excited at the prospect."); *id.* at 17 ("A continual optimism was expressed during these early years that as soon as the canal was completed the many problems connected with the Indians of western Arizona would be resolved."); *id.* ("There was no overflow of the river and the canal was not completed in time."); *id.* ("Because [the Indian agent] didn't feel that the limited amount of money at his command would do any real good, he didn't spend any at all for the canal.").

290. *Id.* at 18.

291. *Id.* at 21 (quoting George Allen, *Report of Colorado River Agency*, in 59TH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, 1, 4 (1890)).

Allen's optimism proved unwarranted. The CRIT reservation remained home only to Mohave and Chemehuevi people, and not even all of their numbers. Nonetheless, over the years the CRIT boundaries expanded. River bottom-lands were added by executive order in November 1873, and the reservation was again enlarged in 1874.<sup>292</sup> Other alterations over the years included boundary adjustments and sales to railroad companies. By the beginning of the twentieth century, the CRIT reservation comprised over 265,000 acres.<sup>293</sup>

The next attempt to make CRIT into a more efficient and densely populated farming community came during the Allotment era. CRIT allotment was intimately tied to the era's reclamation policies.<sup>294</sup> In 1902, the Reclamation Act<sup>295</sup> authorized federally subsidized water storage projects throughout the West. The aim was to provide western agricultural interests with predictable irrigation flows.<sup>296</sup> Reclamation's primary intended beneficiaries were non-Indians, and the CRIT allotment statutes reflected that larger goal. Allotment and reclamation would finally deliver on the promise of irrigation for CRIT, but any unallotted lands would be opened to non-Indian settlement:<sup>297</sup>

[T]he Indians were expected to accept increased allotment sizes and a government irrigation project to water their holdings, and to pay for this irrigation project with funds derived by the tribe for sale of lands they would have to sell under the provisions of the Reclamation Act. Moreover, the Act of March 3, 1911[,] provided that should the allottee receive patent in fee simple, his outstanding debt for his share of the irrigation cost would be a first lien on the patent.<sup>298</sup>

The intent, in other words, was to divide up the CRIT reservation and provide long-promised irrigation, but also to charge the CRIT tribal members for that service and collect the fees by forcing the sale of unallotted lands and placing liens on the property of any tribal members who received fee patents for their allotments. To fully appreciate the near-diabolical nature of these schemes, it is important to recall that *no*

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292. *See id.* at 22.

293. *Id.* at 23.

294. *See id.* at 23.

295. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C. from § 371 to § 498).

296. *See* CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN* 246–47 (1992) (describing the Reclamation Act of 1902 and associated policies).

297. *See* HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 23–24.

298. *Id.*

*tribes ever negotiated to accept the CRIT reservation and its long-promised “improvements” in exchange for their much larger aboriginal land claims.*<sup>299</sup> The bargain, or lack of one, was of the following nature: stay here, or else you will stay here with even less.

For reasons that are not entirely clear from the historical record, the Secretary of the Interior never did exercise his authority under the CRIT allotment acts to open CRIT lands to non-Indian settlement.<sup>300</sup> Yet Arizona refused to give up on the idea. The Second Arizona Legislature asked Congress “to take the necessary steps to open the reservation’s 100,000 to 125,000 acres of irrigable land to entry.”<sup>301</sup> In 1916, the Senate Indian Affairs Committee held hearings on the Indian Appropriation Bill and considered Arizona’s request, which asserted the following:

That the town site of Parker is a barren desert, on land having an intrinsic value of less than \$1 per acre. That whatever added value it may have arises from the fact that it is adjacent to the bottom lands of the Colorado River Indian Reservation, in which the surplus lands above referred to lie; and *unless said lands are opened to settlement and entry the town site of Parker is worth little, or not more than any other desert land.*

. . . That the residents of Parker and numerous other residents of the State of Arizona interested therein, who were induced to purchase lots in the Parker town site by reason of the implied promise of the United States above set forth to open the reservation lands to entry, have repeatedly petitioned Congress and the Department of the Interior for the opening of the surplus lands.

. . . .

. . . That the surplus Indian lands described above are highly desirable as prospective farms, and hundreds of energetic and enterprising citizens of this State alone are awaiting the opportunity to secure tracts of lands for the purpose of making their homes thereon. That to the best knowledge and belief of

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299. See Kenneth M. Stewart, *The Aboriginal Territory of the Mohave Indians*, 16 ETHNOHISTORY 257, 263 (1969) (discussing how following its establishment in 1865, some Mohave Indians were “persuaded” to move onto the Colorado River Reservation while others “refused to move from their ancestral homeland in the Mohave Valley”); see also *Arizona v. California*, 373 U.S. 546, 598 (1963) (asserting that Indians were “put” on the Colorado River reservation, which was “not considered . . . the most desirable area of the Nation”), *judgment entered*, 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966) and 446 U.S. 144 (1984).

300. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 24.

301. See *id.*

your memorialists a large amount of the delay in opening the surplus lands of said reservation to settlement in accordance with the said implied promise of the United States has been caused by unnecessary entanglements of official red tape in the various bureaus at Washington having charge of reclamation work and Indian affairs.<sup>302</sup>

Despite Arizona's pleas, which relied on the expectations of non-Indian real estate speculators, Congress did not open the CRIT lands for settlement.<sup>303</sup> The federal government seemed poised to relent on trying to settle Indians other than the Mohave and Chemehuevi members of CRIT on the reservation. The concession did not last long. Soon, relocation of Navajo and Hopi people became the focus of the government's plans to redeem CRIT's apparently intolerably sparse population.

## 2. *Battles over CRIT Membership*

In 1933, the Indian Service embarked on a new effort to increase the population of the CRIT reservation by reaching out to tribal members on other reservations. First, Superintendent C.H. Gensler focused on recruiting from the Tohono O'odham (Papago) Reservation.<sup>304</sup> Next, he turned hopefully to the cause of bringing Navajo tribal members to CRIT.<sup>305</sup> Gensler's campaign met with receptive ears in Washington. In 1934, Commissioner of Indian Affairs John Collier "sent a letter to all the reservation superintendents in Arizona calling their attention to the 'lands of the Colorado River Indian Reservation.'" He instructed, "'make a careful canvas or check of your jurisdiction, ascertain the views of the Indians you believe might or should be interested and report the results to this office.'"<sup>306</sup> The Indian Service's settlement goals were, again, linked to their efforts to finalize irrigation projects. With only 700 Mohave and Chemehuevi settled at CRIT in 1935, the Director of Irrigation for the Indian Office testified before a Senate Committee that the plans were to "bring in other Indians" in order to justify his request for funding to irrigate 100,000 acres at CRIT.<sup>307</sup>

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302. *Indian Appropriation Bill: Hearing on H.R. 10385 Before the S. Comm. on Indian Affairs*, 64th Cong. 186 (1916) (emphasis added) (statement of Henry F. Ashurst, Chairman, S. Comm. on Indian Affairs, quoting memorial from the Second Legislature of the State of Arizona).

303. *See id.* at 25.

304. *See id.* at 40.

305. *See id.*

306. *Id.*

307. *See id.* at 41.

Parallel to the Indian Service's colonization effort, CRIT was working to establish an approved tribal constitution under the IRA.<sup>308</sup> This led the Indian Service to intensify its analysis of the exact nature of the legal rights the enrolled CRIT members had to the CRIT reservation. The BIA used this moment to further pressure the Tribe to allow for "colonization," urging them to include a provision in the tribal constitution that would allow the federal government to settle other tribes on the CRIT reservation. The BIA maintained the position that the 1865 Act establishing the Reservation for "Indians of [the Colorado River] and its tributaries" meant that the Mohave and Chemehuevi did not have exclusive rights to the land. The Indian Service clung to this view, notwithstanding three contrary opinions by U.S. Solicitor Nathan Margold, the last of which was quite definitive: "The Secretary of the Interior has no right to locate other Indians on this reservation without the consent of the tribes having jurisdiction over the reservation, and the Indians have a clear legal right to withhold their consent."<sup>309</sup> The Solicitor further warned that "it would be inconsistent with the intent of section 16" of the IRA to compel CRIT to surrender exclusive rights to the reservation by refusing to approve their proposed constitution.<sup>310</sup>

Based on the Solicitor's opinions, in 1937 the Acting Secretary of the Interior approved the CRIT constitution, which maintained that "[t]he jurisdiction of the Colorado River Indian Tribes shall include all the territory within the original confines of the Colorado River Indian Reservation," and vested membership in all persons of Indian blood who appeared on the official census roll of the reservation as of January 1, 1937, as well as offspring of one-half or more Indian blood born to non-resident members of the Tribes.<sup>311</sup> The Constitution also gave the tribe the power by popular referendum to promulgate ordinances regarding new membership requirements and resulting property rights.<sup>312</sup>

Despite the adopted constitution, the Indian Service continued to stress to the CRIT that once the new government-funded irrigation project was in place, there would be 100,000 acres of irrigable land on the reservation, more than the existing CRIT members could farm.

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308. See *supra* note 182 and accompanying text (describing IRA period).

309. Nathan Margold, *Colorado River Indian Tribes of Colorado River Reservation—Surrender of Rights of Exclusive Occupancy* (Oct. 29, 1936), in *OPINIONS OF THE SOLICITOR*, *supra* note 188, at 697, 697.

310. See *id.*

311. CONSTITUTION AND BY-LAWS OF THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER RESERVATION, Aug. 13, 1937, available at <http://thorpe.ou.edu/IRA/colcons.html>.

312. See *id.*

Federal officials warned that the white community was already pressuring the government for access to reservation lands. Commissioner of Indian Affairs John Collier was reported to say in a meeting with CRIT on September 20, 1939:

What is the nature of your title, if any, to this great area? I think the answer is that *nobody quite knows* . . . . However, the real and the practically controlling fact is, the 100,000 acres are going to be irrigated, and you . . . cannot use all of it. Impossible! It will be used either by Indians or white people. If used by white people, it will soon be owned by white people. From your standpoint and that of Indians as a whole, it is better that Indians be located here.<sup>313</sup>

At the time there were about 875 Mohaves and 312 Chemehuevis on the reservation.<sup>314</sup> It is important to recall that Commissioner Collier's Solicitor, Nathan Margold, had answered the very question Collier posed about the nature of CRIT title, and Margold's answer was wholly supportive of the Mohave and Chemehuevi's position. Collier's notable omission of Margold's answer, and the substitution of Collier's own wistful statement that "nobody quite knows" is curious to say the least. Consistent with Collier's position, the BIA continued for the next five years to cajole the tribe to agree to colonization, even overtly threatening that if Congress got involved, the land was likely to go to white community members.<sup>315</sup> A BIA memo dated November 15, 1940, summarized the BIA position:

The Mojaves and Chemehuevis cannot possibly utilize this vast natural resource properly. Careful study of the needs of these Indians including those now residing at Needles and Ft. Mojave, has led to the conclusion that their present and ultimate land requirements will aggregate but not exceed 25,000 acres of irrigated land. This leaves a balance or surplus of 75,000 acres, which, if not utilized by the Indians, may be disposed of to non-Indians at the express direction of Congress, or the appurtenant and extremely valuable water rights without which the land is

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313. See HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 46 (emphasis added).

314. *Id.* at 47.

315. *Id.* at 48 ("On January 19, 1943, Superintendent Gensler wrote a letter to Dr. S.D. Aberle. In it he mentions the proposed division of the reservation for colonization purposes; the need of working slowly with the Tribal Council, and to convince them that '*Congress will take it away from them and give it to whites probably before they will agree to other Indians taking it.*'") (emphasis added).

practically useless, be lost.<sup>316</sup>

In addition to threatening congressional action, federal officials predicted that if the Tribe pursued a case in the Court of Claims (based on Solicitor Margold's memos and other sources indicating that the Mohave and Chemehuevi had exclusive rights to the CRIT reservation absent their consent otherwise), the government's off-sets for improvements and irrigation systems to date, plus any future expenditures to render the irrigation functional on the reservation, would be more than the value of the land taken:

In view of this right to go to court if you are not satisfied, let us look at this matter in a practical and common sense way. . . . [T]here would be an accounting for everything the Government has expended for your benefit since the reservation was established in 1865, and the total of these expenditures would be an offset against the value of the land taken away from you. From a careful study of expenditures already made and a conservative estimate of expenditures still necessary to be made in order to construct a gravity system to deliver water to your lands, it is evident that even if such an accounting were made, the balance would be found to be in favor of the Government.<sup>317</sup>

To summarize, throughout this period, the BIA threatened, coerced, and otherwise urged the CRIT leadership to allow other Indians to settle on the CRIT reservation.<sup>318</sup> Moreover, despite prior notions that "tribes" were composed of individuals from the same or common lineage,<sup>319</sup> in the CRIT's case the government's goal of consolidating all Indians together in a single space overrode the distinctions among different ethnic and linguistic groups. The racialization of CRIT was more of a binary—Indians (any of them) on one side, and whites on the other. The BIA Commissioner John Collier, whose highest charge was safeguarding tribal interests, instead played the age-old role of stern paternalist, warning CRIT that they had better accept more Indians to stave off what would otherwise be unstoppable: white settlement and divestment of the tribal land base.<sup>320</sup> Collier did so even in the face of

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316. *Id.* at 55 (quoting Statement, A Program from the Utilization of the Colorado River Indian Reservation, Bureau of Indian Affairs (Nov. 15, 1940)).

317. *Id.* at 47 (quoting Remarks of H.W. Shipe, Special Assistant to the Dir. of Irrigation for the Bureau of Indian Affairs, addressed to the Colorado River Tribal Council (Dec. 23, 1940)).

318. See Bernard L. Fontana, *The Hopi-Navajo Colony on the Lower Colorado River: A Problem in Ethnohistorical Interpretation*, 10 *ETHNOHISTORY* 162, 169–73 (1963).

319. See *supra* Part I.B.1 (discussing judicial definitions of Indian tribe).

320. See *supra* text accompanying note 313.

memos from his Solicitor indicating that the federal government would be violating the Mohave and Chemehuevi's rights under the 1865 statute if they forced them to accept other Indians onto the CRIT reservation.<sup>321</sup>

### 3. *Ordinance Number Five*

On February 8, 1945, the Colorado River Tribal Council finally gave in to relentless pressure from the BIA and passed Ordinance No. Five ("Ordinance Five"), agreeing to open tribal membership and reservation lands to other Indians.<sup>322</sup> The Assistant Secretary of the Interior hastily approved the Ordinance on March 9, 1945.<sup>323</sup> Ordinance Five divided the CRIT reservation into two parts—a Northern Reserve of about 25,000 irrigable acres that belonged exclusively to currently enrolled members of CRIT, and a Southern Reserve of about 75,000 irrigable acres that would be colonized by other tribes of the Colorado River drainage including Hualapai, Hopi, Apache, Zuni, Papago, Havasupai, Yuma, and any other approved tribes.<sup>324</sup> To receive land in the Southern Reserve the "colonists," as they were called without irony, would have to become members of the CRIT.<sup>325</sup> The colonists could apply for tribal membership after one year of residence on the reservation, and the CRIT had to accept their applications unless there was cause not to.<sup>326</sup> In exchange, the government agreed to provide irrigation for an additional 15,000 acres of tribal land in the Northern Reserve.<sup>327</sup>

Once Ordinance Five was passed, the BIA acted quickly. In 1948, thirty-two colonist families were moved on to the reservation.<sup>328</sup> Still, the relocation effort was hardly a big success. By May 17, 1949, only twenty-nine Hopi families and fourteen Navajo families had relocated to CRIT. This was due in part to the relatively slow pace of congressional appropriations for the relocation effort. Despite the many years of federal coercion leading up to the plan to move more Indians onto CRIT, Congress had not appropriated large sums of money to develop the land proposed for the colonists until 1948. By 1950, Congress had appropriated \$5.75 million for the relocation and resettlement of Navajo

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321. *See supra* text accompanying notes 309–10 (discussing the Margold memos).

322. HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 36.

323. *Id.* at 57.

324. *Id.* at 36.

325. *Id.* at 37.

326. *Id.* at 58.

327. *Id.* at 36.

328. *Id.* at 49.

and Hopi Indians on the Reservation, resulting in sixty-two more people willing to move.<sup>329</sup> In a disturbing twist, the Navajo and Hopi families who relocated were initially housed in the former Japanese-American internment camp at Poston while awaiting their new homes on the CRIT reservation.<sup>330</sup> Collier had initially hoped to convert the barracks into Indian housing after the Japanese left, but the buildings were torn down before he had the chance.<sup>331</sup> Whether Collier and his department intended it or not, the use of the former internment barracks heightens the sense that certain communities were fungible, if not disposable, in the government's eyes.

Meanwhile, tribal resistance to the Ordinance was growing. By 1949, the CRIT Tribal Council was "dead set" against it.<sup>332</sup> In 1951, the Council attempted to rescind Ordinance Five, but the Secretary of the Interior refused to accept the rescission.<sup>333</sup> Finally, in 1952, pursuant to Article IX of the Tribal Constitution, the Ordinance was put to popular referendum and rejected by the tribal membership.<sup>334</sup> That put an end to colonization. CRIT membership, however, was already affected. The Navajo and Hopi families who relocated shortly after Ordinance Five (and decided to stay)<sup>335</sup> eventually became tribal members at CRIT. By 1966, CRIT had embraced its mixed membership and a seal was created to honor and memorialize the four tribes that constitute its membership.<sup>336</sup>

#### 4. *CRIT Today*

Today, there are more than 3700 enrolled members of the CRIT,<sup>337</sup> approximately 2500 of whom live on the CRIT reservation. CRIT's total population, including non-Indian residents, is 7151.<sup>338</sup> The CRIT tribal

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329. *Id.* at 54.

330. See TRUDY GRIFFIN-PIERCE, *NATIVE PEOPLES OF THE SOUTHWEST* 251 (2000); see also HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 35–36.

331. ALISON R. BERNSTEIN, *AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS* 85 (1999).

332. HISTORY OF THE COLORADO RIVER RESERVATION, *supra* note 2, at 50.

333. *Id.* at 51.

334. *Id.*

335. See Fontana, *supra* note 318, at 176–77.

336. See GRIFFIN-PIERCE, *supra* note 330, at 250.

337. *Enrollment*, COLO. RIVER INDIAN TRIBES, <http://www.crit-nsn.gov/critenrollment/> (last visited July 2, 2012).

338. See *Colorado River Indian Tribes Primary Care Area Statistical Profile 2011*, ARIZ. DEP'T HEALTH SERVS. (Sept. 19, 2012), <http://www.azdhs.gov/hscd/profiles/12404.pdf> (data gathered from the Arizona Department of Commerce and 2010 U.S. Census indicating that the total population of

government is headed by its nine-member Tribal Council,<sup>339</sup> and has thirty-six departments, including an attorney general's office, tribal police, and tribal utilities.<sup>340</sup> Economic activity at CRIT includes agriculture, gaming, recreation, tourism, and some industrial and service activities.<sup>341</sup>

CRIT's water rights, along with those of four other lower Colorado River tribes, were decreed in *Arizona v. California*.<sup>342</sup> CRIT therefore has senior water rights to 719,248 acre-feet of water (or the amount necessary to irrigate 11,694 acres, whichever is less), which comprises roughly one-third of Arizona's allotment under the Colorado River Compact.<sup>343</sup> With established water rights and irrigation systems, a total of 84,500 acres are under agricultural cultivation on the CRIT reservation.<sup>344</sup> CRIT has also invested in a model riparian restoration project along the banks of the Colorado.<sup>345</sup>

In short, despite the history of pressure, coercion, and outright manipulation by the federal government to try to expand the CRIT population or, in the alternative, shrink its land base, CRIT employed its legal sovereignty as a federally recognized tribe, including associated reserved rights to water, to create a vital and evolving homeland for its multi-ethnic membership. Still, the imposition of a tribal identity that was not organic to the Mohave, Chemehuevi, Navajo, or Hopi remains a source of difficulty.<sup>346</sup> Conflicts arise for which there are no shared cultural norms, and intra-tribal clashes ensue.<sup>347</sup> This is part of the legacy of the government's project of consolidation, though fortunately

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the CRIT is 7151 and that 35.2% of the reservation residents are American Indian).

339. *CRIT Tribal Council and Administration*, COLO. RIVER INDIAN TRIBES, [http://www.crit-nsn.gov/crit\\_contents/government/](http://www.crit-nsn.gov/crit_contents/government/) (last visited July 2, 2012).

340. *CRIT Tribal Departments*, COLO. RIVER INDIAN TRIBES, [http://www.crit-nsn.gov/crit\\_contents/departments/](http://www.crit-nsn.gov/crit_contents/departments/) (last visited July 2, 2012).

341. *See id.*

342. 373 U.S. 546, 600 (1963), *judgment entered*, 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966) and 446 U.S. 144 (1984) (recognizing water rights for the Chemehuevi, Cocopah, CRIT, Fort Mohave, and Quechan (Fort Yuma) tribes).

343. NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* 335–36 n.65 (2009).

344. *Colorado River Indian Reservation Community Profile*, ARIZ. DEP'T COM., (Sept. 2009), available at <http://old.azcommerce.com/doclib/COMMUNE/colorado%20river.pdf>.

345. *See* LINDA S. MASTERS & SABRINA TUTTLE, *THE COLORADO RIVER INDIAN TRIBES (C.R.I.T.) RESERVATION AND EXTENSION PROGRAMS* (2008), available at <http://cals.arizona.edu/pubs/natresources/az1461.pdf>.

346. *See* TSOSIE, *supra* note 276, at 1–2 (describing legacy of identity problems that flow from the government's consolidation of the tribes on the CRIT reservation).

347. *See generally* TSOSIE, *supra* note 276.

for CRIT and its people, the ultimate goal of elimination was never achieved.

*B. The Great Dakota Nation (Sioux People of North America)*

Consolidation was the overriding effect of U.S. policies on CRIT; the contrasting effects on the Sioux people were scattering and concentrating. The Sioux, a large group of affiliated peoples, albeit with distinct expressions of language and culture, were separated into many federally recognized tribes on islands of land much smaller than their aboriginal (and prior treaty) lands. As a result, contemporary Sioux identity comprises a mosaic of affiliations that include language, history, and geography as well as membership in one of more than sixteen federally recognized tribes located in four states.<sup>348</sup> None of these individual levels of identity are likely adequate to capture the full meaning of “Sioux-ness.”<sup>349</sup> In fact, certain affiliations might be in tension with one another, as in the case of the majority of tribes that are associated primarily with one or two bands or sub-bands, but also include Sioux from other bands and even other divisions.<sup>350</sup> Figure 1 illustrates the layers of identity for the contemporary Sioux tribes of North and South Dakota:

**Figure 1 – Sioux Affiliations**

<b>Dakota Nation (<i>OCeti Sakawin</i>)</b>		
<b>Santee (Eastern)</b>	<b>Yankton (Middle or Wiciyela)</b>	<b>Teton (Western)</b>
Dakota dialect	Nakota dialect	Lakota dialect
<b>(Council Fires – bands:)</b>	<b>(Council Fires – bands:)</b>	<b>(Council Fires – bands:)</b>
Mdewakanton Sisseton Wahpekute Wahpeton	Yankton Yanktonai	Teton (Titunwan)

348. See GIBBON, *supra* note 4, at 199; MICHAEL JOHNSON, TRIBES OF THE SIOUX NATION 9 (2001) (listing contemporary Sioux tribes and their respective reservations and reserves in the United States and Canada).

349. See, e.g., Robert E. Daniels, *Cultural Identities Among the Oglala Sioux*, in THE MODERN SIOUX: SOCIAL SYSTEMS AND RESERVATION CULTURE 198, 217 (Ethel Nurge ed., 1970).

350. See *infra* text accompanying notes 464–68 (describing movement among tribes by tribal members); see also Sarah Krakoff, *The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey’s Contributions to American Indian Law*, 98 CALIF. L. REV. 1253, 1275–77 (2010) (describing Northern Cheyenne tribal members who fled to Sioux Reservations and became tribal members whose descendants are there to this day).

		<i>Teton Sub-tribes/sub-bands</i> <sup>351</sup>
		Miniconjou, Sincanju, Oglala, Hunkpapa, Itizipco, Sihasapa, Ohenumpa
<i>Associated Tribe/Reservation</i> <sup>352</sup>	<i>Associated Tribe/Reservation</i> <sup>353</sup>	<i>Associated Tribe/Reservation</i> <sup>354</sup>
Sisseton-Wahpeton Oyate / Lake Traverse Spirit Lake Flandreau Colony Crow Creek	Yankton Reservation Standing Rock Crow Creek	Oglala Sioux Rosebud Sioux Standing Rock Lower Brule Cheyenne River

Before the creation of reservations and individual tribes, the Great Dakota Nation was not a nation-state in our modern concept of the phrase, but rather an alliance of entities with shared history and language.<sup>355</sup> The Nation was organized into three sub-groups, the Santee, Teton, and Yankton, and beneath each were bands (Yankton, Teton) or clans (Santee). The bands were composed of extended family groupings (Tiyospayes), which governed themselves independently despite being affiliated with the bands or clans for various functions.<sup>356</sup> Anthropologist Guy Gibbon summarizes: “Today, ties among the Sioux remain strong, even though they are divided by attitudes, tribal politics, and territory,” and “it is difficult to distinguish one group of Sioux from another . . . although some dialectical differences persist.”<sup>357</sup> Nonetheless, the Sioux collective identity has diminished, and, Gibbon concludes, “Since most tribes are scattered through different, occasionally multi-tribal, reservations and in towns and cities, their integrity as a distinctive people has gradually faded.”<sup>358</sup>

351. *Lakota Winter Counts: Social Structure*, SMITHSONIAN NAT’L MUSEUM NAT. HIST., [http://wintercounts.si.edu/html\\_version/html/socialstructure.html](http://wintercounts.si.edu/html_version/html/socialstructure.html) (last visited Oct. 12, 2012).

352. *Nine Tribes in South Dakota*, S.D. OFF. TRIBAL GOV’T REL., <http://www.sdtribalrelations.com/ninetribes.aspx> (last visited June 29, 2012).

353. *Id.*

354. *Id.*

355. See GIBBON, *supra* note 4, at 213.

356. SATTERLEE & MALAN, *supra* note 6, at 11.

357. GIBBON, *supra* note 4, at 198, 199.

358. *Id.* at 199.

How these numerous and interconnected peoples, whose aboriginal territory stretched across vast plains and mountains, became distinct federally recognized tribes, separated onto jurisdictional islands of Indian country, is a story characterized by violent conflict, legal wrangling, and accommodation to the relentless forces of non-Indian settlement. To some extent, a bare narrative timeline (and accompanying map) of U.S. treaties with the Sioux tells the story.

In 1851, the United States entered into treaties with the “Sioux or Dahcotahs” and other tribes in order to settle questions about non-Indian passage through the territory.<sup>359</sup> The Sioux’s territory was clearly defined and included western South Dakota, northwestern North Dakota, a chunk of Wyoming, and bits of Montana, as well as northeastern Nebraska.<sup>360</sup> Seventeen years later, the Fort Laramie Treaty of 1868<sup>361</sup> put an end to the Plains wars between the Sioux tribes and the U.S. and established new boundaries for the Great Sioux Nation that were more confined than those in 1851.<sup>362</sup> The discovery of gold in the Black Hills as well as persistent pressure from railroads and other constituencies to settle non-Indians in the territories eventually led to the disintegration of the 1868 boundaries. After more than two decades of recurring pressure, both legal and military, the Sioux that had not already retreated to smaller reservations signed an 1889 agreement that broke up the Great Sioux Reservation, created six smaller reservations, and put an end to the military battles, though not to the legal ones.<sup>363</sup> By the end of the nineteenth century, with Allotment and Assimilation policies in full swing, the scattering and concentrating of the Great Dakota Nation had been accomplished. The Sections below chronicle the story of scattering and concentrating in greater detail.

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359. *See* Treaty of Ft. Laramie with Sioux, etc., U.S.-Sioux or Dahcotah, Cheyenne, Arrapahoe, Crow, Assiniboine, Gros-Ventre Mandan, and Arrickara Nations, Sept. 17, 1851, 11 Stat. 749.

360. *See id.* art. V (describing the boundaries of the “Sioux or Dahcotah Nation”).

361. Fort Laramie Treaty of 1868, U.S.-Sioux Nations, Apr. 29, 1868, 15 Stat. 635.

362. *See id.* art. II, XI, XVI. The 1868 Treaty also included extensive reservations of unceded lands and hunting grounds. *See id.*

363. *See* Act of Mar. 2, 1889, chs. 404, 405, 25 Stat. 888. For information on the ongoing legal battles, see JEFFREY OSTLER, *THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND* 139–66 (2010).

1. *Sioux Tribes of the Dakotas History*<sup>364</sup>

a. *Early Dakota Nation, 1500–1800*

In aboriginal times the Sioux shared the same language, which evolved into the three dialects of Dakota, Nakota, and Lakota as the bands expanded their territories and migrated.<sup>365</sup> Dakota/Nakota/Lakota means “those who consider themselves kindred,” describing the collective identity of the Sioux.<sup>366</sup> Europeans made contact with the Sioux in the 1500s, by which time the separate Dakota dialects and cultural differences between divisions were firmly established.<sup>367</sup> During the 1500s and early 1600s the Dakota lived on the eastern seaboard near the Lumber and Santee rivers of modern-day North Carolina, and near the Ohio and Arkansas rivers in modern-day Ohio and Indiana.<sup>368</sup>

The Dakota began their westward migration in the 1600s due to increased pressure from European settlement.<sup>369</sup> In the early 1600s the Dakota resided largely in the area now known as north-central Minnesota and the northwestern corner of Wisconsin.<sup>370</sup> The various bands lived a relatively sedentary river-based lifestyle, practicing some agricultural cultivation, as well as hunting and fishing.<sup>371</sup> In the 1700s, population pressure from both Europeans and other tribes forced the Dakota further westward: the Teton settled in the Lake Traverse area, the Santee settled in the Mille Lacs area of central Minnesota, and the Yankton settled in southern Minnesota.<sup>372</sup> By 1803, at the time of the Louisiana Purchase, the Sioux were widely “distributed across the prairie from Mississippi Valley . . . to just across the Missouri River in the Dakotas.”<sup>373</sup> They were “more numerous, powerful, and widespread

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364. For a map outlining the historical and current boundaries of the Sioux reservation see Kmusser (username), *Sioux Reservation Map*, WIKIPEDIA, <http://en.wikipedia.org/wiki/File:Siouxreservationmap.png> (last visited Aug. 14, 2012).

365. *Lakota Winter Counts: Who are the Lakota*, SMITHSONIAN NAT'L MUSEUM NAT. HIST., [http://wintercounts.si.edu/html\\_version/html/whoare.html](http://wintercounts.si.edu/html_version/html/whoare.html) (last visited June 7, 2012).

366. *Dakota*, SASKATCHEWAN INDIAN CULTURAL CENTER, [http://www.sicc.sk.ca/dakota\\_use\\_existing\\_our\\_languages\\_sections.html](http://www.sicc.sk.ca/dakota_use_existing_our_languages_sections.html) (last visited July 3, 2012).

367. PALMER, *supra* note 4, at 41.

368. SATTERLEE & MALAN, *supra* note 6, at 10.

369. *Id.*

370. *See id.*; *see also Lakota Winter Counts: Who Are The Lakota*, *supra* note 365.

371. SATTERLEE & MALAN, *supra* note 6, at 10.

372. SATTERLEE & MALAN, *supra* note 6, at 12.

373. GIBBON, *supra* note 4, at 76.

than they had ever been.”<sup>374</sup>

b. *The Sioux Westward Migration, Early Reservation Era, and Dismantling of the Great Sioux Nation, 1800–1900*

Under growing pressure from eastern tribes and white settlers, in the early 1800s the Dakota divisions began to disperse even further westward, beginning a process whereby the Western Sioux (Lakota) came to look more like Plains nomads, the Eastern Sioux (Santee) retained a woodland lifestyle, and the Middle Sioux adopted a mixed lifestyle.<sup>375</sup> The “Seven Council Fires” outlined in Figure 1 emerged at the time of the Sioux migration to the Great Plains.<sup>376</sup> As of the 1800s, the separate divisions of the Sioux (Santee, Yankton, and Teton) carried more meaning than the Sioux nation as a whole. Nonetheless, individuals have also always moved fluidly between bands, divisions, and reservations.<sup>377</sup>

i. *Eastern Sioux (Dakota Dialect/Santee)*

When the Sioux divisions dispersed, the Santee division remained furthest east, retaining an ethos much closer to that of woodland tribes such as the Ojibwa and the Potawatomi, than to that of the Nakota or Lakota divisions of the Sioux tribe.<sup>378</sup> The Eastern Sioux maintained a more sedentary, agricultural life, while the Yankton and Teton divisions migrated west and focused on a nomadic way of life.<sup>379</sup> The Santee are the oldest division of the original Sioux nation.<sup>380</sup> The Yankton and Teton divisions based their governing structure on the Tiyospayes (the extended family units), whereas the Santee’s sedentary life allowed for greater interaction between clans.<sup>381</sup>

The Santee became a separate band when they moved away from the larger group in search of food and then became named for the place where they settled.<sup>382</sup> The group then further divided into four of the

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374. *Id.*

375. *Id.* at 77, 84.

376. *Lakota Winter Counts: Social Structure*, *supra* note 351.

377. *See, e.g.*, GIBBON, *supra* note 4, at 208.

378. Stephen A. Feraca & James H. Howard, *The Identity and Demography of the Dakota or Sioux Tribe*, 8 *PLAINS ANTHROPOLOGIST* 80, 80–82 (1963).

379. SATTERLEE & MALAN, *supra* note 6, at 19.

380. Feraca & Howard, *supra* note 378, at 82.

381. SATTERLEE & MALAN, *supra* note 6, at 20–21.

382. PALMER, *supra* note 4, at 42–43.

seven council fires in the 1800s (Mdewakanton, Wahpekute, Wahpeton, and Sisseton).<sup>383</sup> Exemplifying the fluidity of Sioux affiliations, some of the Wahpeton bands lived with the Sisseton and Yankton in the 1800s.<sup>384</sup> The Sisseton were the fourth Santee council fire to form.<sup>385</sup> Eroding the idea of a monolithic Sioux identity, each band was considered to have its own character.<sup>386</sup>

By 1803, most Eastern Santee Sioux lived between the Mississippi and Missouri rivers, east of the 100th meridian.<sup>387</sup> However, they faced intense pressure from the north, south, and east by whites and other tribes throughout the 1830s.<sup>388</sup> In 1837, the Santee sold its land east of Mississippi to the U.S. government, resulting in the tribe's dependence on government support during the ensuing decades.<sup>389</sup> The Santee migrated west and by 1839 around 4000 Santee lived in southern Minnesota and the eastern Dakotas.<sup>390</sup>

With the 1851 Second Treaty of Traverse des Sioux and the Treaty of Mendota,<sup>391</sup> the Santee moved farther west and ceded all of its all Dakota land between the Mississippi and Big Sioux rivers, from central Minnesota into northern Iowa.<sup>392</sup> The resulting Santee reservation consisted of a ten-mile swath of land on both sides of the upper Minnesota River that ran about 150 miles from Lake Traverse in the west, to Little Rock Creek in the east.<sup>393</sup> Upon Minnesota statehood in 1858, government officials forced the Santee to cede the north side of the Minnesota River to the new state or risk seeing the state claim the entire reservation.<sup>394</sup>

The incessant encroachment on their land, and Santee concern over

383. *Id.* at 42–46. The Mdewakanton was considered the first tribe from which all the other council fires originated. The Wahpekute and Wahpeton were the second or third hearths to form. (It is not clear which came first.) *See id.* at 43–44.

384. *Id.* at 46.

385. *Id.*

386. *Id.* at 44–46.

387. GIBBON, *supra* note 4, at 78.

388. *Id.* at 81.

389. *Id.* at 83.

390. *Id.* at 79.

391. *See* Treaty of Traverse des Sioux, U.S.-See-see-toan and Wah-pay-toan Bands of the Dakota or Sioux Indians, July 23, 1851, 10 Stat. 949 (spelling in original); Treaty of Mendota, U.S.-Meday-wa-kan-toan and Wah-pay-koo-tay bands of the Dakota and Sioux Indians, Aug. 5, 1851, 10 Stat. 954 (spelling in original).

392. GIBBON, *supra* note 4, at 109.

393. *Id.*

394. *Id.*

intermarriage and acculturation, set the stage for the 1862 Minnesota Sioux Uprising, in which the Santee Sioux besieged a non-Indian town and took over the Indian Agency offices.<sup>395</sup> The aftermath led to further blurring of Sioux divisions and affiliations. The federal government, in retaliation for the uprising, negated all Dakota treaty rights, confiscated the Santee's land, and banished the Mdewakanton and Wahpekute from Minnesota.<sup>396</sup> While the Sisseton and Wahpeton were allowed to stay in Minnesota, almost all left out of fear of reprisal.<sup>397</sup> At least 3000 Santee fled westward to live with the Yanktonai and Lakota in North Dakota.<sup>398</sup> In general, there was much Eastern Sioux migration during the 1860s and 1870s due to disillusionment with certain reservations (Crow Creek), and the aftermath of the 1862 Uprising.<sup>399</sup> Some Santee Sioux mixed with the Western Teton Sioux and adopted that lifestyle, while other Santee Sioux acculturated with white communities in Minnesota and at the Flandreau settlement (discussed further below).<sup>400</sup>

For the Santee who did not merge with other cultural entities, on February 19, 1867, two reservations were established—Lake Traverse and Devil's Lake (now Spirit Lake).<sup>401</sup> The Devil's Lake reservation was established for Santee who migrated across the plains, as well as Yanktonai who had previously occupied the area.<sup>402</sup> Most of the Christianized Sioux were on the Sisseton reservation (Lake Traverse), while Indians who held closer to traditional religion were placed on Devil's Lake.<sup>403</sup> Devil's Lake also had an influx of Teton families nominally assigned to the Standing Rock reservation, as well as some lower Sioux from the Turtle Mountain area.<sup>404</sup> As a result, there was a high degree of cultural diversity among the Indians on the Devil's Lake reservation compared to the Lake Traverse reservation.<sup>405</sup>

In one of the most unique expressions of the complexity of Sioux

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395. *Id.* at 110.

396. *Id.* at 111.

397. *Id.*

398. *Id.*

399. CLIFFORD ALLEN ET AL., *FLANDREAU SANTEE SIOUX TRIBE, HISTORY OF THE FLANDREAU SANTEE SIOUX TRIBE* 61 (1971).

400. *Id.*

401. RON MEYER, *HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL* 220 (rev. ed. 1993).

402. *Id.*

403. *Id.* at 223.

404. *Id.* at 223–24.

405. *Id.* at 224.

tribal identity, in 1869, twenty-five families left the Santee reservations without Indian Agency authorization and settled on unoccupied land in the valley of the Big Sioux River.<sup>406</sup> They renounced their tribal ties and claims to benefits, and applied for homesteads in order to create the Flandreau settlement.<sup>407</sup> The families doubled to fifty in the fall of 1869 and their population hovered around 300 during 1890s.<sup>408</sup> The Flandreau community's living conditions through the 1800s were similar to those of their white pioneer neighbors, and by the end of 1800s they were better off economically than the Sisseton, Devil's Lake Tribe, or the Minnesota Santee.<sup>409</sup> While the Flandreau residents were Sioux by blood, they relinquished their tribal affiliation to become citizens of the United States.<sup>410</sup> In an interesting twist, the Flandreau community was nonetheless recognized as a tribe in the Sioux Treaty of 1889.<sup>411</sup> Their tribal affiliation proved critical for the Flandreau in the early twentieth century when they relied on their government-to-government relationship to obtain assistance during economically challenging times.<sup>412</sup>

*ii. Middle Sioux (Nakota Dialect/Yankton and Yanktonai)*

During the late eighteenth century, the Nakota moved into the eastern Dakotas; by 1804 Lewis and Clark reported that the Yankton lived among the James, Des Moines, and Big Sioux rivers in eastern South Dakota and northwestern Iowa, and Yanktonai lived along the headwaters of the Big Sioux, James, and Red rivers in what is now North Dakota.<sup>413</sup> By the 1830s around 4000 Yanktonai had moved westward beyond the Dakotas, with around 1000 staying east with the Sisseton (Santee).<sup>414</sup>

As the Nakota migrated, they maintained some gardening and villages like the Eastern Sioux, but also adopted new habits such as hunting bison in the summer and living in lodges during the winter.<sup>415</sup> Unlike

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406. *Id.* at 242.

407. *Id.* at 245–46.

408. *Id.* at 247, 256.

409. *Id.* at 252, 256.

410. ALLEN ET AL., *supra* note 399, at 116.

411. *Id.*; see Act of Mar. 2, 1889, chs. 404, 405, 25 Stat. 888.

412. *Id.* at 87–89.

413. GIBBON, *supra* note 4, at 83.

414. *Id.* at 84.

415. *Id.* at 84, 108.

either their eastern or western cousins, the Nakota spent most of the year in permanent villages.<sup>416</sup> As mentioned above, the basic unit of the Nakota (and of the Teton division below) was the Tiyospayes, which consisted of ten to twenty conjugal families that functioned essentially as one large familial unit.<sup>417</sup>

With the Treaty of Prairie de Chine in 1830, the Yankton ceded title to their land in the Des Moines River region in return for a \$3000 annuity and services.<sup>418</sup> Although they ceded interest to an additional two million acres in the Treaty of October 21, 1837, in general the land base of the Middle Sioux was not as heavily affected during this period as that of the Eastern Sioux.<sup>419</sup>

In yet another example of the fluidity of band affiliation among the Sioux, in 1830 the Yankton were joined by a small group of dissident Wahpekute Dakota who retained their Santee identity for many years, but operated politically as part of Yankton tribe.<sup>420</sup> Interaction was common between the Middle and Eastern Sioux, and Santees by birth might be Yankton in terms of tribal allegiance.<sup>421</sup>

By the 1850s American settlers were encroaching on the Yankton territory in large numbers, and on April 19, 1858, a number of Yankton Chiefs were pressured to sign a treaty ceding the remaining majority of their territory.<sup>422</sup> In the Treaty of Washington in 1858, they gave up over eleven million acres on the delta between the Big Sioux and Missouri rivers in exchange for a 430,000-acre reservation in the Missouri Hills of South Dakota and fifty years of government services and rations.<sup>423</sup> In 1896, the Yankton were forced to sell more than half of this reservation land through the allotment program.<sup>424</sup> Meanwhile, the Yankton and Yanktonai who did not settle on the reservation land in the late 1800s followed the retreating bison herds westward into Lakota Territory.<sup>425</sup>

Most modern Yankton still live on or nearby the reservation lands established in the 1800s, with concentrations in the towns of Yankton,

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416. *Id.* at 84.

417. SATTERLEE & MALAN, *supra* note 6, at 13.

418. GIBBON, *supra* note 4, at 86.

419. *See id.*

420. *Id.*

421. *Id.*

422. *See* HOOVER, *supra* note 4, at 30.

423. *Id.*

424. *Id.*

425. *See* GIBBON, *supra* note 4, at 113.

Wagner, Greenwood, Marty, Ravinia, and Lake Andes.<sup>426</sup> The tribes and reservations primarily associated with the Middle Sioux include the Yankton Reservation, Standing Rock, and Crow Creek.<sup>427</sup> The size of the Yankton population is average for tribes in the Sioux federation, and their economic and cultural situation is considered representative of the Sioux in general.<sup>428</sup>

*iii. Western Sioux (The Seven Lakota or Teton Tribes)*

Various influences, including the lure of abundant beaver populations and migrating buffalo herds, drove the migration of the Western Sioux tribes in the late eighteenth century and through much of the nineteenth century, while the Eastern Sioux remained in the eastern woodlands.<sup>429</sup> At their height, the Western Sioux consisted of twenty sub-bands.<sup>430</sup> Seven sub-bands survive: Oglala, Brule (Sicangu), Sans Arcs (Itazipco), Sicasapa (Black Foot), Minikonjou, Oohenonpa (Two Kettles of Cheyenne River), and the Hunkpapa.<sup>431</sup> Both the Oglala and Brule claim that they are the parent group of all the Lakota sub-bands, but most experts believe it was the Oglala from which the other sub-bands emerged.<sup>432</sup> While Lakota sub-bands appear as yet another layer of Sioux identity, it is unclear how effectively they capture ethnic unity. Sub-bands merged and separated as needed for hunting, or for military purposes.<sup>433</sup> Bands such as the Brules were rarely together as one unit (pre-reservation) due to the requirements of hunting,<sup>434</sup> and the Hunkpapa (the last Lakota sub-band to form) often allied with the Yankton.<sup>435</sup>

During the early 1800s, the Lakota began to move onto the western plains because of conflict with neighboring tribes and encroaching whites, as well as to follow the large herds of buffalo.<sup>436</sup> By 1804, the Lakota were already migrating as far west as the Rockies and the Platte

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426. See HOOVER, *supra* note 4, at 95–96, 105.

427. See *id.* at 105.

428. See HOOVER, *supra* note 4, at 22.

429. See Richard White, *The Winning of the West: The Expansion of the Western Sioux in the Eighteenth and Nineteenth Centuries*, 65 J. AM. HIST. 321–22, 334–35 (1978).

430. PALMER, *supra* note 4, at 43.

431. DANIELS, *supra* note 349, at 215.

432. JOSEPH CASH, *THE SIOUX PEOPLE* 6 (1971).

433. *Id.* at 20–23.

434. *Id.* at 6.

435. PALMER, *supra* note 4, at 51.

436. *Lakota Winter Counts: Social Structure*, *supra* note 351.

River, and north to the Saskatchewan River.<sup>437</sup> Their adaptation to the plains was greatly accelerated and their lifestyle radically altered by acquiring horses.<sup>438</sup> By the 1830s, the Lakota had moved so far west that they were warring with the Crow for control of the Powder River country south of Yellowstone River in eastern Wyoming.<sup>439</sup> In response to the declining bison population and the Oglala, Brules, and Miniconjous migration into hunting grounds of the Platte River Valley, the Sioux Alliance formed in the 1820s. The alliance, which provides yet another example of fluid Sioux affiliations, consisted of Oglalas, Brules, Miniconjou, Yankton, Yanktonai, Northern Cheyenne, and Northern Arapaho.<sup>440</sup> The Lakota and their successful Sioux Alliance eventually seized territory from the Iowa, Ponca, Pawnee, Arikara, Mandan, Hidatsa, Assiniboin, Kiowa, Crow, and Cheyenne.<sup>441</sup>

The Lakota prospered on the plains, and outnumbered the combined Eastern and Middle Sioux.<sup>442</sup> There were an estimated 25,000 Lakota in the 1800s.<sup>443</sup> The Lakota lifestyle (also adopted by some Middle Sioux) differed significantly from the majority of the Middle and Eastern Sioux's lifestyle.<sup>444</sup> They acquired horses, lived in tipis, and were nomadic. They exhibited the "classic Plains complex" that existed from 1800 to 1880 including: war bonnets, bison robes, medicine bundles, horse gear, horsemanship, and the Sun Dance.<sup>445</sup> Their itinerancy protected them somewhat from the devastation of infectious diseases that swept through more sedentary tribes, allowing them to flourish and dominate their territory.<sup>446</sup> The bison was central to Lakota culture and wealth, and due to hunting and hide trading, the early to mid- nineteenth century was a period of unprecedented wealth for the Lakota.<sup>447</sup>

The 1860s and 1870s were the climax of northern plains warfare and the military glory of the Sioux Alliance, which numbered 20,000 Indians in 1865, 5000 of whom were warriors.<sup>448</sup> Despite this Alliance, by the

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437. GIBBON, *supra* note 4, at 86–87.

438. See *Lakota Winter Counts: Who Are The Lakota*, *supra* note 365.

439. GIBBON, *supra* note 4, at 87.

440. *Id.* at 88.

441. *Id.*

442. *Id.*

443. PALMER, *supra* note 4, at 48.

444. GIBBON, *supra* note 4, at 89.

445. *Id.*

446. *Id.*

447. *Id.* at 90.

448. *Id.* at 115.

late 1800s the Western Sioux would succumb to the federal government's splintering and dividing forces. In 1868, some Lakota bands gave in to the relentless pressure to live on reservations and avoid conflict with the whites, and they signed the Treaty of Fort Laramie to create the Great Sioux Reservation.<sup>449</sup> Other Lakota who refused to be confined to reservations saw their livelihood destroyed when, between 1872 and 1874, non-Indian hunters killed over three million bison on the plains, driving the species to extinction by the end of the decade.<sup>450</sup> In 1876, the U.S. Government ordered the remaining itinerant hunting bands of Sioux to report to the reservations, and set out to destroy the camps of non-complying bands in order to force them to do so.<sup>451</sup> This led to Sitting Bull and Crazy Horse's war with the U.S. government, culminating in the Battle of Little Bighorn.<sup>452</sup> Little Big Horn instigated fierce retribution from the U.S. government, and the Winter of 1877 campaign forced most of the remaining Lakota Sioux onto reservations or into Canada, thus shattering the mighty federation of Lakota bands.<sup>453</sup> The well-known story of the Lakota's loss of the Black Hills in particular illustrates the relentless pressure to seize aboriginal lands whenever resources valuable to the non-Indian community came to light.<sup>454</sup>

The current-day Lakota reservations were carved from the Great Sioux Reservation as it was dismantled during the late 1800s. The Great Sioux Settlement of 1889 reduced the Great Sioux Reservation to six separate reservations: Rosebud, Lower Brule, Standing Rock, Cheyenne River, Crow Creek, and Pine Ridge.<sup>455</sup> The reservations were chosen for a variety of reasons, including their proximity to agencies for the purpose of military control.<sup>456</sup> About one-half of modern Lakota live on

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449. Fort Laramie Treaty of 1868, U.S.-Sioux, art. 2, Apr. 29, 1868, 15 Stat. 635.

450. GIBBON, *supra* note 4, at 114.

451. *Id.* at 116.

452. *Id.* at 116–17.

453. *Id.* at 117.

454. See OSTLER, *supra* note 363, at 69–74 (describing the immediate conflicts in interpretation of the 1868 Treaty between Lakota leaders and the federal government, stemming in large part from pressure to seek gold in the Black Hills); *id.* at 85–92 (describing role that Custer's reports of gold in the Black Hills had on subsequent efforts to divest Lakota of those lands). For a detailed legal history of this conflict, see generally EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1991).

455. Act of Mar. 2, 1889, chs. 404, 405, 25 Stat. 888.

456. See OSTLER, *supra* note 363, at 73–74 (describing process of selecting agencies for the Dakota bands, which would eventually become their reservations).

or near these reservations.<sup>457</sup> Similar to the Eastern and Middle Sioux, the Western Sioux reservations and tribes offer diverse examples of both intermixed and cohesive cultural units.<sup>458</sup> The Pine Ridge and Lower Brule Reservations were noteworthy because their inhabitants (until the 1970s) were nearly all descendants of one pre-reservation social unit.<sup>459</sup> However, as of 1975 the Lower Brule Reservation population was divided approximately equally between mixed-bloods and full-bloods—with tension between the two groups.<sup>460</sup> Similarly, the Oohenunpa band (or Two Kettles) survived into modern times as a separate entity on the Cheyenne River Reservation.<sup>461</sup> In comparison, the Rosebud Reservation has many members with Brule ancestry,<sup>462</sup> Oglala ancestry, and Lakota-Ponca ancestry; the Standing Rock tribe includes both Hunkpapa Lakota and Yanktonai Nakotas; and the Cheyenne River Sioux include individuals from the Minikonjou, Oohenonpa, Itazipco, and Shasapa sub-tribes.<sup>463</sup>

## 2. *The Dakota Today: A Snapshot of the Federally Recognized Tribes in North and South Dakota*

Sioux history continues to unfold for the ten federally recognized Sioux tribes of North and South Dakota: Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, Sisseton Wahpeton Oyate of The Lake Traverse Reservation, Oglala Sioux Tribe, Lower Brule Sioux Tribe, Flandreau Santee Sioux Tribe, Yankton Sioux Reservation, Crow Creek Sioux Reservation, and the Spirit Lake Tribe. The mixed membership and shifting enrollments within some of these tribes indicate the complexities of tribal membership as an affiliation. The migration of members between tribes reflects the continuity of Indian and/or Sioux identity notwithstanding the legal boundaries established by reservations and distinct federally recognized tribes. For example, two tribes include in their enrollment statistics the number of tribal members who have relinquished their membership to join other tribes. The Crow Creek Sioux Tribe, which has a total enrollment of

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457. *Lakota Winter Counts: Who Are The Lakota*, *supra* note 365.

458. *See, e.g.*, DANIELS, *supra* note 349, at 223.

459. *Id.* at 216.

460. ERNEST L. SCHUSKY, *THE FORGOTTEN SIOUX: AN ETHNOHISTORY OF THE LOWER BRULE RESERVATION* 227 (1975).

461. PALMER, *supra* note 44, at 51.

462. CASH, *supra* note 432, at 54.

463. DANIELS, *supra* note 349, at 233.

5069 members, 1230 of whom live on the Crow Creek Reservation, reported in 2011 that 180 individuals had relinquished their Crow Creek enrollment to join other tribes.<sup>464</sup> The Flandreau Santee Sioux Tribe, which has 759 enrolled members and 1266 members of other tribes residing on their lands (mostly attributable to the Flandreau Indian School), reported that approximately forty of their members disenrolled to join other tribes, and 250 relinquished other tribal affiliations to join Flandreau.<sup>465</sup> Similar phenomena of enrollment and relinquishment are evident for the Rosebud Sioux Tribe,<sup>466</sup> a much larger tribe with over 21,000 enrolled members living on its reservation.<sup>467</sup>

Given the static boundaries imposed on the Dakota people as a result of carving up their aboriginal territory into discrete reservations, it is not surprising that membership in a federally recognized tribe is, for some, not necessarily paramount to tribal identity. The degree of migration, disenrollment, and reenrollment reflects the extent to which Dakota people still identify with the larger Dakota Nation, notwithstanding the political and legal significance of membership in a particular tribe.<sup>468</sup> At the same time, the federally recognized tribe has become the primary site of identity for many, as well as the symbol for the persistence of separate Dakota political and cultural existence. For members of the ten federally recognized tribes that once comprised part of the Great Dakota Nation, identity (including its racial, political, and cultural aspects) derives from the history and politics that lie within current legal distinctions.

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464. E-mails from Rozelle Lockwood, Enrollment Specialist, Cheyenne River Sioux Tribe, to Nancy Smith (Jan. 26, 2011 and Feb. 2, 2011) (on file with author).

465. E-mail from Scott Anderson, Benefits Eligibility Specialist, Tribal Enrollment Office, Flandreau Santee Sioux Tribe, to author (Jan. 25, 2011) (on file with author).

466. At one time, general enrollment and relinquishment numbers were available on the internet. See Rosebud Sioux Tribe, Culture, Le Oyate Ki, [http://www.rosebudsiouxtribe-nsn.gov/index.php?option=com\\_content&view=article&id=61&Itemid=68](http://www.rosebudsiouxtribe-nsn.gov/index.php?option=com_content&view=article&id=61&Itemid=68) (last visited June 7, 2012, but no longer available). The general information is no longer publicly available, but Rosebud Tribal Council Meeting minutes corroborate that enrollment and relinquishment do occur. See Rosebud Sioux Tribal Council Minutes of Oct. 4, 2011 (documenting Tribal Council approval of motions to enroll new members and to accept relinquishment by existing members) (on file with author).

467. *Nine Tribes in South Dakota*, S.D. DEPARTMENT TRIBAL GOV'T REL., <http://www.sdtribalrelations.com/rosebud.aspx> (last visited June 7, 2012).

468. The phenomenon of migration and changing membership also reflects the evolution of a broader pan-Indian identity. See Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1140-45 (1994) (describing rise of pan-Indian political and social organizing in response to policies and actions threatening all tribes).

### III. SETTLER COLONIALISM, THE ELIMINATIONIST AGENDA, AND THE RACIAL FORMATION OF NATIVE PEOPLES

The general history of tribal federal recognition and membership in Part I and the specific histories of the CRIT and Sioux Tribes in Part II reveal how race was constructed in the American Indian context. The concept of the inferior and disappearing tribe justified laws and policies that fixed tribes in time and space in order to diminish their separate status and claims to land. The means of achieving Indian elimination varied. In the CRIT context, the predominant approach was to consolidate distinct ethnic and linguistic groups into one tribe on one reservation. The Sioux story, by contrast, is characterized by scattering connected groups into many smaller tribes (with smaller reservations). Throughout these two histories, as well as the broader history of federal recognition, the government's role in entangling race, blood, and tribal status to achieve the ends of shrinking Indian tribes and their claims to land is evident.

In their influential work on racism in the United States, Michael Omi and Howard Winant coined the term "racial formation," which they defined as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed."<sup>469</sup> Omi and Winant posit that the initial essentialist construction of race, which ascribed inferior characteristics to groups based on allegedly biological traits, performed certain key historical functions (such as the expropriation of land and labor.) Yet once the category of race is created, and social ordering based on racism occurs, neither the category nor the social ordering disappear despite the absence of biological bases for racial distinctions. Race, though a social construct and not a biological trait, thus acquires and produces cultural meanings that continue to infuse our everyday encounters and structure aspects of our society.<sup>470</sup> Rather than jettison race as an archaic misconception, Omi and Winant urge that "[a] more effective starting point is the recognition that despite its uncertainties and contradictions, the concept of race continues to play a fundamental role in structuring and representing the social world."<sup>471</sup>

Although they mention American Indians in passing, Omi and Winant do not account separately for the racial formation of indigenous peoples historically, nor do they grapple with the unique legacies of racism on

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469. OMI & WINANT, *supra* note 26, at 55.

470. *See id.* at 54–61.

471. *Id.* at 55.

American Indian communities and individuals.<sup>472</sup> Patrick Wolfe, however, has applied a similar framework when analyzing the racialization of indigenous peoples in settler-colonial societies.<sup>473</sup> As theorized by Wolfe, settler-colonial societies, such as Australia and the United States, are those where the colonizing people came to stay and quickly outnumbered the indigenous inhabitants.<sup>474</sup> Traditional colonialism, as was imposed in much of Africa and India, was characterized by small numbers of colonizers dependent on much larger numbers of native people for labor.<sup>475</sup> To extract value from the land, traditional colonial societies required the continued presence of their subordinated labor force.<sup>476</sup> By contrast, “settler colonies were not primarily established to extract surplus value from indigenous labour. Rather, they are premised on displacing indigenes from (or replacing them on) the land.”<sup>477</sup> The racial project for indigenous peoples was therefore one of elimination: “Settler colonies were (are) premised on the elimination of native societies. The split tensing reflects a determinate feature of settler colonization. The colonizers come to stay—invasion is a structure not an event.”<sup>478</sup>

Wolfe’s work on the racialization of indigenous people focuses largely on miscegenation and assimilation laws and policies.<sup>479</sup> The histories of federal recognition and membership composition discussed above add yet another dimension to explicating the eliminationist project: Federally recognized tribes were consolidated and concentrated from the previously un-quantified (and therefore, beyond state control)

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472. Omi and Winant discuss Native Americans specifically in just two places in their book. *See id.* at 61–62 (discussing the age of “discovery” and religiously inspired precursors to racialization of American Indians); *id.* at 80 (describing Native opposition to racism).

473. *See generally* Wolfe, *Land, Labor, and Difference*, *supra* note 28.

474. *See* WOLFE, *SETTLER COLONIALISM*, *supra* note 8, at 1–2.

475. *See id.*

476. *See id.*

477. *Id.* at 1 (emphasis in original); *see also* Berger, *supra* note 9. Berger traces the divergent paths of racism against African Americans and American Indians, and concludes that Indians’ racialization took the form of denigration of their collective tribal existence. Breaking up the tribe, and liberating the land and resources, was the political and economic objective served:

European Americans were not primarily concerned with using Indian people as a source of labor, and so did not have to theorize Indians as inferior individuals to justify the unfair terms of that labor. Rather, colonists’ primary concern with respect to Indians was to obtain tribal resources and use tribes as a flattering foil for American society and culture.

*Id.* at 593.

478. WOLFE, *SETTLER COLONIALISM*, *supra* note 8, at 2.

479. *See generally id.*; *see also* Wolfe, *Land, Labor, and Difference*, *supra* note 28. *But see* Wolfe, *Settler Colonialism and the Elimination of the Native*, *supra* note 8, at 391–92 (addressing treaty interpretation and property law manifestations of the eliminationist agenda).

groups of tribally affiliated Indians. The very process of recognition reduced tribes from free and independent peoples (with potentially vast claims to land) to manageable units, which could be bargained with, reduced, and ultimately displaced.<sup>480</sup>

The CRIT and Dakota stories contain characteristics that are generalizable, particularly when placed in the larger historical context of how tribes evolved from free and independent nations to federally recognized tribes. First, the politics that constructed federally recognized tribes included recurring pressures to shrink aboriginal claims to territory.<sup>481</sup> Second, justifications for shrinking territory were often couched in narratives of the tribe's waste (or non-use) of resources, with necessarily negative characterizations of Indian people.<sup>482</sup> Third, the fluidity with which Indian tribes defined their own members prior to European contact was necessarily compromised by the federal government's imposition on tribes of regimes of land and resource scarcity.<sup>483</sup> Fourth, today, federally recognized tribes nonetheless include considerable ethnic diversity among enrolled members, as well as varying kinds of political and social affiliations that extend beyond enrolled membership.<sup>484</sup>

Folded within each history are the forms of racialization that applied to American Indians more generally. First, to justify divisions among tribes between those that were considered allies and those that were not, Indian agents and the federal government (including the courts) ascribed wild and unruly characteristics to some tribes and friendly and docile (assimilable) characteristics to others.<sup>485</sup> Then, as it became clear that no tribe was docile or friendly enough to justify standing in the way of non-Indian settlement, assimilation of individuals and the destruction of the tribe *qua* tribe became the dominant objective.<sup>486</sup> Thus, during the allotment era, all *tribes*, regardless of degree of assimilation, were deemed to have inferior qualities that were ineradicable except by

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480. *See supra* Part II.B.

481. *See supra* Part II.A.4.

482. *See supra* Part II.A.2; *see also* OSTLER, *supra* note 363, at 88–89 (describing justifications for taking the Black Hills from the Lakota). Ostler recounts that Custer declared the Black Hills region as unoccupied and “‘seldom visited by [the Indians.] It is used as sort of a back-room to which they may escape after committing depredations.’” *Id.* at 88. Another commentator of the times put it this way: “‘The grand and beautiful Eden just discovered . . .’ should not be left in the hands of ‘the most obstinately depraved nomad that bears the ‘human form divine.’” *Id.*

483. *See supra* Part I.B.1.b.

484. *See supra* Parts II.A and II.B.1.

485. *See supra* text accompanying notes 169–71.

486. *See supra* text accompanying notes 132–50.

dissolution of group status. Winnowing the number of people with tribal affiliation (through the creation of membership rolls and the inclusion of descent or blood quantum based criteria) was a way to ensure the eventual extinction of tribes themselves. By the time policies of self-determination became ascendant, all of this history was baked into what it meant to be an American Indian tribe.

For the CRIT, the overriding sense from history is that, from the federal government's perspective, all Indians in the area were fungible and ultimately disposable. The Indian Service attempted repeatedly to justify its failure to consolidate all tribes of the lower Colorado River onto one reservation with efforts to increase the CRIT population in other ways. When early attempts to locate tribes other than the Mohave and Chemehuevi failed, allotment seemed to be the best solution. When allotment efforts failed to shrink the CRIT reservation by opening it for non-Indian settlement, federal agents tried yet another strategy: relocating Navajo and Hopi tribal members who themselves were objects of failed government policies to contain and control tribes and their homelands. Throughout, federal officials referred to the waste of resources that would otherwise result if lands set aside in the 1865 statute (with subsequent additions) were home only to a paltry number of Indians. The multi-linguistic, multi-cultural composition of today's Colorado River Indian Tribe is the outcome of that statist project of racialized consolidation,<sup>487</sup> even while today CRIT itself exercises its powers of self-government and inherent sovereignty to further a living, complicated culture with ties to its several indigenous peoples.

The history of the ten federally recognized tribes in North and South Dakota reflects the eliminationist agenda in similar as well as distinct ways. For the affiliated peoples of the Great Dakota Nation, their presence throughout the upper Midwest and Great Plains seemed initially to require a global territorial solution.<sup>488</sup> After the Civil War, when pressure and desire to settle the western territories increased, that solution was inadequate. The subsequent break-up of the Great Sioux Nation followed the dictates of non-Indian desire for land and resources rather than any pre-existing identities claimed by the many Dakota bands and affiliations. To some extent, peoples of common language, political structure, and tradition were assembled within a federally recognized tribe on a reservation having some connection to their aboriginal lands.

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487. See OMI & WINANT, *supra* note 26, at 56 (defining "racial projects").

488. See *supra* Part II.B.1.b; see also Treaty of Traverse des Sioux, U.S. See-see-toan and Wah-pay-toan Bands of the Dakota or Sioux Indians, July 23, 1851, 10 Stat. 949 (spelling in original).

But that was due more to the will and agency of the bands themselves than the design of the federal government.

Wolfe's observation that "invasion is a structure not an event,"<sup>489</sup> applies forcefully to the CRIT and Sioux tribes today. Invasion structured the membership composition of the CRIT and Sioux tribes according to non-Indian desire for land and resources, and the political and legal consequences for the tribes persist. Internally, the CRIT and Sioux tribal governments struggle to reconcile the divergent cultures and backgrounds of their members. Externally, the tribes must defend their legal and political sovereignty (derived from their pre-contact status as independent peoples and recognized in the US constitution) even though the form it takes necessarily reflects the history of invasion.

#### IV. IMPLICATIONS FOR EQUAL PROTECTION DOCTRINE

Politics and law construct race, and the racial characteristics assigned to certain groups then generate their own politics and law. Accepting those premises necessarily implies acceptance of the conclusion that different politico-legal *goals* motivated the construction of different racial groups. As discussed above, for American Indian tribes, the overriding characteristic of their racialization was the goal of elimination. Therefore, the overriding characteristic of redress for tribes is to perpetuate their existence as distinct peoples.<sup>490</sup> Today, that means supporting classifications that further the unique obligations that Congress has to tribes regardless of whether they incorporate membership criteria that (inevitably) reflect the racializing project imposed on them. A source no less than the leading Indian law treatise makes the same point: "A sound reading of *Morton v. Mancari* would acknowledge that even though ancestry may figure into some Indian classifications, ultimately the most important inquiry is whether the law can be justified as fulfilling 'Congress' unique obligation toward the

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489. WOLFE, SETTLER COLONIALISM, *supra* note 8, at 2.

490. This overriding characteristic applies to classifications affecting tribes and, by extension, classifications (largely in the form of preferences and benefits) that apply to Indians as members of tribes. There are also still many instances and forms of racism against individual Indians that require the full range of individual civil rights remedies, *including* those of perpetuating their tribal connection. *See* Rolnick, *supra* note 9, at 959–68; *see also* Berger, *supra* note 9, at 594–95. In other words, redress for the eliminationist harms perpetrated against tribes requires certain forms of response (support for tribes as peoples). Redress—for lack of a better word—for more generic forms of racism against Indians requires the full range of civil rights remedies, including sometimes restoring connections to their tribe. *See* Rolnick, *supra* note 9, at 1036–45 (coming to similar conclusions).

Indians.”<sup>491</sup> The legal histories of CRIT and the Great Dakota Nation illuminate the wisdom of this view, and highlight the thicket that lies behind any judicial attempt to unwind the racial from the political with respect to that aspect of *Mancari*.

The following brief review of how courts have addressed equal protection issues since *Mancari* reinforces the conclusion that courts risk furthering the settler-colonial project rather than reversing it when they stray from inquiring whether a classification can be justified as fulfilling “Congress’s unique obligation toward the Indians.” Post-*Mancari*, courts have faced four types of equal protection challenges in the American Indian context. First, similar to *Mancari* itself, non-Indians continue to challenge laws that confer benefits on Indians and tribes.<sup>492</sup> Second, nonmember Indians have challenged a federal law, known as the *Duro*-fix legislation, that recognized inherent tribal powers to prosecute nonmember Indians, but not non-Indians, for tribal crimes.<sup>493</sup> Third, courts have addressed equal protection challenges brought by nonmember Indians to legislation that gives preference to tribal members.<sup>494</sup> Fourth, Indians have brought equal protection challenges to federal criminal prosecution.<sup>495</sup> While most courts that address these questions find them easily resolved under *Mancari*, the creep of color-blind jurisprudence and its ahistorical approach to racial formation generally, and Indian law specifically, is evident in a few cases that fall in the first two categories. Those categories are, therefore, addressed in

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491. COHEN, *supra* note 42, § 14.03[2][b], at 927 (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

492. *See infra* IV.A; *see also* Alaska Chapter, *Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1163 (9th Cir. 1982) (upholding HUD preference for Indian-owned companies to build housing for Indians); *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980) (upholding tribal employment preference against equal protection challenge brought by non-Indian former police chief); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979) (upholding New Mexico statute granting only Indians the right to display and sell handcrafted jewelry on grounds of public museum).

493. *See infra* Part IV.B.

494. *See Mullenberg v. United States*, 857 F.2d 770 (Fed. Cir. 1988) (rejecting equal protection challenge by nonmember Indian to IHS Indian employment preference). *But see Dawavenda v. Salt River Agric. Improvement and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (holding that Indian preference policy that favored members of one federally recognized tribe over another violated Title VII prohibition on national origin discrimination).

495. *See United States v. Broncheau*, 597 F.2d 1260 (9th Cir. 1979) (rejecting equal protection challenge to federal criminal prosecution, reasoning that the claim was indistinguishable from the one rejected in *Antelope*); *cf. United States v. Keys*, 103 F.3d 758 (9th Cir. 1996) (upholding conviction of defendant for assault on an Indian child on grounds that government had met its burden to prove victim was a member of an Indian tribe and that classification was political, pursuant to *Antelope*).

more detail below.

A. *Challenges by Non-Indians to Classifications Conferring Benefits on Indians*

Since *Mancari*, non-Indian plaintiffs have continued to bring equal protection challenges to classifications that afford distinctive treatment to American Indians and American Indian tribes. These challenges can be divided into two groups: challenges to religious exemptions specific to Indians and challenges to economic legislation, in particular Indian gaming laws.

The religious exemption cases, when brought as equal protection challenges, have generally been rejected based on *Mancari*.<sup>496</sup> In *Peyote Way Church of God v. Thornburgh*,<sup>497</sup> the Fifth Circuit upheld federal legislation exempting Native American Church (NAC) members from statutes prohibiting peyote possession against an equal protection challenge.<sup>498</sup> The court had no difficulty concluding that the NAC membership requirements, which included twenty-five percent Native ancestry as well as membership in a federally recognized tribe, met the “political classification” test, and therefore applied *Mancari*’s rational basis approach.<sup>499</sup> The court then concluded that the NAC exemption furthered the legitimate governmental purpose of preserving Native American religion.<sup>500</sup> Other religious exemption cases have had similar outcomes.<sup>501</sup>

Viewed in the context of the racial formation of tribes, for which the perpetuation of tribal culture is an appropriate form of redress, the approach followed in *Peyote Way Church of God* is the right one. Part of the eliminationist agenda was the destruction of tribal religion and culture.<sup>502</sup> Affirming congressional and administrative efforts to

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496. Some challenges to religious exemptions have succeeded when brought under the Religious Freedom Restoration Act, however. See *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).

497. 922 F.2d 1210 (5th Cir. 1991).

498. See *id.* at 1211.

499. See *id.* at 1216.

500. See *id.*

501. See, e.g., *Rupert v. Dir.*, U.S. Fish & Wildlife Serv., 957 F.2d 32, 34 (1st Cir. 1992) (upholding Indian religious exemption for eagle feather possession). The court applied equal protection analysis to the claim, which had been brought as an establishment clause challenge. See *id.*

502. See generally Allison Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (describing Allotment era’s destruction of religion); see also Berger, *supra* note 9, at 628–39 (discussing destruction of culture as linked to racialization of the tribe).

perpetuate American Indian religious practices, even as they evolve in pan-Indian forms like the NAC, is a constructive step toward reversing elimination. At the same time, the “religion and culture” equal protection cases may not be the most challenging ones in terms of unsettling the paradigm of the disappearing Indian. Perpetuating Native culture is crucial, yet (with important exceptions) can coexist with stereotypical notions of Indians fixed in time and space, and importantly, pose no threat to economic interests.<sup>503</sup>

The harder cases, in terms of unsettling racially constructed ideas about Indians, are the ones recognizing tribal powers to engage in economic activity. In particular, non-Indian plaintiffs have brought challenges to laws that recognize tribes’ exclusive powers to operate gaming activities within states. Similar to the equal protection/religion cases, to date, these challenges have been rejected.<sup>504</sup> But language in the recent case of *KG Urban Enterprises, LLC v. Patrick*<sup>505</sup> adverts to the ease with which some courts might start to employ racial vocabulary to undermine tribal sovereignty. In *KG Urban Enterprises*, a federal district court in Massachusetts upheld a Massachusetts gaming law that authorized casino-style gaming and established a scheme for issuing licenses for different categories of gaming.<sup>506</sup> Consistent with the federal Indian Gaming Regulatory Act,<sup>507</sup> the Massachusetts law authorized gaming compacts with federally recognized Indian tribes and required at least one member of the state’s Gaming Policy Advisory Committee to be a representative of a federally recognized Indian tribe. The Massachusetts Act also provided that if the state “enters into a Tribal State gaming compact with an Indian tribe, the Gaming commission will not issue a Category One license” for one of the designated geographic

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during allotment).

503. The exceptions include cases in which Indian claims to culture and religion raise questions about land use. These are more threatening to the established order because they raise the specter, realistic or not, of Indians reclaiming vast swaths of land. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); *see also* Kristen Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005) (analyzing *Lyng* and related cases and proposing property rights approach in light of repeated poor outcomes in the First Amendment context).

504. *See Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (upholding gaming compacts under the Indian Gaming Regulatory Act between the state of California and Indian tribes).

505. 839 F. Supp. 2d 338 (D. Mass.) *aff’d in part, vacated and remanded in part*, 693 F.3d 1 (1st Cir. 2012).

506. *See id.*

507. 25 U.S.C. §§ 2702–2721 (2006).

regions of the state.<sup>508</sup> KG Urban Enterprises, a non-Indian company that had acquired a former brownfields site in order to develop a multi-level casino and shopping/retail and conference center, challenged the Massachusetts law on equal protection and other grounds.<sup>509</sup>

The district court upheld the law, but first questioned the *Mancari* distinction between the “political” category of the federal recognized tribe and the “racial” composition of tribal membership:

The government’s power to regulate Indian affairs, which implicates weighty constitutional issues, should not rise or fall on a facile distinction. “Federally recognized tribes” are quasi-sovereign political entities, to be sure, which is why some courts characterize the classification as political. Their members, however, share more than a like-minded spirit of civic participation; they share the same *racial heritage*.<sup>510</sup>

The court then cited to articles by Indian law scholars to support this conclusion.<sup>511</sup> The court used the nuanced work of these scholars, whose analyses are embedded in the history of ideological and structural forces that shaped tribal membership into membership by descent,<sup>512</sup> to conclude that tribal membership relies on “racial heritage.” That the court used the term “racial heritage” is significant. The term implies a distinctly biological and essentialist understanding of tribal membership requirements, as opposed to the more accurate understanding that the descent-based requirements were (and in many cases still are) an inevitable artifact of *the political relationship* (wrought by historical, ideological, and structural forces) between tribes and the federal government.<sup>513</sup>

Despite the court’s disquiet over the Supreme Court’s failure to grapple “with complex constitutional issues such as the scope of congressional power to regulate Indian affairs and the inherent tension between the Indian Commerce Clause and the Equal Protection Clause,” it concluded that the state gaming law survives *Mancari* rational basis

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508. *KG Urban Enters.*, 839 F. Supp. 2d. at 394.

509. *See id.* at 392.

510. *Id.* at 403 (emphasis added).

511. *See id.* at 403–04 (citing Spruhan, *supra* note 77, at 12; Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2009); Rolnick, *supra* note 9, at 1001).

512. *See* Gover, *supra* note 511, at 248–54; Rolnick, *supra* note 9, at 1008–10; Spruhan, *supra* note 77, at 47–49.

513. *See supra* Parts II.B and III; *see also* Goldberg, *supra* note 41, at 958–64; Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1673 (2002).

review.<sup>514</sup> But, if the court could have addressed the issue as one of first impression:

[I]t would treat Indian tribal status as a quasi-political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at stake. Federal laws relating to native land, tribal status or Indian culture would require minimal review because such laws fall squarely within the historical and constitutional authority of Congress to regulate core Indian affairs. Laws granting gratuitous preference divorced from those interests, such as . . . a law granting tribes a quasi-monopoly on casino gaming, would be subject to more searching scrutiny.<sup>515</sup>

The district court's proposed multi-tiered scrutiny reveals precisely why the Supreme Court should resist the invitation to grapple with the "inherent tension" between the Indian Commerce Clause and the Equal Protection Clause.<sup>516</sup> If it does so, it will be likely to misconceive the tension in precisely the way the Massachusetts court did. The tension is not bi-polar: "Indian Commerce Clause versus Equal Protection." The tension is multi-directional and dynamic. The historical racialization of tribes and the lingering effects of that eliminationist project cannot be redressed by empowering courts, for the first time, to scrutinize economic legislation that allows tribes to carry out inherent governmental powers. To the contrary, embedded in the court's proposed approach is a re-racialization that boxes tribes into traditional cultural projects while pre-judging as "gratuitous" contemporary economic benefits.<sup>517</sup> If the Supreme Court opts to grapple with the tensions inherent in federal Indian law, it should take in the full scope of how the federal government's relationship with tribes has racialized the political relationship and politicized "race" in ways that defy ahistorical and colorblind scrutiny. Otherwise, tugging on just one strand might well unravel all that is moving in the right direction in terms of perpetuating tribal survival, and leave intact the most crushing forms of eliminationist law and policy.

#### *B. Challenges by Nonmember Indians to Duro-fix Legislation*

Tribal governments exercise inherent criminal authority over tribal

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514. See *KG Urban Enters.*, 839 F. Supp. 2d. at 405.

515. *Id.* at 404.

516. *Id.*

517. See *id.*

members and also over members of other Indian tribes.<sup>518</sup> The history of how tribes became “federally recognized tribes,” and the more particular histories of CRIT and the Great Dakota Nation recounted in Parts II.B and III above, echo the broader historical justification for recognizing tribal powers over their own *and* other members, in that the distinction between a tribe’s members and those of another tribe was, and remains, fluid and historically contingent.<sup>519</sup> Nonetheless, as discussed above, in *Duro v. Reina*, the Supreme Court held that tribes did not have inherent authority to prosecute nonmember Indians.<sup>520</sup> Tribal leaders and academics immediately and roundly criticized *Duro*.<sup>521</sup> Not only did *Duro* misconceive history, the decision created a jurisdictional vacuum for criminal law enforcement in Indian country. States do not have criminal jurisdiction to prosecute crimes in Indian country committed by Indians, and the federal government lacks the authority to prosecute misdemeanor crimes committed by Indian perpetrators against Indian victims.<sup>522</sup> The only government with the authority to prosecute nonmember Indians for certain categories of crimes against other Indians was and remains the tribal government.<sup>523</sup> As a result, Congress overturned the result in *Duro* just a year after the case was decided.<sup>524</sup>

The Supreme Court upheld the *Duro*-fix legislation in *United States v. Lara*<sup>525</sup> on the grounds that Congress’s power in Indian affairs includes the ability to affirm the inherent authority of tribes to subject nonmember Indians to criminal prosecution.<sup>526</sup> *Lara* was brought as a double jeopardy case.<sup>527</sup> The defendant, Billy Jo Lara, had already been convicted in tribal court.<sup>528</sup> He argued that Congress lacked the power to

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518. See *supra* Part I.B.2.d.

519. See *supra* Parts II.B and III; see also Krakoff, *supra* note 350, at 1280–82 (describing incorporation of Northern Cheyenne tribal members into the Pine Ridge/Oglala Lakota Tribe).

520. *Duro v. Reina*, 495 U.S. 676, 685 (1990), discussed *supra* at note 256.

521. See Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004) (describing strong negative response from tribal leaders and academics).

522. See ANDERSON ET AL., *supra* note 127, at 310–21 (describing criminal jurisdiction in Indian country).

523. Public Law 280 jurisdictions where states have assumed criminal authority over Indian Country are the only exception to this. The weakness of PL 280 law enforcement further highlights the impracticality of turning to states to address Indian country crime. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

524. See 25 U.S.C. § 1301(2), (4) (2006).

525. 541 U.S. 193 (2004).

526. See *id.* at 200.

527. *Id.* at 196–97.

528. *Id.*

restore tribal inherent sovereignty and that his tribal prosecution, therefore, was federal in nature and barred a second prosecution by the same sovereign—the federal government.<sup>529</sup> Lara also challenged his federal prosecution on equal protection and due process grounds, but the Court set those issues aside as relevant only to the tribal prosecution.<sup>530</sup> The Court indicated that there might well be equal protection and due process concerns, but they would have to be raised in a challenge to the tribal court’s criminal jurisdiction.<sup>531</sup>

Russell Means brought that challenge. In *Means v. Navajo Nation*,<sup>532</sup> Means, a member of the Oglala Lakota Nation, had been charged in the Navajo Nation tribal court for various crimes, including assault.<sup>533</sup> He disputed the Navajo Nation’s criminal power, arguing that subjecting him to the tribal court’s jurisdiction was no different than subjecting a non-Indian because Means could never become a member of the Navajo Nation. The *Duro-fix* subjected only other Indians, and not non-Indians, to tribal court jurisdiction, a distinction that Means argued violated the equal protection component of the Due Process clause. The Ninth Circuit, though noting that Means’ argument had “real force,”<sup>534</sup> upheld the *Duro-fix* and Means’ tribal court prosecution under *Mancari*. The court first noted that the *Duro-fix* did not subject all “ethnic Indians” to criminal prosecution, but only those Indians who met the Major Crimes Act definition that requires Indian ancestry and political affiliation.<sup>535</sup> Therefore, the classification, like the one in *Mancari* itself, “is political rather than racial, and the only Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, not all ethnic Indians.”<sup>536</sup> Furthermore, Means’ enrollment in another tribe satisfied the statute’s requirements: “The statute subjects Means to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe.”<sup>537</sup>

Despite *Means*’ relatively straightforward application of *Mancari*, the court expressed concern about the turbulent backdrop of politics and race. The “force” it found in Means’ claims consisted of three factors,

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529. *See id.* at 208–09.

530. *See id.*

531. *See id.*

532. 432 F.3d 924 (9th Cir. 2005).

533. *Id.*

534. *Id.* at 932.

535. *See id.* at 930.

536. *Id.* at 933 (emphasis in original).

537. *Id.* at 934.

the first two of which are relevant here.<sup>538</sup> First, Means, although not Navajo, could be prosecuted by the Navajo Nation, which situated him differently from “whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation.”<sup>539</sup> The court’s concern was that the *Duro*-fix, therefore, exposed a certain category of nonmembers to tribal prosecution, but not others. The appeal of Means’ argument is that he was being “checked off” by race in ways that “whites, blacks, Asians” were not. A response (that the court did not provide) is that Means is simply incorrect. White, black, and Asian people *who are also members of federally recognized tribes* (in other words, people of mixed ancestry who nonetheless meet their tribes’ membership requirements) would also be subject to tribal prosecution. This can only be disputed on the basis that some “races” are not susceptible to mixed ancestry. While there was a time that such an assertion, in the context of whiteness, was unproblematic,<sup>540</sup> presumably it would be a reactionary one to make today. The court, therefore, missed an opportunity to explain the political (and legal) nature of all racial categories inherent in Means’ assumption that some “races” (whites, blacks, Asians) cannot also be Indian. The *Means* court’s second concern was that Means could never become Navajo.<sup>541</sup> The history of tribal recognition, including the overriding forces limiting tribal territory and membership, should inform current judgments about tribal enrollment criteria. Against the backdrop of relentless historical pressure to define “tribes” and “tribal membership” in ways convenient for the settler society’s goals of clearing the land, the only appropriate judicial role is to refrain from holding that very history against tribes today.

To date, courts are following *Mancari*, though some appear to bristle at what they perceive to be its blind spots. The foregoing histories of tribal recognition and tribal membership indicate that the failure of vision is much larger than an unsatisfying doctrinal distinction between the “political” and the “racial.” It is a failure to grapple with the ways that tribes and their members were racialized in order to divest them of

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538. The court’s third concern was that the Navajo Nation, like all tribes, is not subject to the Bill of Rights. *See id.* at 932. Tribal courts are, however, subject to the Indian Civil Rights Act, which includes most of the same protections. *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2006). The most significant exception is the right to free counsel for indigent defendants. The Navajo Nation, however, provides representation to indigent defendants through a public defender service and requires *pro bono* representation. *See* NAVAJO NATION CODE ANN. tit. 7, § 606(A) (2010).

539. *Means*, 432 F.2d at 932.

540. *See* Harris, *supra* note 86, at 1737.

541. *Means*, 432 F.2d at 932.

land and, ultimately, ensure their orderly disappearance. There is no distinction between the political and the racial in that larger story, yet the story reinforces the importance of judicial restraint when it comes to unpacking those categories today.

## CONCLUSION

Race and politics are deeply entangled by and throughout our history. The construction of racial categories has served distinct political ends for all subordinated groups. In the case of indigenous peoples, that end was their eventual erasure from the continent. The resulting eliminationist policies shaped early conceptions of tribes and have had sticky effects on all aspects of federal Indian law, including the federal government's trust relationship with tribes as well as understandings of tribal political status, tribal membership, and tribal inherent powers. For the past several decades, the federal government's policies with respect to tribes have generally supported tribal self-governance and self-determination. Laws affecting Indian tribes and people no longer *overtly* embrace the racial logic of elimination. Yet the current laws operate in a context inevitably soaked in the racialized and eliminationist policies of the past. For contemporary federal policies to reach fruition, tribes and their allies must continue to work their way out of that racial and political thicket.

Untangling the ways in which American Indian tribes have been constructed by the racial and eliminationist logic of our past is no mean feat. The first crucial step, however, is to understand the history in all of its complexity. The legal histories of the Colorado River Indian Tribes and the tribes of the Great Dakota Nation provide two different windows into that larger history. The CRIT story is one of constructing a single tribe out of many distinct peoples. The "race" of the single tribe was subordinate to the larger distinction between Indians and whites. The overriding need to clear the West for non-Indian settlement resulted in a multi-ethnic polity that had no precedence in the governing or social structures of the Mohave, Chemehuevi, Navajo, and Hopi people. The Dakota story, on the other hand, is one of scattering and concentrating peoples of various and overlapping ethnic, social, and political structures onto separate reservations. The result today is a much greater degree of affiliation between and among the Sioux Tribes than is generally appreciated.

Both of these histories are set in the larger context of the federal government's imposition of static definitions of "tribe" and "membership." Whatever membership might have meant for tribes in pre-contact times, today it is shaped by the complicated process of having traveled the route from independent people to "domestic

dependent nation.” Part of that process entailed a shift from fluid and territorially-based absorptions of new people to bureaucratized accountings that incorporated blood quantum and descent.<sup>542</sup> That shift was imposed on tribes by the federal government’s overriding objectives, during different policy periods, of quantifying and ultimately shrinking the number of indigenous people who inconveniently occupied and had legitimate claims to land and resources.

In terms of current legal doctrine, the *Mancari* rule—that federal courts should not subject classifications based on tribal political status to heightened scrutiny when those classifications “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians”<sup>543</sup>—is probably the best courts can do. The categories “federally recognized tribe” and “tribal member” are political, even while they also include the racialized history of the federal government’s treatment of Native peoples. Given that courts are unlikely to engage in the deep, contextual analysis necessary to untangle the racial from the political in ways that will reverse eliminationist policies, it is better to stick with *Mancari*’s good-enough formulation. If courts move in the direction of scrutinizing tribes’ distinctive status in today’s color-blind climate, they are more likely to entrench historical discrimination against indigenous peoples than to reverse it. Thus, while courts should continue to subject racial discrimination against Indian people to heightened scrutiny, they should not reassess *Mancari*’s approach toward federal classifications that further the unique government-to-government relationship between tribes and the federal government.

Despite the dominance of eliminationist policies toward indigenous peoples, there has always been a tensile counter-thread. As a nation, we pulled up short of severing completely the ties that American Indian tribes had to their pre-contact status as independent sovereigns. And American Indian tribes have seized each opportunity to continue as distinct peoples, exercising tribal self-governance in the shadow of the law when necessary, as well as through the convoluted forms made available through law. The legal forms of the federally recognized tribe and tribal member, and the legal doctrines assigning meaning to those forms, are a product of that complicated history of subordination and survival. The ultimate goals of Indian law today should be to overthrow the remnants of elimination in favor of indigenous survival.

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542. See *supra* Part I.B.

543. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).