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### They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum

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## ARTICLE

## They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum

Sarah Krakoff\*

**Abstract.** In American law, Native nations (denominated in the Constitution and elsewhere as “tribes”) are sovereigns with a direct relationship with the federal government. Tribes’ governmental status situates them differently from other minority groups for many legal purposes, including equal protection analysis. Under current equal protection doctrine, classifications that further the federal government’s unique relationship with tribes and their members are subject to rationality review. Yet this deferential approach has recently been subject to criticism and is currently being challenged in the courts. Swept up in the larger drift toward colorblind or race-neutral understandings of the Constitution, advocates and commentators are questioning the distinction between tribes’ political and racial statuses and are calling for the invalidation of child welfare and gaming laws that further tribes’ unique sovereign status.

The parties urging strict scrutiny of laws that benefit tribes contend that tribal membership rules, which often include elements of lineage or ancestry, are the same as racial classifications. In their view, tribes are therefore nothing other than collections of people connected by race. Yet federal law requires tribes (as collectives) to trace their heritage to peoples who preceded European/American settlement in order to establish a political relationship with the federal government. Descent and ancestry (not the sociological category of “race”) make the difference between legitimate federal recognition of tribal status and unauthorized, unconstitutional acts by Congress. Congress, in other words, cannot establish a government-to-government relationship with just any group of people. Tribes are treated differently from other groups due to their ties to the indigenous peoples of North America. These ties comprise a constitutional minimum requirement for federal tribal recognition. This constitutional understanding of tribes derives from the international law origins of the federal-tribal relationship and is reflected in contemporary case law and federal regulations.

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\* Raphael J. Moses Professor, University of Colorado Law School. Thank you to Greg Ablavsky, Kristen Carpenter, Michael Dorf, Angela Riley, Pierre Schlag, Anna Spain, Gerald Torres, and colleagues at the University of Colorado works-in-progress workshop and Cornell Law School symposium series for invaluable feedback. I am also indebted to Melissa Austin, Emily Lubarsky, Andy Ball, and Jesse Heibel for their good cheer and excellent research assistance.

*They Were Here First*  
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The argument advanced in this Article might be seen as a form of American Indian law exceptionalism. Yet it is consistent with racial formation theory's project of understanding race as a construction that serves, creates, and perpetuates legalized subordination and shapes daily social conceptions and interactions. Racial formation theory calls for multiple accounts of racialization depending on the social and economic purposes served by each group's subordination. On the remedial side, racial formation theory therefore necessarily anticipates what we might think of as multiple exceptionalisms. Put more simply, racism takes different forms for each group to which inferior characteristics have been ascribed. Undoing the effects of racism therefore requires customization. Reversing policies that aimed to eliminate Native people, and the racialized understanding of Indians that drove those policies, requires maintaining the political status of tribes as separate sovereigns, not destroying it in the name of an ahistorical conception of "race" neutrality. This Article untangles the legitimate constitutional basis for tribal recognition—that tribes can trace their ancestry to a time before nonindigenous arrival—from the racial logic that nearly eliminated tribes from the continent despite their unique constitutional status.

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## Introduction

Should children who are eligible for membership in an American Indian tribe be treated differently from other children for purposes of foster care and adoption?<sup>1</sup> Can states treat American Indian tribes differently from non-Indian companies under state gaming laws?<sup>2</sup> As of today, the law's answer to these and similar questions is yes. In American law, Native nations are sovereigns with a direct relationship with the federal government.<sup>3</sup> Native nations' governmental status situates them differently from other minority groups for many legal purposes, including equal protection analysis. Under current equal protection doctrine, classifications that further the federal government's unique relationship with American Indians are not subject to heightened scrutiny.<sup>4</sup> The Supreme Court held in *Morton v. Mancari* that such classifications are political distinctions rather than acts of "invidious racial discrimination"<sup>5</sup> and therefore are not subject to the Court's most exacting review.<sup>6</sup> As noted in *Mancari*, tribes' distinctive status has been recognized since the Founding and is reflected in hundreds of treaties, statutes, and regulations that support tribal rights to self-determination.<sup>7</sup> "If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code . . . would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."<sup>8</sup>

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1. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013) (noting equal protection "concerns" but ruling on other grounds); Civil Rights Class Action Complaint for Declaratory & Injunctive Relief at 21-22, 24, *Carter ex rel. A.D. v. Washburn*, No. 2:15-cv-01259-DKD (D. Ariz. July 6, 2015) (challenging the Indian Child Welfare Act on equal protection grounds).
  2. See *KG Urban Enters. v. Patrick*, 693 F.3d 1, 16-17 (1st Cir. 2012) (considering a non-Indian development company's challenge to a state law that gave priority to eligible American Indian tribes).
  3. I use the terms "American Indian tribe" and "Native nation" interchangeably in this Article. "Native nation" is the preferred contemporary term for indigenous political sovereigns, but "American Indian tribe" is firmly ensconced in legal documents and vocabulary.
  4. See *Morton v. Mancari*, 417 U.S. 535, 555 (1974).
  5. *Id.* at 551.
  6. *Id.* at 553-54.
  7. *Id.* at 552-53; see also Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 164-72 (2008) (describing the historical understanding and treatment of tribes).
  8. *Mancari*, 417 U.S. at 552.

Yet the Court's deferential approach to classifications that affect tribes and their members has come under attack.<sup>9</sup> Swept up in the larger drift toward colorblind or race-neutral understandings of the Constitution, courts and some commentators question the distinction between tribes' political and racial statuses.<sup>10</sup> They suggest that the Court's rational basis approach to classifications concerning tribes and tribal members should be modified, if not altogether rejected.<sup>11</sup> These arguments rely on what their proponents claim to be the race-based requirements (including lineal descent or "blood quantum") for membership in many Native nations and therefore the "racial" status of tribes themselves.<sup>12</sup>

One response to these arguments is historical, rooted in how tribes evolved from precontact<sup>13</sup> peoples with their own definitions of membership to today's "federally recognized tribes." Since the arrival of Europeans, American Indian tribal formation has been a distinctly political process, one that also reflects the ways that U.S. laws and policies imposed racial characteristics on American Indian individuals and tribes.<sup>14</sup> To the extent that tribes today have membership requirements that include lineage or blood quantum, they are part and parcel of that process of racial/political formation.<sup>15</sup> The federal government catalogued tribes, defining them and imposing membership requirements at key historical moments, as part of a strategy of control and elimination.<sup>16</sup> The process of bureaucratizing tribes and their members while simultaneously ascribing inferior characteristics to American Indians comprised a racializing project aimed at eventually defining Indians out of

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9. See *KG Urban Enters. v. Patrick*, 839 F. Supp. 2d 388, 403-04 (D. Mass.) (criticizing *Mancari*), *aff'd in part, vacated in part, and remanded*, 693 F.3d 1 (1st Cir. 2012). The Supreme Court has continued to affirm *Mancari* but has indirectly questioned aspects of its reasoning in two cases. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013); *Rice v. Cayetano*, 528 U.S. 495, 514 (2000); see also *infra* notes 103-20 and accompanying text (discussing *Adoptive Couple*).

10. See *infra* Part I.A-B.

11. See *infra* Part I.

12. See *infra* Part I.

13. I use "precontact" as shorthand for the political and legal status that indigenous peoples of North America possessed before the arrival of Europeans or—in cases where sustained contact did not occur until after the American Revolution—before the arrival of American settlers.

14. See Fletcher, *supra* note 7, at 164-69; Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1043 (2012).

15. See Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 FLA. INT'L U. L. REV. 295, 296 (2014).

16. See Krakoff, *supra* note 14, at 1060-83 (recounting the historical evolution of the federal government's tribal recognition practices and definitions).

existence.<sup>17</sup> That project took the form of violent removals and massacres as well as assimilationist strategies.<sup>18</sup> As I have argued in previous articles, using equal protection doctrine to demand a highly formalized and acontextual race neutrality with respect to tribes and their members today would, ironically, perpetuate the settler/colonial project of elimination.<sup>19</sup> Used in this way, colorblindness could threaten tribes' separate political status just as they are beginning to break free from the historical legacies of tribal racialization.<sup>20</sup>

There is another complementary response that lies deep in the structure of tribes' relationship with the federal government and is at the very heart of the federal power to recognize tribes as sovereigns. It is this: tribes (as collectives) must trace their heritage to peoples who preceded European/American settlement in order to establish a political relationship with the federal government. Tribes, in order to be recognized as such under the Constitution, therefore must, as an initial definitional matter, consist of people tied together by something akin to lineage. Descent and ancestry—distinct from but often conflated with the sociolegal category of “race”<sup>21</sup>—are the difference between

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17. See *id.* at 1118-22; Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 399-401 (2006).

18. See, e.g., DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (30th anniversary ed. 2001) (describing the violent displacement of Native peoples in the American West from 1860 to 1890); ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* (2014) (reviewing U.S. policies toward Native peoples from the Founding to the present). As one historian stated, describing removal policies specifically, “[t]he removal of American Indians from their lands east of the Mississippi River was an act of all-encompassing violence that did not take place in an abstract world of political debates and historical narratives.” JOHN P. BOWES, *LAND TOO GOOD FOR INDIANS: NORTHERN INDIAN REMOVAL* 4 (2016).

19. See Krakoff, *supra* note 15, at 325-26; Krakoff, *supra* note 14, at 1122-31.

20. See Krakoff, *supra* note 15, at 325-26; Krakoff, *supra* note 14, at 1122-31.

21. See *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (“Ancestry can be a proxy for race.”). Justice Kennedy made this statement in the context of striking down a state law that allowed only Native Hawaiians to vote for board members of a state agency that governed programs for Native Hawaiians. *Id.* at 498-99. Justice Kennedy is not wholly wrong in saying this; ancestry certainly *can be* a proxy for racial discrimination in that it can be used in an attempt to disguise the continuation of racially discriminatory policies. See, e.g., *Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (striking down a literacy requirement for voting that exempted the descendants of those eligible to vote prior to the adoption of the Fifteenth Amendment, effectively exempting whites). But as Justice Stevens noted in his dissent in *Rice*, ancestry is not necessarily a proxy for race, and context and history make all the difference. *Rice*, 528 U.S. at 544-45 (Stevens, J., dissenting) (concluding that the ancestry requirement was not a proxy for racial discrimination but rather a recognition of Native Hawaiians' distinct claims to compensation and self-determination); see also Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1390-93 (2002) (arguing that tribes' descent-based membership criteria serve the functions of political and cultural survival and should not be equated with illegitimate racial distinctions). Equating ancestry with race also belies the many ways in which laws recognize and honor ancestry outside of the Indian law context.

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legitimate federal recognition of tribal status and unauthorized, unconstitutional acts by Congress. In other words, Congress cannot establish a government-to-government relationship with just any group of people. When nonindigenous groups of people attempt to form a government within the United States, their options are extremely limited, to say the least.<sup>22</sup> Tribes are treated differently from other groups due to their ties to the indigenous peoples of North America. Those ties therefore comprise a constitutional minimum for federal recognition. The federal courts should not use that constitutional distinction against tribes today in a misguided pursuit of colorblind constitutionalism. That is, at least, the argument in this Article, which will proceed as follows.

Part I reviews contemporary equal protection cases as applied to Indians, focusing on challenges to the Indian Child Welfare Act (ICWA)<sup>23</sup> and tribal gaming. These cases either question whether tribal classifications are political rather than racial or argue for a tiered approach to scrutinizing classifications that affect tribes and tribal members. The parties opposing tribes' distinctive treatment urge the courts to adopt a reverse discrimination paradigm, subjecting all classifications (regardless of intent, history, or connections to animus or subordination) to heightened judicial scrutiny.

Part II addresses the constitutional basis for tribal political recognition and discusses definitions of Indian tribes from the time of the Founding through today. The Constitution's structure and text, including the Indian Commerce Clause and the Treaty Clause, provide the federal government with the authority to enter into political and legal relationships with tribes.<sup>24</sup> No other

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The laws of intestate succession in most states, for example, rely on ancestry. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2103 (2016); CAL. PROB. CODE § 6402 (West 2016); MICH. COMP. LAWS § 700.2103 (2016); 20 PA. CONS. STAT. § 2103 (2016) (all requiring decedents' property to pass based on lineage in the absence of a surviving spouse); *see also* UNIF. PROBATE CODE § 2-103 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (doing the same). U.S. citizenship laws also recognize ancestry. *See, e.g.*, 8 C.F.R. § 322.2 (2016) (allowing a child to be eligible for citizenship if he or she has at least one U.S.-citizen parent).

22. *See* U.S. CONST. art. IV, § 3, cl. 1 (authorizing Congress to create new states but prohibiting the creation of a new state by partitioning or joining existing states without the affected states' and Congress's consent). Outside of Article IV, there are no constitutionally recognized avenues for non-Indian citizens to band together to form a new internal government with a direct relationship with the U.S. federal government.

23. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963 (2015)).

24. The Indian Commerce Clause provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8. The Treaty Clause authorizes the executive's power, "by and with the Advice and Consent of the Senate, to make Treaties." *Id.* art. II, § 2, cl. 2. The Treaty Clause does not mention Indian tribes specifically, but there is no dispute that the power includes treaty-making with tribes. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[2], at 386 (Nell Jessup Newton

*footnote continued on next page*

nonstate entity has a similar constitutional relationship with the federal government.<sup>25</sup> Despite the longstanding nature of tribes' distinct legal and political status, there was very little discussion of how tribes should be defined at the time of the Founding and for many decades thereafter.<sup>26</sup> Yet it is clear from the historical context as well as international law doctrines (from which federal Indian law derived) that tribes' singular constitutional status stemmed from their precontact existence as free and independent peoples indigenous to the continent.<sup>27</sup>

Definitions later supplied by federal courts and federal agencies affirm this, either assuming or requiring ties to precontact peoples in order for tribes to be recognized by the federal government.<sup>28</sup> More recently, definitions of indigenous peoples under international law, while careful to emphasize the importance of self-definition, likewise assume precolonial presence and ties to the land. These contemporary international legal definitions are not binding on U.S. law. But the initial principles for treating American Indians distinctly under the Constitution were drawn from the early law of nations. Contemporary international law thus offers a fitting interpretive approach, particularly given its recent embrace of the rights of indigenous peoples.<sup>29</sup> In short, the

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ed., 2012) [hereinafter COHEN'S HANDBOOK] ("The treaty clause . . . has been a principal foundation for federal power in Indian affairs."). Some courts and scholars have also suggested that there is an extratextual source of the federal government's power to enter into political relationships with the sovereigns that predated it. *See, e.g.*, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 52-73 (1996) (discussing cases that advert to an extraconstitutional source and theorizing that international law provided the basis for this approach). Similarly, Gregory Ablavsky has argued that the Founders and first few presidential administrations relied broadly on the Constitution's structure and purpose—rather than taking a narrow clause-bound approach—to justify exclusive and broad (though not absolute) powers in Indian affairs. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1017-21 (2015).

25. The legal status of U.S. territories is distinct from that of tribes and other entities, although one scholar has argued that aspects of the federal Indian law paradigm should be extended to indigenous peoples in U.S. territories. *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 833-36 (2008).

26. *See* William T. Hagan, *Full Blood, Mixed Blood, Generic, and Ersatz: The Problem of Indian Identity*, 27 ARIZ. & WEST 309, 309-10 (1985); *see also* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 352-53 (1990). A review of documents by the nation's founders reveals significant discussion of tribes' legal status and the power of the federal government versus that of states to regulate relationships with tribes but virtually no discussion of what tribes are or how they are defined. *See* 2 THE FOUNDERS' CONSTITUTION 528-56 (Philip B. Kurland & Ralph Lerner eds., 1987).

27. *See infra* Part II.A.

28. *See infra* Part II.B.1-2.

29. *See* ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 165-66, 173-74, 193 (2005)

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Constitution's unique treatment of tribes assumes that they are successors to the peoples who occupied the continent before the arrival of European explorers and American settlers. The constitutional distinction between tribes and other groups rests on this historical connection and therefore inscribes ancestry into the definition of "American Indian tribe."

Part III situates American Indians' constitutional status in the larger context of racial formation and American law. Shaken loose from the formalist grip of race neutrality and colorblindness, we might see that (contra Chief Justice Roberts) the only way to stop discriminating on the basis of race is to be more discriminate in our understandings of race, its origins, and its meanings.<sup>30</sup> This is as true for African Americans, Latinos, and other groups as it is for American Indians.<sup>31</sup>

In the American Indian context, tribes' legal status, while crucial to their survival as independent peoples, was also laced from the outset with racialized depictions. Tribes' otherness (as "savage," "uncivilized," and so forth) justified the subordination of tribes and tribal interests to the settler society's demands for land and resources.<sup>32</sup> Examples throughout Indian law and policy abound.<sup>33</sup>

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(arguing that the human rights turn in contemporary international law should be deployed to redeem federal Indian law from its colonialist origins); Frickey, *supra* note 24, at 74-75 (arguing that because international law justified the assertion of federal power over tribes, contemporary international law should inform rights-based limits on that power).

30. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); see also Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 985-91, 1002 (2010) (arguing that the Court's postracial view is belied by ongoing race-based discrimination and would further rather than reverse current racial inequality).
31. There is a rich sociolegal literature on racial formation and the political-social constructions of race on which this Article relies throughout. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xv-xvi (rev. & updated ed. 2006); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 3-4 (2d ed. 1994); WILLIAMS, *supra* note 29, at 211 n.70 (describing the book's central thesis as being informed by Omi and Winant's concept of racial formation); Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395, 1405 (2002); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714-16 (1993).
32. See ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* 223-25 (2012).
33. See generally WILLIAMS, *supra* note 29. Williams provides a comprehensive tour through almost all of American Indian law, describing how every policy period and major doctrinal innovation was informed by anti-Indian racism. See, e.g., *id.* at 39 ("An overtly racist, hostile, and violent language of Indian savagery can be found in the first official U.S. legal document . . . , the Declaration of Independence."); *id.* at 69 (describing the "racist language of Indian savagery" in the Marshall trilogy); *id.* at 143 (describing the Rehnquist Court's Indian law as including "judicially validated language of Indian racial inferiority").

In *Johnson v. McIntosh*, one of the foundational cases in federal Indian law, Chief Justice Marshall described tribes as “fierce savages” to rationalize federal control over tribal rights to convey property.<sup>34</sup> In *Ex parte Crow Dog*, the Court affirmed tribal freedom from federal criminal laws but on the basis that Indians needed time to advance from their “condition of a savage tribe to that of a people who, through the discipline of labor . . . , it was hoped might become a self-supporting and self-governed society.”<sup>35</sup> In the mid-nineteenth century, federal officials urged the adoption of oppressive reservation policies with the following justification: “Stolid and unyielding in his nature, and inveterately wedded to . . . savage habits, customs, and prejudices . . . , it is seldom the case that the full blood Indian of our hemisphere can . . . be brought farther within the pale of civilization than to adopt its vices . . . .”<sup>36</sup> The goal of contemporary American Indian policy is, or should be, to preserve tribes’ hard-earned political independence while simultaneously reversing the discrimination embedded in Indian law’s past.<sup>37</sup> Eroding tribes’ constitutional status in the name of a misguided effort to eradicate all things sounding in “race” would have the opposite effect.

On the one hand, this argument can be seen as a form of American Indian law exceptionalism—the idea that general public law principles do not apply to federal Indian law.<sup>38</sup> And yet it is wholly consistent with the larger project of understanding race as a construction that serves, creates, and perpetuates legalized subordination and shapes daily social conceptions and interactions.<sup>39</sup> Racial formation theory calls for multiple accounts of racialization depending on the social and economic purposes served by each group’s subordination.<sup>40</sup> On the remedial side, racial formation theory therefore necessarily anticipates what we might think of as multiple exceptionalisms.<sup>41</sup> To put it simply, if race

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34. 21 U.S. (8 Wheat.) 543, 590 (1823).

35. 109 U.S. 556, 569 (1883).

36. W. MEDILL, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 1, at 385 (1848).

37. For a similar argument, see Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 334-35, 374-75 (2004).

38. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 437-43 (2005).

39. See OMI & WINANT, *supra* note 31, at 4, 54-56; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994) (advancing a “theory of race as a social complex of meanings we continually replicate in our daily lives”).

40. See OMI & WINANT, *supra* note 31, at 55-61; Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1214-16 (1997).

is a construct that divides and subordinates (or privileges) different groups for different purposes, then remedies may also have to be distinct for each group. The law's role may be less to impose an artificial uniformity on this remedial process than to work through how to create an equal society in light of historic and legally constructed racial identities.<sup>42</sup>

This Article fits within that larger project by supporting the specific goal of stripping racial discrimination from federal Indian policy.<sup>43</sup> Its novel contribution is to highlight that tribes' constitutional status assumes ancestral ties to peoples who preceded European (and then American) arrival. Tribes' connections to their predecessors on the continent are what make those tribes distinct, politically and legally, from other groups.<sup>44</sup> Courts that equate that distinction with racial discrimination misread the Constitution and risk reinscribing the racially discriminatory policies that aimed to destroy tribes' continued separate existence.

## I. American Indians and Equal Protection

American Indians have a unique legal and political status in the United States. If they belong to one of the federally recognized tribes (of which there

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41. See OMI & WINANT, *supra* note 31, at 55-61; see also HANEY LÓPEZ, *supra* note 31, at 78-81 (describing the complex forces and multiple actors that contribute to the legal construction of race).

42. See Barnes et al., *supra* note 30, at 1002-04 (rejecting a postracialist approach to equal protection). The Court's recent decision in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), is an ambivalent endorsement of maintaining the equality-promoting aspects of race-consciousness. The Court upheld the university's affirmative action plan, which included consideration of race as a subfactor in a holistic admissions process. *Id.* at 2207, 2214-15. Justice Kennedy authored the 4-3 decision, marking the first time he has endorsed a race-conscious approach to admissions. The case is a landmark in that it appears to put to rest the argument that educational institutions can never take race or ethnicity into account in order to achieve educational objectives.

43. See, e.g., WILLIAMS, *supra* note 29; Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593 (2009); Goldberg, *supra* note 21, at 1392-94; Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 969-74 (2011).

44. This Article does not address a related question: whether, once tribes are recognized as governments under the Constitution, they are required to maintain membership requirements based on ancestry or lineal descent. My own position is that the Constitution imposes no such requirement. After the initial point of origin, tribes, like other governments, should be free to define citizenship in ways consistent with their values as nations. For scholarly support for this position, see Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 12 (2012-2013). For more on tribal citizenship rules and the functions they serve, see Krakoff, *supra* note 15, at 321-25. For a study of contemporary challenges in the context of tribal membership decisions, see Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383 (2015).

are currently 567<sup>45</sup>), they are members of political sovereigns, have distinct rights, and are subject to different legislative and jurisdictional schemes than nonmembers.<sup>46</sup> At the same time, whether tribal members or not, American Indians may be (and unfortunately often are) subject to discrimination on the basis of race or ethnicity.<sup>47</sup>

To date, equal protection doctrine has (for the most part) treated these two forms of differential treatment of American Indians differently—and for good reason. The former—laws, treaties, regulations, and other forms of legal classification that treat tribes and individual Indians distinctly based on their political status—are part and parcel of tribes’ retained inherent sovereignty and their contemporary self-determination.<sup>48</sup> As a result, courts uphold these classifications by asking only whether they further Congress’s unique relationship with tribes.<sup>49</sup> The latter—acts that discriminate against American Indians (whether tribal members or not) on the basis of their race or ethnicity—are subjected to the highest level of scrutiny.<sup>50</sup> Under strict scrutiny, courts require the government to show that it has a compelling interest in its use of the racial classification and that its means for achieving that interest are narrowly tailored.<sup>51</sup>

The Supreme Court first articulated the deferential standard for classifications that further tribal interests—the first category discussed above—in *Morton v. Mancari*. In that case, the Court upheld a Bureau of Indian Affairs

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45. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826 (May 4, 2016).

46. See COHEN’S HANDBOOK, *supra* note 24, at 1-2 (providing an overview of the many sources of law governing the tribal-federal relationship).

47. Recently, egregious acts of racism by non-Indians against Native Americans have included burning a Native homeless man, cursing and yelling “go back to the reservation” at Native American children, and other violence and abuse targeted at Native people. See, e.g., Simon Moya-Smith, *Beer Poured on Students, Told to “Go Back to the Reservation” at Hockey Game*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 28, 2015), <http://ictmn.com/Z6Hp>; Sheena Louise Roetman, *Couple Allegedly Set Homeless Native American Man on Fire, Police Say*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 30, 2015), <http://ictmn.com/4QeD>. For a thorough account of egregious racism in a town bordering the Navajo Nation, see RODNEY BARKER, *THE BROKEN CIRCLE: A TRUE STORY OF MURDER AND MAGIC IN INDIAN COUNTRY* chs. 1-8 (1992). These types of racist acts are, in theory anyway, redressable under civil rights laws and, if perpetrated by state actors, subject to strict scrutiny under the Equal Protection Clause.

48. See Valencia-Weber, *supra* note 37, at 341-43.

49. See *Morton v. Mancari*, 417 U.S. 535, 555 (1974); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1187 (2010).

50. See *Navajo Nation v. New Mexico*, 975 F.2d 741, 743-45 (10th Cir. 1992); *Natonabah v. Bd. of Educ.*, 355 F. Supp. 716, 724 (D.N.M. 1973); COHEN’S HANDBOOK, *supra* note 24, § 14.02[2][b], at 936-37.

51. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208, 2210 (2016) (summarizing the test in the context of a challenge to a public university’s affirmative action program).

(BIA) employment preference for tribal members against a challenge by non-Indians.<sup>52</sup> The employment preference was first adopted in 1934 as part of the Indian Reorganization Act (IRA), which aimed to make the BIA more responsive to its constituents—American Indian tribes and tribal members.<sup>53</sup> The BIA largely ignored the IRA’s preference until tribal members sued the BIA in the 1970s, prompting the agency to adopt the following policy: “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>54</sup> The Supreme Court in *Mancari* unanimously upheld this preference because it relied on a political distinction—membership in a federally recognized tribe—rather than a racial one: “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”<sup>55</sup>

As has been noted, the Court failed to grapple with the fact that the BIA supplemented the political membership criterion with a seemingly gratuitous blood quantum requirement, complicating the conclusion that the distinction was political and not “racial.”<sup>56</sup> Other scholars have thoroughly examined the “racial versus political” dichotomy, largely concluding that *Mancari*’s doctrinal approach was the right one even if its explanation lacked nuance.<sup>57</sup> Further, in the years since *Mancari* was decided, the federal government has all but eliminated supplemental blood quantum requirements from its criteria for federal Indian programs.<sup>58</sup> Therefore, while *Mancari*’s “racial versus political” characterization glossed over uncomfortable aspects of the BIA rule, *Mancari*’s central point—that federal actions in furtherance of tribal self-governance should not be viewed in the same light as discriminatory racial classifications—remains sensible. The leading Indian law treatise reconciles *Mancari*’s imprecise wording with its larger import by concluding: “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

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52. *Mancari*, 417 U.S. at 537, 555.

53. *Id.* at 542-43.

54. *Id.* at 553 n.24 (quoting 44 BUREAU OF INDIAN AFFAIRS MANUAL § 3.1, at 335 (1974)).

55. *Id.*

56. See Krakoff, *supra* note 14, at 1058.

57. See Berger, *supra* note 49, at 1187-88; Krakoff, *supra* note 14, at 1082; Rolnick, *supra* note 43, at 969-74; see also Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 973 (2002).

58. See Krakoff, *supra* note 14, at 1083-85.

law can be justified as fulfilling ‘Congress’ unique obligation toward the Indians.”<sup>59</sup>

After rejecting the argument that the BIA preference was racial in nature, *Mancari* characterized the rule as “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>60</sup> It then concluded that the preference was “reasonably and directly related to a legitimate, nonracially based goal.”<sup>61</sup> The Court noted more broadly that American Indians’ unique legal and political status resulted in many laws and classifications that treat Indians differently from other groups or individuals, and it stated, “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>62</sup>

Not long after *Mancari*, however, the Supreme Court abandoned any effort to grapple with whether federal classifications affecting tribes or tribal members fulfilled “Congress’ unique obligations toward the Indians.”<sup>63</sup> In *United States v. Antelope*,<sup>64</sup> two Indian defendants challenged their prosecution under the Major Crimes Act (MCA)<sup>65</sup> on equal protection grounds. The MCA subjects Indian defendants to federal prosecution for listed felonies occurring in Indian country and can result in treatment substantially different from what defendants would receive under state law.<sup>66</sup> The *Antelope* defendants had been convicted of felony murder under the MCA, but the state in which the crime was allegedly committed had no felony murder provision.<sup>67</sup> The Court rejected the *Antelope* defendants’ equal protection arguments, citing *Mancari* for the conclusion that the MCA’s distinctive treatment of Indian defendants was based on their political status as tribal members.<sup>68</sup> As several scholars have noted, *Antelope* failed to engage the question how a federal jurisdictional scheme for prosecuting crimes by and against Native people fulfilled the government’s “unique” obligations to tribes.<sup>69</sup> Instead, “the Court collapsed the [*Mancari*]

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59. COHEN’S HANDBOOK, *supra* note 24, § 14.03[2][b], at 954 (quoting *Mancari*, 417 U.S. at 555).

60. 417 U.S. at 554.

61. *Id.*

62. *Id.* at 555.

63. *Id.*

64. 430 U.S. 641 (1977).

65. For the current version of the relevant provisions, see 18 U.S.C. § 1153 (2015).

66. *See Antelope*, 430 U.S. at 644-45 (describing the differences between the state and federal laws applicable to the *Antelope* defendants).

67. *Id.* at 644.

68. *Id.* at 645-47.

69. *See Berger*, *supra* note 49, at 1187; Rolnick, *supra* note 43, at 993-94.

analysis into a simple one-line formula: if the distinction is based on tribes or tribal membership, it will be upheld.<sup>70</sup>

After *Antelope*, tribes and tribal members had little hope of using *Mancari* to challenge federal actions that harmed tribal interests. Courts were reluctant to plumb the distinction between federal classifications that furthered the political relationship with tribes and those that did not.<sup>71</sup> Several commentators have critiqued the post-*Mancari* framework on this basis and proposed that courts could give *Mancari*'s test teeth without eroding its deference to laws that support tribes and their members.<sup>72</sup> Other scholars have proposed that the *Mancari* approach should not be limited to federally recognized tribes but should also encompass the claims of other indigenous groups with valid arguments for distinctive treatment and self-determination.<sup>73</sup> Native Hawaiians and American Samoans, for example, have property rights based on their indigenous status, but because they are not federally recognized Indian tribes, those rights might be vulnerable to equal protection challenges.<sup>74</sup>

These are important contributions that highlight limitations within the *Mancari* framework, but they are not the main focus of this Article.<sup>75</sup> Instead, the primary focus here is defending *Mancari* against the latest wave of attacks, which—similar to the claims in *Mancari* itself (and unlike *Antelope* and other cases that involve equal protection claims brought by American Indians<sup>76</sup>)—are in the nature of anti-affirmative action claims. These latest cases, discussed below, are brought either by non-Indians directly or by those representing the interests of non-Indians in the child welfare and adoption context. They aim to cast doubt on *Mancari*'s distinction between political and racial classifications. They therefore seek to recruit courts to second-guess federal and state classifications that promote or recognize tribes' unique governmental status and powers as well as individual tribal members' distinctive rights and interests. Like opponents of affirmative action programs, the parties

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70. Krakoff, *supra* note 14, at 1059.

71. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85-90 (1977) (rejecting an equal protection challenge by a group of Delawares to a federal statute that had excluded them from an award from the Indian Claims Commission).

72. See Krakoff, *supra* note 14, at 1058-59; Rolnick, *supra* note 43, at 993.

73. See Villazor, *supra* note 25, at 819-24.

74. See *id.*

75. As I have discussed elsewhere, however, the formulaic application of the *Mancari* rule has also informed current efforts to revive judicial scrutiny in ways that would *not* further tribal interests. See Krakoff, *supra* note 14, at 1059 n.85, 1125-27.

76. See *United States v. Antelope*, 430 U.S. 641, 642-44 (1977); see also *United States v. Zepeda*, 792 F.3d 1103, 1109 (9th Cir. 2015); *United States v. Broncheau*, 597 F.2d 1260, 1265 (9th Cir. 1979).

attempting to overthrow *Mancari* pursue a colorblind approach to the Constitution, an approach that would subject all racial classifications to strict scrutiny whether or not they have nondiscriminatory purposes.<sup>77</sup>

#### A. Adoption and Foster Care

Children who are tribal members, or who are eligible for membership in an Indian tribe, are treated differently from non-Indian children in the foster care and adoption context pursuant to a federal statute, the Indian Child Welfare Act.<sup>78</sup> Non-Indians who object to ICWA's distinctive treatment of Indian children have brought a series of cases, discussed below, challenging ICWA on equal protection grounds.

To understand the threat these cases pose to tribes and their members, it is necessary to review the context of ICWA's passage. Congress passed ICWA in response to overwhelming evidence that "an alarmingly high percentage" of Indian children are removed from their families "by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."<sup>79</sup> In extensive hearings before Congress, tribal members and various experts testified about the discriminatory practices of state and private welfare and adoption agencies and state courts' abuse of their authority.<sup>80</sup> Before ICWA's passage, courts and other state actors justified removing Indian children from their families based on uninformed judgments about Native family arrangements and living circumstances, as well as the notion that Indian children could be saved only by placement in non-Native homes.<sup>81</sup> "Congressional reports documented the ignorance and hostility of state social workers and judges toward tribal culture and its benefits . . . [S]tates asserted exclusive jurisdiction and denied due process in state proceedings brought to remove Indian children from their families."<sup>82</sup> Similar to the infamous slogan associated with the Carlisle Indian Industrial School, "Kill the Indian, save the

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77. See Goldberg, *supra* note 21, at 1375 (criticizing challenges to Indian programs that use "racialization to trigger strict scrutiny under equal protection law and thereby to deny Indians the benefit of federal measures enacted to compensate for or reverse prior harms").

78. See 25 U.S.C. § 1903(4) (2015) (defining Indian children for the purposes of the Act).

79. *Id.* § 1901(4).

80. H.R. REP. NO. 95-1386, at 8-9 (1978); S. REP. NO. 95-597, at 11-13 (1977).

81. See H.R. REP. NO. 95-1386, at 8-12.

82. COHEN'S HANDBOOK, *supra* note 24, § 11.01[2], at 832.

man,” the pre-ICWA mantra might be summarized as “Extract the Indian to save the child.”<sup>83</sup>

To stanch the exodus of Indian children from their communities, ICWA “constructs a statutory scheme to prevent states from improperly removing Indian children from their parents, extended families, and tribes.”<sup>84</sup> ICWA’s provisions include exclusive jurisdiction for tribal courts in certain proceedings;<sup>85</sup> tribal rights of intervention and transfer of jurisdiction in others;<sup>86</sup> and heightened standards for the removal of Indian children, their foster care placement, and the termination of parental rights.<sup>87</sup> ICWA also imposes preferences for adoptive and foster care placements of Indian children, prioritizing the child’s extended family, tribal members, and other tribal or Indian placements.<sup>88</sup>

ICWA fits readily within *Mancari*’s rationale: ICWA’s “special treatment” of Indian children in the adoption and foster care context fulfills “Congress’ unique obligation toward the Indians” and is therefore justifiable on equal

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83. See Barbara Landis, *Carlisle Indian Industrial School History*, CARLISLE INDIAN INDUS. SCH., <http://home.epix.net/~landis/histry.html> (last visited Feb. 2, 2017). This quotation is attributed to the Carlisle School’s founder, Richard Henry Pratt. Pratt did not say precisely those words, but his mission in founding the school in 1879 was unabashedly assimilationist. Pratt, like many reformers of his era, believed that the only way to save Indians was to force them to adopt white ways. See generally Rennard Strickland, *Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy*, 3 AM. INDIAN L. REV. 313 (1975) (describing the assimilationist strategies of nineteenth-century reformers). Landis, a historian of the Carlisle School, quotes a letter by Pratt responding to a request for “Indian stories” that was the likely source of the quotation:

The author of the letter evidently has the idea of Indians that Buffalo Bill and other showmen keep alive, by hiring the reservation wild man to dress in his most hideous costume of feathers, paint, moccasins, blanket, leggins, and scalp lock, and to display his savagery, by hair lifting war-whoops make those who pay to see him, think he is a blood-thirsty creature ready to devour people alive. It is this nature in our red brother that is better dead than alive, and when we agree with the oft-repeated sentiment that the only good Indian is a dead one, we mean this characteristic of the Indian. *Carlisle’s mission is to kill THIS Indian, as we build up the better man.* We give the rising Indian something nobler and higher to think about and do, and he comes out a young man with the ambitions and aspirations of his more favored white brother. We do not like to keep alive the stories of his past, hence deal more with his present and his future.

Landis, *supra* (emphasis added).

84. COHEN’S HANDBOOK, *supra* note 24, § 11.01[1], at 830.

85. 25 U.S.C. § 1911(a) (2015) (giving Indian tribes exclusive jurisdiction over custody proceedings involving Indian children who reside on or are domiciled within the tribe’s reservation or who are already wards of the tribal court, regardless of residence or domicile).

86. *Id.* § 1911(b)-(c).

87. See *id.* § 1912(d)-(f).

88. *Id.* § 1915(a)-(b) (addressing placement preferences for adoptive and foster care, respectively).

protection grounds.<sup>89</sup> Further, ICWA classifies children based on their affiliation with a federally recognized tribe, not their racial or ethnic identity. ICWA defines an Indian child as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>90</sup> “Indian” is defined as “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation.”<sup>91</sup> ICWA therefore tracks *Mancari*’s distinction between people who may be “racially” Indian and those who are members of recognized tribes.<sup>92</sup> Children who have Indian ancestry but are not eligible for membership in a federally recognized tribe are not subject to ICWA’s protections.

Further, there is ample social science support for the conclusion that ICWA is indeed serving its congressional purpose, thus easily satisfying rational basis review under *Mancari*.<sup>93</sup> Since ICWA’s passage, there have been several studies concerning its implementation and effectiveness. More comprehensive data would be ideal, but the assessments to date indicate that ICWA, when properly implemented, achieves its goals.<sup>94</sup> Furthermore, some childcare professionals credit ICWA with creating a standard for best practices in all child welfare cases.<sup>95</sup> Specifically, ICWA requires “active efforts” to

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

90. 25 U.S.C. § 1903(4).

91. *Id.* § 1903(3).

92. See *Mancari*, 417 U.S. at 553 n.24.

93. See *id.* at 555.

94. See Gordon E. Limb et al., *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Familial Preservation for American Indian Children*, 28 CHILD ABUSE & NEGLECT 1279, 1280-82 (2004) (concluding that ICWA compliance showed promise for implementation of key family preservation provisions); see also Ann E. MacEachron et al., *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 454-60 (1996) (showing decreases in state adoption rates and state foster care placement rates for American Indian children between 1975 and 1986). Most studies of ICWA, including a 2005 Government Accountability Office report, note that insufficient recordkeeping and data collection hamper assessments of ICWA compliance and outcomes. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 4-5 (2005), <http://www.gao.gov/new.items/d05290.pdf>; MARGARET C. PLANTZ ET AL., CSR, INC. & THREE FEATHERS ASSOCS., INDIAN CHILD WELFARE: A STATUS REPORT 254 (1988), <http://eric.ed.gov/?id=ED302352>.

95. See Limb et al., *supra* note 94, at 1280-81 (“ICWA is important because it not only clarifies jurisdictional authority, but it also mandates that ‘American Indian definitions of family be used as [a] guide for child welfare matters.’ Therefore, American Indians, through passage of ICWA, began setting the stage for an updated orientation toward family preservation in national child welfare matters.” (quoting JOHN G. RED HORSE ET AL., FAMILY PRESERVATION: CONCEPTS IN AMERICAN INDIAN COMMUNITIES 18 (2000), <http://www.nicwa.org/research/01.FamilyPreservation.pdf>)).

prevent the breakup of families, the provision of rehabilitative and remedial services, and placement of children with extended family.<sup>96</sup> ICWA's goal of ensuring that children are placed with their relatives rather than in foster care or institutions is, according to many schools of thought, the best approach for all children, not only American Indian children.<sup>97</sup>

Today, however, ICWA has some powerful opposition. Parties and special interest groups that favor adoption are raising a number of challenges to ICWA and its state counterparts.<sup>98</sup> In July 2015, for example, parties represented by the Goldwater Institute filed a class action lawsuit alleging that ICWA violates the equal protection and due process rights of Indian children in foster care.<sup>99</sup> The named plaintiffs in that case include two very young children who are eligible for tribal membership, a non-Indian "next friend" who purports to represent the interests of the children, and two sets of non-Indian foster parents.<sup>100</sup> The complaint alleges that the named plaintiffs and all other similarly situated children are discriminated against on the basis of race (often equating ancestry with race) due to ICWA's procedural and substantive requirements.<sup>101</sup> The complaint acknowledges that ICWA applies only to children who are eligible for tribal membership but then asserts: "Most Indian tribes have only blood quantum or lineage requirements as prerequisites for membership," and therefore "ICWA's definition of 'Indian child' is based solely on the child's race or ancestry."<sup>102</sup> This case is at an early stage, but it builds on a multiyear campaign of challenging ICWA as a race-based scheme that harms Indian children by making them ineligible for adoption by non-Indians.

In the most high-profile case of this sort to date, *Adoptive Couple v. Baby Girl*, non-Indian adoptive parents argued that the application of ICWA to their

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96. 25 U.S.C. § 1912(d).

97. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at v-x (2002) (documenting the destructive state role in removing children from African American families); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 672-87 (2006) (discussing the benefits of a problem-solving approach to child welfare that incorporates the entire family).

98. See, e.g., *Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016) (challenging the notice and intervention provisions of the Minnesota Indian Family Preservation Act); Nat'l Council for Adoption v. Jewell, 156 F. Supp. 3d 727 (E.D. Va. 2015) (challenging the BIA's 2015 guidelines for implementing ICWA); Verified Complaint for Declaratory and Injunctive Relief at 2, *Doe v. Pruitt*, No. 2015-cv-471-JED-FHM, 2015 WL 7259553 (N.D. Okla. Aug. 19, 2015) (challenging the constitutionality of certain provisions of the Oklahoma Indian Child Welfare Act).

99. Civil Rights Class Action Complaint for Declaratory and Injunctive Relief at 1-3, 21-25, *Carter ex rel. A.D. v. Washburn*, No. 2:15-cv-01259-DKD (D. Ariz. July 6, 2015).

100. *Id.* at 3-4.

101. *Id.* at 7-9, 21-23.

102. *Id.* at 9.

adoption raised serious equal protection concerns.<sup>103</sup> That case, which garnered significant media coverage,<sup>104</sup> involved a girl whose father was an enrolled member of the Cherokee Nation of Oklahoma and whose mother was non-Indian.<sup>105</sup> The record, which was thoroughly reviewed by the Supreme Court of South Carolina in its opinion affirming the application of ICWA, indicated that the birth mother placed the baby for adoption without properly notifying the Cherokee father or ultimately identifying him in the adoption papers.<sup>106</sup> The baby was therefore delivered to the non-Indian adoptive couple shortly after her birth and taken to the couple's home in South Carolina.<sup>107</sup>

Although the adoptive parents filed for adoption in South Carolina when the baby was three days old, the Cherokee biological father was not served with notice until four months later, shortly before he was deployed to Iraq.<sup>108</sup> When the biological father was finally served, he signed the adoption papers before realizing that the baby had been placed with outsiders rather than her biological mother.<sup>109</sup> He also testified that he immediately tried to get the papers back, but the process server "told me that I could not grab that [sic] because . . . I would be going to jail if I was to do any harm to the paper."<sup>110</sup> The biological father promptly consulted a lawyer and filed for a stay of the adoption proceedings the next week.<sup>111</sup> This set in motion a contest for the

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103. See Brief for Petitioners at 43-47, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399); Brief for Guardian ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 53-55, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399).

104. See, e.g., Megan Lindsey, *What About Veronica?: A Look into Adoptive Couple v. Baby Girl*, JURIST (May 6, 2013, 2:15 PM ET), <http://www.jurist.org/sidebar/2013/05/megan-lindsey-adoptive-couple.php>; Bill Mears, *Justices Rule for Adoptive Couple in Native-American Custody Dispute*, CNN (June 26, 2013, 9:46 AM ET), <http://www.cnn.com/2013/06/25/politics/scotus-adoptive-parents>; Josh Voorhees, *The Long, Complicated "Baby Veronica" Saga Comes to an Unsatisfying End*, SLATE (July 17, 2013, 8:54 PM), [http://www.slate.com/blogs/the\\_slatest/2013/07/17/adoptive\\_couple\\_vs\\_baby\\_girl\\_south\\_carolina\\_court\\_sends\\_baby\\_veronica\\_back.html](http://www.slate.com/blogs/the_slatest/2013/07/17/adoptive_couple_vs_baby_girl_south_carolina_court_sends_baby_veronica_back.html).

105. *Adoptive Couple*, 133 S. Ct. at 2558.

106. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553-54 (S.C. 2012) (recounting the actions by the birth mother and the adoptive parents' lawyers that concealed the biological father's status as a tribal member, as well as the biological father's testimony that he would not have told the birth mother that he would relinquish his rights had he known she planned to give the baby up for adoption), *rev'd*, 133 S. Ct. 2552 (2013). For more detailed accounts of the facts of the case, see Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 296-300 (2015); and Krakoff, *supra* note 15, at 299-303.

107. *Adoptive Couple*, 731 S.E.2d at 554.

108. *Id.* at 555.

109. *Id.*

110. *Id.* (alterations in original).

111. *Id.*

baby's custody, which resulted in a South Carolina Supreme Court decision in favor of the biological father.<sup>112</sup> At the age of two, the baby was placed with her biological father and returned to Oklahoma to be raised by her Cherokee family.<sup>113</sup>

The U.S. Supreme Court reversed, precipitating the second highly publicized custody change in the child's short life. The Court ruled solely on statutory grounds, holding that three provisions of ICWA—25 U.S.C. §§ 1912(d), 1912(f), and 1915(a)—did not apply under the circumstances of the case.<sup>114</sup> More relevant to this Article, however, are the Court's few but telling words about identity and equal protection in *Adoptive Couple*. Justice Alito, who wrote the majority opinion, began by stating:

This case is about a little girl (Baby Girl) *who is classified as an Indian* because she is 1.2% (3/256) Cherokee. Because Baby Girl *is classified* in this way, the South Carolina Supreme Court held that certain provisions of [ICWA] required her to be taken, at the age of 27 months, from the only parents she had ever known . . .<sup>115</sup>

Later in the opinion, Justice Alito wrote: "It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."<sup>116</sup> And toward the end of the opinion, Justice Alito gave a nod to the adoptive parents' equal protection argument: "[U]nder the State Supreme Court's reading, [ICWA] would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."<sup>117</sup> This, according to Justice Alito, "would raise equal protection concerns," which were avoided by the Court's narrow interpretation of the statute.<sup>118</sup>

The constitutional concerns are presumably that ancestry results in distinctive treatment in the context of adoption and foster care. Yet the child's ancestral tie to Cherokee people, which the Court apparently found troublingly slim, is what qualified her for membership in the tribe. The Cherokee Nation defines citizenship based on descent from historic

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112. *Id.* at 555-56, 567.

113. *See id.* at 552, 556.

114. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013); *see also* Berger, *supra* note 106, at 297-98, 311-15, 318-19; Jessica Di Palma, Comment, *Adoptive Couple v. Baby Girl: The Supreme Court's Distorted Interpretation of the Indian Child Welfare Act of 1978*, 47 LOY. L.A. L. REV. 523, 534-36 (2014). *But see Adoptive Couple*, 133 S. Ct. at 2572-86 (Sotomayor, J., dissenting) (criticizing the majority opinion's approach to statutory interpretation).

115. *Adoptive Couple*, 133 S. Ct. at 2556 (emphasis added).

116. *Id.* at 2559.

117. *Id.* at 2565.

118. *Id.*

membership rolls.<sup>119</sup> When Justice Alito wrote that Baby Veronica was “classified as an Indian because she is 1.2% (3/256) Cherokee,”<sup>120</sup> he may just as well have written that she was “classified as an Indian because she was eligible for membership in a federally recognized Indian tribe.” All Justice Alito was doing, in essence, was repeating that Baby Veronica met the tribe’s requirements for political membership.

Treating children differently based on their eligibility for tribal membership is, of course, precisely what ICWA requires. As explained above, ICWA’s goals are to preserve American Indian tribes and families and protect Indian children. Meeting these goals necessarily entails defining who qualifies for protection under the Act. The definitions the Act provides, referenced above, track the political classification of Indians and Indian children by making membership, or eligibility for membership, in a federally recognized tribe the triggering criterion.<sup>121</sup> ICWA, in other words, classifies children according to political membership rather than race, and it should be subject only to *Mancari*’s deferential standard of review. Even if the Court decided to revive the effort, abandoned since *Antelope*, to give meaning to the inquiry whether the federal classification actually furthered the “unique relationship” with Indians, ICWA would readily meet that test.<sup>122</sup> ICWA was passed explicitly to protect tribal self-governance and culture against the discriminatory practices of state social service workers and state courts.<sup>123</sup> For the Court to scrutinize ICWA’s application to particular cases or its workings as a whole, it would have to abandon *Mancari*’s deferential approach and adopt a higher standard of judicial review.

*Adoptive Couple* was the first U.S. Supreme Court case to raise constitutional questions about ICWA, but it built on earlier state court challenges. Two California intermediate appellate courts have applied a judge-made exception to ICWA, known as the “existing Indian family doctrine,” on constitutional avoidance grounds.<sup>124</sup> The doctrine empowers state courts to assess whether the Indian parent of an ICWA-eligible child has sufficient cultural or political connections to his or her tribe to warrant ICWA’s protections. It does not derive from any language in the Act itself and, as several commentators and

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119. See *Tribal Citizenship*, CHEROKEE NATION, <http://www.cherokee.org/Services/TribalCitizenship.aspx> (last visited Feb. 2, 2017).

120. *Adoptive Couple*, 133 S. Ct. at 2556 (emphasis added).

121. 25 U.S.C. § 1903(3)-(4) (2015); see also *supra* text accompanying notes 89-92.

122. See *supra* text accompanying notes 89-92.

123. See 25 U.S.C. § 1901(2)-(5); H.R. REP. NO. 95-1386, at 1-2, 9-11 (1978); S. REP. NO. 95-597, at 1-2, 9-13 (1977).

124. See *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 697, 716-23 (Ct. App. 2001); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 515-16 (Ct. App. 1996).

courts have described, it licenses state judges to decide who is sufficiently Indian, directly contradicting the goals and purposes of ICWA.<sup>125</sup>

In *In re Bridget R.*, the first of the California cases, the parents surrendered twin girls for adoption shortly after their birth.<sup>126</sup> The biological father was a member of the Dry Creek Rancheria of Pomo Indians. Under the advice of the lawyer arranging the adoption, the biological father changed his identification from one-quarter Indian to white on the relevant forms. A non-Indian couple from Ohio adopted the twins and took them to their new home state.<sup>127</sup> In the meantime, the birth father, with the support of his family and tribe, sought to rescind his relinquishment of the twins.<sup>128</sup> There was no question that ICWA had not been followed in the case. The court held, however, that applying the Act would be unconstitutional under the circumstances. The court concluded:

It is almost too obvious to require articulation that “the unique values of Indian culture” (25 U.S.C. § 1902) will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture. This being so, it is questionable whether a rational basis, far less a compelling need, exists for applying the requirements of the Act where fully assimilated Indian parents seek to voluntarily relinquish children for adoption.<sup>129</sup>

The second California case, *In re Santos Y.*, involved ICWA’s placement preferences.<sup>130</sup> The child—whose mother was an enrolled member of the Minnesota Chippewa Tribe Grand Portage Band and whose father was of Navajo descent but was not registered with the Navajo Tribe—had been placed in foster care due to neglect when he was a few months old.<sup>131</sup> After parental rights were terminated, the Grand Portage Band identified a relative who was willing to adopt the child. A foster family, who had by then taken care of Santos for two years, also wanted to adopt the child.<sup>132</sup> State reports on both placements concluded that each family was well qualified to provide a suitable home for Santos, and the trial court ordered that Santos be placed with the Grand Portage family in compliance with ICWA’s placement preferences.<sup>133</sup>

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125. See *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009) (rejecting the doctrine and overturning an earlier Kansas case that had adopted it); Lorie M. Graham, “*The Past Never Vanishes*”: A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 34-43 (1998).

126. 49 Cal. Rptr. 2d at 517.

127. *Id.* at 515, 518.

128. *Id.* at 518.

129. *Id.* at 526.

130. 112 Cal. Rptr. 2d 692, 699 (Ct. App. 2001).

131. *Id.* at 697-98.

132. *Id.* at 702-07.

133. *Id.* at 706-12.

The appellate court reversed, stating that ICWA had to be analyzed under “strict scrutiny to determine whether, as applied, it serves a compelling government purpose and, if so, whether its application is actually necessary and effective to the accomplishment of that purpose.”<sup>134</sup> The court did not “disagree . . . that preserving Native American culture is a significant, if not compelling, governmental interest.”<sup>135</sup> It concluded, however, that the statute’s purpose was not met in that case because there was “no Indian family here to preserve.”<sup>136</sup> Similar to *Adoptive Couple*, the concern in *In re Santos Y.* was that individual children were being sorted based on their ancestry and thus implicitly subjected to different treatment based solely on that ancestry.<sup>137</sup> *In re Santos Y.* then makes the leap from ancestry to strict scrutiny for equal protection purposes without grappling with the fact that ancestry is the basis for political membership in a tribe.

To date, only these two intermediate state courts have declined to apply ICWA on equal protection grounds.<sup>138</sup> Courts in two other states, North Dakota and Oklahoma, have explicitly rejected such claims.<sup>139</sup> The Supreme Court of North Dakota observed that “[t]he United States Supreme Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection. The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe.”<sup>140</sup> The Supreme Court of Oklahoma likewise held that there was no equal protection or other constitutional infirmity with ICWA.<sup>141</sup>

In addition, the trend over the past decade has been that more state courts have declined to adopt the existing Indian family doctrine (which reflects the same concerns as the equal protection objections to ICWA without necessarily referring to the constitutional language) than have adopted it. Courts or

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134. *Id.* at 725.

135. *Id.* at 726.

136. *Id.*

137. *Id.* at 726-31; see *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556, 2559, 2565 (2013).

138. Even within California, there is no consensus. See *Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 609-11 (Ct. App. 2006) (rejecting the existing Indian family doctrine and an equal protection challenge to ICWA); *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 126-29 (Ct. App. 1998) (rejecting the existing Indian family doctrine).

139. See *In re A.B.*, 663 N.W.2d 625, 635-36 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004).

140. *In re A.B.*, 663 N.W.2d at 636 (citations omitted).

141. *In re Baby Boy L.*, 103 P.3d at 1107.

legislatures in sixteen states have rejected the existing Indian family doctrine, including in two—Oklahoma and Kansas—that initially adopted it.<sup>142</sup>

The courts that have rejected equal protection challenges and refused to apply the existing Indian family doctrine focus on the clear language and purposes of ICWA.<sup>143</sup> These courts also recognize, as several scholars have documented, that judicially crafted exceptions to ICWA would replicate the very circumstance that the Act aimed to redress: that of non-Indians, and state courts in particular, passing judgment on the validity of Native identity and culture.<sup>144</sup> Further, as Lorie M. Graham has argued, the existing Indian family doctrine tragically reenacts the historical traumas that necessitated ICWA's passage.<sup>145</sup> Many Indian people struggle to overcome the legacies of forced separations from their tribes that were the direct result of policies that devalued Native family structures and cultivated animosity toward Indian culture.<sup>146</sup> When their difficulties plunge them into a world governed by state

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142. The sixteen states where courts or legislatures have rejected (or refused to adopt) the existing Indian family doctrine by case law or statute are Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, and Washington. See *In re Adoption of T.N.F.*, 781 P.2d 973, 977-78 (Alaska 1989); *Michael J. v. Michael J.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 20-22 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 657 N.E.2d 935, 943 (Ill. 1995) (applying ICWA notwithstanding arguments in favor of adopting a version of the existing Indian family doctrine); *In re R.E.K.F.*, 698 N.W.2d 147, 151 (Iowa 2005) (“A state court does not have discretion to determine the applicability of . . . this chapter to a child custody proceeding based upon whether an Indian child is part of an existing Indian family.” (alteration in original) (quoting IOWA CODE § 232B.5(2))); *In re A.J.S.*, 204 P.3d 543, 547-51 (Kan. 2009) (overruling *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982)); *In re Elliott*, 554 N.W.2d 32, 35-37 (Mich. Ct. App. 1996); *In re Welfare of S.N.R.*, 617 N.W.2d 77, 83-84 (Minn. Ct. App. 2000); *In re Adoption of Riffle*, 922 P.2d 510, 513-14 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 931-32 (N.J. 1988); *In re A.B.*, 663 N.W.2d at 635-36; *In re Baby Boy L.*, 103 P.3d at 1107 (overruling *In re Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985)); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *State ex rel. D.A.C.*, 933 P.2d 993, 998-1000 (Utah Ct. App. 1997); see also WASH. REV. CODE § 26.33.040(1)(a)-(b) (2016) (superseding *In re Adoption of Crews*, 825 P.2d 305 (Wash. 1992)). One of New York’s intermediate courts has also rejected the doctrine. *In re Baby Boy C.*, 805 N.Y.S.2d 313, 318-27 (App. Div. 2005). Courts in six states have applied the doctrine: Alabama, Indiana, Louisiana, Missouri, Nevada, and Tennessee. See *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *In re Hampton*, 658 So. 2d 331, 333-37 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986); *In re Parental Rights as to N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at \*16-17 (Tenn. Ct. App. Nov. 19, 1997).

143. See, e.g., *In re Alicia S.*, 76 Cal. Rptr. 2d at 126-29; *In re A.J.S.*, 204 P.3d at 549-51.

144. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 624-36 (2002); Graham, *supra* note 125, at 34-43.

145. Graham, *supra* note 125, at 39-42.

146. See *id.* at 41-42.

social workers, their families are again torn apart and stamped, with cruel irony, as insufficiently Indian.<sup>147</sup>

The courts that apply ICWA despite calls to avoid it are well aware of the tragic circumstances that often prompt attempts to deviate from the Act's jurisdictional and placement priorities.<sup>148</sup> By the time an appellate court reviews a case involving the foster care or adoptive placement of a child, there is inevitably a heart-wrenching story that has been compounded by delay. But as the Supreme Court of Kansas recognized when it overruled its own precedent and rejected the existing Indian family doctrine, ICWA itself has flexibility to address necessary departures from its procedural and placement preferences.<sup>149</sup> Furthermore, some of the hardest cases arise because social service workers, attorneys, and guardians ad litem either are unaware of or intentionally flout ICWA's requirements at the outset. In both *In re Bridget R.* and *Adoptive Couple*, for example, there were attempts to submerge the biological father's tribal member identity in order to facilitate placement with non-Indians.<sup>150</sup> Even when ICWA avoidance is not quite so blatant, mistakes made early in the process—including failure to obtain information about the child's heritage, identify the appropriate tribes, and contact the relevant entity within the tribes—result in violations of the Act that become self-fulfilling prophecies: a child's stability is at stake, which militates against applying ICWA.<sup>151</sup>

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147. *See id.*

148. *See, e.g., In re Alicia S.*, 76 Cal. Rptr. 2d at 88 (“We share the court’s concern for a dependent child’s interests in permanence and stability . . . . But we believe this concern can and should be accommodated by the ICWA without resort to the existing Indian family doctrine’s strained interpretation of the Act.”).

149. *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009) (noting that the Act’s placement preferences include a “good cause” exception); *see* 25 U.S.C. § 1915(a) (2015) (“In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” (emphasis added)).

150. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 517 (Ct. App. 1996); *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 554 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013); *see also* Graham, *supra* note 125, at 37 (noting that in *In re Bridget R.*, “the attorney went so far as to urge the father to remove any reference to his Native American ancestry from the adoption forms”).

151. *See* Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647, 657-58 (1997) (discussing the attorney in *In re Bridget R.*, who told his Native American client to lie about the client’s heritage to make the adoption process easier); Karen Gray Young, Note, *Do We Have It Right This Time?: An Analysis of the Accomplishments and Shortcomings of Washington’s Indian Child Welfare Act*, 11 SEATTLE J. FOR SOC. JUST. 1229, 1252-53 (2013) (discussing statistics documenting noncompliance with ICWA in various states).

While the hard cases land in state appellate courts and therefore often receive media attention, the many ICWA success stories go unnoticed. ICWA frequently results in restoration of the child to her family. In other cases, placements with relatives or tribal foster or adoptive families occur without delay or incident. And in cases where Indian children are not placed according to ICWA preferences because there is “good cause” under the Act to deviate from them, plans are often made to cultivate the children’s connections to their tribes and cultures nonetheless, and the non-Indian foster or adoptive families are often happy to cooperate in such arrangements.<sup>152</sup> For these reasons, ICWA is described in some child welfare circles as a model for best practices concerning how to address issues of foster care and adoptive placement.<sup>153</sup> If the Supreme Court strikes down ICWA on equal protection grounds, all of this will be swept aside in pursuit of formal colorblind equality.

An equal protection challenge to ICWA starts, necessarily, with an individual case in which a disadvantage to an Indian child can be plausibly alleged. But if federal courts accept the invitation to scrutinize the statute, rather than call attention to the ways that ICWA allows for exceptions on its own terms, they will necessarily undermine the good that ICWA does for Indian children, tribes, and families in the name of a colorblind agenda that threatens the legal foundations of justice for all American Indians.<sup>154</sup> As discussed in Part II below, there are strong historical and structural reasons for courts not to make that ill-advised foray.

#### B. Gaming and Commercial Interests

Non-Indians have also raised equal protection challenges to economic regulation that recognizes tribal powers, particularly in the context of

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152. As director of the American Indian Law Clinic at the University of Colorado Law School from 1996 to 1999, I litigated ICWA cases that had each of these outcomes. *See also Amendments to the Indian Child Welfare Act: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. 134 (1996) (statement of W. Ron Allen, President, National Congress of American Indians) (“Our tribes have taken the position that ICWA works well and, despite some highly publicized cases, continues to work well.”); *id.* at 26 (statement of Seth Waxman, Associate Deputy Att’y Gen., United States Department of Justice) (“Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families and tribes. We understand that the vast majority of these cases are adjudicated without significant problems.”).

153. *See, e.g.*, Brief of Casey Family Programs et al. as Amici Curiae in Support of Respondent Birth Father at 2-5, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399).

154. *See* Krakoff, *supra* note 15, at 326-28.

gaming.<sup>155</sup> In *KG Urban Enterprises v. Patrick*, a non-Indian development company argued that a Massachusetts gaming law violated the Equal Protection Clause by giving priority to federally recognized tribes.<sup>156</sup> The First Circuit ultimately denied that claim, but during the course of the litigation, several published decisions adopted the plaintiffs' framing of the equal protection issues.<sup>157</sup> For this reason alone, *KG Urban* warrants some discussion. In addition, *KG Urban*'s attorney, former Solicitor General Paul Clement, also represented the guardian ad litem in *Adoptive Couple*.<sup>158</sup> Clement, along with conservative interest groups, has long shown interest in overturning or narrowing *Mancari*.<sup>159</sup> There is therefore ample reason to think that the arguments raised in *KG Urban* will resurface in other contexts.

Similar to the equal protection challenges to ICWA, the gaming cases take place in a context in which Congress has legislated in support of tribal rights. Congress passed the Indian Gaming Regulatory Act (IGRA)<sup>160</sup> in the wake of a Supreme Court decision that affirmed tribes' inherent right to conduct gaming activity on tribal lands.<sup>161</sup> IGRA provided a federal statutory basis for regulating Indian gaming to ensure that tribes would be the primary beneficiaries of gaming revenue.<sup>162</sup> IGRA also struck a compromise, however, by accommodating states' interests in controlling the level and amount of gaming occurring within their boundaries. To engage in certain high-stakes categories of gaming (defined as "class III gaming"), tribes have to negotiate with the state to achieve gaming compacts.<sup>163</sup> If states prohibit class III gaming

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155. See, e.g., *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 731-36 (9th Cir. 2003) (rejecting an equal protection challenge to state-tribal gaming compacts under the Indian Gaming Regulatory Act); see also *Native Am. Arts, Inc. v. Mangalick Enters.*, 633 F. Supp. 2d 591, 594-95 (N.D. Ill. 2009) (rejecting an equal protection challenge to the Indian Arts and Crafts Act).

156. 693 F.3d 1, 4-6 (1st Cir. 2012) (describing the claims and state statutory scheme).

157. See *id.* at 17-25 (analyzing the equal protection claim); *KG Urban Enters. v. Patrick*, Civil Action No. 11-12070-NMG, 2014 WL 108307, at \*8-12 (D. Mass. Jan. 9, 2014) (ruling against the plaintiffs but accepting their framing of the question concerning whether a preference for tribes is a discriminatory racial preference); *KG Urban Enters. v. Patrick*, 839 F. Supp. 2d 388, 402-05 (D. Mass. 2012) (applying *Mancari* but questioning its approach), *aff'd in part, vacated in part, and remanded*, 693 F.3d 1 (1st Cir. 2012).

158. See *Adoptive Couple*, 133 S. Ct. at 2556.

159. See Gregory Smith & Caroline Mayhew, *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari*, FED. LAW., Apr. 2013, at 47, 48, 55.

160. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (2015)).

161. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-19, 221-22 (1987).

162. See 25 U.S.C. § 2702.

163. *Id.* § 2703(6)-(8) (defining class III gaming); *id.* § 2710(d) (describing the conditions for class III gaming, including the state compact requirement).

altogether, then they do not have to enter into compacts with tribes. But if states do allow class III gaming, they are required to “negotiate . . . in good faith” with tribes that request compacts.<sup>164</sup>

The Massachusetts Gaming Act, subject to constitutional challenge in *KG Urban*, divided the state into three regions for purposes of issuing gaming licenses.<sup>165</sup> The state law limited the total number of high-stakes licenses to three and the number in any given region to one.<sup>166</sup> The law also gave priority to the state’s two federally recognized tribes—the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head—in the event that they completed other legal steps necessary to open class III casinos.<sup>167</sup> *KG Urban* argued that the Massachusetts Gaming Act violated the Equal Protection Clause because it favored tribes to the disadvantage of non-Indians.<sup>168</sup>

The federal district court initially rejected *KG Urban*’s equal protection claim, citing *Mancari*.<sup>169</sup> The court volunteered, however, that if it “were addressing the issue as one of first impression, it 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.”<sup>170</sup> The lowest level of scrutiny would apply to “[f]ederal laws relating to native land, tribal status or Indian culture . . . because such laws fall squarely within the historical and constitutional authority of Congress to regulate core Indian affairs.”<sup>171</sup> “Laws granting gratuitous Indian preferences divorced from those interests . . . would be subject to more searching scrutiny.”<sup>172</sup> The court’s lone concrete example of such a law, not coincidentally, was one “granting tribes a quasi-monopoly on casino gaming.”<sup>173</sup> (Ironically, the court’s own rationale—to subject laws outside of Congress’s constitutional authority to higher scrutiny—would not apply to regulation of gaming, which falls well within any definition of “commerce” and is thus defensible under the Indian Commerce Clause.)<sup>174</sup> Despite these musings, the court denied *KG Urban*’s

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164. *Id.* § 2710(d)(3)(A).

165. *KG Urban Enters. v. Patrick*, 93 F.3d 1, 4 (1st Cir. 2012).

166. *Id.*

167. *Id.* at 6, 11 & nn.7-8.

168. *Id.* at 12.

169. *KG Urban Enters. v. Patrick*, 839 F. Supp. 2d 388, 404-05 (D. Mass. 2012), *aff’d in part, vacated in part, and remanded*, 693 F.3d 1 (1st Cir. 2012).

170. *Id.* at 404.

171. *Id.*

172. *Id.*

173. *Id.*

174. The dominant reading of the Indian Commerce Clause is that it authorizes very broad authority in Indian affairs. *See United States v. Lara*, 541 U.S. 193, 200 (2004); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Recent scholarship has

*footnote continued on next page*

motion for a preliminary injunction because the equal protection claim was unlikely to succeed on the merits given that “*Mancari* remains good law.”<sup>175</sup>

The district court’s willingness to substitute its judgment for that of Congress about what might comprise “core” Indian affairs resonates with the state court decisions in the “existing Indian family doctrine” cases discussed above.<sup>176</sup> There, state courts employed their own assessments of whether families were sufficiently Indian despite clear definitions under ICWA.<sup>177</sup> Also, the *KG Urban* district court and the courts construing ICWA expressed discomfort with the lineal descent or blood quantum aspect of tribal identification and accordingly questioned *Mancari*’s distinction between political and racial definitions of Indians.<sup>178</sup>

On appeal, the First Circuit did not entertain the district court’s invitation to revise its understanding of *Mancari*. But the appellate court nonetheless breathed life into *KG Urban*’s equal protection claim by questioning whether Massachusetts could enact legislation protective of tribal rights.<sup>179</sup> It directed the district court to consider whether the state had violated *KG Urban*’s rights by requiring the corporation to wait an unreasonably long time for a determination of its license application due to the pendency of a claim by the Mashpee Tribe.<sup>180</sup>

On remand, the district court once again rejected *KG Urban*’s equal protection claim. But the court, without explanation, accepted *KG Urban*’s framing of the question, which equated mere mention or acknowledgment of administrative preferences for a federally recognized tribe as possible evidence of “discriminatory intent.”<sup>181</sup> The court ultimately found no evidence of such

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questioned whether the power is as boundless as the Court suggests, but even a cabined understanding of congressional authority in Indian affairs would include legislation addressing tribal powers to conduct economic enterprises. *See Ablavsky, supra* note 24, at 1028-32 (discussing the historical understanding of “commerce” in the context of Indian affairs); *see also* *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2566-67 (2013) (Thomas, J., concurring) (arguing for a narrow understanding of congressional power in Indian affairs but one that nonetheless would include commercial interactions with tribes).

175. *KG Urban*, 839 F. Supp. 2d at 407.

176. *See supra* Part I.A.

177. *See supra* Part I.A.

178. *KG Urban*, 839 F. Supp. 2d at 403-04; *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 726-30 (Ct. App. 2001); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527-28 (Ct. App. 1996).

179. *KG Urban Enters. v. Patrick*, 693 F.3d 1, 19-20 (1st Cir. 2012).

180. *Id.* at 25-28. The Mashpee Tribe, one of the federally recognized tribes in southeast Massachusetts, had begun negotiations for a gaming compact and was awaiting a decision on whether its land would be taken into trust by the federal government. *See id.* at 25-26.

181. *KG Urban Enters. v. Patrick*, Civil Action No. 11-12070-NMG, 2014 WL 108307, at \*8-10 (D. Mass. Jan. 9, 2014).

intent, but it skipped over an important threshold question: Why should a state law that recognizes the rights of federally recognized tribes in the economic context be analyzed through the lens of racial discrimination?

This unexplained move by the district court was likely the result of confusing language in the First Circuit's opinion concerning when states, as opposed to the federal government, can enact legislation affecting tribes.<sup>182</sup> As a general matter, states lack the federal government's broad authority to legislate concerning tribes or to regulate tribes or their members in Indian country.<sup>183</sup> However, state laws or classifications affecting tribes uniquely will be upheld against equal protection challenges so long as they implement, reflect, or effectuate federal laws or policies.<sup>184</sup> States, in other words, cannot create their own Indian policies, nor can they enact legislation that discriminates against tribes or their members, but they may pass laws that further federal Indian law policies and goals.<sup>185</sup> The First Circuit's approach to this area of law—a subject at the crossroads of state limitations to regulate tribes and tribes' rights to be free from discrimination—gave undue support for the idea that state accommodation of tribal rights is the same as a state preference based on race.<sup>186</sup>

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182. See *KG Urban*, 693 F.3d at 18-20 (stating correctly that states lack the authority to set Indian policy but then mistakenly concluding that states therefore engage in race-based discrimination simply by acknowledging tribes as governments and accommodating that unique status).

183. This principle has been in place since Chief Justice Marshall wrote the opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The general topic of limitations on state regulation in Indian country comprises a significant portion of federal Indian law, and a full treatment is beyond the scope of this Article. See COHEN'S HANDBOOK, *supra* note 24, § 6.03[1][a], at 511-13 (describing the general rule that states lack authority in Indian country); *id.* § 6.03[1][b], at 514-17 (providing exceptions to that general rule).

184. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979) (holding that a state law passed in furtherance of a federal statute authorizing state criminal jurisdiction in Indian country does not violate tribal members' rights to equal protection); see also *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214-15, 1218-20 (5th Cir. 1991); *St. Paul Intertribal Hous. Bd. v. Reynolds*, 564 F. Supp. 1408, 1411-13 (D. Minn. 1983); *N.Y. Ass'n of Convenience Stores v. Urbach*, 699 N.E.2d 904, 908 (N.Y. 1998) (“[W]hile ‘States do not enjoy th[e] same unique relationship,’ they may adopt laws and policies to reflect or effectuate Federal laws designed ‘to readjust the allocation of jurisdiction over Indians’ without opening themselves to the charge that they have engaged in race-based discrimination.” (second alteration in original) (quoting *Yakima Indian Nation*, 439 U.S. at 501)).

185. See *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 733-35 (9th Cir. 2003) (upholding against an equal protection challenge a state law granting a monopoly on casino-style gaming to tribes); see also COHEN'S HANDBOOK, *supra* note 24, § 6.04[1]-[2], at 530-36 (summarizing the federal power to authorize state jurisdiction and its limitations).

186. See *KG Urban*, 693 F.3d at 19-20.

The Massachusetts Gaming Act aimed to create and regulate a class III gaming economy that, pursuant to IGRA, had to accommodate the federally recognized tribes located in the state.<sup>187</sup> The Act contemplated just one class III enterprise per region and anticipated that the state's tribes, located only in southeast Massachusetts, might obtain that region's single license.<sup>188</sup> The state's interest, presumably, was in capping the total number of high-stakes gaming enterprises while simultaneously accommodating its obligations under federal law to allow tribal gaming under IGRA's terms.<sup>189</sup> Even if the state mentioned tribes specifically in its rationale for the permitting process under the Act, doing so should not have triggered heightened scrutiny under the Equal Protection Clause.<sup>190</sup> The state was merely anticipating that federally recognized tribes would exercise their rights under federal law to enter into gaming compacts.

The First Circuit's and the district court's confusion over this in *KG Urban*, however, reflects the success that non-Indian enterprises (and their powerful advocates) have had in creating a narrative of colorblind injustice in this context. Taking a step back from the intricacies of the claims and the courts' analyses, it should strike most of us as odd that *KG Urban*, a successful development corporation hoping to edge in to casino gaming, could use the legacy of *Brown v. Board of Education*<sup>191</sup> to leverage its position. Yet that is where the Court's colorblind approach may be leading. The *KG Urban* decisions, while ultimately rejecting the equal protection challenges to the Massachusetts Gaming Act, conflated federally recognized tribes with racial groups and tiptoed toward the kinds of interference with state economic legislation that have been generally disapproved since the *Lochner* era.<sup>192</sup> This approach would be very troubling for tribes, but it should also raise concerns for anyone with qualms about excessive judicial review on behalf of politically powerful constituencies.

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187. *See id.* at 4-5.

188. *See id.* at 4-7.

189. *See id.*

190. *See Artichoke Joe's*, 353 F.3d at 733-35.

191. 347 U.S. 483 (1954).

192. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1259-62 (1986) (discussing post-*Lochner* decisions in which the Supreme Court upheld regulations of economic activity); *see also* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude . . .").

C. Equal Protection, Colorblind Constitutionalism, and American Indian Law

Classifications are everywhere in the law, which is why courts sweep away most equal protection challenges by consigning them to rational basis review.<sup>193</sup> The equal protection claims that warrant higher levels of judicial scrutiny are those that include allegations of discrimination on the basis of race, ethnicity, or gender, as well as those that allege discriminatory allocation of other fundamental rights.<sup>194</sup> In the era of constitutional colorblindness and opposition to affirmative action, courts have extended their heightened scrutiny to classifications that aim to increase minority representation in work and educational settings.<sup>195</sup> As Reva Siegel has described, the equal protection framework has shifted from considering whether a classification subordinates a minority group unable to overcome majoritarian politics to whether the classification includes race, gender, or ethnicity, in which case heightened scrutiny is automatic.<sup>196</sup> This has opened the door to searching judicial scrutiny of any and all programs using race or ethnicity, even those designed to overcome discrimination against disadvantaged groups.<sup>197</sup>

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193. See *Cleburne*, 473 U.S. at 440 (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

194. See *id.* (stating that classifications based on race, alienage, national origin, “personal rights protected by the Constitution,” and gender are subject to higher levels of scrutiny).

195. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016) (stating that heightened scrutiny applies to state higher education affirmative action plans that consider race); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (holding that affirmative action plans for federal contracts must meet strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989) (plurality opinion) (applying strict scrutiny to a city affirmative action plan).

196. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1476-78 (2004) (describing how equal protection law evolved from expressing antisubordination to anticlassification norms in the five decades after *Brown*). More recently, Siegel has argued that a third approach has emerged, which she labels “antibalkanization.” Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282, 1300-03 (2011) (arguing that the Supreme Court’s “race moderates” embrace a view of equal protection that recognizes historical racial injustice but aims for solutions that promote social cohesion).

197. See *Fisher*, 136 S. Ct. at 2207, 2214 (upholding the university’s affirmative action program on the grounds that the holistic admissions process used race only as one subfactor among many and was narrowly tailored to meet the state’s substantial objective of providing diverse educational experiences); see also Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 231-35 (2010) (analyzing affirmative action cases).

There are some signs that the Court's approach to equal protection doctrine is shifting subtly, reviving a more nuanced and contextualized understanding of barriers to equality. First, the Court struck down bans on same-sex marriage, in part based on equal protection concerns.<sup>198</sup> Second, the Court's recent decision in *Fisher v. University of Texas at Austin*, while preserving strict scrutiny of affirmative action programs, nonetheless upheld the university's admissions policies, which used race as "a 'factor of a factor of a factor' in the holistic-review" of applicants' files.<sup>199</sup> It is possible that these cases reflect a rejection of the highly formalist approach that colorblind constitutionalism entails in favor of at least some recognition of the importance of context for rooting out inequality.

If so, the Court can continue to do the least harm in the American Indian law and equal protection contexts simply by following, rather than overturning, precedent or legislative enactments. In the Native nation context, the Court need only exercise restraint. If laws or policies further the federal government's unique obligations to Indian tribes, then the Court should hew to *Mancari* and stay its hand.<sup>200</sup>

Laws that perpetuate tribal survival (like ICWA) and safeguard tribal economic powers (like IGRA and complementary state laws) fall squarely within the government's unique relationship with tribes. Yet these laws, which assist tribal efforts to emerge from their racialized and subordinated status, are

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198. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606-08 (2015). *Obergefell* built on previous cases that recognized associational, privacy, and due process rights for gays and lesbians, but the rhetorical structure of *Obergefell* is in many ways analogous to Justice Brennan's equal protection approach in *Plyler v. Doe*, which struck down laws that banned the children of undocumented immigrants from attending public schools. 457 U.S. 202, 222-26 (1982). Like *Plyler*, *Obergefell* asks whether a combination of values and factors calls for judicial intervention in a scheme that treats some people differently from others. The *Obergefell* opinion might be a sign that the Court remains committed to interrogating how laws instigate and perpetuate status-based inequality rather than simply identifying certain formal categories of distinction. It is more likely, however, that *Obergefell* is singular, reflecting Justice Kennedy's particular concern for discrimination against gays and lesbians, as well as his interest in promoting individual dignity. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 165 (2016) (describing *Obergefell* and related precedents as announcing that "sexual orientation enjoys a tier of its own"); see also Bharat Malkhani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 HASTINGS CONST. L.Q. 145, 192 (2017) (describing Justice Kennedy's conceptions of dignity).

199. *Fisher*, 136 S. Ct. at 2207 (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

200. Note that this leaves open the possibility that if a federal classification concerning tribes or tribal members does *not* further the unique relationship between tribes and the federal government, then it should be subject to some form of heightened scrutiny. As discussed above, this avenue, though seemingly closed off by *Antelope* and its progeny, could be revived consistently with *Mancari*. See *supra* notes 69-72 and accompanying text.

the target of today's equal protection challenges.<sup>201</sup> If courts do not adhere to the *Mancari* approach, equal protection as anticlassification will become a tool to resurrect the very forms of racial discrimination that subjugated Native peoples and brought them nearly to the brink of elimination.<sup>202</sup> One such form of discrimination is the assignment of inferior characteristics, such as "savageness," to tribes collectively to justify taking their land and destroying their familial and tribal structures.<sup>203</sup> Another is the imposition of biological (as opposed to territorial or affiliation-based) membership requirements and forced-assimilation policies designed to make Indians eventually disappear.<sup>204</sup> The pernicious stereotypes that accompanied these policies—what Renee Ann Cramer has described as the "common sense" of anti-Indian racism<sup>205</sup>—lurk not far beneath the surface of the ICWA and gaming cases described above. In the ICWA context, tribes and tribal members are deemed unfit to judge what is best for their individual children, and tribal affiliation is described disparagingly as nothing more than a remote blood tie rather than as a political and cultural connection to a Native nation.<sup>206</sup> In the gaming and economic contexts, tribes—described as "quasi-racial" collections of individuals rather than as governments—are viewed as standing in the way of non-Indian economic progress.<sup>207</sup> These are the same tropes that drove America's worst

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201. It is worth noting that the Court's approach in *Obergefell* and *Plyler* led it to strike down state and local laws. The added justificatory burden in those cases—to explain why federal judges should overturn state and local democratic decisions—is absent for courts applying *Mancari*. The *Mancari* approach defers to, rather than undermines, Congress. Deference to the political branches is thus another reason for the Court to maintain its current rational basis review of laws that further Congress's unique relationship with tribes.

202. See Krakoff, *supra* note 14, at 1070, 1122-31.

203. See Berger, *supra* note 43, at 593; see also Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 317-19 (2006) (summarizing scholarship that explores and catalogues the racist stereotypes that drove colonial and postcolonial policies of Indian dispossession and that continue to pervade contemporary culture and views).

204. See EVA MARIE GARROUTTE, REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA 21-37 (2003); Krakoff, *supra* note 14, at 1067-70.

205. See Cramer, *supra* note 203, at 316-17. Cramer builds on Ian Haney López's vocabulary of a "common sense" of racism, by which he means the ways that racist constructs have infiltrated American views of the world and therefore become naturalized. See *id.* (citing IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 119 (2003)).

206. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013) ("[U]nder the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian.").

207. See *KG Urban Enters. v. Patrick*, 839 F. Supp. 2d 388, 404 (D. Mass. 2012), *aff'd in part, vacated in part, and remanded*, 693 F.3d 1 (1st Cir. 2012); see also Cramer, *supra* note 203, at 325-26. Cramer makes the additional observation that lurking beneath this misunderstanding of tribes as collections of individuals connected solely "by blood" is the

*footnote continued on next page*

and most racialized treatment of tribes, and they should not be resurrected in the name of a supposedly race-neutral equal protection agenda. Moreover, as discussed in Part II below, the trigger for this ill-advised foray into second-guessing laws that benefit tribes—tribes’ supposed “racial” status—is in fact the basis for tribes’ distinct constitutional standing. Ancestry and lineage tie tribes to their precontact existence and justify their unique place in our constitutional order.

## II. Tribes and the Constitutional Minimum

The parties bringing equal protection challenges against federal programs and legislation benefitting American Indians do not accept the *Mancari* approach of deferring to classifications that further the government-to-government relationship with Native nations. To the contrary, they question the very basis for tribes’ distinct treatment under the Constitution by conflating lineal descent from an ancestral group with the invidious sociopolitical category of “race.” In *Adoptive Couple*, for example, the non-Indian parties urged the Court to view the child whose custody was in dispute as someone with a fractional racial identity rather than as a potential citizen of the Cherokee Nation of Oklahoma.<sup>208</sup> And in *KG Urban*, the non-Indian development company argued that tribal governments should be viewed no differently from collections of racially connected people because they have membership criteria that rely on ancestry.<sup>209</sup> These challenges equate tribal status and membership with race and use that as the basis for urging courts to overthrow statutory protections for tribes and their members.

Yet *Mancari* makes an unassailable descriptive point about tribes: they *are* governments, and membership in a tribe is therefore a political status.<sup>210</sup> Native nations are political entities, and each of these nations therefore has

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ironically complementary suspicion that they are not really Indian at all. In analyzing the backlash to tribal recognition that resulted from the economic success of the Mashantucket Pequot’s gaming enterprise, Cramer observed:

Mashantucket Pequot’s “inauthentic” Indian identity becomes its own disabling certitude; alluding to the Mashantucket Pequot tribe becomes shorthand for “undeserving” and “inauthentic” Indians. Anti-Mashantucket Pequot rhetoric becomes anti-Indian rhetoric; in the new common sense racism fueled by casino success, the Pequots are a trope for everything a “real” Indian is not.

*Id.* at 325.

208. *See supra* Part I.A.

209. *See supra* Part I.B.

210. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

powers that nonstate entities lack.<sup>211</sup> *Mancari's* approach appropriately accounts for this legal-political landscape, noting that empowering courts to strike down laws affecting tribes could put myriad statutes and regulations in jeopardy.<sup>212</sup>

This legal-political landscape nonetheless raises an important question at the heart of the equal protection challenges: What distinguishes “tribes” from other groups that have no constitutional basis for this distinctive political recognition? Since the Founding, the United States has recognized the indigenous peoples of North America as entities with powers of self-governance and property rights.<sup>213</sup> While the precise source and scope of the federal government’s power in Indian affairs has been the subject of significant debate,<sup>214</sup> the very fact of a government-to-government relationship is beyond question.<sup>215</sup> It is also clear that what justifies this relationship is that American

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211. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826 (May 4, 2016); COHEN’S HANDBOOK, *supra* note 24, § 4.01[1][a], at 207.

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

213. See Fletcher, *supra* note 7, at 164-70. See generally ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997) (documenting the bilateral nature of treaty negotiations between the United States and Indian tribes).

214. The textual sources are the Treaty and Commerce Clauses. See U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2. Some scholars have argued that international law also provides justification for, as well as inherent limitations on, federal power in Indian affairs. See Frickey, *supra* note 24, at 55-56, 64, 74-75 (arguing that, to the extent that federal power over Indian affairs is extraconstitutional, international law is its source and also implies limitations on its scope). Others contend that congressional power is limited based on varying interpretive theories. See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115-18 (2002) (“[T]here is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty.”); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984) (contending that the historical basis for a broad understanding of congressional power in Indian affairs is “no longer applicable”); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 265 (arguing that federal power should be rejected wholesale as irremediably genocidal). Gregory Ablavsky has documented that early Americans did not look to specific constitutional clauses for the source of authority in Indian affairs. Rather, “most of those who drafted and interpreted the Constitution wrote of authority over Indian affairs as an interrelated, coherent bundle of powers.” Ablavsky, *supra* note 24, at 1040.

215. Even scholars who are skeptical of tribes’ inherent powers or the exclusivity of federal authority in Indian affairs acknowledge some form of political status for tribes and some degree of federal authority in Indian affairs. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 259 (2007); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1072 (2004).

Indians were on the continent first.<sup>216</sup> As William Quinn has described, this fact was so obvious to the Founders that formal definitions for the term “tribe” were lacking in the early years of the republic.<sup>217</sup> Nonetheless, “[t]he inescapable conclusion . . . is that all the colonial powers recognized at least those tribes with which they treated as separate, autonomous political entities . . . . The new Republic was legatee of a heritage that recognized, albeit sometimes grudgingly, the sovereignty of Indian tribes *native to the continent.*”<sup>218</sup> Tribes—as political sovereigns recognized by the federal government and denominated as such—therefore have ties to precontact peoples and indeed must have such ties to be acknowledged as governments outside of the state-based federalism framework.<sup>219</sup> Without those connections, a group of people getting together to form a government within the United States would be an entirely different matter. In the more benign version, it could be an attempt to form a new state; otherwise, it is something closer to secession.<sup>220</sup> Indigenous peoples’ claims to self-government are exceptional in this sense, but in the U.S. context, they are an exception enshrined in the Constitution.<sup>221</sup>

To be a tribe, and therefore subject to *Mancari’s* approach to equal protection analysis, requires connection to an ancestral group.<sup>222</sup> This aspect of federally recognized Indian tribes is reflected in the history and structure of the Constitution, the common law definitions of “tribe” that evolved after the Founding, federal regulations governing tribal recognition today, and definitions of indigenous peoples under international law. Each of these sources is discussed in turn below.

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216. See Quinn, *supra* note 26, at 333-38.

217. *Id.* at 336 (“[I]t was usually more clear . . . to the person of 1789, or even 1889, exactly who was an Indian and what Indian community was a tribe, than it is to the person of 1989. Thus the question of recognition was more of a non-issue for the first century of the United States than for the second century.”).

218. *Id.* at 336-37 (emphasis added).

219. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832) (affirming tribes’ status as governments with retained inherent powers to regulate their members and territory); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (denominating tribes “domestic dependent nations” based on their status as unique sovereign entities within the U.S. legal framework).

220. See *supra* note 22 and accompanying text.

221. A full discussion of the nature of tribal sovereignty under American constitutional law is beyond the scope of my argument. For exemplary scholarship on this topic, see CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 54-63 (1987). See also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 8-13 (1999).

222. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2584-85 (2013) (Sotomayor, J., dissenting).

A. Constitutional Text and Context

Tribes' political status is woven into the text and structure of our Constitution, and yet that document provides no guidance regarding how to define "tribe." In terms of constitutional text, the Indian Commerce Clause recognizes tribes as distinct entities.<sup>223</sup> The other textual source for the federal government's relationship with tribes is the Treaty Clause,<sup>224</sup> which indisputably includes the power to enter into treaties with tribes even though it does not mention them specifically.<sup>225</sup> The Constitution includes these powers because addressing the presence and territorial claims of indigenous peoples was central to the country's formation.<sup>226</sup> As many scholars and jurists have noted, all of federal Indian law, and by extension much of American law itself, is grounded in this initial point of origin: indigenous peoples occupied the continent, and their presence and claims had to be addressed.<sup>227</sup> But what was the definition of indigenous peoples—labeled American "Indian tribes" in the Constitution—for the purpose of this unique treatment and recognition?

Textual guidance is lacking, but the historical context points to some clear answers. The origins of the federal relationship with tribes lie in early encounters by indigenous peoples with Spain, England, and other colonizing nations.<sup>228</sup> When Spanish explorers first arrived on the islands and shores of North America, they encountered populated and settled places. They drew their justifications for occupying and eventually assuming control over lands occupied by others from early international law doctrines.<sup>229</sup> Those doctrines were often blatantly self-serving, and if they were not, they were abandoned as

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223. U.S. CONST. art. I, § 8, cl. 3.

224. *Id.* art. II, § 2, cl. 2.

225. See Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1041-42 (2014) (recounting the history of the Founding and the significance of concerns about consolidating federal power over Indian affairs to the drafting of the Treaty and Supremacy Clauses). Ablavsky argues persuasively that the consolidation of federal power was justified in large part by concerns about Indian tribes and the threats they posed. See *id.* at 1062-64.

226. See WILLIAMS, *supra* note 213, at 20-21; Ablavsky, *supra* note 225, at 1002.

227. See Ablavsky, *supra* note 225, at 1002; see also William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 2 (1987).

228. See COHEN'S HANDBOOK, *supra* note 24, § 1.02[1], at 8-17; Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43-47 (1947) [hereinafter Cohen, *Original Indian Title*]; Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 20 (1942) [hereinafter Cohen, *Spanish Origin*].

229. See Cohen, *Spanish Origin*, *supra* note 228, at 17; see also Ablavsky, *supra* note 24, at 1059-61 ("There was widespread agreement . . . that the law of nations should govern relations between the United States and Natives. It was less clear what the content of that law would be."); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 181-83 (2014) (describing early international law approaches to contact with indigenous peoples).

often as they were followed.<sup>230</sup> But the felt necessity to articulate any legal principles at all reflected the stark reality that the Spanish—and later the British, French, and eventually Americans—did not confront a so-called *terra nullius*, or “blank land.”<sup>231</sup> Nor did they find stray individuals roaming the continent. Rather, as William Canby describes, “the British Crown and several of its colonies dealt with the Indian tribes as wholly independent foreign nations.”<sup>232</sup> The precontact presence of tribes, in other words, created the basis for early international law governing the efforts to colonize and then settle North America.<sup>233</sup>

In the postrevolutionary period, the presence and claims of Native peoples animated many of the discussions about the extent and scope of federal power. Gregory Ablavsky has argued that concerns about Native nations and the threat they posed to the young United States propelled arguments supporting a stronger federal government and were thus foundational to the Constitution’s structure and adoption.<sup>234</sup> Federal assertions of the right to obtain Indian property likewise accounted for indigenous peoples’ prior presence on the land.<sup>235</sup> The so-called discovery doctrine, deployed first by European nations and adopted by Chief Justice Marshall in *Johnson v. M’Intosh*,<sup>236</sup> was a rationale for acquiring territory from *peoples* who were *here first*, not merely from individuals with competing claims to territory.<sup>237</sup> Similarly, early federal

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230. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 96-108 (1990).

231. See *id.* Despite knowing that the lands were populated by indigenous peoples, some colonizing countries adopted the doctrine of *terra nullius* to justify claiming ownership of indigenous territory and resources. See MATTIAS ÅHRÉN, *INDIGENOUS PEOPLES’ STATUS IN THE INTERNATIONAL LEGAL SYSTEM* 16-18 (2016).

232. Canby, *supra* note 227, at 2.

233. See Ablavsky, *supra* note 24, at 1059-61; Carpenter & Riley, *supra* note 229, at 181-83.

234. See Ablavsky, *supra* note 225, at 1002; see also John R. Wunder, “*Merciless Indian Savages*” and the Declaration of Independence: Native Americans Translate the Ecunnaunuxulgee Document, 25 AM. INDIAN L. REV. 65, 65-66 (2000-2001) (noting that the grievances against the Crown in the Declaration of Independence included the Crown’s failure to mitigate the threat posed by “merciless Indian savages” to the frontier colonies (quoting THE DECLARATION OF INDEPENDENCE para. 24 (U.S. 1776))).

235. See Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (describing early treaty-making policies, which had the purpose of obtaining land cessions from tribes); see also Cohen, *Original Indian Title*, *supra* note 228, at 43-47.

236. See 21 U.S. (8 Wheat.) 543, 573-88 (1823) (discussing the origins of the doctrine, its use by European nations to justify their claims to property occupied by indigenous peoples, and the United States’ adoption of it).

237. See *id.*; Ablavsky, *supra* note 24, at 1071-72 (noting that use of the term “doctrine of discovery” obscures the reality that “[i]n both international law and American practice respecting Native lands, purchase and possession played a far greater role than discovery and conquest”); Cohen, *Original Indian Title*, *supra* note 228, at 44-45; see also ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF*  
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statutes prohibiting the sale of Indian land to individuals or states (known as the Trade and Intercourse Acts) acknowledged the distinct nature of Indian collective rights to property.<sup>238</sup> The Trade and Intercourse Acts consolidated the power to obtain property from tribes in the federal government in order to ensure that those transactions would occur between peoples.<sup>239</sup> In short, laws centralizing power over Indian tribes in the federal government and justifying the taking of Indian property assumed and depended on tribes' precontact existence.

As noted above, despite the centrality of indigenous peoples' legal status to the formation of the United States, culminating in the distinct treatment of Indian tribes in the Constitution, there was virtually no Founding-era discussion about how to define those tribes.<sup>240</sup> William Hagan describes this gap in an article addressing the related problem how to define individual American Indian identity.<sup>241</sup> Hagan quotes an 1892 annual report by the Commissioner of Indian Affairs, Thomas Jefferson Morgan, who was addressing the question "What is an Indian?":

"One would have supposed," observed Morgan, "that this question would have been considered a hundred years ago and had been adjudicated long before this." "Singularly enough, however, . . . it has remained in abeyance, and the Government has gone on legislating and administering law without carefully discriminating as to those over whom it has a right to exercise such control."<sup>242</sup>

As Hagan and Commissioner Morgan observed, not only did the "founding fathers provide[] little guidance," but the federal agencies first charged with addressing Indian affairs—the War Department and then the Interior

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DISCOVERY IN THE ENGLISH COLONIES 2-3 (2010) (critiquing the doctrine as it was articulated and exercised in all of the commonwealth countries).

238. These Acts are now codified at 25 U.S.C. § 177 (2015) and remain in effect with minor revisions. The first Trade and Intercourse Act was passed in 1790, Pub. L. No. 1-33, 1 Stat. 137 (1790), but even it had origins in earlier enactments. One such enactment was the Northwest Ordinance of July 1787, which stated that Indians' land and property

shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 340-41 (Roscoe R. Hill ed., 1936). These statutes were passed both to protect Native peoples' interests and to shore up the federal government's power to regulate relations with tribes and the settlement of the frontier. See COHEN'S HANDBOOK, *supra* note 24, § 1.03[2], at 34-36.

239. See COHEN'S HANDBOOK, *supra* note 24, § 1.03[2], at 35.

240. See Hagan, *supra* note 26, at 309-10; Quinn, *supra* note 26, at 352-53.

241. See Hagan, *supra* note 26, at 309.

242. *Id.* (quoting T.J. Morgan, *Report of the Commissioner of Indian Affairs*, in SIXTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 5, 31 (1892)).

Department—did very little to “fill the gap” in the first decades of the new republic.<sup>243</sup>

The absence of such definitions in the early years likely reflected nothing more than the stunning obviousness of the situation: Indian tribes were peoples already on the continent, whose claims to self-governance and property were therefore, literally, facts on the ground. As Native nations became folded into the domestic legal order, the impetus to define tribes grew. Case law, statutes, and eventually administrative criteria filled this gap but also reflected the changing priorities of the federal government concerning Indian policy. Those post-Founding-era definitions are discussed below, as are emerging definitions in international law.

B. Definitions of Indigenous Peoples in Federal Common Law, Federal Regulations, and Contemporary International Law

As described above, early international law, widely recognized as the source for American Indian law,<sup>244</sup> spoke to the rules for interaction with Native peoples. Like the Constitution, however, early international law did not take on the task of defining tribes or indigenous peoples.<sup>245</sup> As U.S. law for engaging with Native nations evolved from a species of international law to a body of domestic law, common law definitions emerged that served the U.S. purposes of categorization, bureaucratization, control, and elimination.<sup>246</sup> These definitions included the racialization of Native peoples and accompanying derogatory characterizations.<sup>247</sup> To be legally “Indian” depended, first and foremost, on the stakes for non-Indians in any particular case.<sup>248</sup>

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243. *Id.* at 310.

244. See Carpenter & Riley, *supra* note 229, at 182 (“[M]any of the foundational interactions between indigenous peoples and Europeans occurred pursuant to international law . . .”); Frickey, *supra* note 24, at 36-37 (summarizing the international law origins of federal Indian law).

245. Robert Williams has thoroughly documented that international law’s assumptions—including that indigenous peoples were uncivilized and “savage”—were self-servingly negative in order to justify the unilateral assertion of European, and then American, power. See WILLIAMS, *supra* note 230, at 7; WILLIAMS, *supra* note 32, at 223-36. But perhaps because of these assumptions, and the accompanying presumption and hope that indigenous peoples would not survive, early international law made no effort to identify and define “indigenous peoples” as such.

246. See Krakoff, *supra* note 14, at 1060-77 (summarizing the history of federal definitions of tribes); see also Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 LAW & SOC. INQUIRY 359, 362 (1997) (book review) (describing how colonial laws and policies shaped the legal construct of Indian tribes to serve the ends of the colonizing regime).

247. See Krakoff, *supra* note 14, at 1060-77.

248. See *id.*

In recent years, however, definitions have emerged that retain the common law elements of precolonial presence, attachment to land, and longstanding cultural and political institutions but that finally shed the discriminatory and racialized descriptions. Crucially, a continuous thread—even throughout the period when tribes were defined in part by their supposed inferiority—is tribes’ ties to peoples here before the settlers arrived. The more recent definitions can be found in U.S. federal regulations governing tribal recognition and in contemporary international law on the rights of indigenous peoples.

1. Federal common law definitions

Early case law on questions of congressional power in Indian affairs included occasional discussion of how to define the objects of that power—the Indian tribes themselves. In *United States v. Sandoval*, the Court addressed whether Congress had the authority to define the New Mexico Pueblos as tribes under a federal statute banning the introduction of liquor into tribal territory.<sup>249</sup> The Court held, as a general matter, that Congress has wide leeway to enter into relationships with tribes and pass legislation in furtherance of that relationship.<sup>250</sup> Yet Congress, notwithstanding its broad authority, cannot “bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe.”<sup>251</sup> Much of the *Sandoval* opinion describes the Pueblos in the most demeaning terms, justifying federal power on the basis of the Pueblos’ inferiority and dependency.<sup>252</sup> But *Sandoval* also includes the following factors inclining in favor of treating a group as a tribe: treatment by the government as a distinct community, a history of separate existence, and “Indian lineage.”<sup>253</sup> *Sandoval* thus articulates an early form of rationality review in the context of tribal definition: Congress rationally exercises its broad power to recognize tribes so long as they meet the *Sandoval* criteria.<sup>254</sup>

Similarly, *United States v. Montoya*, decided twelve years earlier, defined a tribe as “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

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249. 231 U.S. 28, 38 (1913).

250. *See id.* at 45-46.

251. *Id.* at 46.

252. *See id.* at 39 (describing the Pueblos as “living in separate and isolated communities, adhering to primitive modes of life,” and “essentially a simple, uninformed and inferior people”).

253. *Id.* at 47.

254. *See id.*

sometimes ill-defined territory.”<sup>255</sup> Shorn of their discriminatory language, these cases affirm that Congress’s power to recognize tribes and pass legislation concerning them hinges on tribes’ status as distinct political communities with ties to precontact aboriginal peoples, whether those ties are described as “lineage” (in *Sandoval*) or “race” (in *Montoya*).<sup>256</sup> In the absence of such ties, Congress exceeds even its broad authority in Indian affairs to recognize a people as a “tribe.”<sup>257</sup>

Cases in the modern era likewise include this element of connection to a distinct community with presettler ties to the land.<sup>258</sup> In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the Passamaquoddy Tribe sued the United States to request representation in the Tribe’s Nonintercourse Act claims against Maine and Massachusetts for the unlawful taking of the Tribe’s property.<sup>259</sup> The Department of the Interior refused the Tribe’s request, arguing that the Tribe lacked a government-to-government relationship with the United States and therefore was not a “tribe” under the Nonintercourse Act.<sup>260</sup> The First Circuit quoted *Montoya*’s definition of a tribe, including its requirements of “a body of Indians of the same or similar race,” and held that the Passamaquoddy’s long history of treatment as a tribe by Maine, the federal government’s early acknowledgment that the Tribe was entitled to federal protection, and the Tribe’s clear political organization “plainly fit[.]” *Montoya*’s definition.<sup>261</sup>

The judicial definition of “tribe,” as it has emerged in the modern era, therefore includes the key elements of ties to ancestral territory, a distinct community, and, in the words of the Court in *Sandoval* and *Montoya*, Indian “lineage” or “race.” *Cohen’s Handbook* distills these criteria as “the broad requirements that: (a) the group have some ancestors who lived in what is now

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255. 180 U.S. 261, 266 (1901).

256. Extracting this nondiscriminatory thread from the law of tribal recognition neither justifies nor erases the history of defining tribes as inferior for the purposes of eliminating them. For more on the ineradicability of the racialization of tribes, see Krakoff, *supra* note 15, at 312-13, which describes how racialization of the Seminole served goals of settling Florida and preventing the settlement of American Indians in the newly acquired territory; and Krakoff, *supra* note 14, at 1065-75, which describes how inferiority was stitched into the early cases defining tribes.

257. See *Sandoval*, 231 U.S. at 46.

258. See COHEN’S HANDBOOK, *supra* note 24, § 3.02[4], at 138-39.

259. 528 F.2d 370, 372 (1st Cir. 1975).

260. *Id.* at 372-73.

261. *Id.* at 377 n.8. For further analysis of *Passamaquoddy* and other contemporary cases, see Krakoff, *supra* note 14, at 1078-81.

the United States before discovery by Europeans, and (b) the group be a ‘people distinct from others.’”<sup>262</sup>

## 2. Administrative definitions: federal acknowledgment criteria

Today, groups in the United States with indigenous identity can seek federal recognition as tribes through three channels: the courts, Congress, and the BIA’s administrative acknowledgment process. The Passamaquoddy and other tribes litigated their tribal status in the courts, but most tribes seeking federal recognition today do so through the BIA’s acknowledgment process.<sup>263</sup> Regulations governing this process were first overhauled in the 1970s, culminating in the 1978 criteria, which have since been amended twice, once in 1994 and again in 2015.<sup>264</sup> Before 1978, the BIA used an ad hoc approach to recognition based on factors developed by Felix Cohen in the 1930s. The Cohen factors largely focused on how the federal government and other tribes viewed or treated the petitioning tribe.<sup>265</sup> The 1978 revisions were a response to the flood of acknowledgment petitions filed by tribes that had been omitted from the government’s list of federally recognized tribes, formalized for the first time in 1934.<sup>266</sup>

The current federal acknowledgment regulations have roots in Cohen’s de facto approach but also include factors reflecting that tribes, to be recognized as such under the Constitution, must have ties to peoples who preceded European arrival. First, the regulations define the term “indigenous” to mean “native to the continental United States in that at least part of the petitioner’s territory at the time of first sustained contact extended into what is now the continental United States.”<sup>267</sup> Second, several of the seven criteria for federal acknowledgment include ties to peoples who are “native” in the same sense. These include

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262. COHEN’S HANDBOOK, *supra* note 24, § 3.02[4], at 138-39 (quoting *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867)).

263. See Procedures for Federal Acknowledgment of Indian Tribes, 25 C.F.R. pt. 83 (2016).

264. See Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (July 1, 2015) (codified at 25 C.F.R. pt. 83); Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994) (codified as amended at 25 C.F.R. pt. 83).

265. See Krakoff, *supra* note 14, at 1076 (discussing the Cohen criteria); Quinn, *supra* note 26, at 358.

266. See Krakoff, *supra* note 14, at 1075-83 (discussing the Indian Reorganization Act’s definition, initial list of tribes, and subsequent need to recognize the many tribes inadvertently omitted from the list); Quinn, *supra* note 26, at 363; see also COHEN’S HANDBOOK, *supra* note 24, § 3.02[2], at 133.

267. 25 C.F.R. § 83.1.

the criteria of “Indian entity identification,”<sup>268</sup> “[c]ommunity,”<sup>269</sup> and, perhaps most obviously, “[d]escent.”<sup>270</sup> Each is discussed in turn below.

The “Indian identity” requirement states that the petitioning group must have been “identified as an American Indian entity on a substantially continuous basis since 1900.”<sup>271</sup> Likewise, the “[c]ommunity” criterion requires the petitioning tribe to show that it “comprises a distinct community and demonstrate[] that it existed as a community from 1900 until the present.”<sup>272</sup> When the BIA published proposed changes to the criteria in 2014, it suggested moving the date for Indian identity forward to 1934, the year the Indian Reorganization Act first created the list of recognized tribes.<sup>273</sup> There was also discussion of whether the start date should be moved back to “historical times,” which is what it had been for the “[c]ommunity” criterion prior to the proposed changes.<sup>274</sup> In the end, the BIA retained the 1900 start date for “Indian identity” and adopted it for purposes of “[c]ommunity” as well.

The BIA provided many reasons for this seeming compromise between “historical times” and 1934. First, the years surrounding 1900 were a time of great pressure on tribes to assimilate and disband.<sup>275</sup> Groups petitioning for recognition today therefore might find it difficult to provide any documentation dating from before that period.<sup>276</sup> Further, for many tribes (presumably in the American West), their first sustained contact with non-Indians was not long before 1900.<sup>277</sup> Westward expansion did not begin in earnest until the late 1800s, and tribes in the Southwest in particular had no reason to document their status as governing entities for outsiders.<sup>278</sup> In addition, the BIA

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268. *Id.* § 83.11(a) (italics omitted).

269. *Id.* § 83.11(b) (italics omitted).

270. *Id.* § 83.11(e) (italics omitted). The other criteria are: “[p]olitical influence or authority,” a “[g]overning document,” “[u]nique membership,” and “[c]ongressional termination” (defined as a showing that the tribe was *not* previously terminated by Congress). *Id.* § 83.11(c), (d), (f), (g) (italics omitted).

271. *Id.* § 83.11(a).

272. *Id.* § 83.11(b).

273. *See* Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862, 37,868-69 (July 1, 2015) (codified at 25 C.F.R. pt. 83) (discussing the 2014 proposed changes and justifications for retaining 1900 as the relevant date).

274. *See id.* at 37,867. “Historical times” was not defined with precision, but the understanding was that it referred to any period before which it would have been unnecessary for tribes to appear on any official federal list or otherwise be formally acknowledged by the federal government. *See id.*

275. *See id.* at 37,869.

276. *See id.* at 37,868.

277. *Id.*

278. *See generally* WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* (Penguin Books 1992) (1954) (chroni-  
*footnote continued on next page*

explained that “based on its experience in nearly 40 years of implementing the regulations, every group that has proven its existence from 1900 forward has successfully proven its existence prior to that time as well, making 1900 to the present a reliable proxy for all of history but at less expense.”<sup>279</sup> The criteria themselves, like the justifications for using 1900 as the starting point, therefore reflect an understanding that tribes, to be recognized as such, must have Indian identity and comprise a distinct community that extends back to the time before European and American contact.

The “descent” criterion requires that “petitioner’s membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity).”<sup>280</sup> “Historical tribe,” it is clear, means a political entity composed of peoples who predate nonindigenous contact.<sup>281</sup> The 2015 final rule did not adopt a proposed change that would have required instead that “at least 80 percent” of petitioner’s membership descended from a historical tribe.<sup>282</sup> The BIA explained that there were objections on both sides of the debate, with some urging a 100% descent requirement and others urging a lower requirement to account for lack of records.<sup>283</sup> The BIA therefore decided to omit any quantitative measure but clarified that the 80% language merely reflected past decisions and that the policies would remain consistent with those practices.<sup>284</sup> Whether fixed at 80% or 100%, the import of this criterion is unmistakable: to be a federally recognized tribe today, there must be a strong showing of “descent” from (meaning ancestral ties to) a historical tribe.

The federal criteria as a whole reflect both of the key aspects of Native nationhood: first, that the entity petitioning to be a tribe is a political community with a history of governance,<sup>285</sup> and second, that the entity has ties

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cling the first nonindigenous mapping and exploration of the Southwest, which did not occur until after the Civil War).

279. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. at 37,863.

280. 25 C.F.R. § 83.11(e) (2016).

281. See Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. at 37,866-67. The BIA refers repeatedly to connections to “tribe or tribes” instead of “indigenous peoples.” But using the BIA’s vocabulary alone begins to sound somewhat circular, given that the regulations are supposed to govern whether the group has met the standard for being recognized as a “tribe.” I therefore occasionally substitute “indigenous peoples” for “tribe” in order to explain the BIA regulations more clearly.

282. *Id.*

283. *Id.* at 37,866.

284. See *id.* at 37,866-67.

285. The community requirement, political influence or authority requirement, and governing document requirement all reflect the community and political aspects of federal recognition. See 25 C.F.R. § 83.11(b)-(d).

to the people who were here first.<sup>286</sup> To achieve status as a federally recognized tribe today through the acknowledgment process, it is therefore necessary for a tribe to make its case in part through the language of descent.

While the regulations do not discuss the constitutional necessity of such a criterion, the BIA did address comments suggesting that the descent criterion should be eliminated “because it is race-based, while tribal membership is a political classification.”<sup>287</sup> The BIA responded:

The Department recognizes descent from a political entity (tribe or tribes) as a basis from which evaluations of identification, community, and political influence/authority under criteria (a), (b), and (c) may reveal continuation of that political entity. Evidence sufficient to satisfy (e) is utilized as an approximation of tribal membership before 1900.<sup>288</sup>

To translate from bureaucratese, the BIA is saying that descent is another proxy for connections to a political entity, specifically a *tribe*, which existed historically. It is not a proxy for “race.”

But this again begs the question: What is a tribe? Tribes, recognized in the Constitution as such, were the people here first. The BIA’s otherwise circular explanation makes sense if we add this reminder about the context and circumstances of our nation’s history. The notion of descent in this context is neither “race-based” nor a “proxy for race,” in Justice Kennedy’s formulation.<sup>289</sup> Instead, descent is a proxy for a people’s historical connection to place—a connection that, perhaps amazingly, has been recognized in American law since the Founding—despite American law’s frequent contradictory role of attempting to sever that very connection.

### 3. International law definitions

American Indian law was, at its inception, a creature of the law of nations.<sup>290</sup> As discussed above, early legal doctrine largely ratified the assertion of colonial and settler-nation authority over indigenous peoples, justifying the taking of Indian property and the unilateral assertion of political authority.<sup>291</sup> As Phillip Frickey has argued, international law also underwrote core foundational principles in American Indian law, including exclusive congressional power in Indian affairs.<sup>292</sup> Since the rise of human rights in

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286. See *id.* § 83.11(a)-(b), (e).

287. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. at 37,867.

288. *Id.*

289. *Rice v. Cayetano*, 528 U.S. 495, 514 (2000); see *supra* note 21 and accompanying text.

290. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 23-26 (1996); *supra* note 244 and text accompanying notes 244-46.

291. See ANAYA, *supra* note 290, at 23-26.

292. See Frickey, *supra* note 24, at 55-56.

international law, however, indigenous peoples have pushed for international recognition of their rights to land, culture, and self-determination. According to Kristen Carpenter and Angela Riley, “[i]nternational human rights law now serves as a basis for indigenous peoples’ claims against states and even influences indigenous groups’ internal processes of revitalization.”<sup>293</sup> Indigenous peoples have, in other words, pushed international law to become a means to recognize their rights rather than to undermine them.<sup>294</sup> It is therefore instructive to look to definitions in international law of “indigenous peoples” to aid in the interpretation of “tribes” in U.S. law. Frickey made a similar argument concerning contemporary international law’s relevance to constitutional limitations on federal power: “emerging international law concerning the rights of indigenous peoples . . . provide[s] a domestic interpretive backdrop” for the interpretation of domestic law.<sup>295</sup> The international definitions are not binding, but they connect Indian law’s origins with its present, providing the opportunity to redeem the racializing effects of the settler/colonial project.<sup>296</sup>

At the outset, it is important to note that there is no universally accepted definition of indigenous peoples or indigenous identity under international law. According to Robert Williams, Jr., “[g]enerally, indigenous peoples have insisted on the right to define themselves.”<sup>297</sup> Working definitions have nonetheless emerged from the International Labour Organization (ILO) and the United Nations. These definitions identify factors similar to those in U.S. law, including ties to people who preceded colonization. Similar to the definitions in the federal acknowledgment regulations, the international law definitions emphasize connections to history and place—as opposed to blood and race—appropriately rejecting the racializing and subordinating language of the colonial past.

In 1989, the ILO adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169).<sup>298</sup> This

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293. Carpenter & Riley, *supra* note 229, at 175.

294. *See generally id.* (arguing that recent developments in international indigenous human rights law have allowed indigenous peoples to reverse the effects of colonization and oppression).

295. Frickey, *supra* note 24, at 37.

296. *Cf. id.* at 74-78 (arguing that the international law origins of federal power in Indian affairs justify looking to international human rights norms today to inform the development of tribal rights in domestic law).

297. Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 663 n.4.

298. International Labour Organization, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169].

document, which has been ratified by twenty-two countries (not including the United States), is aimed at protecting and fostering indigenous culture, land, and resource rights as well as addressing discrimination.<sup>299</sup> ILO Convention 169 was a significant step in the development of international legal recognition of distinctive indigenous rights.<sup>300</sup> Before its passage, indigenous peoples had to articulate their claims largely through the prism of individual human rights.<sup>301</sup> ILO Convention 169's broader set of claims encompassed indigenous peoples' group rights and therefore necessitated a description of the people to whom it applied. Thus, while ILO Convention 169 does not define "indigenous peoples," it does include the following description:

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community . . . ;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation . . . .

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.<sup>302</sup>

The ILO's description emphasizes ties to populations that inhabited the country precolonization, the presence of political and cultural institutions, and self-identification. And the ILO description, like the federal acknowledgment criteria, includes a criterion of descent from earlier indigenous populations.<sup>303</sup>

In the United Nations context, the most important development has been the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.<sup>304</sup> The Declaration establishes and acknowledges

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299. See *id.* pmb., arts. 3-4, 14-15. The twenty-two countries are: Argentina, Bolivia, Brazil, the Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. *Ratifications of C169: Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT'L LAB. ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO) (last visited Feb. 2, 2017).

300. See Carpenter & Riley, *supra* note 229, at 190-91 (describing the history and effects of ILO Convention 169).

301. See *id.*

302. See ILO Convention 169, *supra* note 298, art. 1 (third emphasis added). The use of the term "peoples" rather than "populations" was an intense sticking point during the debate leading up to the adoption of ILO Convention 169 because "peoples" is seen by many to imply greater recognition of group identity than "populations." ANAYA, *supra* note 290, at 48.

303. ILO Convention 169, *supra* note 298, art. 1.

304. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); see also *Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS HUM. RTS.:

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the rights and freedoms of indigenous peoples around the world.<sup>305</sup> UNDRIP was the culmination of many years of organizing by indigenous peoples and built on previous efforts (including the ILO's) to write indigenous peoples into international legal instruments.<sup>306</sup> While UNDRIP itself, like ILO Convention 169, has no formal definition of indigenous peoples, the United Nations lists several factors that have their roots in earlier documents.<sup>307</sup> The most significant of these documents is a report by José Martínez Cobo, who was appointed by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a study on the problem of discrimination against indigenous populations.<sup>308</sup> In the report, Cobo provided the following working definition of "indigenous peoples":

Indigenous communities, peoples and nations are those which, *having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories*, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>309</sup>

The Cobo study also mentions several ways that a community could be seen to have "historical continuity" with a precolonial society, including but not limited to whether the community occupies ancestral lands and whether the community shares a common culture or language with the precolonial society.<sup>310</sup> Cobo's working definition therefore shares essential elements with the U.S. common law and administrative definitions described above: ties to precontact peoples (descent) and status as a distinct people today (including evidence of political, legal, and cultural institutions).

In short, the definitions that have emerged in the international indigenous rights era include elements of descent and ancestry, just as they do under U.S.

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OFF. HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (last visited Feb. 2, 2017) (discussing UNDRIP's content and history).

305. See G.A. Res. 61/295, *supra* note 304, art. 1.

306. See Carpenter & Riley, *supra* note 229, at 189-92.

307. See U.N. Permanent Forum on Indigenous Issues, *Who Are Indigenous Peoples?* (n.d.), [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

308. Sarah Pritchard, *Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* 40, 40-41 (Sarah Pritchard ed., 1998).

309. José R. Martínez Cobo (Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Mar. 1987) (emphasis added).

310. *Id.* ¶ 380.

law. This makes sense given that the process of becoming “indigenous” is essentially a historical one. Before the arrival of others, indigenous peoples were simply the peoples of a given territory. To be indigenous is to have preceded colonization and settlement, necessitating historical continuity to peoples before that time. Descent, in this context, is a historical and normative description and not merely a substitute for “race.”

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Early definitions of tribes in U.S. law were tainted by paternalism and assumptions of inferiority, yet they also contained a kernel of understanding that congressional power to recognize tribes could not exist in the absence of ties to peoples who preceded non-Indian colonization and settlement.<sup>311</sup> The U.N. working definition shares key elements with the definitions of “tribe” that have evolved in U.S. law more recently—connections to precontact peoples, ties and attachment to ancestral lands, and distinct cultural and political structures—but the language is devoid of the racialized and demeaning aspects that pervaded early U.S. doctrine and have yet to be completely expunged.<sup>312</sup>

The U.N. approach therefore points a way forward, providing terminology that connects “indigenous peoples” to history and place without resorting to the language of “race” and “blood.” This difference is not just a matter of vocabulary; the racialized language of U.S. law inscribes a social and political hierarchy that, today, perpetuates a “common sense” of anti-Indian racism.<sup>313</sup> If ties to ancestral peoples, the very criteria necessary to establish separate political existence as a tribe, are digested (by Supreme Court Justices, politicians, and the public alike) as “racial” ties as opposed to indicators of indigenous peoplehood, then the deck is instantly stacked against nonbiased ways of interpreting the meaning of any classification or distinctive treatment. The U.N. and ILO working definitions are more nuanced and also less succinct, but necessarily so; they describe not only historical and factual criteria but also factors rooted in intentions for the future—intentions to continue to exist *as peoples* who are connected to the past but not destined to remain there. For tribes to be recognized as such under our Constitution, the minimum criterion of descent from historical peoples should and can be interpreted similarly.

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311. *See supra* Part II.B.1 (discussing *United States v. Sandoval*, 231 U.S. 28 (1913); and *United States v. Montoya*, 180 U.S. 261 (1901)).

312. *See supra* Part II.B.1.

313. *See* IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 36 (2014) (describing how racial beliefs today often operate as “commonsense,” as obvious truths that, even though rooted in social structures and cultural beliefs, are accepted as reality); Cramer, *supra* note 203, at 316-17.

### III. Being More Discriminate to Eliminate Discrimination

The project of preserving tribes' constitutional status while deconstructing the racialized definitions of tribes under U.S. law coheres with a larger body of work on the social construction of race. In their pathbreaking work on race and racism, Michael Omi and Howard Winant coined the term "racial formation."<sup>314</sup> They defined racial formation as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed."<sup>315</sup> Race, though a social construct and not a biological trait, acquires and produces meanings that structure aspects of our society and infuse everyday interactions.<sup>316</sup> Racial formation theorists therefore "examine the ways in which race is constantly redefined, reworked, and rearticulated by social and political institutions in different political and historical periods."<sup>317</sup> Further, as Laura Gómez has described, "race itself is made meaningful by law, and law writ large is a reflection of racial-classification systems, racial ideology, and racial inequality."<sup>318</sup> Some critical race legal theorists have therefore focused on the "mutually constitutive" roles of law and race as they shape and reinforce one another.<sup>319</sup>

Omi and Winant's theory of race as a social construct also opened terrain to interrogate how different groups were racialized for different purposes.<sup>320</sup> In this vein, scholars of American Indian law and theorists of settler colonialism have analyzed the unique purposes served by the racialization of Native peoples.<sup>321</sup> Native peoples were characterized as savage, uncivilized, and, like the animals that they hunted, ultimately doomed to extinction.<sup>322</sup> No less a figure than George Washington, outlining the Indian policy of the Continental Congress, articulated this view:

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314. OMI & WINANT, *supra* note 31, at 55.

315. *Id.*

316. *Id.* at 54-61.

317. Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*, 127 HARV. L. REV. 1341, 1345 (2014) (reviewing ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY (2013)).

318. Laura E. Gómez, President, Law & Soc'y Ass'n, Looking for Race in All the Wrong Places, Presidential Address at the Annual Meeting of the Law and Society Association (June 5, 2011), in 46 LAW & SOC'Y REV. 221, 231 (2012).

319. *See id.*

320. *See id.*; *see also* HANEY LÓPEZ, *supra* note 31, at 134-38.

321. *See* Tsosie, *supra* note 246, at 363; *see also* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1125 (1994).

322. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590-91 (1823) (describing Indians as "fierce savages, whose occupation was war" and likening them to the "game [that] fled into thicker and more unbroken forests"); *see also* WILLIAMS, *supra* note 29, at 214.

[P]olicy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest . . . ; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape.<sup>323</sup>

Alternatively, the troublesome racial aspects of individual Native Americans could be eradicated through forced assimilation; Indians, unlike African Americans, could become white through processes of civilization.<sup>324</sup> The abovementioned quotation attributed to Richard Henry Pratt—"Kill the Indian, save the man"<sup>325</sup>—embodies this racialized view.

These characterizations of Native people served the purpose of achieving their disappearance from the land, or in Patrick Wolfe's influential terminology, they served the goal of indigenous "elimination."<sup>326</sup> Settler/colonial societies—like the United States, Australia, Canada, and New Zealand—had to wrest land and resources from indigenous populations, which they quickly outnumbered.<sup>327</sup> The structure of race in American Indian law—which either assumed or actively worked toward elimination of Native people—served to accomplish the objective of freeing up the land.

Early definitions of tribes in U.S. law reflect the racialized conception of Indians. As discussed above, in *United States v. Montoya*<sup>328</sup> and *United States v. Sandoval*,<sup>329</sup> as well as many other cases, Indian cultural and political inferiority was integral to the conclusion that the entities were "tribes."<sup>330</sup> Further, whether an entity was a "tribe" and therefore entitled to protection by the United States sometimes hinged on whether that conclusion inhibited acquisition of land by non-Indians.<sup>331</sup> Federal law and policy toward American Indians also reconstituted Native nations in various ways, forcing some distinct groups together and artificially separating others, thereby imposing

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323. Letter from George Washington to James Duane (Sept. 7, 1783), in DOCUMENTS OF UNITED STATES INDIAN POLICY 1, 2 (Francis Paul Prucha ed., 3d ed. 2000).

324. See PATRICK WOLFE, SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT 1-3 (1999).

325. For a discussion of this quotation and its origins, see note 83 above.

326. WOLFE, *supra* note 324, at 2.

327. See *id.* at 1-2.

328. 180 U.S. 261 (1901).

329. 231 U.S. 28 (1913).

330. See *supra* Part II.B.1; see also Krakoff, *supra* note 14, at 1070-74.

331. See *United States v. Joseph*, 94 U.S. 614, 617 (1877) (holding that Pueblos were *not* tribes because of their advanced state of civilization and therefore were not entitled to the protections of the Nonintercourse Act, which prohibited land sales to non-Indians), *abrogated by* *United States v. Candelaria*, 271 U.S. 432 (1926).

membership criteria on tribes that reflected the federal goals of controlling tribes' existence and minimizing their disruptions to non-Indians.<sup>332</sup> The rigid accounting measures imposed on tribes during the allotment era, including for many tribes the requirement that their members have certain quanta of Indian "blood," represent another aspect of tribal racialization.<sup>333</sup>

Despite eliminationist strategies and constructions of the disappearing Indian that they inscribed, tribes are still here. Tribal governments are working to overcome the historic traumas of land loss, cultural devastation, and familial disruption through tribal political, legal, and economic revitalization efforts.<sup>334</sup> Federal laws, including ICWA and IGRA, recognize tribes as governments and provide the means for tribes to restore their cultures and their economies. Like all laws, they are not perfect. And like all human situations to which laws apply, there are examples of how these laws may result in difficult outcomes or cause unfairness.

But the equal protection attacks on ICWA and on tribal gaming laws aim to do far more than tinker at the margins. They aim to recruit federal courts to strike down these statutes on the ground that tribes are nothing other than racial groups. This is today's formulation of the eliminationist structure of racism against Native peoples. Rather than see tribes as governments, the cases describe tribal membership as nothing other than blood ties. The refrain in *Adoptive Couple* went further; not only was it a blood tie, it was a very scant one. ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption . . .")<sup>335</sup> This repeats the eliminationist logic of allotment and termination: insufficient "blood" means you cannot really be Indian. And it also resonates with the "common sense" of racism in the context of Indian gaming. As Renee Ann Cramer has described, tribes who have gained economic success through gaming are accused of not truly being Indian; racist tropes, including that Indians should look like "full-bloods" and should not participate in the modern economy, pervade objections to gaming and creep into other areas of law as well.<sup>336</sup>

It would therefore be worse than ironic for federal courts to deploy equal protection analysis to overthrow statutes like ICWA and tribal gaming laws; it would be tragic because it would reenact the very policies of elimination that

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332. See Goldberg-Ambrose, *supra* note 321, at 1131-33 (describing how removal policies separated and reconstituted tribes because some members refused to leave their homelands); Krakoff, *supra* note 14, at 1061-83.

333. See GARROUTTE, *supra* note 204, at 22-37.

334. See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS, at xiii-xvi (2005); Carpenter & Riley, *supra* note 229, at 176-78.

335. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013).

336. See Cramer, *supra* note 203, at 325.

those laws were passed to redress. Furthermore, employing such an analysis is easily avoided on multiple grounds. First, federal courts can and should hew to precedent and uphold *Mancari*.<sup>337</sup> Second, courts that are unconvinced by precedent alone due to *Mancari*'s insufficient articulation of its rationale can rely on the deeper explanations for tribes' political status.<sup>338</sup> Third, as argued here, tribes—recognized in our Constitution and accorded distinct status by that document, its structure, and its history—are necessarily defined as the peoples who preceded us on the continent. Shorn of the racialized descriptions that were attached to the definition of tribes for too long, the criterion of connection to precolonial peoples remains. Today's federal acknowledgment criteria recognize and require this relationship, and working definitions in international law include such ties as well.<sup>339</sup> Those ties, whether expressed today in terms of lineal descent, ancestry, or otherwise, should not be used against tribes or Indian people in a misguided pursuit of constitutional colorblindness.

This Article advances an exceptionalist position for resisting colorblind constitutionalism and the opposition to affirmative action in American Indian law. But it is consistent with racial formation theory's call for contextualized analysis of the working and reworking of racial concepts in law. Race and racism have done different work in the American Indian context than in the context of African Americans, Latinos, Hispanics, and Asians. In particular, racialized constructs are associated with legal definitions of tribes and tribal members in ways that reinforce the very stereotypes that pose obstacles to tribal survival today. The theoretical approach embraced in this Article can and should yield very different analyses for other groups, and in this way the project advances the larger goal of urging multiple exceptionalisms to redress the different inequalities produced by racism in this country.

Moreover, the argument here supports rejecting colorblind constitutionalism generally. Race, as racial formation theory posits, is not *just* a formal category that can be detected and routed from the law. It is a shifting social and political construct, and its capacity to perpetuate inequality evades efforts to locate it through formal categories alone.<sup>340</sup> Paying attention to race and its formations is more likely to someday yield a racially equal society than the

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337. See *Morton v. Mancari*, 417 U.S. 535 (1974); see also *supra* Part I (discussing *Mancari*).

338. See Fletcher, *supra* note 7, at 153-55 (describing the historical origins of tribes' political status); Krakoff, *supra* note 14, at 1048-51.

339. See *supra* Part II.B.2-3.

340. See HANEY LÓPEZ, *supra* note 31, at 1-2; Gómez, *supra* note 31, at 1397; Rich, *supra* note 317, at 1354-55; Gómez, *supra* note 318, at 231.

strategy of equating all uses of race—including those that combat historical subordination—with discrimination “on the basis of race.”<sup>341</sup>

### Conclusion

The history of European/American settlement and the formation of the republic leave no doubt that the words “Indian tribes” refer to the peoples who occupied the continent before non-Indian settlement. The federal government’s power to recognize Native peoples as governments within the United States rests on the constitutional distinction between “tribes”—self-governing societies with ties to precontact peoples—and other groups. A constitutional minimum for tribal political recognition, in other words, is connection to the people who preceded European/American arrival. That connection is not “racial,” so long as we understand race to be a sociolegal construct that assigns characteristics to certain groups for the purpose of unjustified subordination (or, in the case of whiteness, the assertion of unjustified privilege).<sup>342</sup> Though legal definitions of “tribe” were freighted with discriminatory meanings for centuries, today domestic and international legal criteria defining tribal status focus instead on historical ties to land as well as continuity of politics, culture, and self-understanding. International law’s embrace of the rights of indigenous peoples can and should inform definitions of tribes under U.S. law, linking Indian law to its internationalist past while shedding the taint of colonialism.

Attempts to enshrine unyielding colorblind or race-neutral understandings of the Equal Protection Clause threaten, perversely, to characterize tribes once again as groups defined primarily by “race.” Such attempts undermine laws and policies that protect tribes as governments. At the same time, they deploy misunderstandings and stereotypes about Native people to gain traction. In the adoption and child welfare context, Indian tribal status is depicted as nothing more than a blood tie that keeps children from being placed in better circumstances. Tribal connections are implicitly challenged as not being “real,” and Native parents are seen as using their racial status to get a leg up in custody battles. In the gaming context, there is a similar dynamic. Tribes, instead of being categorized as governments engaged in economic development, are depicted as “quasi-racial” groups unfairly competing in the marketplace.

To avoid reinscribing this racially discriminatory understanding of tribes and Indian people, courts need only exercise restraint. They do not have to

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341. *But see* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (plurality opinion) (opining just the opposite).

342. As Ian Haney López points out, whiteness is no less a social construction than other races. *See* HANEY LÓPEZ, *supra* note 31, at 109.

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create new categories of protected classes for equal protection analysis. They do not have to second-guess the legislative branch. Instead, all courts have to do is hew to precedent, deferring to Congress when it enacts legislation that furthers its unique relationship with American Indian tribes—the peoples who were here first.