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### Constitutional Concern, Membership, and Race

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#### Citation Information

Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 FIU L. REV. 295 (2014), available at <https://scholar.law.colorado.edu/faculty-articles/89>.

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# Constitutional Concern, Membership, and Race

Sarah Krakoff\*

## INTRODUCTION

American Indian Tribes in the United States have a unique legal and political status shaped by fluctuating federal policies and the over-arching history of this country's brand of settler-colonialism.<sup>1</sup> One of the several legacies of this history is that federally recognized tribes have membership rules that diverge significantly from typical state or national citizenship criteria. These rules and their history are poorly understood by judges and members of the public, leading to misunderstandings about the "racial" status of tribes and Indian people, and on occasion to incoherent and damaging decisions on a range of Indian law issues. This article, which is part of a larger project on tribes, sovereignty, and race, will discuss the history of Florida's tribes, their road from pre-contact independent peoples to federally recognized tribes, and their contemporary membership criteria in order to shed light on the inextricably political nature of race, membership, and sovereignty in the American Indian context.<sup>2</sup>

There are 566 American Indian tribes that are federally recognized, meaning that they have a direct government-to-government relationship with the United States.<sup>3</sup> One of the requirements for federal recognition, both historical and contemporary, is descent from an historical Indian tribe or group of tribes.<sup>4</sup> To achieve recognition today, tribes must also demonstrate that most of their members come from a "distinct community."<sup>5</sup> Further, all tribes are required to have membership criteria.<sup>6</sup>

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<sup>1</sup> Settler colonial societies are those where non-indigenous people came to stay and quickly outnumbered the indigenous inhabitants, thus making elimination of indigenous claims to territory the primary object of settler laws and policies. See PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY* 1-2 (1999); Patrick Wolfe, *Land, Labor, and Difference: Elementary Structures of Race*, 106 AM. HIST. REV. 866, 867-68 (2001).

<sup>2</sup> For the other articles related to this project, see Sarah Krakoff, *Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012) [hereinafter *Inextricably Political*]; *Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet*, 24 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 261 (2013).

<sup>3</sup> See Indian Tribal Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 79 Fed. Reg., no. 19, 4748 (Jan. 29, 2014).

<sup>4</sup> See 25 C.F.R. § 83.7(e).

<sup>5</sup> See 25 C.F.R. § 83.7(b).

<sup>6</sup> See 25 C.F.R. § 83.7(d).

While in theory tribes' present-day membership criteria do not have to include lineage or descent requirements, a long and complicated history, which included many instances of coercion by the Federal Government, has resulted in virtually all tribes requiring some form of ancestral or familial tie to be a member.<sup>7</sup> Taking these requirements together, all federally recognized tribes are required by federal and tribal law to show that their members have some shared ancestry with pre-contact indigenous peoples.<sup>8</sup> At the same time, today's federally recognized tribes are composed of members whose ethnic, racial, linguistic, and cultural heritage is quite diverse.<sup>9</sup> Tribes' political status today seldom (if ever) tracks their pre-contact group identity seamlessly. Some tribes were compelled to join together as a single federally-recognized entity, while others were scattered and dispersed irrespective of their historical unity.<sup>10</sup> The legal category "federally recognized tribe" is therefore political in several senses, and the membership rules for such tribes are likewise both products and expressions of politics, even while they also include (indeed must include) lineal descent or other ancestry requirements.

In *Morton v. Mancari*, the Supreme Court held that federal classifications that further the unique government-to-government relationship with American Indian tribes should not be subject to heightened scrutiny.<sup>11</sup> *Mancari* upheld an employment preference for tribal members at the Bureau of Indian Affairs, noting along the way that the preference was conferred on Indians who were members of a tribe, and not on all people who could claim to be Indian as a racial or ethnic matter. The Court therefore described the classification as political rather than racial for the purpose of its analysis.<sup>12</sup> While some courts and commentators have made much of the "political *versus* racial or ethnic" distinction, the better reading of *Mancari* is that classifications that recognize the unique status and rights of tribes, even if they necessarily include aspects of lineage and descent, should generally be upheld. As the leading American Indian law treatise states, "[a] sound reading of *Morton v. Mancari* would acknowledge that even though ancestry may figure into some Indian classifications, ultimately the most important inquiry is whether the law can

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<sup>7</sup> See, e.g., *Inextricably Political*, *supra* note 2; Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006); Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. IND. L. REV. 243 (2008-09).

<sup>8</sup> See *Inextricably Political*, *supra* note 2, at 1081-82. It is also possible that connection to a pre-contact group is a constitutional requirement for tribal recognition.

<sup>9</sup> See *id.* at 1103.

<sup>10</sup> See *id.* at 1118.

<sup>11</sup> See *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

<sup>12</sup> See *id.* at 553 n.24.

be justified as fulfilling 'Congress' unique obligation toward the Indians."<sup>13</sup>

Recently, however, the Supreme Court and some lower federal courts have expressed concern about laws that acknowledge the distinct political and legal status of American Indian tribes and tribal members.<sup>14</sup> In *Adoptive Couple v. Baby Girl*, the Court interpreted the Indian Child Welfare Act (ICWA) narrowly to exclude its application to a case involving the adoption of a child who, the Court noted repeatedly, was "classified as an Indian because she is 1.2% (3/256) Cherokee."<sup>15</sup> The parties opposing application of the ICWA had pressed an equal protection argument.<sup>16</sup> While the Court concluded that the ICWA's "plain text" controlled the outcome and therefore did not reach the equal protection issue, the Court was nonetheless troubled by the fact that this child's fate could differ from that of other prospective adoptive children because of what the Court perceived to be her scant blood tie to an Indian tribe.<sup>17</sup> The Court therefore mentioned, near the end of its opinion, that excluding the case from the ICWA's requirements avoided "equal protection concerns."<sup>18</sup> Under *Mancari*'s approach, however, there are no such concerns. The child in *Adoptive Couple* was eligible for membership in the Cherokee Nation according to the Nation's citizenship rules, which require direct descent from a member of the Cherokee rolls taken during a federal census from 1899-1906. Therefore while the Court described the child as "1.2% Cherokee," it might instead have described her as "eligible to be a Cherokee citizen," which, had she been able to enroll, would have made her "100% Cherokee" in the only sense with any relevance to the opinion. The ICWA distinguishes between members of tribes and nonmembers, not people who are racially Indian or not. Further, there is no doubt that the ICWA was passed in furtherance of Congress's unique obligation to American Indian tribes, so under the *Mancari* framework this was an easy case.<sup>19</sup>

The Court's tendency to conflate the categories of race, lineage, and tribal membership, and to see all of those classifications as troubling regardless of the context or purposes, has been developing over time.<sup>20</sup> In

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<sup>13</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][b] at 927 (Nell Jessup Newton et al. eds., 2005).

<sup>14</sup> See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *KG Urban Enters., LLC, v. Patrick*, 693 F.3d 1 (1st Cir. 2012); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

<sup>15</sup> See *Adoptive Couple*, 133 S. Ct. at 2556, 2559, 2565.

<sup>16</sup> See Response of Guardian Ad Litem in Support of Petition for Writ of Certiorari, *Adoptive Couple v. Baby Girl*, No. 12-399, 2012 WL 5209997, at \*10 (Oct. 22, 2012).

<sup>17</sup> See *Adoptive Couple*, 133 S. Ct. at 2565.

<sup>18</sup> See *id.* at 2565.

<sup>19</sup> See *infra* Part I. A. (describing history and purposes of the ICWA).

<sup>20</sup> This trend is part of a larger one, in which the Court subjects all government classifications, even those designed to achieve substantive racial and ethnic equality, to the Court's highest level of

*Rice v. Cayetano*, the Court expressed the view that a lineage requirement was simply a “proxy for race” when it struck down a state voting law on the ground that it violated the Fifteenth Amendment.<sup>21</sup> While *Rice* did not involve a federal law affecting a recognized American Indian tribe, the Court’s views about lineage and race, evident in both *Rice* and *Adoptive Couple*, do not augur well for future cases involving such challenges. As the Court moves, in general, toward an increasingly ahistorical and genealogical approach to racial classifications, it sows confusion about tribes, their status, and their interests, and obscures the law’s historical role in racializing and subordinating American Indians as well as other groups.<sup>22</sup> The Court’s purportedly “color-blind” approach risks reinscribing the various forms of racial subordination that contemporary laws have aimed to reverse.

This Article wades into this difficult terrain. After a review of equal protection law, the Article will recount, in necessarily cursory fashion, the story of how the Seminole Tribe of Indians of Florida and the Miccosukee Tribe of Florida evolved from pre-contact sovereign peoples to their current status as federally recognized tribes. Like many tribes, the Seminole and Miccosukee survived a violent history replete with attempts to eliminate them. Both tribes descend from the Creek and other indigenous peoples, and each tribe also has members who reflect a range of other ethnic, racial, and cultural backgrounds. Their histories reveal how race was used to marginalize and subordinate tribes, and also how distinct political groups were carved out of larger ethnic, linguistic, and cultural peoples. The Article will then consider the Seminole and Miccosukee’s current membership rules in order to reflect on the role of tribal membership criteria more generally. Whether lineal descent requirements, as in the case of the Cherokee Nation, or quarter or more ancestry requirements, as at Seminole and Miccosukee respectively, tribal membership criteria are political expressions of a people trying to maintain an indigenous cultural identity against the backdrop of histories that reflected the dominant, if inconsistent, goal of wiping them out. The Article ends by considering how these histories should influence our views of federal equal protection challenges to laws that further tribal political independence. First, tribal

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scrutiny. Reva Siegel has described this as the shift from an antisubordination to an anticlassification approach to equal protection. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1473 (2004).

<sup>21</sup> *Rice v. Cayetano*, 528 U.S. 495, 514, 519-20 (2000).

<sup>22</sup> See Siegel, *supra* note 20. For more on the socio-legal construction of race generally, see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. ed. 2006) (analyzing legal construction of racial hierarchies in the United States); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

membership criteria should be seen in their proper light, as expressions of tribal political identity as well as mandatory federal requirements for separate political status. Second, and following from that, courts should continue to hew to the holding in *Morton v. Mancari*,<sup>23</sup> upholding laws that are rooted in the political relationship between tribes and the Federal Government and that further the government's unique obligations to tribes.

## I. EQUAL PROTECTION AND THE COURT'S RECENT BOUT OF "CONSTITUTIONAL CONCERN"

### A. Constitutional Concern and Baby Veronica

In 2013, the Supreme Court decided *Adoptive Couple v. Baby Girl*, a case involving the custody of a young child who spent the first two years of her life with white adoptive parents and the next two years with her biological father, an enrolled member of the Cherokee Nation of Oklahoma.<sup>24</sup> The fate of Baby Veronica, as she became known in the press, captivated national attention as well as the support of former U.S. Solicitor Paul Clement, who has made no secret of his interests in reversing *Morton v. Mancari* and limiting federal laws that recognize American Indian tribal rights.<sup>25</sup> The case proved to be a good vehicle to challenge aspects of the Indian Child Welfare Act (ICWA),<sup>26</sup> a federal law that imposes distinct procedural and substantive requirements on the adoption and foster care placement of American Indian children, because the Act's application to Baby Veronica resulted in the tearful scene of her being taken away from her adoptive parents at the age of two by a father whom she had never met. In an opinion that was clearly swayed by the adoptive parents' narrative of the story, the Supreme Court held that the ICWA did not apply to Baby Veronica's adoption.<sup>27</sup> This set in motion the second wrenching change of custody in the girl's short life, which was carried out with dispatch when the adoptive parents took her from her Cherokee father back to a home that it is likely she barely recalled.

The Indian Child Welfare Act was passed in 1978 in response to overwhelming evidence that state and private child welfare workers and adoption agencies were removing American Indian children from their families at shocking rates.<sup>28</sup> The removals were often based on biases or

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<sup>23</sup> *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>24</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

<sup>25</sup> See Gregory Smith & Carolyn Mayhew, *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari*, 60 FED. LAWYER 47, 48, 55 (2013).

<sup>26</sup> 25 U.S.C. §§ 1901, et seq.

<sup>27</sup> See *Adoptive Couple*, 133 S. Ct. 2552.

<sup>28</sup> See H.R. REP. NO. 95-1386, at 9 (1978); S. REP. NO. 95-597, at 11-13 (1977); see also COHEN,

misunderstandings about American Indian family structures and norms, and were sufficiently widespread to create existential threats to some tribes. The ICWA put in place a number of procedural and substantive requirements that mandate Tribal Court jurisdiction in some cases; allow tribal participation in state proceedings in others; and impose different standards for removal, placement, and termination of parental rights.<sup>29</sup> The ICWA treats American Indian children differently from other children based on their political status as members, or potential members, of federally recognized tribes.<sup>30</sup> Without this distinct treatment, the statute would have no effect or purpose. The ICWA was designed to address the fundamental problem (by many accounts a continuing one)<sup>31</sup> of discriminatory interference in the families of American Indian tribal members. The solution was to bolster legal protections for those families based on their status as members of sovereign nations with their own legal systems, and to recognize rights in both the family members and the tribes to enforce the law.<sup>32</sup>

Like all laws, the ICWA is neither perfectly enforced nor perfectly crafted. In terms of enforcement, many state courts initially resisted its application, and state child welfare workers and private adoption agencies were slow to get the news that their practices had to change. For many lawyers and judges, the overlay of federal law onto their typically state-law-only practices was odd and unfamiliar. Delay in identifying children as Indian, notifying tribes, and applying the ICWA's protective measures often resulted in situations where courts then strained to avoid the ICWA's application at all.<sup>33</sup> In terms of the legislation itself, there are some gaps in terms of when and how tribes have to be notified, again contributing to delay and consequent resistance to enforcement.<sup>34</sup> Despite the fact that in the vast majority of cases, the ICWA is applied without incident to the benefit of Indian children, their families, their tribes, and all other parties involved,<sup>35</sup> the problems and gaps lead to anguished situations that tend to

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*supra* note 13, at § 11.01[2], 821-25.

<sup>29</sup> See 25 U.S.C. §§ 1901, et seq.; COHEN, *supra* note 13, at §§ 11.02-11.06, 826-48 (reviewing provisions of the ICWA).

<sup>30</sup> See 25 U.S.C. § 1903(4), et seq.

<sup>31</sup> See, e.g., *Oglala Sioux Tribe v. Hunnik*, No. 13-5020-JLV, 2014 U.S. Dist. LEXIS 10162 (S.D. Jan. 28, 2014) (class action lawsuit brought by tribes alleging widespread violations of the ICWA in the state of South Dakota).

<sup>32</sup> See COHEN, *supra* note 13, at § 11.01[2], 824.

<sup>33</sup> See *id.* at § 11.05[2], 844-45 (describing misuses of "good cause" exception to the ICWA's placement preferences); § 11.07, 852-55 (describing judge-made doctrine, often called the "existing Indian family doctrine" employed to avoid application of the ICWA).

<sup>34</sup> See 25 U.S.C. § 1912(a) (requiring notice to tribe only in involuntary proceedings).

<sup>35</sup> See, e.g., B.J. JONES ET AL., INDIAN CHILD WELFARE ACT: A PILOT STUDY OF COMPLIANCE IN NORTH DAKOTA (2000).



grab all of the headlines. *Adoptive Couple v. Baby Girl* was such a case.

Baby Veronica's birth mother and father were engaged but living apart when the birth mother informed the father she was pregnant. The birth father urged the birth mother to move up their wedding plans. Apparently she refused and their relations deteriorated from there.<sup>36</sup> While the U.S. Supreme Court opinion did not emphasize some of the following facts, the South Carolina State Supreme Court, which affirmed a lower court decision to award custody to the Cherokee father, included them in its opinion. First, although the birth mother knew that the father was an enrolled member of the Cherokee Nation and testified that she made his heritage known to the adoptive parents and to all agencies involved, the South Carolina Court concluded that "there were some efforts to conceal [the birth father's] Indian status."<sup>37</sup> Specifically, the birth mother "initially . . . did not wish to identify the father, said she wanted to keep things [as] low-key as possible for the [adoptive parents], because he's registered in the Cherokee tribe. It was determined that naming him would be detrimental to the adoption."<sup>38</sup> In addition, the lawyer who was hired by the adoptive parents to represent the birth mother misspelled the birth father's name and misrepresented his birth date in the letter to the Cherokee Nation. The Cherokee Nation, faced with inaccurate information, therefore responded that they could not confirm that the child was an Indian child.<sup>39</sup> Finally, the birth mother, when it came time to deliver the baby, requested that the hospital put her on "no report" status, meaning that if anyone inquired about her, the hospital should list her as not admitted. After delivery, the birth mother listed the baby's status as Hispanic only (and not Native American or Cherokee) on the form necessary under Oklahoma law to approve the baby's transfer from the state.<sup>40</sup> Baby Veronica was therefore delivered shortly after her birth into the arms of the adoptive parents and taken to their home in South Carolina without the additional procedures, including notification to the Tribe and likely refusal to transfer from Oklahoma, which the ICWA would have required.<sup>41</sup>

For his part, the birth father, after failing to convince the birth mother to move up their wedding, told the birth mother that he would relinquish his parental rights rather than pay child support. He testified, however, that he thought that the birth mother would keep the child, and that if he gave her some time and space, the couple would reconcile and raise the baby

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<sup>36</sup> See *Adoptive Couple*, 133 S. Ct. at 2558.

<sup>37</sup> *Adoptive Couple v. Baby Girl*, 398 S.C. 625 (2012), *rev'd*, 133 S. Ct. 2552 (2013).

<sup>38</sup> See *Adoptive Couple*, 398 S.C. at 632.

<sup>39</sup> See *id.*

<sup>40</sup> *Id.* at 633.

<sup>41</sup> See *id.* at 633-34.

together.<sup>42</sup> While the birth father acknowledged that some of his interactions with the birth mother were not models of exemplary parenting, “Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would have never considered relinquishing his rights.”<sup>43</sup>

The adoptive parents filed for adoption in South Carolina when Baby Veronica was nine days old. The birth father was not served with notice of the adoption until four months later, on the eve of his deployment to Iraq for military service. Initially, when the process server pressed the papers on him, the birth father signed away his right to object to the adoption. As soon as he realized that it was an outside adoption rather than relinquishment to the birth mother, he tried to get the papers back: “I then tried to grab the paper up. [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>44</sup> The birth father immediately consulted with his family, contacted a lawyer, and the next day filed for a stay of the adoption proceedings.<sup>45</sup>

Like most family law stories that make their way to popular consciousness, by the time Baby Veronica’s case reached the U.S. Supreme Court there would be no universal happy ending. The rest of the case and its history are recounted in the Supreme Court opinion: the South Carolina family court awarded custody to the birth father in 2011 and Baby Veronica was transferred to her father’s custody. The adoptive parents appealed to the South Carolina Supreme Court, which affirmed the lower court’s decision under the ICWA.<sup>46</sup> The adoptive parents then petitioned for certiorari to the Supreme Court, where they won and, at the age of four, Baby Veronica was ordered to be returned to their custody.<sup>47</sup>

Had a few things gone differently, Baby Veronica would in all likelihood never have been placed with the adoptive family in the first place. If the birth mother had clarified that she intended to give the child up for adoption; if the birth mother’s lawyer had spelled the father’s name correctly and/or referenced his actual birth date; if the birth mother had not omitted Baby Veronica’s Cherokee heritage from the form required by Oklahoma to allow her transfer out of state; if any one or all of these had occurred, Baby Veronica would have been placed with her biological father

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<sup>42</sup> See *id.* at 631.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 634.

<sup>45</sup> See *id.*

<sup>46</sup> See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556-57 (2013).

<sup>47</sup> See *id.* at 2559, 2565; see also *Adoptive Couple v. Baby Girl*, 404 S.C. 483 (2013) (directing entry of order finalizing adoption after remand from U.S. Supreme Court).

from the outset. While that outcome may not be the preferred result of those who think that birth mothers should have a greater say than birth fathers about the placement of their biological children, it would (presumably) not strike the same nerve as the specter of removing a child who was two years old from, as Justice Alito wrote “the only parents she had ever known.”<sup>48</sup> In other words, the attempt to avoid the ICWA’s application in the first place created the sympathetic factual scenario that became its own logic for interpreting the ICWA narrowly in order to place Baby Veronica with the adoptive parents.

Justice Alito’s several references to the (apparently) troublingly slim connection that Baby Veronica had to her Cherokee heritage must be examined in this light. It is correct that but for this heritage, Baby Veronica’s adoption would have proceeded quite differently. It is also the case, however, that but for the attempt to avoid the ICWA’s application to Baby Veronica, she would have had a stable placement with her father or his relatives from the outset of her life. Furthermore, as Justice Sotomayor emphasized in her dissent, several states recognize similarly strong rights by birth fathers in the adoption context, including Arizona, Washington and Nevada.<sup>49</sup> In other words, it is not just membership in an Indian tribe that can result in distinctive treatment in the adoption context. If the adoption had taken place in Washington, it also would have required additional procedural and substantive protections for the father.<sup>50</sup> Flukes of birth, geographical and otherwise, lead to different legal regimes. What troubled Justice Alito was that this fluke sounded in ancestry rather than geography. And yet, Baby Veronica’s lineal descent from a member of the Cherokee Nation’s historic rolls is what constituted her eligibility for tribal membership. When the Justice wrote, disparagingly, that Baby Veronica was “*classified* as an Indian because she is 1.2% (3/256) Cherokee,”<sup>51</sup> he could 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 political membership requirements.

Justice Alito’s apparent discomfort with Baby Veronica’s “1.2%” status begs the question of whether it would have been any less troubling if the Cherokee Nation had a different set of membership requirements, perhaps with a higher degree of “Cherokee blood.” If Baby Veronica had been “more Indian by blood,” would it have struck the Justices as less unfair that a white family could not adopt her? Justice Alito’s repeated (and

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<sup>48</sup> *Adoptive Couple*, 133 S. Ct. at 2556.

<sup>49</sup> *See id.* at 2581-82 (Sotomayor, J., dissenting).

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 2552, 2556 (emphasis added).

unnecessary) references to Baby Veronica's percentage of Cherokee heritage resonate in unfortunate ways with the eliminationist agenda behind the racialization of American Indians during some of our most shameful historical periods.<sup>52</sup> The eliminationist logic that Justice Alito (no doubt unknowingly) echoed was that Indian tribes must eventually disappear, and that one pathway for making them do so was to shrink the number of people eligible to be tribal members.<sup>53</sup>

### B. *Morton v. Mancari* and the Political-not-Racial Distinction

Had the Court gone any further than merely mentioning its concern about the constitutionality of the ICWA's application to Baby Veronica, it would have run into its own wall of precedent. In *Morton v. Mancari*, the Supreme Court upheld a Bureau of Indian Affairs (BIA) employment preference against a challenge brought by non-Indian plaintiffs.<sup>54</sup> The Court held that federal classifications that benefit American Indians should be upheld so long as they can be tied to "Congress' unique obligations toward the Indians."<sup>55</sup> To put this in the context of equal protection doctrine generally, the Supreme Court has settled on a three-tier system for the judicial review of equal protection challenges to federal or state actions that burden or benefit particular groups.<sup>56</sup> First, the Court subjects most classifications to rational basis review, meaning that if the legal distinction is based on any facially plausible rationale, the Court will not second-guess the legislative decision.<sup>57</sup> Second, a middle-tier of review (known as "intermediate scrutiny"), applied most commonly to classifications based on sex, asks whether the distinction is reasonably related to an important governmental objective.<sup>58</sup> And third, classifications based on race or

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<sup>52</sup> See *Inextricably Political*, *supra* note 2, at 1065-70; see also Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009).

<sup>53</sup> See *Inextricably Political*, *supra* note 2, at 1070.

<sup>54</sup> *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>55</sup> *Id.* at 555.

<sup>56</sup> Equal protection challenges to federal action are brought under the Due Process Clause of the Fifth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment, which applies only to states, but the "Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981) (citing *Weinberger v. Salfi*, 422 U.S. 749, 768-70 (1975)); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

<sup>57</sup> See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (upholding state law requiring police officers to retire at age fifty); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding school funding system that discriminated against poor districts); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES* 669-74 (3d ed. 2006) (summarizing tiers of judicial review). But see *Romer v. Evans*, 517 U.S. 620 (1996) (applying strengthened version of rational basis review to equal protection challenge involving distinctions based on sexual orientation).

<sup>58</sup> For the latest articulation of the gender standard of intermediate scrutiny, see *United States v. Virginia*, 518 U.S. 515 (1996). On very rare occasions, the Supreme Court has applied heightened

ethnicity are subject to the Court's most exacting review ("strict scrutiny"), which asks whether there is a compelling state interest that supports the classification and whether the government's means of achieving that interest are narrowly tailored to the government's objective.<sup>59</sup> Overtly discriminatory classifications—those that deprive racial or ethnic groups of access to programs or benefits because of their racial or ethnic status—nearly automatically fail strict scrutiny.<sup>60</sup> The harder cases involve either actions that do not overtly sort people based on race or ethnicity, but that nonetheless result in disparate effects on minority racial or ethnic groups, or actions that sort people by race or ethnicity with the benign purpose of either remedying past discrimination or promoting diversity.<sup>61</sup> Challenges to affirmative action programs in education and employment fall into the latter category.<sup>62</sup>

In *Mancari*, the Court adopted a form of the first type of review—rational basis review—for federal classifications singling out members of American Indian tribes for distinctive treatment. According to *Mancari*, if the classification is based on tribal members' political affiliation with a recognized American Indian tribe<sup>63</sup> and furthers Congress's "unique obligation" to American Indians, then the Court will not subject it to a heightened form of judicial review.<sup>64</sup> Applied straight up, the ICWA should pass this test easily, even on the facts of the Baby Veronica case. Veronica was eligible for membership in her tribe based on the Cherokee

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review based on an ad-hoc mix of factors. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (factors warranting heightened scrutiny included childhood, education, and minority status).

<sup>59</sup> See, e.g., *Johnson v. California*, 543 U.S. 499 (2005) (strict scrutiny must be used in evaluating the routine racial segregation of new intake prisoners); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (federal affirmative action programs must meet strict scrutiny); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down school board's policy of extending preferential protection against layoffs to some employees because of their race); CHEMERINSKY, *supra* note 57, at 694-95.

<sup>60</sup> See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (state court acted unconstitutionally by taking into account a stepfather's race in child custody case); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding state miscegenation statute unconstitutional); *Anderson v. Martin*, 375 U.S. 399 (1964) (striking down statute requiring the race of candidates for office to be listed on ballots); CHEMERINSKY, *supra* note 57, at 671 ("Strict scrutiny is virtually always fatal to the challenged law.").

<sup>61</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989); *McKlesky v. Kemp*, 481 U.S. 279 (1987) (proof of racially disproportionate impact in administration of death penalty did not constitute equal protection violation); *Washington v. Davis*, 426 U.S. 229 (1976) (upholding police departments use of a test that disproportionately disadvantaged African-American applicants).

<sup>62</sup> See *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469.

<sup>63</sup> *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes.").

<sup>64</sup> *Id.* at 555.

Nations' rules, and the ICWA furthers Congress's obligation to ensure the survival of tribes by eliminating rampant and biased activities that dismantled tribal families.

For a host of practical and legal reasons, the *Mancari* rule makes sense. As the *Mancari* Court noted, the Federal Government has been treating American Indian tribes and their members distinctively since the country's founding.<sup>65</sup> License for distinctive treatment exists in the Constitution,<sup>66</sup> in the history of federal-tribal legal relations,<sup>67</sup> and in international law norms that formed the basis for domestic federal Indian law.<sup>68</sup> Further, if the Court had held otherwise, federal courts could be subjecting scores of treaties, statutes, and policies to heightened judicial scrutiny.<sup>69</sup> Perhaps this unmanageability has kept courts in check on these issues. If they peek behind the curtain of tribal political classifications, they will have to assume the wizard's role, deciding one case at a time whether a distinction that affects tribes or tribal members withstands strict scrutiny.<sup>70</sup> Doing so would take courts well beyond their traditional competencies, and intrude into centuries of agreements and relations with hundreds of tribes.

### C. Nipping at *Mancari*

Whether due to the strength of *Mancari*'s underlying rationale or to the Supreme Court's concerns about its institutional competence (or both), to date *Mancari* has survived intact. *Adoptive Couple* did not come out of nowhere, however. For years, various parties, including some ideologically and politically motivated interest groups, have mounted challenges to classifications that benefit tribes and tribal members in an effort to have the Court overturn or modify *Mancari*.<sup>71</sup> *Mancari*'s opponents have relied on language in two post-*Mancari* Supreme Court cases to support their arguments.

First, in *Adarand Constructors, Inc.*, the Supreme Court considered a

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<sup>65</sup> See *id.* at 551-53.

<sup>66</sup> See U.S. CONST. art. I, § 8, cl. 3 ("[Congress has the power to . . .] regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . .").

<sup>67</sup> See William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 338-47 (1990).

<sup>68</sup> See ROBERT WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 218 (1990); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); see also *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (relying on the discovery doctrine, including its origins in international law, as basis for U.S. relations with tribes).

<sup>69</sup> See *Mancari*, 417 U.S. at 552.

<sup>70</sup> See Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 955-57 (2002).

<sup>71</sup> See Smith & Mayhew, *supra* note 25 (describing efforts of Mountain States Legal Foundation and Paul Clement to overturn or narrow *Mancari*).

challenge to a federal program offering financial incentives to contractors who hired subcontractors controlled by economically and socially disadvantaged groups.<sup>72</sup> The federal program listed certain races and ethnicities as having presumptive status as socially disadvantaged, including African American, Hispanic, Asian Pacific, Subcontinent Asian, and Native American.<sup>73</sup> The issue before the Court was whether the program should be reviewed under the intermediate standard of scrutiny, announced in *Metro Broadcasting, Inc. v. FCC*,<sup>74</sup> or strict scrutiny, which would require the Federal Government to show that its interest in the preference was compelling, and that it had employed the least restrictive means of meeting that interest.<sup>75</sup>

*Adarand* was an important case for opponents of affirmative action programs, who had already succeeded in subjecting state-based versions to the highest level of scrutiny.<sup>76</sup> If federal preferences could be treated similarly, then the era of benign governmental uses of race and ethnicity to level the social and economic playing field would be all but over. In *Adarand*, that goal was achieved. The Court concluded that *Metro Broadcasting*, its precedent of just five years earlier, should be overturned.<sup>77</sup> Justice O'Connor disparaged *Metro Broadcasting* for its conclusion that race could be presumed to be a benign category, even if its purpose was to allow participation by historically disadvantaged groups.<sup>78</sup> Adhering to the view that the Constitution protects individuals, not groups, Justice O'Connor concluded that any use of race was presumptively suspicious because its effect was to burden individuals with the government's effort to create greater economic opportunity for disadvantaged groups.<sup>79</sup>

*Adarand* did not address legislation or classifications passed in furtherance of Congress' unique obligation to American Indian tribes. Yet because *Adarand* applied the Court's highest scrutiny to actions by Congress, it has been looked upon as a first step toward questioning *Mancari*.<sup>80</sup> Advocates and some courts have seized on language in Justice Stevens' *Adarand* dissent, which cautioned that the Court's reasoning could lead toward the conclusion that the federal relationship with tribes should

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<sup>72</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

<sup>73</sup> *See id.* at 207.

<sup>74</sup> 497 U.S. 547 (1990).

<sup>75</sup> *See id.*

<sup>76</sup> *See Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>77</sup> *See Adarand*, 515 U.S. at 227.

<sup>78</sup> *See id.* at 226.

<sup>79</sup> *Id.* at 226-27.

<sup>80</sup> *See Smith & Mayhew, supra* note 25, at 51-53 (discussing cases and briefs arguing that *Adarand* undermines *Mancari*).

be seen in the same light as invidious racial classifications.<sup>81</sup> Justice Stevens was warning about this interpretation; not embracing it nor stating it was inevitable.<sup>82</sup> Nonetheless, in *Williams v. Babbitt*, the Ninth Circuit refused to read a Native American preference into the Reindeer Act of 1937, concluding that to do so would raise “grave” constitutional questions.<sup>83</sup> The *Babbitt* court relied on what it claimed to be Justice Stevens’ assessment of the “logical implications” of *Adarand*, and then went so far as to predict that *Mancari*’s “days are numbered.”<sup>84</sup> To date, that prediction has not held. Eighteen years after *Adarand*, the Supreme Court has yet to question *Mancari* directly.

Nonetheless, a second Supreme Court case, *Rice v. Cayetano*,<sup>85</sup> provides succor to *Mancari*’s detractors on different grounds. In *Rice*, a non-Native Hawaiian challenged voting restrictions for the Office of Hawaiian Affairs (OHA). The OHA was created by Hawaii to administer programs for Native Hawaiians consistent with the State’s historic and legal obligations to its indigenous population. Hawaii restricted voting for the OHA Board of Trustees to Native Hawaiians, defined according to when their ancestors arrived in Hawaii. The State argued that the classification was based on lineal descent from indigenous peoples, and not on race or ethnicity, but the Court found that the ancestry component of the requirement was merely a “proxy” for race.<sup>86</sup> On one hand, *Rice* did not question *Mancari* itself.<sup>87</sup> Rather, *Rice* held that *Mancari* did not apply to the Hawaii voting law for two reasons. First, the state, and not the Federal Government, had imposed the restriction. Second, Native Hawaiians are not a federally recognized tribe.<sup>88</sup> The Court therefore struck down the State’s voting restriction on Fifteenth Amendment grounds.<sup>89</sup> Yet *Rice*’s language about the equivalence between ancestry and “race” opens the door to reasoning that questions tribal membership rules and leaves them vulnerable to being seen as invidious racial classifications. Justice Alito’s repeated references to Baby Veronica’s percentage of Cherokee blood echo this conflation of lineal descent and race.<sup>90</sup> Thus, while *Rice* is even less directly challenging to *Mancari* than *Adarand*, together the cases provide distinct building blocks for those pursuing an anti-tribal agenda. They urge

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<sup>81</sup> See *Adarand*, 515 U.S. at 244 n.3 (Stevens, J., dissenting).

<sup>82</sup> See *id.*

<sup>83</sup> *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997).

<sup>84</sup> *Id.* at 665.

<sup>85</sup> 528 U.S. 495 (2000).

<sup>86</sup> *Id.* at 514.

<sup>87</sup> See *id.* at 519.

<sup>88</sup> See *id.* at 520.

<sup>89</sup> See *id.* at 517.

<sup>90</sup> See generally *supra* notes 49-53, and accompanying text.



that the Federal Government should treat all distinct groups equally, irrespective of history, context, and purpose. Unique legal obligations and political relationships, some of which inevitably are rooted in ancestry, are seen as no worthier of deferential treatment by the courts than overtly discriminatory and exclusionary laws.<sup>91</sup>

## II. FEDERAL RECOGNITION IS POLITICAL: A TRIP TO FLORIDA

*Mancari* made the distinction between classifications that address members of federally recognized tribes, and those that distinguish only based on race or ethnicity.<sup>92</sup> As discussed above, one approach to eroding *Mancari* is to question whether the political status (and membership rules) of tribes are just a “proxy for race.” Tribes are composed of members who share ancestry. This seems to cut against liberal consent-based norms for democratic governance, lending credence to the notion that lineage and race are indistinguishable constructs.<sup>93</sup> To question the political status of tribes, however, is to delve into the history of federal recognition itself, including the process by which indigenous peoples traveled from free and independent polities to the legal category of “federally recognized tribe” that they occupy today.<sup>94</sup> That history reveals that federally recognized tribal status is indeed political, in nearly every sense of the word. Power, violence, and resistance characterized the process, and inevitably racial formation played, and continues to play, a role.<sup>95</sup> Tribes, in other words, are political even while they reflect the unique ways in which American Indians were racialized by the American version of settler-colonialism.<sup>96</sup> In other articles, I have explored how these processes played out for the Colorado River Indian Tribes and the several federally recognized tribes in the Dakotas that were carved out of the Great Sioux Nation.<sup>97</sup> Here, I apply a similar analysis to the Seminole Tribe of Florida and the Miccosukee Tribe of Florida.

### A. Seminole and Miccosukee: Separate Tribes, Shared Roots

Today, the indigenous people known as Seminole are divided into three federally recognized tribes and one non-recognized group. Two of the

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<sup>91</sup> See Smith & Mayhew, *supra* note 25.

<sup>92</sup> See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

<sup>93</sup> See Gover, *supra* note 7, at 250. To be clear, however, all members of tribes must also consent to their enrollment. Consent is therefore necessary but not sufficient for membership in an American Indian tribe.

<sup>94</sup> See *Inextricably Political*, *supra* note 2, at 1061-83.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 1118-22.

<sup>97</sup> See *id.*; see also Krakoff, *Settler Colonialism and Reclamation*, *supra* note 2.

three federally recognized tribes are in Florida—the Seminole Tribe of Florida, and the Miccosukee Tribe of Indians of Florida—the third is the Seminole Nation of Oklahoma. The non-recognized group is the Traditional (or Independent) Seminole Nation.<sup>98</sup> The Seminole Tribe of Florida's land base includes the Big Cypress Reservation, Brighton Reservation, Hollywood Reservation, Immokalee Reservation, Tampa Reservation, and Fort Pierce Reservation. The Miccosukee Tribe's lands consist of four reservations, the Tamiami Trail Reservation, Alligator Alley Reservation (the largest, at a size of nearly 75,000 acres), and two smaller reservations at the intersection of Krome Avenue and the Tamiami Trail in Miami. The Seminole people (the term "Seminole" will be used to refer to all people of Seminole origin, regardless of current political affiliation in the Seminole or Miccosukee Tribes) speak two languages with common linguistic roots—Muskogee and Mikasuki.<sup>99</sup> The Miccosukee and most Seminole Tribe members speak Mikasuki, while Seminole Tribe members at the Brighton Reservation speak Muskogee.<sup>100</sup>

As historian Brent Weisman has observed, "[t]he division between the Seminole and Miccosukee tribes reflects differing responses by groups of related people to the federal tribal recognition process rather than deep-seated differences in cultural or historical origins."<sup>101</sup> The story of how Florida's indigenous people of shared origins became differentiated into several political entities, each also with a distinct cultural identity, reflects the processes of settler occupation of North America, fluctuating U.S. policies toward tribes, and indigenous responses of survival and adaptation.

### 1. From "Creek" to "Seminole"

As with all histories of indigenous peoples in the pre-contact period, much of what we know about Florida and the Southeast has been reconstructed from archeological sources. According to these, when Spanish explorers first arrived in Florida in the early 1500s, the indigenous population was roughly 350,000.<sup>102</sup> Diseases brought by Europeans coupled with deliberate efforts to exterminate the indigenous population, resulting in devastating population losses. By the 1700s, the Southeast

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<sup>98</sup> See Kirsten Matoy Carlson & Robert T. Coulter, *Natural Allies: Conservationists, Indian Tribes, and Protecting Native North America*, in TRIBES, LAND AND THE ENVIRONMENT (Ezra Rosser & Sarah Krakoff, eds., 2012).

<sup>99</sup> Brent R. Weisman, *Nativism, Resistance, and Ethnogenesis of the Florida Seminole Indian Identity*, in 41:4 HIST. ARCHAEOLOGY 198, 199 (2007).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See JERALD T. MILANICH, *FLORIDA'S INDIANS: FROM ANCIENT TIMES TO THE PRESENT* at viii (1998).

indigenous population was already transformed significantly by Spanish, British, and French settlement.<sup>103</sup> Almost all of the pre-contact indigenous peoples in Florida were gone, either because they did not survive the European invasion or had been forced to leave the area.<sup>104</sup> As a result, the indigenous population of Florida in the 1700s was composed predominately of Creek Indians who migrated from elsewhere in the Southeast, as well as small populations of Florida's indigenous peoples who managed to survive from pre-contact times.

The Creeks who migrated into Florida became known as Lower Creeks, and those who ended up in Alabama, as Upper Creeks. These Creek migrations were a response to British expansion throughout Georgia.<sup>105</sup> The division into Lower and Upper Creeks was the first European-provoked step toward the eventual split into Seminole and Creek peoples. According to Weisman, "[i]t was from the Lower Creeks that the founding populations of Seminole were to come."<sup>106</sup>

Seminole political and cultural identity was forged during the eighteenth century, when the Spanish attempted repeatedly to confine the Lower Creeks in Florida to missions or communities near trading posts. The Lower Creeks who refused to comply moved further into central Florida and occupied land that had been largely (though not entirely) abandoned by the Apalachee and other indigenous peoples who predated the Spanish.<sup>107</sup> During this period, the Spanish began to refer to the Lower Creeks and other indigenous peoples uniformly as "cimmarones," which became Seminole in Creek pronunciation, meaning people who would not be subdued.<sup>108</sup> The term Seminole thus grew out of a blanket label that Europeans applied to people they assumed to be Lower Creek, but that the people themselves (of Lower Creek but also more diverse indigenous origins) appropriated as a self-defining term of resistance.

The Seminoles' resistance to colonial power grew throughout the century, and culminated in an event that Weisman pinpoints as the date at which Seminole identity truly began: "[i]f the birth of the Seminole can be traced to a specific time and place, that date is November 18, 1765, the place, Picolata on the banks of St. Johns River west of St. Augustine,

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<sup>103</sup> See *id.*; see also Weisman, *supra* note 99, at 200.

<sup>104</sup> MILANICH, *supra* note 102, at viii.

<sup>105</sup> BRENT RICHARDS WEISMAN, UNCONQUERED PEOPLE: FLORIDA'S SEMINOLE AND MICCOSUKEE INDIANS 12 (1999).

<sup>106</sup> *Id.* at 12.

<sup>107</sup> *Id.* at 13-14. Not all of Florida's pre-contact indigenous inhabitants were gone, and the Seminole today also reflect the integration of Lower Creek with these peoples. See generally *Frequently Asked Questions*, SEMINOLE TRIBE OF FLORIDA, <http://www.semtribe.com/FAQ/> (last visited Mar. 31, 2014).

<sup>108</sup> WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 14; Weisman, *supra* note 99, at 200.

Florida.”<sup>109</sup> At that point, the British controlled Florida. The British Governor had invited the Lower Creeks to a gathering at which he planned to explain that the entire peninsula was under British rule. The Governor requested land cessions from the Lower Creek chiefs for all claims east of the St. Johns. A ceremony was conducted, and the Lower Creeks and the British appeared to have reached an agreement. According to Weisman, what the Governor “did not understand was that Cowkeeper of the Alachua band held himself apart from this conference, and in so doing made it clear that the Lower Creeks did not speak for his interest.”<sup>110</sup> Cowkeeper, a formidable Seminole leader, forged his tribe’s identity by refusing to participate in the land cessions, and instead arranging a meeting of his own in December to negotiate with the British on his own terms.<sup>111</sup> The results included that a vast swathe of central Florida, today south of Gainesville, would “become a heartland of the Seminole nation . . . .”<sup>112</sup>

## 2. Seminole Identity Formation: The First, Second, and Third Seminole Wars

Cowkeeper’s strategic separation from the Creeks marked the beginning of a distinct Seminole identity, and the ensuing decades further defined the Seminole through acts of resistance. After the American Revolution, the Spanish regained Florida from the British, but this was to be a short-lived acquisition. The American ideology of Manifest Destiny pushed American expansion south as well as west, and conflicts over slavery heightened ambitions to eliminate an international border between slave states and what they perceived as ungovernable terrain to which their “property” could flee.<sup>113</sup> Acquiring Florida and removing the Seminole would therefore accomplish two racialized goals at once for the young United States: property (in the form of land) would be acquired for non-Indian settlement, (necessitating the disappearance of the Indians themselves); and the slave states could reassert their primacy over their human property (Black slaves), by the same strategy of eliminating the Indians.<sup>114</sup> Weisman succinctly describes the zeitgeist of the times, “[i]f destiny guided human affairs, and it most surely did, then this much was certain: the Seminoles had to go.”<sup>115</sup>

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<sup>109</sup> WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 14.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 15.

<sup>113</sup> *See id.* at 43-44.

<sup>114</sup> *See id.*; *see also* WOLFE, *supra* note 1, at 1-2 (explaining distinct logics of racial construction of indigenous peoples versus African Americans in settler-colonial societies).

<sup>115</sup> WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 43.

Efforts to eradicate the Seminole from Florida were carried out over the course of several decades. In 1818, General Andrew Jackson, with a force that included 1,500 Creek Indians, “swept into Spanish Florida on a scorched earth offensive against the Florida Seminoles.”<sup>116</sup> This offensive, which has become known as the First Seminole War, eliminated several Seminole villages and, more importantly for Jackson’s larger strategic goals, paved the way for acquiring Florida from Spain. Having put up very little defense to Jackson’s invasion, Spain ceded Florida to the United States in 1821.

Andrew Jackson’s work with respect to eliminating the Seminole was not yet complete, however. Many Seminole had evaded death or capture during the First Seminole War, and once Florida formally joined the slave-holding south, pressure increased to free the territory for white settlement. The slave states had particular concerns about the presence of Black Seminole (former slaves who escaped to Florida and joined the Seminole, many as free men), and in particular the specter of free Blacks living alongside slaves.<sup>117</sup> During this period, United States Indian Policy in general was moving toward strategies of removal and containment, and both of these methods were employed to wrest Florida from Seminole control.<sup>118</sup> To contain the Florida Indians, the government set about counting the number of Seminoles and Black Seminoles, and obtaining information about who was recognized as a Seminole leader or headman. The headmen were then invited to a meeting at Moultrie Creek on the St. Johns River, the purpose of which was to dictate the terms of a non-negotiated treaty. The Treaty of Moultrie Creek, as it became known, confined all Florida Seminoles to designated reservation lands, and provided them with annuities and tools for twenty-five years, a school, an Indian agent, and other minimal offerings.<sup>119</sup> The Treaty also required the Seminole to assist in the capture and return of any fugitive slaves.<sup>120</sup>

The Treaty of Moultrie Creek and its policy of containment failed miserably. Having never agreed to be confined to the low-quality lands that the government designated, a majority of the Seminole refused to move. One Seminole leader, Neamathla, negotiated for lands near Apalachicola, but otherwise the people had had no say and did not feel bound by the

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<sup>116</sup> *Id.* at 45.

<sup>117</sup> See WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 45.

<sup>118</sup> For more on the removal policies generally, see ROBERT ANDERSON, ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 50-77 (2nd ed., 2010).

<sup>119</sup> See WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 45-46; see generally Treaty with the Florida Tribes of Indians, Sept. 18, 1823, 7 Stat. 224, available at <http://digital.library.okstate.edu/kappler/vol2/treaties/sem0203.htm>.

<sup>120</sup> See Treaty with the Florida Tribes of Indians, art. 7, Sept. 18, 1823, 7 Stat. 224.

arbitrary lines drawn by government agents.<sup>121</sup> Many Seminole also balked at the requirement to return fugitive slaves. "Black Seminoles had become important to the Indians, as partners, as subordinates, as allies. Who was to say which of them was to go back?"<sup>122</sup> The attempt to confine the Seminole to reservations and cleave the Black Seminoles from among them backfired. The Seminoles' emerging identity as people known for their resistance had further solidified through their refusal to be contained.<sup>123</sup>

By the 1830s, U.S. policies of Indian removal were in high gear.<sup>124</sup> Government pressure on the Seminole to leave Florida for the proposed Indian Territory (today's Oklahoma) was intense, and some Seminole complied. The ones who refused sharpened their identity through their defiance of federal pressure and acts of resistance. The events that sparked the Second Seminole War, which lasted from 1835-42, grew out of this context.<sup>125</sup> Seminole leaders, including Osceola, who came of age during the Seminole resistance to Andrew Jackson's forces during the Creek War, staged an attack on U.S. troops in and around Fort King. A group of Black Seminole, led by Abraham, joined in the resistance as well.<sup>126</sup> What followed was a seven-year war that drew in every regiment of the U.S. Army. More than 1,500 U.S. troops and hundreds of Seminole were killed, and another 4,420 Seminole were removed by force to the Indian Territory.<sup>127</sup> When the war ended without a treaty in 1842, only 300 Seminoles were left in Florida.<sup>128</sup> One final burst of resistance, known as the Third Seminole War (1855-58), resulted in the deportation of another 168 Seminole from Florida to Oklahoma.<sup>129</sup> At the end of this period, only 200 or so Seminole remained in the state.

The federally recognized Seminole and Miccosukee Tribes of Florida

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<sup>121</sup> See WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 46.

<sup>122</sup> *Id.* at 47.

<sup>123</sup> See *id.* at 45-49. Weisman also discusses the influence of the Creek War of 1814 on the emerging Seminole identity. The conflict, which started as a battle among Creek factions concerning pressures to capitulate to American settlement, ended with Andrew Jackson leading U.S. troops against the anti-assimilationist Creeks. See *id.* at 48. Many Creeks were killed, but some fled into Florida, spurring Jackson to pursue them in what became the First Seminole War, discussed above. Jackson's failure to capture the fleeing Creeks, who then remained in Florida and became Seminole, contributed to the emerging Seminole identity as people who would not be subdued. As Weisman notes, among the Indians that evaded capture was a "boy in his early teen years . . . who was to be known in manhood as Osceola . . ." *Id.* at 48.

<sup>124</sup> See ANDERSON, *supra* note 118, at 52-53.

<sup>125</sup> See WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 49.

<sup>126</sup> See *id.* at 50-51.

<sup>127</sup> See *id.* at 57-58. But see James W. Covington, *Trail Indians of Florida*, in 58:1 FLA. HIST. Q. 37, 38 (July 1979) (providing figure of 3,000 Seminoles who had been captured or surrendered during Second and Third Seminole Wars).

<sup>128</sup> WEISMAN, UNCONQUERED PEOPLE, *supra* note 105, at 57.

<sup>129</sup> See *id.* at 59.

and the non-recognized Independent Seminoles, who today have a combined population of nearly 3,000, descend from this group of 200 who resisted the U.S. military's repeated efforts to remove them from Florida. Brent Weisman has theorized that the Seminole response to Removal during the Second Seminole War in particular solidified their identity as a distinct people:

Like other native peoples in postcontact North America whose political and ethnic identities reflect contact with an intrusive society, the Seminoles had pluralistic cultural and biological origins and were composed of groups speaking different languages with distinct histories . . . . In the organized resistance to the removal effort [during the period of the Second Seminole War], the Seminole identity was given birth as a 'creative adaptation' to violent change.<sup>130</sup>

To summarize, by the middle of the nineteenth century, the process of "creative adaptation" had crystallized into a clear Seminole identity. That identity was forged during several periods of American policies toward Native people that dislocated them from their pre-contact lands through invasion, disease, war, and forced removal. Larger economic and social forces, including the battle over slavery and its extension into the territories, also contributed to the unique ethnic and cultural composition of the people who became Seminole. The combined efforts to eliminate indigenous peoples and secure the South for a plantation economy resulted in a vigorously independent group, descended largely from the Lower Creeks but also including other indigenous and African-American people, who became the Seminole Indians of Florida.

### 3. From Seminole to the Federally Recognized Seminole and Miccosukee Tribes of Florida

The roughly 200 Seminole who remained in Florida after the Third Seminole War lived in village and clan-based communities throughout southern Florida.<sup>131</sup> Non-Indian settlement continued to put pressure on these communities, however, and despite Seminole resistance to being confined to specific reservations, the need to secure at least some lands from drainage and incursion became increasingly necessary for survival. The Seminole reestablished limited relations with the state and federal governments toward the end of the nineteenth century, and secured state and federal reservation lands during the period between 1911 and 1935.<sup>132</sup>

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<sup>130</sup> Weisman, *supra* note 99, at 198-99.

<sup>131</sup> See Covington, *supra* note 127, at 38.

<sup>132</sup> See generally 4 NATIVE AMERICANS AND THE LEGACY OF HARRY S. TRUMAN, THE TRUMAN LEGACY SERIES (Brian Hosmer ed., 2006); see also Jessica R. Cattellino, *Termination Redux? Seminole*

During these years, the next shift in Seminole political and cultural identity occurred. The Big Cypress Reservation was established in 1937, and the government appointed a white man who spoke Mikasuki to be the agent there.<sup>133</sup> The agent was able to recruit several of the families living nearby to move to the reservation. According to historian James W. Covington, “Those . . . who left their villages to live on the Big Cypress Reservation represented an element of the Indian population undergoing rapid change.”<sup>134</sup> One aspect of this was that some Seminoles were converting to Christianity, and in particular becoming members of the Baptist faith. The Big Cypress Reservation was a place where “a center for the Christians could be maintained.”<sup>135</sup>

Other Seminoles remained in villages in and near the Everglades. They maintained a land-based economy and culture, supporting themselves by hunting, fishing, small-scale agriculture, and gathering wild plants.<sup>136</sup> When the Tamiami Trail (U.S. Highway 41) was constructed to cut through the Everglades, some of these Seminole moved to scattered communities along the Highway, and became known as the “Trail Indians.”<sup>137</sup> The Seminole from these communities who refused to move to the Big Cypress or other reservations created an identity distinct from the Seminoles who had relocated, and eventually the two groups formed the basis for what would become two distinct federally recognized tribes. To some extent, the divide was cultural. The Trail Indians identified as hewing more closely to indigenous cultural and religious practices than the Seminole who had moved onto reservations.<sup>138</sup> In addition to refusing to relocate, they took pride in their independence from federal assistance and their maintenance of traditional ecological knowledge, which they passed on to the younger generations.<sup>139</sup> Despite these emerging differences in cultural identity, all Seminole, whether reservation-based or not, kept their core traditions alive. The most significant practice was (and remains) the Green Corn Dance, and this “central religious, social, and political focus of tribal life” was maintained by all Seminole, whether on-reservation or not.<sup>140</sup>

Given all that the Trail group and the reservation Seminoles shared, it seems unlikely that the emerging cultural differences would have been

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*Citizenship and Economy from Truman to Gaming in 4 NATIVE AMERICANS AND THE LEGACY OF HARRY S. TRUMAN, THE TRUMAN LEGACY SERIES 122-35* (Brian Hosmer, ed., 2006).

<sup>133</sup> Covington, *supra* note 127, at 40.

<sup>134</sup> *Id.* at 40.

<sup>135</sup> *Id.* at 40-41.

<sup>136</sup> *Id.* at 40.

<sup>137</sup> *See generally id.*

<sup>138</sup> *See id.* at 42.

<sup>139</sup> *See id.* at 40, 42.

<sup>140</sup> *Id.* at 42.



enough on their own to cause the formal split into two tribes. Instead, the catalysts were legal and political. First, the reservation-based Seminoles filed a claim against the United States under the Indian Claims Commission Act for taking Seminole land and other violations during the period of the Seminole Wars.<sup>141</sup> The Seminole who filed the case had hired a law firm to represent them, but the bands of people living along the Tamiami Trail or otherwise outside of the reservations had not participated in nor authorized the representation.<sup>142</sup> The Trail Indians, most of whom spoke Mikasuki, sought their own legal counsel and began to differentiate themselves from the legal and political strategies of the reservation Seminole.<sup>143</sup> During this process, the Miccosukee emerged as a distinct self-governing political entity.

Second, while the claims case was being pursued, the Federal Government embarked on its short-lived and disastrous policy of terminating the federal relationship with American Indian tribes. The Termination Era (1947-1961), as it is known, began after World War II when various political sentiments converged on the conclusion that the “Indian problem” could be solved once and for all by eliminating the separate political status of American Indian tribes.<sup>144</sup> Federal bureaucrats and politicians hatched the idea, and it had a sufficient veneer of equality and civil rights to gain momentum. Senator Arthur V. Watkins, the Chair of the Senate Committee on Indian Affairs held blatantly prejudiced views of American Indians, including that “[t]hey want all the benefits of the things we have . . . highways, schools, hospitals, everything that civilization furnishes, but they don’t want to help pay their share of it.”<sup>145</sup> Yet Watkins was also convinced that his effort to impose termination unilaterally on Indian people was a benevolent act of emancipation:

In view of the historic policy of Congress favoring freedom for the Indians, we may well expect future Congresses to continue to endorse the principle that “as rapidly as possible” we should end the status of Indians as wards of the government and grant them all of the rights and prerogatives pertaining to American citizenship.

With the aim of equality before the law in mind our course should rightly be no other . . . . Following in the footsteps of the

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<sup>141</sup> See *id.* at 41.

<sup>142</sup> See *id.* at 42.

<sup>143</sup> See *id.* at 42-43; see also Harry A. Kersey, Jr., “Give Us Twenty-Five Years”: *Florida Seminoles from New Termination to Self-Determination, 1953-1957*, in 67:3 FLA. HIST. Q. 290, 298 (Jan. 1989).

<sup>144</sup> See ANDERSON, *supra* note 118, at 142-45.

<sup>145</sup> CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 68-69 (2005) (internal quotations omitted).

Emancipation Proclamation of ninety-four years ago, I see the following words emblazoned in letters of fire above the heads of Indians—*THESE PEOPLE SHALL BE FREE!*<sup>146</sup>

For the overwhelming majority of American Indian people, freedom meant keeping their lands and maintaining their separate political status, not eliminating them. But neither Watkins nor any other of the architects of termination had bothered to ask them. House Concurrent Resolution 108, which outlined the Termination era's goals, was passed without any meaningful consultation with tribes.<sup>147</sup> Termination policies included subjecting some tribes to state criminal and civil laws, funding urban relocation programs to incentivize tribal people to leave their reservations, and eliminating the separate political status and trust relationship with certain listed tribes.<sup>148</sup> For reasons that remain somewhat mysterious, the Florida Seminoles were on H.C.R. 108's list of tribes to be considered for termination.<sup>149</sup> While tribes were afforded virtually no input concerning whether they should be on the list, Congress had to pass a separate termination bill for each tribe. Hearings were conducted on the bills, and this was when the Seminole and other tribes had a brief and vital chance to make their voices heard.

The Senate and the House of Representatives introduced companion Seminole termination bills in January of 1954. Senator Watkins presided over hearings on the bills before a joint subcommittee in March of the same year. The Seminole bills provided that within three years, the Secretary of the Interior would release all tribal lands from protected trust status, transfer them to a tribal corporation or its elected trustees, and then open the lands for sale.<sup>150</sup> Shortly thereafter, the federal trust relationship with the tribe would be formally severed.<sup>151</sup> Two separate groups of Seminoles, one representing the on-reservation and the other the off-reservation, or Trail, group, came to Washington to speak against termination.<sup>152</sup> A delegation of eight people elected by the on-reservation Seminole testified at the hearings and entered a prepared statement into the record requesting "that no action be taken on the termination of Federal supervision over the property of the

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<sup>146</sup> ANDERSON, *supra* note 118, at 143-44 (quoting Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 55 (May, 1957)).

<sup>147</sup> See 67 STAT. B132 (Aug. 1, 1953).

<sup>148</sup> See ANDERSON, *supra* note 118, at 142-51 (summarizing termination era policies).

<sup>149</sup> See Kersey, Jr., *supra* note 143, at 292-93 (discussing possible explanations).

<sup>150</sup> *Id.* at 294-95.

<sup>151</sup> *Id.* at 295.

<sup>152</sup> See Covington, *supra* note 127, at 43; Kersey, Jr., *supra* note 143, at 295-98.

Seminole Indians for a period of 25 years.”<sup>153</sup> Their reasons included that basic services and infrastructure, including, housing, education, and health care, were not yet sufficient to meet the tribe’s needs and allow them to manage their own affairs independently. The inadequate services also affected the tribe’s ability to manage its land, and a premature release of tribal land from trust status could result in the tribe’s inability to make tax payments.<sup>154</sup>

The off-reservation Seminole, who increasingly self-identified as Miccosukee, also opposed Congress’s actions, but they used different rhetoric and tactics.<sup>155</sup> George Osceola and Jimmie Billie represented the Miccosukee, and instead of testifying before Congress, sought to meet with President Eisenhower directly.<sup>156</sup> While in Washington, they presented their “Buckskin Declaration,” which expressed the Miccosukee intent to maintain their separate cultural and political existence as well as their land.<sup>157</sup> According to historian Harry Kersey, Jr., it was in response to President Eisenhower’s sympathetic reply that nonetheless urged the Miccosukee to work through existing bureaucratic channels that “the Mikasukis [sic] developed a position that they were an independent nation with a political existence separate from other Seminoles.”<sup>158</sup>

The Seminole and Miccosukee opposition succeeded in staving off the termination bills in 1954.<sup>159</sup> There was a revival of the idea in 1955, and the House Subcommittee on Indian Affairs held hearings in Florida during April of that year. The Seminole and Miccosukee again spoke out against termination, and their voices were joined by those of several local officials who were concerned about the increased burden on state and local services.<sup>160</sup> Again, the diverging positions of the Seminole and Miccosukee became apparent. The Miccosukee raised the issue of the Seminole claims case during their testimony, with Buffalo Tiger stating “‘We don’t want a claim for money’ . . . ‘we want a claim for land.’”<sup>161</sup> In the end, no Seminole termination legislation was introduced that year or ever after, and in retrospect historians have wondered why the Seminole, few in number

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<sup>153</sup> Kersey, Jr., *supra* note 143, at 295 (quoting U.S. Congress, *Termination of Federal Supervision Over Certain Tribes of Indians*, 83d Cong., 2nd sess., on S. 2747 and H.R. 7321, Part 8, Seminole Indians, Florida, March 1-2, 1954 (Washington, D.C. 1954)) at 1038.

<sup>154</sup> See Kersey, Jr., *supra* note 143, at 295.

<sup>155</sup> See Covington, *supra* note 127, at 43.

<sup>156</sup> Covington, *supra* note 127, at 43; Kersey, Jr., *supra* note 143, at 299.

<sup>157</sup> Covington, *supra* note 127, at 43.

<sup>158</sup> Kersey, Jr., *supra* note 143, at 299.

<sup>159</sup> *Id.* at 297-99.

<sup>160</sup> See *id.* at 300-01.

<sup>161</sup> Kersey, Jr., *supra* note 143, at 301 (quoting the hearings before the subcommittee discussed *supra* note 149).

and persistently outspoken in their desire to remain independent peoples, were on the list at all.<sup>162</sup>

The lasting impact for the Seminole and Miccosukee was the separation into two federally recognized tribes. Shortly after the threat of termination subsided, the on-reservation Seminoles began to consider organizing formally, under the Indian Reorganization Act. Having barely escaped involuntary termination of their separate status, they wanted to ensure against any future efforts along those lines. A group of Seminole leaders that included Sam Tommie, Billy Osceola, Frank Billie, and Bill Osceola led the drive toward IRA organization, and federal officials supported them.<sup>163</sup> The Miccosukee group refused to join, and the on-reservation Seminole decided to move forward largely without them.<sup>164</sup> In 1957, an IRA charter was issued to the Seminole Tribe of Florida, and the charter was ratified by a majority of voters, who included at least thirty percent of those eligible to participate in the election.<sup>165</sup> The Tribe then adopted its constitution and by-laws, and the Tribal Council became its governing body.<sup>166</sup> The split between the Seminole Tribe of Florida and the Miccosukee was complete.

The next chapter was for the Miccosukee to obtain separate federally recognized status. They took steps toward formal organization under state law during the same period that the Seminoles were working on their IRA status. In 1957, the Everglades Miccosukee General Council adopted a constitution that was recognized by the State of Florida.<sup>167</sup> Eventually, however, the Miccosukee's efforts to obtain recognition and land from Florida ran into opposition. They began, as the 1960s dawned, to engage in pan-Indian organizing and to reach out to international as well as national agencies to address their concerns.<sup>168</sup> The Miccosukee's outreach included sending a "'buckskin of recognition' to Fidel Castro who had just come to power in Cuba."<sup>169</sup> The Miccosukee succeeded on several fronts with their efforts. Florida set aside 143,400 acres of the Everglades for their use in 1959. Then, with the support of the Bureau of Indian Affairs and no opposition from the Seminole Tribe, the Miccosukee adopted a constitution and bylaws, and achieved federal recognition in 1962 as the Miccosukee

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<sup>162</sup> See *id.* at 303.

<sup>163</sup> *Id.* at 303-04.

<sup>164</sup> See *id.*

<sup>165</sup> *Id.* at 306-07.

<sup>166</sup> *Id.*

<sup>167</sup> See Covington, *supra* note 127, at 48-49.

<sup>168</sup> See *id.* at 52.

<sup>169</sup> *Id.* at 52.

Tribe of Indians of Florida.<sup>170</sup>

For both of Florida's federally recognized tribes, official status has brought many benefits. Federal services, including schools, health care, and housing, became available. Self-determination era policies facilitated tribal control over these programs, and also gave the tribes room to build their economies while safeguarding their traditions and cultures.<sup>171</sup> Their separate political status has also furthered the process of divergent identity formation for the Seminole and Miccosukee. Although descending from core groups of ancestors, and sharing a history of resisting various efforts to eliminate them, their distinct responses to contemporary pressures have resulted in two separate political and cultural bodies, albeit with much in common. Within each tribe, the different paths to persisting as Seminole are reflected in a modern and evolving polity.

### III. TRIBAL MEMBERSHIP RULES ARE POLITICAL TOO

In the decades before their respective federal recognitions in 1957 and 1962, the Seminole and Miccosukee Tribes shared common ancestry, language, and culture, which also inevitably reflected how the Seminole people had responded to the processes of settler colonialism.<sup>172</sup> Law and politics then separated this fairly cohesive (though unquestionably diverse) ethnic and cultural group into two distinct federally recognized tribes, each of which, to obtain federally recognized status, had to adopt criteria for membership going forward.<sup>173</sup> Today, both tribes have membership criteria that reflect a strong interest in maintaining their distinct identities as Seminole and Miccosukee peoples, and in cultivating participation in and connection to their cultural and political practices. Their identities as Seminole and Miccosukee also necessarily include the history of colonization, attempted elimination, and oppression that they have endured.

The Seminole Tribe initially adopted membership rules that allowed enrollment based on the federal census lists of the Seminole Agency in 1957. The following categories of people were eligible for enrollment: (1) any person of Seminole Indian blood, regardless of blood quantum, whose name appeared on the Census Roll of the Seminole Agency at the time of federal recognition; (2) any child of Seminole Indian blood, born to a parent

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<sup>170</sup> *Id.* at 53.

<sup>171</sup> See Kersey, Jr., *supra* note 143, at 308-09 (describing Miccosukee programs); for a thorough overview of tribal programs, see *Government*, SEMINOLE TRIBE FLA., <http://www.semtribe.com> (last visited Mar. 31, 2014); *Enterprises*, SEMINOLE TRIBE FLA., <http://www.semtribe.com> (last visited Mar. 31, 2014); *Services*, SEMINOLE TRIBE FLA., <http://www.semtribe.com> (last visited Mar. 31, 2014).

<sup>172</sup> See *supra* Part II; see also MARK EDWIN MILLER, CLAIMING TRIBAL IDENTITY: THE FIVE TRIBES AND THE POLITICS OF FEDERAL ACKNOWLEDGMENT 163 (2013).

<sup>173</sup> See 25 C.F.R. § 83.7(d).

or parents either or both of whose names appeared on the Census Roll, regardless of blood quantum or places of residence; (3) any descendant of Seminole Indian blood of a person whose name appeared on the Census Roll.<sup>174</sup> In 1963, the Tribe revised its membership criteria to require one quarter or more degree of Seminole Indian blood to be eligible to enroll.<sup>175</sup> Today, to enroll in the Seminole Tribe, three criteria must be met. First, an individual must have “a direct relationship to a Seminole who is listed on the 1957 Tribal Roll.”<sup>176</sup> Second, the person’s blood quantum must be no less than one quarter, “which indicates that she is no more than a single generation removed from the cultural heritage.”<sup>177</sup> And third, “the applicant must be sponsored for membership by a current Tribal member and accepted by vote of the Tribal Council.”<sup>178</sup>

The Seminole Tribe’s Department of Anthropology & Genealogy provides a nuanced explanation for these requirements. It begins by noting that blood quantum itself has “only a limited value . . . .”<sup>179</sup> Its purpose is not to enforce biological coherence or genealogical purity, but rather to track proximity to the tribe’s political formation in 1957 as well as current connection to the tribal community. As the Department states, “[i]n the final analysis, [] all of these criteria are dependent upon a single criterion: group recognition . . . . [I]f the group recognizes you as a member, you are a member and, if they do not, you are not.”<sup>180</sup> In this context, as the Tribe makes clear, the blood quantum requirement is not a proxy for race; it is a proxy for connection and belonging.

The Tribe could adopt other criteria that would accomplish the same goals, including residence requirements, cultural or linguistic orthodoxy requirements, or the “public will of the group.”<sup>181</sup> But the blood quantum requirement, which essentially requires a familial tie to the previous generation of tribal members, maintains the Tribe’s relationship to its indigenous heritage, which its people fought for centuries to keep alive. To the Seminole, diluting the one quarter blood quantum requirement would be tantamount to conceding their assimilation into non-Indian society just at the point when their self-governing powers and separate status are safe from attack: “[w]hat all of the wars and treaties and diseases could not

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<sup>174</sup> CONST. & BYLAWS SEMINOLE TRIBE FLA. of Aug. 21, 1957, *available at* <http://Thorpe.ou.edu/IRA/flsemcons.html>.

<sup>175</sup> See Kersey, Jr., *supra* note 143, at 307, citing CONST. AND BYLAWS OF THE SEMINOLE TRIBE OF FLA. (as amended), U.S. Dept. of Int., Bureau of Indian Affairs, (D.C., 1967).

<sup>176</sup> See generally SEMINOLE TRIBE FLA., *supra* note 171.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See *id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *id.*

accomplish—the destruction of the Seminoles—would be accomplished now, for the sole sake of a misperceived political expediency.”<sup>182</sup>

The Seminole Tribe’s explanation also acknowledges the troubled history of the Federal Government’s use of blood quantum requirements. Tribes themselves had no need for such criteria prior to European contact. In pre-contact times, membership was not fixed by colonial processes aimed at accounting for and eventually shrinking their populations.<sup>183</sup> Rather, “Indian groups were distinct, and controlled their own memberships absolutely, and admitted or rejected whomsoever they pleased.”<sup>184</sup> It was the United States that first imposed blood quantum requirements on tribes, focusing on “this single criterion, and [taking] it out of the context of the numerous criteria that the Indians themselves used, and assigned to it an unrealistic degree of importance . . . .”<sup>185</sup> The Seminole Tribe does not use blood quantum in this reductive way, to sort Indians from non-Indians for the purpose of federal control. Rather, the Tribe is clear that it is a tie to the Seminole Tribe, its place, and its culture that matters. A close familial tie is one part of that assessment, but not an on/off switch for being considered Indian.

The strong sense that emerges from the Seminole Tribe’s explanation of its membership rules is that they aim to ask one core question: are you truly a part of our unique Seminole community that has survived despite the odds, or would allowing you to join be a small step backward toward the abandoned goal of eliminating us? While the criterion of “blood quantum” is part of the equation, it is used to ensure a connection to a political community (defined at the moment of legal recognition of the Seminole Tribe in 1957) and to perpetuate the cultural norm of group determination of membership.

The Miccosukee Tribe has published less about its membership criteria, but the aims appear similar from the face of the Tribe’s rules. When the Miccosukee Tribe achieved recognition in 1962, the Constitution established membership criteria for the six-month period after ratification and approval. These were: (1) that all adults and children of one-half degree or more Miccosukee Indian blood would be eligible for membership; (2) that all children of one-half or more Miccosukee Indian blood born to members of the Tribe were eligible; and (3) that all adults or children of less than one-half degree Miccosukee blood who apply for membership and have their applications approved may join the Tribe.<sup>186</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> For more on this process generally, see *Inextricably Political*, *supra* note 2.

<sup>184</sup> See SEMINOLE TRIBE FLA., *supra* note 171.

<sup>185</sup> See *id.*

<sup>186</sup> CONST. MICCOSUKEE TRIBE OF INDIANS FLA., Art. 2, § 1, available at

Today, Miccosukee membership “is open to individuals who have Miccosukee mothers and are not enrolled in any other Tribe.”<sup>187</sup> The Tribe follows its traditional matrilineal system of inheritance and kinship, and therefore children are born into their mother’s clan, from which they gain status in the Tribe. The Tribe’s web site also mentions that the “Miccosukee Service Area is composed of Tribal members and their families, independent Miccosukees, Seminoles and other Indian families residing along the Tamiami Trail from Miami to Naples. The total population of the Miccosukee Service [A]rea is about 640.”<sup>188</sup> In other words, the Miccosukee Tribe serves an indigenous population broader than the Tribe’s membership.

The Seminole and Miccosukee Tribe’s membership criteria reflect the road they have traveled to become federally recognized tribes. The use of close ancestry (or “blood quantum”) requirements is an effort to maintain their indigenous identities despite the many attempts that have been made to eliminate them as separate peoples, which included lumping them with the Creeks for the expedience of invading Florida, removing them to the Indian territory, and attempting to terminate their political relationship with the Federal Government.<sup>189</sup> As expressed by the Seminole Tribe, the requirement of one degree of removal from a relative who is a tribal member reflects a desire to keep an intact community that knows its culture and history, and can perpetuate both.<sup>190</sup> The Miccosukee Tribe’s matrilineal descent requirement reflects the same goals.<sup>191</sup>

They may seem anathema to liberal consent-based theories of democratic communities, but American Indian tribes’ ancestry requirements reflect efforts to reclaim group identities that were assailed until the contemporary era. Until very recently, the overarching logic of U.S. policies toward indigenous peoples was to eliminate them.<sup>192</sup> Tribes were inconvenient barriers to non-Indian settlement and access to natural resources.<sup>193</sup> Now, federally recognized tribes have some assurance that they can continue as separate sovereigns to chart their own economic and

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<http://www.indigenouspeople.net/micconst.htm> (the site labels the Miccosukee Constitution as the “Constitution of the Miccosukee Nation,” but the Tribe’s legal name is Miccosukee Tribe of Indians of Florida, as evident in the Constitution itself).

<sup>187</sup> *Tribal Programs and Business*, MICCOSUKEE TRIBE FLA., <http://www.miccosukee.com/tribe> (last visited Mar. 3, 2014).

<sup>188</sup> *Id.*

<sup>189</sup> *See supra* Part II.

<sup>190</sup> *See* SEMINOLE TRIBE FLA., *supra* note 171.

<sup>191</sup> *See* MICCOSUKEE TRIBE FLA., *Tribal Programs & Business*, *supra* note 187.

<sup>192</sup> *See Inextricably Political*, *supra* note 2; Wolfe, *supra* note 1.

<sup>193</sup> *See Inextricably Political*, *supra* note 2; *see also* Krakoff, *Settler Colonialism and Reclamation*, *supra* note 2.



cultural futures. For those futures to be *tribal*, however, some tie to a tribe's pre-contact roots is necessary as are contemporary membership criteria that reflect the tribe's own norms for inclusion. Those can and do vary, with some tribes relying only on lineal descent from an historic group and others, like the Seminole and Miccosukee, requiring closer ties.<sup>194</sup> Tribal histories regarding their paths to federal recognition also make clear, however, that by the time a tribe achieves that status, its members already reflect a mix of identities—linguistic, ethnic, and otherwise.<sup>195</sup> Tribes' membership rules are therefore not "racial" in either a biological or a socially constructed sense, except insofar as they inevitably reflect the ways that tribes and Indians themselves were racialized by U.S. laws and policies. The best, and perhaps only, way to reverse that process of subordination is to allow tribes today to define their members free from non-Indian constraint. Leading Lakota intellectual and scholar Vine Deloria, Jr. advocated a similar position when he remarked, "[b]efore the white man can relate to others he must forego the pleasure of defining them."<sup>196</sup>

#### IV. EQUAL PROTECTION AND JUDICIAL REVIEW: DOING THE LEAST HARM

As discussed in Part II, in *Adoptive Couple v. Baby Girl*, the Supreme Court expressed "equal protection concerns" about the prospect of a child who was eligible for enrollment in an Indian tribe being unavailable for adoption to non-Indians.<sup>197</sup> The Court's several references to Baby Veronica's "1.2%" Cherokee lineage give the impression that the Court's concerns arose due to a perception that the child was not really Indian.<sup>198</sup> As the foregoing histories reveal, the recurring enemy to American Indian tribal existence has been non-Indian power to set the terms of their identity. If tribes could not be eliminated through disease and violence, then removal and containment might do the job. When these policies failed to eradicate all tribes, efforts to assimilate them out of existence, including unilaterally imposing membership requirements, became a dominant strategy.<sup>199</sup> More recently, during the era of termination, the Federal Government opted for ending the separate political status of tribes through a variety of legal

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<sup>194</sup> While it is beyond the scope of this article to discuss in detail, tribes in the Southeast might have gravitated toward tighter membership requirements in response to a wave of non-Indians who claimed Indian identity for a variety of fraudulent or spurious purposes. See MILLER, *supra* note 172, at 8.

<sup>195</sup> See *supra* Part II; see also *Inextricably Political*, *supra* note 2.

<sup>196</sup> DAVID R. ROEDIGER, *THE WAGES OF WHITENESS* 93 (1991) (quoting Deloria, Jr.).

<sup>197</sup> See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

<sup>198</sup> See *id.* at 2556.

<sup>199</sup> For more on allotment and assimilation policies and their relationship to racial formation in the Indian context, see *Inextricably Political*, *supra* note 2, at 1065-75.

mechanisms, a sublimely bureaucratic approach to eliminating tribes. The Court, by questioning Baby Veronica's Cherokee identity and intimating that it might be tantamount to an invidious racial classification, unwittingly echoes the logic and policies of American Indian elimination.

Unguided judicial scrutiny of classifications that *further* the unique government-to-government relationship with American Indian tribes is more likely to perpetuate the subordination of Indian people than to reverse it.<sup>200</sup> Instead of regressing in this way, the Court should adhere to *Mancari*. As the histories of the Seminole and Miccosukee Tribes indicate, federally recognized tribes are indeed political bodies, and their members are ethnically, linguistically, and even racially diverse, reflecting their varied histories of evolving from pre-contact peoples to present-day tribes. Further, the Seminole and Miccosukee Tribes' federally recognized status depends not only on their ties to an aboriginal people, but equally on their political and strategic responses to policies of elimination. Proving the point, the Independent Seminoles of Florida are just as indigenous as the Miccosukee and Seminole Tribes, but the Independent Seminoles have chosen not to seek federal recognition on cultural and political grounds. The distinction between the Independent Seminoles, and even among the Miccosukee and Seminole Tribes, is therefore political, not racial or ethnic, even while the composition of all of these groups also reflects *both* how U.S. policies deployed race in the American Indian context, *as well as* the tribes' continuing connection to their aboriginal roots.

The Supreme Court's constitutional concern in *Adoptive Couple v. Baby Girl*, to put it bluntly, is that questionable Indian ties will be used to gain strategic advantage in custody and adoption cases.<sup>201</sup> In lower court cases, there is an analogous narrative emerging in the context of economic regulation. In *KG Urban Enterprises, LLC v. Patrick*, a case percolating through the federal courts, a non-Indian gaming company challenged a Massachusetts law on equal protection grounds.<sup>202</sup> The case is procedurally

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<sup>200</sup> Under the *Mancari* framework, courts already have the tools to scrutinize legislation that discriminates against Indian people on the basis of their race, as well as to question federal legislation that *does not* further the government's unique obligations to tribes. The Court can also, under existing law, exercise its power of judicial review to nudge Congress to live up to its trust obligations. See *Inextricably Political*, *supra* note 2, at 1122 n.490 (and sources cited therein). That the Court does not do so, and in fact has regressed on this front in recent years, provides yet another reason to adhere to formulations that restrain the Court from unguided intermeddling.

<sup>201</sup> The Court says as much. See 133 S. Ct. at 2565:

[U]nder the State Supreme Court's reading, the [ICWA] would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian . . . . [A] biological Indian father could abandon his child *in utero* and refuse any support for the birth mother . . . and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests.

<sup>202</sup> See *KG Urban Enters. LLC v. Patrick*, No. 11-12070-NMG, 2014 WL 108307 (Jan. 9, 2014),

complex, but the gist of *KG Urban*'s claim is that the law discriminates on the basis of race because it affords priorities to federally recognized tribes that, pursuant to the Indian Gaming Regulatory Act, might enter into a gaming compact with the State.<sup>203</sup> So far, *KG Urban* has been losing on the merits, but its narrative of tribes as racial, as opposed to political groups, has crept into the courts' discussions. First, the district court rejected *KG Urban*'s equal protection claim on the grounds that *Mancari* controlled, but only after questioning *Mancari*'s reasoning and continuing relevance. The district court described tribes as being composed of members who share "racial heritage," and then mused that if it could do so, "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>204</sup> As I have discussed elsewhere, this multi-tiered approach would be a mistake. It would license federal courts to impose stereotypical views on tribes, in particular the dated notion that tribes' only legitimate projects pertain to land or culture.<sup>205</sup> Fortunately, the district court could only engage in wishful thinking along these lines. Constrained by *Mancari*, it ruled against *KG Urban* on its equal protection claim.

The First Circuit largely affirmed the lower court's decision to reject *KG Urban*'s claims, but revived a narrow version of *KG Urban*'s equal protection challenge, directing the district court to consider whether the Massachusetts law would violate *KG Urban*'s constitutional rights if the State's waiting period for determining whether the Mashpee Tribe could meet the IGRA requirements was unduly long.<sup>206</sup> On remand, the district court again rejected *KG Urban*'s equal protection claim, but accepted its framing of the question to be addressed: does the Massachusetts law, either expressly or as applied, discriminate on the basis of race by anticipating the possibility of a gaming compact with a federally recognized tribe? The district court, throughout the opinion, equates mention of the Mashpee Tribe with possible evidence of "discriminatory intent."<sup>207</sup> In the end the district court found no evidence of such intent, but it skipped entirely over an important threshold question: why should a state law that treats federally recognized tribes in distinct ways in the economic context be analyzed through the lens of racial discrimination? Such state laws may or may not be good policy; they may or may not be rational. But states are generally

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on remand from 693 F.3d 1 (1st Cir. 2012).

<sup>203</sup> See *KG Urban Enters., LLC, v. Patrick*, 693 F.3d 1, 12 (2012).

<sup>204</sup> *KG Urban Enters., LLC v. Patrick*, 839 F. Supp. 2d 388, 404 (D. Mass. 2012) *aff'd in part, vacated and remanded in part*, 693 F.3d 1.

<sup>205</sup> See *Inextricably Political*, *supra* note 2, at 1127-28.

<sup>206</sup> See 693 F.3d at 24-28.

<sup>207</sup> See *KG Urban Enters., LLC*, 2014 WL 108307 at \*9-10.

given wide leeway to make distinctions between economic actors without being subject to heightened judicial scrutiny. One problem for the district court was some confusion in the First Circuit opinion concerning when states, as opposed to the Federal Government, can enact legislation that affects tribes.<sup>208</sup> That line of cases has generally addressed state legislation that has intruded into tribal sovereign powers.<sup>209</sup> States lack the authority to pass laws that impinge on tribal inherent powers, and this has been true since Chief Justice John Marshall penned *Worcester v. Georgia*.<sup>210</sup> If states pass laws that *accommodate* tribes as governments, including as governments with inherent power to engage in economic activity, it may well be the case that other economic actors are disadvantaged, but that disadvantage is not a result of racial discrimination by the State. Yet if *KG Urban* and its lawyer, Paul Clement, have their way, that is the approach that the Supreme Court may someday consider.

In *Adoptive Couple*, the Court implicitly disparaged Cherokee membership rules because they define too many people as “Indian” in a way that deprives them of the opportunity to be adopted out to white families. In *KG Urban*, the district court assumed that treating a tribe differently from other economic groups was the same as “discriminating on the basis of race.” These cases indicate that the effort to equate, in the public mind, classifications that further the political independence of tribes with invidious racial classifications has been succeeding. This effort resonates disturbingly with the ways that Indian tribes and people have been racialized throughout our history. The stereotypical Indian is dressed in traditional garb, lives in harmony with nature (or, in the negative version, is a savage of the wilderness), and has an ethereal (or wicked) and, in either case, largely silent demeanor. Anything other than this “full blood” vision is not truly Indian. The narrative of the disappearing full-blooded Indian justified severing Indians from their land and resources, and facilitated non-Indian settlement.<sup>211</sup> The flip side of this is that today’s tribes, especially if they engage in mainstream economic activity, are not really “tribes,” but amalgams of racially-related opportunists getting a leg up on non-Indian competition. Both stereotypes should be rejected, and at a minimum, should not undergird doctrinal shifts that would allow for subjective judicial review of classifications that, finally in recent times, have aimed to reverse our sorry history of attempts to eliminate Indian tribes and people.

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<sup>208</sup> See 693 F.3d at 19-23.

<sup>209</sup> See *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).

<sup>210</sup> See 31 U.S. 515 (1832).

<sup>211</sup> For more on the broad deployment of Native stereotypes throughout American legal thought, see ROBERT WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1992).

## CONCLUSION

Florida's American Indian tribes, like all American Indian tribes, are political entities that evolved from pre-contact peoples to governments recognized under United States law. The classification "federally recognized tribe" is political, at a minimum, because it reflects that process. For the Seminole and Miccosukee Tribes, the long road to federal recognition included evolving from pre-contact and Creek peoples to a people distinctly known as Seminole, and then resisting repeated (and often violent) efforts to eliminate them from the State. That today there are three federally recognized tribes composed of Seminole people (two in Florida and one in Oklahoma) and one unrecognized tribe is further evidence that the distinctions among, and between tribes, are political. The Seminole people in all four tribes have much in common linguistically and culturally, but political and strategic responses to efforts to eliminate them resulted in the tribes' different statuses and geographies. Finally, the Seminole Tribes, like all tribes, have members who derive from a variety of ethnic and cultural backgrounds. Tribes, and especially federally recognized tribes, are political in all of these senses.

Federally recognized tribes, including the Seminole and Miccosukee Tribes of Florida, are required by federal law to have membership rules. Those rules reflect the tribes priorities with respect to maintaining their cohesiveness as a group, perpetuating their norms and customs, and encouraging participation in governance, among other factors. The Seminole and Miccosukee Tribes meet these goals through membership criteria that require relatively close familial ties to tribal members (at least one grandparent, in the case of Seminole, and a mother, in the case of Miccosukee), as well as acceptance by the Tribe. Other tribes, like the Cherokee Nation of Oklahoma, have opted for more expansive membership rules, requiring only lineal descent from certain census rolls. Regardless of the form, membership criteria are political expressions of the tribe's priorities for perpetuating itself as a distinct people. Further, because ties to an aboriginal people are required for federal recognition, tribes may have to include at least lineal descent from an historic group to maintain their separate status.

To summarize, the classification "federally recognized tribe" is political, and tribes' membership rules are political. Today, our laws and policies reflect the overdue priority of supporting tribes as independent, self-governing sovereigns. But those policies risk being undermined by the judicial branch if its bout of "constitutional concern" gets any worse, and it licenses judicial review of laws that further the government's unique obligations to tribes. Perhaps telling the Seminole story will make some bit of difference. For those who are not optimists about influencing the Court,

a larger solace is that the Seminole—the Unconquered People—will surely find a way to survive nonetheless.