2011

The Promise of Mancari: Indian Political Rights As Racial Remedy

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THE PROMISE OF *MANCARI*: INDIAN POLITICAL RIGHTS AS RACIAL REMEDY

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In 1974, the Supreme Court declared that an Indian employment preference was based on a "political rather than racial" classification. The Court's framing of Indianness as a political matter and its positioning of "political" and "racial" as opposing concepts has defined the trajectory of federal Indian law and influenced common sense ideas about what it means to be Indian ever since. This oppositional framing has had specific practical consequences, including obscuring the continuing significance of racialization for Indians and concealing the mutually constitutive relationship between Indian racialization and Indian political status. This Article explores the legal roots of the political classification doctrine, its ongoing significance, and the descriptive limits and normative consequences of the ideas that it contains. Specifically, this Article argues that the political classification doctrine constructs race as an irrelevant matter of ancestry and Indianness as a simple matter of civic participation. This Article suggests a new framework for considering Indian issues and federal Indian law that draws on a more robust and realistic understanding of both race and Indianness to acknowledge the cyclical relationship between Indian racialization and Indian political status.

 Associate Professor, University of Nevada, Las Vegas–Boyd School of Law. I am grateful to UCLA School of Law and the Critical Race Studies Law Teaching Fellowship for their support of this project; Neelum Arya, Asli Bâli, Jessica Cattelino, Devon Carbado, Reid Chambers, Bob Clinton, andré douglas pond cummings, Nicholas Espíritu, Matthew Fletcher, Carole Goldberg, Neil Gotanda, Sora Han, Jerry Kang, Hiroshi Motomura, Priscilla Ocen, Kim Pearson, Gowri Ramachandran, Angela Riley, Russell Robinson, Harry Sachse, Rob Williams, Noah Zatz, and especially Cheryl I. Harris for their comments; Caroline Mayhew and Alison Grigonis for excellent research assistance; Angela Mooney-D'Arcy, Saúl Sarabia, and the participants in the Fifth Annual Critical Race Studies Symposium at UCLA for helping me refine the ideas presented here; and Patrick Naranjo for continuing to guide my work in the right direction.

I received helpful comments when I presented this Article at the 2010 Law and Society Association Annual Meeting, the 2010 Critical Race Theory in Native American Communities Speaker Series at UCLA School of Law, the Fall 2009 Critical Race Theory seminar at U.C. Berkeley School of Law, the Spring 2010 Advanced Critical Race Theory seminar at UCLA School of Law and before the law faculties at Arizona State University, Western State University, University of Nevada, Las Vegas, U.C. Berkeley and Southwestern. I am also indebted to the students in the Fall 2009 Indigenous Peoples, Race, and American Law seminar at UCLA for providing a robust and challenging testing ground for the ideas in this Article.

INTRODUCTION

In Farmington, New Mexico, a town that borders the Navajo Reservation,[1] a long history of hate violence against Indians[2] has

[1] While the Navajo Nation, like other Indian tribes, exercises governmental jurisdiction over its reservation, towns such as Farmington that are located adjacent to reservations are simply local governments operating within a state jurisdictional framework. Although these border towns have many Indian residents and significant interaction with the neighboring reservation communities, they are not areas in which the tribal governments can exert much political or governmental power. For example, policing in Farmington is provided by the city, not the Navajo Nation.

[2] The term "Indian" is a legal term referring to people or groups who fit within a shifting federal definition. Categorization as Indian in a legal sense implicates a range of legal rights and benefits based on the historical relationship between the United States and certain indigenous groups. "Indian" is also a term of common usage, referring to people identified as belonging to the shifting and variously defined Indian racial category. While my intent in this paper is to interrogate the content of the legal usage, I also use the term Indian in this paper to signify the larger, blurrier racial category. I use the terms "Indianness," "indigeneity," and "being Indian" to refer to the sense of belonging, as defined by

earned the town a reputation as "[t]he Selma, Alabama, of the Southwest."[3] In 1974 a group of white high school students burned, tortured, and abandoned the bodies of three Navajo men in a canyon outside of town.[4] In 1997 a Navajo man suffered brain damage when four white men assaulted him.[5] A year later a Navajo man was beaten to death with a shovel and left in a ravine,[6] and in 2000 a Navajo woman was beaten to death with a sledgehammer after she accepted a ride.[7] Two young white men belonging to a gang calling themselves the Krazy Kowboy Killers (KKK) were later convicted in both killings.[8] In 2006 three white men picked up a Navajo man walking home, drove him to the outskirts of town, and beat and robbed him.[9] In 2010 three white men kidnapped a Navajo man and branded a swastika into his arm.[10]

This anti-Indian violence has become normalized in Farmington; attacks on Navajos are so routine among white teenagers that they have a name: "Indian rolling."[11] The institutional response to such

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the self or the community, to a specific tribe or to the broader category of indigenous Americans, a sense of belonging which may not always correspond with legal or racial categorization as an Indian.

3 NEW MEXICO ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, THE FARMINGTON REPORT: CIVIL RIGHTS FOR NATIVE AMERICANS 30 YEARS LATER 10 (2005) [hereinafter THE FARMINGTON REPORT II] (statement of Duane Yazzie, President of the Shiprock Chapter of the Navajo Nation).

4 Susy Buchanan, *Indian Blood*, SANTA FE REP., Feb. 21, 2007, at 13, 18; Dan Frosch, *In Shadow of 70's Racism, Recent Violence Stirs Rage*, N.Y. TIMES, Sept. 17, 2006, at 30; Evelyn Nieves, *In Navajo Country, Racism Rides Again*, SALON (Sept. 2, 2006), http://www.salon.com/news/feature/2006/09/02/navajo/index.html.

5 Buchanan, *supra* note 4, at 16–17.

6 *Id.* at 17.

7 *Id.*; Nieves, *supra* note 4.

8 Buchanan, *supra* note 4, at 17.

9 *Id.*; Frosch, *supra* note 4, at 30; Natasha Kaye Johnson, *Navajo a Hate-crime Victim?*, GALLUP INDEP., June 12, 2006, http://www.gallupindependent.com/2006/jun/061206htcrm.html; Nieves, *supra* note 4; *Edge of the Rez: Racism in Border Towns*, ARIZ. PUB. RADIO (KNAU) (Nov. 13, 2006), http://www.publicbroadcasting.net/knau/news.newsmain?action=article&ARTICLE_ID=995581&sectionID=13.

10 Marjorie Childress, *Swastika Branding in Farmington Part of Ongoing Violence Against Navajo People*, N.M. INDEP., June 7, 2010, http://newmexicoindependent.com/55674/swastika-branding-in-farmington-part-of-ongoing-violence-against-navajo-people.

11 THE FARMINGTON REPORT II, *supra* note 3, at 1; NEW MEXICO ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, THE FARMINGTON REPORT: A CONFLICT OF CULTURES 17–19 (1975) [hereinafter THE FARMINGTON REPORT I]. The normalcy of anti-Indian racism in these communities is apparent in the observation of a regional director of the U.S. Commission on Civil Rights who supervised and directed the second Farmington Report: "It is possible that some white teenagers may not understand that [American Indians] are fellow human beings and somehow think they are of lesser significance. There are people who attack an Indian and don't consider it quite the same as attacking [a member of] another race." Buchanan, *supra* note 4, at 16.

violence has often been indifferent, if not outright hostile.[12] For example, the day after the defendants were sentenced for the 1974 murders, Navajos seeking to protest the verdict were denied a permit because of the annual Sheriff's Posse Parade, which included officers marching in Old West frontier costumes. When the protestors tried to block the parade route, the Farmington police tear-gassed them. Thirty-one Navajos were arrested and one of the Navajo leaders was charged with a felony.[13] Indeed, the City of Farmington routinely over-polices Navajos while under-policing their victimizers: Navajos recount stories of police harassment and disproportionate arrest and incarceration rates, coupled with poor police responses to their reports of violence and harassment by others.[14]

In Bismarck, North Dakota, a city that lies between the Fort Berthold and Standing Rock reservations, Indian youth have an arrest rate four times that of the general population and a detention rate three times that of the general population.[15] Once in custody, Indian youth remain confined longer than non-Indian youth.[16] The majority of confinements, however, are for property, drug, or alcohol-related offenses, not violent crimes.[17] The North Dakota statistics mirror national trends: Indians have disproportionately high rates of arrest, detention, and incarceration, and these disparities are at their worst in border communities, the predominantly non-Indian towns that border Indian reservations.[18] Indian youth are overrepresented at every stage

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12 A former mayor of Farmington exemplified this institutional hostility when he said in an interview that Navajos "[have] culturally not come in to join what we call modern society. . . . [T]hey haven't been educated to do it. They're not equipped to do it. They're very backward." Buchanan, *supra* note 4, at 18 (quoting 2002 documentary interview of former Mayor Marlo Webb); *see also* DEAN CHAVERS, RACISM IN INDIAN COUNTRY 59 (2009) (describing history of anti-Indian violence in Farmington and attributing the same quote to former Mayor Webb). *But see* John Christian Hopkins, *Past Words Come Back To Haunt Ex-Mayor*, GALLUP INDEP., Feb. 2, 2007, *available at* http://www.gallupindependent.com/2007/feb/020207jch_pastwordsexmayor.html (noting that Webb questions the accuracy of this quotation).

13 THE FARMINGTON REPORT I, *supra* note 11, at 9–10.

14 THE FARMINGTON REPORT II, *supra* note 3, at 17–18, 49; THE FARMINGTON REPORT I, *supra* note 11, at 6–7, 47–48, 63–65.

15 MARK MARTIN, ASSESSMENT OF OVER-REPRESENTATION OF NATIVE AMERICAN YOUTH IN THE JUVENILE JUSTICE SYSTEM 15, 18 (2002).

16 *Id.* at 27.

17 *Id.* at 15.

18 *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 18–21 (2009) (statement of Barry Krisberg, President, National Council on Crime and Delinquency). For example, in Farmington in 2003, Indians represented 17% of the population but 57% of all arrests and 78% of arrests for liquor law violations. THE FARMINGTON REPORT II, *supra* note 3, at 16. In Minnesota, Indians are only 11.5% of the population but account for over 50% of arrests. AM. INDIAN POL'Y CTR., SEARCHING FOR

in the justice system, including arrests for certain offenses, such as alcohol-related offenses, referral to court, secure confinement, and transfer into the adult system, yet they are underrepresented among those who commit serious offenses.[19] Again, the starkest disparities are found in border communities.[20]

In Northern Wisconsin, near the Lac du Flambeau Reservation, federal courts in the 1980s confirmed the treaty-protected rights of tribal members to fish free from state regulation on lands that Great Lakes Chippewa tribes had ceded to the U.S. as part of the treaty.[21] As a practical matter, this meant that Lac du Flambeau tribal members could fish at times and using methods that were prohibited for nonmember fishers. Groups claiming to represent the local sport fishers organized protests to disrupt Indian fishing. They created dangerous wakes to capsize the fishing boats, harassed fishers and their families, and posted signs advertising the "First Annual Indian Shoot" and bumper stickers reading "[s]ave a fish, spear an Indian" and "[s]ave two walleye, spear a pregnant squaw."[22]

Each of these stories demonstrates the continuing effects of racism on Indian people today. While it may not always be clear whether anti-Indian sentiment is rooted in racism as opposed to cultural or political tension, I argue that racial subordination is a critical factor in understanding anti-Indianism today.[23] Yet legal scholarship

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JUSTICE: AMERICAN INDIAN PERSPECTIVES ON DISPARITIES IN MINNESOTA CRIMINAL JUSTICE SYSTEM 13 (2005). They are also more likely to be involved in traffic stops but less likely to possess contraband. *Id.*

19 NEELUM ARYA & ADDIE C. ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 7–9 (2008); NAT'L COUNCIL ON CRIME & DELINQUENCY, NATIVE AMERICAN YOUTH AND THE JUVENILE JUSTICE SYSTEM 1 (2008).

20 ARYA & ROLNICK, *supra* note 19, at 21–24.

21 Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 365 (7th Cir. 1983).

22 LAWRENCE D. BOBO & MIA TUAN, PREJUDICE IN POLITICS: GROUP POSITION, PUBLIC OPINION, AND THE WISCONSIN TREATY RIGHTS DISPUTE 1–3 (2006).

23 While no single test determines whether a group qualifies as a racial group, several factors stand out as common indicators of racial minority status. First, the group in question is usually associated with a distinct phenotype and ancestral background, although members of the group need not share the phenotype with which the group is generally associated. For example, a stereotypical Indian phenotype is caricatured by the Cleveland Indians' mascot, while real Indians demonstrate a range of phenotypes. Second, racial meanings are attached to people based on their membership in the group. These meanings may be legal. For example, Blacks were once legally presumed to be slaves, while whites and Indians were legally presumed free. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 137–39 (1806). Whites were eligible to immigrate and naturalize, whereas Asians were once legally prohibited from doing so. *See* Ozawa v. United States, 260 U.S. 178 (1922) (finding people of Japanese descent ineligible for naturalization because they are not white); Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889) (upholding law that prohibited Chinese laborers residing in the United States from remaining in or returning to

rarely examines the experience of Indians through a racial lens. This Article interrogates this lacuna, tracing it in part to the dichotomy between two different bodies of legal doctrine: constitutional race jurisprudence ("race law") and federal Indian law.

In the 1974 case *Morton v. Mancari*, the Supreme Court declared an employment preference[24] for Indians in the Federal Bureau of Indian Affairs to be "political rather than racial in nature."[25] Although the Court acknowledged that the classification favored people of Indian ancestry, it held that membership in the category "Indian" turned on a person's membership in a federally recognized Indian tribe, not on his or her ancestry. By focusing on the political element of Indianness over the ancestral element, the Court rescued Indian preference laws from the strict Constitutional scrutiny that

United States territory and listing fear of "an Oriental invasion" as one motivation for this and similar laws); Fong Yue Ting v. United States, 149 U.S. 698, 715–17, 732 (1893) (upholding act to exclude Chinese persons from residing in the United States and describing law as driven by racially exclusionary desires); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22 (1998) (describing racial motivation for Asian exclusion laws). Racial meanings may also take the form of stereotypes (for example, Asian is associated with "good at math"). *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005) (describing stereotypes and prejudice as racial meanings triggered once a person is mapped into a racial category); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–98 (1995) (describing cognitive dimension of racial stereotypes). Third, racial meanings contribute to specific instances of discrimination, such as police profiling or hate violence, in which a member of the group is targeted based largely on a presumption of group membership and the meanings attached to that group (for example, Black people may be stereotyped as criminals, and Middle Eastern people may be stereotyped as Muslim terrorists). Fourth, the group may suffer disproportionately from other forms of structural inequality resulting from systematic racism, such as poverty, poor educational and health outcomes, and high rates of incarceration. According to each of these factors, Indians qualify as a racial group.

[24] I avoid using the term "racial preference" in this paper to refer to affirmative action policies because I wish to emphasize the role of these policies in correcting structurally embedded preferences for whites. *See generally* Devon W. Carbado and Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139 (2008). The same analysis can be applied to laws that give priority to Indians in federal employment in order to correct for structural and historical disadvantaging of Indians. However, for the sake of clarity I adopt the term "Indian preference" here because it is the term most commonly used by Indian advocates, though I reserve my critique of this term for a later project.

[25] 417 U.S. 535, 553 n.24 (1974). *See infra* Part I.A for a detailed discussion of the case.

would soon be applied to race-based affirmative action laws,[26] thereby introducing the political classification doctrine.[27]

Although the *Mancari* opinion itself leaves room for several different interpretations of the relationship between Indian race and Indian political status, it has since been invoked to stand for the idea that Indian refers solely to a political category.[28] That is, being Indian is a matter of membership in a political group, a status that is framed as oppositional or unrelated to race. Federal Indian law—the body of federal statutes, court decisions, and regulations that recognizes the unique legal status of Indian nations and authorizes special rules or benefits for Indians because of that unique status—has been upheld against constitutional challenges based in part on this idea.[29] Although civil rights doctrine recognizes Indian as a racial classification as well,[30] the privileging of Indian political status obscures the significant

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[26] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying strict scrutiny standard to an affirmative action plan for government contracts); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.) (holding that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" and striking down the medical school's special admission program on this ground).

[27] The *Mancari* decision does not actually employ the term "political classification," describing the rule as concerning only "participation by the governed," and not "'racial' preference[s]." 417 U.S. at 553–54. The term "political classification" was subsequently adopted as a description of the Court's holding in *Mancari*. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 542 n.14 (2000) (Stevens, J., dissenting) ("[T]he majority's concern . . . becomes salient only if one assumes that something other than a *Mancari*-like political classification is at stake."); Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 734 (9th Cir. 2003) ("Our early discussions of *Mancari* suggested that, so long as a federal statute evinced a rational relationship to Congress's trust obligations toward the Indians, it involved political classification, so rational-basis review was appropriate."); William C. Canby, Jr., *The Concept of Equality in Indian Law*, 85 WASH. L. REV. 13, 16 (2010) ("The Court upheld the preference, holding that the preference did not constitute racial or ethnic discrimination, but was a political classification reflecting the relationship between the federal government and recognized Indian tribes.").

[28] *See infra* Part I.D (discussing how *Mancari* has been interpreted in subsequent Indian law cases).

[29] *See, e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480 (1976) (rejecting race-based challenge to legislation singling out Indians as foreclosed by *Mancari*); United States v. Antelope, 430 U.S. 641, 645 (1977) ("[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions.").

[30] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14 (Nell Jessup Newton ed., 2005) (cataloguing application of anti-discrimination laws to Indian people); *see, e.g.*, Eakerns v. Kingman Reg'l Med. Ctr., No. CIV 06-3009-PHX-SMM, 2009 WL 735148, at *17 (D. Ariz. 2009) (allowing Indian plaintiff to proceed on a race discrimination claim under Title VII); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385, 1392–94 (W.D. Wis. 1992) (finding in favor of Indian plaintiffs on a claim of race discrimination under 42 U.S.C. § 1982).

effects of racialization[31] on Indians today. The political classification doctrine reflects and entrenches a discursive gap between Indian law, which focuses on the group rights of political entities, and race scholarship, which focuses on the individual rights of racial minorities.[32] Because of this gap, Indian racialization is under-theorized[33] and under-addressed.[34] This explains in part why the stories recounted here may not be readily legible as racial subordination.

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[31] I use the term "racialization" to refer to a discursive process by which particular groups have been classified as non-white, specific meanings have been attached to those groups, and those meanings have been used to support the hierarchical distribution of power, land, and resources. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994) (discussing process by which the concept of race is constructed and thereby shapes identities and institutions). On an individual level, racialization also requires the classification of a particular person as a member of a specific racial group, a process Jerry Kang describes as "mapping." Kang, *supra* note 23, at 1499. A variety of factors may be used to map people into racial categories, including but not limited to, ancestry, phenotype, and biological characteristics. *See generally* Devon W. Carbado & G. Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001) (discussing theory of "identity performance," which recognizes that racial discrimination is based not just on phenotypic difference but also on how one chooses to present such difference, including factors such as dress or hairstyle). For an expanded discussion of racialization, see *infra* Part II.A.

I use "race" in this paper to describe the social category that results from racialization. Because of its importance as a force of hierarchical social organization, I do not view race as an irrelevant category of analysis even though it refers to a socially constructed, imposed identity. In my view, race continues to be important as a matter of commonly understood hierarchies, social organization, individual identity, and political power. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991) (critiquing the "vulgarized social construction" thesis and noting that "to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world"). Moreover, the various factors that have been assigned racial meanings—such as skin color, ancestry, and culture—remain important to people for a variety of reasons not necessarily linked to the creation of hierarchies.

[32] *See infra* Part I (comparing Indian law and race law).

[33] *See* J. KEHAULANI KAUANUI, HAWAIIAN BLOOD 10–11 (2008) (critiquing critical race theorists for insufficiently interrogating the relationship between Indian racialization and land dispossession); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1290 (2002) ("[O]ur national understanding of Black history and contemporary reality . . . is far more complete than our understanding of the history and contemporary reality of Native Americans."). This is not intended to suggest that the racial oppression of Indians is worse than that experienced by other groups. *See id.* at 1289–90 (discussing difficulties inherent in assigning hierarchies of oppression).

[34] Federal Indian law scholars tend to avoid discussion of Indian racialization, casting race as a constructed and imposed identity and emphasizing tribal affiliation and sovereignty as the most significant aspects of Indianness. *See, e.g.*, Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373, 1374, 1389 (2002) (emphasizing that race was a European invention and that individual Indians identify themselves "on the basis of tribal affiliation rather than race"); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 156 (1999) ("The problem, then, with fixating on 'race' . . . is that Indigenous people are thus only perceived

The *Lac du Flambeau* story is illustrative of this effect. The Lac du Flambeau Indians understood the fight over fishing rights as motivated by racism. They sued the protestors, alleging that the protests amounted to a racially-motivated civil rights violation. The protestors maintained, however, that it was opposition to unfair spearing activities, not racial animus, which motivated their actions. They insisted that their anger was directed at the political advantage that Indians had by virtue of their status as tribal members. It was the advantage they resented, not the Indians *qua* Indians.[35] The protesters also saw themselves as champions of equality, arguing that "an exclusive right to engage in hunting and fishing activity claimed by a political entity has no bearing on 'equality between persons of different races'" and so could not be the basis of a civil rights claim.[36] The protestors' claims—that anti-Indian violence is not racism, and that political rights have nothing to do with racial equality—reflect the oppositional framing of race and political rights embedded in the political classification doctrine.

Another consequence of this gap is that legal and political advocacy on Indian issues, which proceeds under the banner of tribal sovereignty, is separate from and sometimes at odds with the advocacy efforts of other racial groups, which are often asserted under the banner of civil rights. This can make forming coalitions among minority groups difficult and can obscure important similarities in the way racialization has affected different minority groups.[37]

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by American society in terms of race. This is true notwithstanding the fact that many of these discussions about 'race' actually focus on concerns about Indigenous sovereignty and self-government.").

[35] *Lac du Flambeau*, 781 F. Supp. at 1393.

[36] *Id.*

[37] One illustration of how Indian interests are positioned against the interests of other racial groups appears in the recent debate over federal rules concerning eligibility for federal contracting set-asides for small and disadvantaged businesses (known as 8(A) contracts). Under current rules, tribal corporations and Alaska Native Corporations (ANCs) are eligible for 8(A) contracts. Groups representing non-Indian minority contractors sought to change the rules because they perceived tribes and ANCs to be unfairly benefitting at the expense of other 8(A) firms. These groups argued that inclusion of tribes and ANCs in the 8(A) program is based on their political status, so they do not represent the kind of "socially and economically disadvantaged" small businesses that the program was intended to benefit, while Indian advocates argued that tribes and ANCs were properly included in the 8(A) program because federal contracting benefits have helped strengthen tribal economies and because tribal groups have been historically underrepresented in federal contracting. *Compare* Public Comments from Rudy Sutherland, to Joseph Loddo, Associate Administrator, Small Business Administration, on Proposed Rules: 8(A) Business Development/Small Disadvantaged Business Status Determinations, at 2, 5 (Nov.25, 2009), at http://www.regulations.gov/#!documentDetail;D=SBA-2009-0019-0014 (last visited Aug. 14, 2011) (opposing inclusion of tribes and ANCs in 8(A) program), *with* Nat'l Cong. of American Indians, No. PSP-09-065, at 1–2 (Oct. 16, 2009), *available at* http://

I argue in this Article that the oppositional framing signified by the political classification doctrine, which posits race and Indianness as opposing concepts, contains two distinct corollaries. First, the doctrine equates race with ancestry. Race is viewed as a fixed characteristic, usually reducible to ancestry. It is understood to lack political content and social meaning. Race, therefore, is seen as a classification that is or ought to be irrelevant to important decisions. Second, the doctrine equates Indianness with tribal membership, understood as a simple matter of civic participation. In case law, Indianness is most often signified by formal enrollment in a tribe. Tribal membership is in turn understood as an exercise of political consent and voluntary civic participation. As such, it is nearly indistinguishable from political participation in a local or state government.

These ideas fail to capture the way racialization has functioned for Indian people or what Indianness and tribal belonging mean to the people and communities involved. The understanding of race as an irrelevant matter of ancestry obscures the process of Indian racialization, in which diverse groups of indigenous Americans were classified into a single socially-constructed racial category.[38] Rather than being a simple descriptor of ancestry, Indian racialization has drawn on ideas about culture, religion, savagery, skin color, and ancestry to justify an unequal distribution of power, land, and rights. The oversimplified version of tribal membership that has emerged from efforts to disaggregate race and Indianness obscures the complex dimensions of belonging, including but not limited to ancestry and racialization, that define indigeneity and tribal groups. Finally, the false disaggregation of the racial and the political ignores the cyclical relationship between Indian racialization and Indian political status. That is, the Indian legal category is shaped by racialized ideas about Indians, and Indians' exercise of legally-protected political rights can trigger further racial subordination.

Instead of a framework that disaggregates racial Indianness from political Indianness, I suggest an integrated framework that would begin where *Mancari* left off by recognizing that "Indian" signifies both a racial category and the unique political history of Indian tribes, including their ongoing political relationship with the federal government. This framework would further suggest that the political and racial elements of Indianness are inseparable. That is, Indians belong to a group that has been racialized, and that has a particular political

www.ncai.org/index.php?id=105&selectpro_resid=43 (supporting inclusion of tribes and ANCs in 8(A) program).

[38] *See infra* Part II.A.2 (describing the process and means of Indian racialization).

and historical relationship with the United States government that is inextricably related to this history of racialization. While recognizing and privileging this unique political relationship, an integrated framework would acknowledge that these two statuses (political and racial) are hopelessly intertwined, such that it makes little sense to engage the question of Indianness without at least considering the role of Indian racialization. By linking racial and political Indianness, this framework also facilitates consideration of how tribal political rights counteract anti-Indian racism, in that it connects antiracism with group rights and thereby reveals federal Indian law as a potential doctrinal model for recognizing such rights.

In Part I of this Article, I analyze the development of the political classification doctrine, which constructs "political" and "racial" as opposing concepts, by examining the Supreme Court opinion in *Morton v. Mancari*.[39] I contrast that case with *Regents of the University of California v. Bakke*,[40] a case that arose around the same time from arguably similar factual circumstances. I attempt to place the opinions within the appropriate doctrinal contexts, including both race law and Indian law. I then examine the way that the political classification doctrine has evolved in case law post-*Mancari*, which culminated in the Supreme Court's decision in *Rice v. Cayetano* to overturn a particular classification that applied only to indigenous people of Native Hawaiian ancestry based in part on the conclusion that Hawaiians are not a recognized tribal group.[41]

In Part II, I explore the theoretical underpinnings and consequences of the political classification doctrine. Through a discussion of case law concerning criminal and civil jurisdiction in Indian country, I examine how the doctrine's construction of race as an irrelevant matter of ancestry and Indianness as a simple matter of tribal membership, understood in terms of voluntary civic participation, has permeated Indian law jurisprudence. I argue that the federal definitions of Indianness articulated in these two bodies of law are in tension with tribal ideas, an inconsistency traceable to the influence of the political classification framework.

In Part III, I explore the nuances of an integrated framework that links racism and political rights. Drawing on the Farmington and Lac du Flambeau stories set forth in this introduction, I consider how anti-Indian sentiment today draws on both political and racialized ideas about Indians and how an explanatory framework that privileges one

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[39] 417 U.S. 535 (1974).

[40] 438 U.S. 265 (1978).

[41] 528 U.S. 495 (2000). See *infra* Part I.D for a detailed discussion of *Rice* and its relationship to the political classification doctrine.

over the other is inadequate. I then argue that, in light of the interaction between racial and political Indianness, federal Indian law (and the sovereignty rights it protects) can be understood as an important tool of anti-racism. Drawing on the story of juvenile justice system disparities in North Dakota, I explore a concrete example of how tribal political rights may provide a remedy for a problem that is often framed as one of individual-level racialization.

I do not suggest that Indian law advocates should abandon reliance on *Morton v. Mancari* and the political classification doctrine. A wholesale turn to civil rights doctrine would be unlikely to serve Indian people any better, for it is impossible to acknowledge the link between racial and political that I articulate here without first accepting a more robust definition of race,[42] a step that the Court has so far been unwilling to take. I also recognize that tribes are sovereign political entities and that there are fundamental and important differences between the legal status of Indian tribes and that of other racial groups. More to the point, even after *Mancari*, the legality and legitimacy of federal Indian law continues to be called into question by critics, who seize on the role that ancestry plays in defining who qualifies as indigenous and claim that this invocation of ancestry constitutes a constitutionally impermissible use of race.[43] In light of the Supreme Court's modern race jurisprudence, it has become a necessary legal strategy for Indians to defend their benefits as stemming from the unique political status of Indian tribes, rather than from their race. I seek simply to examine the relationship between Indian racialization and tribal political status, to consider how legal ideology has obscured this relationship, and to explore the anti-racist potential of federal Indian law in light of Indian racial subordination.

I
DOCTRINE: "POLITICAL RATHER THAN RACIAL"

The examples described in the introduction, although probably familiar to many Indian people, are rarely discussed as racial claims.[44]

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[42] *See infra* Part II.A.2 (offering an alternative to the Court's definition of race as an irrelevant matter of ancestry).

[43] *See infra* notes 239–44 and accompanying text (describing challenges to federal laws that employ ancestry-based definitions of "Indian").

[44] In the Lac du Flambeau fishing rights example, the Indians framed their claim as a civil rights issue, and the district court accepted this explanation, granting a permanent injunction under 42 U.S.C. § 1982. *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385, 1392–94 (W.D. Wis. 1992). However, the court of appeals reversed the summary judgment holding, finding insufficient evidence that the harassment was motivated by racism. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249,

In this Part, I explore why Indian racialization is so under-studied.[45] One reason is that legal discourse discourages recognition of Indian racialization by constructing "political" and "racial" as opposing concepts. While it is easy to point to *Mancari* as the moment the Court enunciated this juxtaposition most clearly, *Mancari* is a reflection of a much longer story—one about the divergent development of constitutional race jurisprudence ("race law") and federal Indian law and the contemporary moments in which these two doctrines interact.

A. Morton v. Mancari*: Affirmative Action v. Political Classification*

In order to illustrate the very different doctrinal contours of each legal framework and the consequences of invoking one over the other, it is useful to consider *Morton v. Mancari*[46] alongside a lawsuit that arose under arguably parallel circumstances but was decided using a different legal analytic framework: *Regents of the University of California v. Bakke*.[47]

Mancari was a challenge by white (and other non-Indian) applicants to a hiring preference for Indians within the Bureau of Indian Affairs (BIA), the federal agency charged with overseeing Indian affairs. *Bakke* was a challenge by a white applicant to an affirmative action program for minorities (including American Indians) in admission to a public medical school. In both cases, the programs were intended to counter a history of discrimination against the group in

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1251, 1260–64 (7th Cir. 1993). The Farmington and Wisconsin incidents generated committee reports by the U.S. Commission on Civil Rights, but little or no scholarly attention. *See* THE FARMINGTON REPORT I, *supra* note 11, at 17–19 (1975 report describing racial tension in Farmington, New Mexico); THE FARMINGTON REPORT II, *supra* note 3, at 8–10 (2005 follow-up report describing the persistence of racial tension in Farmington); WIS. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, DISCRIMINATION AGAINST CHIPPEWA INDIANS IN NORTHERN WISCONSIN: A SUMMARY REPORT 1–5 (1989) (recounting threats and harassment directed toward Chippewa Indians following *Voigt* decision).

[45] *See* BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS 2 (2008) ("Scholarly attention to the historical and contemporary victimization of American Indians as nations has unfortunately blinded us to the corresponding victimization of American Indians as individual members of those many nations."). The few legal scholars who explicitly focus on Indian racialization have primarily employed a historical analysis. Most notable among them is Robert A. Williams, Jr., whose work engages Indian law from a Critical Race Theory perspective. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Robert A. Williams, Jr., *"The Savage as the Wolf": The Idea of the Indian on the Frontier Borders of the American Racial Imagination*, 60 W. HUMAN. REV. 9 (2006). Another exception is Bethany R. Berger's insightful article, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009), in which the author argues that the history of racialization of American Indians shaped Indian law and policy.

[46] 417 U.S. 535 (1974).

[47] 438 U.S. 265 (1978).

question: prior to the policies, both the BIA and U.C. Davis Medical School were populated mostly by whites. Under civil service laws, the BIA had largely failed to hire or promote Indian people into powerful positions within the agency.[48] Under the standard medical school application and admission procedures in place at the time, minorities were underrepresented in the medical profession and, after two years of applying its old admissions policy, Davis had admitted very few minorities.[49] While existing selection rules in each case were nominally equal or neutral, each group had been systematically excluded from the institution in question for decades by a combination of formal laws and policies, and social and educational disadvantage. Both policies attempted to correct this discrimination and redress structural inequality by including within the evaluation of qualifications considerations of race or group membership.[50] Each of the challenged policies resulted in significantly greater representation of the group in question.[51]

Both programs were challenged as invidious racial classifications that violated civil rights statutes and the equal protection guarantees of the Fifth and Fourteenth Amendments. In *Bakke*, no one contested that the classification involved race, but the university argued that its program was permissible because it was intended to counter the lingering effects of pervasive historical discrimination, an objective the university argued was sufficiently compelling to withstand the exacting scrutiny due to racial classifications under equal protection doctrine.[52] The Court rejected this justification; it affirmed the lower court's order granting the white applicant admission to the medical school and invalidating the minority admissions program.[53]

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48 *Mancari*, 417 U.S. at 542–45.

49 *Bakke*, 438 U.S. at 272.

50 *See id.* at 273–76 (describing U.C. Davis Medical School's admissions system, which included separate admission program for disadvantaged—meaning minority—applicants); *Mancari*, 417 U.S. at 538, 544 ("[T]he BIA's policy [was] to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.").

51 "The percentage of Indians employed in the BIA rose from 34% in 1934 to 57% in 1972." *Mancari*, 417 U.S. at 545. The 1968 entering class at U.C. Davis included only three Asian Americans and no African Americans, Mexican Americans, or American Indians. *Bakke*, 438 U.S. at 272. After the special admissions program was created, total minority admissions rose to twelve in 1970 and twenty-five in 1974. *Id.* at 276 n.6.

52 *Bakke*, 438 U.S. at 305–06.

53 *Id.* at 320. However, the Court reversed the portion of the lower court's ruling that prohibited the medical school from taking race into account at all in future admissions cycles, holding that race could be taken into account in limited circumstances which I do not discuss at length here. *Id.*

In *Mancari*, the government suggested to the district court that the Indian preference was similarly supported by an important governmental objective.[54] The court was not persuaded by the government's defense of the program, and held that the preference was impliedly repealed by the Equal Employment Opportunity Act of 1972 (EEOA), which prohibited race discrimination in the civil service. The court accepted the plaintiffs' characterization of the preference as racial: the opinion focused on the minimum ancestry requirement used in the classification—characterizing it as a "preference to persons of one-quarter or more Indian blood"[55]—and equated this requirement with race, a criterion it considered irrelevant to employment.[56] The district court did not reach the constitutional question (including the level of scrutiny applicable) but suggested that it also could have held the preference invalid under the Fifth Amendment because the defendants failed to meet their burden of "coming forward with evidence of an important governmental objective."[57]

In the Supreme Court, however, the government adopted a different approach, arguing that the preference was based not on race but on membership in an Indian tribe with a specific political relationship to the United States.[58] The government characterized the preference as an expression of self-government: an effort to increase the

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[54] *See* Carole E. Goldberg, *What's Race Got To Do with It?: The Story of* Morton v. Mancari, *in* RACE LAW STORIES 237, 248 (Rachel F. Moran & Devon Wayne Carbado, eds., 2008) (explaining that, in district court, plaintiff characterized issue as concerning racial classifications and that government announced its intention to offer evidence of important governmental purpose but failed to do so). The Mexican American Legal Defense Fund, which filed an amicus brief in the Supreme Court litigation, characterized the program as an affirmative action program intended to counter the BIA's history of discrimination against Indians. *Id.* at 256.

[55] Mancari v. Morton, 359 F. Supp. 585, 587 (D.N.M. 1973). The BIA rule at issue included a reference to tribal membership as well a reference to ancestry, *see infra* note 71 and accompanying text, but the district court described it as only an ancestry-based classification.

[56] *Mancari*, 359 F. Supp. at 590 n.5 ("There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion."); *see also* Goldberg, *supra* note 54, at 248 (discussing plaintiffs' arguments at trial that sought to emphasize irrelevance of race to employment qualifications).

[57] *Mancari*, 359 F. Supp. at 591.

[58] Goldberg, *supra* note 54, at 253. While this argument was also raised in the lower court, the court dispensed with it in a single paragraph, holding that the history of specific legislation relating to Indian *tribes* "is no reason for a different treatment of Indians generally. Indians as such are not considered to have rights, so far as here pertinent, different from other citizens." *Mancari*, 359 F. Supp. at 591. Where the district court saw no connection between tribal rights and individual Indian rights, the government's appeal intentionally conflated the two. Goldberg, *supra* note 54, at 253 ("The BIA's requirement of one-quarter Indian descent . . . received no attention at all, emphasis being placed

participation of Indians in the agency that governed them.[59] This strategy achieved its intended result: The Supreme Court characterized the policy as an effort to increase the participation of "tribal Indians" in the BIA.[60] It described the purposes of the policy as increasing Indian participation in self-government, furthering the federal government's trust obligation toward Indians, and reducing the negative impact of longstanding non-Indian management of an agency that largely controlled everyday Indian life.[61] Given the different purposes of the Indian Reorganization Act (IRA)[62] and the civil rights law and the long coexistence of the two types of laws (including express exemptions for Indian preference in some civil rights laws), the Court saw no conflict between the EEOA and the Indian preference rule.[63]

As to the constitutional question, the Court again emphasized the importance of the "unique legal status of Indian tribes" and the "*sui generis*" nature of the BIA among federal agencies.[64] Unlike the district court, which viewed the legal status of tribes as unrelated to the legal status of Indians,[65] the Supreme Court viewed the two as inextricably linked. Thus it held that the preference "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference."[66] Instead, the Court framed the preference as a classification "directed to participation by the governed in the governing agency," equating it with the requirement that a Senator reside in the state he seeks to represent or that a member of a city council live in the city governed by the council.[67]

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instead on the requirement that preferred Indians be members of federally recognized tribes.").

59 Goldberg, *supra* note 54, at 253, 257–58.

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

61 *Id.* at 541–42 ("The purpose of these preferences . . . [was] to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.").

62 25 U.S.C. §§ 461–479 (2006). The purposes of the Act included slowing the loss of reservation lands, encouraging tribal sovereignty and self-government, and supporting Indian economic development.

63 *Id.* at 550 ("The [Indian] preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.").

64 *Id.* at 551, 554.

65 *See supra* note 58 and accompanying text (describing district court's view that the unique political status of tribes did not support differential treatment of Indians as individuals).

66 Morton v. Mancari, 417 U.S. 535, 553 (1974).

67 *Id.* at 554.

To support this differentiation between the Indian preference and a racial preference, the Court, aided by the BIA, selectively interpreted the facts of the case to support its own legal fiction, noting that the preference "is not directed toward a 'racial' group consisting of 'Indians'" but "only to members of 'federally recognized' tribes."[68] As Carole Goldberg has pointed out, the IRA actually defined "Indian" as including both people who were members of federally recognized tribes and people who had at least one-half Indian ancestry, regardless of tribal membership.[69] Earlier statutes authorizing Indian preferences relied only on ancestry.[70] In fact, the BIA regulations that gave rise to the suit imposed an additional ancestry requirement: the regulations interpreted the IRA-authorized preference to require one-quarter ancestry from a recognized tribe in all cases, even though the IRA definition of "Indian" would also include a member of a tribe with any amount of Indian ancestry.[71] In other words, earlier definitions did not even mention tribal membership, and the law that was the subject of the suit viewed tribal membership as one option—but not a requirement—for proving legal Indiannness.[72] The updated version of the BIA Manual that was in effect when the case reached the Supreme Court, however, required *both* one-quarter Indian ancestry *and* enrolled membership in a federally recognized tribe. The Court seized on this recently-implemented tribal membership requirement—conveniently ignoring the earlier definitions—to support its holding that the preference was purely political because it applied only to Indians who are members of federally recognized tribes.[73]

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[68] *Id.* at 553 n.24.

[69] The IRA defined Indians as including "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . [and] all other persons of one-half or more Indian blood." Goldberg, *supra* note 54, at 241 (quoting Indian Reorganization Act of 1934, 25 U.S.C. § 479 (2006)).

[70] *See Mancari*, 417 U.S. at 541 (describing an 1834 statute according hiring preference to "persons of Indian descent").

[71] Goldberg, *supra* note 54, at 242. In the IRA definition, *supra* note 69, the tribal membership option also included a separate requirement that the person have some Indian ancestry, but established no fractional floor.

[72] *See* Goldberg, *supra* note 54, at 242 (suggesting circumstances under which non-tribal member Indians could qualify for the preference).

[73] *Id.* at 260–61. Before the Supreme Court opinion was issued, the government filed a motion to amend a lower court opinion in an earlier case regarding the preference. The motion requested that the court change language describing the preference as applying to all those of one-quarter or more Indian blood because such a description would be misleading given the additional tribal membership requirement in the current regulations. *Id.* at 260. In addition to requiring tribal membership in all cases, the revised rule also continued the BIA's previous imposition of a quarter-blood requirement even for those Indians who were tribal members, effectively excluding tribal members with a lower blood quantum who would have qualified under the earlier version. The current BIA rule provides four independent categories under which a person may prove eligibility: membership

Despite their similarities, the remedial program in *Bakke* was characterized as racial while the remedial program in *Mancari* was characterized as non-racial. In order to fully understand the significance of the different legal frameworks underlying the racial versus non-racial distinction in *Mancari* and *Bakke*, it is helpful to situate these cases in the doctrinal and historical context of both race law and Indian law.

B. Contrasting Race Law with Indian Law

Race law and Indian law appear today as two distinct and often mutually exclusive spheres, one dealing with individual inequality and racial classifications and the other dealing with the rights of sovereign governments and political classifications. They are taught in separate law school classes, and in the courts they are explicitly juxtaposed against each other such that the word political is understood to mean nonracial.[74] This compartmentalization is not natural or inevitable. Rather, it is the product of the doctrinal history of each area of law.

Both areas of law have roots in the explicit racialization of a particular group and are concerned in part with remedying the effects of that racialization (slavery and exclusion from citizenship in the case of race jurisprudence; loss of land and denial of sovereignty in the case of federal Indian law), but they have evolved quite differently. Constitutional race jurisprudence began as a context-specific effort to undo the substantive reality of Black inequality and the lingering effects of Black slavery. But it has developed today into an abstract doctrine aimed primarily at eliminating any legal recognition of race (including, in many cases, race- conscious remedial measures) rather than at eliminating the substantive effects of racial subordination.[75]

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in a federally-recognized tribe, descent from a member of a federally-recognized tribe, possession of one-half Indian blood, or membership in an Alaska Native entity. *See* Verification of Indian Preference for Employment in the Bureau of Indian Affairs and the Indian Health Service, Form BIA-4432 (valid through August 31, 2011), *available at* https://www.pmf.opm.gov/documents/bia4432.pdf (last visited Aug. 14, 2011).

74 *See supra* notes 65–66 and accompanying text (discussing *Mancari* Court's definition of political Indiannes as non-racial) and *infra* notes 173–76 and accompanying text (discussing juxtaposition of political against racial in *Rice v. Cayetano*).

75 The meaning of the Fourteenth Amendment's equality guarantee remains contested, and the Supreme Court's interpretation of civil rights statutes differs significantly from its interpretation of the constitutional provisions. *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 111–18 (2010) (discussing how *Ricci* highlighted tensions between Title VII's disparate impact framework and the Fourteenth Amendment's affirmative action framework). The evolution I describe here emphasizes the framework constructed by the Supreme Court's recent racial jurisprudence, which aims to create a society in which racial differences are irrelevant by insisting that we treat race as if it is already irrelevant. *See* Parents Involved

This journey from context and substance toward abstraction and formality has been characterized by a series of nominal rejections of racism and an increasingly ahistorical view.

While race law moved from a concern about historical context and substantive outcomes to a focus on abstract principles and formal equality, Indian law followed a different arc, evolving into a historically conscious and context-specific doctrine. Courts applying Indian law principles today specifically recognize that those principles, including those that might be characterized as "remedial," are required by the specific historical circumstance of U.S.-Indian relations. However, Indian law doctrine involves neither a clear recognition of the role that racialization played in conquest nor a ringing rejection of past racist beliefs. As a consequence, Indian law decisions have continued to rely on crude racialization, both explicitly and implicitly, as a rationale for specific outcomes well after such language of racialization was rejected in race cases.[76]

The following abbreviated history is intended to trace these evolutionary arcs, emphasizing critical differences and contextualizing significant moments for each area of law within the history of the other. My discussion is intentionally oversimplified in order to focus on overall themes and conceptual shifts and to illustrate the historical and political contexts from which *Mancari* and *Bakke* arose.[77] And while many other groups, including Chinese Americans, Japanese Americans, and Mexican Americans, figure prominently in the full story of race and civil rights in the United States, I focus the race law discussion on African American history because constitutional race jurisprudence has roots in a specific effort to counter the effects of Black slavery.

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in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discriminating on the basis of race is to stop discrimination on the basis of race.").

[76] *See, e.g.*, *infra* text accompanying notes 122–27 (describing use of racist language in *Tee-Hit-Ton*); *see also* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON 104–06 (2005) (discussing the *Oliphant* Court's direct reliance on racist reasoning of early Indian law cases).

[77] For more detailed accounts and critiques of the development of race law, see generally Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988), Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29–46 (Kimberlé Crenshaw et al. eds., 1995), and Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991). For similar accounts of the history of federal Indian law doctrine and policy, see generally CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1988), and Berger, *supra* note 45.

1. Dred Scott *and the Racial Construction of Blacks and Indians as Noncitizens*

Court opinions such as *Johnson v. M'Intosh* and *Dred Scott v. Sandford* in the early to mid-1800s explicitly racialized both Black and Indian people, characterizing them as biologically distinct groups that were each fundamentally inferior to white Europeans.[78] In the 1823 case *Johnson v. M'Intosh*, the Supreme Court described European seizure of Indian land as justified because "the character and religion of [the land's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[79] And in the 1857 case *Dred Scott v. Sandford*, the Court held that the Founders' intent to deny citizenship rights to Blacks was apparent in light of the long-held belief that Blacks were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[80] This legal racialization was used to support the territorial and economic expansion of the new United States, as conquest and subjugation of Indians and Blacks was justified based on arguments of their racial inferiority.[81]

The Court's opinion in *Dred Scott* exemplifies not only how both groups were excluded from U.S. citizenship, but also how the particular racial stereotypes associated with each group led the Court to cast their exclusions differently. The *Dred Scott* opinion described Indians as "uncivilized, . . . yet a free and independent" people who were recognized as independent political communities but remained "under subjection to the white race" and "in a state of pupilage," "for their sake as well as our own."[82] While Indians were described as eligible for naturalization as long as they left their tribes and "[took] up [their] abode among the white population,"[83] their innate desire for freedom and savagery apparently prevented them from doing so.

The opinion reflected the fact that Indian nations at that time were recognized as separate political entities having a direct relation-

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78 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823); *see also* WILLIAMS, *supra* note 76, at 48–49 (arguing that "[s]teadfast beliefs in white superiority and Indian savagery" were "central organizing principles" in the Court's early opinions on Indian rights).

79 *Johnson*, 21 U.S. (8 Wheat.) at 573, 589.

80 *Dred Scott*, 60 U.S. (19 How.) at 407.

81 *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1721 (1993) (describing how property rights based on conceptions of racial inferiority of Blacks and Indians were used to justify white privilege).

82 *Dred Scott*, 60 U.S. (19 How.) at 403–04.

83 *Id.* at 404.

ship with the federal government.[84] This recognition stemmed from the status of Indian nations as predating the United States government, from a European tradition of dealing with Native Americans as sovereign nations, and from an acknowledgement of tribes as a real military threat to white settlers.[85] But as the new United States government increased in power, it did not treat tribes as fully equal governments. The federal-tribal relationship was instead characterized as a relationship between a superior power and a conquered nation: "a ward to his guardian."[86] This understanding was bolstered by the perception of Indians as a racially distinct and inferior people, incapable of making important decisions or making the most productive use of rights—a view that helped justify white appropriation of Indian land.[87]

The *Dred Scott* Court contrasted Indians with Blacks, whom it described as existing in a "degraded condition,"[88] so far inferior to whites that they "might justly and lawfully be reduced to slavery for [their] benefit" and "bought and sold, and treated as an ordinary article of merchandise."[89] As property, Blacks, who had been forcibly denaturalized from African nations, were fully owned by the white

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[84] *Dred Scott* was decided during an era known to Indian law scholars as the Removal Era, which lasted from approximately 1835 to 1861. During this era, the United States entered into treaties concerned primarily with removing Eastern tribes to Western territories to make way for white settlement. In the first such treaty in 1817, leaders of Cherokee towns agreed to cede land to the United States and move west of the Mississippi River. The Cherokee Nation challenged Georgia laws claiming ownership and jurisdiction over Cherokee lands. While the Supreme Court declared the laws unconstitutional, President Jackson supported Georgia and forced many Cherokee and other Southeastern Indians west on the widely known "Trail of Tears." The Indian Removal Act of 1830 authorized the President to provide Eastern tribes with lands west of the Mississippi in exchange for their Eastern homelands. By the end of the Removal Era, many Eastern tribes had been removed west. *See generally* ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 26–28 (5th ed. 2007); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 30, § 1.03[4][a].

[85] CLINTON, GOLDBERG & TSOSIE, *supra* note 84, at 2, 25–26.

[86] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[Indian nations] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, ... Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

[87] This position was exemplified in the decision in *M'Intosh*:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823); *see also supra* notes 78–79, 82–83 and accompanying text (discussing Court's characterization of Indians).

[88] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409.

[89] *Id.* at 407.

American nation, but not racially qualified to become a part of it.[90] Just as a racialized understanding of Indianness provided a justification for seizure of Indian land, this racialized understanding of Blackness provided a justification for enslavement. As Patrick Wolfe explains, "the separate destinies that race inscribed harmoniously reproduced the foundational structures of U.S. society, simultaneously providing for both the elimination of Indians [from the land] and the exclusion of blacks. As such, the two disparate racializations together served a unitary end."[91]

2. *Jim Crow Exclusion and Forced Assimilation*

After the Civil War, the United States outlawed Black slavery and extended limited citizenship rights to Blacks through the Thirteenth, Fourteenth, and Fifteenth Amendments.[92] With passage of these amendments, the American people, through Congress, rejected the use of race as a justification for slavery and provided a narrow guarantee of citizenship rights to Blacks. Despite this nominal rejection of slavery and political exclusion, however, Blacks were still subject to legal segregation and Jim Crow laws passed by states in order to maintain the racial caste system that had existed under institutionalized slavery.[93] The Supreme Court largely approved of such laws as consistent with the Fourteenth Amendment, effectively ensuring that Black racial subordination was left undisturbed.[94] Throughout the late 1800s and early 1900s, these laws ensured that Blacks remained separate and excluded from white society.[95]

During the period when Jim Crow laws kept Blacks out of white institutions despite their nominally equal legal rights, federal laws forced Indian people to join these same institutions. Beginning in the

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90 Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 644–45 (2005).

91 Patrick Wolfe, *Land, Labor, and Difference: Elementary Structures of Race*, 106 AM. HIST. REV. 866, 887 (2001).

92 These amendments abolished slavery, U.S. CONST. amend XIII extended birthright citizenship to Black Americans, and guaranteed "equal protection of the laws" to all, U.S. CONST. amend XIV § 1, and provided that the right of citizens to vote shall not be denied "on account of race, color, or previous condition of servitude," U.S. CONST. amend. XV. They were passed in 1865, 1868, and 1870, respectively.

93 *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2d rev. ed. 1966) (documenting role of Jim Crow laws in maintaining Southern racism).

94 The Court's approach in this era was exemplified by the *Civil Rights Cases*, 109 U.S. 3 (1883), in which the Court limited the reach of the Equal Protection Clause to state action, thereby leaving private discrimination untouched, and *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court held that racial segregation of Blacks did not violate equal protection guarantees as long as "equal" facilities were provided for them.

95 *See* Wolfe, *supra* note 91, at 880–81 (describing how the juridical barrier of slavery was replaced by the juridical barrier of race).

late 1800s, the federal government embraced a policy of forced assimilation,[96] which was driven by both the desire to open Indian lands for settlement and by the desire to "help" Indians by civilizing them.[97] Tribal land holdings were broken up into individual allotments, which allowed for "surplus" lands to be made available for sale to white settlers and facilitated a transition for Indians to the American system of individual property ownership and agricultural use of the land.[98] Indians who accepted allotments were also given U.S. citizenship and a European name to complete the assimilative process.[99] The citizenship grant was accompanied by an oath in which the Indian promised to substitute loyalty to the tribe and Indian cultural practices with loyalty to the United States and white cultural practices.[100] During this time, Indian children were also sent to federally-sponsored boarding schools designed to "kill the Indian in him and save the man,"[101]

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[96] The Allotment and Assimilation Era lasted from approximately 1871 until 1934. Congress ended the policy of making treaties with Indian tribes in 1871, putting new emphasis on legislation geared toward civilization and assimilation. In 1885, the Major Crimes Act, 18 U.S.C. § 1153 (2006), extended federal court jurisdiction over certain major crimes committed by Indians on reservations. The Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.), authorized a policy of allotting tribal lands and opening up the "surplus" land to non-Indians. The goal of the policy included detribalization through the division of communally-held tribal land and indoctrination into a Western, capitalist way of life through individualized property ownership. CHRISTINE BOLT, AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS 95–97 (1987). These major pieces of legislation were accompanied by other policies designed to physically and culturally assimilate Indians, including the Code of Indian Offenses, which prohibited many tribal cultural and religious activities; the removal of Indian children from their communities for placement in boarding schools that instructed them in Western traditions and punished them for speaking Native languages; and the Indian Citizenship Act of 1924, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)(2006)), which unilaterally conferred United States citizenship on all Indians born within the territorial limits of the United States. *See generally* CLINTON, GOLDBERG & TSOSIE, *supra* note 84, at 30–36; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 30, § 1.04 (giving 1928 as end of Allotment and Assimilation Era).

[97] *See generally* Helen M. Bannan, *The Idea of Civilization and American Indian Policy Reformers in the 1880s*, 1 J. AM. CULTURE 787 (2004) (discussing 1880s policy reformers' focus on "civilizing" Indians).

[98] BOLT, *supra* note 96, at 100–01.

[99] Porter, *supra* note 34, at 119–20.

[100] *Id.* at 120–21. Men and women were given separate oaths, reflecting the gendered nature of American citizenship expectations. *Summary of Conditions of the Indian in the United States: Hearings Before a Subcomm. of the Comm. on Indian Affairs*, 70th Cong. (1930), *available at* http://ia600208.us.archive.org/7/items/surveypart12ofconditiounitrich/surveypart12ofconditiounitrich.pdf (last visited Aug. 14, 2011).

[101] This phrase was coined by Captain Richard Pratt, founder of the first Indian boarding school in Carlisle, Pennsylvania, to describe his assimilationist solution to the conflict between the presence of Indian tribes and the expanding U.S. nation's need for land. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 SOC. WELFARE F. 1, 45 (1892), *available at* http://babel.hathitrust.org/cgi/pt?view=image;size=100;id=mdp.

where they were forced to cut their hair and were punished for speaking Native languages.[102] Finally, the federal government replaced traditional systems of tribal governance with federal police, federal jurisdiction, and federally-run reservation courts.[103]

The goal of the government's assimilation program was to eliminate Indian tribes as a barrier to white settlement by physically and culturally breaking up tribes, transforming individual Indians into copies of white Americans, and hoping that they would be swallowed by the expanding American nation.[104] All of these actions were taken in the name of "saving" Indians from their own inherent inferiority by teaching them white ways. Indian race during this period was increasingly understood as a matter of culture and identity performance, so anti-Indian efforts took the form of programs designed to annihilate all forms of cultural distinction; once assimilation was accomplished, a person would become white and an Indian would disappear.

3. *Civil Rights Enforcement and Tribal Revitalization*

In a series of cases filed by the National Association for the Advancement of Colored People in the early to mid-1900s, federal courts became more openly critical of segregation and racial discrimination, interpreting the Fourteenth Amendment as providing a more substantive guarantee of equal treatment by the state.[105] This reinvig-

39015039399053;page=root;seq=1. *See* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 397 (2006) (describing Pratt's assimilationist philosophy).

102 *See generally* BOLT, *supra* note 96 (discussing government policies and programs to assimilate Indians); K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994) (relating Indian experience of assimilation through boarding school program); MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928 (1999) (discussing educational programs as a vehicle for assimilation of Indians). During the boarding school era, Indian children were removed from their families and cultures, significantly disrupting Indian family structures and impeding intergenerational cultural transmission. CLINTON, GOLDBERG & TSOSIE, *supra* note 84, at 35. This practice has been blamed for a range of social ills affecting Indians today, from physical abuse to the loss of tribal languages. *Id.* at 35–36.

103 CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM, CASES AND MATERIALS 24–29 (6th ed. 2010) (describing extension of colonial domination over Indians via Major Crimes Act, BIA, and Courts of Indian Offenses).

104 *See supra* notes 218–21 and accompanying text (discussing relationship between Indian racialization, assimilation policy, and efforts to erase the Indian presence as a barrier to U.S. expansion).

105 *See, e.g.*, Harper v. Va. Bd. of Election, 383 U.S. 663 (1966) (striking down a poll tax required to participate in Virginia state elections as a violation of the Fourteenth Amendment); Terry v. Adams, 345 U.S. 461 (1953) (rejecting scheme in which private, whites-only association held primary election selecting candidates for Democratic party primary as violation of Fifteenth Amendment); McLaurin v. Okla. State Regents for Higher Educ., 339

oration of the Equal Protection Clause marked the second formal rejection of anti-Black racism since the Civil War. This rejection is signified most clearly by *Brown v. Board of Education*,[106] in which the Supreme Court rejected legal segregation, overruling *Plessy v. Ferguson*[107] and focusing on both the practical reality of unequal conditions and the psychological effects of stamping one racial group with a badge of inferiority.[108] Although the primary rationale of *Brown* has been the subject of much debate,[109] the Court seemed concerned not with the practice of racial classifications in a vacuum, but with the practical, structural, and psychic damage of these classifications on the Black community. The decision was solidly rooted in historical context, in which the Black community in particular had suffered decades of inequality and segregation.[110]

During this same time period, federal Indian policy shifted away from assimilation and federal dominance and toward greater tribal

U.S. 637 (1950) (holding racially segregated state-supported graduate school violative of Fourteenth Amendment Equal Protection Clause); Sweatt v. Painter, 339 U.S. 629 (1950) (holding inferior education offered at separate law school for Blacks in Texas unconstitutional under Equal Protection Clause of Fourteenth Amendment); Shelley v. Kraemer, 334 U.S. 1 (1948) (forbidding courts from enforcing private, racially-exclusionary real estate covenants on Equal Protection Clause grounds); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding Missouri in violation of Fourteenth Amendment for providing degree in law for whites only while furnishing no option for African Americans to study law). To be sure, the Supreme Court had struck down some racially discriminatory laws as unconstitutional in earlier years. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917) (declaring a city ordinance prohibiting Blacks from moving into homes on predominantly white blocks and vice versa in violation of Fourteenth Amendment); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down facially-neutral municipal laundry regulation ordinance because it was administered discriminatorily against Chinese laundry owners). However, the 1930s to 1950s marked a significant and more consistent shift in the Court's treatment of such cases.

106 347 U.S. 483 (1954).

107 163 U.S. 537 (1896).

108 *Id.* at 494. In discussing the psychological effects of segregation, the Court cited the district court's finding that

> [s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system (alteration in original) (citation omitted).

109 *See* Freeman, *supra* note 77, at 31–36 (discussing various theories of *Brown* and characterizing it as a hallmark of an "era of uncertainty," in which it was unclear whether courts would ultimately focus on formal equality and abstract principles or substantive equality and practical realities).

110 *See id.* at 32–33 (proposing that the *Brown* decision relied heavily on the historical oppression of the Black community).

self-control.[111] This reversal followed a 1928 federal report criticizing the assimilationist policies of the previous era and documenting the harms caused to Indians by those policies, including massive loss of land, widespread poverty, poor health, and the failure of Indians to adjust to white American institutions.[112] Similar to the civil rights jurisprudence of this era, this shift in Indian policy was informed by attention to the practical harms experienced by Indian people as a result of prior law and policy. Many of the reforms were implemented through the Indian Reorganization Act (IRA),[113] which curtailed allotment and reaffirmed the importance of tribal governments and a tribal land base.

But a suspicion of all things Indian still animated federal actions. Although tribal governments were reconstituted under the IRA, tribes were encouraged to refashion their governments in the image of the U.S. government, with key structural differences that rendered the new governments less politically powerful.[114] Tribes were treated as governments during this era, but their traditional style of governing, including their legislative bodies and dispute resolution systems, were still seen as fundamentally deficient, so they were replaced with business councils, western court systems, and boilerplate constitutions and laws. While IRA policy was not anti-tribal, it was still anti-Indian.

4. *Race-Conscious Desegregation and Detribalization*

Once *Brown* pronounced de jure segregation illegal, courts began to focus on the problem of how to undo an entrenched system of de

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111 This era, often referred to as the Indian New Deal, lasted from approximately 1934 until the early 1940s. The Indian Reorganization (Wheeler-Howard) Act of 1934, 25 U.S.C. §§ 461–479 (2006), curtailed the Allotment and Assimilation Era. The Act ended further allotment, authorized the Secretary of the Interior to acquire trust lands for Indian tribes, provided for the organization of tribal governments, established business loans and educational grants for Indians, and created an Indian preference for positions in the Indian Office. *Id.* New Deal programs also fostered economic growth for Indian tribes during this period. *See generally* CLINTON, GOLDBERG & TSOSIE, *supra* note 84, at 36–39; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 30, § 1.05 (discussing period of Indian Reorganization, 1928–1942).

112 This report, called the Meriam Report, was commissioned by the Department of the Interior. INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 3–21 (1928). The report called for major reforms in federal Indian policy, and President Roosevelt subsequently appointed a new Commissioner of Indian Affairs who initiated the shift from assimilation to reorganization.

113 Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–463 (2006)).

114 *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 437 n.3 (2002) (noting that federal government "did not treat these [IRA] constitutions as charters for governments" but instead "viewed them as some variation on private associations or student councils, designed to instruct Indian people in self-government rather than to facilitate genuine self-determination").

facto segregation in education. Courts during the 1960s ordered school districts to implement race-conscious remedies. That is, they ordered schools to acknowledge the racial makeup of their student population and to take affirmative steps, such as busing children to schools in other neighborhoods, to undo the vestiges of legal segregation.[115] Courts also scrutinized school districting and pupil assignment plans with an eye toward the racial effect of the plans, rather than solely their stated intent.[116]

In the 1950s, as the Supreme Court issued *Brown*, the capstone of its rejection of Black racial inequality, Congress adopted what is known as the Termination Policy.[117] Under a banner of racial equality borrowed from *Brown*, Congress sought again to assimilate Indian people and end the separate political status of tribes and the special tribal-federal relationship.[118] It pursued these goals using three main tools. First, Congress passed a series of Acts unilaterally terminating the relationship with certain tribal governments.[119] Second, Congress

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[115] *See, e.g.*, Davis v. Bd. of Sch. Comm'rs, 402 U.S. 33, 37 (1971) (holding that school must consider restructuring attendance zones and split zoning to achieve maximum degree possible of desegregation); Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968) (noting that *Brown* "clearly charged [school districts] with the affirmative duty to take whatever steps may be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

[116] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971) (invalidating formally race-neutral system of neighborhood schools because it produced racially segregated results and ordering district to employ race-conscious balancing plan to undo those effects); *see also* Freeman, *supra* note 77, at 39–41 (describing *Swann* and similar cases).

[117] The Termination Era lasted from approximately 1940 until 1962. During this period, the federal government embarked on a campaign to dismantle tribal sovereignty through a series of specific and general legislative acts. Laws were passed that extended state jurisdiction over specific reservations or over all reservations in particular states. This was followed by several statutes terminating the federal recognition of and relationship to specific tribes, thereby subjecting these tribes to full state authority. In 1953, Congress also passed Public Law 280, which extended state criminal jurisdiction over Indian country in certain states. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18 and 28 U.S.C.). *See generally* CLINTON, GOLDBERG & TSOSIE, *supra* note 84, at 39–41; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 30, § 1.06 (discussing Termination Era 1943–1961).

[118] H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953) (declaring policy of Congress "as rapidly as possible to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens . . . and to grant them all of the rights and prerogatives pertaining to American citizenship"); *see also* Berger, *supra* note 45, at 642 (highlighting the equality rhetoric used by advocates of the termination policy); Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1585562 (discussing the arguments about Indian equality used by both supporters and opponents of the termination policy).

[119] Approximately 109 tribes and bands were affected by termination legislation. Although this number represents a small percentage of federally recognized Indians, the

delegated civil and criminal jurisdiction on reservations to a handful of states, effectively handing over federal responsibility for law enforcement to those states.[120] Third, a federal relocation program was established to move Indian people from reservations to urban areas.[121] Yet again, the U.S. government sought to force Indian people to assimilate in the hopes that they would be absorbed into American culture and would no longer represent a separate and collective group requiring federal attention and resources.

In the Termination Era, the racial equality interests of Indian people were viewed as unconnected with or antithetical to the political interests of tribal governments. Indeed, while rhetoric of racial equality was used to support the destruction of tribal communities through Termination policies, old-fashioned racist rhetoric was still being used to justify limits on the political rights of tribal governments. In *Tee-Hit-Ton v. United States*,[122] a case decided the year after *Brown*, the Court considered whether a tribe had a legal right to be compensated for the illegal taking of timber from land held under aboriginal title. The land in question had been continually claimed,

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effects of termination on those tribes were devastating. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of Termination Policy*, 5 AM. IND. L. REV. 139, 151–54 (1977) (listing terminated tribes and discussing effects of termination legislation); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 30, § 3.02[8][b] (discussing the immediate effects and long-term impacts of termination legislation on tribal status of specific tribes).

120 Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 25 U.S.C. §§ 1162, 1360, 1321 (2006)). Public Law 280 automatically transferred Indian country jurisdiction to six states and permitted other states voluntarily to assume jurisdiction over Indian country within the state. The mandatory states were Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. Although Public Law 280 passed *federal* jurisdictional responsibilities on to states, it did not expressly terminate inherent tribal jurisdiction, with the result that tribal jurisdiction continued over many matters concurrently with state jurisdiction. *See* CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997) (discussing shifts in state and federal jurisdiction over tribal lands under Public Law 280). States voluntarily accepting jurisdiction over some or all reservations pursuant to § 1321 were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. In the voluntary states, the exact scope of state jurisdiction is defined by state statute.

121 The relocation program began in 1931 as a voluntary program to move returning veterans to cities, but by the 1950s, relocation of reservation residents to urban areas had become the BIA's highest priority, resulting in a withdrawal of funding from other priorities. Participants received limited federal assistance—usually a one-way ticket and a subsistence allowance until they received their first paycheck. Once relocated, they were cut off from the federal services that had been available on reservations. The transition was financially and personally difficult, and many Indians eventually returned to reservations. *See generally* DONALD F. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960 (1986) (examining motives for enactment and effects of relocation program on Indians).

122 348 U.S. 272 (1955).

occupied, and used by the Tee-Hit-Ton Indians since time immemorial,[123] but had not been recognized by the federal government through a treaty or proclaimed a reservation. The Court relied on cases describing Indians as "an ignorant and dependent race"[124] to explain that, because conquest rendered tribal land rights subordinate to the right of the conquering nation, tribal aboriginal title did not qualify as a property right. Therefore its taking was not compensable under the Fifth Amendment.[125] In *Tee-Hit-Ton*, the Court directly reaffirmed the logic of conquest expressed in *Johnson v. M'Intosh*[126] and explained the justification for the doctrine as a matter of racial common sense:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[127]

The 1950s were marked by a push for equality and inclusion, ideas that sometimes proved helpful for Blacks, given their history of racialized exclusion, but almost always proved disastrous for Indians, given their history of forced inclusion.

5. *Civil Rights Retrenchment and Tribal Self-Determination*

The 1970s brought a sea change in both areas.[128] In equal protection cases, the Court began to scale back the potential effects of its prior decisions by focusing only on discrete instances of intentional discrimination and disallowing race-conscious remedies that were not specifically linked to a finding of those violations.[129] The Court's approach in this era was to temporally distance present inequitable

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123 *Id.* at 277.

124 *Id.* at 281 (quoting Beecher v. Wetherby, 95 U.S. 517, 525 (1877)).

125 *Id.* at 279 ("[Aboriginal title] is not a property right but amounts to a right of occupancy which the sovereign grants and protects . . . but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.").

126 *Id.* at 279–80.

127 *Id.* at 289–90; *see also* WILLIAMS, *supra* note 76, at 89–95 (discussing *Tee-Hit-Ton*).

128 Although many scholars characterize the turn to colorblindness as a departure from *Brown*-era principles, it is important to note that the Court characterized its jurisprudence as an extension of the principles expressed in *Brown*. The policy shift in Indian law, on the other hand, was clearly marked by the Executive (if not always by the courts) as a reversal from prior policies of termination and assimilation.

129 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (applying strict scrutiny standard to affirmative action plan for government contracts); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.) (holding that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

outcomes from past legal or illegal discrimination, rationalizing any remaining racial disparities or substantive inequality by characterizing it as the inevitable result of neutral rules of merit and private preferences. The Court "'declare[d] that the war [was] over,' [and attempted to] make the problem of racial discrimination go away by announcing that it ha[d] been solved."[130]

The federal government's prior rejection of race as a marker of legal status was thus treated as effectively ending racial inequality. It was as if the "racial paradigm shift"[131] of *Brown* allowed this country to leave behind its history of anti-Black racism, slavery, and violence for good. In other words, the price of the Court's doctrinal rejection of explicit and intentional anti-Black racism has been an increased unwillingness to look backward. The Court is consequently unwilling today to acknowledge how a history of formal racism created persistent social and structural inequality that refuses to fall away with the formal pronouncement that all races are equal. Courts increasingly see their work as done, and it has become more and more difficult for Blacks (and other racial minorities) to achieve any significant protections by invoking the Constitution.

In Indian law, President Nixon rejected prior assimilationist and integrationist policies, and adopted an official position supportive of tribal self-determination and self-government.[132] However, rather

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[130] Freeman, *supra* note 77, at 41; *see, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974) (refusing to permit Detroit schools to implement race-conscious interdistrict busing plan because no specific interdistrict violation had been found, thus converting the school system's use of race in its busing plan into a Constitutional violation in itself); *see also* Freeman, *supra* note 77, at 41–43 (describing *Milliken* and similar cases); Crenshaw, *supra* note 77, at 1344 ("[O]nce law had performed its 'proper' function of assuring equality of process, then differences in outcomes between groups would not reflect past discrimination but rather real differences between groups competing for societal rewards.").

[131] WILLIAMS, *supra* note 76, at 86.

[132] This policy was first set forth in President Nixon's Message to the Congress on Indian Affairs. Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970). President Nixon's statement rejected the policies pursued in the past where an "Indian community is almost entirely run by outsiders" and directed Congress to "create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." *Id.* at 565–66. Every subsequent President has reaffirmed the policy. Memorandum No. 215, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (President Barack Obama); Proclamation No. 7500, 66 Fed. Reg. 57,641 (Nov. 12, 2001) (President George W. Bush); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (President Bill Clinton); Memorandum No. 85, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (President Bill Clinton); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) (President Bill Clinton); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662 (June 14, 1991) (President George H.W. Bush); Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) (President Ronald Reagan). A cornerstone of the Self-Determination Era was passage of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered titles of U.S.C. (2006)), which requires the BIA to

than rejecting the early cases filled with anti-Indian racism, courts continue to rely on those cases as the basis for the separate sovereignty and jurisdictional status of Indian tribal governments.[133] As Robert Williams has pointed out, Indian law is not marked by a moment of "transformation" in which old racism is rejected.[134] Instead, the same cases are read and reread throughout history and used to support each of the shifts in federal Indian policy; the same cases used to chip away at tribal rights under assimilation policy are used to bolster them in the Self-Determination Era. Depending on the desired outcome, the anti-Indian language is either emphasized or obscured.[135] Indian advocacy strategies in this era generally embrace

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contract with tribes if requested for the management of Indian programs, and the Tribal Self-Governance Act, Pub. L. No. 103-413, 108 Stat. 4270 (1994) (codified as amended at 25 U.S.C. § 458 (2006)), which authorizes certain tribes to receive federal funding in the form of block grants in order to increase tribal budgeting authority.

[133] *See, e.g.*, Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233–36 (1985) (citing *Johnson* as establishing core principles relating to tribe's interest in its property); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (citing *Johnson* for proposition that tribes' inherent sovereign powers were necessarily diminished so as not to conflict with overriding sovereignty of United States); Cobell v. Norton, 240 F.3d 1081, 1100 (D.C. Cir. 2001) (citing *Cherokee Nation* as foundation of trust relationship between Indians and federal government); Village of Gambell v. Hodel, 869 F.2d 1273, 1277 (9th Cir. 1989) (citing *Johnson* for "settled United States policy that federal sovereignty is subject to the Indians' right of occupancy" (citations omitted)). *Worcester v. Georgia*, the third case in the "Marshall Trilogy," was the fourth most cited pre-Civil War Supreme Court case during the 1970s and 1980s. DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 126 (5th ed. 2005). Indian law advocates regularly cite all three Marshall Trilogy cases as the source of foundational Indian law principles. *See, e.g.*, Brief for Law Professors as Amici Curiae Supporting Respondents at 5–7, United States v. Navajo Nation, 129 S. Ct. 547 (2009) (No. 07-1410) (citing all three Marshall Trilogy cases).

[134] WILLIAMS, *supra* note 76, at 86 (explaining that *Brown* is widely recognized as "an unequivocal rejection by the twentieth-century Supreme Court of racist nineteenth-century legal precedents, forms of reasoning, and judicial language," which "inadequately describes the post-*Brown* Supreme Court's stated racial attitudes in defining the rights of Indian tribal peoples . . . [and] continued . . . rel[iance] on the same racist precedents and language that had characterized the Supreme Court's Indian rights decisions of the nineteenth century"); *see also* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 73–75 (2002) (contrasting Supreme Court's rejection of *Dred Scott* and *Plessy v. Ferguson* with its continued reliance on Indian law decision *Lone Wolf v. Hitchcock*, which rested on similar logic of white racial superiority). As the preceding sections demonstrate, the *Brown* Court's rejection of racism was far from "unequivocal" in practice. Nevertheless, Indian law lacks even the nominal rejection of racism signified by the Reconstruction Amendments and *Brown*.

[135] *Compare* Brief for Law Professors as Amici Curiae Supporting Respondents at 6–7 & n.10, *Navajo Nation*, 129 S. Ct. 547 (No. 07-1410) (citing *Cherokee Nation* only for proposition that tribes have ward-guardian relationship with federal government), *with* Brief for National Congress of American Indians as Amicus Curiae Supporting Petitioner at 3, 8–9, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107) (citing *Cherokee Nation* for proposition that tribes were "recognized as sovereigns and retained police power within their territory" and citing *Cherokee Nation* and *Johnson* as holding that treaty power and

self-determination policy, which emphasizes the government-to-government relationship between the United States and tribes, and obscures the role of race and racism in the decisions that originally established these principles. As we shall see, this approach squares well with the Court's colorblind civil rights jurisprudence.

C. Mancari *in Context*

This history provides an important context for understanding the political and legal climate from which *Morton v. Mancari* arose. By the 1970s, race jurisprudence included a nominal rejection of race-based discrimination, including overruling early seminal cases that espoused Black inferiority, and the Supreme Court was beginning to develop its colorblind, ahistorical approach to civil rights law.[136] The day before *Mancari* was argued, the Court issued its opinion in *DeFunis v. Odegaard*,[137] which raised questions similar to those explored in *Bakke*. Although the Court declined to reach the question of the legality of benign racial classifications in *DeFunis*, both the lawyers and the Court in *Mancari* must have been aware of its significance.[138]

In contrast to the brewing backlash against affirmative action that characterized equal protection jurisprudence in the 1970s, official Indian policy at that time was supportive of tribal rights and recognized the history of destructive federal-tribal relations, a history which explained the basis and need for current policy.[139] However, the Court had neither overruled the early cases that laid the racial foundation for the subordinative relationship nor explicitly rejected the rationale of conquest. In fact, Indian law attorneys actively relied on those early cases for the core principles of Indian law; they simply deemphasized the language explicitly racializing Indians, while using the cases to protect tribal rights under the new policy.[140]

The choice between these two analytical frameworks has striking consequences for challenged remedial programs, as demonstrated by *Mancari* and *Bakke*. As a result of the invocation of a race framework, Justice Powell's opinion required the university in *Bakke* to meet a heightened constitutional standard.[141] Justices Brennan, Mar-

power to freely dispose of land were only inherent powers of sovereignty divested from tribes).

136 *See infra* Part II.A.1 (discussing colorblind approach).

137 416 U.S. 312 (1974) (per curiam).

138 *Id.* at 319–20.

139 *See supra* note 132 (describing self-determination policy).

140 *See supra* notes 133, 135 (noting recent cases relying on early case law to support fundamental Indian law principles).

141 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978).

shall, Blackmun, and White would have held that racial classifications serving a remedial purpose should be subjected to intermediate scrutiny usually reserved for gender classifications.[142] Justice Powell's opinion, however, held that all racial classifications, whether characterized as invidious or benign, must be subjected to the strictest constitutional scrutiny. Of course, Justice Powell's opinion predicted the later direction of the Court, which has since held that all racial classifications are unconstitutional unless they can be shown to be necessary to achieve a compelling government interest.[143] As a result of its invocation of an Indian law framework, on the other hand, the government in *Mancari* needed to show only that the preference "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[144]

The doctrinal histories also make clear, however, that the choice between a race and an Indian law framework has consequences beyond the level of constitutional scrutiny that will be applied. One striking difference appears in the invocation of history in the *Mancari* opinion as opposed to Justice Powell's opinion in *Bakke* (and in later cases adopting his approach). As to the type of interest that could support the use of race for remedial purposes, Justice Powell held that a purpose of remedying the effects of generalized societal discrimination could not support the consideration of race in medical school admissions. While he stopped short of holding that race-consciousness could never be used to remedy past discrimination, he required a legislative, judicial, or administrative finding of specific illegal discrimination by the institution in question in order to justify it.[145] By acknowledging only discrete and officially-recognized instances of

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142 *Id.* at 359 (Brennan, White, Marshall, Blackmun, JJ., concurring in judgment in part and dissenting in part).

143 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (upholding a state university law school admissions program that took race into account on the ground that the school had a compelling interest in achieving student body diversity, and the program was sufficiently narrowly tailored to that interest); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by state actors are subject to strict scrutiny).

144 Morton v. Mancari, 417 U.S. 535, 555 (1974). As Goldberg points out, this is not exactly rational basis scrutiny. It is clearly lower than intermediate or strict scrutiny, however. Goldberg, *supra* note 54, at 263.

145 *Bakke*, 438 U.S. 265, 307 (1978). Justices Brennan, Marshall, Blackmun, and White would have held that remedying past societal discrimination was a sufficiently important interest to justify race-conscious remedies. *Id.* at 328 (Brennan, Marshall, Blackmun, White, JJ., concurring in judgment in part and dissenting in part). This approach takes a more connected view of history and is similar in this respect to Indian law decisions. *See infra* notes 182–86 (discussing different approaches to history depending on whether an Indian law or a race law framework is applied). Although this interpretation of the Equal Protection Clause finds broad support in the scholarly literature, *see, e.g.*, *supra* note 77

past discrimination as appropriate for race-conscious remedies, Justice Powell's opinion protected the settled expectations of white students who benefited from centuries of systematic discrimination.[146]

In his present-focused view, whites and minorities alike must be protected from the dignitary and exclusionary harm of racial quotas. His opinion thus equated the injury to white applicants, who were not permitted to compete for sixteen out of 200 slots in the entering class at Davis, but who would likely go on to study medicine at another school, with the injury to minorities who, in light of pervasive legal and social discrimination, had never enjoyed the same expectation of "equal" competition. This equation also elided the fact that minorities often faced wholesale exclusion from all educational institutions and from entire industries, impeding the group's economic and educational attainment for generations. Justice Powell's opinion effectively denied the continued existence of a white majority, reasoning that by the end of Reconstruction,

> it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups . . . .[147]

In *Mancari*, on the other hand, a unanimous Court, including eight of the same Justices who decided *Bakke*,[148] acknowledged that the Indian employment preference was intended to counter "overly paternalistic" policies of the past and undo historical dominance of non-Indians in the management of Indian affairs by gradually replacing non-Indian employees with Indian ones.[149] In its constitutional analysis, the Court took care to contextualize historically the preference policy. The opinion cited the long history of Indian-specific legislation, the problems engendered by a system in which non-

(citing articles that critique colorblindness), it has been jettisoned by the Supreme Court in favor of Powell's ahistorical, colorblind approach.

146 *See* GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS 37 (2006) ("In this case as in many others, guesses about the perceptions and expectations of whites supersede the constitutional rights and empirical realities of blacks and other minorities."); Harris, *supra* note 81, at 1773 (characterizing Bakke's argument as turning on his expectation "that he would never be disfavored" except with respect to more privileged whites and characterizing this perspective as "[e]xpectations of privilege based on past and present wrongs").

147 *Bakke*, 438 U.S. at 292 (citations omitted).

148 Justice Stevens replaced Justice Douglas in 1975, one year after the *Mancari* decision.

149 *Mancari*, 417 U.S. at 542–43, 553.

Indians primarily managed Indian affairs, the failure to adequately train Indian people to compete in civil service examinations, and the federal government's trust obligation to facilitate Indian self-determination in light of past federal mismanagement of Indian affairs and the "guardian-ward" relationship resulting from European conquest of Indian nations.[150] Moreover, the Court specifically acknowledged that the preference would disadvantage non-Indian applicants.[151]

While the choice of an Indian law framework allowed the Court to draw on the historical context of conquest to justify the Indian preference rule, it also led the Court to bury the role of race and racialization in two ways. First, the Court's invocation of history did not characterize conquest as racism. Second, the Court denied any connection except an incidental one between the Indian racial category and the Indian political category, insisting instead that the Indian preference rule was nonracial. Although the United States government certainly recognizes Indian tribes because of their political status as separate governments predating United States settlement, the disaggregation of this political status from the history of Indian racialization is misleading because the United States's course of dealing with these governments was shaped by a racialized assumption of Indian savagery.[152]

Considering these cases together illustrates the importance of the political classification doctrine in preserving Indian programs and perhaps even all of federal Indian law. Indeed, when the university in *Bakke* sought to rely on *Mancari* for the argument that remedial racial classifications that give preference to members of historically disadvantaged groups are constitutionally permissible, Justice Powell made clear the importance of *Mancari*'s political classification doctrine, distinguishing the case as one that did not involve a racial classification at all.[153] This is significant because Justice Powell could have distinguished *Mancari* on other grounds. For example, *Mancari* involved specific evidence of the BIA's failure to hire and promote Indians, sometimes as a result of intentional federal policies, whereas the university in *Bakke* cited generalized societal discrimination as the

150 *Id.* at 542–44, 551–53; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (grounding guardian-ward relationship in conquest).

151 *Mancari*, 417 U.S. at 544 & n.17.

152 *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (relying on perceptions of Indian savagery to explain why tribes could neither be governed nor left in possession of their lands, instead requiring separate and subordinate legal status).

153 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304 n.42 (1978).

harm it sought to remedy. Despite these differences, Justice Powell distinguished *Mancari* only as a case that was not about race.

D. Mancari*'s Aftermath*

Although the decision in *Mancari* emphasized the sui generis character of the Bureau of Indian Affairs, its subsequent impact has not been so limited. The Supreme Court has since relied on *Mancari* to uphold a broad array of legislation benefiting Indians and tribes against challenges by non-Indians. For example, in *Moe v. Confederated Salish and Kootenai Tribes*,[154] the Supreme Court easily rejected an argument that tax exemptions for Indians on reservations would violate equal protection guarantees. The Court reasoned that the exemptions are based on the unique constitutional status of tribal governments and tribal land and simply cited *Mancari* for the rule that legislation singling out Indians was not "racial" and thus should be analyzed under *Mancari*'s rational basis standard.[155] Without significant discussion, *Moe* extended the *Mancari* rule beyond the unique circumstances of the BIA preference to support a range of legislation affecting Indians living on reservations.

The Court expanded the reach of the *Mancari* rule even farther the next year in *United States v. Antelope*.[156] *Antelope* involved a challenge by Indian defendants to a law extending federal criminal jurisdiction into Indian country.[157] The defendants argued that, because federal criminal laws were often harsher than state laws, Indian people living on reservations were subject to greater criminal penalties than their non-Indian counterparts prosecuted under state jurisdiction for the same acts, even if committed in Indian country.[158] In this case, the defendants were subject to the felony murder rule under federal law, but the same rule would not have applied under state law. They argued that subjecting Indian defendants to harsher criminal laws solely because of their status as Indians amounted to invidious

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154 425 U.S. 463 (1976).

155 *Id.* at 480; *see also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (dismissing argument that treaty-guaranteed fishing rights for Washington Indians violate equal protection guarantees and relying on *Mancari* for general proposition that the "peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf" so long as it is rationally related to government's unique obligations to Indians); Am. Fed'n of Gov't Emps. v. United States, 330 F.3d 513 (D.C. Cir.), *cert. denied*, 540 U.S. 1088 (2003) (upholding exceptions to restrictive federal contracting rules for Indian- or Alaska Native-owned firms under *Mancari* standard after *Adarand*).

156 430 U.S. 641 (1977) (challenge to constitutionality of the Major Crimes Act).

157 *Id.* at 642–44.

158 Non-Indians who victimize other non-Indians in Indian country are subject to state law. United States v. McBratney, 104 U.S. 621 (1881).

racial discrimination. The Court disagreed, reasoning that "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[159]

Antelope was a significant extension of *Mancari* in two respects. First, it involved a law that allegedly disadvantages Indians, rather than a law that benefits them.[160] Second, it involved a law extending federal power over Indians, rather than a law intended to strengthen tribal self-government and self-determination.[161] In these and other cases decided during a time of increasingly restrictive race jurisprudence, *Mancari* became an important constitutional shield for the entire body of federal Indian law. And while the *Mancari* opinion acknowledged the racial significance of the Indian category, it ultimately rested its decision on the category's political significance.[162]

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159 *Antelope*, 430 U.S. at 645.

160 Laws that disadvantage Indians have been upheld in other cases as well, reflecting judicial reluctance to scrutinize Congress's plenary power over Indian affairs. *See* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) (upholding under *Mancari* federal law permitting states to assume criminal and civil jurisdiction against wishes of affected tribe); Fisher v. Dist. Court, 424 U.S. 382 (1976) (per curiam) (upholding under *Mancari* states' different treatment of Indian children under federal adoption laws). Although its protection is limited, the *Mancari* standard's requirement that federal actions be rationally tied to Congress's trust obligations to Indian people provides an important constitutional shield against potentially negative federal actions. *See* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83–85 (1977) (citing *Mancari* standard as constitutional limit on Congress's otherwise plenary power over tribal property). However, the difference between the *Mancari* standard and strict scrutiny is apparent in the fact that very few federal actions have ever been struck down as violations of the *Mancari* standard. *See* CLINTON, GOLDBERG & TSOSIE, *supra* note 84, at 532–33 (discussing only four occasions on which the Court has declared acts of Congress affecting Indian country unconstitutional under other constitutional provisions and implying that *Weeks* and *Mancari* leave a great deal of room for deference).

161 The employment preference in *Mancari* was "designed to further the cause of Indian self-government" by increasing Indian control over the federal agency most involved in Indian affairs. Morton v. Mancari, 417 U.S. 535, 554 (1974). Both the authorizing statute and the regulation at issue in the case were passed during eras in which federal Indian policy favored strengthening tribal autonomy and self-government in order to counteract the effects of pervasive federal control over Indian people. The Major Crimes Act, on the other hand, was passed in 1885 at the height of the Allotment and Assimilation Era and represented a significant incursion into tribal sovereignty. Major Crimes Act, 23 Stat. 362 (codified at 18 U.S.C. § 1153 (2006)); *see also* United States v. Kagama, 118 U.S. 375 (1886) (upholding Major Crimes Act by denying tribal sovereignty, holding instead that tribes "are under the political control" of federal and state governments). *See generally* SIDNEY L. HARING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 142–74 (1994) (discussing *Kagama* and Major Crimes Act's rejection of Indian sovereignty).

162 *See* WILKINSON, *supra* note 77, at 48–49 (characterizing *Mancari* as approving Indian preference law as "an exception to the general rule against preferences based on race" as opposed to a non-racial classification).

Thus, the racial acknowledgement is buried in cases that cite *Mancari* for the rule that Indian generally is not a racial classification.

The "political rather than racial" rule is not the only option for upholding Indian classifications in the face of strict scrutiny doctrine. Indeed, the Court's reasoning in some of these cases draws on the idea that any use of racial classifications implicated by Indian legislation is a constitutionally sanctioned use of race.[163] Because federal treaties and the Constitution[164] recognized Indians as unique and politically distinct bodies long before passage of the Fourteenth Amendment—and indeed because the Fourteenth Amendment itself excludes Indians[165]—federal legislation singling out Indians is arguably exempt from the strict scrutiny regime developed out of the Fourteenth Amendment, even if it does draw on racial classifications. Some scholars, courts, and advocates have also suggested that federal Indian classifications could survive strict scrutiny.[166] For example, attorneys for tribes could argue that a racial classification singling out Indians is permissible if it is narrowly tailored to serve the compelling federal interest in upholding the trust responsibility to Indians, if it is carefully designed to undo the historical damage wrought by specific federal policies—damage which was recognized and repudiated by later legis-

163 *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (rejecting equal protection challenge to Indian treaty because "the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf"); *Antelope*, 430 U.S. at 645 ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution . . . .").

164 U.S. CONST. art. I, § 8, cl. 2 (authorizing Congress to "regulate Commerce with . . . the Indian tribes").

165 U.S. CONST. amend. XIV, § 2 (excluding "Indians not taxed" from apportionment counts). *See generally* George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed,"* 28 AM. INDIAN CULTURE & RES. J. 37 (2004) (demonstrating through historical and legislative analysis that the Fourteenth Amendment was meant to exclude tribal Indians).

166 *See* Williams v. Babbitt, 115 F.3d 657, 665 n.8 (9th Cir. 1997) (suggesting that most of Title 25—the Title regarding government relations with Indians—would pass strict scrutiny analysis); Am. Fed'n of Gov't Emps. v. United States, 104 F. Supp. 2d 58 (D.D.C. 2000) (upholding defense contracting preference for Indian tribes based on strict scrutiny analysis); *Hearing on the Indian Health Care Improvement Act Before the S. Comm. on Indian Affairs*, 110th Cong. 27–29 (2007) (statement of Edward P. Lazarus, Partner, Akin, Gump, Strauss, Hauer, and Feld, LLP) (arguing that Indian Health Care Improvement Act would be legal even under strict scrutiny standard); *see also* Goldberg, *supra* note 54, at 238, 257 (discussing alternative legal theories that could have supported government's position in *Mancari*, one of which would have applied under strict scrutiny standard). *See generally* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 955–58 (2002) (describing "strict scrutiny survival" approach).

lation[167]—or if it is necessary to honor specific promises made to Indian people.[168]

After *Mancari*, however, scholars and practitioners have understandably avoided the question of permissible racial classifications whenever possible, characterizing Indian issues as political instead. The history of Indian law and the specter of strict scrutiny encourage Indians to argue that their categorization is nonracial despite the historical and contemporary racialization of Indian people, for being labeled a racial classification means vulnerability to a very difficult legal challenge. Thus, while it arose in the limited legal context of considering the level of scrutiny due a particular classification under the Equal Protection Clause, the political classification doctrine has evolved into an ideological understanding of Indian tribes as political groups and "Indian" as a political identity. In this context, "political" is understood in opposition to racial groups and racial identities.

Twenty-six years after *Mancari*, the Court solidified this oppositional framing in a case involving Native Hawaiians, *Rice v. Cayetano*.[169] *Rice* was a challenge by a non–Native Hawaiian resident to a state law permitting only people of Native Hawaiian ancestry to vote for trustees of the Office of Hawaiian Affairs, the state agency charged with administering trust resources for the benefit of Native Hawaiians.[170] Rice challenged the voting restriction under both the Fourteenth and Fifteenth Amendments, arguing that, by conditioning voting rights on Native Hawaiian ancestry, the statute impermissibly premised the right to vote upon a racial classification.[171] Rice further

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[167] This justification could apply to the BIA employment preference, the Indian Child Welfare Act, 25 U.S.C. §§ 1901–1968 (2006), and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–458 (2006).

[168] This is a frequently cited justification for Indian health and educational benefits. *See* U.S. Dep't of Health & Human Servs., *IHS Fact Sheet: Federal Basis for Health Services*, INDIAN HEALTH SERVICE, http://info.ihs.gov/BasisHlthSvcs.asp (last updated Jan. 2011) ("Treaties between the United States Government and Indian Tribes frequently call for the provision of medical services, the services of physicians, or the provision of hospitals for the care of Indian people."); Press Release, U.S. Senate Comm. on Indian Affairs, President Obama Signs Indian Health Care Improvement Act (Mar. 23, 2010), *available at* http://indian.senate.gov/news/pressreleases/2010-03-23.cfm ("The federal government has trust and treaty obligations to provide health care to American Indians and Alaska Natives."); *Native Education 101*, NAT'L INDIAN EDUC. ASS'N, http://www.niea.org/data/files/policy/nativeeducation101.pdf (last visited Aug. 14, 2011) (discussing treaty provisions for educational services in exchange for cessions of Indian lands).

[169] 528 U.S. 495 (2000).

[170] *Id.* at 498–99.

[171] *Id.* at 510.

argued that *Mancari* was inapplicable because Native Hawaiians, although clearly indigenous, were not a federally recognized tribe.[172]

The Supreme Court struck down the voting scheme as an unconstitutional use of race, holding that the use of ancestry in an election for state officials violated the blanket prohibition expressed in the text of the Fifteenth Amendment.[173] The Court then rejected the state's argument that the classification was nevertheless permissible under *Mancari* because it was designed to facilitate Native Hawaiian self-governance. The Court interpreted *Mancari* as being "confined to the authority of the BIA" and refused to apply it to elections for a state governmental body.[174] But it also declined to apply *Mancari* for a more fundamental reason. The Court rejected the premise that Congress had determined that Native Hawaiians "have a status like that of Indians in organized tribes."[175] The Court further questioned Congress's ability to make such a determination, citing scholarship that argued that federal laws singling out Native Hawaiians (and Indians and Alaska Natives who are not members of federally recognized tribes) constitute illegal racial classifications.[176]

In the article discussed by the Court, Stuart Minor Benjamin argued that after *Croson* and *Adarand*—which held that benign racial classifications are subject to strict scrutiny and that countering generalized historical discrimination against a group is not a sufficient justification to withstand such scrutiny[177]—laws singling out indigenous groups are unconstitutional racial classifications unless they are limited to members of federally recognized tribes.[178] Although the

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172 *See id.* at 518 (questioning whether *Mancari* could be applied to Native Hawaiians because they may be unlike Indians in organized tribes). By the time *Rice* was decided, the Supreme Court had squarely held that all racial classifications, regardless of benign purpose, would be subject to strict scrutiny and that remedying or counteracting generalized historical discrimination against a group did not qualify as a compelling interest sufficient to justify a racial classification. *See infra* note 196 (citing cases establishing this principle).

173 *Rice*, 528 U.S. at 523–24.

174 *Id.* at 520.

175 *Id.* at 518.

176 *Id.* at 518–19 (citing Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996)).

177 *See infra* note 196 and accompanying text (discussing these two cases and describing Court's adoption of colorblindness as equal protection standard).

178 Benjamin, *supra* note 176, at 567–68. Benjamin further suggested that it would be difficult or impossible for Native Hawaiians to achieve recognized tribal status because, in Benjamin's view, they would not be able to demonstrate sufficient connection to a historical sovereign entity or continuous existence as a tribe. *Id.* at 603–08. Legislation is now pending before Congress that would recognize Native Hawaiians as a tribal entity, thus bringing them under the umbrella of federal Indian law. *See* Native Hawaiian Government Reorganization Act of 2011, S. 675, 112th Cong. (2011) (proposing to extend federal recognition to a newly formed Native Hawaiian governing entity and reaffirm the federal government-to-government relationship with this entity in accordance with Indian law

majority opinion dispensed with the *Mancari* argument in a short section of the opinion, the tension identified in Benjamin's article between colorblind race jurisprudence and federal Indian jurisprudence was a critical factor underlying the Court's decision in *Rice*. Just as Benjamin suggested in his article, the Court felt a need to "delineate[ ] the boundary between tribal and racial classifications,"[179] and it determined that an ancestral classification without a requirement of membership in a federally recognized tribe fell on the racial side of that divide.

Justice Stevens's dissenting opinion adopted an Indian law framework instead. Beginning from the premise that the federal government has a trust responsibility to indigenous peoples, including Native Hawaiians, Justice Stevens reasoned that the federal government has wide latitude to implement that responsibility, including determining who falls within the Indian category and delegating trust duties to states.[180] Pointing to a number of federal statutes and to the classification in *Mancari*, Justice Stevens determined that the scope of federal power over Indian affairs is not limited to members of recognized tribes.[181]

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principles). I do not mean to suggest here that federal recognition would be a panacea, or even necessarily a desirable outcome, for Native Hawaiians. Indeed, many in the Native Hawaiian community are critical of the bill and of federal recognition generally. *See, e.g.*, KAUANUI, *supra* note 33, at 3 (indicating that the bill "threaten[s] to transform the Hawaiian national independence movement claim to that of a domestic dependent nation under U.S. federal policy"); Jonathan Kamakawiwo'ole Osorio, *Colonizing Hawai'i: The Cultural Power of Law*, 13 THE CONTEMP. PAC. 359, 374 (2001) ("[With recognition, Hawaiians] will not simply surrender a portion of our lands . . . , nor will we surrender only the scope of our sovereignty. We are surrendering something far more important, faith and trust in each other and our willingness to continue working out our own kinship among ourselves."); *see also* KAUANUI, *supra* note 33, at 184–89 (critiquing federal recognition bill). *But see* Kathryn Nalani Setsuko Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of* Rice v. Cayetano, 15 ASIAN AM. L.J. 9, 42–44 (2008) (describing federal recognition bill as "a welcome compromise"); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 HAW. L. REV. 427, 427–28 (1995) (discussing push for federal recognition and comparing models of recognized sovereignty).

179 Benjamin, *supra* note 176, at 538.

180 *Id.* at 529–37. The Indian law framework employed by the dissent echoed the lower courts' interpretation of the case as ultimately controlled by Indian law principles despite the role of ancestry in the classification scheme and the lack of federal recognition of Native Hawaiians. *Id.*

181 *Id.* at 535 & n.11 ("[M]embership in a 'tribal' structure *per se* . . . is not the acid test for the exercise of federal power in this arena."). With regard to Native Hawaiian interests, the invocation of federal plenary power that came with Justice Stevens's Indian law framing is a double-edged sword. While federal power would have provided a legally sufficient justification for laws singling out Native Hawaiians, it would also subject Native Hawaiians to federal dominance in many areas. *See* KAUANUI, *supra* note 33, at 179–80 (identifying the central role of the plenary power doctrine in *Rice* arguments); *see also*

As in *Mancari*, the consequences of the *Rice* Court's doctrinal framing were significant. In interpreting the purpose and scope of the Fifteenth Amendment, the Court dismissed history and context in the same manner that Justice Powell did in *Bakke*. Although the Court acknowledged that the Amendment was passed in order to guarantee the right of emancipated slaves to vote in a political climate intent on denying them that right, it explained that the Amendment "goes beyond" this objective and "grants protection to all persons, not just members of a particular race."[182]

After ensuring that injury to a white voter was embraced within the scope of harms against which the Amendment protects, the Court went on to explain that racial classifications are forbidden because "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" and because classifying on the basis of race "is corruptive of the whole legal order democratic elections seek to preserve."[183] According to the *Rice* Court, these dignitary and symbolic harms are equally applicable to white people who are subjected to racial classifications. Significantly, the Court made no mention of the practical, structural, and psychic harms experienced by people of color, but not by whites.[184] The majority also made no effort to connect the historical injuries suffered by Native Hawaiians (including illegal takeover of their government,

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supra note 160 (discussing how plenary power doctrine in Indian law shields both beneficial and detrimental federal actions from scrutiny).

182 *Rice*, 528 U.S. at 512.

183 *Id.* at 517.

184 Commentators have noted the qualitative difference in harm experienced by people of color. For example, Frances Lee Ainsley writes,

> White supremacy produces material and psychological benefits for whites, while exacting a heavy material and psychological price from blacks. . . . It assures [the former] greater resources, a wider range of personal choice, more power, and more self-esteem than they would have if they were (1) forced to share the above with people of color, and (2) deprived of the subject sensation of superiority they enjoy as a result of the societal presence of subordinate non-white others.

Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1035 (1989); *see also* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (describing Court's opinion in *Bakke* as "utterly ignoring social questions about which race in fact has power and advantages and which race has been denied entry for centuries into academia"); Daniel P. Tokaji, *Representation and Raceblindness: The Story of* Shaw v. Reno, *in* DEVON W. CARBADO & RACHEL MORAN, RACE LAW STORIES 497–540 (2008) (describing how Court's focus on "expressive" harms in *Shaw* failed to take into account concrete harm of Black political disenfranchisement in North Carolina).

loss of land, forced religious conversion, and importation of foreign diseases) with the legal status of Native Hawaiians today.[185]

On the other hand, Justice Stevens's dissent interpreted the case in light of the relevant histories, including the history of the Hawaiian Islands, the history of the federal government's relationship with indigenous peoples, the present-day effects of colonization and loss of land on the Hawaiian people, and the specific history of Black racial subordination that gave rise to federal laws prohibiting racial classifications. Thus, it was a simple matter for Justice Stevens to differentiate between the illicit use of ancestry restrictions to disenfranchise Black voters in *Guinn v. United States*[186] and the role played by ancestry in Hawaii's attempt to deliver federal benefits to the descendants of indigenous Hawaiians.

To be sure, the appropriateness and desirability of an Indian law framework for Native Hawaiians is highly contested,[187] and the purpose of this analysis is not to suggest that Native Hawaiians would be better off if *Rice* were decided differently. Rather, it is to point out that *Rice* is a key step in the evolution of the political classification doctrine because the majority decision crystallized the dichotomy between "political" and "racial" that was first suggested in *Mancari*.[188] Although the outcome in *Rice* turned on several factors, it was driven in part by a concern that legal recognition of indigeneity, which implicates ancestry, would be in conflict with Equal Protection jurisprudence that eschews any use of racial classifications. The Court responded to this perceived tension by contracting the legal definition of indigeneity, suggesting that it requires political status as a recognized tribe, and implying that the only other way indigenous status would carry legal significance under U.S. law would be as a racial designation.

II

IMPLICATIONS: CONSTRAINING RACE AND INDIANNESS

On the surface, the doctrinal split between Indian law and civil rights law embodied in the political classification doctrine has had

185 *See Rice*, 528 U.S. at 534 (Stevens, J., dissenting) (criticizing majority for its failure to acknowledge historical context).

186 238 U.S. 347 (1915). *Guinn* involved a state literacy requirement for voting with an exemption for people whose ancestors were eligible to vote prior to passage of the Fifteenth Amendment.

187 *See supra* note 178 (describing conflict between Native Hawaiian independence movement and federal recognition as an Indian tribe).

188 Chris K. Iijima, *Race over* Rice*: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 91 (2000).

mostly positive consequences for recognized Indian tribes. In an era of retrenchment[189] against gains for other racial minorities, programs benefiting Indians have survived. The status of Indian tribes as separate nations with sovereign rights predating U.S. colonization is recognized in an era when nationalist movements for other minority groups have been sidelined in favor of a story of inclusion and advancement.[190] Such a limited focus on short term gains, however, can obscure important theoretical implications.

The positioning of "political" opposite "racial" signaled by the political classification doctrine relies on and reinforces two underlying ideas that have not been fully explored. The first is the idea that race is nothing more than a politically meaningless classification based on ancestry. The second is the idea that Indianness is equivalent to membership in a federally recognized tribe, and that tribal membership is purely a matter of voluntary civic participation. Each of these underlying ideas is descriptively inaccurate, and each has troubling consequences when applied.

The Court's embrace of a formal understanding of race and its consequences for indigenous peoples appears most clearly in *Rice*. The opinion is animated by a definition of race as solely a matter of ancestry or skin color—immutable characteristics that are not (or should not be) relevant to important decisions—and without political, historical, or identity significance. Because race is simply a matter of irrelevant physical characteristics according to this definition, a law that classifies on the basis of race harms individuals by attaching too much significance to what ought to be an insignificant distinction. A

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189 Crenshaw, *supra* note 77, at 1336–41.

190 Black nationalist leaders of the 1960s and 1970s have been replaced in advocacy campaigns and the popular imagination by stories of individuals who symbolize integration and racial transcendence, such as President Obama. The NAACP's current "One Nation" campaign espouses the idea that "everyone deserves the opportunity to achieve the American Dream—a secure job, a safe home, and a quality education." *March with the NAACP and One Nation*, NAACP, http://www.naacp.org/pages/one-nation-march (last visited Aug. 14, 2011). Even the histories of these Black nationalist movements are buried by the historical attention paid to integrationist efforts. *See generally* STEVEN HAHN, THE POLITICAL WORLDS OF SLAVERY AND FREEDOM 115–62 (2009) (describing significance of self-governance and separatism in Black political struggles and way these themes have been buried in historical accounts); NIKHIL PAL SINGH, BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY 1–14 (2004) (same). Similarly, the Chicano movement in the 1970s focused on the rights to nationhood and land embodied in the concept of Aztlan, but this has largely been replaced in popular consciousness by the emphasis on Latino integration into U.S. culture. For example, the Mexican American Legal Defense and Education Fund today seeks to "implement programs that are structured to bring Latinos into the mainstream of American political and socio-economic life." *About MALDEF*, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, http://www.maldef.org/about/index.html (last visited Aug. 14, 2011).

classification along the lines of ancestry would consequently only be constitutionally permissible if the use of ancestry is merely incidental to a classification based on a non-racial distinction. This overly restrictive view of race led the *Rice* Court to invalidate a law designed to empower an indigenous group because the law classified on the basis of ancestry but, unlike in *Mancari*, it did not involve a federally recognized tribe.

Just as the Court's interpretation has contracted the terrain of permissible race consciousness, it has similarly constrained the scope of the political dimension of Indianness by increasingly defining Indianness as formal enrollment in a federally-recognized tribe. The *Rice* decision highlights the consequences of legally equating *federal recognition* with indigenous rights and identity. For Native Hawaiians and other unrecognized groups, this has meant the constant threat of being treated as "mere" racial groups because of lack of federal recognition.[191] Likewise, the equation of political Indianness with *enrolled membership* confuses and renders unstable the areas of Indian law that do not turn on formal enrollment, such as Indian health entitlements and tribal power to prosecute nonmember Indians.[192]

Furthermore, tribal membership itself is characterized by the Court in a manner that narrows the definition of Indianness even more. The Court conceives of tribal membership as a matter of civic participation divorced from kinship, culture, religion and identity, making it indistinguishable from state citizenship or participation in local government. This characterization and its consequences are evident in the Court's evolving jurisprudence in the area of tribal civil jurisdiction. In the civil jurisdiction cases, this restrictive understanding of tribal membership, which is rooted in attempts to make a principled distinction between Indianness and race, has supported increasing limits on the jurisdiction of Indian tribes as political entities.[193] In this Part, I discuss each of these theoretical implications, explaining how reductive ideas about race and Indianness are linked to the political classification doctrine, how they are descriptively inaccurate, and what practical consequences they have, such as excluding certain people and groups from the protections afforded by federal Indian law and providing a basis for further diminishing tribal sovereign rights.

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191 *See* KAUANUI, *supra* note 33, at 183 (describing post-*Rice* lawsuits challenging various programs benefitting Native Hawaiians).

192 *See infra* Part II.B.1 (discussing federal benefits extending to non-member Indians and case law regarding criminal jurisdiction over nonmember Indians on reservations).

193 *See infra* Part II.B.2 (discussing case law chipping away at tribal jurisdiction over non-members on reservations).

A. Formal-Race

The Court in *Rice* embraced a particular vision of race as a static biological fact. Race in this view signifies nothing more than a difference in skin color or ancestry. According to this definition of race, which Neil Gotanda has labeled "formal-race,"[194] race is devoid of political content or historical significance and should therefore be irrelevant to important decisions. In the following section, I elaborate on the Court's vision of race and the significance of this view to the development of the political classification doctrine. This formal definition of race, which many people today take as a given, is neither the only nor, in my view, the most accurate one. Using Indians as an example, I describe how race has actually functioned as a shifting and flexible construction, rather than a static biological fact. This flexible understanding of race embraces multiple definitions, several of which I describe in Part II.A.2 below.[195]

1. *Formal-Race, Colorblindness, and* Rice

The *Rice* majority viewed race as a fixed and immutable biological fact, usually reducible to a question of ancestry. Race, in this view, should have no political content or social meaning, and its historical significance is limited to a story about how the United States long ago discriminated on the basis of race but no longer does so. The companion to this formal understanding of race is the idea that race is or should be irrelevant to all decision making and to all social differences.

This understanding of race is a consequence of the *Rice* Court's invocation of constitutional race jurisprudence as a framework for analyzing the case. As described in Part I, the post-*Brown* era has been marked by an increasing turn to colorblindness. The Fourteenth Amendment is interpreted to bar racial classifications, not racial subordination. Any racial classification—not just one privileging white

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194 In this view, race is "seen as [a] neutral, apolitical description[ ], reflecting merely 'skin color' or country of ancestral origin. . . . [F]ormal-race categories are unconnected to social attributes such as culture, education, wealth, or language. This 'unconnectedness' is the defining characteristic of formal-race . . . ." Gotanda, *supra* note 77, at 4.

195 It would also encompass the varying definitions identified by Gotanda in Supreme Court jurisprudence. *See id.* at 4 (defining "status-race" as "the traditional notion of race as an indicator of social status" used in cases such as *Dred Scott* but "largely discredited" today); *id.* (defining "historical-race" as "assign[ing] substance to racial categories" and "embod[ying] past and continuing racial subordination"); *id.* at 4–5 & n.14 (describing "culture-race" as referring "to African-American culture, community, and consciousness" and explaining that this understanding of race underlies the Supreme Court's jurisprudence around diversity as a compelling interest to justify affirmative action in higher education).

people—is therefore subject to strict scrutiny, and the goal of undoing the effects of generalized past racism is not a sufficient rationale for recognizing race in the present.[196] The injury wrought by a racial classification is to the dignity of an individual who has been judged by an irrelevant characteristic, and to society's belief that race should not be the basis of decision making. The evil is not persistent racial inequality, but any recognition of race at all.[197]

As explained in Part I, civil rights laws were developed to counteract a specific history in which legal significance was attached to racial differences, and those differences were used to support white dominance. Colorblind equal protection jurisprudence attacks only the first component by prohibiting actors from attaching legal significance to racial distinctions. It leaves the second part untouched, and in fact makes it difficult to counter entrenched hierarchies because it normatively discourages any recognition of race, which makes it difficult to recognize and counteract racism.

The effect of colorblind jurisprudence is most apparent in early affirmative action cases like *Bakke*, in which courts considered the legality of programs that rely explicitly on racial classifications in order to counter the economic, social, and educational barriers faced by members of historically disadvantaged groups.[198] The pressing question before the Court in *Bakke* was whether a racial classification designed to counter racial subordination should be subject to the same level of scrutiny as one intended to subordinate. Employing a colorblind view of antidiscrimination law, any injury to white students who may be prevented from exercising the full benefits of their racial privilege is morally indistinguishable from the injury to minority students who have been excluded by a supposedly neutral practice.[199] And

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196 Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); *id.* at 239 (Scalia, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (plurality opinion); *id.* at 505–06 (opinion of the Court); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90, 307–10 (1978).

197 *See* Crenshaw, *supra* note 77, at 1342 (explaining "restrictive vision" of antidiscrimination law as primarily concerned with "prevent[ing] future wrongdoing," not correcting present effects of past injustices); Freeman, *supra* note 77, at 43 (describing "perpetrator perspective" animating modern anti-discrimination law as primarily concerned with neutralizing "badness" of particular acts of discrimination and viewing persistence of unequal results as irrelevant); Gotanda, *supra* note 77, at 16–23 (discussing problems with racial "nonrecognition" approach of colorblind jurisprudence).

198 Unlike the school desegregation cases, affirmative action cases involve the voluntary use of race-conscious remedies, rather than a judicial mandate to use race-conscious means (usually temporarily) in order to undo discrimination.

199 *See* Crenshaw, *supra* note 77, at 1342 (explaining that, in colorblind view, "efforts to redress [injustice] must be balanced against, and limited by, competing interests of white workers—even when those interests were actually created by the subordination of Blacks"); Freeman, *supra* note 77, at 34 ("The only way that discrimination by whites

because colorblindness conceives of the conscious use of race in decision making as inherently wrong, the injury to white students, whose race appears to have been suddenly made relevant, seems all the more objectionable.

Given this definition, the *Rice* majority was troubled by a law that treated Native Hawaiians—a group it saw as bound by nothing more than common ancestry—"as a distinct people."[200] In the majority's view, this attempt to infuse ancestry with political significance was equivalent to Reconstruction Era voting rights cases, in which white voters used ancestry-based criteria in order to exclude Black voters. In each instance, the Court concluded, ancestry operated as a "proxy" to illegally insert race into the political process.[201]

As articulated in *Rice*, the full expression of the political classification doctrine begins from the premise that race should not be relevant to matters of political identity, a premise that is based on the concept of formal-race. Because "Indian" designates a group marked by race and by a particular political history, a doctrine that treats political and racial classifications differently requires courts and advocates to determine which Indian classifications are primarily political and which are primarily racial in order to determine which will be preserved. Where the line between political and racial Indianness seems blurry, the political classification doctrine requires courts and advocates to highlight the political aspects of federal Indianness—such as treaties, the federal-tribal relationship, and recognized tribal nationhood—and correspondingly deemphasize any element of the classification (including ancestry) that suggests race. This tactic fits well with the current federal Indian policy of self-determination, which is supportive of tribal political autonomy and acknowledges tribal nationhood.[202]

But unless self-determination policy is linked to something concretely non-racial, such as recognized tribal status, as it was in *Rice*,

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against blacks can become ethically equivalent to discrimination by blacks against whites is to presuppose that there is no actual problem of racial discrimination.").

[200] Rice v. Cateyano, 528 U.S. 495, 514–16 (2000). The tension between the formal definition of race and the reality of racialized groups is apparent in the way the Court acknowledged that pre-1778 Native Hawaiians shared both "common physical characteristics" and a "common culture," but insisted that shared Native Hawaiian ancestry could have no political or cultural significance today. *Id.*

[201] *Id.* at 513–16. Of course, because race in the Court's view meant nothing more than ancestry, this language about proxies was unnecessary. Further underscoring the perceived disjuncture between race and political meaning, the Court relied heavily on legislative history which indicated that the word "races" was used interchangeably with the word "peoples" when describing Native Hawaiians, signaling to the Court that any recognition of Native Hawaiian "peoplehood" was merely code for an illicit use of race.

[202] *See supra* note 132 (describing self-determination policy).

the policy's recognition of Indian political identity and rights could be read as threatening the formal-race assumption that race has no political significance (which could raise questions about this apolitical assumption for other racial groups as well). So whereas *Mancari* can be read as recognizing an Indian exception to the constitutional treatment of racial classifications,[203] the *Rice* Court abandoned this characterization in favor of making a clear distinction between racial status on the one hand and political status on the other, suggesting that the two should not overlap.

The political classification doctrine rests on a formal definition of race, but its use also fuels that understanding. By failing to challenge formal-race and instead seeking simply to characterize Indian classifications as non-racial, Indian advocates who invoke the political classification doctrine reinforce the colorblind jurisprudence that has grown out of this formal understanding of race. By arguing that recognizing Indian tribal rights is a purely political move and does not implicate race at all, tribal advocates unintentionally reinforce the idea that race is a natural (as opposed to socially constructed) characteristic of other minority groups and that race-consciousness causes racial inequality.

2. *Alternative Conceptions of Race*

A more accurate understanding of race is one that emphasizes racialization as a social process by which discursive racial identities are produced and racial meaning is assigned to a group that was previously racially unclassified.[204] Through the use of legal meanings, stereotypes, and associations, a racialized group is constructed as the non-white "other" with the ascribed characteristics, creating a duality in which whites are understood as opposite and superior to the racialized group.[205] These constructed racial differences are in turn relied upon to justify an unequal distribution of resources, as well as con-

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[203] Although the reasons for this exception are not fully articulated in *Mancari*, and although the Court ultimately invoked the language of "political rather than racial," much of the opinion would support alternative interpretations of Indian exceptionalism. *See supra* notes 162–68 and accompanying text (offering alternatives to the political classification doctrine).

[204] OMI & WINANT, *supra* note 31. Jerry Kang also adopts a process-oriented understanding of race, defining racialization as a process by which racial categories are designated, rules are created to delineate the boundaries of those categories, and racial meanings are assigned to the categories. Kang, *supra* note 23, at 1499–1504.

[205] *See generally* LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007) (describing dualities associated with whites and Indians); EDWARD SAID, ORIENTALISM (1978) (describing dualities associated with whites and Asians and Middle Easterners); Crenshaw, *supra* note 77 (describing dualities associated with whites and Blacks); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing dualities associated with whites and Arabs or Middle Easterners).

quest and subjugation of specific groups.[206] This understanding of race also acknowledges that racial categories are not innate, fixed, or static. Rather, they are assigned based on a range of characteristics including, but not limited to, phenotype and ancestry.[207] Although racial group identities are constructed and imposed, they carry political and cultural significance. At a minimum, the historical fact of racialization, and the subsequent impact of individualized and systemic racial discrimination on members of that group, imbues the racial category with historical, cultural, political, and identity significance.

According to this understanding, Indians are not a racial group because they share certain biological characteristics, innate cultural traits, or common ancestral tracing. Indians are a racial group because they have been racialized, and this racialization has occurred along many different axes. Simply put, Indians did not exist as a group until European settlers classified the hundreds of tribal groups they encountered into a single non-white category. Throughout U.S. history, this Indian racial category has been constructed, maintained, and policed by highlighting (and often inventing) ancestral difference, biological difference, phenotypic difference, religious difference, cultural difference, and political difference. Although the term "Indian" also implies legal recognition of political distinctiveness, the broad Indian legal category could not exist if a racial category had not first been delineated. Indian racial distinctiveness was then relied upon to support recognition of a particular type of political relationship—one in which the United States government exercised colonial domination over Indians and in which the land rights of Indians were secondary to the land needs of white settlers.

Equally important, this delineation of Indian racial difference was not simply a matter of phenotypic or ancestral difference from Europeans. The brief discussion below illustrates the different factors used by the federal government to determine the racial boundaries of

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[206] *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 10 (rev. ed. 2006) ("The distribution of wealth and poverty turns in part on the actions of social and legal actors who have accepted ideas of race, with the resulting material conditions becoming part of and reinforcement for the contingent meanings understood as race."); *accord* Harris, *supra* note 81, at 1714 n.10 (defining white supremacy as "a political, economic, and cultural system in which whites overwhelmingly control power and material resources" (citing Ansley, *supra* note 184, at 1024 n.129)).

[207] *See* Carbado & Gulati, *supra* note 31, at 722–25 (discussing role of phenotypic characteristics and racial identity performance in the formation of racial categories); Devon W. Carbado, 15th Annual Derrick Bell Lecture on Race in American Society: After Obama: Three "Post-Racial" Challenges (Nov. 3, 2010) (discussing role of identity performance in racial categorization).

Indianness (and thus the boundaries of the legal Indian category) and the ways in which this racialization has served material interests.

Ancestry has certainly been used to define Indian race, but its significance is not reducible to the idea that ancestry is equivalent to race. Federal courts have been clear that some amount of indigenous or common ancestry is essential to an individual being considered Indian or to a group being considered an Indian tribe. In *Montoya v. United States*, the Supreme Court defined a tribe as "a body of Indians of the same or a similar race."[208] In *United States v. Rogers*, the Court held that a white man married to a Cherokee woman and living as a citizen of the Cherokee Nation could not be an Indian for purposes of federal jurisdiction:

> [W]e think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception [to federal jurisdiction for crimes committed by one Indian against another]. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.[209]

Historically, however, a tiny amount of Indian blood was not enough to establish Indian identity. The federal government has long incorporated a blood quantum floor into its legal definitions of Indian.[210] Virginia anti-miscegenation laws similarly classified persons

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[208] 180 U.S. 261, 266 (1901). "Race" was used in *Montoya* to signify common ancestry. This common-ancestry requirement is embodied today in the requirement that, in order to qualify as an Indian tribe under federal regulations, a group must demonstrate that its "membership consists of individuals who descend from a historical Indian tribe [or combined tribes]." 25 C.F.R. § 83.7 (2010).

[209] 45 U.S. (4 How.) 567, 572–73 (1846). *But see* Bethany R. Berger, *"Power over this Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2019 & n.318 (2004) (discussing the handful of cases since *Rogers* in which adopted white members of Indian tribes were recognized as Indians for certain federal purposes).

[210] *See* Goldberg, *supra* note 54, at 242 n.19 (citing one-quarter Indian blood requirement for Indian education benefits as example of standard BIA "blood" requirement). This requirement of Indian racial authenticity also appears in the area of federal recognition, in which groups viewed as having an insufficient amount of Indian blood can face considerable resistance to recognition. *See* PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND 3–65 (1988) (describing how Mashpees' history of intermarriage with Blacks may have contributed to doubts about their Indianness, which in turn led the federal court to determine that they did not qualify as Indian tribe under federal definitions); RENÉE ANN

with less than one-sixteenth Indian blood as white for intermarriage purposes.[211] Whereas Black racial classifications were usually defined by a one-drop rule, in which any discernible trace of Black ancestry could "taint" whiteness,[212] a certain minimum quantum of Indian ancestry was required before a person would register racially (and thus federally) as Indian.

This difference makes sense when viewed in light of the different ways in which Blacks and Indians were situated vis-à-vis American expansion. For Blacks, who had the legal status of property and laborer, a one-drop classification system in which a child's race followed her mother's meant that interracial sex produced more property and more laborers for white slaveowners. The "Indian problem," on the other hand, was how to eliminate Indian people in order to free up their lands for expanded white settlement,[213] and how to relieve the federal government of its obligation to pay annuities under Indian treaties. By imposing a minimum ancestral floor on Indian race, these laws ensured that interracial unions would over time result in fewer Indians, providing assurance that Indians would eventually disappear.[214]

This history provides a context that complicates Indian blood quantum requirements today. The federal government still sometimes

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CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2005) (discussing role that racial stereotypes and classifications have had in failure or success of federal recognition petitions); David E. Wilkins, *Breaking Into the Intergovernmental Matrix: The Lumbee Tribe's Efforts To Secure Federal Acknowledgement*, 23 PUBLIUS 123, 140–41 (1993) (discussing how uncertainty about Lumbee ancestry has impeded federal recognition efforts).

211 Kevin N. Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 352–53 & n.8 (2007) (citing An Act to Preserve Racial Integrity, ch. 371, § 5099a, 1924 Va. Acts 534 (repealed 1975)).

212 *See* Gotanda, *supra* note 77, at 23–24 (describing rules of American racial classifications); *id.* at 24–25 n.95 (citing MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 37, 56 (1964)) (discussing hypodescent, which is the "practice of assigning the 'subordinate' classification to the offspring of one 'superordinate' parent and one 'subordinate' parent").

213 Wolfe, *supra* note 101, at 388. Wolfe explains the difference between Black and Indian racialization this way: "As opposed to enslaved people, whose reproduction augmented their owners' wealth, Indigenous people obstructed settlers' access to land, so their increase was counterproductive. In this way, the restrictive racial classification of Indians straightforwardly furthered the logic of elimination." *Id. See also* PHILIP J. DELORIA, PLAYING INDIAN 64 (1998) (describing American ideology of "the vanishing Indian"). *See generally* ROBERT HAYS, EDITORIALIZING "THE INDIAN PROBLEM": THE *New York Times* on Native Americans, 1860–1900 (2007) (documenting editorials on the question of how the presence of Indians could be reconciled with the expansionist goals of the United States).

214 As Kevin Maillard argues, "such laws relegate Indians to existence only in a distant past, creating a temporal disjuncture to free Indians from a contemporary discourse of racial politics . . . [and] assess Indians as abstractions rather than practicalities, or as fictive temporalities characterized by romantic ideals." Maillard, *supra* note 211, at 357.

uses minimum ancestry as a criterion for Indianness.[215] If an individual does not meet the ancestry requirement—most often one-half or one-quarter "Indian blood"—he or she will no longer be considered Indian for that particular federal purpose. There are countless Indians who are phenotypically, culturally, and historically identifiable as Indians but who do not meet the minimum ancestry requirement and so are not Indian by some federal definitions.[216] Indians have one of the highest outmarriage rates of any racial group,[217] and many Indian people struggle with the reality that their children may not qualify as Indian under federal definitions or as tribal members under tribal requirements. In many ways, then, Indianness continues to be legislated out of existence.

Culture and performance have been used at least as frequently as ancestry to define the boundaries of Indian race (and thus the boundaries of federal Indianness), and these factors too have been used in a way that facilitates disappearance. As Bethany R. Berger notes, Indians were a racial anomaly, as they were sometimes permitted to "become" white as long as they assimilated, regardless of ancestry or

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[215] *See, e.g.*, 8 U.S.C. § 1359 (2006) (specifying that immigration exceptions only apply to American Indians born in Canada, "who possess at least 50 per centum of blood of American Indian race"); 25 C.F.R. § 32.4(z) (2010) (requiring "Indian blood quantum of 1/4 degree or more" for students to be eligible for specified services). The BIA also issues "Certificate of Degree of Indian Blood" (CDIB) cards, which become official representations of a person's degree of Indianness and can be used to establish federal Indianness in the absence of proof of tribal membership. *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 252–53 (2008) (discussing federal CDIB system of identification).

[216] While the majority of federal laws today refer to tribal membership alone or as one option for proving federal Indianness, blood quantum remains an issue because many tribes require a specific degree of Indian blood for membership. Tribes may also rely on CDIB cards to establish the required minimum blood quantum, further complicating the relationship between tribal and federal definitions of Indian. For a thoughtful discussion of the impact of federal definitions on tribal definitions, the functions of blood quantum requirements under tribal law, and the difference between tribal and Indian blood quantum, see generally Gover, *supra* note 215. For a discussion of the role of blood quantum requirements as a proxy for other criteria, see Kimberly TallBear, *DNA, Blood, and Racializing the Tribe*, 18 WICAZO SA REV. 81, 104 n.44 (2003), and Goldberg, *supra* note 34, at 1390.

[217] Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, POPULATION BULL., June 2005, at 1, 12 tbl.2 (indicating high rates of outmarriage among Indians); Haeyoun Park, *Who Is Marrying Whom*, N.Y. TIMES, Jan. 29, 2011, http://www.nytimes.com/interactive/2011/01/29/us/20110130mixedrace.html?scp=3&sq=intermarriage&st=cse (same); *see also* Zhenchao Qian & Daniel T. Lichter, Crossing Racial Boundaries: Changes of Interracial Marriage in America, 1990–2000, at 3, 10, 19–20 (unpublished manuscript, on file with the author) (finding high rates of Indian-white intermarriage and noting tendency of children of these unions to identify as white).

phenotype.[218] That is, an Indian was a person who adhered to a traditional religion, spoke a traditional language, wore traditional dress and hairstyle, and lived on communally-owned land. Any Indian person who adopted Christian or Catholic religion, spoke English or Spanish, adopted Western dress and hairstyle, and owned property individually ceased to be Indian.[219] Cultural definitions of Indian race correlated with federal assimilation policy, which was introduced as an alternative solution to the "Indian problem."[220] Simply put, Indians were not dying off or intermarrying fast enough, so the new federal policy was to eradicate them by making them white. Viewed this way, flexible racial boundaries and access to whiteness were not so much a special benefit conferred on Indians as they were part of a concerted strategy to eradicate them.[221]

Cultural definitions of race were also used to determine which groups would qualify as Indian tribes, relying on a civilized-savage dichotomy to differentiate between whites and Indians.[222] In *United*

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218 Berger, *supra* note 45, at 593–94 & n.9 (citing VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 171, 172 (1988)) (describing pressure for Indians to "become" white, and explaining that tribes and Indians who chose to remain with them were theorized as racially inferior to whites while individual Indians were permitted and encouraged to assimilate into white society).

219 I disagree with Berger's implication that phenotype and ancestry no longer matters for Indians who have assimilated culturally. Historically, this is not completely accurate. For example, restrictions in California on Indians voting, attending school, or testifying in court did not turn on cultural performance. Neither did Indian slave laws or bounties placed on Indian heads during the Gold Rush. Rather, courts and the public were free to provide their own content to the "Indian" designation. Although a determination of whether someone was Indian may often have turned on culture or performance, particularly for those whose phenotype or ancestry were ambiguous, there were certainly other ways to identify someone as Indian. Then, as now, people who are phenotypically identifiable as Indians would be racially classified as Indians, even if they had converted to Catholicism, left their tribes, and lived in cities. With respect to hate crimes—the modern version of bounties—phenotype, not cultural practices or tribal membership, is undoubtedly what most attackers use to identify victims. This use of flexible racial criteria is consistent with the way race has been defined for other groups. *Compare* United States v. Ozawa, 260 U.S. 178 (1922) (moving from phenotypic to cultural definitions of racial difference when confronted with a white-skinned Japanese man who argued that he was legally white) *with* Theophanis v. Theophanis, 51 S.W.2d 957 (Ky. 1932) (relying on evidence of ancestry, community reputation, and prior legal designation to determine whether a woman who represented herself as white was actually a mulatto).

220 Bannan, *supra* note 97, at 787.

221 Yael Ben-zvi, *Where Did Red Go?: Henry Louis Morgan's Evolutionary Inheritance and U.S. Racial Imagination*, 7 NEW CENTENNIAL REV. 204–06 (2007) (describing the virtual elimination of Indian populations as a result of theories of cultural evolutionism).

222 *See* Montoya v. United States, 180 U.S. 261, 265 (1901) ("Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word.").

States v. Joseph,[223] the Supreme Court confronted the question of whether Pueblo Indians were Indians under federal law. The Court relied on a racialized definition of Indianness informed mainly by the relative civilization or savagery of a particular group:

> As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. . . . [T]hey have adopted mainly not only the Spanish language, but the religion of a Christian church. . . . Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside . . . . The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. *They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country* . . . . The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all *forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made*, or that in the intent of the act of 1851 its provisions were applicable to them.[224]

Nearly forty years later, in *United States v. Sandoval*,[225] the Court invoked a similar racialized definition of Indianness to determine whether the Pueblos were subject to a federal law regulating liquor in Indian country. Relying primarily on the observations of federal Indian agents, the Court determined this time that Pueblos were Indians:

> The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism [sic], and chiefly governed according to the crude customs inherited from

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223 94 U.S. 614 (1877).

224 *Id.* at 616–17 (emphasis added). The Court's determination that Pueblos were not Indians also suggested without deciding that Pueblos, who had been citizens of Mexico, should be considered citizens of the United States and New Mexico under the Treaty of Guadalupe Hidalgo at a time when Indians were not U.S. citizens. *Id.* at 618.

225 231 U.S. 28, 39 (1913).

> their ancestors, they are essentially a simple, uninformed and inferior people.[226]

Today, when struggling to determine who is Indian and who is not, courts often revive cultural definitions of Indian race, drawing on the idea that an Indian is a person who practices a traditional religion, speaks a native language, and adheres to pre-contact cultural practices, in order to determine the limits of federal Indian rights.[227]

Finally, Indian racialization is often tied to the exercise of legal or political rights reserved for Indians.[228] In some communities, for example, Indians may be identifiable not by skin color or even cultural performance, but by tribal membership as demonstrated by the exercise of rights reserved for tribal members. Indians (including those who might otherwise "pass" as white) are marked as Indian when they seek to exert or defend these political rights. This was the case in Northern Wisconsin when the Lac du Flambeau tribal members who engaged in treaty-protected fishing activities were targeted for racialized harassment, and it is still the case in many communities today where Indians operate successful casinos.[229]

Once people are classified as Indian by virtue of their exercise of rights, they are vulnerable to racial stereotypes. The Lac du Flambeau protestors drew on commonly held stereotypes of Indians as drunk, freeloading, lazy, and undeserving.[230] These stereotypes are easily

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226 *Id.* The Pueblos' arguable status as U.S. citizens was cited in *Sandoval* as a basis for finding that they were not Indians, but the Court rejected this argument, reasoning that Pueblo citizenship remained an open question and that citizenship was not necessarily a barrier to classification as an Indian. *Id.* at 47–48.

227 For example, the Ninth Circuit upheld an Interior Board of Indian Appeals opinion that because reindeer were introduced to Alaska post-contact, reindeer herding was not a "uniquely native" activity, unlike fishing and hunting wild game, which were characterized as "an integral and time-honored part of native subsistence culture." As a result, the court rejected an interpretation of the Reindeer Industry Act of 1937 that would preserve a monopoly for Native Alaskan reindeer herders on the basis that *Mancari* only shields from strict scrutiny review those statutes "that affect uniquely Indian interests." Williams v. Babbitt, 115 F.3d 657, 664–65 (9th Cir. 1997); *see also In re* Santos Y., 112 Cal. Rptr. 2d 692, 730 (Cal. Ct. App. 2001) (finding that, after *Adarand*, the Ninth Circuit had "limited application of the rational basis test to legislation involving uniquely Indian concerns" and that it did "not find child custody or dependency proceedings to involve uniquely Native American concerns"). *See generally* Goldberg, *supra* note 34, at 1376–88 (discussing the Ninth Circuit's imposition of cultural requirements for Indianness).

228 Although the federal government rarely engages in explicit racial classifications today and in fact formally minimizes any relationship between Indian race and legal Indianness, racial classifications persist in the (non-Indian) public imagination, and these "common sense" understandings of race can shape and complicate federal and tribal rules about legal Indianness.

229 *See infra* Part III.A (discussing relationship between Indian racialization and exercise of Indian political rights).

230 Pamphlets distributed by the protestors referred to Indians as lazy and wasteful, with a "lack of ambition" to clean the fish they caught. The pamphlets also alleged that Lac du

accessible and recognizable precisely because they are so historically ingrained—always visible just below the surface and always available to be mobilized in a dispute challenging Indian political rights.[231]

As these examples demonstrate, Indian race is hardly a static matter of biology, ancestry, or skin color. Rather, ancestry, culture, history, and political status interact to shape the boundaries of the Indian racial category. Any inquiry into the potential dangers posed by the use of race or ancestry to classify Indians should be attentive to these historical circumstances, rather than just the general dignitary harm cited by the *Rice* majority. From a dynamic and historical perspective, it is also clear that racialization is not at all irrelevant to Indian political status. Rather, political recognition as an Indian tribe or tribal member, which originally hinged in part on an inquiry into racial differences (biologically and culturally defined), cannot be understood independently from Indian racialization. I address this point in more detail in Part III.

This alternative understanding of race also highlights certain similarities between the experiences of Indians and other racialized groups that are buried by the political classification doctrine. For example, some Indian law scholars argue that Indians should reject any pan-Indian racial identity in favor of an identity as tribal political subjects because Indian race is an invented and imposed category. These scholars are correct in insisting that the pan-Indian racial category was fabricated and imposed on a diverse set of cultural, ethnic, tribal, and

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Flambeau tribal members received "huge amounts of free government surplus food," free housing, free health care, and large cash subsidies from the federal government. Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1386, 1391–92 (W.D. Wis. 1992), *rev'd*, 991 F.2d 1249 (7th Cir. 1993); *see also* BOBO & TUAN, *supra* note 22, at 156–59 (discussing perceptions that "Indians are getting ahead at the expense of others" because they "exploit their rights for money," and "don't want to work" (internal quotation marks omitted)).

231 This relationship between racialization and legal or political status can also be seen outside the Indian context in the debate surrounding immigration. Race and citizenship or immigration status are historically intertwined in the sense that Congress and the courts have placed racial limits on immigration and naturalization, both through express rules and through quotas. *See supra* note 23 (discussing relationship between race and legal meaning in context of Asian exclusion laws). This history informs a modern debate in which racialized critiques are leveled at immigrant groups and the "political" status of a group (for example, as an undocumented immigrant) can serve as a legally defensible focal point for animus that is difficult or impossible to separate from racism. *See generally* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 168–88 (2006) (discussing role of race and ethnicity in immigration law); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21–55 (2004) (examining race and national origin quotas in Immigration Act of 1924).

national groups indigenous to America.[232] However, denial of racial group status does little to prevent racism, and it can be counter-productive in the sense that it may impede group-based mobilization to counter racism. As critical race theory scholars have convincingly argued, the imposed nature of racial categories does not mean that they cannot be an important site for identity production and a category around which political mobilization has occurred—usually in express opposition to the harmful consequences of racialization.[233]

B. *Indianness as Civic Participation*

In addition to reducing race to a formal matter of ancestry and constricting the permissible scope of race consciousness, the Court's embrace of the political classification doctrine has reduced Indianness to a matter of voluntary civic participation. This move has occurred in two steps. First the Court has increasingly equated Indianness with membership in a federally recognized tribe, an idea that crystallized in the *Rice* discussion of Native Hawaiians, but which has had more subtle consequences for Indian law. Second, the Court's interpretations have further reduced tribal membership to a matter of voluntary civic participation, the consequences of which are apparent in cases considering the extent of tribal civil jurisdiction over non-members. In other words, the effect of *Rice* has been to reduce Indianness to tribal membership, and the effect of the civil jurisdiction cases has been to further reduce tribal membership to a matter of political choice.

1. *The Instability of Equating Indianness with Tribal Membership*

Rice helped to solidify the legal relationship between indigeneity and membership in a federally recognized tribe. After *Rice*, Indianness must be about something more than ancestry in order to avoid the tension with race jurisprudence described in the Benjamin article and in the *Rice* opinion. In an effort to distinguish Indian classifications from illegitimate racial classifications, courts have focused more and more on membership in a federally recognized tribe as the lynchpin of the Indian classification.[234] While *Mancari* still provides a

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[232] *See supra* note 34 (citing scholarly critiques of pan-Indian racial identity). Of course, this is no different from the way that a fabricated racial category like Black was imposed on diverse cultural, ethnic, tribal, and national groups from Africa.

[233] *See, e.g.*, Crenshaw, *supra* note 31, at 1242 (discussing racial identity as "the source of social empowerment and reconstruction").

[234] *See, e.g.*, Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 734–35 (9th Cir. 2003) (upholding Indian Gaming Regulatory Act under *Mancari* standard and noting that the Act differs from ancestry-based Indian laws in part because it applies only to federally recognized tribes); *cf.* Williams v. Babbitt, 115 F.3d 657, 663–64 (9th Cir. 1997)

legal foothold for Indian rights, classifications that rely on indigenous ancestry are difficult for some courts to square with the Court's color-blind race jurisprudence in light of *Rice*. And while the *Rice* Court took care to limit its analysis to the Fifteenth Amendment's restrictions on state elections, the ideas that informed the majority opinion seem to question any legal recognition of indigeneity outside of membership in a federally recognized tribe.[235] Courts faced with equal protection challenges to statutes that single out Indians must now struggle to determine where political Indianness ends and racial Indianness begins.[236]

Trying to separate ancestry from tribal membership presents a problem for Indian law.[237] Many federal laws today include Indians who are not enrolled members of federally recognized tribes. Federal educational and health benefits, for example, do not turn solely on tribal membership. For certain federal scholarship eligibility, "Native American" is defined as "an individual who is of a tribe, people, or culture that is indigenous to the United States."[238] Similarly, a person may demonstrate eligibility for federal Indian health services by showing that he or she is regarded by the community as Indian or actively participates in tribal affairs.[239] In another example, the Reindeer Act prohibits reindeer herding by all but Native Alaskans,

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(interpreting *Mancari* as "shielding only those statutes that affect uniquely Indian interests").

235 *See supra* notes 176–79 and accompanying text (discussing *Rice* Court's reliance on article that questioned any indigenous classfication not involving recognized tribes).

236 Even classifications intended primarily to benefit members of federally recognized tribes remain contested. If the classification scheme appears to put too much weight on ancestry or if it is not clearly limited to members of federally recognized tribes, it is vulnerable to a challenge on equal protection grounds. *See infra* notes 238–40 and accompanying text (describing federal classifications which rely at least in part on ancestry but are intended to benefit class of people consisting mostly of members of federally recognized tribes).

237 This problem is complex even for members of federally recognized tribes, as many tribal membership rules include an ancestral component. *See* Gover, *supra* note 215, at 271–72 (citing increased proportion of documented tribal constitutions using lineal descent rules (currently forty-four percent) and blood-quantum rules (currently seventy-one percent)).

238 20 U.S.C. § 1067q(c)(6) (Supp. III 2010).

239 The Indian Health Service includes the following definition in determining eligibility for federal Indian health services:

> A person may be regarded as within the scope of the Indian Health program if he . . . [i]s of Indian and/or Alaska Native descent as evidenced by one or more of the following factors: (1) Is regarded by the community in which he lives as an Indian or Alaska Native; (2) Is a member, enrolled or otherwise, of an Indian or Alaska Native Tribe or Group under Federal supervision; (3) Resides on tax-exempt land or owns restricted property; (4) Actively participates in tribal affairs; (5) Any other reasonable factor indicative of Indian descent . . . .

which the Act defines solely in terms of ancestry.[240] Given the resistance to ancestry-based classifications after *Rice*, courts sometimes have difficulty making a principled distinction between Indian classifications, which are legally permissible, and racial classifications, which generally are not.[241]

As in *Rice*, invocation of ancestry, particularly without a tribal membership requirement, sets off racial alarms. For example, under the George W. Bush Administration, the Department of Justice objected to the proposed reauthorization of the Indian Health Care Improvement Act, the authorizing legislation for Indian Health Services programs, on the grounds that the provision of services to urban Indians who were not members of federally recognized tribes would violate the Fourteenth Amendment.[242] Some courts go so far as to inject additional requirements into ancestry-based classifications, such as cultural authenticity requirements, in order to ensure that Indian laws are not race-based.[243]

The post-*Rice* dilemma is most apparent in cases where courts must consider federal and tribal power over Indians who are not members of the tribe. In the criminal context, Congress and the

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U.S. Dep't of Health & Human Servs., *Eligibility Requirements for Health Services from the Indian Health Service*, INDIAN HEALTH SERVICE, http://www.ihs.gov/generalweb/helpcenter/customerservices/elig.asp (last visited Aug. 15, 2011).

240 25 U.S.C. § 500n (2006) defines "natives of Alaska" to include:

> the native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to September 1, 1937, have migrated into Alaska from the Dominion of Canada, and their descendants of the whole or part blood.

Unlike Native Hawaiians, most Native Alaskan groups are recognized as Indian tribes.

241 *See, e.g.*, Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 850 (9th Cir. 2006) (Fletcher, J., concurring) (noting that majority assumes that "Native Hawaiian is a racial classification" but emphasizing that "[i]t is also a political classification"); Kahawaiolaa v. Norton, 386 F.3d 1271, 1279 (9th Cir. 2004) (acknowledging that Indian classifications are racial in certain contexts and political in others).

242 *See* Kitty Marx & Jim Roberts, *DOJ White Paper Derails Reauthorization of IHCIA*, NORTHWEST PORTLAND AREA INDIAN HEALTH BOARD, Oct. 9, 2006, http://www.npaihb.org/images/policy_docs/legisupdates/2007/No.%2018%20-%20IHCIA%20Update%20-%20October%209,%202006.pdf (discussing Department of Justice objections to Indian health bill).

243 *See* Goldberg, *supra* note 34, at 1380–88 (discussing how California courts created "existing Indian family" exception to Indian Child Welfare Act (ICWA)). The ICWA by its terms applies to children who are tribal members and to any child who is "eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2006). However, the California Court of Appeals has declined to apply the statute to children whose Indian parents have not demonstrated sufficient cultural and political involvement with their tribes. In the court's view, applying the statute to children whose parents were not culturally or politically Indian enough would result in an impermissible racial classification because of the statute's invocation of ancestry.

Supreme Court have been clear that this power exists,[244] yet lower federal courts struggle to devise a test for Indianness outside of the context of tribal membership. Two recent federal appellate decisions have articulated complex standards for determining whether a person is Indian for purposes of federal criminal jurisdiction when that person is not a member of the tribe which has jurisdiction over that reservation. In *Cruz v. United States*, the Ninth Circuit explained that a determination of Indianness required (1) a sufficient degree of Indian blood and (2) tribal or federal government recognition as Indian.[245] This basic test comes from the Supreme Court's 1846 decision in *United States v. Rogers*, in which the Court held that a white man who had married into the Cherokee Nation was not an Indian for purposes of federal jurisdiction.[246] In the absence of formal tribal membership to satisfy the political prong of the test, the Ninth Circuit set forth four factors for determining whether a person is recognized as Indian in order of importance, "1) tribal enrollment [in another tribe]; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."[247]

In *Stymiest v. United States*, the Eighth Circuit applied a similar initial test, also based on *Rogers*,[248] which required "some Indian blood" and recognition by a tribal or federal government as an Indian. The specific factors used to determine whether a person is recognized as Indian in *Stymiest*, however, were slightly different:

> (1) enrollment in a tribe; (2) government recognition formally or informally through providing the defendant assistance reserved only to Indians; (3) tribal recognition formally or informally through sub-

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[244] *See* 18 U.S.C. § 1153 (2006) (asserting federal criminal jurisdiction over Indians committing listed crimes); 25 U.S.C. § 1301(2) (2006) (recognizing "power of Indian tribes . . . to exercise criminal jurisdiction over all Indians"); United States v. Lara, 541 U.S. 193, 196 (2004) (holding that Congress in § 1301(2) confirmed tribes' inherent power to exercise jurisdiction over nonmember Indians).

[245] United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009) (citing United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005)).

[246] United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846). Unlike in *Cruz* and *Bruce*, where the defendants' political Indianness was in question, the Court in *Rogers* refused to grant federal Indian status to the defendant because he failed the first requirement of Indian blood. *See supra* note 209 and accompanying text (quoting passage from *Rogers*).

[247] *Cruz*, 554 F.3d at 846 (quoting *Bruce*, 394 F.3d at 1224). The court in *Cruz* and *Bruce* specified that these factors should be considered "in declining order of importance." *Id.* (quoting *Bruce*, 394 F.3d at 1224).

[248] Stymiest v. United States, 581 F.3d 759, 762 (8th Cir. 2009) (citing *Rogers*, 45 U.S. (4 How.) at 572–73).

> jecting the defendant to tribal court jurisdiction; (4) enjoying benefits of tribal affiliation; and (5) social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.[249]

Unlike in *Cruz*, the Eighth Circuit did not require that the factors be considered in any particular order of importance (except that tribal enrollment alone would be dispositive), and the court pointed out that the list of factors "should not be considered exhaustive."[250]

In each case, the enumeration of specific factors and the dispute over the weight given to those factors stemmed from the court's struggle to reconcile a purely political justification for Indian law with a category that appears at first glance to be defined by ancestry. As the *Cruz* court stated, "[t]he four factors that constitute the second *Bruce* prong are designed to 'probe[ ] whether the Native American has a sufficient *non-racial* link to a formerly sovereign people.'"[251] In an effort to give non-racial content to the legal category of non-member Indian, each court invented a series of additional tests to demonstrate Indian authenticity, resulting in varying standards and inconsistent determinations across courts.[252]

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249 *Id.* at 763.

250 *Id.* at 764.

251 *Cruz*, 554 F.3d at 849 (quoting *Bruce*, 394 F.3d at 1224) (emphasis added).

252 Cruz's blood quantum was "29/128 Blackfeet Indian and 32/128 Blood [Canadian] Indian," and his mother was a Blackfeet tribal member. *Id.* at 843. In other words, his ancestry was nearly half indigenous and he was directly descended from a member of the tribe in question. He lived on the Blackfeet Reservation as a child and had recently moved back at the time of his offense. *Id.* He had worked as a BIA firefighter, and he qualified as a "descendant" under tribal law, meaning he was subject to tribal court jurisdiction. *Id.* at 847. Under the Ninth Circuit's test, Cruz did not qualify as Indian. In particular, the court held that the fourth factor (social recognition) was not satisfied, despite the fact that Cruz lived on the reservation as a child, because he did not participate in Indian "religious ceremonies, . . . cultural festivals, or dance competitions," nor did he vote in tribal elections or carry a tribal identification card. *Id.* at 846–48. The court's inquiry into "social recognition" as Indian and "participation in Indian social life" was limited to factors demonstrating either *political* affiliation or *religious* practices, evidencing a continuing struggle to differentiate between Indians and non-Indians on grounds that the court deems more defensible than ancestry.

Stymiest had "three thirty-seconds Indian blood." *Stymiest*, 581 F.3d at 762. His maternal grandfather was an enrolled member of the Leech Lake Band of Ojibwe (a different tribe than the one with jurisdiction over the Rosebud reservation), but his mother was not a tribal member at all. *Id.* at 765. He was also adopted by white parents. He previously lived with his grandfather at Leech Lake for six months and had resided on the Rosebud reservation for a year at the time of his offense. *Id.* He had identified himself as an Indian (sometimes inaccurately claiming to be an enrolled tribal member) to friends, to the tribal police, and to Indian Health Service officials, but had never been affirmatively determined to qualify for services by any federal or tribal agency. *Id.* at 764–65. Under the Eighth Circuit's more flexible test, Stymiest qualified as an Indian for jurisdictional purposes. *Id.* at 766.

More alarming than the inconsistency, however, is the gap between the federal definition of Indian and the subjective understandings of Indian people and tribes about who belongs to the Indian community. In both *Rogers* and *Stymiest*, the courts expressed concern about overreliance on self-identification as an Indian. In *Rogers*, the Court seemed concerned that overreliance on Rogers's self-identification as Cherokee failed to capture some objective racial truth. In *Stymiest*, on the other hand, the court said that self-identification "is not otherwise sufficient to satisfy the political underpinnings" of the second *Rogers* prong.[253] The *Rogers* and *Cruz* courts were similarly reluctant to accord too much weight to acceptance by the tribal community in the absence of formal recognition. Rogers was integrated into and accepted by the Cherokee community, and Cruz was subject to Blackfeet tribal jurisdiction as a "descendant" under tribal law, yet in neither case was this community recognition sufficient to establish Indianness for federal purposes. Taken together, these cases demonstrate that federal Indianness is neither purely racial nor purely political. They also highlight the clash between the federal courts' definition of Indianness and tribal conceptions of belonging.

2. *The Danger of Reducing Tribal Membership to Civic Participation*

The struggle to emphasize the political content of Indianness has also affected *how* courts understand tribal membership. The Supreme Court has propounded a definition of tribal membership that edits out all but the civic participation element. This restrictive definition of tribal membership appears most clearly in cases addressing the extent of tribal civil jurisdiction, and it has been used there to justify further encroachment on Indian tribal rights. As the Court's view of tribal membership has narrowed, so has the extent of tribal civil jurisdiction permitted by the Court.

The civil jurisdiction cases concern the power of Indian tribes to regulate and adjudicate disputes involving nonmembers within the tribe's territory. In the 1981 case *Montana v. United States*, the Supreme Court announced a new principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," except in limited circumstances.[254] Relying on this new principle, the Court has gradually reversed the general rule of *Worcester v. Georgia* that "the laws of [the state] can have no

[253] 581 F.3d at 764.

[254] 450 U.S. 544, 565 (1981).

force" in Indian country,[255] arriving at the conclusion that Indian tribes presumptively lack power over nonmembers even within tribal territory.[256]

Montana's general rule was a sharp departure from Indian law precedent, which had previously confirmed exclusive tribal power to adjudicate a contract dispute between a non-Indian merchant and an Indian customer[257] and concurrent tribal power to tax commercial transactions by non-Indians on reservations.[258] *Montana* involved a unique situation: non-Indian conduct on a parcel of land within the boundaries of the reservation owned in fee simple by a non-Indian. The Court, however, framed its ruling as a general principle that tribes lack power over nonmembers.[259] The Court then characterized all previous affirmations of tribal power over nonmembers in terms of two limited exceptions to the general rule of no power,[260] effectively adopting a new presumption against tribal jurisdiction. This rule, which governs tribal civil jurisdiction cases today, has provided the baseline for a steady divestment of tribal power. In the cases following *Montana*, through a piecemeal focus on specific circumstances, the Court has invented a new default rule that Indian tribes generally lack governmental power over anyone who is not a member, steadily chipping away at tribal governmental authority over reservations.[261]

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255 31 U.S. (6 Pet.) 515, 561 (1832).

256 *Montana*, 450 U.S. at 565 ("Indian tribes have lost any 'right of governing every person within their limits except themselves.'" (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1977))).

257 Williams v. Lee, 358 U.S. 217, 223 (1959).

258 Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152–54 (1980).

259 *Montana*, 450 U.S. at 565.

260 The two exceptions to the *Montana* rule involve nonmembers who have entered into a consensual relationship with the tribe and nonmembers whose conduct directly threatens the political integrity, economic security, or health and welfare of the tribe. Subsequent cases have interpreted these two exceptions very narrowly. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (holding that nonmembers who avail themselves of tribal police and emergency services do not consent to tribal jurisdiction and that tribal health and welfare exception does not permit tribes to exercise jurisdiction over highway accidents that involve nonmembers and occur on state rights-of-way through reservations); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001) (finding that nonmember's actual or potential receipt of tribal fire, police, and emergency services does not satisfy *Montana*'s consensual relationship exception, which instead requires commercial dealing, contract, or lease); Nevada v. Hicks, 553 U.S. 353, 358–60 (2001) (holding under *Montana*'s consensual relationship exception that tribe did not have jurisdiction over state officers executing process on reservation even where state officers had obtained tribal court warrant).

261 *Montana*, 450 U.S. at 557 (holding that tribe may not regulate nonmember hunting and fishing on land owned by nonmember within reservation); *see also supra* note 260 and accompanying text (discussing cases that further limited tribal authority).

In *Montana*, the Court framed its civil jurisdiction rule as an extension of a general principle that Indian tribes have been implicitly divested of the power to regulate relations between the tribe and nonmembers generally, a principle it traced to *United States v. Wheeler*[262] and *Oliphant v. Suquamish Indian Tribe*.[263] However, *Oliphant* and *Wheeler* (both criminal jurisdiction cases) discussed a distinction between Indians and non-*Indians*, and Congress and the Court had since confirmed that tribal criminal jurisdiction extended to Indians who were not members of the tribe.[264] Despite the focus on jurisdiction over non-*Indians* in *Oliphant*, and Congress's statutory affirmation of tribal criminal jurisdiction over nonmember Indians, the Court in *Montana* described *Oliphant* as a case about the member/nonmember distinction,[265] and the subsequent cases applying the *Montana* rule have continued that charade. Building on this disingenuous interpretation of *Oliphant*, the *Montana* Court announced its general rule that Indian tribes lack power over *nonmembers* and subsequent cases have adopted this general presumption.[266]

A main undercurrent in the cases limiting tribal jurisdiction over nonmembers is a concern about whether it is fair to exert tribal authority over them. The Court views tribal power as flowing strictly from the consent of the tribe's members to be governed by tribal law as expressed through the choice to live on the reservation and to vote in tribal elections. Thus, the Court is skeptical of attempts by tribes to assert political power over anyone who has not actively consented to be governed by the tribe and is not permitted to vote or participate in tribal political life (even if they choose to live within the boundaries of

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262 435 U.S. 313 (1978); *see also Montana*, 450 U.S. at 563 (citing *Wheeler*).

263 435 U.S. 191 (1978); *see also Montana*, 450 U.S. at 565 (citing *Oliphant*).

264 *See supra* note 244 and accompanying text (citing statute confirming this power and case upholding the statute).

265 *Montana*, 450 U.S. at 557.

266 *Id.*; *see also* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 427 (1989) (citing *Wheeler* as source of general rule that "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested"); Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) ("Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) ("[W]ith limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation."); Nevada v. Hicks, 553 U.S. 353, 359 (2001) (holding that Indian ownership of land does not suspend *Montana*'s general proposition that tribes lack authority over nonmembers); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008) (citing *Oliphant* for the proposition that tribes have lost "the right of governing . . . person[s] within their limits except themselves") (alterations in original) (internal quotation marks omitted).

the reservation). In *Plains Commerce Bank*, a case applying the *Montana* rule, the Court elaborated on those concerns:

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." The Bill of Rights does not apply to Indian tribes. Indian courts "differ from traditional American courts in a number of significant respects." And *nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions*.[267]

The line of cases chipping away at the sovereign power of Indian tribes to exercise jurisdiction over their territory is thus couched in concern over tribes' refusal to permit nonmembers to participate in political life. In this view, an Indian tribe is little more than a municipality, held together by the voluntary choice of its members to be governed by an extra-constitutional set of laws.

This restrictive understanding of political Indianness pretends that there is no link (or only an accidental one) between people who are citizens of Indian tribes and people who are racially Indian.[268] It completely erases any recognition of the kinship structures that undergird most tribal governments, the ancestral component of indigeneity, or the way federal law has limited the ability of tribal governments to consider making non-Indians tribal citizens.[269] When it is detached from other aspects of Indianness, tribal membership is nearly indistinguishable from citizenship in a local government.[270]

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267 *Plains Commerce Bank*, 554 U.S. at 337 (citations omitted) (emphasis added).

268 This is, of course, disingenuous in light of the *Rogers* test, *supra* notes 248–53 and accompanying text, and the Court's longstanding concern with limiting tribal power over non-Indians. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). A purely political definition of Indianness would not distinguish between tribal incorporation of and jurisdiction over nonmember Indians versus non-Indians, when in reality the federal government has been far more concerned about the latter. *See Plains Commerce Bank*, 554 U.S. at 337 (expressing concern about fairness of subjecting to tribal jurisdiction non-Indians who moved to reservations as part of allotment policy). The member/nonmember rhetoric, however, enables courts to blame tribes for racial exclusion of non-Indians from membership, discounting the federal role in establishing racial limits.

269 Goldberg, *supra* note 34, at 1394 ("Courts should frankly acknowledge and affirm the kinship– and descent-based nature of tribal communities, recognizing that the Constitution allows Congress to legislate for communities defined on that basis.").

270 This characterization finds support in the Court's opinion in *Mancari*. In emphasizing the political character of the BIA Indian preference, the Court said: "The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall be chosen,' or that a member of a

This limited understanding of tribal membership is a consequence of the Court's overall discomfort with race-like classifications in Indian law. In an attempt to reconcile existing Indian law rules with larger principles of American law, the Court has arrived at a justification for tribal power that rests completely on a notion of tribes as voluntary political associations. Like the static definition of race discussed in the previous section, the Court's limited view of tribal membership fails to accurately capture the various indices of tribal belonging that might be significant in determining how far the powers of tribal government should extend.[271] It falsely disaggregates the political and racial elements of Indianness, and it also ignores other elements that are equally or more important to indigenous[272] identity and tribal belonging.

As in the criminal jurisdiction cases, the federal courts' definition of Indianness stands in tension with tribal definitions.[273] Civic partici-

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city council reside within the city governed by the council." Morton v. Mancari, 417 U.S. 535, 554 (1974) (internal citation omitted).

271 This understanding of tribes also reduces them to consent-based organizations with power only over their members, as opposed to governments with control over their territory, including nonmember Indians and non-Indians therein.

272 A fact sheet distributed by the U.N. Permanent Forum on Indigenous Issues explains that the U.N. system has

> developed a modern understanding of this term based on the following: Self-identification as indigenous peoples at the individual level and accepted by the community as their member; Historical continuity with pre-colonial and/or pre-settler societies; Strong link to territories and surrounding natural resources; Distinct social, economic or political systems; Distinct language, culture and beliefs; Form non-dominant groups of society; Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

UNITED NATIONS, *Who Are Indigenous Peoples?*, www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited Aug. 14, 2011).

273 To be sure, the oppositional understanding employed by the political classification doctrine also influences internal debates over tribal membership rules, which present some of the stickiest issues in Indian law today. Because membership determinations are ostensibly internal political decisions made by tribal governments, they raise questions about how Indian communities understand themselves. Three strategies have emerged in recent scholarship attempting to address the link between race and tribal membership: (1) insisting that ancestry requirements are simply a stand-in for kinship or historical continuity, *e.g.*, Goldberg, *supra* note 34, at 1394 ("Courts . . . [and] scholars attacking tribal membership criteria . . . have associated the fundamental kinship and clan ties of Indian nations with legally proscribed racial classifications."); (2) suggesting that tribes move away from tribally-imposed blood quantum requirements in favor of a more politically-focused idea of citizenship, *e.g.*, Matthew L.M. Fletcher, Race and American Indian Tribal Nationhood 42 (Mich. State Univ. College of Law, Legal Research Paper Series, No. 08-11, 2009) ("Most nations around the world adopt citizenship rules and criteria without regard to race and ancestry, and Indian nations should consider doing the same."); and (3) insisting that full nationhood requires admitting members without regard to race, including people with no tribal or indigenous ancestry, *see, e.g.*, Poka Lenui, *The Rediscovery of Hawaiian Sovereignty*, 17 AMER. IND. CULTURE & RES. J. 79, 97 (1993) (describing "a

pation is rarely, if ever, used as a criterion for tribal membership.[274] Tribal communities also include many people who are not formally enrolled members. This may be true for several reasons: some people are descended from tribal members but do not meet the minimum blood quantum requirements of their tribes; some tribes are matrilineal or patrilineal, so they only permit members of a certain gender to enroll their children in the tribe;[275] and some people who are eligible for membership simply have not followed the official procedures to enroll. Many of these nonmember Indians are fully integrated into their communities, live on the reservation, and participate fully in tribal religious, cultural, and social life. The Supreme Court's equation of Indianness with tribal membership—narrowly understood to mean enrollment and voluntary political participation—writes these people out of existence.

My argument here is not that more emphasis on race would result in a better legal definition of Indianness. Rather, a frank acknowledgement that race is implicated in Indianness would alleviate the perceived need to obscure or deemphasize race. To the extent that this imperative drives courts to articulate inconsistent or restrictive definitions of Indianness, courts would be freer without it to set forth more realistic and flexible definitions of Indianness.

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growing vision of Hawai'i becoming an independent nation, rejoining the ranks of other nations of the world . . . [, in which] the question of citizenship and residence would be settled not by racial extraction but by one's relationship to Hawai'i . . . ").

I want to suggest that all of these ideas accept the formal conception of race described in Part II.A and begin from the assumption that racial classifications are always illegitimate. They suggest that the way to avoid using racial classifications is to embrace a purely political idea of belonging that parallels modern U.S. citizenship norms. Such ideas may or may not be appropriate for tribes, and that decision is certainly one for each tribe to make. However, it should not be made without careful attention to what racialization, ancestry, and descent have meant for the tribe in question and the extent to which the Supreme Court's assumptions about race and Indianness have shaped the tribe's conception of itself. *See* Jonathan Kamakawiwo'ole Osorio, *"What Kine Hawaiian Are You? A Mo'olelo About Nationhood, Race, History, and the Contemporary Sovereignty Movement in Hawaii*, 13 CONTEMP. PAC. 359, 364–65 (2001) (describing importance of ancestry, culture, and Hawaiianness in contemporary soveriegnty movement and noting that "it is difficult to convince Americans and their Supreme Court that not every culture has had such a violent and ugly experience with race that it is necessary to pretend that it does not exist in law").

274 *Cf.* Gover, *supra* note 215 (reviewing the membership requirements of various tribes and describing none that require civic participation).

275 *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 (1978) (citing ordinance enacted by Santa Clara Pueblo Council disallowing membership in Santa Clara Pueblo to children born of female members and male non-members); *Geneology*, SENECA NATION OF INDIANS, http://www.sni.org/Culture/Genealogy.aspx (last visited Aug. 14, 2011) ("[T]he mother must be an enrolled member in order for the children to be enrolled.").

III
REFRAMING: RACISM, ANTIRACISM, AND POLITICAL RIGHTS

Because Indian legal status and Indian racialization are so intimately bound together, a thorough understanding of either is impossible if it begins with the premise that political Indianness and racial Indianness are unrelated. The question of when Indianness ceases to be political and starts to be racial therefore contains a false dichotomy. Neither the problems encountered by Indian people nor the solutions to those problems can be adequately addressed without attention to both the racial and the political elements thereof and the mutually constitutive relationship between them. Instead of treating federal Indian law as separate from and antithetical to issues of race, a new theoretical paradigm, one that engages the impact of both racialization and political rights, must be developed.

This framework would embrace the premise that Indianness has both political and racial elements. That is, Indians (whether formally enrolled or not) belong to a group that both has been racialized and that has a particular political and historical relationship with the United States government. It would begin where *Mancari* left off by recognizing that, although the federal Indian category includes only members of a "discrete racial group," Indian people are "members of quasi-sovereign tribal entities whose lives and activities are governed by the [federal government] in a unique fashion" and to whom the federal government owes a particular responsibility.[276] While recognizing and privileging this unique political relationship, this new framework would acknowledge that these two statuses (political and racial) are hopelessly intertwined.[277] Every aspect of the Indian political relationship has been shaped by a racialized definition of Indians, from the trust relationship[278] to the recognition of separate jurisdiction[279] to the question of which groups qualify as Indian tribes.[280]

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[276] *Mancari*, 417 U.S. at 554.

[277] This framework shares some characteristics with Rose Cuison Villazor's expanded concept of "political indigeneity." *See generally* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008) (arguing for a broadened definition of political indigeneity). However, I mean to link race, not merely indigeneity, with political rights.

[278] *See* United States v. Kagama, 118 U.S. 375, 384 (1886) ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.").

[279] *See Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (exempting Indians from federal criminal jurisdiction in order to ensure that "the red man's revenge" is not measured by "the white man's morality"); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210–11

Therefore, it makes little sense to engage the question of Indianness without at least considering how Indian racialization fits in.[281]

First, though, the doctrinal allegiance to formal-race must be rejected. In the context of a modern legal regime that focuses on formal-race, any suggestion that Indian law involves a racial classification is potentially devastating. Under a formal-race regime, any invocation of race must be strictly scrutinized, regardless of historical context or present-day disparities. Federal Indian law—the body of federal statutes, court decisions, and regulations recognizing the unique legal status of Indian nations and authorizing special rules or benefits for Indians because of that unique status—is vulnerable under such a regime if opponents of Indian rights can convincingly argue that federal Indian law is race-based. This vulnerability is complicated by the fact that advocates and courts often invoke historical context and present-day disparities in order to support Indian rights—arguments that would be largely irrelevant under a formal-race regime.[282]

Rice stands as a cautionary tale of what could happen if indigenous groups fail to cast these laws as purely political. Without the political veneer, indigenous classifications under a formal-race regime become nothing more than ancestry-based classifications.[283] Hundreds of federal laws could be ruled unconstitutional if all indigenous classifications were treated under the formal-race regime outlined in *Rice*,[284] including laws recognizing Indian entitlements to federal health care and education benefits; laws acknowledging tribes' rights to exercise taxing, regulatory, and adjudicatory jurisdiction over their

(1978) (relying on reasoning of *Crow Dog* to hold that non-Indians who commit crimes in Indian country may not be subjected to tribal criminal jurisdiction).

280 *See supra* Part II.A.2 (discussing the role of racialization in determining which groups qualify as tribes).

281 By frankly acknowledging this relationship, this framework would remove the need to minimize or obscure the role of race in Indianness and Indian law. It would allow courts to freely address questions like those implicated in the criminal jurisdiction cases by engaging in an expansive and realistic analysis of what it means to "be Indian" or to belong to an Indian community.

282 *See supra* notes 58–60 and accompanying text (discussing the role played by the historical relationship between Indian tribes and the United States in the *Mancari* decision).

283 *See supra* notes 196–201 and accompanying text (discussing the relationship between formal-race theory and the decision in *Rice*).

284 Although the ideological position undergirding *Rice* suggests the possibility of this outcome, the decision itself is far more limited, particularly because it involved a *state* law classification on the basis of indigenous status. While the outcome in *Rice*, in which a law ostensibly intending to facilitate indigenous self-governance was overturned, stands as a warning of the vulnerability of indigenous classifications generally, as a doctrinal matter the case does not necessarily foretell a large scale reversal of *federal* laws relating to indigenous peoples.

people and their territory; and laws confirming tribal rights to protect linguistic, cultural, and natural resources. In other words, given the current legal climate surrounding race, the political classification doctrine may be the best practical option for protecting Indian rights.

By conceptually disaggregating political Indianness from racial Indianness, post-*Mancari* courts and advocates have articulated a legally defensible justification for the many laws that treat Indians differently because they are Indians. And because Indian nations view themselves as politically distinct bodies exercising independent governmental powers over members and territory, the purely political justification for Indian law rings true to many Indian people as well. Finally, because a specific goal and consequence of Indian racialization has been the denial of tribal nationhood, the political classification doctrine serves the important purpose of reasserting tribal nationhood in opposition to these racialized denials. What I suggest here is not a doctrinal departure from *Mancari*, but rather a conceptual reframing of *both* political and racial Indianness that I believe may facilitate a less restrictive interpretation of Indian law doctrine, including *Mancari*.

In this Part, I consider the implications of such a reframing. First, using the stories described in the introduction about hate crimes in Farmington, New Mexico, and fishing rights protests in Northern Wisconsin, I explain how anti-Indian sentiment today draws on both opposition to Indian political rights and racialized ideas about Indians, and how an explanatory framework that privileges one over the other is inadequate. Rather than presenting either a political or a racial problem, these examples of anti-Indianism implicate both political and racial tensions.

Second, I argue that, in light of the interaction between racial and political Indianness, federal Indian law as a body of law that protects the political rights of tribes is an important tool of anti-racism.[285] Federal Indian law is unique in that it is the only American legal doctrine that explicitly disavows assimilation, values cultural distinctiveness, and protects the political self-determination rights of a racial minority community. The importance of these values can only be fully

[285] My point about the link between tribal rights and anti-racism is not meant to suggest that tribal rights are a perfect or complete solution to the racism affecting Indians. To be sure, tribes have sometimes exercised their power to exclude in a manner that reproduces racial hierarchies. *See, e.g.*, CIRCE STURM, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA 168–200 (2002) (discussing history and present controversy surrounding Cherokee Nation's efforts to exclude from citizenship the descendants of former Black slaves); Berger, *supra* note 45, at 652 (same). At a conceptual level, however, it is important to understand how group political rights can protect individuals from racial subordination.

understood in light of the way that anti-Indian racism has manifested as efforts to forcibly assimilate Indians and destroy Indian political power. Highlighting this link also underscores the idea that each assertion of tribal political rights is on some level an anti-racist endeavor. Drawing on the story described in the introduction about juvenile justice system disparities in North Dakota, I examine a concrete example of how tribal political rights may provide a remedy for a problem that is often framed as one of individual-level racialization.

While this project may be theoretically ambitious, its goals are doctrinally modest: to raise awareness among advocates and courts of the larger consequences of the political classification doctrine, to provide a conceptual framework that might broaden the application of this doctrine, and to counter the judicial trend toward curtailing Indian rights in order to fit them into a restrictive political box.

A. Political and Racial Tension

Recall the stories of anti-Indianism described in the introduction. In Farmington, New Mexico, white teenagers engaged in "Indian rolling"—vicious assaults against Navajo people for fun.[286] In Northern Wisconsin, white protestors opposed to Lac du Flambeau tribal fishing rights harassed Indian fishermen and distributed flyers perpetuating stereotypes of Indians and advocating anti-Indian violence.[287] These stories may seem at first glance to be explainable using either a race framework or a political rights framework. Each framing offers important insights, but each leaves out fundamental aspects of the conflict. The separate frameworks imply that Indians are some-

286 *See supra* notes 1–14 and accompanying text (discussing hate violence in Farmington, New Mexico). Farmington is just one example of a larger phenomenon of hate violence in border communities. In Rapid City, South Dakota, in 2008 and 2009, teenagers engaged in a series of drive-by assaults, in which they drove around town shooting BB guns and throwing eggs, rocks, and urine at Indians on the street. Andrea J. Cook, *As More Details Come to Light in BB Gun Shootings, Solutions Sought to End Racial Attacks*, RAPID CITY J., Mar. 25, 2009. In 2011, a group of skinheads attacked an Indian family in Fernley, Nevada, a town between the Fallon and Pyramid Lake Reservations, prompting stories of similar assaults on other Indians in the area. Valerie Taliman, *Native Family Allegedly Attacked by Skinheads*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 27, 2011), http://indiancountrytodaymedianetwork.com/2011/06/native-family-attacked-by-skinheads/. According to FBI reports, Indians are disproportionately affected by bias crimes. *See* S.E. Ruckman, *FBI Hate Crime Report Shows Indians Remain Most Often Assaulted*, NATIVE AM.TIMES, Nov. 10, 2008, http://www.nativetimes.com/index.php?option=com_content&view=article&id=516:fbi-hate-crime-report-shows-indians-remain-most-often-assaulted&catid=22&Itemid=2. Nationwide, Indian and Alaska Native people have the highest rates of interracial violent-crime victimization of any group. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME vi (1999).

287 *See supra* notes 21–22 and accompanying text (discussing actions of white protesters in Wisconsin).

times a racialized minority and at other times a group bound by shared political rights when, in fact, they are always both.

The hate crimes and atmosphere of inter-group tension described in the Farmington story may seem easily explained by employing a race framework. The tension and violence can be seen as a purely racial problem because the description recalls well-known incidents of racism against Southern Blacks, and tribal membership is not explicitly invoked. In Farmington and other border communities like it, Indian racialization looks very much like the racialization of other groups more readily identified as racial minorities. The significant racial binary in these communities is usually white/Indian. The white/Indian hierarchy is even more pronounced in areas where tribes retain large land bases and where relatively few Blacks live, such as Alaska, the Great Plains, and the Southwest.[288] The history of these communities is often a history of white/Indian racial tension, with Indians clearly at the bottom of the racial hierarchy.[289] Indians in these communities are overrepresented among the poor, unhealthy, imprisoned, and unemployed, and they are often associated with negative stereotypes, such as that they are drunk, violent, or lazy. In these communities, Indians do not stand outside the racial hierarchy; rather, they define it. A race frame is readily accessible in these examples because it looks like other examples of racism with which most people are familiar.[290]

On the other hand, the story about fishing rights protests at Lac du Flambeau may seem easily explained through a framework of political rights. The points of tension are rights that belong to tribes as political entities and that are guaranteed by treaties between the U.S. and the tribal governments, leading to questions about whether the tension is political, racial, or both. While the language and tactics employed by the protestors in Lac du Flambeau may raise the specter of racism, they can be explained as the unrelated racist views of a few

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288 For example, the population of San Juan County, home of Farmington, is 47% white, 37% Indian, 15% Hispanic/Latino, and less than 1% Black. THE FARMINGTON REPORT II, *supra* note 3, at 6 (citing 2000 census figures).

289 *E.g.*, GOMEZ, *supra* note 205, at 54 (describing Indians as at bottom of racial hierarchy in New Mexico at end of eighteenth century and beginning of nineteenth century).

290 Even those incidents most easily framed as racial can be difficult to name as such. For example, despite the obvious racial overtones of the incidents in Farmington, the allegations of racism by Navajos, and the Committee's later description of "a crisis in race relations," THE FARMINGTON REPORT II, *supra* note 3, at 1, the title of the first report emphasizes cultural clashes over racial tensions (the subtitle of the report is "A Conflict of Cultures"), reflecting a deep reluctance to name anti-Indianism as racism. *See* THE FARMINGTON REPORT I, *supra* note 11, at 2.

specific perpetrators disrupting an otherwise political battle. Indeed, this is how the protestors characterized it.[291]

The Lac du Flambeau example is actually an anomaly among stories of rights fights because the openly racist rhetoric deployed by the anti-Indian protestors served to counteract their insistence that the tension was political. The tribe filed a lawsuit against the protesters, in which the tribe alleged that the protestors had conspired to violate the tribe members' civil rights.[292] The district court easily recognized the existence of anti-Indian racism in the blatant racial overtones of the protests;[293] the suit resulted in a series of court decisions recognizing the role that racism played in this supposedly political dispute. Applying a version of the framework I describe in this paper, the court acknowledged the anti-Indian racism and rejected the defendants' attempt to draw a bright line between political and racial animus, clarifying that racism need not be "*the* motivating factor"[294] in a denial of rights for it to violate federal civil rights statutes. The court further described the interplay between racism and resistance to Indian political rights as follows:

> [I]t is disingenuous for defendants to argue that they are trying to prevent the Lac du Flambeau from spearing or gill netting only because they oppose those activities and not because they are biased against Indians in general. Defendants have not pointed to any other instance in which they have acted against a threatened harm to the fishing environment. It is impossible to escape the conclusion that it is the coalescence of a perceived harm *and* the minority source of that harm that produced the defendants' reaction. This is not unusual. Instances of racial discrimination rarely occur until and unless a minority group acts to exercise its rights.[295]

Departing from constitutional race jurisprudence, the court also distinguished between the legal justification for *federal* laws *favoring* Indians and the legality of *private* animus *against* Indians.[296]

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[291] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385, 1393 (W.D. Wis. 1992) (noting defendants' argument that protests were "rooted in a political relationship").

[292] The tribes alleged interference with property rights in violation of 25 U.S.C. §§ 1982, 1985–1986, which confirm that all citizens have "the same rights enjoyed by white citizens" and are generally used to protect against race-based denials of rights. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 759 F. Supp. 1339, 1349 (W.D. Wis. 1991).

[293] *See id.* at 1354 (noting defendants' racist motivation and granting preliminary injunction); *Lac du Flambeau*, 781 F. Supp. at 1393–95 (granting permanent injunction).

[294] *Lac du Flambeau*, 781 F. Supp. at 1393 (emphasis in original).

[295] *Id.* at 1394.

[296] *Id.* at 1393 ("That the federal government may establish special preferences *in favor of* Indians without running afoul of the requirements of the Constitution or of federal anti-discrimination statutes because of its political relationship with Indians does not mean that

But similar resistance against Indians exercising political rights in other places—from disputes about cigarette tax exemptions on New York Indian reservations to tensions around the economic success of tribal casinos in California, Connecticut and Massachusetts—has been less readily tagged as racism.[297] In fact, racialization is intimately bound up in all of these instances of political tension, even when it is not named as such.[298] And even in the *Lac du Flambeau* case, the court of appeals reversed the district court's grant of summary judgment, holding that although the "ample" evidence of racism in the case provided "strong" evidence that the protests were racially motivated, the district court was incorrect in holding that the evidence was "undisputed."[299] The court explained its reasoning as follows:

> The issue . . . is not whether Crist and STA are racist. It is whether that racism was a motivating factor in the decision to harass LDF spearers. If the spearers were white, would STA and Crist have protested anyway, but seized upon some other attribute, such as hair length, to insult?[300]

The court then concluded that the district court was not free to disbelieve the protestors' assertions that they were not motivated by

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private persons are free to discriminate *against* Indians for the same reason.") (emphasis in original).

[297] *See, e.g.*, Donald L. Bartlett & James B. Steele, *Special Report on Indian Casinos: Playing the Political Slots*, TIME, Dec. 23, 2002, at 52 (framing a critique of Indian gaming in terms of concerns about lobbying and political influence); Donald L. Bartlett & James B. Steele, *Special Report on Indian Casinos: Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44 (framing a critique of California Indian gaming in terms of concern about economic fairness, corruption, and poor regulatory enforcement). *But see* Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success In Gaming and Acknowledgement*, 31 LAW & SOC. INQUIRY 313, 315 (2006) (arguing that "the backlash over Mashantucket Pequot recognition and casino success [in Connecticut] has taken the form . . . of racialized attacks on the Mashantucket Pequot's Indian identity"); Bill Weinberg, *Bloomberg's Racist Blooper*, INDIAN COUNTRY TODAY, Sept. 1, 2010, at 1 (describing Indian reactions to remarks by New York City mayor suggesting that Governor should "get [him]self a cowboy hat and a shotgun" in order to collect taxes from cigarette sellers on New York reservations) (quoting Adam Lisberg et al., *Bloomberg Tells Paterson to Cowboy Up, Crack Down on Senecas Selling Tax-Free Smokes on NY Thruway*, N.Y. DAILY NEWS (Aug. 13, 2010, 11:23AM), http://www.nydailynews.com/ny_local/2010/08/13/2010-08-13_bloomberg_tells_paterson_to_cowboy_up_crack_down_on_senecas_selling_taxfree_smok.html).

[298] Although most accounts describe the acute racial tension in Northern Wisconsin as having dissipated since the early 1990s, the Lac du Flambeau Tribe's announcement that it intended to spear the entire available catch in 1996 spurred a boycott of the Tribe's casino and threats of renewed protests. BOBO & TUAN, *supra* note 22, at 85 (noting that issue of treaty rights "always threaten[s] to crack the fragile veneer of peace").

[299] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249, 1260 (7th Cir. 1993).

[300] *Id.* at 1261 n.11.

racism but by a desire to save fish.[301] In so holding, the appeals court implicitly rejected the district court's nuanced analysis of political and racial tension and accepted the protestors' invocation of an either/or understanding, in which racism and opposition to political rights may be (and usually are) unrelated. Describing the protestors' proffered motivation (to save fish) as plausible and "not irrational,"[302] the court reasoned that "racist conduct accompanying a particular behavior does not necessarily mean that the behavior was racially motivated."[303] Rather, the court viewed racial slurs as a "common" and pervasive part of social interaction that may sometimes be used in the absence of racist motivations.[304] Just because the targets of the protests will always be Indians, and just because some protestors used anti-Indian slurs, the court explained, does not necessarily lead to the conclusion that the protests are motivated by anti-Indian racism.[305] The appellate decision exemplifies the typical approach to anti-Indian incidents: Despite a recognition that anti-Indian racism and opposition to Indian political rights sometimes coexist, many people see that coexistence as coincidental.

A notable exception is anthropologist and ethnic studies professor Thomas Biolsi, who set forth a theory of the interaction between tribal political rights and Indian racialization in his book *"Deadliest Enemies": Law and the Making of Race Relations on and off Rosebud Reservation*.[306] In a study focused on the Rosebud Sioux Reservation in South Dakota, Biolsi described two neighboring communities—one white and one Indian—bound by overlapping geography, marriage and family relations, and certain common interests. His goal, he explained, was to understand how the Indian-white "racial divide" has nevertheless come to be seen as "part of the landscape" of South Dakota. Biolsi's theory blames tribal assertions of political rights for naturalizing and sustaining the racial tensions that simmer in most border communities. The expectation of racial

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301 *Id.* at 1263.

302 *Id.*

303 *Id.* at 1262.

304 *Id.*

305 After a trial on remand, the district court again held that the harassment was racially motivated, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin., Inc.*, 843 F. Supp. 1284, 1295 (W.D. Wis. 1994), and this time the court of appeals affirmed. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 41 F.3d 1190, 1195 (7th Cir. 1994).

306 THOMAS BIOLSI, "DEADLIEST ENEMIES": LAW AND RACE RELATIONS ON AND OFF ROSEBUD RESERVATION (2001).

conflict, he argues, must be politically produced, and Indian law does "the work of demarcating political interests along racial lines."[307]

In Biolsi's framing, Indian law and the tribal political rights it protects "produce racial politics and racial tensions" and incite "racial 'hard feelings.'"[308] For example, Biolsi described a 1972 lawsuit by the Rosebud Sioux Tribe seeking to clarify tribal jurisdiction over certain lands as a moment that transformed race relations on the reservation. Prior to the lawsuit, certain portions of the reservation were open to white settlement, many whites had settled there, and the county governments were exercising jurisdiction over the settled portions in contravention of federal law. Yet in Biolsi's estimation, there was "no political content to race relations" until the Tribe sought to protect its rights under federal law to retain jurisdiction over this part of the reservation. In his description, racial tensions in these areas were exacerbated when the Indians sought to assert their legal rights to jurisdiction, whereas the status quo in earlier years, in which white settlement had gradually eaten away at Indian jurisdiction and seeped into Indian communities while white governments systematically failed to provide basic services to Indian communities, was a time before racial tension.[309]

Despite his attempt to focus on the interplay between the racial and the political, Biolsi's analysis is exactly backward. While he is correct that the exercise of Indian political rights may trigger or exacerbate racial tensions, he is incorrect in his assertion that Indian political rights *create* racial tensions. His analysis implicitly characterizes Indian subordination as a state of affairs that existed prior to racism, rather than as a direct result of it. When Indian assertions of rights challenge the longstanding American arrangement of white dominance over Indians, his model places the blame on Indians for creating racial tension out of whole cloth.

A better explanation of the interplay between racialization and political rights in border communities is that these communities are steeped in a history of anti-Indian racism. This racism is fed each time the Indians exert political rights, but it existed prior to the assertion of these rights. Racism also provides a backdrop and familiar vocabulary to use against Indians who make themselves visible either by exerting

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307 *Id.* at 6.

308 *Id.* at 6, 19.

309 *Id.* at 40. Biolsi describes another civil rights lawsuit around the same time, alleging race discrimination by a city government for failure to maintain streets, lights, and utilities in the Indian part of town, as another moment that politicized Indian-white relations. Here again, it is the Indians' use of the legal system to protect their interests that is blamed for creating racial tension.

political rights or by being associated with a local tribe that has exerted those rights.

An analysis that takes the role of racialization seriously would link the fervent opposition to Indian "special" rights to other instances in which blame has been shifted to minorities for disrupting the status quo. It would identify how the status quo reflects an unacknowledged investment in white supremacy[310]—an arrangement in which whites have greater economic and political power, white fishermen have unrestricted access to fish, and white settlers have unrestricted access to land, often at the expense of Indian sources of food, religion, and community. In Northern Wisconsin, Indian fishing rights appeared to infringe on the unrestricted access that white fishermen had previously enjoyed as a result of entrenched white economic and political dominance and illegal denial of Indian treaty rights. By focusing on the upstart Indians, the protestors were in effect insisting that Indians remain economically, socially, and politically powerless in order that white dominance and access not be disturbed.

In the fights over cigarette taxes and casinos, resistance to the political rights of tribes draws on a similar set of racial stereotypes familiar to residents of surrounding communities. Where tribes have successful casinos, the surrounding public often views Indians as corrupt, under the thumb of organized crime or conniving developers, or as inauthentic Indians, as if an authentic Indian could not get rich without crime, corruption, or the influence of a white mastermind.[311] The stereotype of the corrupt or inauthentic Indian depends on the

310 *See* Harris, *supra* note 81, at 1766–77 (explaining how unacknowledged investment in white supremacy underlies controversy over affirmative action). *See generally* LIPSITZ, *supra* note 146 (arguing that white supremacy is a system of structured advantages for whites, resulting in unfair gains and undeserved rewards for whites and corresponding impediments for non-whites). *See also* NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 230–34 (2006) (linking colorblindness to efforts by conservatives to characterize minorities as lazy, unambitious, and in pursuit of government handouts or special rights).

311 *See* Joanne Barker, *Recognition*, 46 AM. STUD. 133, 142 (2005) (describing resentment of "rich Indians" and explaining that "gaming revenues have undermined stereotypes not only of what Indian people should look like but what real Indian culture should be"); Berger, *supra* note 45, at 651 (discussing how protests against casino gaming draw on "a racially fixed image" of Indians as "poor, traditional, and close to the earth" and noting that public responses to Indian gaming often question whether tribes operating casinos are "really Indian"); Eve Darian-Smith, *Savage Capitalists: Law and Politics Surrounding Indian Casino Operations in California*, 26 STUD. L. POL. & SOC'Y 109, 126–27 (2002) (describing how Indian gaming in California has challenged stereotypes of Indians as poor and primitive); Katherine A. Spilde, Dir. of Research, Nat'l Indian Gaming Ass'n, Address at the Eleventh Annual International Conference on Gambling and Risk Taking: Rich Indian Racism: The Uses of Indian Imagery in the Political Process (June 20, 2000), *available at* http://www.indiangaming.org/library/articles/rich-indian-racism.shtml ("[N]on-Indians equate authentic 'Indianness' with poverty and create a distinction between so-

familiar vision of Indians as poor, broken, and dependent on government handouts. Tribal economic success challenges this stereotype and threatens white economic dominance. Because the success comes in the form of casinos, the Indians are perceived as getting rich as the result of an unfair advantage, and the issue is framed as one of political opposition to casinos, not anti-Indian racism.

Likewise, the existence of Indian political rights complicates Indian-white racial tension in border communities. The geographic and cultural separateness of reservation communities (and the legal right of tribes to maintain that separateness through the exercise of sovereign political rights) help to mark the group as racially distinct. Indian racialization in border communities may look like it is about skin color alone, but it actually draws on a complex amalgamation of phenotypical, cultural, and political factors.

When viewed through a frame that acknowledges the mutually constitutive relationship between Indian racialization and Indian political rights, the Lac du Flambeau case no longer appears to be an example of atypical racist behavior becoming mixed into a larger landscape of political tension over rights. The case is better understood as simply another manifestation of the Farmington story, in which deeply entrenched racial tensions defining ongoing interactions between whites and Indians are woven into the fabric of the community. Whenever, and however, the Indians are made visible in the communities—whether by skin color, cultural cues, or the exercise of previously dormant political rights—they become the targets of racialized stereotypes and violence.

B. Political Rights as Racial Remedy

The interplay between anti-Indian racism and tribal political rights is not only important for illuminating tension. It also provides context to explain the significance of tribal political rights. If the *Lac du Flambeau* court's recognition of the relationship between racism and the assertion of minority political rights is one aspect of the integrated framework described in this Article, the antiracist nature of federal Indian law is the other. While it is generally acknowledged that federal Indian law protects tribal political rights, it is not usually acknowledged that the protection and exercise of tribal political rights is in itself a form of anti-racism. This aspect is important because it emphasizes the way that political rights provide a defense against racism, countering Biolsi's one-sided explanation of the interaction

called rich Indians and some romantic real Indians. By this logic, once a tribal nation acquires wealth, they cannot be real Indians.").

between political and racial. In this section, I first elaborate on how federal Indian law's protection of Indian group rights is antiracist in the sense that is culturally and politically anti-assimilationist, it incentivizes non-white identity, and it explicitly protects political self-determination for a minority community in the United States. I then explore how tribal political rights can provide a racial remedy in one specific situation: the racial disparities in the North Dakota juvenile justice system described in the introduction.

Indian law is anti-assimilationist in that it protects the rights of Indians to strive for goals that do not mirror (and sometimes oppose) the goals articulated by white American culture. Indian law protects the right of Indians to be culturally non-white. This is especially apparent when contrasted with civil rights laws, which protect the rights of people of color to be treated the same as and to have access to the full array of legal and political rights belonging to white people.[312] The focus of civil rights litigation, therefore, is often on ensuring access to predominantly white schools, neighborhoods, and professions. Within a standard civil rights framework, communities of color often encounter resistance to anti-racist strategies that attempt to preserve cultural differences or redefine success in terms that do not center on what white people are doing.[313]

Indian law, by contrast, protects the rights of Indians to do things differently. Specific laws protect the rights of Indian people to practice traditional religions.[314] Others protect tribal rights to teach Native languages.[315] The Indian Child Welfare Act establishes a legal preference

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312 Although the critique of civil rights laws as assimilationist has been strongly contested, their emphasis on inclusion and full citizenship rights means that white citizens are necessarily the main point of reference for what these rights look like. *See, e.g.*, 42 U.S.C. § 1982 (2006) ("All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . .").

313 *E.g.*, Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1226–38, 1246–47 (1991) (arguing that race matching in adoption facilitates "racial separatism" and conflicts with anti-discrimination norms); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507 (1976) (describing how desire of Black parents to pursue alternative educational improvement strategies for Black students was undermined by focus on integration); *Preserving Families of African Ancestry*, NAT'L ASS'N OF BLACK SOCIAL WORKERS, http://www.nabsw.org/mserver/PreservingFamilies.aspx (last visited Aug. 14, 2011) (advocating placement of "children of African ancestry" with "families of the same race and culture" and discussing how current child welfare laws conflict with this goal).

314 Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2006) (providing exemption from federal prohibition on possession of eagle feathers for "the religious purposes of Indian tribes"); *see also* American Indian Religious Freedom Act, 42 U.S.C. §§ 1996–1996a (2006) (providing Indians with freedom of religion generally).

315 Native American Languages Act, 25 U.S.C. §§ 2901–2906 (2006) (declaring policy of United States to preserve and protect Native American languages and recognizing right of

for placement of an Indian child with an Indian family.[316] Still other laws protect the right of tribal governments to violate certain American constitutional norms in order to preserve tribal cultures that may not be compatible with those norms.[317] The separate governmental status of tribes has also facilitated the establishment of separate tribal court systems, many of which adjudicate disputes in a manner that incorporates tribal custom and privileges reconciliation over adversarial proceedings.[318] Taken together, the body of federal Indian law explicitly protects the right of Indians *not* to assimilate and instead to preserve cultural and normative differences.

Indian law also ties specific legal advantages to Indianness, thereby incentivizing a non-white identity, whereas most of U.S. law incentivizes whiteness. Historically, legal advantages—including the right to personal freedom, the right to citizenship, and the right to own land—were explicitly tied to whiteness.[319] Today, facially neutral legal structures protect white expectations that grew of out of these explicit legal advantages.[320] The legal advantages attached to whiteness have had concrete consequences for identity management for people of color, such as: efforts to claim white racial identity, denial of culture, chemical and surgical attempts to alter physical appearance, and efforts to subordinate other people of color in order to secure a

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Indian tribes to use Native languages as medium of instruction in federally-run schools). In the Native American Languages Act, Congress finds specifically that "special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities." 25 U.S.C. § 2901(2); *see also* Esther Martinez Native Languages Preservation Act of 2006, 42 U.S.C. § 2991b-3 (authorizing Native American language immersion programs).

316 *See infra* notes 328–34 and accompanying text (discussing Act in detail). For a thorough discussion of the relationship between race-matching controversies and the ICWA and the role of shifting definitions of race in each, see RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 126–53 (2001).

317 *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2006) (imposing version of Bill of Rights on Indian tribes but leaving out certain protections contained in original, such as prohibition on establishment of religion and guarantee of jury trial); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (confirming right of tribes to determine membership in manner that might violate U.S. equal protection norms).

318 *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 249–55 (1994) (describing incorporation of customary law in tribal legal systems); Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180–87 (1994) (describing "horizontal justice model" used in Navajo peacemaker courts).

319 *See* Devon W. Carbado, *Yellow by Law: The Story of* Ozawa v. United States, *in* RACE LAW STORIES 175, 176 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (discussing case in which claimant attempted to persuade Supreme Court that he was white and thus eligible for naturalization); LÓPEZ, *supra* note 206, at 28 (discussing historical practice of reserving naturalization right exclusively for whites); Harris, *supra* note 81, at 1717–21 (highlighting convergence of racial and legal status that lead to presumptions of freedom and right to own property attached to whiteness).

320 Harris, *supra* note 81, at 1758–59.

place closer to whiteness in the racial hierarchy.[321] In other words, the legal privileging of whiteness has had far-reaching psychological, cultural, and ideological consequences.

Federal Indian law, on the other hand, protects specific legal rights for Indians. People who can prove legal Indian status (which often correlates with Indian racial identity) may have access to health and education benefits, hunting and fishing rights, and immunities from state taxation and regulation. Of course, these rights are a matter of political status, not racial classification alone. But their effect is to reserve specific legal advantages to people who are, by and large, racially non-white. While the practical promise of these incentives may never fully materialize, their ideological significance is powerful. In cases concerning access to Indian rights, people and groups work hard to assert and provide evidentiary support for their Indian status, assertions which often include embracing Indian racial and cultural identity. These cases stand in stark contrast to the legions of cases in which people seek to prove that they are white in order to access some legal privilege reserved for whites.[322]

Finally, Indian law provides legal recognition of the sovereign status, political rights, and claims to nationhood of Indian tribes as groups. In so doing, it teaches us that group rights to sovereignty and self-determination can be tools for communities of color to resist the devastating history of American racism. For Indians, political rights have served as tools of anti-racism in very concrete ways. For example, the political rights protected by federal Indian law enable tribes to counter the forced disappearance of Indian people accomplished through racialization. Tribes can redefine membership rules to do away with restrictive blood quantum requirements, thus protecting against disappearance in a physical sense. They can take steps to pro-

321 *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927) (highlighting inter-minority subordination, in that in this desegregation case, Chinese students argued that they had a legal right to be protected from the dangers of associating with black students); KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 18–19 (1950) (describing experiments in which Black children showed strong preference for white dolls over Black ones); GOMEZ, *supra* note 205, at 83–87 (describing how legal privileging of whiteness influenced Mexican claims to white identity); LÓPEZ, *supra* note 206, at 57, 61 (discussing claims to whiteness made in order to access U.S. citizenship); Harris, *supra* note 81, at 1710–13 (describing efforts by African Americans to "pass" as white in order to access legal and social value attached to whiteness and the attendant psychological and emotional consequences); A GIRL LIKE ME (Reel Works Teen Filmmaking 2005), *available at* http://www.mediathat mattersfest.org/watch/6/a_girl_like_me (recreating Clark doll studies with similar results in 2005).

322 *E.g.*, United States v. Thind, 261 U.S. 204 (1923) (claim to whiteness made in order to establish eligibility to naturalize); Ozawa v. United States, 260 U.S. 178 (1922) (same); Plessy v. Ferguson, 163 U.S. 537 (1896) (claim to whiteness made in order to access reputational benefits of whiteness and gain access to segregated institutions).

tect natural resources, spur economic development, and ensure public safety in Indian communities, thereby countering disappearance in a geographic sense. They can run schools, justice systems, and social service programs in a manner that reflects and protects Indian languages, religions, and cultural traditions, thereby protecting against disappearance in a cultural sense.

No other community of color in the United States can legally exercise these types of political and governmental powers. Indeed, most racial minority groups encounter significant resistance when they even begin to articulate a group political identity,[323] let alone exert claims to nationhood, separateness, or political autonomy.[324] Indian law is unique in that it provides explicit legal recognition of the power and importance of group rights, political self-determination, and governmental power for a minority community.

An integrated framework would emphasize that Indian group rights are an important tool of anti-racism, thereby permitting a fuller exploration of solutions to problems like the racial disparities in the North Dakota juvenile justice system. The tendency to frame a problem as either racial or political limits the potential solutions available: a race frame leads us to consider solutions focused on vindicating individual rights, whereas a political frame leads us to look for solutions focusing on strengthening group rights. In reality, the group

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[323] *E.g.*, Shaw v. Reno, 509 U.S. 630, 647 (1993) (treating the intentional creation of majority black voting district with strict scrutiny because, in the Court's view, grouping individuals into a single voting district by race incorrectly "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which the live—think alike, share the same political interests, and will prefer the same candidates at the polls").

[324] Movements seeking political autonomy for racial minority groups, such as the Republic of New Afrika (RNA), which has a goal of establishing a separate black nation on land in five southern states, and the Atzlán movement, in which Chicano activists articulated a claim to nationhood and claimed entitlement to lands in the Southwestern United States, have been criticized as separatist and anti-American and are viewed today as fringe movements. *See, e.g.*, Dan Berger, *"The Malcolm X Doctrine": The Republic of New Afrika and National Liberation on U.S. Soil*, *in* NEW WORLD COMING: THE SIXTIES AND THE SHAPING OF GLOBAL CONSCIOUSNESS 46–55 (Karen Dubinsky et al. eds., 2009) (describing RNA's focus on sovereignty and political self-determination and negative response it incited from U.S. government, including armed conflict); Dan Berger & Roxanne Dunbar-Ortiz, *"The Struggle is for Land!": Race, Territory, and National Liberation*, *in* DAN BERGER, THE HIDDEN 1970S: HISTORIES OF RADICALISM 57–76 (Dan Berger ed., 2010) (describing how RNA's focus on nationhood and decolonization led to government suppression and was out of step with majority of population by 1980s); ROBIN D.G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION 16–23, 124–26 (2002) (describing back-to-Africa movements and noting that they are "almost universally dismissed" today); *see also* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 180–83 (1988) (describing similarities in 1960s between goals of black nationalist movement and goals of Indian tribal rights movement).

rights protected by federal Indian law may offer important solutions to individual rights problems.

The juvenile justice system disparities near the Fort Berthold and Standing Rock Reservations in North Dakota described in the introduction illustrate how strengthening group political rights can help remedy individual instances of racial subordination.[325] Indians are largely invisible in the national conversation about racial disparities, reflecting the disappearance that is a hallmark of Indian racialization. Local statistics from places like Bismarck with relatively concentrated Indian populations, however, reveal stark disparities in the outcomes for Indian youth versus white youth, reflecting the racial dynamics of these border communities. Supposedly neutral policies favoring harsh penalties and incarceration, particularly in state and federal justice systems, disproportionately affect Indian youth in border communities. The data suggests that, at least in communities with a large Indian population, Indian youth are stereotyped as criminal in much the same way Black and Latino youth are stereotyped nationwide. It also suggests that Indian youth disproportionally face some of the same structural difficulties that lead to over-institutionalization for Blacks and Latinos, such as poverty, family dysfunction, and an overall lack of resources.[326] At the very least, Indian disproportionality statistics raise questions about the complex and multi-faceted way that racialization affects Indian people and communities.

Many tribal governments are struggling to reshape their juvenile justice systems in a manner that would redirect youth out of secure facilities and into alternative programs. Many are also working to incorporate cultural and religious traditions into delinquency programs in an attempt to counteract the historical damage that likely contributes to delinquent behavior among Indian youth.[327] More funding, autonomy, and federal policy support for tribes would thus directly impact outcomes for individual Indian youth. Strong tribal justice systems reflecting cultural values, as well as strong tribal governments that can provide employment and social services, would also increase the resources available to children and families.

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325 These observations and the data they rely on are drawn from my recent policy paper on Indian youth in the juvenile justice system. ARYA & ROLNICK, *supra* note 19. The paper was part of a series about racial and ethnic minority youth and juvenile justice, which focused on justice system disparities like those that exist for Indians in North Dakota.

326 *See supra* notes 15–20 and accompanying text (discussing racial disparities affecting Indian youth in juvenile justice system).

327 *See* ARYA & ROLNICK, *supra* note 19, at 27–30 (discussing alternative juvenile justice programs).

Strengthening tribal political rights would provide an important remedy for racial disparities in the juvenile justice system.

Yet, the separation between the fields of Indian law and civil rights law makes it challenging to reconcile these two viewpoints and to frame increased tribal political rights as an intervention that can directly counteract racial disparities faced by individual Indian youth. Indian law advocates typically represent tribal governments only, so they focus few resources on issues affecting individual Indians unless an issue can be framed as one about tribal political rights. In contrast, juvenile justice advocates do not distinguish between the role of tribal governments and the role of state or federal governments—each is seen as equally capable of functioning as a racially oppressive force and each is therefore equally targeted for critique.

More often than not, tribal governments can provide key interventions to counteract individual-level racism by exercising their rights as political entities. In the North Dakota example, two potential solutions to the disproportionately high rates of arrest and incarceration of Indian youth in the state system would be 1) to strengthen tribal juvenile justice systems so that fewer Indian youth are left under the jurisdiction of the state system; and 2) for the state to bring the Fort Berthold and Standing Rock tribal governments to the table when determining state-level policies affecting Indian youth. In communities like Farmington, tribal governments can similarly help to disrupt the uneasy relationship between hate crimes and institutional racism by entering into intergovernmental agreements with local police in order to improve training, police services, and even social services. They could work an even more direct intervention if they were legally permitted to prosecute perpetrators of anti-Indian violence in tribal courts.

One piece of legislation that explicitly acknowledges the link between the individualized effects of Indian racialization and the political rights of tribal governments is the Indian Child Welfare Act (ICWA).[328] The ICWA seeks to protect Indian children in light of their poor outcomes in state child welfare systems. It also seeks to counteract the history of formal and informal removal of Indian children from tribal communities as a means of destroying those communities,[329] a practice that was facilitated by Indian racialization.

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[328] 25 U.S.C. §§ 1901–1963 (2006).

[329] *See* Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History* 4–5 (Mich. State Univ. College of Law, Indigenous Law & Policy Center Occasional Paper Series, 2009) (describing historical context surrounding enactment of ICWA).

The ICWA links individual outcomes with tribal rights in two ways. First, it is based on a group rights model. It is premised on the ideas that Indian tribal communities have a right to a separate existence, that this requires keeping children in those communities, and that strong communities are in turn better for children.[330] Second, it employs a group-based means. That is, it seeks to protect Indian children by strengthening tribal political rights. Specifically, the ICWA affirms the exclusive jurisdiction of tribes over child custody proceedings on reservations,[331] authorizes Indian tribes to intervene in state child custody proceedings involving tribal children,[332] and allows them to exercise concurrent jurisdiction over those proceedings through elective transfer to tribal courts.[333] The Act also authorizes programs designed to strengthen tribal child welfare systems.[334]

Unfortunately, the ICWA remains unique in its explicit linking of individual and group interests and rights. Despite the obvious parallels between child welfare and delinquency, efforts to address inequitable outcomes for Indians in the juvenile justice system are generally not linked to tribal political rights. An integrated framework, however, would highlight the role that tribal governments as *political entities* play in countering disparities faced by Indian youth *as racial minorities* and protecting Indian people from other effects of racialization.

CONCLUSION

In this article, I have shown how the political classification doctrine positions Indianness and race as opposing concepts. Although this oppositional framing is most clearly exemplified in *Mancari*, its roots are much deeper and its impact extends much further. I have attempted to peel back the layers of the doctrine to examine the underlying ideas that buttress it: that race is a formal and politically meaningless designation that ought not to be recognized in legal decision making and that Indianness is reducible to voluntary civic participation.

The political classification doctrine is an example of how legal rules have the power to shape "common sense" understandings of certain issues. The doctrine is not simply a reflection of a pre-existing, inevitable truth that Indianness is political; it has instead helped to create and reinforce that definition of Indianness. The success of the

330 25 U.S.C. §§ 1901–1902 (2006).
331 *Id.* § 1911(a).
332 *Id.* § 1911(c).
333 *Id.* § 1911(b).
334 *Id.* §§ 1931–1933.

political classification doctrine in divorcing the concept of Indianness from the concept of race has even influenced the way that Indian people understand themselves. A former student described the doctrine's real life effects in this way:

> Federal Indian law is something not only those who study [American Indian Studies] learn about, it is what you learn to know, live (practice), and protect as an American Indian. . . . So when I have been instilled in protecting that political framework, it is difficult to resort to a simple racial view of American Indians. . . . If I consider my people a race [then] the sovereign relationship to the federal government will be diminished. . . . I'm not blind and I know American Indians have a certain phenotype that is non-white. . . . Yet it's difficult to accept being racialized because of my background and strong connection to treaties and the tribal relationship to the federal government. [But] race concepts [occur] whether I like it or not. . . . I'm brown and people will speak in Spanish to me no matter how political I think I am. There's always going to be some ignorant white male drinking in a bar and wearing a headdress because he thinks he has a great grandmother who was a Cherokee Princess.[335]

This student identified a tension between the ideology of Indianness, as shaped by the political classification doctrine, and the reality of Indian experience. As I have described here, this tension results in real costs to Indians and other people of color.

Finally, I have sketched the outline of a theoretical framework that better captures the complexity of Indian experience, providing a fuller explanation of certain issues and leading to a broader vision of potential solutions. The most significant implication of this integrated framework is the idea that Indian political rights are a racial remedy. This is true not just because they happen to provide useful tools in the struggle against racism, but because Indian political rights and the laws that protect those rights are fundamental to countering anti-Indian racism. As the above discussion suggests, this conception of Indian political rights may also help to broaden our ideas about anti-racism for other minority groups by helping to clarify the role that political group rights have played in their anti-racist struggles and reframing the search for specific remedies.

The ICWA example discussed in the previous section highlights the role that political rights can play in anti-racism. It also shows what has been denied to other minority communities, none of which are

335 Cheryl Ellenwood (unpublished student essay written for seminar on Indigenous Peoples, Race, and American Law, UCLA School of Law, Fall 2009) (on file with the author).

legally recognized as national groups with political rights. The ICWA was passed to counter the removal of Indian children from tribal communities. Removal happened by various means, from federally-run boarding schools to religious missionaries to state child welfare systems, but the common theme was the belief that Indian children would be better served by being raised in white families and white communities because Indian tribal culture was somehow deficient. Of course, these themes are not unique to Indian children.[336] State child welfare systems are notorious for breaking up Black families, and those removals likewise affect families and communities for generations. Despite widespread criticism of the rates of removal, our popular discourse still supports the notion that white adoptive parents can save children of color from dysfunctional families and communities.[337] Yet, in part because the law views Indians as members of political groups and Blacks, Latinos, and other minorities as members of racial ones, the ICWA remains the only legislative pronouncement in favor of keeping children of color in their communities.

Drawing on the Court's reasoning in *Mancari*, this Article attempts to bore holes in the increasingly thick wall between the legal understandings of racial and political. Once the integrated relationship between Indian racialization and Indian political rights is clarified, it becomes clear in the Indian context that, far from being a static and irrlevant designation, race is a shifting and flexible concept with significant historical and political content. While such an exploration is beyond the scope of this paper, this integrated conception of racial and political identities could offer important insights for other racial minority communities, in particular for breaking down the strict barrier between individual and group rights.

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336 *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 54–55, 224 (2002) (documenting overrepresentation of black children in child welfare system, attributing disparity to view of black families as pathological and inadequate, and showing destructive effects of child welfare policies on black families); Annette R. Appell, *'Bad' Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 102, 113–21 (2007) (presenting case study of how linguistic and cultural differences can lead to "inappropriate and culturally incompetent child welfare interventions" for Spanish-speaking Latino families). *See generally* CAROL B. STACK, ALL OUR KIN (1974) (arguing that social welfare policies are based on stereotypes of black families as dysfunctional and self-destructive and challenging those stereotypes by documenting kinship and child-rearing networks in a poor black community).

337 *See* Kim H. Pearson, *Absent and Unnatural Fathers: The False Competition Between Gay Men and Black Men* 6 (describing "Good Fatherhood" concept as being based, in part, on white middle class normative standards) (draft on file with the N.Y.U. Law Review).