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## American Blood: Who is Counting and for What?

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## AMERICAN BLOOD: WHO IS COUNTING AND FOR WHAT?

GERALD TORRES\*

### INTRODUCTION

I want to thank Saint Louis University School of Law, Professor Joel Goldstein, and my good friend Sandy Levinson for inviting me to participate in this gathering on the occasion of the 2013 Childress Lecture. As is typical, Sandy's essay "Who Counts? Sez Who?" is rich with both insight and provocation.<sup>1</sup> Beginning as it does with a consideration of "'who counts' as part of the 'We the People,'"<sup>2</sup> his essay puts the question of the legitimacy of the polity immediately front and center. As a constitutional law scholar and political scientist, it is not surprising that he would start with this question. Nonetheless, as he points out, that focus immediately generates conceptual problems ranging from who gets to be included as a person for apportionment purposes to who gets to be a person for purposes of actual or virtual representation.<sup>3</sup>

Because Professor Levinson is talking about the United States, he concedes, as he must, that the persons who were excluded from the political community included those who were either completely outside the polity or who were counted for purposes completely distinct from their own interests.<sup>4</sup> Slaves, after all, may have been partially counted in order to decide the number of representatives and to ensure Southern slave-owner power in particular and Southern white power in general, but there was never any question that the interests of the slaves themselves were of any concern whatsoever in the three-

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1. You can pick up virtually anything Professor Levinson has written and find grist for one mill or another. One of my personal favorites is: SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (1998).

2. Sanford Levinson, "Who Counts?" "Sez Who?", 58 ST. LOUIS U. L.J. 937, 938 (2014).

3. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 175 (2002). "Using theories of 'adequate' or 'virtual' representation to justify geographic districting, the Court has opined that the winning candidate still 'adequately' represents those in the district who vote for a losing candidate." *Id.*

4. Levinson, *supra* note 2, at 938.

fifths of a person calculation.<sup>5</sup> As Professor Levinson explains, the Southern delegates would have been just as happy for slaves to count as full persons because it would have given the South even more power in the emergent national government;<sup>6</sup> perhaps power sufficient to slip the yoke of the Union without precipitating a blood bath.

There was another group of persons who also did not figure in this initial accounting. I am going to focus my remarks on that group of people, tribal Indians, who were explicitly excluded from the political society that was being constructed. Yet, as I will illustrate, the problems of internal colonialism were not just problems of management; they were, in a real sense, constitutional problems.

The tortured legal history through which this country has come to terms with contending pre-constitutional political communities highlights the way in which the question “who counts” is always about power. We cannot escape this conclusion, as Professor Levinson demonstrates, by resorting to one institution or another, regardless of whether that institution is dressed up as the agreed upon authority or as tradition.<sup>7</sup> Such a dodge merely moves the question of power one step back.

For Indians, the problem of “who counts” is complex. That it could be asked at all reveals that asking “who counts?” is an artifact of power. The question could be whether Indians have “American blood”? Could they be part of the political community that was being created by Europeans in North America? Or could it mean who counts as an Indian for other reasons? These are not as radically divergent questions as they might first appear because they both pivot around the deeper inquiry: *who is counting and for what?* And because of the nature of the political culture of the new United States, “who counts” also necessarily implicates the question of race. Thus for Indians, the question is not merely whether they are a “race.” The question for Indians and other indigenous people is whether they will have access to the power that attaches to their being a *nation* and not just another “race” or ethnicity.

To address this question, I want to combine two of the categories that paradoxically both mask and highlight the power exercised by the sorting mechanism of institutions. Looking at the evolution of federal Indian law reveals, for example, the malignant role that race has played in our law and in our political self-definition. The corrosive effects of race are always evident in Indian law. Even the attempt to manage Indian people through a resort to a form of sovereignty captured in the phrase “domestic dependent nations”<sup>8</sup> is

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5. U.S. CONST. art. I, § 2, cl. 3.

6. Levinson, *supra* note 2, at 939.

7. *Id.*

8. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

not immune from the idea of race. It may, in fact, be rooted in European ideas of race.<sup>9</sup>

Today, because of the increasing illegitimacy of race in constitutional discourse, the political position of tribes and Indian people are more vulnerable than at any time since the end of the wars of extermination or the termination period to normative views that are exogenous to the norms of the tribes themselves. Because governmental racial classifications are understood to be toxic, we should be wary when they are used to create a framework for understanding the power that tribes have as political communities in relation to their members and, perhaps especially, in relation to the states and federal government.

I will undertake this inquiry by looking at a series of cases where the imposition of American racial ideology and taxonomy has been used to grant, limit, or otherwise regulate the political life of tribes. Race has been used by courts and the Congress to control who is defined as Indian or whether a particular group of Indians is a tribe or whether one federal program or another ought to apply. This use of race is independent of the tribal conceptions of race and its role in belonging.

In addition, tribal history also helps us see beyond slavery while simultaneously showing how deeply race and racism continue to figure in complex ways when answering the question “who counts.” While the black/white division is the paradigmatic conception of race in America, from the beginning, tribes have revealed the malleability of the concept and porousness of its application.<sup>10</sup> In short, race in the United States has consistently functioned as a proxy for power. For Indians and other indigenous people, therefore, the question of power is invariably linked to the questions posed above: Are Indians in the United States a “race”? Is “race” merely incidental to their status as a nation? Or is the European conception of race irrelevant to tribal sovereign status as “nations” under our law?

#### I. THE JURISPRUDENTIAL CONSEQUENCES OF AN OBSESSION

While it might make sense to begin the exploration of the political consequences of race for tribes by looking at the earliest characterization of Indian people, in some ways the use of the term “race” had a different valence at the time of the initial encounter than it does today. As I discuss later, the

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9. The colloquy among the various Justices in *Cherokee Nation v. Georgia* clearly reflects the idea that the Indian nations were composed of people who were not just politically distinct, but racially distinct and somehow incapable of being incorporated into the American political community. *Id.* at 54, 66. The ideas expressed in that opinion are in tension with the theory of assimilation that Justice Marshall advanced in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 589–91 (1823).

10. See GUINIER & TORRES, *supra* note 3, at 223–53.

“science” of racial categorization had not yet fully taken hold of the European imagination at the time of the initial encounter with the indigenous people of North America. But while the differences in culture, language, religion, and physiognomy clearly played a role in the treatment of Indian people, the modern idea of “race” as being the central defining characteristic of a people had not yet fully taken hold.<sup>11</sup>

To trace the evolution of the role of race in the legal and political treatment of Indians, let’s start with one recent example and then work backwards. The case that has become known as the Baby Veronica case, *Adoptive Couple v. Baby Girl*, is particularly instructive in the unconscious attribution of race to a situation where it ought, at least legally, to be completely irrelevant.<sup>12</sup> Compare the role that race plays in the following excerpts from a legal scholar, a tribal legal advocate, and the U.S. Supreme Court in their characterization of the case:

1.

*Adoptive Couple v. Baby Girl* illustrates the absurdity of this federal effort to channel non-autonomous persons into tribal communities. A Latina woman in Oklahoma (Birth Mother) was impregnated by her boyfriend (Biological Father), who is 125/128 non-Native American (most likely ninety-eight percent European-American). Neither Birth Mother nor Biological Father ever lived in a Native American community. After their relationship dissolved and Biological Father appeared indifferent to the child, Birth Mother placed the child (Veronica) for adoption with a married couple with an Italian surname. Yet solely because Veronica’s 3/256 Cherokee ancestry satisfied the Cherokee Nation’s self-set criteria for membership, the South Carolina courts undid the adoption placement, ordering Veronica’s transfer to Biological Father after she spent over two years with and formed an attachment to Adoptive Couple.<sup>13</sup>

2.

*Adoptive Couple v. Baby Girl* is a case involving a non-Native couple in South Carolina seeking to adopt a young Cherokee girl (Veronica) over the objections of her Cherokee father who asserted the primacy of his own parental rights. The child was initially placed with the family by the birth mother. Hearings were held before the South Carolina Family Court, the Court applied

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11. See *infra* note 41.

12. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2570 (2013).

13. James G. Dwyer, *Adoptive Couple v. Baby Girl: Erasing the Last Vestiges of Human Property*, 93 B.U. L. REV. ANNEX 51, 53 (2013) (footnotes omitted). Professor Carole Goldberg has already outlined the hazards of adopting the racialist perspective that characterizes Professor Dwyer’s critique. See Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1380–88 (2002).

the Indian Child Welfare Act, and transferred physical and legal custody of the child to her father. The South Carolina Supreme Court affirmed.<sup>14</sup>

3.

This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.<sup>15</sup>

One might not guess from at least two of these brief summaries that this was a case that turned on the power of a nation to intervene on behalf of one of its citizens in adoption proceedings that involved a minor who had been taken out of the jurisdiction and subjected to the power of a competing sovereign. It is already the law that one parent may not remove a child from the United States with the intention of obstructing the custodial rights of the other parent.<sup>16</sup> But of course this was not an international case; it was merely the case of one parent, the mother, who lied about the citizenship of the child in order to facilitate the removal of the child from a jurisdiction in which the child's father might have prevented the removal. But citizenship barely mattered in two of the characterizations. In the first excerpt the mother was a "Latina" and the father was an Indian of dubious authenticity because the author presumed on the basis of no facts that the father was largely "non-Indian." The adoptive parents had "an Italian surname." Race and ethnicity pervade the characterization of the case as if any of it mattered. Legally what mattered was whether the father and the child were members of the Cherokee Nation or otherwise within the ambit of the Indian Child Welfare Act.<sup>17</sup> How the mother characterized herself is utterly irrelevant except to the extent that it permitted her to misrepresent the child's legal status. That is normally called fraud.

The characterization by the Court in the third passage fairly dripped with the same contempt as the first excerpt. How could this child or her father be Indian when they had so little "Indian blood"? There is almost no disagreement that one of the attributes of sovereignty is that the sovereign gets to say "who

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14. ASS'N ON AM. INDIAN AFFAIRS & NAT'L INDIAN CHILD WELFARE ASS'N, *A Guide to the Supreme Court Decision in Adoptive Couple v. Baby Girl*, INDIAN-AFFAIRS.ORG 1, <http://www.indian-affairs.org/Analysis%20of%20Adoptive%20Couple%20v%20Baby%20Girl%20-%20final.pdf> (last visited Feb. 1, 2014).

15. *Adoptive Couple*, 133 S. Ct. at 2556–57.

16. 18 U.S.C. § 1204 (2012).

17. 25 U.S.C. §§ 1901–1963 (2006).

counts” for purposes of membership in the political community. The idea that “blood” counts turns out to be as much an artifact of the racialization of Indians as anything tribes might have constructed on their own.<sup>18</sup> It took a civil war, the violence of which is still staggering when soberly considered, to overturn the idea that “blood” should matter in questions of American citizenship.

Justice Taney asked in *Dred Scott*:

The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.<sup>19</sup>

The answer in that case was, of course, no. Those with “African blood” could not be considered for inclusion in the American political community. They would “count” only for purposes that were unrelated to their civic worth. It took “a new birth of freedom” to cut *that* link between blood and citizenship.<sup>20</sup>

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18. I will discuss this later in the context of both the *Sandoval* and *Martinez* cases. See *infra* notes 51–80, 104–17 and accompanying text.

19. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

20. The Gettysburg Address:

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a *new birth of freedom*—and that government of the people, by the people, for the people, shall not perish from the earth.

Abraham Lincoln, Address at Dedication of Gettysburg National Cemetery (Nov. 19, 1863), in ABRAHAM LINCOLN, FIRST AND SECOND INAUGURAL ADDRESSES; MESSAGE, JULY 5, 1861; PROCLAMATION, JANUARY 1, 1863; GETTYSBURG ADDRESS, NOVEMBER 19, 1863, S. DOC. NO. 439, at 35 (2d Sess. 1912) (emphasis added); see also, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED (1997).

But lest we think that descent does not matter for American citizenship we need only look to those times when citizenship for Americans is not claimed through naturalization or Fourteenth Amendment birthright citizenship. Citizenship depends on the question “from whom are you descended.” We can pretend it does not matter, but just talk to those who oppose birthright citizenship and that pretense melts away.<sup>21</sup>

It matters so much that *Elk v. Wilkins* remains vital in the jurisprudence of birthright citizenship.<sup>22</sup> In that case, John Elk, an Indian who had severed his relationship to his tribe and had considered himself subject to the jurisdiction of the United States wanted a civic existence in the Nebraska community.<sup>23</sup> When he presented himself to register to vote and take his place among those with whom he had cast his lot, he was turned away.<sup>24</sup> He would not be permitted to register because, according to the registrar, he was not a citizen.<sup>25</sup> When Elk objected that he was born in Nebraska and thus—under the Fourteenth Amendment—was a citizen of both the United States and Nebraska, he learned that it did not apply to him because he was born on a reservation and thus was not born subject to the jurisdiction of the United States.<sup>26</sup> But if descent matters, then whether you are born in a place that

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21. PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 90–115 (1985).

22. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

23. *Id.* at 95.

24. *Id.* at 96.

25. *Id.*

26. *Id.* at 109. Of course, Chief Justice Taney might have been surprised by this conclusion. After all he opined in *Dred Scott* that:

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may,



makes you subject to the jurisdiction of the United States becomes an issue of secondary importance.

The Constitution requires that a candidate for president be a “natural born citizen.”<sup>27</sup> By contrast, if a Presidential candidate is born in a foreign country, he can still run for president as a natural born citizen. Apparently who your daddy is does matter for purposes of being a “natural born” American. A recent example illustrates this point. George Romney was born in Colonia Dublán, Mexico, son of Americans who were fleeing American jurisdiction.<sup>28</sup> Because Mexico applies the rules of *jus soli* as well as *jus sanguinis*,<sup>29</sup> George

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without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

27. Section 1 of Article Two of the U.S. Constitution sets forth the eligibility requirements for serving as president of the United States:

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

The Twelfth Amendment states, “[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”

28. Nick Miroff, *In Besieged Mormon Colony, Mitt Romney’s Mexican Roots*, WASH. POST, (July 23, 2011), [http://articles.washingtonpost.com/2011-07-23/politics/35267650\\_1\\_miles-park-romney-mitt-romney-mormon](http://articles.washingtonpost.com/2011-07-23/politics/35267650_1_miles-park-romney-mitt-romney-mormon).

Three dozen of Mitt Romney’s relatives live here in a narrow river valley at the foot of the western Sierra Madre mountains, surrounded by peach groves, apple orchards and some of the baddest, most fearsome drug gangsters and kidnapers in all of northern Mexico.

Like Mitt, the Mexican Romneys are descendants of Miles Park Romney, who came to the Chihuahua desert in 1885 seeking refuge from U.S. anti-polygamy laws. He had four wives and 30 children, and on the rocky banks of the Piedras Verdes River, he and his fellow Mormon pioneers carved out a prosperous settlement beyond the reach of U.S. federal marshals. He was Mitt’s great-grandfather.

Gaskell Romney, Mitt’s grandfather, settled in Mexico as well, and Mitt’s father, George Romney, was born in nearby Colonia Dublan—raising the possibility of a 2012 presidential race between two contenders whose fathers were born outside the United States.

29. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 30(A), Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

Mexican nationality is acquired by birth or by naturalization:

A) Mexicans by birth are:

I. Those born in the territory of the Republic, regardless of the nationality of their parents;

Romney was a Mexican. But, of course, the United States also applies the rules of *jus soli* and *jus sanguinis*, and because blood matters, George Romney was deemed American enough to satisfy the constitutional qualifications for president.<sup>30</sup>

Let me give you another example. The story of William Rogers reads like a parable of power.<sup>31</sup> In the 1832 case of *Worcester v. Georgia*, the general understanding (if not the actual practice) arising from the holding was that tribes had exclusive jurisdiction over their internal affairs.<sup>32</sup> Thus, a crime committed within Indian country between two Indians was a matter of tribal jurisdiction.<sup>33</sup> In such an instance, the question of who counted as an Indian was a question not just of jurisdiction but of sovereignty. In 1845, Rogers was indicted in the federal district court of Arkansas for murdering another Cherokee.<sup>34</sup> Rogers objected to federal jurisdiction on the grounds that the federal government had no power to regulate crimes between two Indians.<sup>35</sup> The statute under which he was being prosecuted provided its jurisdiction “shall not extend to crimes committed by one Indian against the person or property of another Indian.”<sup>36</sup> The central element of Roger’s defense was dependent on whether Rogers and his victim were Cherokee and thus beyond the reach of federal criminal prosecution. Both Rogers and his victim had been born outside of Cherokee country, but both had been adopted into the tribe and

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II. Those born in a foreign country of Mexican parents; of a Mexican father and a foreign mother; or of a Mexican mother and an unknown father;

III. Those born on Mexican vessels or airships, either war or merchant vessels.

30. Huma Khan, *How Mitt Romney’s Mexican-Born Father Was Eligible to be President*, ABC NEWS BLOG (Jan. 7, 2012, 6:12 PM), <http://abcnews.go.com/blogs/politics/2012/01/how-mitt-romneys-mexican-born-father-was-eligible-to-be-president/>.

Even though he wasn’t born in a United States territory or state, George Romney was given citizenship at birth because he was born to American citizens, essentially granting him the status of a natural-born citizen.

“When you’re born outside the United States to [U.S.] citizens, you have citizenship at birth,” explained Peter J. Spiro, a professor of law and an expert on the law of citizenship at Temple University. “You don’t have to do anything to claim your citizenship. You are a citizen from birth.”

31. 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, 1963 (2004).

32. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 547 (1832), *abrogated by Nevada v. Hicks*, 533 U.S. 353 (2001).

33. See, e.g., *Ex parte Crow Dog* (*Ex parte Kan-gi-Shun-ca*), 109 U.S. 556 (1883) (standing for this proposition, although it also began the process for a more comprehensive federal control over crimes committed by Indians in Indian country and the full embrace of the Congressional plenary power doctrine over Indian affairs).

34. *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846).

35. *Id.*

36. *Id.* at 572.

lived there long before the crime at issue.<sup>37</sup> Although he may have counted as a Cherokee by the Cherokee, he did not count as an Indian for purposes of federal criminal law.<sup>38</sup>

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.<sup>39</sup>

To be immune from the reach of the federal statute you had to be born an Indian, which of course, meant blood. Whether the tribes had a conception of race (as distinct, say, from clan) was irrelevant, the tribe could not by its own power make a non-member a member. Tribal citizenship was, apparently, contingent on the whim of the conqueror. If the conqueror thought to make descent the dispositive inquiry, then so be it. In any event, Chief Justice Taney could not have been plainer in his explanation that the race of Indians is what mattered, not whatever tribal status they might claim.<sup>40</sup>

Blood counts, in short, especially when the sovereign determines it counts. Where you might be born is a matter of primary importance *only* if those with the power to say it is so determine. The real lesson, though, is that the sovereign governing majority—in this case the representatives of the United States *or* the majority of the Supreme Court—gets to say “who counts.”

#### A. *How “Blood” Counts*

By juxtaposing two cases at more than a hundred year remove from one another, I wanted to open a window into the ways in which the American preoccupation with policing the racial divide has had an impact on the legal and political development of tribes. It has been used to define them, discipline them, and to subject both tribes and individual Indian people to the categories that are the residue of the racialist taxonomy the settlers brought with them, as well as racial compromises necessary to secure a constitution.<sup>41</sup> It has

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37. *Id.* at 571.

38. *Id.* at 573. Presumably this result would not offend people like Professor Dwyer, who seem to be contemptuous of the power that tribes exercise over membership/citizenship. *See* Dwyer, *supra* note 13.

39. *Rogers*, 45 U.S. at 573.

40. Of course, Chief Justice Taney’s characterization merely confirms the idea that tribes were outside of the constitutional and political structure that governed the country; thus, membership for purposes of tribal criminal jurisdiction over other Indians was a matter of indifference for the Court or the Congress.

41. For a discussion of “racialism,” see KWAME ANTHONY APPIAH, *IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 13 (1992).

permitted policy makers and jurists to project their own conceptions of native peoples onto Indians and to use racialist categories to justify the legal treatment of Indian people whether in tribes or individually.

The question of just how Indians would count within the political imagination of the Founders was answered within a framework that placed Indians outside of the confines of conventional domestic legal categories but not quite within the categories governing foreigners. Because treaties were the first legal instruments to institutionalize relations between tribes and settlers (beyond individual commercial agreements), their use suggests the recognition by the British settlers that tribes were people with an independent and pre-existing political status. Indian nations did not depend on the recognition of the settlers for their legitimacy. At contact, tribes were the unit of political engagement even if, ultimately, the treaties that were negotiated were understood to be in a category different from other treaties.<sup>42</sup> The classification of tribes as “domestic dependent nation” had not yet been conceptualized even as it worked itself out in practice and in the mind of the settlers. But it was clear that the path to peace rested on negotiated agreements with *tribes* and would remain so until the tribes ceased to be a formidable military threat.<sup>43</sup>

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The first doctrine is the view—which I shall call *racialism*—that there are heritable characteristics, possessed by members of our species, which allow us to divide them into a small set of races, in such a way that all the members of these races share certain traits and tendencies with each other that they do not share with members of any other race. These traits and tendencies characteristic of a race constitute, on the racialist view, a sort of racial essence; it is part of the content of racialism that the essential heritable characteristics of the “Races of Man” account for more than the visible morphological characteristics—skin color, hair type, facial features—on the basis of which we make our informal classifications. Racialism is at the heart of nineteenth-century attempts to develop a science of racial difference, but it appears to have been believed by others—like Hegel, before then . . . .

42. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 2 (1994).

The United States, from the beginning of its political existence, recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty or quasi sovereignty and in turn greatly contributed to that concept. Treaties, as it was repeatedly pointed out in discourse about the relations between the United States and the Indians, made no sense unless based on recognition of some kind of special legal status of the Indians.

*Id.* Yet, as Chief Justice Marshall put it in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831):

The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where [sic] else.

43. The last treaty was ratified in 1868. The treaty making power was removed from the President by Congress in 1871 in a statute of dubious constitutionality. See Siegfried Wiessner,

If the civic and social existence of tribes had been created on the basis of equality through the medium of negotiated agreements, the history of this country would have been dramatically different. But the anomalous political relations between the settlers and the Indians meant that, despite the roots of the relationship in international law, Indian treaties were different. The Supreme Court in *Talton v. Mayes*, recognized that the Constitution by its terms did not apply to tribes, but that did not prevent the political branches from playing a greater role in their management.<sup>44</sup> Ten years before the decision in *Talton*, the Supreme Court had to wrestle with the status of Indians and the authority of the United States to regulate their internal relations. The initial characterization, while consistent with Marshall's categorization of tribes, seemed to open the door to much more intrusive external regulation.

[Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.<sup>45</sup>

Based on this formulation, one might ask by what authority may tribes be brought under the legislative regulation of the federal government or of the states? The answer the court gives here is culturally patronizing and as naked an assertion of power as one could hope to find.

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. It must exist in that government, because it never has existed anywhere else . . .<sup>46</sup>

Like nations reduced to pupilage by Chief Justice Marshall, the firm hand of civilizing instruction must come from a political power alien to the tribes. Tribes are, in the formulation of Justice Miller, "remnants of a race once powerful."

The path of the status of tribes from nations with whom the settlers had to negotiate treaties to "remnants of a race once powerful" is marked by war and the use of racial categories to justify the legal treatment of tribes.

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

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*American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 573 n.28, 580 (1995).

44. *Talton v. Mayes*, 163 U.S. 376, 382–84 (1896).

45. *United States v. Kagama*, 118 U.S. 375, 381–82 (1886).

46. *Id.* at 384.

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.<sup>47</sup>

In the Court's characterization, this race of savages was unworthy of the dignity of treaties or even fair dealing. Whether power is behind the question of "who counts and for what" is never clearer than in these kinds of offhand descriptions of tribes and the relation between them and the non-Indian governments confronting them.

The description of the encounters between Indians and non-Indians reflects the conflicted stance that the colonizing powers had towards Indian people, yet because the impact on the legitimate use of particular kinds of governmental power turned on whether the people being confronted were, in fact, Indian, that question often loomed as the fundamental inquiry, but not one that the Indian people were themselves always empowered to make. Elsewhere, I have discussed one such case where the tribal members' stories about themselves carried far less weight than the stories historians could tell about them.<sup>48</sup> In addition, because the tribe had taken in runaway slaves and had integrated them into the life of their community including intermarriage, their "race" read as black rather than Indian.<sup>49</sup> Ascription, one of the primary tools of racial management in general, is central in defining Indian people, but far more critically it can define the contours of their legal existence.

I now turn to some specific examples of how race as a proxy for power "counts" in the context of Indian law. The life of race as a social and political category has always been complicated. The ways in which race is used, especially when not specifically limited to the division between blackness and whiteness, draws on the varieties of socio-racial types related to the ersatz science of racialism. Thus, there has always been complex relationship between Indians and white non-Indians.<sup>50</sup> The important thing to remember, however, is that there are legal consequences, some quite dramatic, that follow

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47. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289–90 (1955).

48. Gerald Torres & Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990).

49. *Id.* at 638.

Runaway slaves took refuge with and married Mashpee Indians. The Mashpee became members of a "mixed" race, and the names some of the Mashpee carried reflected this mixture. What was clear to the Mashpee, if not to outside observers, was that this mixing did not dilute their tribal status because they did not define themselves according to racial type, but rather by membership in their community.

50. See, e.g., *DRESSING IN FEATHERS: THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE* (S. Elizabeth Bird ed., 1996); see also COLIN G. CALLOWAY, *WHITE PEOPLE, INDIANS, AND HIGHLANDERS: TRIBAL PEOPLES AND COLONIAL ENCOUNTERS IN SCOTLAND AND AMERICA* (2008). Of course, it is also seen in the recent quite public debate about the naming of various professional sports franchises. See, e.g., Maureen Dowd, *Call an Audible, Dan*, N.Y. TIMES, Oct. 9, 2013, at A29, available at <http://nytimes.com/2013/10/09/opinion/dowd-call-an-audible-dan.html?hp>.

from the interplay of race and nation that has circumscribed Indians' status in our political culture.

*B. Race and Nationhood*

As I have described in an earlier essay, the power to say who is or who is not an Indian (putting aside the question of who is or who is not a citizen, which as we have seen establishes a different kind of political existence) resides in the federal government.<sup>51</sup> But how does a court, or any federal agent, for that matter go about deciding who counts as an Indian? If we are not going to permit the tribes to self-identify then the process of ascription has to have some non-arbitrary basis in order to be lawful. What is that non-arbitrary method? Let's look at the method adopted by the Supreme Court.

In the case involving the Mashpee Indians of Cape Cod,<sup>52</sup> the federal district court relied on a definition of tribe adopted by the United States Supreme Court at the turn of the century in *Montoya v. United States*: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ."<sup>53</sup> By relying on a definition that the Court developed to determine whether a band of Indians were part of a tribe for purposes of the Indian Depredation Act,<sup>54</sup> the Court crafted a definition that had no relevance to the Mashpee. Nonetheless, "Judge Skinner instructed the jury that the Mashpee had to meet the requirements of *Montoya*—rooted in notions of racial purity, authoritarian leadership, and consistent territorial occupancy—in order to establish their tribal identity, despite the fact that *Montoya* itself did not address the Non-Intercourse Act."<sup>55</sup> Of course, the power to say who is or is not an Indian is independent of the particular test applied.

Like the case of *Baby Veronica*, the case through which the federal government asserted the power to say who is or is not an Indian arose, like many important cases involving Indians, around an issue that was seemingly trivial, but that implicated the power to regulate the lives of the tribe and that divided political power to control the lives of the Pueblo Indians between the State of New Mexico and the federal government. The issue was whether Felipe Sandoval had violated federal law when he wheeled his cart into Santa

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51. Gerald Torres, *Who is an Indian? The Story of United States v. Sandoval*, in *INDIAN LAW STORIES* 109, 109–45 (Carole Goldberg et al. eds., 2011).

52. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).

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

54. Indian Depredation Act, ch. 538, 26 Stat. 851 (1891).

55. Torres & Milun, *supra* note 48, at 634 (citation omitted).

Clara Pueblo and tried to sell wine.<sup>56</sup> Yet as the previous discussion involving the Mashpee indicates, the rules that are applied to one tribe are not contextualized in the ordinary course, but are deemed to apply to all tribes regardless of the difference in their circumstances. The reason, of course, is that it is describing a political relationship that is outside of those domestic distributions of political power contemplated by the Constitution.

The Pueblo had been fighting to maintain some form of independence from external control, especially European control, since at least the early 1500s.<sup>57</sup>

The effort to keep the Spanish and the Mexicans and now the Americans out of their land was a problem that seemed never to end. It was different from the defensive struggles or commercial engagements the Pueblos had with the Utes, Apaches, Comanches, or Navajos. With the Europeans and their heirs it was always a military, commercial, *and* legal fight.<sup>58</sup>

The dispute between the state and the federal government, while complicated because of the long territorial status of the area and the conceit of independent self-governance that had infected the local American and Mexican elite, was really very simple. If the Santa Clarans were Indian, then the federal government would have jurisdiction over the importation of alcohol into Indian country as well as primary jurisdiction over a raft of other issues, but if the Santa Clarans were not Indians, then the State would have jurisdiction over tribal members and perhaps most importantly their land.<sup>59</sup> How was the court to decide?

The fundamental error in the district court opinion is one that is repeated to this day. If you think of Indians as a race and not a nation, then you only have to focus on what their “race” tells you. By characterizing Indians as a race, first, you reduce their political existence to a legal category of far lesser significance than if they were an independent or at minimum semi-independent sovereign. As the district court Judge Pope wrote:

We have, therefore, left, as the sole basis upon which federal jurisdiction may be retained over these people, the fact that they are of Indian lineage. Is this enough? There is, from a governmental standpoint, no magic in the word “Indian.” It has through the course of our legislation indicated a condition no less than a race. With the condition gone by the assimilation of the person into the body politic, and the release of his lands from governmental control by the issuance of unconditional patents, his race loses significance. If the mere fact that he be an Indian is of itself sufficient to justify his being held always subject to a species of federal police power, that power would seem, likewise,

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56. *United States v. Sandoval*, 231 U.S. 28, 36 (1913).

57. *Torres*, *supra* note 51, at 110.

58. *Id.* at 128–29.

59. *Sandoval*, 231 U.S. at 38.



logically to extend to his remote posterity; for they, like him, have Indian blood in their veins calling for the national guardianship.<sup>60</sup>

The racial condition of the Pueblos is what determines their legal status. This is reflected in the racialist thinking that percolates through this opinion (and through the Supreme Court's later opinion as well). If Pueblo Indians are just as good as Mexicans, then they should have the same status as Mexicans.<sup>61</sup>

[Y]ou may pick out 1,000 of the best Americans in New Mexico, and 1,000 of the best Mexicans in New Mexico, and 1,000 of the worst Pueblo Indians, and there will be found less, vastly less, murder, robbery, theft, or other crimes among the 1,000 of the worst Pueblo Indians than among the 1,000 of the best Mexicans or Americans in New Mexico.<sup>62</sup>

The district court seemed to say that, while the Pueblo were racially Indians, that would be an insufficient and possibly unconstitutional basis upon which to assert federal control. Of course, the lack of federal superintendence in this case would have left the Pueblo to the tender mercies of the state.

The Supreme Court decided that the Pueblo Indians were not as civilized or distinct from the general run of other Indians under federal jurisdiction as the district court would have us believe.<sup>63</sup> The Court turned to early ethnographers to demonstrate that the Pueblo Indians were governed by fear and petty despotism.<sup>64</sup> Not only were they uncivilized, they were obdurate and unwilling to adopt the white man's ways.<sup>65</sup> They wanted to remain separate.<sup>66</sup> These facts, according to Justice Van Devanter's opinion, do not dispose the dispassionate observer to conclude that the Pueblos are not Indian in either race or condition.<sup>67</sup> So if the Court was supposed to resolve the issue of Congress's power over the Pueblos based on their race and condition, it was prepared to answer that Congress had such power. The Pueblo Indians were clearly an inferior race in need of tutelage, and Congress had taken that obligation seriously by providing them with the essentials of civilized life, even if the Pueblos had not made the best use of them.<sup>68</sup> Merely because they

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60. *United States v. Sandoval*, 198 F. 539, 551 (D.N.M. 1912), *rev'd*, 231 U.S. 28 (1913).

61. This kind of analysis is compellingly documented in other areas by Professor Neil Foley. NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* (1997).

62. *Sandoval*, 198 F. at 543. Because the Treaty of Guadalupe-Hidalgo made citizens of all inhabitants regardless of race or caste, who the "Mexicans" would be is only self-evident to the court.

63. *Sandoval*, 231 U.S. at 43.

64. *Id.* at 42-43.

65. *Id.* at 42.

66. *Id.*

67. *Id.* at 44.

68. *Sandoval*, 231 U.S. at 39-40.

held their land in ways that were distinct from other Indians was a matter of no moment for the court.<sup>69</sup>

The State's trump card was the claim that the Pueblo Indians had lost their legal identity as Indians when they were made citizens by the entry of New Mexico territory into the United States after the Mexican-American War.<sup>70</sup> If they were citizens, then the classification of the Pueblo as Indians would be an absurd attempt by the federal government to base its authority on the illegitimate categorization of people. Justice Van Devanter was sensitive to this argument, but he felt that he had disposed of the ethnographic point and that it was unnecessary to address the citizenship point, since, as he pointed out, the federal government had long exercised its jurisdiction over Indians who were both citizens and tribal members.

As before stated, whether [the Pueblo] are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people.<sup>71</sup>

But this did not answer the explicit racial claim that was advanced by the district court. That court maintained that federal jurisdiction could not be predicated on the mere fact that the Pueblo people were Indian by blood, even if state racial segregation laws were regularly upheld at that time.<sup>72</sup> Sandoval's attorney suggested that once the racial basis for regulating Indians was lost it could not be resurrected.<sup>73</sup> To do so would be to claim that other ethnic groups could be regulated on the same grounds.<sup>74</sup> This would be an absurd and unconstitutional basis for anchoring federal power. Sandoval's lawyers argued that if such a basis for federal jurisdiction were to be found constitutional, it would be without limit.<sup>75</sup> Citizens and states would be at the mercy of unbounded federal power.<sup>76</sup> The Supreme Court recognized the force of this criticism and replied:

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the

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69. *Id.* at 48.

70. *Id.* at 38–40, 47–48.

71. *Id.* at 48. That is an interesting argument understood from the perspective of “who counts.” In this formulation, even the invocation of citizenship would be insufficient for the Pueblo to count in ways that would both provide them with constitutional protections and provide protection from an acquisitive state.

72. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 543 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

73. *United States v. Sandoval*, 198 F. 539, 548 (D.N.M. 1912), *rev'd*, 231 U.S. 28 (1913).

74. *Id.* at 549.

75. *Id.*

76. *Id.*

questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.<sup>77</sup>

The district court had made a fundamental error in thinking it was within either the province of the court or the state to determine who was or was not an Indian; the Supreme Court was merely saying that it had to decide whether these particular people were subject to the exclusive jurisdiction of the federal government. The decision was really one that Congress made.<sup>78</sup> Congress and not the state could decide whether further superintendence was required, but the identity of the Pueblo Indians as Indian did not hinge on the degree of solicitude shown by the non-Indian neighbors of the Pueblos.<sup>79</sup>

The Supreme Court used law office anthropology to determine that the Pueblo were racially Indian,<sup>80</sup> and once that decision was made it could not be second guessed by state or territorial authorities, and the federal legislature alone had the power to manage the affairs or resources of the tribes.

*Morton v. Mancari*<sup>81</sup> was decided in 1974 almost a hundred years after *Sandoval*. Nevertheless, race still paved the way. The Court, in fact, underlined the role of race and the peculiar place that “blood” plays in the construction of tribal membership and the ways in which that membership insulates tribes from some conventional constitutional categories. In the discussion of *Mancari*, keep in mind the almost modern argument that the district court made in suggesting that regulating Indians on the basis of a racial or ethnographic category would be dangerous to our constitutional order.<sup>82</sup> Of course, as is usually the case, this argument was not really advanced on behalf of the tribes, but on behalf of those who wanted access to the resources the tribes controlled.<sup>83</sup>

The case involved a challenge to a Bureau of Indian Affairs (BIA) Indian preference in training, promotion, and hiring as well as for lateral hiring at the Bureau.<sup>84</sup> Certain non-Indian BIA employees claimed that the preference was unconstitutional as well as in violation of federal anti-discrimination statutes.<sup>85</sup>

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77. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

78. *Id.* at 47.

79. *Id.* at 45–47.

80. *Id.* at 39.

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

82. *Mancari v. Morton*, 359 F. Supp. 585, 590–91 (D.N.M. 1973), *rev'd*, 417 U.S. 535 (1974).

83. We could take a detour into the current Supreme Court jurisprudence of employment discrimination or affirmative action more generally to examine “who counts” through an entirely different lens. My sense is that the conclusion in the previous sentence would remain largely unchanged.

84. *Mancari*, 417 U.S. at 538–39.

85. *Id.* at 539.

The preference was predicated on the Indian Reorganization Act,<sup>86</sup> and, under the regulations adopted by the BIA to be eligible for the preference, an applicant had to be from a federally recognized tribe with more than one-quarter Indian blood.<sup>87</sup> To the challengers this requirement seemed a clear case of racial preference.<sup>88</sup> Nonetheless, the Court upheld the preference.<sup>89</sup>

As described by Professor Goldberg in her analysis of the case, the Court having just sidestepped affirmative action in the *DeFunis* case was not eager to fully engage the question of racial preferences, especially in a case involving the federal government.<sup>90</sup> As Professor Frickey has demonstrated on strictly formal grounds, the BIA preference was vulnerable to attack.<sup>91</sup> But formalism is not the province of federal Indian law.

If the “life of the law” for legal formalists is logic and for legal pragmatists is experience, then federal Indian law is for neither. More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent—the displacement of its native peoples—by the descendants of Europeans.<sup>92</sup>

But what was the way out for the Court? The language of “blood” in the regulations clearly indicates a descent requirement, and, as the Court has indicated, “descent” is just a proxy for race and is thus suspect as a governmental classification.<sup>93</sup> The way out was actually dictated by the same conflicted treatment of Indians reflected in the *Sandoval* case. Indians were a race of people, but that race permitted them to be classified as “tribal” and thus capable of being dealt with as a political entity. The treaty clause of the Constitution and the practice of dealing with tribes through treaties suggested that they had a political existence that was, perhaps, derivative of their race but not dependent on it.<sup>94</sup> The regulation thus seemed to be addressing the same fear that the court addressed in *Rogers*: being Indian had to mean something

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86. 25 U.S.C. § 472 (1934).

87. *Mancari*, 417 U.S. at 553 n.24.

88. See Carole Goldberg, *What's Race Got to Do With It? The Story of Morton v. Mancari*, in *INDIAN LAW STORIES* 397, 405 (Goldberg et al. eds., 2011).

89. *Mancari*, 417 U.S. at 555.

90. Goldberg, *supra* note 88, at 389, 402; *DeFunis v. Odegaard*, 416 U.S. 312, 319–20 (1974); see also, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

91. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 *HARV. L. REV.* 1754, 1762 (1997).

92. *Id.* at 1754 (footnotes omitted).

93. See discussion of *Rice v. Cayetano*, 528 U.S. 495 (2000), *infra* notes 133–42 and accompanying text.

94. U.S. CONST. art. II, § 2, cl. 2.

that entailed race and not just political membership. This conflation clearly put the court in a difficult position.

What the Court did in *Mancari* was to prioritize politics. Drawing on the same power it described in *Sandoval*, the political departments of government could determine who was or was not an Indian and, on the basis of the federal recognition process, could determine to deal with Indians in their role as members of a political group and not as members of a racial group. As Professor Frickey put it: “*Morton v. Mancari* fares equally poorly when subjected to critical light. It is rooted in a double-barreled cluster of constitutional fictions, some purporting to support federal power over Indians in the first place, and others ignoring the ethnic quality of the classification at issue in that case.”<sup>95</sup>

*Mancari* may provide safe harbor for the BIA’s Indian preference but only because the Court ignores the racial dimension of the preference. It did not do this in the straightforward way of saying that the Equal Protection Clause by its terms applies only to the states. Instead, it avoided the question completely. Once the political dimension of the relationship could be asserted as the principal basis for the preference, the characteristics necessary for making that political judgment could melt into the background. This was exactly the problem that the district court in *Sandoval* claimed damned the classification scheme that stripped the state of jurisdiction over the Santa Clara Pueblo.<sup>96</sup> But as the Court noted in *Adarand*, there are some political judgments that are beyond the Court to reconsider; apparently the use of race as regards to Indians and other groups subject to the plenary power of the federal government were these types of judgments.<sup>97</sup>

Race matters in determining “who counts” but only to satisfy the objectives of the one doing the counting. As I suggested earlier, how race is used is always a question of power. The techniques for wielding that power may be more or less sophisticated. Power involves not just power over the objects of regulation, but those objects become instruments for apportioning power among the powerful.

I now turn to three more cases that suggest different ways in which race matters for Indians in ways that complicate the discussion, but which at root

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95. Frickey, *supra* note 91, at 1760.

96. *United States v. Sandoval*, 198 F. 539, 549 (D.N.M. 1912), *rev’d*, 231 U.S. 28 (1913).

97. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (quoting *United States v. Paradise*, 480 U. S. 149, 166 n.16 (1987) (Brennan, J., plurality opinion) (“[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth”); *see also id.* at 217–18:

We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate, *e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101–02, n. 21 (1976) (federal power over immigration), to detract from this general rule.

still point to the deformations of high-minded commitments to principles that we think of as fundamental to our system of political life.

## II. GIVING AND TAKING AWAY

The following cases suggest that the use of race has a troubled history in Indian law, but what is really at play is the troubled history with race that has bedeviled this country from its inception.<sup>98</sup> The history of European settlement and colonization of the United States is not limited to the contiguous forty-eight states, but it extends to the time and context that brought other territories into American jurisdiction, which had profound effects on the characterization of the indigenous people encountered there. The tribes in the contiguous forty-eight states were subject to often head-snapping changes in federal policy.<sup>99</sup>

With the passage of the Indian Civil Rights Act (ICRA)<sup>100</sup> Congress tried to insert U.S. Constitutional protections between tribal members and their government. Apparently Congress was concerned about the abuses tribal governments might be committing by failing to conform their procedures and habits of governance to constitutional norms.<sup>101</sup> While it might be easy to understand this invasion of tribal autonomy as an expression of the termination ethos that was driving federal policy at the time, it also reflects the complicated relationship between tribes as separate political communities and the plenary supervisory authority of the federal government. One of the difficulties that emerged immediately was the diametrical opposition between exogenous norms and the indigenous tribal norms. The cardinal example is the First Amendment.<sup>102</sup> The federal prohibition on laws establishing or burdening the free exercise of religion would, if adopted uncritically, make some theocratic tribal governments illegitimate.<sup>103</sup> ICRA took some of these differences into account and established limits of tribal criminal jurisdiction. One of the provisions was a version of the equal protection clause.<sup>104</sup> Relying on this

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98. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998).

99. ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW* 79–166 (2d ed. 2010) (beginning its treatment of federal Indian law by periodizing federal policy towards Indians).

100. 25 U.S.C. §§ 1301–1302 (1970).

101. See Harv. L. Rev. Ass'n, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1355–57 (1969).

102. U.S. CONST. amend. I. The text of the First Amendment is *inter alia*: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”

103. The prohibition on the establishment of religion, for example, would have prevented the religious leaders, the Kikmongwi, from exercising any Hopi governmental power. See CONSTITUTION AND BY-LAWS OF THE HOPI TRIBE ARIZONA Dec. 19, 1936, art. 3, § 3.

104. 25 U.S.C. § 1302(8) (2006) (“No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”).

provision in *Santa Clara Pueblo v. Martinez*, Julia Martinez challenged a tribal membership rule that excluded her children from membership.<sup>105</sup> The ordinance in question established a patrilineal requirement for children born of a mixed marriage.<sup>106</sup> Julia Martinez, a Santa Clara native, had married Myles Martinez, a Navajo.<sup>107</sup> According to the ordinance, the children of this marriage would not be Santa Claran.<sup>108</sup> While this exclusion would undoubtedly have become an issue at some point, it became particularly acute when one of the Martinez children needed specialized medical care that tribal membership would have facilitated.<sup>109</sup>

In *Martinez*, Julia Martinez claimed that she had been denied equal protection of the law in part because of her gender.<sup>110</sup> In an opinion that seemed to satisfy no one, Justice Marshall held that because ICRA did not provide a remedy, it could not order an injunction and thus subject the tribe to all of the remedies available under federal law.<sup>111</sup> To do so would interfere with the internal affairs of the tribe and would be so intrusive that it would compromise the integrity of the tribe.<sup>112</sup> Of course, the passage of ICRA itself compromised the integrity of tribes, but the Court declined to exacerbate the problem. The denial of a federal remedy did not leave Ms. Martinez without a remedy; instead, she would have access to tribal processes. As Justice Marshall noted: “Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”<sup>113</sup>

One of the ironies revealed by this case is how race was used both to constitute the tribes (*Sandoval*, again) and to ultimately permit the children to gain access to Indian Health Service care despite being denied membership in either the mother’s or father’s tribe.<sup>114</sup> What was the work that race was doing here? A deeper analysis of the case reveals that the ordinance that later became the subject of the suit brought by Ms. Martinez was adopted by the Pueblo in order to control the loss of the land resource to non-Indians.<sup>115</sup> By controlling

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105. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978).

106. *Id.* at 52 n.2.

107. *Id.* at 52; *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 12 (D.N.M. 1975), *rev’d*, 540 F.2d 1049 (10th Cir. 1976), *rev’d*, 436 U.S. 49 (1978).

108. *Martinez*, 436 U.S. at 52.

109. Gloria Valencia-Weber, *Three Stories in One: The Story of Santa Clara Pueblo v. Martinez*, in *INDIAN LAW STORIES* 451, 453 (Goldberg et al. eds., 2011).

110. *Martinez*, 436 U.S. at 51.

111. *Id.* at 61.

112. *Id.* at 66–67.

113. *Id.* at 65.

114. Valencia-Weber, *supra* note 109, at 488.

115. *See Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 15–16 (D.N.M. 1975), *rev’d*, 540 F.2d 1049 (10th Cir. 1976), *rev’d*, 436 U.S. 49 (1978).

membership in the way that it did, the tribe was attempting to preserve its community and its resources by using descent to regulate membership. Who counts for this community was a very specific question with quite concrete implications. The Pueblo had a long history of resisting predatory outsiders.<sup>116</sup> Moreover, it is not an isolated memory but a part of the DNA in the history of the European encounters with native people.<sup>117</sup>

There are indigenous people in all of the territories that became states. In Alaska, native claims were addressed with the Alaska Native Claims Settlement Act<sup>118</sup> (among other statutes), but Hawaiian natives have not fared as well.

Hawaii was first occupied by people from other Pacific islands over a thousand years ago.<sup>119</sup> Before European contact, native Hawaiians developed a complex economic and political system that in many ways resembled the feudalism of Europe (before the Statute of *Quia Emptores*) with the major difference being that those at the bottom of the economic system were not tied to the land.<sup>120</sup> While estimates vary, some suggest that about 300,000 people inhabited the islands at the time of European contact.<sup>121</sup> Even after contact, the Hawaiian monarchy was recognized as the sovereign power in the islands.<sup>122</sup> When the crown lands were distributed in what came to be called the Great Mahele, many native Hawaiians were effectively dispossessed.<sup>123</sup> To ameliorate the condition of native Hawaiians, Congress created the Hawaiian Homes Commission in order to provide a land base for native Hawaiians.<sup>124</sup> The Hawaiian Homes Commission Act set aside about 200,000 acres of public lands and created a program of loans and long-term leases for the benefit of native Hawaiians.<sup>125</sup> “The Act defined ‘native Hawaiian[s]’ to include ‘any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.’”<sup>126</sup> When Hawaii was admitted to the

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116. See Torres, *supra* note 51, at 145.

117. For accounts of particularly brutal uses of marriage and murder to obtain tribal resources, see LAWRENCE J. HOGAN, *THE OSAGE INDIAN MURDERS* (2d. ed. 1998) and DENNIS MCAULIFFE, JR., *BLOODLAND: A FAMILY STORY OF OIL, GREED AND MURDER ON THE OSAGE RESERVATION* (Council Oak Books 1999) (1994).

118. 43 U.S.C. § 1601 (2006).

119. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §4.07[4][b], at 365 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN’S HANDBOOK].

120. *Id.* at 365–66.

121. ROBERT C. SCHMITT, *DEMOGRAPHIC STATISTICS OF HAWAII: 1778–1965* 10 (1968).

122. COHEN’S HANDBOOK, *supra* note 119, §4.07[4][b], at 366.

123. *Id.*

124. *Id.* at 369 & n.1348 (referencing Hawaii Homes Commission Act, 42 Stat. 108 (1959) (formerly codified as amended at 48 U.S.C. §§ 691–718 (1958)) (omitted from codification upon admission of Hawai’i to the Union in 1959) (set out in full as amended at 1 Haw. Rev. Stat. 191)).

125. *Id.* at 369–70.

126. *Rice v. Cayetano*, 528 U.S. 495, 507 (2000).



Union, it agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution.<sup>127</sup> The income from the management of the lands set aside by the act went either for the betterment of native Hawaiians or for education.<sup>128</sup>

In 1978, Hawaii amended its constitution to create the Office of Hawaiian Affairs.<sup>129</sup> The State vested the Office of Hawaiian Affairs (OHA) with broad authority to administer a twenty percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to the Admission Act, which OHA is required to administer “for the betterment of the conditions of native Hawaiians,”<sup>130</sup> as well as any other funds that may be received for the benefit of “native Hawaiians” and “Hawaiians.”<sup>131</sup>

These provisions were created with the express intention of ameliorating the oppressive effects of colonialism on Native Hawaiians and to give them the wherewithal to participate more fully in the life of the state.<sup>132</sup> The difficulty arose when the mechanism for managing the OHA was created. To quote the Court at length:

OHA is overseen by a nine-member board of trustees, the members of which “shall be Hawaiians” and—presenting the precise issue in this case—shall be “elected by qualified voters who are Hawaiians, as provided by law.” Haw. Const., Art. XII, § 5; see Haw. Rev. Stat. §§ 13D-1, 13D-3(b)(1) (1993). The term “Hawaiian” is defined by statute:

“‘Hawaiian’ means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.” §10-2.

The statute defines “native Hawaiian” as follows:

“‘Native Hawaiian’ means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.”<sup>133</sup>

In the case of *Rice v. Cayetano*, Harold Rice, a citizen of Hawaii who did not qualify as Hawaiian or Native Hawaiian under the terms of the Act set out

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127. See HAW. CONST. art. XII, §§ 1-3.

128. COHEN’ S HANDBOOK, *supra* note 119, §4.07[4][b], at 369.

129. HAW. CONST. art. XII, § 5.

130. *Rice*, 528 U.S. at 509 (referencing HAW. REV. STAT. §10-13.5 (1993)); see also HAW. REV. STAT. § 10-3 (1993).

131. HAW. CONST. art. XII, § 6.

132. COHEN’ S HANDBOOK, *supra* note 119, §4.07[4][b]-[c], at 370-71.

133. *Rice v. Cayetano*, 528 U.S. 495, 509-10 (2000).

above, tried to register to vote in the election, but was refused.<sup>134</sup> Rice came from an old family, but could not claim Native Hawaiian status.<sup>135</sup> He sued claiming race discrimination. He lost in the lower court because of the trust duty the state and the federal government owed to Native Hawaiians.<sup>136</sup> The district court expressly adopted the trust responsibility by suggesting that Native Hawaiians bore the same relationship to the government as tribes.<sup>137</sup> On the basis of that trust duty, the lower court reasoned that any special treatment was a function of the political relationship, not a function of race.<sup>138</sup>

It is important to remember the genesis of the limiting requirement found in the OHA and the justification for it. Its origins lie in the Act passed by Congress and imposed upon the new state upon entry to the Union. The resources managed by the OHA were for the benefit of Native Hawaiians. By putting the management of the resources in the hands of the beneficiaries, the Act merely treated Native Hawaiians as tribes would be treated: self-management, especially of resources, is a critical component of self-governance even if it is bounded by trust supervision.<sup>139</sup> Descent, which was critical for determining the legitimacy of membership in tribes according to the federal government in its regulation of indigenous people in the contiguous forty-eight states, somehow became a radioactive racial qualifier in Hawaii.<sup>140</sup>

The voting scheme proposed by the State in its creation of the OHA, because it was an election run by the state (there being no federally recognized tribes in Hawaii despite the genesis of the distinctive state status of “Native Hawaiian”), violated the Fifteenth Amendment and offended the race neutral norms of the Constitution. “The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve.”<sup>141</sup> Their tender concern for the condition of Native Hawaiians is expressed as the fundamental revulsion for all racial categorization:

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans

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134. *Id.* at 510.

135. *Id.*

136. *Id.* at 511.

137. *Id.*

138. *Rice*, 528 U.S. at 511.

139. COHEN’ S HANDBOOK, *supra* note 119, §4.07[4][b]–[f], at 365–86.

140. *Rice*, 528 U.S. at 539–40 (Stevens, J., dissenting).

141. *Id.* at 517 (majority opinion).

the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.<sup>142</sup>

The corrosive power of ignoring the political reasons for deciding “who counts and for what” is particularly evident in this case. The material resources that might actually be used for the benefit of Native Hawaiians cannot be managed by the people for whom the resources were set aside. There are analogies to this kind of supervision in the trust cases governing Indian resources, but rarely is the justification done with resort to modern appeals to race. Apparently, race “counts” for determining who is an Indian, but indigenous people of lands colonized post continental conquest do not “count” as Indians.<sup>143</sup> To be an Indian in this context is to describe a specific political relationship, and there is a historical limit to the creation of that relationship. The next case shows just how malleable that historical limitation is.

The Indian Reorganization Act (IRA), enacted in 1934, authorizes, among other things, the Secretary of Interior to acquire land and hold it in trust “for the purpose of providing land for Indians,”<sup>144</sup> and defines “Indian” to “include all persons of Indian *descent* who are members of any recognized Indian tribe now under Federal jurisdiction.”<sup>145</sup> The Narragansett Tribe, inhabitants of the territory that was to become Rhode Island, was placed under the Colony of Rhode Island’s formal guardianship in 1709.<sup>146</sup> Like many New England tribes, it relinquished its tribal authority and “sold” all but two acres of its

142. *Id.*

143. For another expression of this, see *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530 n.5 (1998), and what I consider its infamous footnote five:

In attempting to defend the Court of Appeals’ judgment, the Tribe asks us to adopt a different conception of the term “dependent Indian communities.” Borrowing from Chief Justice Marshall’s seminal opinions in *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831), and *Worcester v. Georgia*, 6 Pet. 515 (1832), the Tribe argues that the term refers to *political* dependence, and that Indian country exists wherever land is owned by a federally recognized tribe. Federally recognized tribes, the Tribe contends, are “domestic dependent nations,” *Cherokee Nation v. Georgia*, *supra*, at 17, and thus *ipso facto* under the superintendence of the Federal Government. See Brief for Respondents 23–24.

This argument ignores our Indian country precedents, which indicate both that the Federal Government must take some action setting apart the land for the use of the Indians “as such,” and that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government. See, e.g., *United States v. McGowan*, 302 U.S. 535, 539 (1938) (“The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy”); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (noting that the Federal Government retained “ultimate control” over the allotments in question).

144. 25 U.S.C. § 465 (2006).

145. *Id.* § 479 (emphasis added).

146. *Carcieri v. Salazar*, 555 U.S. 379, 383 (2009).

remaining reservation land in 1880.<sup>147</sup> But, also like many tribes, it began buying back some its aboriginal land in an effort to restore its land base and regain its independent tribal status.<sup>148</sup> The Tribe sought to recover its ancestral land, claiming that the State had misappropriated its territory in violation of the Indian Non-Intercourse Act.<sup>149</sup> The claims were resolved by enactment of the Rhode Island Indian Claims Settlement Act.<sup>150</sup> The Tribe received title to 1,800 acres of land in exchange for relinquishing all claims to land based on aboriginal title.<sup>151</sup> In 1983, the tribe achieved federal recognition.<sup>152</sup> In 1988, the Secretary of the Interior took the 1,800 acres into trust.<sup>153</sup> When the tribe purchased some additional acreage in order to build tribal housing the state objected that the tribe was not conforming to applicable state and local codes.<sup>154</sup> While that dispute was pending the Secretary took the thirty-one acres into trust.<sup>155</sup>

The State challenged the Secretary's decision to take the land into trust in the case of *Carcieri v. Salazar*.<sup>156</sup> The State argued that the Secretary did not have the authority to take the land in trust for the Narragansett under the IRA.<sup>157</sup> The language of the Act provided that the Secretary may take land into trust for Indian people.<sup>158</sup>

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.<sup>159</sup>

Read the definition closely. To whom does the statute apply?

Certainly the Narragansett qualify as Indian. They were recognized as such by the State since early in the eighteenth century.<sup>160</sup> They lost their land as did most eastern Indians, and they reclaimed it through application of the Non-

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147. *Id.*

148. *Id.* at 383–85.

149. *Id.* at 384; 25 U.S.C. § 177 (2006).

150. *Carcieri*, 555 U.S. at 384; 25 U.S.C. § 1701–16 (2006).

151. *Carcieri*, 555 U.S. at 384.

152. *Id.*

153. *Id.* at 385.

154. *Id.*

155. *Id.*

156. *Carcieri*, 555 U.S. at 385–87.

157. *Id.* at 382.

158. *Id.* at 381–82.

159. 25 U.S.C. § 479 (2006).

160. *Carcieri*, 555 U.S. at 383.

Intercourse Act.<sup>161</sup> They did this without state or federal assistance and regained federal recognition in 1983.<sup>162</sup> So what is the problem? According to the district court and the appeals court that heard this case the statute was ambiguous, and applying the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>163</sup> giving deference to the reading of the agency so long as it is reasonable, they held that the action of the agency was permitted.<sup>164</sup>

Yet, according to the Supreme Court the lower courts were wrong.<sup>165</sup> There was no ambiguity in the statute, and the agency acted beyond its authority.<sup>166</sup> The charge of ambiguity pivoted on the critical word: *now*.<sup>167</sup> “The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction . . . .”<sup>168</sup> According to the lower courts *now* could refer to the time the statute was applied or it could refer to the time the statute was passed.<sup>169</sup> If it meant the former, there would be no problem.<sup>170</sup> If it referred to the time the Act was passed, then the Narragansett lose since they did not receive federal recognition until 1983.<sup>171</sup> There was no question that the Narragansett were recognized as a tribe.<sup>172</sup> They had been since the initial encounter.<sup>173</sup> Rhode Island itself was carved from their aboriginal land.<sup>174</sup> According to the analysis the Court outlined in *Sandoval* and other cases, the Narragansett were clearly a tribe. Yet, because of the existence of the recognition process, the undisputed truth of their existence as a tribe, recognized even by the state that was opposing them, was of no moment. Now the State was taking shelter behind a statute that was passed “to conserve and develop Indian lands and resources” and that, in the same section that had the jurisdictional language, also said “The term ‘tribe’ wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”<sup>175</sup> It was as if the State had won that winter day in New Mexico in 1913. Only, now, the supposed trustee was a co-conspirator.

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161. *Id.* at 384.

162. *Id.*

163. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

164. *Carcieri*, 555 U.S. at 386–87.

165. *Id.* at 387.

166. *Id.* at 395.

167. *Id.* at 382.

168. 25 U.S.C. § 479 (2006) (emphasis added).

169. *Carcieri*, 555 U.S. at 386.

170. *Id.* If “now” referred to the time the Act was applied it would clearly encompass the Secretary’s actions in relation to the Narragansett.

171. *Id.* at 382, 384.

172. *Id.* at 384.

173. *Id.* at 383.

174. *Carcieri*, 555 U.S. at 383.

175. 25 U.S.C. § 479 (2006).

## CONCLUSION

When thinking about “who counts,” I initially titled this Essay: “Who is Counting and for What?” I wanted to highlight the role that power necessarily plays in the very asking of the question. It presumes a perspective, and interrogating that perspective can only occur if the second part of the question is answered. Because race has always played a critical role in our culture from the very beginning, I wanted to explore one of the many ways it has been deployed to justify a particular expression of power. The story virtually every American learns is the story of the inevitable continental expansion of the American Nation. It is not told as a story of coming to terms with a form of internal colonization filled with contradictions, complications, horrors, and graces.

What is clear is that racial ideas are woven through the story of our national identity. That identity emerged as a series of oppositions in which race figured prominently, not just in the slave trade, but in the very conquest of the continent and beyond.

Unlike Latin America, we do not have a detailed philosophical tradition exploring the question of whether Indians “count” as people with souls worth saving. Instead, we supplied a political answer that was premised on exclusion, but which was also informed by pre-existing ideas of racial hierarchy that used to justify treating Indians like political communities suitable of recognition framed by the law of nations. It would also be used, however, to strip these tribes of autonomy, resources, and humanity. Indians, whether in tribes or individual, would count in different ways but always for the purposes of the one doing the counting.

