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ARTICLE

"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings

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Abstract. Under black-letter law declared in the U.S. Supreme Court's decision in *Morton v. Mancari*, federal classifications of individuals as "Indian" based on membership in a federally recognized tribe rely on a political, not a racial, distinction, and so are generally subject only to rational basis review. But the Court recently questioned this longstanding dichotomy, resulting in renewed challenges arguing that because tribal membership usually requires Native ancestry, such classifications are race based.

The term "Indian" appears twice in the original U.S. Constitution. A large and important scholarly literature has developed arguing that this specific constitutional inclusion of "Indian Tribes" mitigates equal protection concerns. Missing from these discussions, however, is much consideration of these terms' meaning at the time of the Constitution's adoption. Most scholars have concluded that there is a lack of evidence on this point—a gap in the historical record.

This Article uses legal, intellectual, and cultural history to close that perceived gap and reconstruct the historical meanings of "tribe" and "Indian" in the late eighteenth century. This Article finds not a single original meaning but duality: Anglo-Americans of the time also alternated between referring to Native communities as "nations," which connoted equality, and "tribes," which conveyed Natives' purported uncivilized status. They also defined "Indians" both in racial terms, as nonwhite, and in jurisdictional terms, as noncitizens.

These contrasting meanings, I argue, have potentially important doctrinal implications for current debates in Indian law, depending on the interpretive approach applied. Although the term "tribe" had at times derogatory connotations, its use in the Constitution bolsters arguments emphasizing the significance of Native descent and arguably weakens current attacks on Native sovereignty based on hierarchies of sovereignty among Native communities. Similarly, there is convincing evidence to read "Indian" in the Constitution

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in political terms, justifying *Mancari*'s dichotomy. But interpreting "Indian" as a "racial" category also provides little solace to Indian law's critics because it fundamentally undermines their insistence on a colorblind Constitution.

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Introduction

Does federal legal classification of individuals as "Indian"[1] constitute a racial category? Since the U.S. Supreme Court's 1974 decision in *Morton v. Mancari*,[2] the doctrinal answer has been no. In *Mancari*, the Court rejected an equal protection challenge to a Bureau of Indian Affairs employment preference for "Indians."[3] Although the Court gestured toward several possible rationales,[4] subsequent interpreters have compressed the holding to a single footnote in which the Court reasoned that because Indian status required membership in a "'federally recognized' tribe[], . . . the preference [was] political rather than racial in nature."[5] The Court invoked this distinction in later cases to reject most challenges arguing that Indian legal status amounts to a racial classification subject to strict scrutiny.[6]

Yet the proposition for which *Mancari* has come to stand—that legal classification as "Indian" is political, not racial—has always rested on a tenuous foundation. Indian status has long been bound up with requirements of descent that, often crudely expressed in terms of "blood," seem to hearken to the worst aspects of American racial history.[7] Even the classification at issue in *Mancari*

1. In this Article, I use the term "Indian" as a term of art for individuals either historically labeled as "Indians" by Anglo-Americans or, in the present, legally defined as "Indian" by the federal government. I use the term "Native" to describe the indigenous peoples of North America and their descendants.

2. 417 U.S. 535 (1974).

3. *See id.* at 552-55, 553 n.24.

4. On the multiple possible interpretations of *Mancari*'s holding, see Carole Goldberg, *What's Race Got to Do With It?: The Story of* Morton v. Mancari, *in* INDIAN LAW STORIES 389, 410-13 (Carole Goldberg et al. eds., 2011).

5. *See Mancari*, 417 U.S. at 553 n.24; *see also* United States v. Antelope, 430 U.S. 641, 646 (1977); Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 996 (2011) ("After *Mancari*, . . . scholars and practitioners have understandably avoided the question of permissible racial classifications whenever possible, characterizing Indian issues as political instead.").

6. *See, e.g.*, *Antelope*, 430 U.S. at 645-47; Fisher v. Dist. Court, 424 U.S. 382, 390-91 (1976) (per curiam); *cf.* Rice v. Cayetano, 528 U.S. 495, 518-22 (2000) (declining to extend *Mancari* to Hawaii's use of Hawaiian ancestry as a qualification to vote in a state-run election).

7. The Supreme Court has assumed, in the context of federal Indian law, that "[a]ncestry can be a proxy for race." *See Rice*, 528 U.S. at 514. There are good reasons to question this tidy equivalence, which, as scholars have explored, obscures a much more complicated history. *See* Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIR. 23, 32-36 (2013) (arguing that descent-based membership criteria are not race based); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 496 n.21 (2017) (interrogating the relationship between race and ancestry). But this debate lies outside the scope of this Article, which seeks to answer a different question: Given the Supreme Court's (potentially problematic) conclusion that state and federal classifications based on Native ancestry constitute "racial" classifications, at least for the purposes of the Fifteenth Amendment, *see Rice*,

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required "one-fourth or more degree Indian blood" in addition to tribal membership, a fact the Court mentioned and then ignored.[8] Bureau of Indian Affairs regulations governing federal recognition of Indian tribes require that tribes "consist[] of individuals who descend from a historical Indian tribe."[9] This tension has produced an important and thoughtful literature among Indian law scholars demonstrating the artificiality of the political-racial dichotomy.[10] In light of the long, complicated history of Native peoples within the United States, they argue, "the political and racial elements of Indianness are inseparable" and "hopelessly intertwined."[11]

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528 U.S. at 517, are federal definitions of Indian status based on tribal membership—as in the Indian Child Welfare Act (ICWA) of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963 (2016)), which includes in its definition of "Indian" "any person who is a member of an Indian tribe," 25 U.S.C. § 1903(3)—similarly subject to strict scrutiny if the tribe defines its membership based in part on ancestry?

8. *See Mancari*, 417 U.S. at 553 n.24 (quoting 44 BUREAU OF INDIAN AFFAIRS MANUAL § 3.1, at 335 (1974)).

9. 25 C.F.R. § 83.11(e) (2017).

10. The literature on this topic is large. *See generally, e.g.*, Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165 (2010) [hereinafter Berger, *Reconciling Equal Protection*]; Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009) [hereinafter Berger, *Red*]; Robert N. Clinton, Essay, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739 (1990); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153 (2008) [hereinafter Fletcher, *Political Status*]; Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295 (2011) [hereinafter Fletcher, *Race and American Indian Tribal Nationhood*]; Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002) [hereinafter Goldberg, *American Indians*]; Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001); 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 (2008-2009); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012) [hereinafter Krakoff, *Inextricably Political*]; Krakoff, *supra* note 7; Angela R. Riley & Kristen A. Carpenter, *Owning* Red*: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016); Rolnick, *supra* note 5; Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49 (2017); John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171 (2001); Paul Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement Under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2006) [hereinafter Spruhan, *Indian as Race*]; Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006) [hereinafter Spruhan, *Legal History of Blood Quantum*].

11. *See, e.g.*, Rolnick, *supra* note 5, at 967-68.

Lately, this critique of *Mancari* has moved from the academy into doctrine and litigation. In the process, it has transformed: Instead of scholars' call for greater awareness of the complexities of history, a group of conservative and libertarian thinkers whom I call collectively Indian law's critics now advance the claim that Indian status is an impermissible racial classification, even when defined solely by eligibility for membership in a federally recognized tribe.[12] As the Court warned in *Mancari*, this approach would likely undermine nearly the entire body of federal law concerning Native peoples.[13] Practically every federal statute and rule in Indian law—including recent federal laws protecting tribal autonomy, jurisdiction, and property—relies on classifying individuals as Indian.

Nonetheless, the legal position that "Indian" classifications are constitutionally suspect has gained ground, particularly in litigation around the Indian Child Welfare Act (ICWA) of 1978,[14] a federal statute enacted to staunch an epidemic of Indian children being taken from their homes and placed with non-Native families.[15] In the Supreme Court's recent decision in *Adoptive Couple v. Baby Girl*, Justice Alito's opinion for the Court suggested that ICWA's provisions protecting the children of enrolled tribal members "would raise equal protection concerns" if applied to a child with a "remote" Indian "ancestor."[16] In dissent, Justice Sotomayor noted that ICWA defines Indian

12. The most fully elaborated statement of this position appears in a recent online forum on ICWA. *See* Timothy Sandefur, *Treat Children as Individuals, Not as Resources*, CATO UNBOUND (Aug. 1, 2016), https://perma.cc/D6SW-M4UU. For additional examples, see Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 9-12, S.S. v. Colo. River Indian Tribes, No. 17-95 (U.S. Aug. 18, 2017), 2017 WL 3635428; Naomi Schaefer Riley, *A Welcome Victory Against the Indian Child Welfare Act*, WKLY. STANDARD (June 28, 2017, 5:15 AM), https://perma.cc/J5C4-KPVZ; and George F. Will, Opinion, *The Blood-Stained Indian Child Welfare Act*, WASH. POST. (Sept. 2, 2015), https://perma.cc/6449-3MF2. For an overview of the broader legal campaign, see Rebecca Clarren, *A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why?*, NATION (Apr. 6, 2017), https://perma.cc/ZKM2-B5E2.

13. *See Mancari*, 417 U.S. at 552 (noting that if classifications based on Indian status "were deemed invidious racial discrimination, an entire Title of the United States Code . . . would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized"); *see also* Marcia Zug, Adoptive Couple v. Baby Girl*: Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46, 49-50 (2013) (noting that invalidating ICWA as an impermissible racial classification "would almost completely eliminate existing Indian law").

14. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1963 (2016)).

15. *See* 25 U.S.C. §§ 1901-1902.

16. *See* 133 S. Ct. 2552, 2557-58, 2565 (2013).

status based on eligibility for membership, not ancestry, and suggested that the majority's phrasing was a subtle attack on *Mancari*.[17]

Subsequent litigation has borne out Justice Sotomayor's concerns. A host of lawsuits have seized on Justice Alito's words as an invitation to attack ICWA and other statutes by pointing toward the role of descent in tribal citizenship, wrapping themselves in the language of constitutional colorblindness and that principle's repudiation of racial classifications.[18] "By honoring the moral imperatives enshrined in our Constitution, this nation has successfully shed much of its history of legally sanctioned discrimination on the basis of race or

17. *See id.* at 2584-85 (Sotomayor, J., dissenting); *see also* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 325-35 (2015) (critiquing the Court's reasoning on race).

18. *See, e.g.*, Doe v. Piper, 165 F. Supp. 3d 789, 793-94, 796 (D. Minn. 2016) (involving Minnesota's analog to ICWA); S.S. v. Stephanie H., 388 P.3d 569, 576 (Ariz. Ct. App. 2017) (involving ICWA), *cert. denied sub nom.* S.S. v. Colo. River Indian Tribes, 138 S. Ct. 380 (Oct. 30, 2017); L.A. Cty. Dep't of Children & Family Servs. v. J.E. (*In re* Alexandria P.), 204 Cal. Rptr. 3d 617, 632-33, 635-36 (Ct. App. 2016) (involving ICWA), *cert. denied sub nom.* R.P. v. L.A. Cty. Dep't of Children & Family Servs., 137 S. Ct. 713 (2017); Complaint and Prayer for Declaratory and Injunctive Relief ¶¶ 12-13, 236-46, Brackeen v. Zinke, No. 4:17-cv-00868-O (N.D. Tex. Oct. 25, 2017) (involving a challenge to ICWA by private parties and the state of Texas); Verified Complaint for Declaratory and Injunctive Relief ¶¶ 1, 78, Donn v. Nelson, No. 1:15-cv-00982-JTN-ESC (W.D. Mich. Sept. 29, 2015) (challenging Michigan's analog to ICWA); Verified Complaint for Declaratory and Injunctive Relief ¶¶ 1, 57-59, Doe v. Pruitt, No. 4:15-cv-00471-JED-FHM (N.D. Okla. Aug. 19, 2015), 2015 WL 7259553 (challenging Oklahoma's analog to ICWA); Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 1-5, 87, 89-94, A.D. *ex rel.* Carter v. Washburn, No. 2:15-cv-01259-DKD (D. Ariz. July 6, 2015) [hereinafter *A.D.* Complaint] (challenging ICWA).

Although many of these cases have been resolved on procedural grounds, nearly all presented constitutional claims sounding in equal protection. These cases build on a number of challenges to Indian law alleging equal protection violations outside the context of ICWA. *See, e.g.*, United States v. Zepeda, 792 F.3d 1103, 1110-15 (9th Cir. 2015) (en banc) (holding that although "some quantum of Indian blood" is required for Indian status under the Indian Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2016)), a prosecution under that statute is "insulate[d] . . . from an equal protection challenge" when the defendant has "Indian political status" as evidenced by "a current relationship with a federally recognized tribe"); KG Urban Enters. v. Patrick, 693 F.3d 1, 17-20 (1st Cir. 2012) (affirming the district court's denial of a preliminary injunction but suggesting that state gaming preferences based on Indian status may violate the Equal Protection Clause); Williams v. Babbitt, 115 F.3d 657, 663-66 (9th Cir. 1997) (engaging in constitutional avoidance by rejecting an agency's interpretation of a statute as barring reindeer herding by non-Indians because the interpretation raised equal protection concerns). For additional background on current challenges to ICWA, see Addie C. Rolnick & Kim Hai Pearson, *Racial Anxieties in Adoption: Reflections on* Adoptive Couple*, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. (forthcoming 2018).

ethnicity," one representative complaint reads.[19] "Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*."[20]

Yet whatever its moral imperatives, "our Constitution" contains something this argument elides: the term "Indian." The original text excludes "Indians not taxed" from representation and grants Congress the power to regulate "Commerce . . . with the Indian Tribes,"[21] while the Fourteenth Amendment, far from repudiating or altering these provisions, repeats the "Indians not taxed" phrase verbatim.[22] As the Court noted in *Mancari*, the Constitution itself "singles Indians out as a proper subject for separate legislation."[23] This reality presents something of a challenge for Indian law's critics, who are arguing that it is unconstitutional to use a classification used in the Constitution itself.

The presence of "Indian Tribes" within the constitutional text raises the *Mancari* question again, albeit with constitutional import: Are "Indian" and "tribe" as used in the Constitution racial terms? One way to answer this question would be to unpack the terms' meanings at the time of the

19. *A.D.* Complaint, *supra* note 18, ¶ 1.

20. *Id.* ¶ 3; *see also* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

21. U.S. CONST. art. I, §§ 2, 8.

22. *Id.* amend. XIV, § 2. Although outside the scope of this Article, which focuses on history prior to the Civil War, there is a large literature on the implications of the Fourteenth Amendment for Indian status, which persuasively argues that the Fourteenth Amendment was not intended to alter previous arrangements but rather reinforced the separateness of Native peoples. S*ee, e.g.*, Berger, *Reconciling Equal Protection*, *supra* note 10, at 1171-79 (providing background on Indians and the drafting of the Fourteenth Amendment); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 914-29 (2003) (arguing that Indian affairs played a role in shaping the Fourteenth Amendment). The Fourteenth Amendment excluded from birthright citizenship those not "subject to the jurisdiction" of the United States, *see* U.S. CONST. amend. XIV, § 1, a provision that was read to omit Indians, *see* Elk v. Wilkins, 112 U.S. 94, 98-99, 102, 109 (1884); *see also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 309 (1997) ("The jurisdiction clause was meant to signal the tribes' special status as persons who were not fully subject to the U.S. because they had another primary political allegiance."). *See generally* Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185 (2016) [hereinafter Berger, *Birthright Citizenship*] (exploring the history and context of *Elk v. Wilkins*). For additional exploration of the Fourteenth Amendment and Indian citizenship, see Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008); and Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289 (2015).

23. Morton v. Mancari, 417 U.S. 535, 551-52 (1974); *see also* Goldberg, *American Indians*, *supra* note 10, at 966 ("[T]he equal protection requirements of the Constitution have only limited application to federal Indian legislation, because the Indian Commerce Clause of the Constitution specifically authorizes the exercise of federal power with respect to tribes in particular.").

Constitution's adoption. Yet notwithstanding the large and thoughtful literature on Indians and race, there have been few efforts to do so—a surprising omission given the recent scholarly vogue for such textual investigations.[24] The problem is generally perceived to be lack of evidence. In her compelling recent article exploring the role of descent in constitutional definitions of Indianness, for instance, Sarah Krakoff, drawing on the scarce extant literature, describes a "gap" in the late eighteenth century.[25] "[D]espite the . . . distinct treatment of Indian tribes in the Constitution," she observes, "there was virtually no . . . discussion about how to define" them.[26]

This Article seeks to close this perceived gap by reconstructing late eighteenth century meanings of "tribe" and "Indian." The seeming silence on these terms reflects the methodological myopia of many explorations of original constitutional meanings: As I have argued elsewhere, well-known sources like the Federalist Papers or state ratifying conventions often had little to say about Indian affairs, even as Anglo-Americans of the era hotly debated these questions in other fora.[27] An interdisciplinary perspective helps move beyond this source challenge and capture that debate. In recent years, intellectual, cultural, and legal historians of early America, though seemingly unfamiliar with current doctrinal battles, have developed a growing literature on the racialization of Native peoples, one that portrays the mid-to-late eighteenth century as the moment when Anglo-Americans increasingly conceived of themselves as "white" and Indians as "red." Pairing the insights of this work with a reexamination of the era's legal and administrative documents counters claims of a gap: Despite the absence of tidy statutory definitions, Anglo-Americans of the late eighteenth century thought a lot about how to classify Natives and sometimes codified those thoughts into law.

The portrait that emerges is one of dualities rather than consensus. Anglo-Americans of the late eighteenth century defined "Indians" by what they were not. Sometimes, they spoke of Indians as nonwhites, "red" people defined by racial difference. Other times, especially in diplomacy and law, they classified

24. Much of this scholarship has focused on the meaning of "commerce." *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

25. Krakoff, *supra* note 7, at 531 (citing William T. Hagan, *Full Blood, Mixed Blood, Generic, and Ersatz: The Problem of Indian Identity*, 27 ARIZ. & THE WEST 309, 309-10 (1985)).

26. *Id.* Underscoring Krakoff's point, the sole law review article exploring the original understanding of the term "Indian Tribes" mines conventional sources such as the Federalist Papers to argue for the dominance of a political understanding of tribes' status. *See* Fletcher, *Political Status*, *supra* note 10, at 165-70. As thorough as Matthew Fletcher is, the challenge for him as well as for other scholars is that those sources contain almost no discussion of how either "Indians" or "tribes" were to be defined.

27. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1017-18 (2015).

Indians as noncitizens marked by their allegiance to another sovereign. Anglo-Americans also split on how to classify Native polities. Often, they used the term "nation," which implied separateness and participation in the international community on equal footing. But at other moments, they used the word "tribe," a quasi-anthropological term that carried connotations of primitiveness.

Although exploring textual meanings at the time of the Constitution's adoption has become associated with original public meaning originalism, this Article does not argue that the original meaning of the text dictates current law.[28] Rather than advance a particular mode of constitutional interpretation, my goal is to provide a helpful starting point for inquiries about Indians, race, and the Constitution, given that nearly all theories of constitutional interpretation acknowledge a role for text and history.[29] If anything, the multiple historical meanings of "nation," "tribe," and "Indian" conflict with the project to identify a sole, legally binding original public meaning. The tension and overlap between these multiple textual meanings at the time of the Constitution's adoption later produced significant challenges for the document's early interpreters, who legitimately drew sharply different conclusions based on the same text. In this sense, this history bolsters the argument of Indian law scholars who have contended that race and political status are inextricably entangled in defining Indian status. The confusion and interconnection between the two categories they observe in the present traces back to the Constitution's creation.

Both "tribe" and "Indian" are central terms of art in Indian law and, depending on how the past is translated into law, their history has important doctrinal implications. For instance, although many Anglo-Americans used "tribe" and "nation" interchangeably to describe Indian communities, only "tribe" appears in the Constitution. The history of this term helps clarify the current law on the relationship between "tribes" and individual "Indians," as well as the role of courts in parsing tribal status.[30] The historical meaning of

28. The literature on original public meaning originalism is too enormous to cover here. Helpful starting points include KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); and Symposium, *The New Originalism in Constitutional Law*, 82 FORDHAM L. REV. 371 (2013).

29. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 21 (2009) (noting that the claim that "the intent of the framers, the understanding of the ratifiers, [or] the text's original public meaning . . . 'matters' or 'is relevant' to proper constitutional interpretation" is a truism "without dissenters" in constitutional law); *cf.* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351-53, 2404-07 (2015) (arguing that originalism holds a privileged place in constitutional law but noting that even arguments for constitutional pluralism invoke history and textual meaning).

30. *See infra* Part I.

"Indian" also proves highly relevant, particularly to the ongoing controversies over Indians and equal protection. Although early Americans employed both political and racial definitions of Indianness, under either interpretation the current equal protection challenge is at odds with history. If "Indian" in the Constitution is read as a political classification, as one view of the history would suggest, then present-day classifications do not warrant strict scrutiny; if, as another view of the history posits, it should be read as a racial classification, then it is a racial category that appears in the Constitution itself and arguably authorizes the ancestry-based classifications Indian law's critics seek to overturn.[31]

In working through this history, this Article is divided into two Parts. Reversing the order in the Constitution and moving from large to smaller scale, Part I explores meanings of the terms "Nation" and "Tribe"; Part II, the meaning of the term "Indian." Each Part separately considers two diverging textual meanings, only to consider how subsequent history revealed the confusions and overlaps hidden by these dichotomies. Each Part then concludes by examining how, despite these complexities, we might use these terms' respective textual histories to inform current doctrine.

I. "Tribes"

Anglo-Americans used haphazard and seemingly interchangeable language to label Native polities in the late eighteenth century. As Justice Baldwin would later complain, federal officials inconsistently employed diverse terms in treaties and statutes to describe Indians: "nations, tribes, hordes, savages, chiefs, sachems and warriors."[32] By far the most frequent of these labels were "nation" and "tribe."[33] But here too, the early federal government seemed to little heed any difference: "[T]he terms 'nation' and 'tribe' are frequently used indiscriminately, and as importing the same thing," Justice Thompson would later write in his review of early federal practice.[34] Given this promiscuity of language—and the seemingly thoughtless drafting of the Indian Commerce Clause itself—the Constitutional Convention's decision to grant Congress power over commerce with *tribes* did not necessarily carry great linguistic import.[35]

31. *See infra* Part II.E.

32. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 33 (1831) (opinion of Baldwin, J.).

33. *See infra* Parts I.A-.B.

34. *Cherokee Nation*, 30 U.S. (5 Pet.) at 63 (Thompson, J., dissenting).

35. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . with the Indian Tribes"). On the haphazard drafting of the Indian Commerce Clause, see Ablavsky, *supra* note 27, at 1021-23.

Yet "nation" and "tribe" were not exact synonyms, even if Anglo-Americans often used the terms interchangeably. Rather, as this Part explores, considering first "nation," then "tribe," the words arose within different discourses and came freighted with potentially divergent meanings. At times, Anglo-Americans even explicitly examined the stakes involved in choosing how to describe Indians. Recovering these discussions helps us understand why it might matter when contemporaries chose one term over the other and how we should interpret their linguistic choices in the present.

A. Nation

The late eighteenth century was a watershed moment in the history of the concept of nationhood. According to historians, the era witnessed the creation of modern nationalism, a movement invested in the idea of a nation as a "political community [that is] imagined as both inherently limited and sovereign," in the words of Benedict Anderson.[36] Other historians have demonstrated how the concept of nationhood was particularly pressing to the young United States, which came into existence fixated on asserting its right to an "equal station" "among the powers of the earth."[37]

As the Declaration of Independence's bid for international belonging suggests, early Americans' conception of nationhood was bound up in a particular set of legal meanings—those of the era's law of nations. Emer de Vattel, whose writings dominated early Americans' understanding of international law, defined nations as "bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage."[38] Vattelian conceptions of nationhood carried important implications. First,

36. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 5-6 (rev. ed. 2006). Anderson dates "the creation of these artefacts" to "the end of the eighteenth century." *Id.* at 4. Historical investigations focused on particular countries have generally agreed with Anderson's chronology. *See, e.g.*, DAVID A. BELL, THE CULT OF THE NATION IN FRANCE: INVENTING NATIONALISM, 1680-1800, at 3-9 (2001); LINDA COLLEY, BRITONS: FORGING THE NATION, 1707-1837, at 1-9 (2009 ed.).

37. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). For background on this aspiration in the early United States, see ELIGA H. GOULD, AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE (2012); and David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

38. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS preliminaries § 1, at 67 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758). On Vattel's influence in early America, see PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 10-19 (1993).

nations had citizens, created through birth or naturalization.[39] Second, for Vattel, perhaps the most fundamental attribute of the nation was that it was "absolutely free and independent with respect to all other men, all other nations."[40] To claim status as and be recognized as a nation, then, conveyed rights of autonomy and independence, a legal position that the United States also embraced in the Declaration of Independence.[41]

Anglo-Americans understood that using the term of art "nation" to describe Native polities evoked legal meanings of independence, even though one present-day scholar has made a thinly supported assertion to the contrary.[42] In 1784, the New Yorker James Duane, eager to assert New York's purported dominance over the Haudenosaunee (known to New Yorkers as the Iroquois), insisted that in negotiations, he "woud never suffer the word nations, or Six Nations . . . or any other Form which woud revive or seem to confirm their former Ideas of Independence."[43] This association between the term "nation" and autonomy persisted. Two decades later, for instance, a Tennessean, writing to President Jefferson, said of the Cherokee, "I will yet call them a Nation, though they are not alltogether independant in reality, but so in form."[44]

This language of independence carried into the policy views of the Washington Administration. In advocating for Natives' immunity from state authority, for instance, Henry Knox argued that Native polities "ought to be considered as foreign nations, not as the subjects of any particular state."[45] And

39. *See* VATTEL, *supra* note 38, bk. 1, §§ 211-19, at 217-20.

40. *See id.* preliminaries § 4, at 68.

41. *See* THE DECLARATION OF INDEPENDENCE paras. 1, 32 (U.S. 1776); *see also* DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 25-62 (2007).

42. Robert Natelson argues that in the context of late eighteenth century Indian affairs, the "word 'nation' did not necessarily evoke the association with political sovereignty it evokes today." *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 258-59 (2007). In support of this proposition, Natelson cites no evidence from the late eighteenth century United States, instead resting his argument on three British dictionary definitions (one of which, he acknowledges, supports the contrary interpretation) along with his "knowledge of Latin." *See id.* at 259 & nn.411-13.

43. James Duane's Views on Indian Negotiations (1784), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789, at 299, 299-300 (Colin G. Calloway ed., 1994). On the diverse terminology employed for the Haudenosaunee Confederacy, see DANIEL K. RICHTER, THE ORDEAL OF THE LONGHOUSE: THE PEOPLES OF THE IROQUOIS LEAGUE IN THE ERA OF EUROPEAN COLONIZATION 1 (1992).

44. Letter from David Campbell to Thomas Jefferson 2 (Jan. 1, 1804), https://perma.cc/MNT6-8ETW.

45. *See* Letter from Henry Knox to George Washington (July 7, 1789), *in* 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 138 (Dorothy Twohig ed., 1989) [hereinafter PAPERS OF GEORGE WASHINGTON].

Attorney General William Bradford concluded that Native groups living on Indian land were immune from regulation by federal law.[46] Bradford and Knox both used the same terms to describe these communities free from outside interference: "independent Nations & Tribes of Indians."[47]

The evidence suggests, then, that early American references to Native polities as "nations" carried associations of autonomy and sovereignty. Of course, as Bradford's and Knox's statements suggest, these meanings could also extend to "tribes." But it was telling that Bradford and Knox listed "tribes" second because, as I now explore, "tribe" carried a different set of implications.

B. Tribe

"Tribe" emerged from a different discourse than "nation."[48] While nation-hood was bound up with the law of nations, for early Americans "tribe"

46. *See* Letter from William Bradford, U.S. Attorney Gen., to U.S. Sec'y of the Treasury (June 19, 1795), *in* 2 THE TERRITORIAL PAPERS OF THE UNITED STATES 520, 520 (Clarence Edwin Carter ed., 1934).

47. *Id.*; Letter from Henry Knox to George Washington, *supra* note 45, at 138.

48. Full-text searches of digitized versions of late eighteenth century documents should be engaged in carefully, especially given the uneven nature of print culture in the early United States, which was heavily concentrated in New England and in which government printing, religious tracts, and almanacs predominated. *See* Hugh Amory, *A Note on Statistics*, *in* 1 A HISTORY OF THE BOOK IN AMERICA app. at 504, 511 graph 5a (Hugh Amory & David D. Hall eds., Univ. of N.C. Press 2007) (2000). Moreover, most printed material was imported from Europe. *See id.* app. at 511 graph 5a, 514 graphs 7a, 7b.

Nonetheless, a search for the word "tribe" in the Evans compendium of all books and pamphlets printed in the United States in 1787 is suggestive. *See Early American Imprints, Series I: Evans, 1639-1800*, READEX, https://perma.cc/AW7W-VXDN (describing the contents of the Evans compendium). The term appeared in 79 different works printed in 1787. *See Early American Imprints, Series I: Evans*, READEX, https://perma.cc/8LRC-8VN5 (to locate, select "View the live page," then search for "tribe" and narrow by date of publication to "1787"). In 26 of these works, it was used in what I label a religious context, usually to discuss one of the Twelve Tribes of Israel. *See, e.g.*, HANNAH MORE, SACRED DRAMAS, CHIEFLY INTENDED FOR YOUNG PERSONS 66 (Philadelphia, Thomas Dobson 1787). In 24 works, it was used in what I describe as a literary sense, as a term for a collective grouping of like people or natural objects—"feather'd tribe" to describe birds, *see Winter*, *in* MISCELLANIES, MORAL AND INSTRUCTIVE, IN PROSE AND VERSE 150, 150 (Philadelphia, Joseph James 1787), or the "whole sensitive tribe of vegetables," *see* MADAME LA COMTESSE DE GENLIS, ALPHONSO AND DALINDA: OR, THE MAGIC OF ART AND NATURE 240 n.73 (Thomas Holcroft trans., Philadelphia, Thomas Dobson new ed. 1787). In 15 works, "tribe" was used in an ethnographic sense to describe "Indians" or, in a couple of instances, other indigenous peoples. *See, e.g.*, THOMAS HUTCHINS, A TOPOGRAPHICAL DESCRIPTION OF VIRGINIA, PENNSYLVANIA, MARYLAND, AND NORTH CAROLINA 17-18 (Boston, John Norman 1787). In 12 works, "tribe" was used in state statutes or legislative debates to discuss Indian affairs, *see, e.g.*, RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 281 (Boston, Adams & Nourse 1787); 3 instances were reprints of the

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connoted a quasi-ethnographic vision of the past. Most immediately, "tribe" conjured up the Bible and the Twelve Tribes of Israel, whose descendants many whites believed Natives to be.[49] For the educated, "tribe" also hearkened to Anglo-Americans' own imagined origins among the Celtic tribes of antiquity depicted in classical texts.[50] When Anglo-Americans encountered Indians, then, many believed that they were meeting people akin to their own ancestors.

The contrast between nation and tribe—and the latter's connotations of supposed primitiveness and savagery—is apparent in a return to the fundamental text of the era's international order, Vattel's *Law of Nations*. While Vattel employed the term "nation" on nearly every page of his 900-page treatise, he employed the term "tribe" only six times—two of which described primitive "wandering tribes" and one of which referred to the "savage tribes of North America."[51]

But the concept of "tribe" loomed still larger in another set of texts highly influential among the educated early American elite—the writings of the Scottish Enlightenment. One historian has argued that "American theorizing about the Indian owed its greatest debt to [this] group of eighteenth-century Scottish writers on man and society."[52] Many of these writers embraced a

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Constitution or ratification discussions, *see, e.g.*, THE CONSTITUTION OR FRAME OF GOVERNMENT, FOR THE UNITED STATES OF AMERICA, AS REPORTED BY THE CONVENTION OF DELEGATES 10 (Boston, Adams & Nourse 1787); and in 1 instance, the term appeared in a Latin dictionary as the translation of the word "tribus," *see* JAMES GREENWOOD, THE PHILADELPHIA VOCABULARY, ENGLISH AND LATIN 72 (Philadelphia, Carey & Co. 1787). Note that these instances add up to 81 because in 2 works the term was used multiple times in different senses.

49. *See generally* ZVI BEN-DOR BENITE, THE TEN LOST TRIBES: A WORLD HISTORY 135-67 (2009); COLIN KIDD, THE FORGING OF RACES: RACE AND SCRIPTURE IN THE PROTESTANT ATLANTIC WORLD, 1600-2000, at 43-44, 60-62, 203-05 (2006); Richard W. Cogley, *"Some Other Kinde of Being and Condition": The Controversy in Mid-Seventeenth-Century England over the Peopling of Ancient America*, 68 J. HIST. IDEAS 35 (2007). For a key contemporaneous work making this contention based on observation of southern Indians, see JAMES ADAIR, THE HISTORY OF THE AMERICAN INDIANS 75-220 (Kathryn E. Holland Braund ed., Univ. of Ala. Press 2005) (1775).

50. *See, e.g.*, KAREN ORDAHL KUPPERMAN, INDIANS AND ENGLISH: FACING OFF IN EARLY AMERICA 21-30 (2000).

51. *See* VATTEL, *supra* note 38, bk. 1, § 203, at 213 ("wandering tribes"); *id.* bk. 1, § 209, at 216 (same); *id.* bk. 4, § 103, at 721 ("savage tribes of North America"). Two other references described the Scythian and Germanic tribes of antiquity, and the final reference described the "whole tribe of politicians." *See id.* bk. 2, § 104, at 314 ("Scythian tribe"); *id.* bk. 3, § 34, at 487 ("several German tribes"); *id.* bk. 4, § 93, at 709 ("whole tribe of politicians").

52. ROY HARVEY PEARCE, SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND 82 (rev. ed. 1988). For other works emphasizing the influence of Scottish Enlightenment thinking on Anglo-American conceptions of Indians, see COLIN G. CALLOWAY, WHITE PEOPLE, INDIANS, AND HIGHLANDERS: TRIBAL PEOPLES AND

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methodology of conjectural history, in which they theorized the past as a series of phases in human development, progressing from "savage" hunters toward the highest forms of commerce and civilization.[53] Imagined histories of Native peoples played an important role in this literature; one thinker, William Robertson, devoted an entire book, his 1777 *The History of America*, to describing the indigenous peoples of the Western Hemisphere.[54] Although Robertson focused primarily on South America, his book was widely discussed among Anglo-American elites, including Benjamin Franklin, John Adams, James Madison, and Thomas Jefferson.[55]

Robertson studied indigenous peoples to explore what he believed to be the earliest of the "stages of society": "In America," Robertson wrote, "man appears under the rudest form in which we can conceive him to subsist."[56] Robertson proceeded to offer, in lurid terms, an account of Indians' supposed primitiveness. Though Robertson at times described Native peoples as "nations," a term he generally reserved for Europeans, he was quick to qualify: "In America, the word *nation* is not of the same import as in other parts of the globe," he wrote.[57] "It is applied to small societies . . . ."[58] More frequently, however, Robertson contrasted what he called "rude American tribes" unfavorably with "more polished nations."[59] In fact, Robertson consistently favored the term "tribe" to describe indigenous peoples, often loading it with

COLONIAL ENCOUNTERS IN SCOTLAND AND AMERICA 77-81 (2008); and PATRICK GRIFFIN, AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER 21-32 (2007). For a discussion of the influence of Scottish Enlightenment thinking on early U.S. law more generally, see William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053 (2010); and James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011).

53. For explorations of this thought, see H.M. Höpfl, *From Savage to Scotsman: Conjectural History in the Scottish Enlightenment*, J. BRIT. STUD., Spring 1978, at 19; and Joseph S. Lucas, *The Course of Empire and the Long Road to Civilization: North American Indians and Scottish Enlightenment Historians*, 4 EXPLORATIONS EARLY AM. CULTURE 166 (2000).

54. WILLIAM ROBERTSON, THE HISTORY OF AMERICA (Dublin, Whitestone 1777). For an exploration of this literature with a focus on Robertson, see 4 J.G.A. POCOCK, BARBARISM AND RELIGION 157-226 (2005).

55. *See* CAROLINE WINTERER, AMERICAN ENLIGHTENMENTS: PURSUING HAPPINESS IN THE AGE OF REASON 84-85 (2016); *see also* ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 48 (Vintage Books 1979) (1978) (describing Robertson's book as "particularly influential in the newly independent United States in shaping its leaders' comprehension of the Indian").

56. *See* 1 ROBERTSON, *supra* note 54, at 281-82.

57. *Id.* at 337.

58. *Id.*

59. *See id.* at 401. For other instances where indigenous peoples were compared unfavorably to "polished nations," see *id.* at 305-06, 309, 334, 344-45, 351, 368, 397. *See also id.* at 356 (contrasting the "feeble American tribes" with the "powerful nations of Europe").

epithets emphasizing degradation—"rude," "uncivilized," "wandering," "savage."[60]

"Tribe," then, often suggested a different sense than "nation" of Natives' status and civilization. It also conveyed a different conception of political belonging: While belonging to a nation turned on the abstract category of citizenship, tribes were defined by descent. The first definition of "tribe" Anglo-American lexicographer Noah Webster offered was "[a] family, race or series of generations, descending from the same progenitor and kept distinct."[61] Other dictionaries offered similarly descent-based definitions.[62]

Not confined to dictionary pages, this insistence on descent as the principal criterion for tribal status shaped Anglo-Americans' understanding of what constituted a tribe. In his *Notes on the State of Virginia*, for instance, Jefferson described as "nations" only those "Aborigines which still exist in a respectable and independent form"; he consistently referred to the supposedly much-reduced Native peoples of Virginia as "tribes."[63] In seeking to trace "the subsequent history of these tribes severally," Jefferson displayed considerable interest in their "stock[]."[64] He discovered that the Chickahominies had "blended with the Pamunkies and Mattaponies" and so ceased to exist, while the Mattaponies themselves consisted of "three or four men only, and they have more negro than Indian blood in them."[65] Only the Pamunkies persisted, he suggested, with a dozen members "tolerably pure from mixture with other colours."[66] Jefferson's racial essentialism prefigured later understandings of

60. In his book, Robertson used the term "nation" 211 times and the term "tribe" 155 times. Of these instances, "nation" referred unambiguously to indigenous peoples 50 times, while "tribe" referred to them 140 times (and 3 times to describe the ancient peoples of Europe).

61. *Tribe*, 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828). Webster's fifth definition was "[a] nation of savages; a body of rude people united under one leader or government; as . . . the Seneca *tribe* in America." *Id.*

62. *See, e.g.*, *Tribe*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, Toplis & Bunney 18th ed. 1781) (defining "tribe" as "the particular descendants or people sprung from some noted head, or a collective number of people in a colony, &c. but particularly meant of the Jewish nation, who were allotted their possessions by their tribes" (emphasis omitted)); *Tribe*, 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly 3d ed. 1790) (defining "tribe" as "[a] distinct body of the people as divided by family or fortune, or any other characteristick").

63. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 96-97, 102 (William Peden ed., Univ. of N.C. Press 1955) (1787); *see also id.* at 93-95 (presenting a table listing all the "[t]ribes" of Virginia).

64. *See id.* at 96-97.

65. *See id.* at 96.

66. *See id.*

Indian "tribes." Anglo-Americans' obsession with Indian descent made a tribe's purported disappearance upon the death of its "last" descendant a romantic and melancholy staple of American culture in the early republic.[67]

Thus, "tribe," though often used interchangeably with "nation," carried a different set of connotations. Rather than suggesting the independence and equality of Native polities, the term drew attention to their difference: Its quasi-anthropological and historical context emphasized Natives' common descent and supposed lack of civilization. Though these meanings might strike us now as derogatory, Anglo-Americans using "tribe" did not intend it as a slur. Rather, blinkered by their unquestioned belief in their own cultural superiority, Anglo-Americans thought they were accurately describing what made Indian societies different from their own.

C. Legacy

The tension between the discourses of Natives as nations and as tribes long lay submerged within federal law. But as the Supreme Court came to play an increasing role in adjudicating Indian affairs, questions of classification became more pressing. The issue whether Indians legally constituted "nations" or "tribes" came to preoccupy the Court in one of its first and most important Indian law cases, the 1831 decision in *Cherokee Nation v. Georgia*.[68]

A suit by the Cherokee against Georgia's assault on their sovereignty, *Cherokee Nation* squarely presented the issue of Native polities' constitutional classification, as the Court had to determine whether the Cherokee Nation was a "foreign State[]" for the purposes of the Court's original jurisdiction under Article III, Section 2.[69] Most commentary on the case has understandably focused on Chief Justice Marshall's conclusion for the majority that Natives were not foreign, but rather "domestic dependent nations."[70] But there was a

67. On this trope of the vanishing Indian, see BERKHOFER, *supra* note 55, at 86-96; JILL LEPORE, THE NAME OF WAR: KING PHILIP'S WAR AND THE ORIGINS OF AMERICAN IDENTITY 191-226 (Vintage Books 1999) (1998); ANDREW LIPMAN, THE SALTWATER FRONTIER: INDIANS AND THE CONTEST FOR THE AMERICAN COAST 244-48 (2015); JEAN M. O'BRIEN, FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND 105-43 (2010); and Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 308-20 (2013).

68. 30 U.S. (5 Pet.) 1 (1831).

69. U.S. CONST. art. III, § 2; *see Cherokee Nation*, 30 U.S. (5 Pet.) at 15-16. For a sampling of the numerous works on *Cherokee Nation*, see TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 125-50 (2002); JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS (1996); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969); and Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006).

70. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17, 20.

vociferous antecedent debate over whether the Cherokee constituted a "state" at all. While Chief Justice Marshall, in a brief and unequivocal paragraph, concluded that the Cherokee were a state because the federal government had always treated them that way,[71] his fellow Justices were less confident. The case produced two long concurrences and an even longer dissent fixated on the issue Chief Justice Marshall thought so easy: Whether, under the Constitution, "the Indians were considered and treated with as tribes of savages, or independent nations, foreign states on an equality with any other foreign state or nation."[72]

The two concurrences and the dissent seemingly agreed with the proposition that "[t]he terms *state* and *nation* are used in the law of nations, as well as in common parlance, as importing the same thing."[73] But they disagreed strongly over whether Natives could legally claim the mantle of "nation," a divide reflected in the diverging discourses the Justices embraced. Justice Baldwin, adopting a textualist approach, placed considerable weight on the choice of terms in the Constitution, "which refers to [Indians] as tribes only."[74] Justice Johnson's concurrence, by contrast, was quasi-anthropological. The "epithet *state*," Justice Johnson argued, could not apply "to a people so low in the grade of organized society as our Indian tribes most generally are."[75] The Indians' "condition," he observed, "is something like that of the Israelites, when inhabiting the deserts"; elsewhere he described them as "a band of hunters."[76] In short, Justice Johnson concluded, it was "very clear" that Indians could not be considered nations under international law[77]:

> [T]he constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit . . . .[78]

Justice Thompson, joined by Justice Story, dissented.[79] His tone was different from the outset. Rather than beginning with either prior practice or musings on Indian savagery, Justice Thompson started with a lengthy

71. *See id.* at 16.

72. *Id.* at 32 (opinion of Baldwin, J.).

73. *Id.* at 52 (Thompson, J., dissenting); *see also id.* at 21 (opinion of Johnson, J.) (appearing to equate the term "nations" with "states"); *id.* at 32 (opinion of Baldwin, J.) (appearing to equate the term "sovereign independent nation" with "foreign state").

74. *See id.* at 43 (opinion of Baldwin, J.).

75. *Id.* at 21 (opinion of Johnson, J.).

76. *See id.* at 24, 27.

77. *Id.* at 27.

78. *Id.*

79. *Id.* at 50, 80 (Thompson, J., dissenting).

exposition of Vattel's criteria for nationhood, the principal requirement of which was self-government under a nation's own authority and laws.[80] Justice Thompson believed that these principles, when applied to the Cherokee, made inescapable "the conclusion, that they form a sovereign state."[81] Confronting the constitutional language of "tribe" rather than "nation," Justice Thompson asserted that this term had "probably" been selected to ensure that Congress had the authority to regulate not just Native nations but also the subnational "bands or tribes" that constituted those nations.[82]

This vigorous debate proved surprisingly ephemeral: *Cherokee Nation* was both the first and last time the Court grappled with the implications of the Constitution's selection of the word "tribe." Much of this neglect stemmed from Chief Justice Marshall's conclusion that Natives were, regardless of formal legal classification, outside the international community, which blunted most legal consequences of acknowledging Native nationhood.[83] In the ensuing years, as questions of Native status moved ever further from the law of nations, the discourse of Indian polities as tribes became more dominant.[84] By the late nineteenth century, the Supreme Court no longer argued over whether Natives were tribes or nations but instead parsed whether a given group of Indians was culturally inferior enough to constitute a "tribe" in white eyes.[85] This transformation both exacerbated and reflected the ever-greater fixation on descent, in the form of Indian "blood," described above.[86]

The irony of Anglo-Americans' diminishment of Native self-government and autonomy is that it came even as Native communities began to look ever more like Anglo-Americans' visions of "states," with written laws, formal

80. *See id.* at 52-53.

81. *Id.* at 53.

82. *See id.* at 62-63.

83. On the consequences of Anglo-American conclusions that tribes were outside the community of nations, see LEONARD J. SADOSKY, REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA 180-215 (2009).

84. *See generally* Thomas Grillot, *Indian Nations, Indian Tribes: Notes on the Colonial Career of Twin Concepts*, REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES, 3d Trimestre 2015, at 49, 56-58 (tracing what Grillot labels the "long tribalization of Indian nations" and observing that by the late nineteenth century "the concept of [Indian] nations had been closely associated with that of tribe" (capitalization altered)).

85. *Compare* United States v. Joseph, 94 U.S. 614, 614-15, 617 (1877) (concluding that the Pueblo Indians, "if, indeed, they can be called Indians," were not tribes for the purposes of the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 (codified as amended in scattered sections of 25 U.S.C.), because of the "degree of civilization which they had attained"), *abrogated by* United States v. Candelaria, 271 U.S. 432, 441 (1926); *with* United States v. Sandoval, 231 U.S. 28, 39, 48-49 (1913) (holding that the Pueblo Indians *are* tribes because they were "Indians in race, customs, and domestic government" and "essentially a simple, uninformed, and inferior people").

86. *See supra* notes 61-67 and accompanying text.

institutions of governance, and membership based on naturalization as well as ancestry. But for neither the first nor the last time, Anglo-Americans constructed their fantastic imaginings of what Indians were—increasingly defined by their status as primitive, antimodern peoples—by ignoring the contrary evidence in front of them.[87]

D. The Constitutional Meaning of "Tribes"

In 1978, the Bureau of Indian Affairs adopted seven criteria for formal federal recognition of "tribes," including evidence of recognition as an "Indian entity" and proof of indigenous descent.[88] Since the creation of these regulations, the relevant legal distinction for most Native communities has been between recognition and nonrecognition rather than between "nation" and "tribe."[89] Some federally recognized communities self-identify as nations, others as tribes.[90]

Yet the Constitution's use of "tribe," rather than "nation," still has important implications for current doctrine. Given the term's complicated and at times demeaning history, "tribe" might be read to suggest a more cabined constitutional vision of Native authority than "nation." I would argue the contrary: Paradoxically, the Constitution's use of the term "tribe" arguably

87. *See, e.g.*, PHILIP J. DELORIA, INDIANS IN UNEXPECTED PLACES 4, 231 (2004) (noting the dominance of white stereotypes of Indians marked by "[p]rimitivism, technological incompetence, physical distance, and cultural difference," even as many Indian peoples "leapt quickly into modernity"); *see also id.* at 4-12, 224-36.

88. *See* Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361, 39,363 (Aug. 24, 1978) (codified as amended at 25 C.F.R. § 83.11 (2017)).

89. On the process and significance of federal recognition, see RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2005); BRIAN KLOPOTEK, RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES (2011); and Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487 (2006) (reviewing CRAMER, *supra*; and MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS (2004)).

90. For a small sampling of the 567 federally recognized Native polities, see BISHOP PAIUTE TRIBE, https://perma.cc/3XBW-TS7E (archived Feb. 15, 2018); HOPI TRIBE, https://perma.cc/4XWP-9AX2 (archived Feb. 15, 2018); NAVAJO NATION GOV'T, https://perma.cc/SQ6T-AXRC (archived Feb. 15, 2018); and YAKAMA NATION, https://perma.cc/C4S6-PS5C (archived Feb. 15, 2018). *See also* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235 (Jan. 30, 2018) (listing 567 federally recognized "Tribal entities"); NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 9 (n.d.), https://perma.cc/KQ7L-LYHF ("567 sovereign tribal nations (variously called tribes, nations, bands, pueblos, communities, and Native villages) have a formal nation-to-nation relationship with the US government.").

provides a more solid foundation for aspects of present law protective of Native rights.

For one, the use of the term "tribe" is relevant to the legal questions of race discussed more fully in the next Part. Unlike nations, tribes as understood by early Americans were defined through common ancestry. As discussed above, this embrace of descent as a requirement of Indianness was often linked to troubling ideas about racial purity. But this concept also provided legal space for Native peoples to craft membership rules when, for very different reasons from Anglo-Americans, they emphasized shared ancestry as an essential aspect of their communal identity.

The second point is more abstract. It begins with the recognition that Anglo-Americans have often invidiously compared independent Native "nations" against those indigenous communities that failed to satisfy non-Native understandings of Indian separateness and autonomy. Justice Thompson's pro-Cherokee dissent in *Cherokee Nation*, for instance, contrasted the self-governing Cherokee peoples against the "mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country: their national character extinguished; and their usages and customs in a great measure abandoned."[91] Justice Johnson framed the problem as he saw it: "Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?"[92]

But by the late nineteenth and early twentieth centuries, the Court largely abandoned its earlier forays into assessing tribal status, instead pledging deference to the determinations of "the executive and other political departments of the government."[93] "If by them those Indians are recognized as a tribe," the Court reasoned, the "court must do the same."[94] Consequently, formal recognition by the Bureau of Indian Affairs and Congress is generally dispositive in establishing tribal status.[95]

91. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 60 (1831) (Thompson, J., dissenting).

92. *Id.* at 25 (opinion of Johnson, J.).

93. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866).

94. *Id.*; *see also* United States v. Sandoval, 231 U.S. 28, 46 (1913) ("[T]he questions whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes . . . are to be determined by Congress, and not by the courts.").

95. *See, e.g.*, United States v. Zepeda, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) ("[F]ederal recognition of a tribe . . . [is] a political decision made solely by the federal government and expressed in authoritative administrative documents . . . ."); United States v. Washington, 394 F.3d 1152, 1158 & n.8, 1159 (9th Cir. 2005), *overruled in part by* United States v. Washington, 593 F.3d 790 (9th Cir. 2010) (en banc); James v. U.S. Dep't of Health & Human Servs., 824 F.2d 1132, 1136-37 (D.C. Cir. 1987).

Recent decisions, however, have returned the courts to the role of distinguishing among tribes even when the political branches have formally recognized them. Such distinctions among federally recognized tribes appear, for instance, in the Court's recent interpretation of the Indian Reorganization Act in *Carcieri v. Salazar*, which divides tribes that were "under federal jurisdiction" in 1934 from those that were not.[96] The Court's interpretation of this ambiguous language has thrust lower courts into the position of scrutinizing each tribe's history to discover the requisite federal involvement, often to the detriment of smaller Native communities, especially in the eastern United States, that whites have long dismissed as no longer Indian.[97] Justice Thomas recently called for the Court to go further, noting that because tribes have "different patterns of assimilation and conquest," the Court should closely scrutinize each tribe "to understand the ultimate source of each tribe's sovereignty and whether it endures."[98] This worrying call seems to suggest that the Court would return to parsing which Native groups are truly "nations," likely based on the same blinkered and culturally essentialist assumptions about what constitutes nationhood, autonomy, and independence as in the past.

Although *Carcieri* rests on statutory grounds, Justice Thomas's call for the Court to second-guess the political branches' recognition decisions implicitly relies on the Constitution.[99] Yet to be an Indian "tribe" in the late eighteenth century did not require the high standard of unbroken outside acknowledgment of sovereignty Justice Thomas seems to advocate as the requisite test; it involved descent and some amount of self-governance.[100] Congress and the executive, by creating the procedures for recognition, have created the system to determine whether these requirements have been met.[101] But when these other branches have acted, the Constitution, by using the term "tribe" and its de minimis standard as opposed to "nation," deprives the courts of any textual basis for second-guessing their judgments.

Finally, Justice Thomas has made a separate point with respect to enumerated powers, arguing that the Constitution's grant of congressional power to regulate commerce "with the Indian *tribes*" does not provide congressional

96. *See* 555 U.S. 379, 387-93 (2009); *see also* Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.).

97. On the geographically disparate impact of the *Carcieri* decision, see William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 KAN. L. REV. 415, 428-30, 483-92 (2016).

98. *See* United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

99. *See id.* at 1967-68 (questioning whether the Court's view of tribal sovereignty rests on a "sound constitutional basis").

100. *See supra* Part I.B.

101. *See* 25 C.F.R. §§ 83.1-.46 (2017).

authority to regulate individual Indians, as ICWA does.[102] This distinction finds no support in constitutional history, regardless whether Native communities are described as nations or as tribes. Whether defined through citizenship or descent, both nations and tribes were, and are, composed of members. Like Vattel, who devoted an entire chapter of his international law treatise to questions of jurisdiction and property over individual foreigners,[103] Anglo-Americans understood that the treatment of the members profoundly affected relationships between sovereigns. That was why the Trade and Intercourse Act of 1790 barred sales to U.S. citizens "by any *Indians*, or any nation or tribe of Indians," and federalized crimes against "any peaceable and friendly Indian or *Indians*," rather than against tribes.[104]

From the perspective of Native peoples, both the terms "nation" and "tribe" are colonial impositions that fail to capture the nuances of their own political orderings.[105] "[N]ation," Chief Justice Marshall acknowledged for the Court, is a "word[] of our own language, selected in our diplomatic and legislative proceedings, by ourselves," and then "applied . . . to Indians."[106] But Natives' longstanding insistence on their status as separate and sovereign stems from a keen recognition that the often grudging rights afforded them under Anglo-American law depend precisely on such terms. In that regard, the constitutional term "tribe," though freighted with historical baggage, paradoxically provides a compelling textual basis for some of those hard-won rights in the present.

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102. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2567-68 (2013) (Thomas, J., concurring).

103. *See* VATTEL, *supra* note 38, at 38; *id.* bk. II, ch. VIII, §§ 99-115, 311-19.

104. *See* ch. 33, §§ 4-5, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177 (2016)) (emphasis added). Although the legislative history of the Trade and Intercourse Act is sparse, context suggests why the statute enumerated a ban on purchases from both individual Indians and tribes. A favorite tactic of would-be land speculators seeking to circumvent this restriction had been to find individual Indians and get them to sign deeds alienating their land rights, notwithstanding their dubious ownership claim. *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 27-33 (2005).

105. *See, e.g.*, STEVEN C. HAHN, THE INVENTION OF THE CREEK NATION, 1670-1763, at 5 (2004) ("Creek peoples are better understood not as a nation in the modern sense but as an extended family united by bonds of clan affiliation, marriage, and ritually prescribed friendships."); Grillot, *supra* note 84, at 51-53 (noting the colonial origins of ideas of Native nationhood); *cf.* MICHAEL WITGEN, AN INFINITY OF NATIONS: HOW THE NATIVE NEW WORLD SHAPED EARLY NORTH AMERICA 12-21 (2012) (arguing for the centrality of Native political conceptions and social formations in dictating encounters between Anglo-Americans and the Anishinaabe).

106. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832), *abrogated in other part by* Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885), *as recognized in* Nevada v. Hicks, 533 U.S. 353 (2001).

II. "Indian"

By the time of the Constitution's drafting, Anglo-Americans had lived alongside, negotiated with, and fought the indigenous peoples they labeled as "Indians" for over two centuries.[107] In the process, the term "Indian" became a signifier for all the ways North America differed from the familiar world of England. Colonists ate maize, "Indian corn," instead of wheat or barley[108] and dressed in "Indian fashion" when they eschewed European clothing.[109] But the most frequent use of "Indian" was to ascribe identity to Native peoples and convey their difference from Europeans. From first settlement onward, English colonists constructed their own identities against qualities they imputed to "Indians."[110] With the American Revolution, historians have argued, the new nation similarly came to define itself against the Native peoples who found themselves unwillingly folded within its borders.[111]

As this Part explores, the definitions of "Indian" that Anglo-Americans employed in the late eighteenth century reflected this oppositional quality: What made people "Indians" was their difference from Anglo-Americans. But which difference was most salient depended on how those who proclaimed themselves "Americans" imagined themselves. Sometimes, the defining characteristic was race: Anglo-Americans, classifying themselves as "white," labeled Indians "not white"—most frequently, "red."[112] At other times, the key

107. Numerous works recount this history. For key works providing an overview, see COLIN G. CALLOWAY, NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE REMAKING OF EARLY AMERICA (1997); DANIEL K. RICHTER, FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA (2001); and RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815 (20th anniversary ed. 2011).

108. *See, e.g.*, JEFFERSON, *supra* note 63, at 166-67 (noting that Virginia exported 600,000 bushels of "Indian corn" each year).

109. On Indian fashion, see Timothy J. Shannon, *Dressing for Success on the Mohawk Frontier: Hendrick, William Johnson, and the Indian Fashion*, 53 WM. & MARY Q. 13 (1996).

110. *See* PHILIP J. DELORIA, PLAYING INDIAN 3 (1998) ("Savage Indians served Americans as oppositional figures against whom one might imagine a civilized national Self."). For other works stressing the oppositional role of Native peoples in Anglo-American efforts to construct their own identity, see BERKHOFER, *supra* note 55; LEPORE, *supra* note 67; and CARROLL SMITH-ROSENBERG, THIS VIOLENT EMPIRE: THE BIRTH OF AN AMERICAN NATIONAL IDENTITY (2010).

111. *See, e.g.*, ROBERT G. PARKINSON, THE COMMON CAUSE: CREATING RACE AND NATION IN THE AMERICAN REVOLUTION 581-673 (2016); PETER SILVER, OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA 230-92 (2008); ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750-1804, at 251-78 (2016); David J. Silverman, *Racial Walls: Race and the Emergence of American White Nationalism*, *in* ANGLICIZING AMERICA: EMPIRE, REVOLUTION, REPUBLIC 181, 196-204 (Ignacio Gallup-Diaz et al. eds., 2015).

112. *See infra* Part II.A.

difference was political allegiance: Anglo-Americans were citizens of the United States, while Indians were members of their respective nations.[113]

Both of these meanings of "Indian"—as nonwhite and noncitizen—have a claim to be the constitutional meaning, especially because, as subsequent history demonstrates, the divide between the two meanings was blurry. Which history we privilege depends on our interpretive approach. Originalism, I suggest, points toward one reading, whereas acknowledging the interconnection between race and formally race-neutral categories points toward another. Yet neither interpretation, I argue, supports Indian law's critics' claim that classifications based on Indian status are constitutionally impermissible. Under one reading, the Constitution enshrined the principle that "Indian" is a race-neutral jurisdictional category; under the other, "Indian" is a racial category, but one that is constitutionally defined and mandated.

A. "Indian" as Nonwhite

During the colonization of North America, conceptions of hierarchies of peoples defined by innate, biological, and physically observable traits supplanted older ideas of difference rooted in culture and religion. Explaining the emergence of this ideology of race has long been one of the central questions of early American history. For many years, a rich historiography has focused on the racial construction of African Americans as "black."[114] In the last couple of decades, a proliferation of monographs and articles has expanded this focus to consider the racial construction of Indians, particularly when and how "Indian" became a separate racial category defined by the skin color "red."[115]

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113. *See infra* Part II.B.

114. The historical literature on the development of racial prejudice against Africans is voluminous. For an overview of one of the core historiographical debates, see Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOGRAPHY 311 (1989). For some of the key entries in this rich literature, see KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA (1996); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016); EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975); and ANTHONY S. PARENT, JR., FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA, 1660-1740 (2003).

115. Some central recent works include TIYA MILES, TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM (2d ed. 2015); THEDA PERDUE, "MIXED BLOOD" INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH (2003); RICHTER, *supra* note 107; CLAUDIO SAUNT, BLACK, WHITE, AND INDIAN: RACE AND THE UNMAKING OF AN AMERICAN FAMILY (2005); NANCY SHOEMAKER, A STRANGE LIKENESS: BECOMING RED AND WHITE IN EIGHTEENTH-CENTURY NORTH AMERICA (2004); SILVER, *supra* note 111; DAVID J. SILVERMAN, RED BRETHREN: THE BROTHERTOWN AND STOCKBRIDGE

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Taken together, these works offer a cohesive narrative. In this account, Natives and Anglo-Americans first began to define themselves as "red" and "white" in the early to mid-eighteenth century, perhaps adopting these labels from longstanding metaphors for the moieties of peace and war employed by Cherokees, Creeks, and other southeastern Indians.[116] But while the terms likely stemmed from Native culture, the concept that physical difference, particularly skin color, best characterized the divide between Europeans and Natives was an idea that Anglo-Americans embraced with gusto. As historian Peter Silver argues, the violence of the Seven Years' War, when British colonists suffered frequent raids from Natives, helped establish the concept that Anglo-Americans collectively constituted "white people," a separate and distinct group bound by common interests.[117] Throughout eastern North America, brutal, searing attacks between "red" and "white" people persisted for decades, during and after the American Revolution, as Native nations and the emergent United States fought for the continent.[118] As a consequence, Silver states, "A newly virulent anti-Indian rhetoric, which included noticeably more often the idea of [Indians'] being a vicious 'race of mankind,' could now begin to spread."[119] As an English visitor to the United States just before the Revolutionary War reported, "The white Americans also have the most rancorous antipathy to the whole race of Indians; and nothing is more common than to hear them talk of extirpating them totally from the face of the earth, men, women, and children."[120] This was not idle talk. Motivated by

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INDIANS AND THE PROBLEM OF RACE IN EARLY AMERICA (2010); JOHN WOOD SWEET, BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730-1830 (2003); ALDEN T. VAUGHAN, ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE (1995); and Kathleen Brown, *Native Americans and Early Modern Concepts of Race*, *in* EMPIRE AND OTHERS: BRITISH ENCOUNTERS WITH INDIGENOUS PEOPLES, 1600-1850, at 79 (Martin Daunton & Rick Halpern eds., 1999). For a review of some of this work, see Joshua Piker, *Indians and Race in Early America: A Review Essay*, HIST. COMPASS (2005), https://perma.cc/XD77-3F2J.

116. *See* SHOEMAKER, *supra* note 115, at 130-34; *see also* Alden T. Vaughan, *From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian*, 87 AM. HIST. REV. 917, 929 (1982) (describing this "fundamental shift in color perception from the early seventeenth to the late eighteenth century").

117. *See* SILVER, *supra* note 111, at xviii-xxvi.

118. *See id.* at 263-92; *see also* COLIN G. CALLOWAY, THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES 272-301 (1995); James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, *in* THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 197, 197-203 (Jack P. Greene ed., 1987).

119. SILVER, *supra* note 111, at 264. For the apparent source of the phrase "race of mankind," see INDEP. CHRON. & UNIVERSAL ADVERTISER (Boston), July 10, 1783, at 2.

120. 1 J.F.D. SMYTH, A TOUR IN THE UNITED STATES OF AMERICA 227 (Dublin, Price 1784). For additional context and instances of postrevolutionary discussions of "extirpating" Indians, see CALLOWAY, *supra* note 118, at 272-91; GRIFFIN, *supra* note 52, at 241-69; *footnote continued on next page*

such hatred, whites committed what historians have labeled genocidal acts against Natives.[121]

These racial views were not universal. There were substantial class and regional divides in how Anglo-Americans viewed Native peoples. Some politicians, particularly from the frontier, readily embraced anti-Indian rhetoric—one Georgia representative proclaimed in Congress that he "would not give the life of one white man for those of fifty Indians."[122] But others, particularly the Federalists who came to populate the Washington Administration, regarded such opinions as the vulgar province of the uneducated and uncultured. "I have known people who by their practices & declarations do not deem Indians entitled to the common rights of humanity," Secretary of War Timothy Pickering observed, "but these people have lived very remote from the seat of government."[123] Many Federalists discounted the vituperative accounts of Indian bloodthirstiness that filled newspapers in the American West. President Washington observed that unlike whites, Indians, "poor wretches, have no Press thro' which their grievances are related."[124]

In contrast to frontier settlers' insistence on race, many of the early U.S. political elite clung to an older view that attributed human difference to class, culture, and upbringing.[125] "The difference between civilized and savage modes of life is so great, as, upon a first view, almost leads to the conclusion that the earth is peopled with races of men possessing distinct primary qualities," Secretary of War Henry Knox, who oversaw Indian affairs in the early 1790s, instructed a federal agent preparing to travel into Indian country.[126] "[B]ut,

SILVER, *supra* note 111, at 263-92; and Jeffrey Ostler, *"To Extirpate the Indians": An Indigenous Consciousness of Genocide in the Ohio Valley and Lower Great Lakes, 1750s-1810*, 72 WM. & MARY Q. 587, 599-622 (2015).

121. *See* Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 AM. HIST. REV. 98, 109, 113-14, 132-34 (2015) (noting that postrevolutionary massacres of Natives constitute prima facie evidence of genocidal acts); *cf.* Rob Harper, Note, *Looking the Other Way: The Gnadenhutten Massacre and the Contextual Interpretation of Violence*, 64 WM. & MARY Q. 621, 621-22, 626-29 (2007) (describing a massacre of nearly a hundred unarmed Natives by an Anglo-American militia during the American Revolution).

122. 4 ANNALS OF CONG. 778 (1794) (statement of Rep. Carnes).

123. Letter from Timothy Pickering, U.S. Sec'y of War, to David Campbell 6-7 (Aug. 28, 1795) (on file with author).

124. Letter from George Washington to Edmund Pendleton (Jan. 22, 1795), *in* 17 PAPERS OF GEORGE WASHINGTON, *supra* note 45, at 424, 425 (David R. Hoth & Carol S. Ebel eds., 2013).

125. On these older ideas about difference applied to Indians, see KUPPERMAN, *supra* note 50, at 41-76.

126. *See* H. Knox, U.S. Sec'y of War, General View (1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 225, 247 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832) (reproducing Knox's instructions in a report to Congress).

upon a closer inspection, this will appear fallacious, and that the immense difference arises from education and habits."[127] Knox's views closely echoed Thomas Jefferson's earlier opinions in *Notes on the State of Virginia*, in which the future Secretary of State argued that Indians were whites' physical and mental equals, with any differences tracing to the "circumstances of [Indians'] situation"—even as Jefferson insisted mere pages later on the innate biological inferiority of black people.[128]

Yet such views did not convert federal officials into anti-racist champions of egalitarianism. Rather, federal officials adopted a condescending paternalism that portrayed Indians as objects of pity rather than as equals. This was particularly true of Knox, who wholeheartedly embraced a powerful and pernicious trope historians have labeled as the myth of the vanishing Indian.[129] In writing to President Washington regarding federal Indian policy, Knox feared that soon "the Idea of an Indian . . . will only be found in the page of the historian."[130] To counteract this imagined future, Knox urged adoption of a system of benevolent federal "protection of the helpless ignorant Indians,"[131] in particular suggesting that Natives' preservation required efforts to "civilize" them by introducing Anglo-American principles of property and governance.[132]

In practice, then, federal officials and their frontier constituents broadly shared similar conceptions about Indians. There were disagreements, to be sure—about the innateness of Native difference and about whether they should regard "Indians" with pity or with fear. These divergent views led to markedly different policy prescriptions: While federal officials halfheartedly sought to protect Indians as vulnerable minorities, white settlers, decrying these actions as coddling vicious and bloodthirsty enemies, called for violence instead.[133] But these heated feuds obscured a more fundamental congruence. Though their views had different roots, elite officials and white settlers thought of "Indians" similarly—as a single, undifferentiated category defined by contrast to its opposite, "white people."

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127. *Id.*

128. *See* JEFFERSON, *supra* note 63, at 60-63, 70-71, 138-43.

129. *See supra* note 67 and accompanying text.

130. *See* Letter from Henry Knox to George Washington, *supra* note 45, at 139.

131. *See* Letter from Henry Knox, U.S. Sec'y of War, to William Blount, Governor, Sw. Territory (Apr. 22, 1792), *in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 46, at 137, 141 (Clarence Edwin Carter ed., 1936).

132. *See* Letter from Henry Knox to George Washington, *supra* note 45, at 139.

133. *See* GRIFFIN, *supra* note 52, at 213-69; DAVID ANDREW NICHOLS, RED GENTLEMEN & WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER 57-97 (2008).

There were good reasons for the ascendance of this dichotomy between "white" and "red." The "white people" of the early United States were a diverse, polyglot, religiously pluralist amalgamation of nationalities further segmented by regional differences.[134] As historians have noted, the shared "white" identity of these myriad groups was one of the few sources of national cohesion.[135] (Equally diverse Native peoples, who also came to conceive of themselves as possessing a shared identity as "red," also drew on these racial ideas to make their own efforts at unity.)[136] But as a consequence of its power, this racialized understanding of a world divided between red and white (and black) came to infect nearly all "white people," even those who insisted that Indians were not a separate race.

B. "Indian" as Noncitizen

Racialized conceptions of Indians as nonwhite were not the only way Anglo-Americans defined Indian status. In actual governance, classing all Indians as a single racial mass proved unworkable. In their diplomatic negotiations with Native peoples, representatives of the new federal government never encountered just "Indians." They met, rather, Cherokees, Chickasaws, Creeks, Delawares, Haudenosaunee, Ottawas, Wyandots, and members of the many other indigenous "nations" or "tribes" discussed above.[137]

Lumping these diverse groups together could prove perilous—sometimes a literal matter of war and peace, given the varying dispositions of the different "Indian" groups. One federal agent complained that "the Whites" frequently retaliated against (peaceful) Cherokees for the actions of (hostile) Creeks: The whites claimed that they could not separate the two, though the agent quipped that "it would not be transgressing the bounds of Charity to say they do not wish to distinguish."[138] In Congress, Representative Fisher Ames of Massachusetts traced the consequences of such actions. When the frontier militia went out, he argued, "the first man with a red skin whom they met would be shot."[139] But, he continued, "Presently you discover that you have

134. *See* DANIEL K. RICHTER, BEFORE THE REVOLUTION: AMERICA'S ANCIENT PASTS 417-22 (2011); SILVER, *supra* note 111, at xviii.

135. *See* SILVER, *supra* note 111, at 114-23 (describing the rise of "white people's nationalism"); Silverman, *supra* note 111, at 196-97.

136. *See* GREGORY EVANS DOWD, A SPIRITED RESISTANCE: THE NORTH AMERICAN INDIAN STRUGGLE FOR UNITY, 1745-1815, at 30-31, 141-42 (1992).

137. *See supra* Part I.

138. *See* Letter from Silas Dinsmoor to Colonel David Henley 1 (Mar. 18, 1795) (on file with author).

139. *See* 4 ANNALS OF CONG. 776 (1794) (statement of Rep. Ames); *see also* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 49

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been shooting an Indian of the wrong nation, while, in the mean time, this whole nation rises and attacks you."[140]

Acknowledging and recognizing Native diversity, then, was central to the federal government's ability to manage so-called "Indian affairs." Despite the new nation's repudiation of many British precedents, Anglo-Americans largely adopted prerevolutionary imperial diplomatic practices, which regarded Native peoples not as an undifferentiated mass of "Indians" but as the polylingual, distinct polities they actually were.[141] Following its predecessor, the federal government negotiated separate treaties with each Native nation.[142] Also like the British, the federal government appointed agents (somewhat analogous to ambassadors) to Native nations to represent the interests of the United States.[143]

The existence of Creeks, Cherokees, and members of other Native nations, however, did not eliminate the category of "Indian," any more than the existence of Englishmen and Frenchmen obviated the category of foreigner. Rather, particularly in matters of law and diplomacy, federal officials adopted a definition of "Indian" different from the racial categorization of Indians as "not white." Similarly framed by opposition, this definition posited as Indians those who, by virtue of their membership in Native nations, were not "citizens or inhabitants of the United States."[144]

Defining Indians as noncitizens represented a break from British precedent. The key term denoting legal belonging within the British Empire was "subject," a status defined primarily by allegiance to the Crown.[145] This

(2005) (listing Representative Fisher Ames of Massachusetts as a member of the Third Congress).

140. *See* 4 ANNALS OF CONG. 776 (1794) (statement of Rep. Ames).

141. On British Indian policy, see COLIN G. CALLOWAY, CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783-1815 (1987); HELEN LOUISE SHAW, BRITISH ADMINISTRATION OF THE SOUTHERN INDIANS, 1756-1783 (1931); and Daniel K. Richter, *Native Americans, the Plan of 1764, and a British Empire That Never Was*, *in* CULTURES AND IDENTITIES IN COLONIAL BRITISH AMERICA 269 (Robert Olwell & Alan Tully eds., 2015).

142. *See, e.g.*, sources cited *infra* note 151.

143. *See, e.g.*, H. Knox, War Office, Report of Secretary at War on Letter of Governor Randolph (1788), *in* 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 182, 182-83 (Roscoe R. Hill ed., 1937) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS] (recommending the appointment of an agent to the Cherokee); Minutes of Aug. 20, 1788, *in* 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 432, 433 (noting a resolution appointing Joseph Martin as agent to the Chickasaw and the Cherokee).

144. *See* Treaty of Peace and Friendship, Cherokee Nation-U.S., art. X, July 2, 1791, 7 Stat. 39 [hereinafter Treaty of Holston]; Treaty of Peace and Friendship, Creek Nation-U.S., art. VIII, Aug. 7, 1790, 7 Stat. 35 [hereinafter Treaty of New York].

145. *See* 2 GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 366 (Philadelphia, William Young Birch &

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expansive conception made subjecthood a capacious category. Anglo-American colonists were British subjects, but Indians were described as subjects too—by both British officials and Native peoples themselves.[146] Though these two groups employed the same ambiguous word to mean strikingly different things, at core was the shared understanding that as long as Natives acknowledged the ultimate protection of the King, they could be *both* British "subjects" and members of separate, autonomous communities.[147] "Citizen," by contrast, required more than shared allegiance; it denoted belonging and participation within a common political community.[148] In other words, defining Indians as noncitizens conveyed a sense of political and jurisdictional difference, of Indian as alien—a person who was a member of a polity *other* than the United States.[149]

This understanding of Indianness as a form of belonging to a Native polity rather than to the political community of the United States prevailed in early American legal documents. Indian treaties adopted both before and after the Constitution, for instance, stated specifically that they were on behalf of, and binding upon, the "citizens and members" of *both* the United States *and* signatory Native nations.[150] In parsing issues of jurisdiction, illegal settlement, and trade, the treaties consistently dichotomized between two groups,

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Abraham Small 1803) ("Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king . . . ."). For consideration of the legal meaning of subjecthood within the British Empire writ large, see HANNAH WEISS MULLER, SUBJECTS AND SOVEREIGN: BONDS OF BELONGING IN THE EIGHTEENTH-CENTURY BRITISH EMPIRE 16-44 (2017).

146. *See, e.g.*, JENNY HALE PULSIPHER, SUBJECTS UNTO THE SAME KING: INDIANS, ENGLISH, AND THE CONTEST FOR AUTHORITY IN COLONIAL NEW ENGLAND 27-31, 110 (2005).

147. *See id.* at 18-20 (describing how New England Natives who regarded themselves "as subjects of the distant king" nonetheless "could, simultaneously, have viewed themselves as sovereign peoples" in part because the English "use[d] the term 'subject' for both themselves and the Indians"); Richter, *supra* note 141, at 292 ("[A]t least some British imperial officials in both Whitehall and North America actually considered Native people to be something resembling subjects of the Crown who had rights and interests that had to be protected . . . ."). *But see* GREGORY EVANS DOWD, WAR UNDER HEAVEN: PONTIAC, THE INDIAN NATIONS, & THE BRITISH EMPIRE 174-85 (2002) (arguing that the British envisioned Indians as subjects primarily as in the context of "subjection" rather than as the equals of white British subjects).

148. *See infra* notes 157-61 and accompanying text.

149. *Cf.* DOUGLAS BRADBURN, THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION, 1774-1804, at 55 (2009) ("One of the most immediate consequences of the citizenship revolution was the bright line drawn between American citizens and American Indians . . . . [F]rom the beginning there existed a widely held presumption that Indians were not Americans . . . .").

150. *See, e.g.*, Treaty of Holston, *supra* note 144, pmbl.; Treaty of New York, *supra* note 144, pmbl.

"Indians" and "citizens of the United States": "Citizen" served as a term of art used 96 times to define non-Indians in the 18 Indian treaties the United States ratified before 1800.[151]

Statutory law was similar. The most important legislation governing Indian affairs during this period, the Trade and Intercourse Act, created federal criminal jurisdiction for crimes committed by non-Indians against "peaceable and friendly . . . Indians."[152] Although the statute did not explicitly define who constituted an Indian, it stipulated that the law's criminal prohibition applied to "any citizen or inhabitant of the United States" and provided that the penalties for crimes committed against an "Indian" would be the same as if the crime were committed in a state or territory "against a citizen or white inhabitant thereof."[153] Moreover, the statute limited the scope of its criminal jurisdiction to "any town, settlement or territory belonging to any nation or tribe of Indians."[154] Implicit throughout the statute, then, was a definitional model predicated on political membership. Non-Indians were defined by their belonging to the United States; Indians, by their presumed belonging to the "nation or tribe" whose territory they inhabited.

These legal categories of Indian and U.S. citizen might seem woefully ill defined, leaving ambiguous all sorts of borderline cases—an issue I explore further in the next Subpart. But setting aside questions of enforcement and indeterminacy, these early treaties and laws conveyed an understanding that legal status as "Indian" hinged on membership in an Indian polity. Federal officials adopted this definition because it was a politically more accurate and

151. Treaty, Cherokee Nation-U.S., Oct. 2, 1798, 7 Stat. 62 [hereinafter Treaty of Tellico]; Treaty of Peace and Friendship, Creek Nation-U.S., June 29, 1796, 7 Stat. 56; Treaty, Seven Nations in Canada-U.S., May 31, 1796, 7 Stat. 55; Treaty of Peace, U.S.-Wyandot Nation et al., Aug. 3, 1795, 7 Stat. 49 [hereinafter Treaty of Greenville]; Treaty, Oneida Nation et al.-U.S., Dec. 2, 1794, 7 Stat. 47; Treaty, Six Nations-U.S., Nov. 11, 1794, 7 Stat. 44; Treaty, Cherokee Nation-U.S., June 26, 1794, 7 Stat. 43; Treaty of Holston, *supra* note 144; Treaty of New York, *supra* note 144; Treaty for Removing All Causes of Controversy, Regulating Trade, and Settling Boundaries, Six Nations-U.S., Jan. 9, 1789, 7 Stat. 33 [hereinafter Treaty of Fort Harmar, Six Nations]; Treaty for Removing All Causes of Controversy, Regulating Trade, and Settling Boundaries, U.S.-Wyandot Nation et al., Jan. 9, 1789, 7 Stat. 28 [hereinafter Treaty of Fort Harmar, Wyandot Nation et al.]; Treaty, Shawanoe Nation-U.S., Jan. 31, 1786, 7 Stat. 26; Treaty, Chickasaw Nation-U.S., Jan. 10, 1786, 7 Stat. 24 [hereinafter Treaty of Hopewell, Chickasaw Nation]; Treaty, Choctaw Nation-U.S., Jan. 3, 1786, 7 Stat. 21 [hereinafter Treaty of Hopewell, Choctaw Nation]; Articles, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18 [hereinafter Treaty of Hopewell, Cherokee Nation]; Treaty, U.S.-Wyandot Nation et al., Jan. 21, 1785, 7 Stat. 16 [hereinafter Treaty of Fort McIntosh]; Articles, Six Nations-U.S., Oct. 22, 1784, 7 Stat. 15; Articles of Agreement and Confederation, Delaware Nation-U.S., Sept. 17, 1778, 7 Stat. 13.

152. *See, e.g.*, Trade and Intercourse Act of 1790, ch. 33, § 5, 1 Stat. 137, 138 (amended 1793).

153. *See id.*

154. *See id.*

useful understanding of Indian status, particularly for the purposes of governance. But this choice had particular salience in the late eighteenth century, a moment when both Indians and non-Indians increasingly interpreted their differences in racial terms. In this context, the decision to adopt legal definitions that were formally race-neutral implicitly reflected a denial of that era's widespread racialization.

C. Whiteness and Citizenship in the Early United States

Indian law's critics argue that status based on tribal membership, although formally race-neutral, nonetheless constitutes impermissible racial discrimination because membership usually requires some form of descent.[155] In the late eighteenth century, however, Native nations' conceptions of belonging were capacious. Although Native peoples did not have formal legal categories of membership, they had long assimilated outsiders through kinship and clan ties, networks that expanded to encompass "whites" who married Native women as well as captive Anglo-American children.[156]

But in the late eighteenth century, there was another formally race-neutral membership category to which access was explicitly limited by race: U.S. citizenship. Prior to the American Revolution, the term "citizen" had little legal content.[157] But in the course of gaining independence, newly minted "Americans" transformed "citizen" into the primary legal term of art for belonging within the new United States, even as "Americans" struggled to define it.[158] Perhaps the dominant understanding was a consensual view of citizenship as a freely chosen political identification with a particular nation, a "tie between the individual and the community" that was "contractual and volitional."[159] This approach, defined in opposition to ideas of subjecthood based on irrevocable allegiance from birth, suggested a nation open to all who

155. *See supra* note 12 and accompanying text.

156. For works exploring intermarriage between Natives and whites, see RICHARD GODBEER, SEXUAL REVOLUTION IN EARLY AMERICA 154-89 (2002); and SUSAN SLEEPER-SMITH, INDIAN WOMEN AND FRENCH MEN: RETHINKING CULTURAL ENCOUNTER IN THE WESTERN GREAT LAKES (2001). On captive Anglo-American children, see JAMES AXTELL, THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA 302-27 (1985); and JOHN DEMOS, THE UNREDEEMED CAPTIVE: A FAMILY STORY FROM EARLY AMERICA (1994).

157. *See* BRADBURN, *supra* note 149, at 10 (noting that before the Revolution, "being a 'citizen' remained limited in legal meaning, completely subsumed by the fundamental status of all members of the British Empire as 'subjects'").

158. *See id.* at 2 (describing the American Revolution as bringing about a "citizenship revolution" that reflected a "transformation in the status of persons, the potential of rights, and the meaning of sovereignty").

159. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 9-10 (1978).

opted to become members. But from the beginning, this view coexisted with an alternate strain of thought that scholar Rogers Smith has labeled an ascriptive vision of citizenship.[160] In this scheme, legal belonging was explicitly conditioned on would-be citizens' membership in dominant racial, ethnic, and gender categories.[161]

There was little tension between ascriptive and consensual conceptions of citizenship when applied to what many early Americans imagined as the generic political actor: a white man born in, or who emigrated to, the United States.[162] Nor did Native peoples, envisioned by most Anglo-Americans as male and in a quasi-foreign region U.S. law labeled "the Indian country,"[163] present conceptual difficulties. Not only were Indians not white, but they also did not seek—in fact, they resisted—inclusion within the political community defined by the United States.[164] They remained members of their own nations, which, although nominally within the borders of the United States, enjoyed both de facto and de jure autonomy.

The definitional challenge for citizenship lay rather with the numerous in-between categories, people who were neither white men who self-identified as "Americans" nor nonwhite aliens. Black people, women, European subjects who served on U.S. ships or roamed the borderlands—all constituted to varying degrees what historian Kunal Parker has labeled as "internal foreigners."[165] These ambiguities meant that citizenship remained a legally hazy and ill-defined concept.[166] Reflecting the partial triumph of the ascriptive vision, practically the sole unifying feature of U.S. citizenship law was race: The nation's first naturalization law, enacted in 1790, explicitly provided that only

160. *See* SMITH, *supra* note 22, at 13-39.

161. *See id.* at 1. Smith's primary argument is that the ascriptive impulse was historically at least as powerful as the consensual approach: "[T]hrough most of U.S. history, lawmakers pervasively and unapologetically structured U.S. citizenship in terms of illiberal and undemocratic racial, ethnic, and gender hierarchies, for reasons rooted in basic, enduring imperatives of political life." *Id.*

162. On white able-bodied men as the "embodiment of the nation" during this period, see BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 21-60 (2010).

163. *See* Trade and Intercourse Act of 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (codified as amended at 25 U.S.C. § 264 (2016)).

164. *See* Merrell, *supra* note 118, at 201-03.

165. *See* KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000, at 4-11, 81-115 (2015). On the ambiguities raised by sailors in particular, see NATHAN PERL-ROSENTHAL, CITIZEN SAILORS: BECOMING AMERICAN IN THE AGE OF REVOLUTION (2015).

166. *Cf.* SMITH, *supra* note 22, at 14 ("American citizenship, in short, has always been an intellectually puzzling, legally confused, and politically charged and contested status.").

"free white person[s]" could naturalize, a requirement that remained in at least partial effect until the 1950s.[167]

These uncertainties affected Indian affairs because Indian country was full of such in-between people—including British and French traders married to Native women, escaped African slaves, and "whites" who nonetheless anointed themselves as Indian leaders.[168] Such people inhabited the seams between "Indian" and "U.S. citizen": Racially non-Indian, they professed no allegiance to the United States but were not members of Native nations in a formal legal sense legible to Anglo-Americans. Federal officials accordingly struggled to craft legal language to classify these ambiguous individuals. Sometimes treaties, repurposing older imperial language, described such people as the "subjects" of the United States, a category that presumably included black people but excluded European foreigners;[169] other times the treaties simply called them, circularly, "other person[s] not being an Indian."[170]

When all else failed, treaties, like the naturalization law, plugged the holes using race. One treaty called white noncitizens in Indian country "all other white persons" and "any other white person or persons."[171] In another instance, a treaty promised indemnity only for actions committed by "a white man, citizen of the United States."[172] The first version of the Trade and Intercourse Act included a promise that crimes against Indians would be punished as if they

167. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 388 (1997).

168. On the diversity of Indian country, see RICHTER, *supra* note 107, at 151-88; AMY C. SCHUTT, PEOPLES OF THE RIVER VALLEYS: THE ODYSSEY OF THE DELAWARE INDIANS 150-74 (2007); and Helen Hornbeck Tanner, *The Glaize in 1792: A Composite Indian Community*, 25 ETHNOHISTORY 15, 15-20 (1978).

169. *See* Treaty of Fort Harmar, Six Nations, *supra* note 151, separate art.; Treaty of Fort Harmar, Wyandot Nation et al., *supra* note 151, arts. III-IV, VI, IX. Anglo-Americans considered black people to be subject to U.S. laws but often excluded them from the privileges of citizenship. *See* DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 3 (n.p., n. pub. 1789) ("Negroes are inhabitants, but not citizens."); *see also* BRADBURN, *supra* note 149, at 235-71 (discussing the citizenship status of black people).

170. *See* Treaty of Holston, *supra* note 144, art. VIII; Treaty of New York, *supra* note 144, art. VI; Treaty of Hopewell, Chickasaw Nation, *supra* note 151, art. IV; Treaty of Hopewell, Choctaw Nation, *supra* note 151, art. IV; Treaty of Hopewell, Cherokee Nation, *supra* note 151, art. V; Treaty of Fort McIntosh, *supra* note 151, art. V; *cf.* Treaty of Fort Harmar, Wyandot Nation et al., *supra* note 151, art. IX ("citizens or subjects of the United States, or any other person not being an Indian").

171. *See* Treaty of Greenville, *supra* note 151, arts. V-VI.

172. *See* Treaty of Tellico, *supra* note 151, art. IX.

had been committed against a "white inhabitant"—implicit reinforcement of the idea that Indians were not white.[173]

As such examples underscore, in the early United States formal and informal racial exclusions suffused the political category of citizenship, limitations that restricted the egalitarian and inclusive promise of consensual membership. Indians defined as noncitizens thus formed a nonracial category only in a legal-fictional sense that ignored these entanglements.

D. Legacy

The tension between Indian as a category of belonging to both a race and a political community, as well as between consensual and ascriptive visions of U.S. citizenship, produced few problems in the late eighteenth century, when most members of Native communities remained both nonwhite and noncitizens who had little interest in joining the U.S. polity. By the mid-nineteenth century, however, neither fact was still true. As they adopted legal systems that paralleled those of their Anglo-American neighbors, some Native nations enacted formal membership criteria.[174] Tribes' membership laws often permitted "whites," particularly those married to tribe members, to legally naturalize as tribal citizens.[175] In other words, in Natives' own debates over citizenship, they opted for consensual as well as ascriptive visions of belonging. At the same time, acculturation among some Native communities meant that some "civilized Indians" now sought to make good the promise of consensual

173. *See* Trade and Intercourse Act of 1790, ch. 33, § 5, 1 Stat. 137, 138 (amended 1793). This provision was also an acknowledgment of the inferior justice afforded under state law for crimes against black people.

174. On the transformation of Native legal systems, see RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975); and Theda Perdue, *Clan and Court: Another Look at the Early Cherokee Republic*, 24 AM. INDIAN Q. 562, 563-64 (2000).

175. *See, e.g.*, Act of Oct. 1840, *in* THE CONSTITUTION AND LAWS OF THE CHOCTAW NATION 33-34 (Park Hill, Cherokee Nation, Mission Press 1847) (requiring that a white man who marries a Choctaw woman procure a license "before he shall be entitled and admitted to the privilege of citizenship"); Act of Nov. 2, 1819, *in* LAWS OF THE CHEROKEE NATION: ADOPTED BY THE COUNCIL AT VARIOUS PERIODS 10, 10 (Tahlequah, Cherokee Nation, Cherokee Advocate Office 1852) (providing that a "white man" who married a Cherokee woman would be "entitled and admitted to the privilege of citizenship" only upon following legal procedures); *see also* Minutes of Aug. 27, 1828, *in* PETER PERKINS PITCHLYNN, A GATHERING OF STATESMEN: RECORDS OF THE CHOCTAW COUNCIL MEETINGS, 1826-1828, at 99, 100-01 (Marcia Haag & Henry Willis eds. & trans., 2013) ("From this day forward, when a white man and a Choctaw woman marry, . . . the man will be included with us and be counted with us."). For background on tribal citizenship for those without Native ancestry, see FAY A. YARBROUGH, RACE AND THE CHEROKEE NATION: SOVEREIGNTY IN THE NINETEENTH CENTURY (2008); and Bethany R. Berger, *"Power Over This Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2020-25 (2004).

U.S. citizenship and naturalize as state and federal citizens.[176] These developments exposed the tension between Anglo-Americans' two definitions of Indians as nonwhites and noncitizens: Could a racially "white" person nonetheless become legally an Indian through naturalization? And could a racially "Indian" person cease legally being an Indian by becoming a U.S. citizen?

The U.S. Supreme Court answered the first question in 1846 in *United States v. Rogers*, a federal prosecution under the Trade and Intercourse Act of an intermarried white citizen of the Cherokee Nation who had killed another intermarried white citizen.[177] At the time, the Trade and Intercourse Act of 1834 specifically excluded from its scope crimes committed by one Indian against another Indian.[178] Rogers argued that because both he and the victim were Cherokee citizens, they were both "Indians," and his crime was therefore exempt from the law.[179] Rogers's insistence that he was legally an Indian found considerable support in the consensual interpretation of citizenship. In the early republic, the federal government had forcefully argued that individuals had the right to renounce membership in one nation and freely choose to join another: As President, Thomas Jefferson had declared this "right of expatriation to be inherent in every man."[180]

176. For an exploration of these debates, see DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880, at 155-201 (2007).

177. *See* 45 U.S. (4 How.) 567, 571-72 (1846). For an excellent overview of the case, see Berger, *supra* note 175.

178. Ch. 161, § 25, 4 Stat. 729, 733 (codified as amended at 18 U.S.C. § 1152 (2016)) (providing that federal criminal jurisdiction "shall not extend to crimes committed by one Indian against the person or property of another Indian").

179. *See Rogers*, 45 U.S. (4 How.) at 571.

180. Letter from Thomas Jefferson to Albert Gallatin (June 26, 1806), https://perma.cc/8KD7-PYYP. On the social and legal history of expatriation in the United States, see Nancy L. Green, *Expatriation, Expatriates, and Expats: The American Transformation of a Concept*, 114 AM. HIST. REV. 307 (2009). In *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795), the Supreme Court, writing seriatim, abstractly embraced a right of expatriation before concluding that the defendant in the case had failed to follow the correct procedures for renouncing his U.S. citizenship. *See id.* at 152-53 (opinion of Paterson, J.); *id.* at 161-65 (opinion of Iredell, J.); *cf. id.* at 168-69 (opinion of Cushing, J.) (declining to reach the expatriation issue but describing the right as "important"); *id.* at 169 (opinion of Rutledge, C.J.) (characterizing the "doctrine of expatriation" as "certainly of great magnitude" but declining to reach the issue). Similarly, in his influential Americanized version of Blackstone, St. George Tucker, a leading early American legal thinker, embraced the right of expatriation as a natural right, concluding that a U.S. citizen who renounces his citizenship and "attaches himself to any other nation" is no "longer amenable to the United States for his conduct." *See* 2 TUCKER, *supra* note 145, app. at 96-97.

Yet the Court rejected both Rogers's purported expatriation and his proposed definition of "Indian."[181] The term "Indian" as used in the statute, Chief Justice Taney wrote for the Court, "does not speak of members of a tribe, but of the race generally,—of the family of Indians."[182] Rogers may have taken on obligations to the Cherokee by virtue of his citizenship, but "[h]e was still a white man, of the white race, and therefore not within the exception in the act of Congress."[183] The Court's decision made explicit the primacy of the racial definition of Indian status: Tribal citizenship was not sufficient to become an Indian for the purposes of federal law.[184]

The inverse question—whether individuals who were racially "Indians" could become citizens—percolated through the courts during the early republic.[185] As states asserted jurisdiction over Indian country, some judges concluded that Native communities could no longer be considered separate nations. If tribes had in fact "lost every attribute of sovereignty," the New York Supreme Court of Judicature reasoned, then tribe members could no longer be aliens; therefore, "upon the principles of the common law, they must be citizens."[186] This vision of Indian citizenship offered a powerful weapon in a broader campaign to dispossess Native peoples by stripping protections Indians enjoyed under federal and state law; the New York case itself involved an effort to divest an Oneida family of its land.[187] But on appeal, Chancellor James Kent forcefully rejected the lower court's conclusion, writing for the court: "In my view of the subject, [Indians] have never been regarded as citizens or members

181. *See Rogers*, 45 U.S. (4 How.) at 572-73.

182. *See id.* at 573.

183. *Id.*

184. *See* Berger, *supra* note 175, at 2019-20 (noting that *Rogers* "defin[ed] tribes as inherently bounded by race").

185. *See, e.g.*, Jeffries v. Ankeny, 11 Ohio 372, 374-75 (1842) (holding that "the offspring of whites and half breed Indians" had the rights of "white citizen[s]" because they were "nearer white than black, or of the grade between the mulattoes and the whites"); State *ex rel.* Marsh v. Managers of Elections, 17 S.C.L. (1 Bail.) 215, 215-16 (1829) (holding that an Indian was ineligible to vote because South Carolina's constitution "confine[d] the right of voting to free white men," as distinct from "the indian, and negro, or mulatto"); *cf.* United States v. Ritchie, 58 U.S. (17 How.) 525, 538-40 (1855) (holding as a matter of Mexican law that "a civilized Indian" was a Mexican citizen and thus competent to receive a land grant from the Mexican government).

186. *See* Jackson *ex rel.* Smith v. Goodell, 20 Johns. 188, 193 (N.Y. Sup. Ct. 1822), *rev'd*, 20 Johns. 693 (N.Y. 1823).

187. *See id.* at 188 (statement of the case). On citizenship as a tool of dispossession, see Frederick E. Hoxie, *What Was Taney Thinking?: American Indian Citizenship in the Era of* Dred Scott, 82 CHI.-KENT L. REV. 329, 335-43 (2007).

of our body politic, within the contemplation of the constitution."[188] Rather, he argued, they had always been regarded as "dependent tribes."[189]

But if antebellum courts declined to deem all Indians citizens, a thornier issue involved Indians who, inverting Rogers's course, sought to expatriate from the Native nations of their birth and naturalize as U.S. citizens. As Native peoples turned to promises of citizenship as a legal tool to avoid removal, antebellum federal treaties and state constitutions, particularly in the Midwest, seemingly opened the possibility that so-called "civilized" Indians could naturalize and vote.[190]

The question of citizenship for such acculturated Indians laid bare the dichotomy between Indians defined as aliens, who could naturalize, and Indians defined as nonwhites, who could not. In a portion of his lengthy opinion for the Court in *Dred Scott v. Sandford*, Chief Justice Taney seemingly embraced the political definition of Indian status, opining that Indians, "like the subjects of any other foreign Government, [may] be naturalized by the authority of Congress, and become citizens of a State, and of the United States."[191] But Chief Justice Taney's aside should probably be read less as a description of the law than as an effort to reinforce what he saw as the uniquely degraded status of African-descended peoples.[192]

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188. Goodell v. Jackson *ex rel.* Smith, 20 Johns. 693, 710 (N.Y. 1823); *see also* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 564 (1993) (noting that James Kent served as Chancellor of New York from 1814 through July 1823).

189. *Goodell*, 20 Johns. at 710.

190. *See, e.g.*, MICH. CONST. of 1850, art. VII, § 1 (enfranchising "every civilized male inhabitant of Indian descent, a native of the United States and not a member of any tribe"); MINN. CONST. of 1857, art. VII, § 1 (enfranchising "[p]ersons of mixed white and Indian blood, who have adopted the customs and habits of civilization" and "[p]ersons of Indian blood residing in this State, who have adopted the language, customs, and habits of civilization"); WIS. CONST. of 1848, art. III, § 1 (enfranchising "[c]ivilized persons of Indian descent not members of any tribe"); *see also* ROSEN, *supra* note 176, at 155-201 (providing background on debates over Indian citizenship at the state level). In 1839, the Brothertown Indians became the first Native nation to receive U.S. citizenship by statute. *See* Act of Mar. 3, 1839, ch. 83, § 7, 5 Stat. 349, 351; *see also* SILVERMAN, *supra* note 115, at 184-210. For antebellum treaties contemplating Indian citizenship, see Treaty, U.S.-Wyandott Indians, art. 1, Jan. 31, 1855, 10 Stat. 1159; Treaty, Cherokee Nation-U.S., art. 12, Dec. 29, 1835, 7 Stat. 478; Treaty of Perpetual Friendship, Cession and Limits, Choctaw Nation-U.S., art. XIV, Sept. 27, 1830, 7 Stat. 333; Treaty of Friendship, Limits, and Accommodation, Choctaw Nation-U.S., art. 4, Oct. 18, 1820, 7 Stat. 210; and Treaty, Cherokee Nation-U.S., art. 8, July 8, 1817, 7 Stat. 156.

191. 60 U.S. (19 How.) 393, 404 (1857), *superseded in other part by constitutional amendment*, U.S. CONST. amend. XIV.

192. *See* Hoxie, *supra* note 187, at 332 (noting Chief Justice Taney's efforts to "distinguish between Indians and blacks"); *see also id.* at 331 ("There was no evidence in 1857 that anyone but the Chief Justice had entertained the idea that Indians could be naturalized as citizens of the United States.").

In a near-simultaneous opinion devoted specifically to the question whether Indians could become citizens, U.S. Attorney General Caleb Cushing concluded that Indians were different from other foreigners.[193] "[N]o person of the *race* of Indians is a citizen of the United States by right of local birth," Cushing stated.[194] "It is an incapacity of his race."[195] Nor, Cushing stressed, could Indians become citizens under the naturalization statute because they were not white.[196] There were, Cushing concluded, only two ways Indians could become citizens. One was through a special act of Congress.[197] The other was that Indians, "by continual crossing of blood, [would] cease to be Indians."[198] But Cushing punted on the precise threshold of European ancestry required for an Indian to become legally white.[199]

By the mid-nineteenth century, then, as race increasingly defined Anglo-American understandings of legal membership within both Native nations and the United States, ideas of Indians as nonwhite and Indians as noncitizens were conflated. In part, this shift reflected changes in racial ideology. While the eighteenth century divide between "red" and "white" had been a crude dichotomy justifying frontier antipathy toward Indians, the antebellum United States, like the European empires of the time, developed increasingly finer racial distinctions embedded within supposedly scientific discourse.[200] This understanding of race, focused on biology and heredity, helped give rise to the fixation with "blood" evident in the views of Cushing and Chief Justice Taney, an obsession that soon translated into federal policies imposed on tribes.[201] As a consequence, from the nineteenth century through the present,

193. *See* Relation of Indians to Citizenship, 7 Op. Att'y Gen. 746, 749 (1856).

194. *Id.* at 750.

195. *Id.*

196. *See id.* at 749-50.

197. *See id.*

198. *See id.* at 750.

199. *See id.* at 750-52.

200. The literature on these topics is enormous. On the development of racial ideology in the early United States, see BRUCE DAIN, A HIDEOUS MONSTER OF THE MIND: AMERICAN RACE THEORY IN THE EARLY REPUBLIC (2002); ANN FABIAN, THE SKULL COLLECTORS: RACE, SCIENCE, AND AMERICA'S UNBURIED DEAD (2010); NICHOLAS GUYATT, BIND US APART: HOW ENLIGHTENED AMERICANS INVENTED RACIAL SEGREGATION (2016); and REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981).

201. For background on this history, see Doug Kiel, *Bleeding Out: Histories and Legacies of "Indian Blood," in* THE GREAT VANISHING ACT: BLOOD QUANTUM AND THE FUTURE OF NATIVE NATIONS 80, 87-90 (Kathleen Ratteree & Norbert Hill eds., 2017).

Native communities have struggled to define their membership in the midst of a society that has employed racial essentialism to assess Native authenticity.[202]

Yet this racialization of Native status did not represent a nineteenth century decline from a race-neutral past. In the late eighteenth century, ideas about membership and citizenship had been vague and ill defined and had coexisted in uncertain relationship with similarly hazy notions about racial difference. Only the naturalization statute, with its requirement of whiteness, had explicitly applied this implicit racial subtext to ideas of federal citizenship.[203] Over the course of the nineteenth century, as questions of status and line drawing became increasingly pressing, these older ideas were refined, clarified, and hardened. As a result, implicit racial boundaries were increasingly enunciated and codified.[204] In the process, the earlier dueling conceptions of Indians as jurisdictional and as racial outsiders collapsed together.

Over the late nineteenth and twentieth centuries, the entanglement of racial and political ideas of Indianness persisted. After the Reconstruction Amendments both expanded citizenship and heightened the category's legal salience, what one observer called the "not quite constitutionalized" status of Indians became an increasingly difficult question for courts.[205] The triumph of federal plenary power and the subordination of tribal sovereignty, the piecemeal statutory extension of citizenship to Indians deemed sufficiently "civilized," the nebulous jurisdictional status of Indian country—all further confused matters until 1924, when Congress granted U.S. citizenship to all Indians.[206] But this action did not settle the question of Native status because

202. On the challenges Native peoples faced in maintaining their autonomy against Anglo-American racial essentialism, see MIKAËLA M. ADAMS, WHO BELONGS?: RACE, RESOURCES, AND TRIBAL CITIZENSHIP IN THE NATIVE SOUTH (2016); ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); MALINDA MAYNOR LOWERY, LUMBEE INDIANS IN THE JIM CROW SOUTH: RACE, IDENTITY, AND THE MAKING OF A NATION (2010); and KATHERINE M.B. OSBURN, CHOCTAW RESURGENCE IN MISSISSIPPI: RACE, CLASS, AND NATION BUILDING IN THE JIM CROW SOUTH, 1830-1977 (2014).

203. *See supra* text accompanying note 167.

204. For foundational works on the hardening of racial categories in the nineteenth century United States, see HORSMAN, *supra* note 200; RONALD TAKAKI, IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA (Oxford Univ. Press rev. ed. 2000) (1979); and James Brewer Stewart, Essay, *The Emergence of Racial Modernity and the Rise of the White North, 1790-1840*, 18 J. EARLY REPUBLIC 181 (1998).

205. Stephen Kantrowitz, *"Not Quite Constitutionalized": The Meanings of "Civilization" and the Limits of Native American Citizenship*, *in* THE WORLD THE CIVIL WAR MADE 75, 76 (Gregory P. Downs & Kate Masur eds., 2015) (quoting CONG. GLOBE, 42d Cong., 3d Sess. 373 (1873) (statement of Sen. Howe)).

206. On the complicated late nineteenth and early twentieth century history of Indian citizenship, see FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 212-23 (1984); SMITH, *supra* note 22, at 390-94, 459-62; Berger, *Birthright Citizenship*, *supra* note 22, at 1231-46; and Philip J. Deloria, *American Master*

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the Supreme Court affirmed that "[c]itizenship is not incompatible with tribal existence or continued guardianship."[207] No longer defined by exclusion from the U.S. polity, "Indian" remained both a nonwhite racial identity and a category marked by formal membership in a quasi-sovereign, quasi-separate polity.

E. The Constitutional Meaning of "Indian"

Like most history, the history of Indians, race, and membership is complicated and messy. But while complexity and ambiguity are comfortable for historians, they poorly serve lawyers and judges, who must draw lines and make distinctions.[208] This Subpart seeks to explore how the constitutional history examined here, though not simple or straightforward, can nonetheless help address the current equal protection challenges to federal classification based on Indian status.

Indian law's critics' arguments against ICWA and similar statutes invoke constitutional colorblindness[209]—the doctrine that the Constitution's guarantee of equal protection prohibits formal classifications based on race.[210]

Narratives and the Problem of Indian Citizenship in the Gilded Age and Progressive Era, 14 J. GILDED AGE & PROGRESSIVE ERA 3 (2015). For the grant of citizenship, see Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401 (2016)). For commentary on this statute, see Kevin Bruyneel, *Challenging American Boundaries: Indigenous People and the "Gift" of U.S. Citizenship*, 18 STUD. AM. POL. DEV. 30 (2004); and 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, 123-28 (1999).

207. United States v. Nice, 241 U.S. 591, 598 (1916); *see also* United States v. Celestine, 215 U.S. 278, 289-90 (1909) (upholding the application of federal criminal jurisdiction based on Indian status because, "[n]otwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race").

208. On the diverging uses of the past between lawyers and historians, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); and Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995).

209. For instance, in his article critiquing ICWA, George Will takes as an epigraph one of constitutional colorblindness's key lines: Chief Justice Roberts's statement, "It is a sordid business, this divvying us up by race." *See* Will, *supra* note 12 (quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part)).

210. The touchstone of constitutional colorblindness is usually Chief Justice Roberts's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, which proclaims, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." 551 U.S. 701, 748 (2007) (plurality opinion); *see also id.* at 772 (Thomas, J., concurring) (emphasizing that racial classifications are illegitimate because "[o]ur Constitution is color-blind" (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954))). For additional background on constitutional colorblindness, see R. Richard Banks, *Race-*

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Here, the constitutional colorblindness claim involves two steps. Step one: Membership in most Native nations requires some form of ancestry, which, this argument runs, amounts to a racial category. Step two: When the federal government labels individuals as "Indians" based on their membership status, it is employing these race-based classifications. This argument, in short, seeks to overturn the *Mancari* dichotomy between race and political status by looking at the underlying requirements for tribal membership: Because tribal membership is supposedly racial, federal classifications based on tribal membership are, too.[211]

This argument elides a substantial challenge. The Constitution uses the very same classification—"Indian"—that Indian law's critics challenge as unconstitutional. This seeming paradox arguably places considerable weight on the interpretation of "Indian" in the Constitution, particularly the question whether the constitutional term is either a political or racial classification.

So which constitutional interpretation of "Indian"—political or racial—is best supported by history? The answer depends on the methodology used to translate the past into law. One approach—original public meaning originalism—posits that the legal meaning of the constitutional text is the word's semantic meaning as understood by a reasonable speaker of English at the time of the Constitution's adoption.[212] In broad strokes, the history explored here suggests that Anglo-Americans of the late eighteenth century understood the term "Indian" to carry both racial and jurisdictional meanings. But original public meaning provides guidance on how to interpret such conflicts between meanings: The more technical meaning prevails if it is apparent that the term is a legal "term of art."[213] Here, while the vernacular

Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse, 48 UCLA L. REV. 1075 (2001).

211. *See, e.g.*, Timothy Sandefur, *Racial Discrimination Is No "Gold Standard,"* CATO UNBOUND (Aug. 15, 2016), https://perma.cc/8ZMC-HUE2.

212. *See, e.g.*, Barnett, *supra* note 24, at 105 ("'[O]riginal meaning' refers to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted.").

213. Originalists largely agree on the need to interpret legal terms of art based on their technical legal meaning of the time. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549 (2003) (observing that originalists consider themselves bound by "founding-era understandings of specialized legal constructions or terms of art"); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 967-70 (2009) (noting the need to interpret "terms of art" based on their meaning to experts in the relevant art). "Indian" might seem like an unlikely "term of art," given that it also enjoyed a popular meaning. But as Lawrence Solum notes, "If different groups had different understandings of the same phrase, constitutional communication could still succeed, assuming the publicly available context of constitutional utterance allowed resolution of the resulting ambiguity." Solum, *supra*, at 968. In this instance, there is a strong case that the context resolves the ambiguity in favor of the formal, diplomatic meaning. As skeptical as I am about the possibility of

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meaning of "Indian" was arguably racial, diplomatic documents and formal statutes employed a definition based on membership and jurisdiction. Given that the Constitution used "Indian Tribes" in the context of federal regulatory and diplomatic powers, there is a persuasive argument under originalist theory that this race-neutral interpretation should be given greater weight.

But if "Indian" in the Constitution is interpreted as a political classification, then the equal protection attack on ICWA and similar statutes becomes very difficult to sustain. Indian law's critics would find themselves in the awkward position of insisting that while "Indian" in the Constitution is a political classification, "Indian" as used in ICWA and other federal laws is not. This is a difficult distinction to make. ICWA, by defining Indian status based on eligibility for membership in a Native community, closely tracks the early U.S. political definitions traced above.[214] It is also unavailing to argue that current tribal membership classifications are actually racial because they involve ancestry and descent. This critique was equally true in the early United States, yet the early U.S. elite nonetheless opted to deal with "Indians" through the formalist language of citizenship and membership.[215]

In short, defining "Indian" as a solely political category is legally defensible. It is also intellectually unsatisfying: Like *Mancari*, this definition is at least in part a legal fiction reliant on a partial and formalist perspective. Careful consideration of history reveals that the purportedly race-neutral category of "Indian" possessed racial content from the beginning. One way to understand the current equal protection challenges to federal Indian law is as an effort to explode this legal fiction and demonstrate that "Indian" is not in fact a race-neutral membership category.[216]

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summoning into being hypothetical eighteenth century English speakers, *cf.* Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 586 (2011) ("[T]he imaginary disinterested original reader of the Constitution remains nothing more nor less than a creature of the modern originalist jurist's imagination."), in this instance I think the evidence persuasive to construe the word "Indian" in the Constitution to resemble the meaning employed in treaties, statutes, and other governmental documents of the time. And I think that Solum's approach similarly endorses this resolution of possible ambiguity.

214. *See supra* Part II.B.

215. *See supra* Part II.B. Indian law's critics also suggest that even if not racial, classifications based on tribal membership might constitute national origin discrimination. *See* Sandefur, *supra* note 211. This claim is untenable. Black-letter law makes clear that classifications based on citizenship do not amount to national origin discrimination under Title VII of the Civil Rights Act of 1964—an unsurprising holding, given that citizenship requirements are rife in U.S. law. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 87-96 (1973), *superseded in other part by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of the U.S. Code); *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)).

216. *See supra* note 12 and accompanying text.

Yet there is a deep irony that this aim arrives cloaked in the rhetoric of constitutional colorblindness. Colorblindness is a formalist doctrine: It seeks to maintain a sharp line between de jure and de facto discrimination and targets as unconstitutional explicit racial classifications.[217] This formalism, and its apparently willful blindness to how race implicates all sorts of seemingly race-neutral categories, has been the focus of the most withering critiques of the doctrine.[218] But the equal protection challenge to Indian classifications is antiformalist: It relies on peering behind the federal legal category of "Indian" to reveal its dependence on the ancestry-based classifications employed by tribes.[219] In their seeming commitment to broaden legal understandings of

217. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (plurality opinion) (stressing the importance of the "distinction between *de jure* and *de facto* segregation"); *see also id.* at 793-96 (Kennedy, J., concurring in part and concurring in the judgment) (examining in detail the "difference between *de jure* and *de facto* segregation" in crafting remedies in the school desegregation cases and arguing that the concept is "of central importance").

218. *See, e.g.*, Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."); GROSS, *supra* note 202, at 294-305; Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1061-62 (2007) ("One detects in current Supreme Court equality discourse a renewed penchant for . . . racial formalism . . . . If race reduces to morphologies entirely disconnected from history and social position, group mistreatment on any basis but one *explicitly* tied to skin color cannot be racism . . . .").

219. One possible way to reconcile this discrepancy might be to invoke Supreme Court precedent discussing when actions by nongovernmental actors may be imputed to the state, thereby constituting state action. *See* Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982) (crafting the test for when a private entity has the requisite nexus to the state to be held to constitutional standards); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001) (refining and applying the test); Smith v. Allwright, 321 U.S. 649, 656-57, 663-64 (1944) (concluding that the Texas Democratic Party's white primary constituted state action because of the party's "character as a state agency" derived from the "duties imposed upon it by state statutes").

Yet this analogy is untenable. First, there is no question that the tribes' membership decisions constitute "state action" because tribes are sovereign governments: This fact renders much of the Court's state action jurisprudence absurd when applied to tribes. *See, e.g.*, *Blum*, 457 U.S. at 1005 (establishing as a prong of the test whether the entity has "exercised powers that are 'traditionally the exclusive prerogative of the State'" (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974))). The Fifth and Fourteenth Amendments do not apply to tribes not because they are private actors but because they, like other sovereigns such as foreign states, are not directly bound by the provisions of the U.S. Constitution. *See* Talton v. Mayes, 163 U.S. 376, 384-85 (1896) (holding that the Fifth Amendment did not apply to the Cherokee Nation because its powers of self-government "existed prior to the Constitution").

Second, the suggestion that the federal government has somehow transformed the tribes into federal agencies by giving tribal membership force of law—which is what

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how race has been lived, defined, and constructed in the United States, then, Indian law's critics have become the unwitting allies of scholars who see the entanglement of race and political status in Indian law as an *attack* on constitutional colorblindness.[220]

But this seeming contradiction offers more than irony; it has important legal implications, even beyond Indian law. Although Indian law's critics often seek to portray federal Indian law as the last vestige of a repudiated legal order that endorsed classifications based on ancestry,[221] ancestry-based distinctions actually litter much of the law. Katie Eyer argues that far from being limited to ICWA, such distinctions are ubiquitous in family law, where they have been tolerated, and even endorsed, by the Supreme Court.[222] Ancestry is arguably even more significant whenever any sovereign, not just a tribe, seeks to define its membership. Nearly all nations' citizenship laws—even those of the United States—employ some jus sanguinis principles that grant citizenship based on biological descent.[223] Some nations go still further and define belonging based on remote ancestry: Spain, Germany, Israel, and several other nations all extend citizenship to those who trace their descent through ancestral nationals, some from centuries earlier.[224] International treaties forbidding racial

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the state action doctrine requires—is sharply at odds with longstanding and very well-settled precedent. Despite repeated constitutional challenges, one of the most durable principles in the Supreme Court's Indian law jurisprudence is the proposition that the federal government is not the *source* of tribes' authority; rather, that authority derives from tribes' retained inherent sovereignty. *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1962 (2016) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1872 (2016); United States v. Lara, 541 U.S. 193, 205 (2004); United States v. Wheeler, 435 U.S. 313, 324-29 (1978), *superseded in other part by statute*, Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1301-1304 (2016)), *as recognized in Lara*, 541 U.S. 193.

220. *See* Krakoff, *supra* note 7, at 546 ("[T]he argument here supports rejecting colorblind constitutionalism generally."); Rolnick, *supra* note 5, at 1026-27 (arguing that the interconnectedness of political and racial definitions of Indians undermines "the doctrinal allegiance to formal-race").

221. *Cf. A.D.* Complaint, *supra* note 18, ¶ 3 (arguing that "[c]hildren with Indian ancestry" are "[a]lone among American children" in that their ethnicity is considered when making adoption and foster care placements).

222. *See* Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 540-41 (2014).

223. *See* Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 103 (2005). On the history of one set of descent-based distinctions in federal citizenship law, see Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2215-19 (2014).

224. On such provisions in the European Union, see Michael D. Moritz, *The Value of Your Ancestors: Gaining "Back-Door" Access to the European Union Through Birthright Citizenship*, 26 DUKE J. COMP. & INT'L L. 229, 254-55 (2015). Both Spain and Portugal grant citizen-

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discrimination explicitly permit such distinctions.[225] In short, if federal classifications are deemed race based whenever they rely on another sovereign's descent-based citizenship, then large swaths of foreign policy are arguably subject to strict scrutiny.[226]

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ship to individuals who can trace their descent to Jews expelled from the Iberian Peninsula in 1492. *See* Conor Gaffey, *Spain Offers Citizenship to Descendents of Jews Who Fled Inquisition*, NEWSWEEK (Mar. 26, 2015, 1:26 PM), https://perma.cc/B5YS-AB4W; Barry Hatton, *Portugal Approves Citizenship Plan for Sephardic Jews*, ASSOCIATED PRESS (Jan. 29, 2015), https://perma.cc/3D42-AN89. The Spanish policy was expected to elicit 200,000 applications for citizenship. *See* Max Kutner, *Spain Expects up to 200,000 Jews to Apply for Citizenship*, NEWSWEEK (June 16, 2015, 1:18 PM), https://perma.cc/MKW5-A2DG. Germany similarly permits the naturalization of individuals who can prove descent from Jews persecuted in Germany between 1933 and 1945. *See* GRUNDGESETZ [GG] [BASIC LAW] art. 116(2), *translation at* https://perma.cc/Q8JE-84V5. Bulgaria, Croatia, and Ireland all permit naturalization based on proof of an individual's descent from a citizen of the nation. *See* DANIEL SMILOV & ELENA JILEVA, EUDO CITIZENSHIP OBSERVATORY, COUNTRY REPORT: BULGARIA 13 (2013), https://perma.cc/ELZ5-LKRV (noting that individuals of "Bulgarian origin," as defined by ethnic criteria, may become Bulgarian citizens by naturalization without satisfying most of the ordinary requirements); FRANCESCO RAGAZZI ET AL., EUDO CITIZENSHIP OBSERVATORY, COUNTRY REPORT: CROATIA 13-14 (2013), https://perma.cc/HSL4-D57Z (noting that great-grandchildren of Croatian citizens may become naturalized Croatian citizens without meeting the ordinary requirements); JOHN HANDOLL, EUDO CITIZENSHIP OBSERVATORY, COUNTRY REPORT: IRELAND 12 (2012), https://perma.cc/QZ8C-QG8X (noting that the Irish Minister for Justice and Equality "is empowered to dispense with [the conditions for naturalization] in relation to persons of Irish descent").

Such descent provisions are less common outside of Europe. Israel permits the naturalization of all Jews and defines Jews as converts or as the children of Jewish mothers, vesting rights in the children and grandchildren of Jews. *See* Law of Return, 5710-1950, § 1, 4 LSI 114 (as amended) ("Every Jew has the right to come to this country as an [immigrant]."). Liberia limits both citizenship by birth and naturalization to persons who are "Negro or of Negro descent." *See* RULE OF LAW INITIATIVE, AM. BAR ASS'N, ANALYSIS OF THE ALIENS AND NATIONALITY LAW OF THE REPUBLIC OF LIBERIA 13-15 (2009), https://perma.cc/F9AS-GNQ5. Rwanda's constitution provides: "All persons originating from Rwanda and their descendants shall, upon their request, be entitled to Rwandan nationality." RWANDA CONST., tit. I, art. 7.

225. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination art. 1, ¶ 3, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 ("Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.").

226. Unlike foreign sovereigns, tribes *are* subject to the power of the federal government. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) (noting that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance"), *superseded in other part by statute*, Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1301-1304 (2016)), *as recognized in* United States v. Lara, 541 U.S. 193, 205 (2004). The federal government has exercised its authority to apply the language of the Equal Protection Clause to tribes, *see* 25 U.S.C. § 1302(a)(8) (2016), but well-established precedent limits the remedies for purported Indian Civil Rights Act (ICRA) violations in noncustodial instances to tribal

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But Indian law's critics present a second, arguably more significant challenge to constitutional colorblindness that further compromises their argument. Indian law, while not unique in its use of ancestry, is exceptional in one sense: "Indian" itself appears in the Constitution. If, as the equal protection argument insists, we must read the classification "Indian" in light of its broader context and definition, then history compels us to acknowledge "Indian" in the Constitution as a racial term. At the time of the Constitution's drafting, Indians were considered nonwhite, a category that as we have seen was premised on ancestry. And as I briefly discuss above, and as other scholars have traced much more fully, this trend toward racialization was not repudiated either formally (through constitutional amendment) or practically in the ensuing two centuries.[227] On the contrary, the Fourteenth Amendment specifically preserved a distinct status for Indians,[228] while the federal government increasingly imposed descent requirements on tribes, seeking to prevent "fake Indians"—that is, those who were supposedly not racially Indian enough—from receiving federal recognition.[229] In short, if we abandon the legal fiction that "Indian" is a political classification, we must also give up the larger fiction of a colorblind Constitution. Under this interpretation, race is literally written into the text of our Constitution.

The normative implications of this conclusion are fraught. It is, perhaps, uncomfortable to think that the Constitution might bind us to a racialized past characterized by an ideology of difference we as a nation have struggled to overcome. In fact, this legal commitment to earlier, repudiated views is one of the most controversial aspects of originalists' commitment to a "dead"

courts, *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60-72 (1978). Accordingly, because the plaintiffs in these suits have elected to seek a federal instead of a tribal remedy, they are foreclosed from advancing equal protection claims under ICRA. Moreover, lower federal court decisions issued prior to *Martinez* uniformly upheld tribal membership requirements against equal protection challenges under ICRA. *See* Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973); Slattery v. Arapahoe Tribal Council, 453 F.2d 278, 282 (10th Cir. 1971); Groundhog v. Keeler, 442 F.2d 674, 679, 681-83 (10th Cir. 1971).

227. For explorations of this subsequent history, see generally Berger, *Red*, *supra* note 10; Fletcher, *Race and American Indian Tribal Nationhood*, *supra* note 10; Krakoff, *Inextricably Political*, *supra* note 10; Riley & Carpenter, *supra* note 10; Spruhan, *Indian as Race*, *supra* note 10; and Spruhan, *Legal History of Blood Quantum*, *supra* note 10.

228. *See* U.S. CONST. amend. XIV, §§ 1-2 (limiting citizenship to those "subject to the jurisdiction" of the United States and specifically "excluding Indians not taxed" from representation).

229. On federal imposition of descent requirements, see 25 C.F.R. § 83.11(e) (2017); Fletcher, *Race and American Indian Tribal Nationhood*, *supra* note 10, at 301-02, 312-13; and Snowden et al., *supra* note 10, at 200-29. On federal fears about "fake" Indians, see Wood, *supra* note 97, at 483-92.

Constitution.[230] But it would be perverse to try to purify the Constitution by striking down statutes like ICWA that seek to remedy the harms caused by earlier racial views. The effect would not be to repudiate the past but to revive it, reinstating the assimilationist imperative at the root of much disastrous federal policy.[231] Moreover, the appearance of the term "Indian" is hardly the only way the Constitution remains entangled in past racial practices; it is merely the most textually explicit.

The doctrinal implications of acknowledging the potential racial meaning of "Indian" in the Constitution are clearer and more straightforward. It is very hard to argue that a classification is unconstitutional when it is mandated by the Constitution itself. This reading strongly suggests that with respect to those people labeled "Indians," the Constitution itself authorizes distinctions based on ancestry.[232] Wriggling out of this conclusion requires implausible intellectual contortions, particularly for those who, like Indian law's critics, are committed to conservative jurisprudential theories. Shy of a new constitutional amendment or the embrace of a very broad concept of living constitutionalism, the word "Indian" cannot be expunged from the Constitution simply because some people dislike the statutes it authorizes.

In sum, the appearance of "Indian" within the U.S. Constitution likely dooms the equal protection challenge to Indian classifications, whichever meaning we assign the term. If we read the history accurately but selectively to conclude that "Indian" in the Constitution is a political classification, then the use of Indian in ICWA and similar statutes must also be read as a political classification. But if we insist on peering behind the formal legal classifications and revealing how "Indian" is bound up with historical conceptions of race, then we must conclude that the Constitution itself authorizes distinctions based on Native ancestry. The implications of this interpretation reach broader still. "Our Constitution is color-blind," Justice Harlan famously stated in his

230. For influential articulations of this critique, see Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518-22 (2011); and Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: 'We the People.' When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens."). For some responses, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 111-12 (2004); and John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1757-64 (2010).

231. On the harms produced by assimilation, see HOXIE, *supra* note 206; and Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

232. For further development of this line of argument based on case law, see Krakoff, *supra* note 7, at 533-35.

Plessy dissent.[233] But Indian law's critics are unwittingly working to discredit this statement: Their reading renders Harlan's formulation a remarkably inaccurate description of a constitutional text that invokes an explicit racial category three times.

Conclusion

This Article has used the tools of legal, intellectual, and cultural history to explore the meanings of the terms "Indian" and "tribe" at the time of the Constitution's adoption. Once we expand our interpretive scope, we discover, in place of the gap current scholarship posits, plenty of discussion, albeit little clarity. Rather, Anglo-Americans promiscuously and interchangeably employed meanings and terms—Natives as tribes and nations; Indians as nonwhites and noncitizens—at once interrelated and in tension. Over the course of the nineteenth century, courts and others struggled to resolve the contradictions inherent in this constitutional legacy. In the process, they often elevated one definition over another, usually favoring the terms and meanings most denigrating to Native peoples.

There is both a simple and a hard story about the relationship of this history to current doctrine. The simple story is that current law's insistence that Indian classification is a political, rather than racial, status has a historical foundation tracing back to the Constitution's creation. Viewed in this frame, federal law has long regarded membership in an Indian nation as a form of citizenship, a legal status no more racialized than classification as a French or British subject.

The hard story starts by acknowledging that this defensible narrative rests on the legal fiction that Indian status and race were, and are, separate and distinguishable. In fact, thanks largely to the efforts of the federal government itself, legal classification as "Indian" increasingly required more than formal membership in a Native community; it mandated the requisite ancestry, often expressed as "Indian blood." Yet this racialized notion of Indian status that came to dominate the nineteenth and twentieth century United States was not a break from an earlier, preracial understanding. It represented rather the efflorescence of an idea of Indians as nonwhite, as members of degraded and racialized "tribes," that was already ascendant when the Constitution was adopted. Any effort to wrestle with this reality must acknowledge that the Constitution does not stand apart from this history; on the contrary, this legacy is arguably implicated in its very text.

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233. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Significantly, under both the simple and hard stories, the current challenges to Indian classifications on equal protection grounds are at odds with history. Either "Indian" is a permissible political classification or it is a racial classification authorized by the Constitution itself. Neither view authorizes courts to take the odd step of implicitly declaring the Constitution unconstitutional.

This conclusion leaves unresolved the thorny problem of how to incorporate this messy past, with its deep roots in earlier unpalatable racial ideologies, into current law. Scholars have offered alternative approaches. One path is a forthright admission of the exceptionalism of Indian law, grounded in the reality that the constitutional text specifically singles out Indian tribes.[234] Another tack makes the opposite claim: Rather than labeling Indian law as exceptional, it posits the field as a model for a more honest, race-conscious jurisprudence in general, one that would acknowledge how frequently race is implicated in purportedly race-neutral categories. Each approach has merits; both require a clear-eyed willingness to recognize in law the complexities and nuances of our nation's racial past. Until such intellectual courage exists, I would argue that we should have the lesser courage of owning and embracing our legal fictions, which, in Indian law, are arguably written into the Constitution itself.

234. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 435-36 (2005) (arguing for the "exceptionalism of the field" of Indian law against efforts to succumb to the "seduction of coherence" by slotting Indian law principles into conventional public law doctrines (quoting Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 698 (2000))); *see also* Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality,"* 130 HARV. L. REV. F. 173, 175-76 (2017) (discussing the legal challenges presented by Native American exceptionalism).