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Tribally Defined Citizenship Criteria: Countering Whiteness as Property Interpretations of "Indian" for Restoring Inherent Sovereignty

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Abstract: *This article implements the framework of whiteness of property to articulate the ways in which holdings of the Supreme Court of the United States (SCOTUS) have limited Tribal Nations' sovereignty because of the illegibility and correlative dispossession of inherent sovereignty itself. This article also highlights how these past SCOTUS opinions, especially recently, threaten to further reduce tribal sovereignty insofar as Tribal Nation citizenship remains based upon blood quantum. The case studies examined herein were selected because of the ways they strategically diminished Tribal Nation sovereignty via rhetorical precarity created using equivocations on the meaning of "Indian." Through articulating how SCOTUS opinions shifted the meaning of sovereignty from a basis in Tribal Nations' territory, i.e., property, towards one based on membership, blood quantum as another mechanism for dispossession and disappearance becomes clearer. This article argues that SCOTUS's blind spots with regard to tribal sovereignty are mechanisms of whiteness as property that make invisible the rights of Tribal Nations so as to dispossess sovereignty as another de-evolutionary tactic of* de juro *federal common law resulting in* de facto *property dispossession in the modern era. Through SCOTUS opinions reshaping the meaning of who counts as "Indian," sovereignty is further threatened because of increased precarity linked to blood quantum as a supposed racist qualifier for citizenship. Most simply, if SCOTUS can enumerate that blood quantum serving as a basis for tribal sovereignty is racist, Tribal Nation sovereignty itself might be delegitimated, and the otherwise persistent debt owed to its citizens as first-in-time, first-in-right owners is erased; the debt owed then can be forgotten. That is, the U.S. fiduciary obligation may also disappear.*

I. INTRODUCTION

Externally imposed, fixed and homogenizing conceptions of "Indian" by the dominant legal culture demonstrate what Jennifer Hendry and Melissa Tatum describe as "the jarring quality of universal claims within rights discourse. . .'to exercise sovereign agency as mastery over meaning.'"[1] Through construction of tribal citizenship qua "Indian," the U.S. government maintains socially constructed power over Tribal Nations' identities because the status "Indian" then eliminates the very differences making each nation unique and culturally sovereign. Tribal citizenship is reduced to being "Indian" under federal law and policy. Alternatively, if complete deference were given to Tribal Nations' sovereignty to define citizenship based on their own cultures, beliefs, and perspectives, then the status of "Indian" could be decolonized from the logics of "whiteness as property."[2]

The social construction of "Indian" within the rhetoric of federal common law, as well as the use of a fictionalized blood quantum in Tribal Nations' constitutions, have imposed precarity as part of the ideological and sovereign colonization by the U.S. Stereotypical perceptions of "being Indian," and recent challenges of tribal sovereignty by the Indian Child

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1. Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 34 YALE L. & POL'Y REV. 351, 374–75 (2016).

2. "Whiteness as Property" was coined by Cheryl Harris's article of the same name. Most simply, this phrase refers to the additional benefits that inure to persons perceived as "white" by the legal system. In contrast, African and Americans and Indigenous Peoples of the U.S. have been excluded from the privileges of property rights in ways that systemically subordinated their socioeconomic mobility. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARVARD L. REV. 1707 (1993).

Welfare Act of 1978 (ICWA) cases reproduce this rhetorical precarity.[3] This article highlights the importance of Tribal Nations to act to "decolonize" their governments' use of "blood quantum" criteria and align their self-determined citizenship[4] criteria with their own spiritual, cultural, and linguistic traditions, in order to reaffirm their inherent sovereignty in relation to the U.S.[5] This article suggests a broader implication: that removing blood quantum from citizenship criteria can further protect Tribal Nations' inherent sovereignty from equal protection attacks.

Although scholars have offered many explanations as to why Indian law cases most often lose in federal courts, few of them analyze the categorical foundations of federal Indian law itself. Through critically analyzing the ways in which the categorical designation of "Indian" has been used strategically to achieve the Supreme Court's political ends, it may better explain why the rights of Native peoples in the U.S. are rarely provided adequate remedies in federal courts. However, federally recognized tribes that define their citizenship based on culturally relevant ways of being and genealogical terms for family relationships have mitigated future equal protection claims against their political status.

II. FIXED CATEGORIZATION OF RADICALLY DIFFERENT TRIBAL NATION COMMUNITIES AS "INDIAN" MISREPRESENTS TRIBES' POLITICAL STATUS AS AUTHORITY BASED UPON "BEING INDIAN," FREEDOM OF ASSOCIATION, OR BLOOD QUANTUM

Deployment of "Indian" as a legal classification by the U.S. government homogenizes cultural differences, and doing so causes confusion about Tribal citizens' identities. Application of "Indian" to Native peoples in the U.S. covertly equivocates on the meaning of Native cultural identity,[6] functioning

3. *See infra* notes 71 and 72.

4. The term "citizenship" more accurately reflects the political status of Tribal Nations as sovereign governments but "membership" is more widely used, especially after the *Oliphant* case. This article prioritizes using "citizenship" because of its implicit recognition of Tribal Nations' inherent sovereignty; however, because of federal Indian law's primary use of "membership," I also use it at times throughout this article to aid in understanding. However, both words refer to the persons comprising Tribal Nations that have possessed inherent sovereignty since time immemorial, whose citizens are determined in accordance with each nation's constitution whether oral or written.

5. This article is a preliminary analysis of the ways SCOTUS has reaffirmed a racialized interpretation of Indian identity despite long-standing precedence affirming that Indian is a political status. While there are many Tribal Nations in the U.S. who do not include blood quantum criteria in their constitutions, the scope of this project is limited to emphasizing the importance of eliminating blood quantum as a "buffer" against future SCOTUS rulings.

6. *See* Mary Beth Mader, *Foucault and Social Measure*, 17 J. FRENCH PHIL. 3, 18 (2007),

as if all Tribal Nation group identities are the same. Public administration carries out population management[7] through utilization of categories without regard to whether the general scope of the category assigned to any particular individual or group is erroneous. These categories are sometimes normative, that is, *setting* the parameters of what essentializing elements "count" as that category itself; other times, these categories are descriptive, that is, describing the essentializing elements of the relevant category. This tactic of U.S. public policies intending to manage large populations is a common move that dispossesses self-defined cultural identities in ways that often go unnoticed. As Mary Beth Mader explains,

> One common objection to the use of the statistical notion of the norm is that since its use often vacillates between descriptive and a normative sense it is fallaciously equivocal. . . . [S]ignificant instances of covert equivocation and tacit amalgams occur on the very level of the statistical concepts of mean and ratio . . . .
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> . . . .
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> [A]side from the oft-noted problem of actually crafting the definitions under which observed phenomena will be classed (the problem of determining what counts as measurable qualities), and the problem of the norm's equivocal descriptive or prescriptive status, there is also the problem of the sort of overlooked equivocations on the ontological or conceptual 'level' . . . .[8]

In order to establish social measures across large populations, what counts as measurable must first be determined and defined, either prescriptively (normalizing) or descriptively (retroactively). While the U.S. government has not yet provided a clear definition of "Indian," it has deployed the more unintelligible fiction of blood quantum as a measurable quality for determining Indian status and property rights, an ontological equivocation of "being Indian." This intentional category error of assigning a generic category of "Indian" to different Tribal Nation communities, usually distinctive in culture, language, and spiritual practices, allowed the

for an in-depth discussion of social measures and "equivocations." This article intentionally utilizes the terms "Tribal Nations" to refer to the 574 federally recognized tribes. "Native peoples" or "Tribal citizens" is used to refer to members of these politically and culturally sovereign nations; whereas the term "Indigenous" captures the first-in-time aboriginal rights of these peoples and nations under customary international law, it does not capture the customs of self-reference primarily used by Native scholars in the U.S.

7. For an extensive analysis of Foucault's idea of "population management power," see DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (Duke Univ. Press, rev. & expanded ed. 2015) (2009).

8. *See* Mader, *supra* note 6, at 3, 18.

federal government throughout U.S. history to manage large populations of Native peoples and their property rights across the vast territory of the U.S. As a tool of dispossession, the blood quantum quality served to be something measurable based on a person's parentage to determine who counted as "Indian." That is, while the definition of "Indian" remained ambiguous, the definition of blood quantum was treated as discrete and measurable. However, there were other collateral consequences to mainstream conceptions of Tribal citizens' identities through the ambiguous use of Indian in the government's project of land dispossession.

The category "Indian" has widely been taken up in mainstream society, circulated, and reproduced to the point that the differences between Native peoples have been largely made invisible. We see this active obliteration of difference when Donald Trump[9] testified to Congress, "they don't look like Indians to me, and they don't look like Indians to Indians." Trump was opposing the building of a casino that was competing with his own casino interests in non-Indian gaming; the implication is that the group is insufficiently culturally distinct from non-Indians to be considered Indian at all: a rhetorical trick using the category of "Indian" as its pawn. A few arbitrary and stereotypical associations with "Indian" become tethered to the term, which circulate broadly in mainstream society until "being Indian" requires fitting into a stereotypical conception, such as dressing in traditional ceremonial attire. It begs the question, "what does 'being Indian' look like?" In federal Indian policy, it looked like having parents who had literally been "counted" on the tribal rolls during Indian relocation across the country, a signifier of persons supposedly possessing sufficient "blood quantum."

Assimilationist policies that determined who counted as Indian based on "blood quantum" derived from parentage were an overt part of federal Indian policies until the Self-Determination Era, which included publication by Congress of formal application procedures for federal recognition in 1978.[10] Until this time, reservations and boarding schools were expressly intended to assimilate Native peoples into the cultural norms of white settlers, a genocidal logics intending to eradicate cultural differences. However, it cannot be stressed enough that dispossession of land *required* the disappearance of Native peoples because if no individual Tribal citizen whose ancestors were "first in time" occupants of the territory of the U.S. persist, then there can be no future property rights exercised.

Given extensive and long-standing federal efforts to assimilate Native peoples, the group right of self-determination was only recently recognized

9. While Mr. Trump was elected President of the U.S. in 2016, the fairness of the election is still widely contested.

10. *See* DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 158–59 (4th ed. 2018).

when President Nixon "called upon Congress to repudiate the termination policy and declared that Tribal self-determination would be the goal of his administration."[11] Tribal self-determination culminated in the legal precedent established in 1974 by *Morton v. Mancari* that still stands as good law for the legal principle that "Indian" is a political status and not a racial designation, reaffirming political sovereignty and self-determination.[12]

A. "Indian" Is a Political Status[13]

While *Morton v. Mancari* held that federally recognized tribes possessed a "unique political status" to which the U.S. owed an obligation, federal Indian policy is still interwoven with racist underpinnings of blood quantum that go back to allotment era policies.[14] *Mancari* was distinctive because it affirmed tribes as groups with a special political status unlike other sovereigns. Federal recognition of tribes' political legitimacy is independent of members' blood quantum percentage.

Mancari held that the Bureau of Indian Affairs policy giving members of federally recognized tribes preference for hiring and promotion was not discrimination based on race but a public policy promoting the U.S. trust obligation. "As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed."[15] While *Mancari* affirmed federally recognized tribes' special political status as sovereigns, inherent sovereignty has existed since time immemorial and certainly prior to the formation of the U.S. Tribes' inherent sovereignty to decide their own criteria for citizenship was more recently reaffirmed in *Santa Clara Pueblo*.[16]

In *Santa Clara Pueblo*, the Court held that the Indian Civil Rights Act,

11. WILKINS & STARK, *supra* note 10, at 159.

12. Morton v. Mancari, 417 U.S. 535, 537 (1974) (holding the Bureau of Indian Affairs policy giving members of federally recognized tribes preference for hiring and promotion was not discrimination based on race but a public policy promoting the U.S. trust obligation). More recently in *McGirt v. Oklahoma*, SCOTUS held that for purposes of the Major Crimes Act, land throughout much of eastern Oklahoma reserved for the Creek Nation since the 19th century remains a Native American territory. McGirt v. Oklahoma, 140 S. Ct. 2542 (2020). More importantly, the Court explained that when "asked whether the land these treaties promised remains an Indian reservation for purpose of federal criminal law," they responded that "[b]ecause Congress has not said otherwise, we hold the government to its word." *Id.* at 2459. That is, without abrogation by Congress, the U.S. trust obligation providing the rationale for *Mancari* would likely be reaffirmed based on the *McGirt* rationale.

13. Some ideas in this section were adapted from my unpublished dissertation proposal titled, "Indigenous Feminist Pedagogy Disorienting Whiteness as Disappearance in the Violence Against Women Reauthorization Act of 2013," defended November 1, 2018.

14. *Mancari*, 417 U.S. at 537.

15. *Id.*

16. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

25 United States Code § 1302, does not create a federal cause of action for declaratory and injunctive relief where tribal membership criteria is gender biased.[17] There, the female tribal member sought injunctive and declaratory relief for the disparate treatment she received under her tribe's gender-biased code.[18] However, the Court was unwilling to diminish tribal sovereignty by ruling on the substantive merits of the case and held it lacked subject matter jurisdiction for non-habeus corpus relief.[19] While this modern affirmation of inherent sovereignty deferred to the tribe to determine its membership, there is a long history of federal policy shaping tribe's membership criteria for its citizens.

The Indian Reorganization Act (IRA) of 1934 had encouraged tribes to adopt initial constitutions modeled on the U.S. constitution. Most tribes defined citizenship in part by adopting some level of blood quantum as they were compelled to align their constitutional construction with the IRA definition of "Indian" as follows:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are "…members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, *and* shall further include *all other persons of one-half or more Indian blood.*"[20]

That is, initial federal recognition of Tribal Nations under IRA included the use of blood quantum—a racist category—as part of recognition criteria. "Indian blood" is a legal fiction that essentializes Native peoples in the U.S. as somehow biologically distinct from non-Indians, but its true intent was to ensure that Indians disappeared over time. Subsequently, tribes used the IRA definition when memorializing their citizenship criteria in their IRA constitutions.[21] However, the original mandatory criteria published by Bureau of Indian Affairs (BIA) in 1978 for the tribal process of gaining federal recognition did not include blood quantum criteria as follows:

17. *Santa Clara Pueblo,* 436 U.S. at 49.

18. *Id.*

19. *Id.*

20. Indian Reorganization Act of 1934, Pub. L. No. 73–383, 48 Stat. 988 (codified at 25 U.S.C. § 5129 (2020)) (emphasis added).

21. Refer to the archive of constitutions collected in the appendix of MELISSA L. TATUM, MIRIAM JORGENSEN, MARY E. GUSS & SARAH DEER, STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS (2014), *available at* https://nnigovernance.arizona.edu/crc/action/full (last visited Oct. 17, 2020).

> [1] [I]dentification of the petitioners "from historical times until the present on a substantially continuous basis, as 'American Indian' or 'Aboriginal'" by the federal, state or local governments, scholars, or other Indian tribes; [2] the habitation of the tribe on land identified as Indian; [3] a functioning government that had authority over its members; [4] a constitution; [5] a roll of members *based on criteria acceptable to the secretary of the interior*; [6] not being a terminated tribe; and [7] members not belonging to other tribes.[22]

The political presumption was that in order for the member roll to be "based on criteria acceptable to the secretary of interior,"[23] the tribe's definition needed to include a blood quantum criterion. This implication is a remnant of allotment era assimilation policies.[24] But there is no explicit requirement of blood quantum for a tribe to become federally recognized, and this criterion is likely a suspect racial classification under equal protection case law. Because tribes generally used outlines of constitutions provided by the federal government, most tribes today still require some level of blood quantum for citizenship.[25]

It is particularly clear that after *Mancari*, SCOTUS affirmed the classification of Indian preference based on political status as constitutional.[26] The residue of racial bias tied to blood quantum remains

22. *See* WILKINS & STARK, *supra* note 10, at 24 (emphasis added).

23. It's also worth noting that many tribes' constitutions include a clause requiring Secretary of Interior approval to amend their constitution. Amendments to these constitutions to exclude this requirement would be a requisite first step to amending the citizenship criteria. See *Kerr-McGee Corp. v. Navajo Tribe*, where the Court affirmed that terms of IRA do not govern tribes such as the Navajo who declined to accept its provisions. 471 U.S. 195, 198–99 (1985).

24. While the recognition process was revised in 2015 to expedite the application and reduce costs, it remains substantially the same. *See* WILKINS & STARK, *supra* note 10, at 27.

25. Matthew Fletcher now suggests that it was a myth that tribes were handed complete constitutions and asked to adopt them, but instead were given outlines as guides. *See* Matthew Fletcher, *The Myth of the Model IRA Constitution?*, TURTLE TALK (Nov. 21, 2007), https://turtletalk.blog/2007/11/21/the-myth-of-the-model-ira-constitution/. Technically, federally recognized tribes are legal entities that may transact business directly with the federal government that were often comprised of disparate cultural groups in one location or geographically dislocated but genealogically connected for a myriad of political and military reasons. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03 (Nell Jessup Newton ed., 2017).

26. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011) (discussing how *Mancari* obfuscates the racialization and politicization of Indian tribes); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991) (discussing *Mancari*'s "political" approach for characterizing Indians for purposes of constitutional review under the Equal Protection clause). The differentiation between Indian as a sovereign group and as an individual is an important distinction as rights inure differentially, but is beyond the scope of

troublesome given that SCOTUS could strike down as unconstitutional any tribal laws discriminating on the basis of race using modern equal protection case law to challenge the very foundation of tribal citizenship if *Mancari* were to be overturned. That is, if tribal status is determined to be a racial classification because of blood quantum criteria for citizenship, then under the Indian Civil Rights Act (ICRA),[27] sovereignty of a tribe could be questioned as unlawful discrimination by SCOTUS. Further, because of the totalizing way in which "Indian" has been ascribed to all tribes, the perception of one tribe's citizenship status criteria being characterized as unlawfully racist would likely have implications for all federally recognized tribes. This risk is most apparent under the recent federal challenges of the ICWA cases.

Dismantling tribal governance and political status is certainly a worthwhile project for non-Indian gaming interests that are in direct economic competition with some tribes. Persons and businesses economically motivated to de-recognize tribes that compete with their own gaming interests have every incentive to declare citizenship criteria unlawful. In what follows, I will look at three actual categorical "misinterpretations"[28] of "Indian" that either potentially or actually created precarity for tribes as diminishment of sovereignty: Donald Trump's 1993 testimony to Congress,[29] the *Oliphant v. Suquamish*[30] case, and the *Adoptive Couple v. Baby Girl* case. These examples aim to impress upon the reader the urgency to eliminate blood quantum criteria to avoid the use of this strategy of dispossession through future misinterpretations of the classification "Indian."

this article.

27. *See generally* Indian Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–1304) (2020)). This legislation effectively provided all the rights enumerated in the bill of rights except for the establishment clause, the grand jury requirement, and quartering of troops. While ICRA requires indigent defense counsel be provided, the legislative scope does not include non-Indians in Indian Country.

28. I cautiously use the word "misinterpretations" here, as it is most likely that, rhetorically, the relevant interests in each of these cases is such that the deployment of "Indian" for achieving political or economic interests was done intentionally.

29. *Oversight Hearing Before the Subcomm. on Native Am. Affairs of the Comm. on Nat. Res.*, 103rd Cong., 1st Sess. 103–17, Part V, at 175 (1993) (statement of Donald Trump, Chairman and President, Trump Organization). *See also* Gillian Brockell, *'They don't look like Indians to me': Donald Trump on Native American casinos in 1993*, WASH. POST (July 1, 2016), https://www.washingtonpost.com/video/politics/they-dont-look-like-indians-to-me-donald-trump-on-native-american-casinos-in-1993/2016/07/01/20736038-3fd4-11e6-9e16-4cf01a41decb_video.html?noredirect=on&utm_term=.4901806d4df8.

30. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding tribes do not have criminal jurisdiction over non-Indians perpetrating crimes in Indian country).

B. Trump's Rhetorical Strategy to Assimilate Mashantucket Pequot Peoples for Economic Gain

When Trump testified to Congress in an attempt to create an urgent concern that reservation casinos were fostering organized crime, he treated "being Indian" as if it were a performative act. He said, "if you look at some of the reservations that you have approved—you, sir, in your great wisdom, have approved—I will tell you right now . . . *They don't look like Indians to me, and they don't look like Indians to Indians*."[31] Trump was referring to members of the Mashantucket Pequots tribe, a federally recognized tribe, whom he was accusing of conspiring with the mafia. This statement implies that one might be able to look at a person and determine their Indian status, which cannot possibly be based on the political status of Indians as members of sovereign nations. It implies the racist conception that Indians are only Indian if they appear to be persons of color, or that Indians must dress or act in culturally distinctive ways that mark them as outside of mainstream society, likely in ways that trope "being Indian" according to mainstream normative stereotypes. Trump implied that "Indian" status should be based on the performance of stereotypical "Indian-ness," which his speech indicated did not align in a persuasive way with the conception of "Indian." Arguably, however, Trump made this statement a rhetorical device, appealing to his audience's own stereotypes about "being Indian," to call into question the status of the Mashantucket Pequot Tribe for his own potential economic gain.

The Mashantucket Pequot Tribe has a reservation in Ledyard, Connecticut where the Foxwoods Resort and Casino, the largest casino in the world, is operated. In 1993, Trump had also begun investing in casinos in Atlantic City and Las Vegas which were in direct competition with the Tribe's. His testimony most likely intended to convince Congress to revoke federal recognition required for casino operations so as to eliminate casino interests that competed with his own.

The error Trump made when he testified to Congress was his treatment of "being Indian" as something other than a political status and more akin to an activity-based identity. James Gee differentiates between activity-based and relational identities in his book *Teaching, Learning, Literacy in our High-Risk High-Tech World*.[32] Most simply put, activity-based identities are

31. Statement of Donald Trump, *supra* note 29, at 242; Brockell, *supra* note 29, at 03:56–04:07. Ideas in this paragraph were adapted from the final unpublished paper for Professor Tsosie's Federal Indian Law course at James E. Rogers College of Law, "Disorienting the Violence of Whiteness as Disappearance: Activist Deborah Parker's Critical Race Testimony."

32. JAMES PAUL GEE, TEACHING, LEARNING, LITERACY IN OUR HIGH-RISK HIGH-TECH WORLD: A FRAMEWORK FOR BECOMING HUMAN 63 (2017).

discourse communities where someone can become fluent in its practices and then become recognized by others in terms of that identity, such as being a professor or a lawyer. When ways of being, speaking, acting, dressing, and performing are sufficiently and fluently demonstrated, others accept the person's normative performance as a member of the activity-based group. These identities are akin to "joining a club." In comparison, relational identities are ascribed by authorities in power to all members of a group and assign hierarchies within a system or institutional structure. Normative, relational identities are those that institutions of power tend to treat as "fixed," such as race and gender, for the purposes of widescale population management. In the case of being "Indian," group outsiders, here the U.S. government externally imposed this ascription to Native peoples.[33]

Trump's comment equivocates on relational (Indian as a political status) and activity-based (dressing and behaving like an Indian) identity categories for his own purposes, in hopes of persuading Congress that the Mashantucket Pequot Tribe should not be counted as "Indians" eligible for federal authorization under the Indian Gaming Regulatory Act of 1988.[34] Trump's rhetorical appeal nicely illustrates the difference between activity-based identities and relational identities.[35] Indian status as members of federally recognized tribes are relational identities based on political status; that is, the identity is imposed or assigned by other people and, primarily, by federal Indian law. Federal laws and policy refer to Native peoples in the U.S. as "Indian," and benefits conferred by the federal government depend on proof of inclusion in this relational category.[36]

33. Over 1,033 cultural groups in the U.S. are referred to as "Indian" (573 federally recognized tribes including Native Alaskans) where there are not necessarily any common characteristics across groups besides aboriginal occupancy of the Americas. Identities of Native peoples are more fundamental in their self-determined conceptions than either of these "outsider" conceptions.

34. Indian and Gaming Act of 1988, Pub. L. No. 100–497, 102 Stat. 2467 (codified at 25 U.S.C. § 2701 *et seq.* (2020)).

35. The point of contact between relational identities and activity-based identities is illuminated by Sara Ahmed in her article *A Phenomenology of Whiteness*. Where a person of color might perform "whiteness" by engaging in activities characterizing mainstream white culture, that does not eliminate or alter a relational identity such as race.
Sara Ahmed, *A Phenomenology of Whiteness*, 8 FEMINIST THEORY 149, 149–68 (2007). Ersula Ore provides the example of Bill Clinton "troping Blackness" as well as President Obama altering his speech for white audiences and Black audiences, as a rhetorical performance of race. Ersula Ore, *Whiteness as Racialized Space: Obama and the Rhetorical Constraints of Phenotypical Blackness*, *in* RHETORICS OF WHITENESS: POSTRACIAL HAUNTINGS IN POPULAR CULTURE, SOCIAL MEDIA, AND EDUCATION 256, 257 (Tammie M. Kennedy, Joyce Irene Middleton & Krista Ratcliffe eds., 2017).

36. While Alaskan Natives are also federally recognized tribes, their status is unique from American Indians in the other states. Native Hawaiians are not federally recognized, and their benefits also vary. While there are some similar benefits conferred to Alaskan Natives and

Here, the benefit of concern is the right of the Indian tribal government to run gaming operations on the reservation. The categorical identity of Indian[37] applies to all Native peoples who may have never referred to themselves as "Indians" outside of the legal parameters of federal Indian law or other references made by non-Indians and other outsiders to Tribal Nation communities. The label "Indian" functions within a hierarchical legal structure that has functioned both to bestow certain privileges to "Indians" who are also members of federally recognized tribes and to dispossess persons of property rights; that is, Indians *who count* as "Indians" count within the structural power of the U.S. government precisely because their property rights were once extinguished to ancestral homelands, creating Congress's "unique obligation" toward the Indian. To "count" or qualify as an Indian is to reproduce and remind the listener of the debt the U.S. owes to Native peoples; the extent to which Indians *may* no longer "count," is the extent to which that debt is forgotten or made invisible.

Trump intends to persuade Congress that the Mashantucket Pequot peoples no longer "count" as Indians. However, Trump's treatment of Indian identity as an activity-based identity, something more akin to being a casino owner or a lawyer, is a fallacious equivocation or category error. That is, one designated category is substituted for another within the rhetorical situation created by the speaker, while treating the equivocation *as if* it is valid. The identity "Indian" is not one that a person may one day decide to become by participating in group activities and acquiring the specific language, actions, attire, and mannerisms of being "Indian" such as one might do to become an accepted member of a social club with particular group norms.

By treating the concept "Indian," which is a political status, as if it were an activity-based and fluid concept, Trump intended to raise doubt in the minds of his audience that Mashantucket Pequot people should not count as "Indian" and be eligible to operate gaming facilities. The relational identity of Indian is not like joining a club or becoming a business partner with the federal government. Trump's rhetoric equivocates being "Indian" with being a member of a voluntary association or group, like a club that one might join and acquire the norms of dressing, acting, and speaking through practice in order to become a member. While one might expect Mr. Trump to utilize this kind of equivocation for his own potential gain, it is more surprising and disturbing to realize the Supreme Court of the United States deployed a similar strategy in *Oliphant*.

Native Hawaiians, they do not enjoy the identical protections of the political status of "Indian." The scope of this article is limited to focusing on the term "Indian" in federal law.

37. Here, there is no differentiation between "Indian" as used to connote individuals who are members of the Mashantucket Pequot tribe and the tribe as a political entity, which is a category error; Trump extrapolates here from the individual to the sovereign nation.

C. Rehnquist's Rhetorical Strategy Equivocating Individual Identity with Group Political Status

The Supreme Court of the United States (SCOTUS) opinion *Oliphant v. Suquamish*[38] discursively constructs individual non-Indian and "Indian"[39] identity in a way that further dispossesses tribes of sovereignty. Several justices, including Rehnquist, made fallacious equivocations on the term "Indian" similar to Trump's in *Oliphant*, which became clear during oral arguments; this artful turn of words had a devastating impact on tribal sovereignty because of its focus on a liberal view of "Indian" focusing on individual persons instead of tribes.[40] When *Oliphant* decided that tribes could no longer prosecute non-Indians, it represented the single most significant limitation on tribal sovereignty by SCOTUS since the Marshall trilogy[41] by virtue of limiting tribes' exercise of criminal jurisdiction[42] in Indian country. Arguably, this was an overreach of SCOTUS with regard to making new laws, which should be reserved for the legislative branch; also, plenary power over Indian affairs has generally been reserved for Congress.[43] In federal Indian policy, the judiciary traditionally has deferred to laws passed by Congress because of its understood plenary power over Indians; however, part of the *Oliphant* decision's rationale was that Congress never *intended* tribes to have jurisdiction over non-Indians given that the allotment era policies[44] aimed to assimilate Indians into white culture and eliminate

38. *Oliphant*, 435 U.S. 191 (1978).

39. While "Indian" is identity assigned by colonizing Europeans due to an error when encountering Indigenous peoples in what has become known as the Americas, I use it throughout this article because of its technical meaning in federal Indian law. It is racist and connotes an inaccurate rationale inscribed by colonization.

40. *Oliphant*, 435 U.S. at 191. Analysis of this oral argument was first produced for my final papers for Professor Tatum's LAW 550A & LAW 699 courses during Fall 2018 at James E. Rogers College of Law and gave rise to this article. For a complete critique of the flawed rationale of *Oliphant*, see Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 436 (1993).

41. Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

42. When considering criminal jurisdiction in Indian country, regulatory/legislative and adjudicatory/judicial jurisdiction collapse. Regulatory jurisdiction is the authority of a government to make laws and require persons in that territory follow them (how states operate in the U.S.). Adjudicatory jurisdiction is comprised of subject matter jurisdiction (states have general jurisdiction and can hear anything that is not a federal question) and personal jurisdiction (ability to require a party to appear in court).

43. *See* U.S. CONST. art. III (establishing ceiling of judicial power of review of executive and legislative branches); *see also* Marbury v. Madison, 5 U.S. 137, 153 (1803) (solidifying the power of judicial review of the U.S. Supreme Court).

44. *See* General Allotment (Dawes) Act of 1887, Pub. L. No. 49–105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–333) (repealed 2000).

Indian country entirely. SCOTUS relied on this interpretation of the Allotment Act, in part, to justify changing tribes' legal authorization to prosecute non-Indians.

Oliphant is one of the most notorious federal Indian law cases ever decided, known not just for its bold enactment by "legislators in robes" diminishing tribes' political sovereignty through limiting tribal jurisdiction to prosecute non-Indians but also for its lack of application of the canons of construction and principles of federal Indian law. The *Oliphant* case consolidated two lower-court Ninth Circuit appeals cases. The first non-Indian defendant, Mark David Oliphant, was charged with assaulting a Suquamish tribal officer during the tribe's Chief Seattle Days; the second non-Indian defendant, Daniel B. Belgarde was charged with "'recklessly endangering another person' and injuring tribal property" after running into a police car following a high-speed chase.[45] Both defendants petitioned the Supreme Court with writs of habeas corpus after the District court and Ninth Circuit Court of Appeals affirmed the tribe's jurisdiction over the matters (Belgarde's Ninth Circuit appeal was pending when certiorari was granted).

The main issue addressed by the court as a question of first impression was whether tribal courts have criminal jurisdiction over non-Indians.[46] SCOTUS held that tribal courts do not have jurisdiction over non-Indians based on the rationale that the tribes' power over non-Indians was abrogated when tribes became "domestic dependent nations" under the authority of the U.S.[47] The decision further asserted that unless the authority to prosecute non-Indians was expressly delegated by Congress, it did not exist. However, this novel interpretation of long-standing legal precedence arising originally from the Marshall Trilogy redefined sovereignty of all tribes in the modern era.

The SCOTUS primarily looked at two factors as rationale justifying its holding as follows: (1) the tribal requirements under the ICRA right to counsel varies from constitutional requirements; and (2) tribes have different laws not known by non-members. Reliance on both factors is problematic for a multitude of reasons. First, the Sixth Amendment right to counsel is triggered for state sovereigns when a felony occurs, jail time may be imposed, or the accused qualifies as "indigent" and cannot pay for their own representation; however, ICRA limits tribal sentencing to less than one year and a fine of no more than $5,000. In effect, these sentencing limitations

45. *Oliphant*, 98 U.S. at 194.

46. *Id*. at 195.

47. *See* Cherokee Nation v. Georgia, 30 U.S. at 17–18. The SCOTUS does not specify by what act sovereignty was abrogated except that upon submission to the sovereignty of the U.S., tribes gave up full sovereignty. "Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States." *Oliphant*, 435 U.S. at 211.

limit the ability to punish persons who have committed felony-level crimes that would customarily exceed these sentencing provisions. Therefore, tribes generally look to the federal government to punish felony crimes committed by Indians, non-Indians, and non-members so that the sentencing is appropriately matched to the crime.

In consideration of both the right to counsel and the lack of familiarity with tribal laws presumes a framework of the U.S. legal system where the model of restitution[48] and the long-standing practice of tribal justice systems were not legible at all to SCOTUS where it did not resemble the U.S. "formal court system."[49] Sadly, what tribes lacked was not a fully developed legal system but a politically legible way to translate their practices to SCOTUS, politically persuasive translations of these legal systems that exercised their inherent sovereignty by ensuring the health, safety, and welfare of its own citizens and residents. Tatum explains how this breakdown of rights discourses at the intersections of legal cultures is a "desire on the part of the dominant legal culture 'to exercise sovereign agency as mastery over meaning.'"[50] That desire of the SCOTUS is precisely what was at play in *Oliphant*, which is made abundantly clear during the oral arguments: the Supreme Court had decided tribal legal systems could not be fair to non-Indians and fallaciously equivocated on the meaning of "Indian" to justify this conclusion.

During oral arguments, Attorney Ernstoff explained to Justice Stewart that constitutional rights do not exist *per se* under the jurisdiction of the Suquamish Indian Tribe for non-Indians; it is at this point that Rehnquist interrupts his explanation to make clear that is his concern. Rehnquist says, "Well, if you['re a member] [. . .] of [a] moose l[odge] and a grand moose [locks you] [. . .] up in a men's room overnight you are not being deprive[d] of any constitutional right, are you?"[51] Raising this question implied Justice Rehnquist's conflation of the Suquamish Tribe government with a voluntary association, which is not subject to the affirmative protection requirements of the bill of rights as a state actor would be under substantive due process protections under the Fourteenth Amendment. In *Oliphant,* the import of Rehnquist's assertion is that the non-Indian defendant would not enjoy equal protection rights if the tribe, qua voluntary association, had been allowed to

48. *Oliphant*, 435 U.S. at 197.

49. *Id*.

50. Tatum, *supra* note 1, at 374–75.

51. Oral Argument at 48:40–48:49, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), https://apps.oyez.org/player/#/burger6/oral_argument_audio/15885 [hereinafter *Oliphant Oral Arguments*]. This statement is a pretty clear reference to the opinion Justice Rehnquist also wrote in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that the state's regulation of a liquor license did not qualify as state action where issued to a discriminatory Moose Lodge unwilling to serve African Americans).

prosecute his crimes. However, ICRA required these protections, which required tribes to uphold most of the same constitutional rights required of states via the reverse incorporation of the Fifth Amendment due process requirements by the Fourteenth Amendment,[52] and some tribes had long-standing practices mirroring the rights in the Bill of Rights.[53]

Justice Rehnquist's equivocation on the meaning of Indian status with a voluntary association reduces tribal sovereignty to a liberal ideal of electing to associate with other persons, based on a presumption that society is comprised of autonomous liberal subjects that then opt to associate with others.[54] Rehnquist conveniently ignores the protections of ICRA, legislated by Congress. This assertion by a SCOTUS justice reduces tribal sovereignty existing since time immemorial, built on a long history of culture, traditions, and family, to the voluntary choice to associate with a group of unrelated persons. At the heart of this equivocation is his presumption of the liberal subject devoid of any citizenship status, which misses the key element of the status "Indian": being a citizen of a sovereign government, a political status.

A private association for the most part represents the fraternization of white, middle class citizens who of their own volition decide to include certain persons and exclude others;[55] this analogy to tribes is false and fails to understand the unique political status of tribes and their inherent sovereignty as nations existing since time immemorial, relegated to "domestic-dependent nations" by federal Indian law and assigned this political status as group relational identities. Meanwhile, the *Oliphant* holding elevates protecting the sovereignty of the non-Indian individual.[56] Liberalism was reaffirmed, over the sovereignty of a Tribal Nation; inherent sovereignty of a group collective disaffirmed. Justice Rehnquist justifies this dispossession of sovereignty through expressing concerns about the non-

52. Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that state actor schools discriminating on the basis of race was a violation of due process clause of Fifth Amendment and applied to states through enactment of the Fourteenth Amendment).

53. For example, Pascua Yaqui cultural practices have included the right of having a person speak on a defendant's behalf since time immemorial.

54. April L. Cherry explains that Locke's liberalism asserts that "[m]en in the state of nature have the absolute freedom to control their property and their persons as they see fit within the bounds of the law of nature." Liberalism fails to account for structural inequalities reproduced by the very relational identities established within a hierarchical system of economic power. April L. Cherry, *Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right*, 75 OR. L. REV. 1037, 1052 (1996).

55. The right to include or exclude, as fundamental features of property law, is always wrapped up in the ways in which property rights have been accessible primarily to persons considered "white," not persons of color. *See* Harris, *supra* note 2.

56. Arguably, this prioritization of the rights of white non-Indians also reaffirms whiteness as property bolstered by a legal system built upon white supremacy and the implicit and pervasive valuation of property rights over civil rights.

Indian individual's liberty. Doing so juxtaposes the categorical identity of "Indian" as a group political status with the liberty interest of non-Indian U.S. citizens; this equivocation teases out a core inability of constitutional law to adequately address sovereignty possessed by Tribal Nations.

The underlying concern of SCOTUS in the *Oliphant* case was that non-Indians might not receive the same due process rights required under ICRA. Prior to *Oliphant*, tribes had the authority to prosecute Indians and non-Indians, applying ICRA requirements to both political classifications of persons. However, Rehnquist's equivocation on "Indian" in Oliphant changed tribes' authority to prosecute non-Indians. Through analogizing with a voluntary association, Rehnquist implied that a tribe is no more than a private party not required to ensure due process for a non-Indian perpetrator; by implication, his statement denies the sovereignty of the Suquamish Tribe as a sovereign government in order to dispossess all tribes of the right to criminally prosecute non-Indians.

Rehnquist makes this point most forcefully during oral arguments when he responds to Attorney Farr's assertion that inherent sovereignty had persisted despite colonization:

> Do you think that was changed at all by the first sentence of the First Amendment – of all the Fourteenth Amendment that reads "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside?"[57]

Upon denial, Rehnquist asks again, "You think that there is no negative implication of *ruling out other sovereignties than the United States or the State* in that?"[58] Here, Rehnquist is asserting that the Fourteenth Amendment somehow abrogated the inherent sovereignty of tribes, leaving only the federal and state governments; however, there is no evidence to support this claim because if it were true, ICRA would not have been necessary. In fact, the very existence of ICRA is proof that limiting tribal sovereignty requires Congress's exercise of plenary power.[59] Rehnquist's prior 1972 decision in the *Moose Lodge No. 107 v. Irvis* case, referenced by his comparison of the Suquamish tribe to a moose lodge, sheds light on his assumptions about tribal

57. *See Oliphant Oral Arguments*, *supra* note 51 at 1:15:07–1:15:23.

58. *Id.* at 1:15:25–1:15:34 (emphasis added).

59. *See also* the Tribal Law and Order Act of 2010, which increased the sentencing authority to 3 years and $15,000 of tribes who opted in by assuring additional civil rights protections (sentencing could be stacked for up to three charges). Tribes opting in to TLOA must provide the right to counsel to defendants, the right to indigent counsel paid for by the tribe and assure that attorneys and judges are licensed in some jurisdiction. TLOA also requires recording court proceedings. 25 U.S.C. 1302(a)(7)(C) (2010).

sovereignty.[60]

In *Moose Lodge*, Justice Rehnquist reaffirmed that private acts of racist discrimination could not be regulated by the rights enumerated in the constitution and reversely incorporated under the Fourteenth Amendment. The Court held, in part, that operation of the liquor law regulations enforced by the Moose Lodge did not implicate the government under the state action doctrine to establish a basis of an equal protection claim under the Fourteenth Amendment, explaining how "[i]t conducts all of its activities in a building that is owned by it. It is not publicly funded."[61] This holding makes clear that SCOTUS protects the liberty interests of private individuals to both associate or exclude as long as doing so occurs on private property.[62]

Unlike *Shelley v. Kraemer*,[63] where the government refused to be implicated in reproducing racism by virtue of a court judgment that would enforce racially restrictive covenants excluding African Americans, the Moose Lodge private club operating in a private building was insulated from being held accountable for its racist refusal to serve alcohol to African Americans, despite the state having issued the liquor license. In *Moose Lodge*, the rights of association as a private exercise of individual liberty were given more weight than the concern of the government's implication in racist discrimination by not including an anti-discrimination provision in its liquor licensing statutes; here, the *de facto* impact was that African Americans were not served alcohol in any clubs because full license quotas precluded alternative clubs being started to serve them.[64] *Moose Lodge* parses out the range of what SCOTUS will permit with regard to perceived racist actions by government actors: regulations not containing non-discrimination provisions cannot implicate governments despite subsequent actions relating to those regulations creating disparate racial impact. Otherwise strict scrutiny could be triggered whenever disparate race impact

60. *See Oliphant Oral Arguments*, *supra* note 51, at 48:40–48:49 (referencing *Moose Lodge*); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 163 (1972).

61. *Moose Lodge*, 407 U.S. at 171.

62. The Court makes no attempt to address one of the central critiques in Cheryl Harris's article *Whiteness as Property*, which recognizes that property rights have not been protected for African Americans or Native Americans. *Moose Lodge*, 407 U.S. at 171. Protecting the right to discriminate in this way is particularly problematic where U.S. history of dispossession of labor and property has occurred disproportionately for persons of color. The import of this legal rule is that if you are white, you may exclude and have your liberty reaffirmed to do so. Harris, *supra* note 2, at 1718.

63. The legal rule here is that action prohibited by the Fourteenth Amendment must be tied to state actors, and "the Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

64. *Moose Lodge*, 407 U.S. at 163. Both access to licenses and the right of private associations to exclude should be viewed as overlapping layers of white privilege, bolstering the exclusion of African Americans in this case.

occurred where a government action was implicated somewhere in the causal chain.[65] This case is one of the first to lessen the potential impact of equal protection remedies through deference to private enterprises; Rehnquist's pattern of deference to states' sovereignty under the Tenth Amendment of the Constitution also is implied here.[66] However, the larger import of *Moose Lodge* and *Oliphant*, in light of the history of the dispossession of property rights for persons of color, is that the racist liberty interest of the freedom (encompassing the idea of individual liberty and sovereignty) to exercise power over a person of color by a private entity is permissible, while a tribe's authority to exercise power over a non-Indian creates fear of potential rights violations that SCOTUS prohibits at the expense of Tribal Nations' sovereignty. The real difference here is property rights because non-Indian associations possess the rights to include or exclude persons from their property, but sovereign nations may not include persons entering their territory; SCOTUS was not preserving civil rights of non-Indians, but reaffirming the reproduction of whiteness as property *qua* Indians do not possess the same rights to include or exclude.

The fact that Rehnquist was willing to analogize the facts in *Oliphant* to a voluntary association that had performed racially discriminatory acts demonstrates his willingness to deploy fallacious equivocations to achieve his desired end of limiting tribal sovereignty, while expanding the liberty interest of non-Indians. Doing so is an exercise of what Harris refers to as "whiteness as property." Indigenous, Tribal Nations in the U.S. are the only sovereigns in the world that do not possess territorial sovereignty over their lands because of Rehnquist's white supremacist equivocation. Where a tribal government is constrained by its own laws, traditions, culture, as well as ICRA, it is not analogous to a racist Moose Lodge. However, the fact that he deployed such a persuasive tactic to inspire fear in his fellow justices that tribal governments *could* act in discriminatory ways when prosecuting non-Indians was sufficient to change the course of tribal criminal jurisdiction, and perhaps one of the greatest ironies in constitutional jurisprudence.

Had Rehnquist been capable of being attuned to his own white privilege and how that assured him and persons like him access to private associations conducting events on private property, perhaps he could have attempted to step outside of his narrow worldview to consider that Native peoples in the U.S. had retained inherent sovereignty limited historically only by means of forceful oppression and dispossession of their sacred homelands. Private property and the affirmation of those rights looks very different through the lens that examines white privilege as affording a kind of property interest that

65. This analysis is based in part upon Professor Toni Massaro's lecture in Equal Protection at the James E. Rogers College of Law, Spring 2019.

66. *Id.*

assured different liberties than enjoyed by persons of color. However, using this lens, it becomes apparent how unjust it is for Rehnquist to equivocate on "Indian" with a voluntary association. This fallacious equivocation relegated tribal sovereignty after *Oliphant* to a conceptual category of membership.[67]

D. *Adoptive Couple v. Baby Girl*: Can an Indian Child with Near Zero Blood Quantum Be Indian?

Oliphant shifted the Supreme Court's basis for treating Tribal Nations as territory-based sovereigns with jurisdiction over any person on the reservation towards a more limited, membership-based, sovereignty. In her article *Group Identity: Changing the Outsider's Perspective*,[68] Melissa Tatum differentiates between how the legal system shifted in the 1980's towards treating "Indian nations as membership-based groups; groups with authority only over their own members, as opposed to a territorial-based authority."[69] *Oliphant* represented the beginning of the erosion of tribes' exercise of criminal jurisdiction over non-members, which is illustrated by Rehnquist's comparison of tribes to a moose lodge, a legal entity entirely untethered by equal protection laws because of SCOTUS's liberal framing of the Fourteenth Amendment by the early 1970's. Rehnquist's liberalism worldview conceptualizes tribes as forming an association of autonomous individuals, a group structure *legally distinct* from a sovereign nation and one that undermines rich cultural conceptualizations of tribal self-determination that would result in different SCOTUS rulings.

This shift is an initial strategy for dispossessing tribes of their political status because authority based on territory combined with inherent sovereignty since time immemorial persists regardless of the population of a tribe's membership. Alternatively, if tribal authority is derived from its population of members, then the tribe's political status will wax or wane depending on the population of members and not on tribally owned land. This ideological shift only makes sense through the lens of whiteness as

67. 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). The *Oliphant* case symbolizes a significant shift by SCOTUS of viewing tribal sovereignty in terms of membership instead of the usual way of sovereigns possessing authority over all lands within their territories. While citizens of tribes are more than mere "members" of an associated group, SCOTUS diminished the meaning of citizenship in this case.

68. Melissa L. Tatum, *Group Identity: Changing the Outsider's Perspective*, 10 GEO. MASON U. C.R. L.J. 357, 382 (2008).

69. *Id.* Tatum's discussion of this shift includes the scholarship of Allison Dussias who makes clear how SCOTUS has increasingly embraced membership as the basis for sovereignty where "tribes have authority over tribal members on the reservation because they are members of a political entity, the tribe." Dussias, *supra* note 67, at 79.

property, the longstanding legal process of not recognizing property rights for African Americans and Native peoples in the U.S.

Where some tribes have increased their economic capacity through gaming revenues and purchased additional land, their jurisdiction would have been proportionally expanded as they increased their land base because all persons entering their territory would be subject to their criminal jurisdiction[70] under a pre-*Oliphant* rationale. However, if tribes are only allowed jurisdiction over their members (and for now, all Indians), their authority cannot be expanded regardless of any increased land base unless they increase membership. Thereby, the otherwise sovereign power that tribes could otherwise exercise over all persons entering their territory is comparatively reduced. The power of civil and criminal jurisdiction that sovereigns generally have over all persons in their territory is *in effect* diminished. This impact on Tribal Nations in the U.S. is a reproduction of the genocidal logics underpinning whiteness as property because it limits the customary property rights enjoyed by all other sovereigns in the world. That is, sovereigns have jurisdiction over all persons entering their territory.

This shift towards individual membership primarily defining tribal sovereignty culminates in the recent decision in *Adoptive Couple v. Baby Girl*, an opinion in which blood quantum as a qualifier for membership is emphasized.[71] *Adoptive Couple* held that the ICWA[72] did not apply where

70. Unlike state sovereigns where jurisdiction is territory-based, different tests are applied for tribal civil and criminal jurisdiction based on land status as well as individual identity. Tribes generally may regulate Indian lands but not lands within the reservation boundaries that are vested as other than tribal trust lands, tribally owned fee lands, trust or restricted allotments, or member-owned fee lands. See the "Modern Series" of federal Indian law cases: *Oliphant*, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313, 319 (1978) (citing the "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government") (internal citations omitted); Duro v. Reina, 495 U.S. 676 (1990) (holding that no tribal government held criminal jurisdiction over non-member Indians) (superseded by "Duro Fix" legislation restoring jurisdiction over all Indians, 25 U.S.C. § 1301(2) (2020)); United States v. Lara, 541 U.S. 193 (2004) (holding that Congress has constitutional power to relax restrictions imposed on the exercise of a tribe's inherent legal authority); Montana v. United States, 450 U.S. 544 (1981) (holding that Tribal Nations can control fishing and hunting only on Indian Lands); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding that under the *Montana* test, the tribal court lacked subject matter jurisdiction over non-members where occurrence happened on non-Indian land easement along highway and rebuttable exceptions do not apply); Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts may not assert jurisdiction over civil claims against state officials entering tribal land to execute warrants on members suspected of violating state law outside reservation).

71. *See generally* Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (holding that the biological Indian father of Baby Girl was not entitled to parental rights where he had never had custody of the child).

72. Indian Child Welfare Act of 1978, Pub. L. No. 96–608, 92 Stat. 3096 (codified at 25 U.S.C. §§ 1901–1963).

the Indian parent supposedly never had custody of the child because the primary legislative intent was to prevent unwarranted removal of Indian children and dissolution of Indian families, which were not implicated in this case.[73] As summarized in the syllabus, the Court held that,

> The phrase "continued custody" thus refers to custody that a parent already has (or at least had at some point in the past). As a result, §1912(f) does not apply where the Indian parent *never* had custody of the Indian child. This reading comports with the statutory text, which demonstrates that the ICWA was designed primarily to counteract the unwarranted *removal* of Indian children from Indian families.[74]

However, ICWA explicitly recognizes the intent "to promote the best interests of Indian children and to promote the stability and security of Indian tribes and families."[75] Baby Veronica's birth family was a Hispanic mother and a Cherokee father, which was the relationship that qualified her as an Indian child. Due to poor communication with the birth mother, the father unwittingly relinquished his parental rights via text message and almost immediately rescinded his decision after realizing he had relinquished his rights to an adoptive couple; however, the mother had authorized the child's adoption at birth. Not only was the father's custody a factual impossibility where he had been deployed to Iraq, but the South Carolina court's inadequate notice to the Cherokee Nation using the wrong father's name had likely violated the Nation's due process rights by failing to give proper notice of termination of parental rights; there is also some question as to whether the father consented to the initial documentation relinquishing his parental rights where he misunderstood he was relinquishing his rights to the birth mother.[76] Not only was ICWA construed too narrowly, a racialized basis of tribal sovereignty was reaffirmed by this holding despite *Morton v. Mancari* still remaining good law and affirming that "Indian" is a political status.[77]

In *Adoptive Couple*, SCOTUS expressed clear concern that tribal membership would confer additional rights upon the father. Further, certain SCOTUS justices expressed hesitation to consider the child's "Indianness"

73. *Adoptive Couple*, 570 U.S. at 638. It is a strange twist of legal fiction here that the father had custody of baby Veronica from the age of 27 months until the end of the review of the case by SCOTUS. While SCOTUS as a matter of procedure may not consider facts outside of the legal record, it's clear that both the father and his parents had a significant relationship with baby Veronica that should have counted as an "Indian family."

74. *Id.*

75. *See* WILKINS & STARK, *supra* note 10, at 1.

76. *Adoptive Couple*, 570 U.S. at 644–45.

77. *Mancari*, 417 U.S. at 537.

where baby Veronica's blood quantum was nearly zero; this case demonstrates how the racist underpinnings of early assimilationist policies still haunt tribes' ability to exercise sovereignty even over their members. These recent misunderstandings of Indian identity are increasingly worrisome with a current Supreme Court composition that is more conservative than the composition during the *Oliphant* or *Adoptive Couple* decisions.[78]

Congress drafted ICWA[79] to counter the hundreds of years of stealing Indian children from tribes and placing them in homes of white families or boarding schools; ICWA intended "to promote the best interests of Indian children and to promote the stability and security of Indian tribes and families."[80] The practice of stealing Indian children had been an intentional part of federal policy since the allotment era beginning with the General Allotment Act of 1887[81] that aimed to culturally assimilate and amalgamate Native peoples in the U.S. into mainstream white society. ICWA took specific steps to prohibit the removal of Indian children to non-Indian homes in support of cultural sovereignty and self-determination, which the holding in *Adoptive Couple* undermined.

Upon review by the SCOTUS, the issue was whether the legislative bar on involuntary termination of parental rights in the absence of serious harm to the Indian child will result in violation of parent's rights to continued custody. The justices ultimately decided in a 5:4 vote that the father had *never had custody* as defined under ICWA despite custody of 27 months during the SCOTUS case. Sotomayor dissented by asserting the majority opinion was, "manifestly contrary to Congress' express purpose in enacting ICWA: preserving the familial bonds between Indian parents and their children and, more broadly, Indian tribes' relationships with their own future

78. During the *Oliphant* case, SCOTUS was comprised of Justices William Rehnquist, Byron White, Harry Blackmun, Thurgood Marshall, Potter Stewart, John Paul Stevens, Lewis Powell, and Warren Burger (6:2). During the *Adoptive Couple* case, SCOTUS was comprised of Justices John Roberts, Anthony Kennedy, Clarence Thomas, Stephen Breyer, Samuel Alito, Antonin Scalia, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan (5:4). With the addition of Neil Gorsuch and Brett Kavanaugh upon Scalia's and Kennedy's departures, the composition became slightly more "neo-liberal." Both justices are conservative, though somewhat unpredictable as to their holdings on certain issues. Gorsuch's recent commitment to uphold the promise made to the Muskogee Creek Nation (and thereby, all "Indians") in the *McGirt* decision provides some hope that federal trust obligations will continue to be honored and *Mancari* upheld. *McGirt*, 140 S. Ct. 2542. It remains to be seen what impact Justice Ginsburg's replacement will have on SCOTUS's approach to Indian law cases.

79. 25 U.S.C. §§ 1901–1963.

80. *See* WILKINS & STARK, *supra* note 10, at 1.

81. General Allotment (Dawes) Act of 1887, Pub. L. No. 49–105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–333) (repealed 2000).

citizens who are 'vital to [their] continued existence and integrity.'"[82] The dissent makes clear the decision does not align with the intent of ICWA.

During the oral arguments, the underlying concerns about Indian identity became clearer. Justice Alito begins the written opinion by referencing the blood quantum of Baby Girl: "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."[83] However, this focus upon blood quantum, a racist classification that would likely prompt strict scrutiny under equal protection case law, is not how the identity classification of "Indian" is described in the controlling decision of *Morton v. Mancari*.[84] *Mancari* distinguished that hiring preference for Indians in the Bureau of Indian Affairs was a preference based on a unique political status, members of federally recognized tribes.[85] Insofar as tribal membership is based on political status, it should *not* be construed as a racialized basis as SCOTUS clearly did in *Adoptive Couple.* Baby Girl is Indian by virtue of being eligible for membership in the Cherokee Nation because of her biological parent's membership; her status is derived from her relationship status with a tribal member, not her race. Similarly, U.S. naturalization policy is based upon derivative relationships between parents and children, spouses, and siblings. However, several attorneys deceptively framed the legal issue in terms of race instead of political status, to which the majority of justices were amenable.

Counsel Blatt, attorney for Adoptive Couple, set the stage for erroneously tying constitutional concerns to Indian racial status by highlighting the potential import of disqualifying a non-Indian adoptive couple. "Second, it would raise grave constitutional concerns. I mean, just look at (a)(3) on the other Indian families if Congress presumptively presumed that a non-Indian parent was unfit to raise any child with any amount of Indian blood."[86] Here, Counsel Blatt focuses on blood quantum that would be an unconstitutional basis for determining parental rights under the Equal Protection Clause of the Fifth Amendment, but this reading of the facts legally misrepresents the dispositive issue – citizenship or eligibility for citizenship in a federally recognized tribe. This covert equivocation on the meaning of "Indian child" is a rhetorical move to persuade the Court that certain provisions of ICWA, if construed to exclude on a racialized basis would invalidate those provisions as unconstitutional. However, it homogenizes differences between Tribal Nations with regard to blood

82. *Adoptive Couple*, 570 U.S. at 691–92 (Sotomayor, J., dissenting).

83. *Id.* at 641.

84. *Mancari*, 417 U.S. at 535.

85. *Id.*

86. Oral Argument at 12:44–13:00, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), https://www.oyez.org/cases/2012/12-399 [hereinafter *Oral Argument in Adoptive Couple*] (argument by Att'y Blatt for Adoptive Couple).

quantum as a qualifier for membership; interestingly, the Cherokee Nation does not require minimum blood quantum for enrollment as a citizen.

Attorney Clement, who argued the case as Guardian ad Litem in support of Adoptive Couple, also asserted race, citing concerns expressed about the statute's discriminatory basis along race lines:

> And that's what makes this child an Indian child here, *it's biology*, it's biology combined with the fact that the tribe, *based on a racial classification*, thinks that somebody with . . . 1 percent Indian blood is enough to make them a tribal . . . member, eligible for tribal membership. And as a result of that, her whole world changes and this whole inquiry changes.
>
> It goes from an inquiry focused on her best interests and it changes to a focus on the birth father and whether or not beyond a reasonable doubt there is a clear and present danger.[87]

Attorney Clement's omission of the *Mancari* basis of membership as political status is unconscionable where the Cherokee Nation clearly does not base membership on blood quantum but lineal ancestry. The Cherokee Constitution enumerates that:

> All citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants.[88]

Attorney Clement's oral argument focuses solely on membership construed as determined by the degree of "Indian blood" passed between tribal member parents and their biological children. However, biology is not determinative for the Cherokee Nation, which did not include blood quantum criteria when it became a federally recognized tribe under the Dawes Act of 1887[89] and recognizes citizens who are lineal descendants of any person listed on the Dawes rolls.[90] This kinship basis has no reliance on the racial fiction of blood quantum, and the authority to self-define membership is

87. *Oral Argument in Adoptive Couple*, *supra* note 86 at 26:44–27:20 (argument by Att'y Clement, Guardian ad Litem in support of Adoptive Couple) (emphasis added).

88. CHEROKEE NATION CONST. art. IV, § 1.

89. General Allotment (Dawes) Act of 1887, Pub. L. No. 49–105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–333) (repealed 2000).

90. *See Frequently Asked Questions*, CHEROKEE NATION, https://www.cherokee.org/about-the-nation/frequently-asked-questions/common-questions/ (last visited Oct. 14, 2020).

derived from tribes' inherent sovereignty as nations; that is, the federal government does not have the authority to define membership based on blood quantum and ICWA defines "Indian child" as a child eligible for membership and a biological child of a member.[91]

It becomes clear in the oral arguments that Justice Roberts both believes that blood quantum is determinative for Cherokee citizenship, and that the prospect that a child with a "near zero" blood quantum is considered Indian is problematic when he asks,

> If – if you had a tribe, is there at all a threshold before you can call, under the statute, a child an "Indian child"? 3/256ths?
>
> And what if the tribe – what if you had a tribe with a *zero percent blood requirement*; they're open for, you know, people who want to apply, who think culturally they're a Cherokee or – or any number of fundamentally accepted conversions. I mean, is it – is – would that child be considered an Indian child, so a father who had renounced any interest in her until he found out about the adoption would have all these rights?"[92]

This line of questioning is problematic because it implies that insufficient blood quantum might mean that a tribe's "Indian" political status is not justified, overturning *Mancari*. At this point during oral arguments, Justice Ginsburg clarifies the meaning of "Indian Child" and explains that "[a]n Indian child is someone who is either a member of a tribe or eligible, and is the biological child of a member of an Indian tribe."[93] This clarification prompts an emotional response from Justice Breyer, who then says,

> But that is a problem.
>
> Because, look, I mean, as it appears in this case is *he had three Cherokee ancestors at the time of George Washington's father.*

91. Barbara Atwood's analysis in her article, *Flashpoints Under the Indian Child Welfare Act*, "attempts to maintain a skepticism about the grand narratives that underlie the Act itself, a wariness about categories that essentialize persons on the basis of group membership, and an approach to identity that recognizes its fluid, dynamic, and highly contextual character." Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 598 (2002). Atwood attempts to articulate a postmodern perspective of identity through her use of Jean-Francois Lyotard, who she describes as "envision[ing] a society in which diverse value systems coexist, not as hermetically sealed structures but as dynamic and interactive fluid processes." *Id.* at 601. This movement away from fixed concepts of identity is critical for more just legal systems.

92. *Oral Argument in Adoptive Couple*, *supra* note 86, at 35:53–36:25 (statement of Roberts, C.J) (emphasis added).

93. *Id.* at 36:50–37:00 (statement of Ginsburg, J.).

> All right?
>
> Now, you say, oh, well, that's a different issue.
>
> But *I don't see how to decide that case without thinking about this issue*, because if your view is taken and *you accept that definition*, a woman who is a rape victim who has never seen the father could, would, in fact, be at risk under this statute that the child would be taken and given to the father who has never seen it and probably just got out of prison, all right?
>
> And you don't know that this beyond reasonable doubt standard would satisfy that. Now, that's obviously something I find disturbing, as a person and also as a judge, *because we're trying to interpret the statute to avoid results that would be very far out, at least*.
>
> And – and that's what I want you to tell me.
>
> How do I prevent that kind of risk through an interpretation of the statute?[94]

Justice Breyer is concerned that a male rapist who counts as Indian, but is not a "real" Indian because of a nearly zero blood quantum, might have paternal rights under ICWA. However, his hyperbolic fears are irrational and seething with racist overtures linked to being Indian. Justice Breyer's presumption that blood quantum is determinative for membership in the Cherokee Nation, or that it should be, illustrates his ignorance that tribal membership is a political status.

It is equally worrisome when Justice Roberts implies that rights allocated because of a presumed sufficient Indian blood quantum of near zero are particularly problematic. He asks, "I mean, that's – that's the question in terms to me, that if you have a definition, is it one drop of blood that triggers all these extraordinary rights?"[95] The irony here, of course, is that African Americans were dispossessed of status under Jim Crow laws based on one drop of blood, which made them "colored." Under the Virginia Racial Integrity laws, an Indian ancestor sufficiently distant in lineage might have meant that descendants were no longer "colored."[96] Justice Roberts'

94. *Oral Argument in Adoptive Couple*, *supra* note 86, at 37:49–38:55 (statement of Breyer, J.) (emphasis added).

95. *Id.* at 40:12–40:20 (statement of Roberts, C.J.).

96. Under laws such as the Virginia Racial Integrity Act, which were not overturned until 1967, persons were either "white" or "colored," which meant that one drop of Indian blood classified persons as colored and not white. *See* Richard B. Sherman, *"The Last Stand": The Fight for Racial Integrity in Virginia in the 1920s*, 54 J. S. HIST. 69 (1988). Persons classified as "colored" could not enjoy the same privileges as whites in the segregated South. This strategy prior to 1934 preceded the reaffirmation of tribes' self-determination under IRA. An exception called the "Pocahontas Exception" was made for grandchildren with 1/16th or less

emphasis on one drop of blood reaffirms this genocidal logic: one drop of blood as an Indian should make you white, not Indian.[97] This question makes clear Justice Breyer's concern about tying the power of these "extraordinary rights" to Indian status, precisely because Indians have been historically excluded from institutional power since "discovery" or "occupation" of the Americas. However, the *Mancari* decision clearly asserted that rights established by Congress to fulfill the U.S. obligation towards Indians would not be disturbed.[98] Here, the right to raise one's own children or for a sovereign nation to retain decision making authority over its own citizens being viewed as an "extraordinary right" makes sense only through this lens of racism that attaches the category of dependency to the category of Indian. This permissive assimilation where blood quantum is insufficient to count as Indian coincides throughout the implicit practices of whiteness as property in the U.S. because to become white meant the disappearance of Tribal citizen property rights that one might otherwise possess, not the attachment of so-called "extraordinary rights!"

Justices Breyer's and Roberts' assiduous focus upon blood quantum illustrates the court's refusal to acknowledge the cultural and political sovereignty of tribes. Implicit in these racist admissions is the refusal to recognize Tribal Nations as nations possessing inherent sovereignty, with the rights implicit in ensuring its own posterity through retaining its own citizen children as the foundation for building strong communities and nations. This opinion further denies the inherent sovereignty of tribes that would assure their sovereignty over all individuals located within its territorial boundaries. After this case, SCOTUS shifted towards acknowledging sovereignty as an association of membership, which diminishes the inherent sovereignty that tribes have enjoyed since time immemorial.

Indian blood. *See* Virginia Racial Integrity Act, discussed at length in Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 352 (2007); An Act to Preserve Racial Integrity, ch. 371, §5099a, 1924 Va. Acts 534 (repealed 1975).

97. Assignment of a "mixed blood" person to a category of persons relationally subordinated in a white supremacist system is referred to as "hypodescent." *See* Marvin Harris, *Patterns of Race in the Americas*, 67 AM. ANTHROPOLOGIST 796 (1965). Hypodescent for African Americans persisted because of the legal liability of dispossessed labor, a persisting debt owed by the U.S. for the labor that was stolen to construct the economic foundation of the U.S. To acknowledge whiteness is also to bestow access to property rights to which persons of color have historically lacked access; whiteness as a property interest itself was made clear in Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that "one drop of blood" was sufficient for Mr. Plessy to be deemed "colored" and dispossessed of the otherwise available property interests available via his perceived whiteness). This tactic was reversed for Indigenous peoples, which J. Kēhaulani Kauanui calls "*hyper*decent," assimilating them into white society for the sake of perfecting property dispossession. *See infra* note 129, at 14–15.

98. *Mancari*, 417 U.S. at 537.

E. Precarity of Equal Protection Clause for Indian Political Status – Excluding Blood Quantum from Membership Criteria

Recent scholarship has examined the precarity of Indian political status resulting from an inaccurate interpretation of federal Indian law precedent surrounding tribal sovereignty. The judiciary persists in questioning tribal sovereignty because of equal protection concerns, despite tribes' inherent sovereignty persisting since time immemorial. This shift since *Oliphant* towards a membership-focused view of tribal sovereignty, instead of recognition of inherent sovereignty, captures the current precarity posed for federally recognized tribes.

In her article titled, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, Allison M. Dussias explains how this shift has impacted the SCOTUS view of tribal sovereignty.[99] The Cherokee cases,[100] decided shortly after the country's founding, clearly established any Indian tribe's authority over all individuals and activities within its geographic territory. However, later SCOTUS cases narrowed the recognition of tribe's inherent authority over individuals as limited depending on the identity of the individual.[101]

The holding of *Oliphant v. Suquamish* uniquely shifted prior SCOTUS precedent. In an artful trick of rhetoric, the opinion asserted that federally recognized tribes had come under the territorial jurisdiction of the United States, *as if* Europeans had not emigrated to the territory of what later became the U.S.![102] This invention was entirely the creation of the Court, *ex nihilo,*

99. *See* Dussias, *supra* note 67.

100. Dussias refers specifically to the Cherokee cases of the Marshall Trilogy, three SCOTUS cases written by John Marshall that establish the original parameters of Federal Indian Law in the U.S.: Johnson v. M'Intosh*,* 21 U.S 543, 584, 587 (1823) (holding that tribes were not "civilized," which precluded the recognition of Indian fee simple title ownership by the U.S.; Britain had fee simple title under the Doctrine of Discovery, so all lands owned by Britain transferred to U.S. after revolutionary war); Cherokee Nation v. Georgia, 30 U.S. 1, 16, 31 (1831) (where the Cherokee Nation injunction to stop Georgia's laws from being imposed on its territory was denied because Cherokee nation is a state and not a foreign nation, thus, SCOTUS has no jurisdiction over the dispute between two states); Worcester v. Georgia*.*, 31 U.S. 515, 540 (1832) (holding that Georgia judgment was void, interfering forcibly with relations between U.S. and Cherokee Nation where Georgia had attempted to enforce its law imposing fines for whites on the Cherokee Nation). Collectively, these opinions establish the trust relationship between the U.S. government and tribes as one giving tribes the right to exclude persons from their aboriginal lands (occupancy rights only under Discovery Doctrine proclaiming "uncivilized" people could not own land in fee); established tribes as sovereign wards of the U.S., as "Domestic Dependent Nations"; and recognized the lack of authority by states over tribes*.*

101. *See* Dussias, *supra* note 67, at 4.

102. *Id.* at 29. While this language represents a significant shift, the limitations imposed were specific to criminal jurisdiction. Civil jurisdiction in Indian Country remained primarily

the same Court that had previously recognized treaties with sovereign Indian nations and recognized Indian Country land within the U.S. as governed by these sovereign Tribal Nations; this rhetorical trick had a legal breadth with significant implications for limiting tribal sovereignty. In this one opinion, tribal sovereignty was well on its way to being treated as based on membership-based criteria, which made tribal inherent sovereignty less visible, though not extinguished.

The *Adoptive Couple* opinion is the culmination of the work of dispossessing tribes of unlimited territorial jurisdiction over tribal lands by way of acknowledging Baby Girl's Indian status only in terms of blood quantum. Once this shift is well-established, as *Adoptive Couple* illustrated, the risk of further erosion of tribal sovereignty based upon membership-based conceptions of sovereignty increased. However, the federal government has offered no single, accepted definition of Indian, "which can only complicate the resolution of jurisdictional disputes in which federal statutes or the Supreme Court have made Indian identity determinative."[103] Ultimately, connecting blood quantum as a qualifier for determining membership provides further rationale for the conservative members of the Court to attempt to entirely dispossess tribes of their special political status. However, as Abi Fain and Mary Kathryn Nagle succinctly highlight, Congress first required the use of blood quantum for tribal membership during allotment era policies as a mechanism of dispossessing Indians of remaining lands.[104]

As Fain and Nagle explain, the allotment acts "took more than tribal lands: they took the inherent right of Tribal Nations to define their own requirements for citizenship."[105] This diminishment became most apparent under the Dawes Commission, which was authorized to determine who counted as a citizen of a Tribal Nation "for any, and all purposes, not just allotment."[106] The Dawes Act and the Commission it created constituted a legal authority that defined the parameters of who could be counted as Indian according to the rolls of individual names created. This power to constitute who would be Indian or not culminated in the Curtis Act, which effectively limited tribes' power to determine membership beyond the scope of the membership rolls.[107]

territory based.

103. *See* Dussias, *supra* note 67, at 84.

104. Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-*Adoptive Couple *Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 823–25, 833 (2017).

105. *Id.* at 833.

106. *Id.* at 834.

107. *Id.* It might be argued that the Dawes Act represented the rhetorical shift towards the language of membership, versus citizenship for Tribal Nations.

The same year as the Curtis Act, the Secretary of the Interior implemented the policy of determining competency of Indians allotted lands based almost exclusively on the amount of "blood quantum" the Indian "possessed."[108] The Commission of Indian Affairs explicitly expressed this intent, explaining that "[t]he Tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted."[109] This statement very clearly articulates the liberal tradition underlying assimilation policy arising in the common law under John Locke's theory of accession[110] and played out in Indian policy since the founding of the U.S. Only Indian landowners who added labor, and thereby, value to the land owned by cultivating and farming it were "competent." More fundamentally, individual labor added value to property in order to perfect an ownership interest to the allottee.

Collective labor could not add value to property under this liberalism framework, as individual allotments were made *only* to Indians who left the reservation. This allotment process and the determination of "competency" covertly equivocated on its meaning because *qua* "Indians," the U.S. government had a fiduciary duty that relegated Indians to a dependent ward status, making Indians presumptively "incompetent." That fiduciary duty disappeared when an Indian was deemed competent through assimilation into white cultural norms by improving land owned, qua individual U.S. citizenship and not as a citizen of a Tribal Nation. That is, by adopting the norms of white culture, it was not only that the Indian individual became competent, they became white.[111] This specific "competency" policy was another intentional maneuver for the government to assimilate citizens of Tribal Nations into white liberal society, including granting citizenship along with the lifting of restrictions on allotted lands.

The lesser the blood quantum, the more "competent" the Indian allottee was likely to be deemed; racist norms of whiteness, cultivation of land as a highly valued societal "good," and individual property ownership as the foundation of liberal ideology overlapped. That is, the less Indian blood a person possessed, the more likely persons were to be deemed competent; this circular logic, where incompetence was the premise presumed by the very

108. Fain & Nagle, *supra* note 104, at 839.

109. *Id.* at 840 (quoting Thomas J. Morgan, *Statement on Indian Policy*, *reprinted in* AMERICANIZING THE AMERICAN INDIANS 75 (Francis Paul Prucha ed., 1973)).

110. According to the law of accession, when the labor of one's person adds value to property of another, it establishes an ownership claim. This utilitarian orientation undergirds all property law and prioritizes individual rights over group rights. John Locke's theories arose during the Enlightenment Era of Western European philosophy; these ideologies continue to shape most of the ethical orientation of the common law in the U.S. today. *See*, *e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 14 (9th ed. 2017).

111. *See* KAUANUI, *infra* note 129, at 89-90.

policy resulting in dispossession of lands, was a rhetorical strategy reproducing whiteness as property as explained by Harris. While masked as transferring ownership to "competent" individual Indians, the impact of allotment was the erosion of the collective political power of tribes through dispossessing Tribal Nations of most of their lands. "That is, the erasure of tribal citizenship coincided with the loss of Indian-owned lands."[112] The territory of Tribal Nations was collectively diminished; less territory meant there was less area over which tribes could exercise tribal jurisdiction. However, despite the reduction of Indian lands during allotment, Tribal Nations retained criminal jurisdiction over all persons in its territory until the modern era of SCOTUS federal Indian law cases.[113]

However, as long as tribal citizens exist, Tribal Nations cannot be broken up entirely. The persistence of tribes past the allotment era provided the U.S. government with additional incentives in addition to land coveted by whites to dispossess tribal membership through blood quantum requirements.[114] The impact of dispossession via the tool of blood quantum persists today in the ICWA cases.

Although SCOTUS reaffirmed inherent sovereignty of Indian tribes in *Morton v. Mancari* and *Santa Clara Pueblo v. Martinez*, there have been several other equal protection challenges based upon blood quantum since *Adoptive Couple*. Fain and Nagle explain that,

> The Supreme Court's "near zero" blood quantum/ancestry dicta in *Adoptive Couple* likewise contradicts the Court's conclusion in *Morton v. Mancari*, in which the Court held that following Congress's departure from the Allotment Acts' reliance on a threshold amount of blood quantum to define citizenship, post-1934, "Indian" under federal law signifies citizenship in a Tribal Nation and is therefore *a political, and not a racial, classification*. And the Supreme Court's suggestion that it could impose a minimum blood quantum requirement to define Cherokee Nation citizenship directly contradicts the Court's affirmance in *Santa Clara Pueblo v. Martinez* of the inherent right of Tribal Nations to define their own citizenship.[115]

These new blood quantum bases for equal protection claims are unfounded.[116] Two key cases were brought more recently by the National

112. Fain & Nagle, *supra* note 104, at 839.
113. *See* Dussias, *supra* note 67.
114. *See* Fain & Nagle, *supra* note 104, at 840.
115. *Id.* at 869 (emphasis added).
116. "And yet, despite this jurisprudential dissonance, because of Adoptive Couple's

Council for Adoption (NCA) on May 27, 2015 and Goldwater institute on July 6, 2015 in federal district courts, Eastern District of Virginia and District of Arizona respectively.[117] While both claims failed, it was not because their equal protection arguments were rejected. In the NCA lawsuit, *National Council for Adoption v. Jewell*, the complaint "attempts to revise the 'Indian child' definition in ICWA by conflating Indian ancestry with tribal membership."[118] Similarly, in *A.D. v. Washburn*,

> [T]he Goldwater Institute's action attempts to insert the words "Indian ancestor" or "ancestry" into ICWA's "Indian child" definition. A plain reading of the statute – as well as an understanding of the evolution of "Indian" under federal law – reveals that the Goldwater Institute's insertion of "Indian ancestor" is nothing more than an attempt to create a racial classification where none exists.[119]

While this case was dismissed for a lack of standing, it is worrisome that well-funded, conservative organizations continue to challenge the constitutionality of Tribal Nation membership using equal protection grounds. While ICWA remains good law, there continue to be challenges based on equal protection.

Most recently the *Brackeen v. Bernhardt* case made its way up through the federal courts to the Fifth Circuit, and the Court reaffirmed that "Indian" classification is a political status, subject to rational basis review.[120] The Court comprehensively denied the facial constitutional challenges raised. According to the Native American Rights Fund (NARF) and National Indian Child Welfare Association (NICWA), the Court made two key points, "[1] ICWA is 'related to tribal self-government and the survival of tribes'. . . and [2] it held that Congress's Indian affairs power is not limited to Indian Country, but instead extends to 'Indians and Indian tribes on and off the reservation.'"[121] The first assertion clearly reaffirms the inherent sovereignty

blood quantum/ancestry dicta, agencies that work to place Indian children in non-Indian homes are leading the way in bringing race-based constitutional challenges to ICWA's 'Indian child' classification." Fain & Nagle, *supra* note 104, at 869.

117. For a thorough analysis, see Fain & Nagle, *supra* note 104, at 870–79.

118. Fain & Nagle, *supra* note 104, at 870.

119. *Id.* at 873.

120. Brackeen v. Bernhardt, 937 F.3d 406, 416 (5th Cir. 2019). According to the Native American Rights Fund, the Fifth Circuit agreed to rehear this case *en banc* the week of January 20, 2020; oral arguments were heard by the 16-judge panel on January 22, 2020. The opinion has not yet been published; however, a decision overturning the three-panel Fifth Circuit decision would likely be at odds with the recent *McGirt* decision affirming the U.S. government's fiduciary obligation to Tribal Nations. *See McGirt*, 140 S. Ct. 2542.

121. *Brackeen v. Bernhardt Case Summary*, NAT'L INDIAN CHILD WELFARE ASS'N (Oct.

of tribes. The latter point articulates that Congress's plenary power over Indian affairs extends to Indians and tribes regardless of their presence on tribal lands. The *Brackeen* decision is important because of its recognition of the inherent sovereignty of federally recognized tribes; its reassertion of Congress's plenary power is also critical because it insulates SCOTUS's practice in *Oliphant* and *Adoptive Couple* of legislating from the bench. As Fain and Nagle have so eloquently stated,

> At the turn of the twentieth century, Congress was the branch of the federal government that attempted to impose minimum blood quantum requirements to extinguish Tribal Nations and their citizens. Today, it is the Supreme Court. Congress, of course, ultimately dismissed the imposition of a federally mandated minimum blood quantum to define eligibility for tribal citizenship. . . . [T]he current blood quantum-based challenges to ICWA trace their origins to an American policy wrongfully designed to eradicate Tribal Nations and their citizens.[122]

While the *Brackeen* decision confirms tribes' inherent sovereignty to define their own citizenship for now, the persistence of blood quantum as an arguably racialized basis for membership would still leave most Tribal Nations vulnerable to continued scrutiny given the current conservative composition of SCOTUS. If the current Court grants certiorari for a future ICWA case based on equal protection claims, it's highly likely that a ruling could assert that Tribal Nations with membership criteria based on blood quantum are facially unconstitutional. Any such ruling could have significant negative consequences for tribes. When the rhetorical strategies of SCOTUS are examined through the lens of whiteness as property, this reproduction of a new variety of Tribal Nation dispossession by creating precarity surrounding tribal sovereignty becomes clearer.

III. SAFETY IN NUMBERS AND REAFFIRMING INHERENT SOVEREIGNTY: SELF-DETERMINED MEMBERSHIP WITHOUT BLOOD QUANTUM

While the Indian Reorganization Act intended to restore tribes' power to self-define their own citizenship, a large number of tribes created constitutions in a very short time. The federal government provided boilerplate constitutions to expedite the process for tribes to adopt

17, 2019), https://www.nicwa.org/wp-content/uploads/2019/10/2019-10-17-Brackeen-v-Bernhardt-Case-Summary-Final.pdf (quoting *Brackeen*, 937 F.3d at 427, n.9).

122. Fain & Nagle, *supra* note 104, at 880.

constitutions that would likely be approved by the Secretary of the Interior; however, many of these constitutions did not fit tribal customs or traditions. During the self-determination era of the 1970's, many tribes revised these constitutions to better match their customs and traditions. However, most constitutions still include blood quantum provisions and require approval by the Secretary of the Interior to make any amendments to them. Both elements limit tribes' sovereignty to self-determine citizenship because blood quantum needlessly narrows tribes' ability to self-determine who their citizens will be independent of historical residues of allotment policies and make tribes dependent on the secretary of the interior's approval for constitutional amendments. Further, blood quantum was an intentional tactic by the federal government to eliminate the existence of "Indian" as a special status along with its associated legal rights; to retain blood quantum is to help perpetuate this "disappearance" because it's improbable that citizens of tribes will only have children with citizens of their same tribe, especially given the proximity of most of Indian Country to non-Indian communities.

A. Tribal Nation Constitutions: Inherent Sovereignty as Self-Determination of Citizens

Constitutions comprise the fundamental law of a nation and are outward expressions of the principles governing the relationships between the government and the people.[123] Constitutions may be oral or written, despite the bias of the common law tradition that they be written. A constitution is itself the foundation for a government to act with authority over the people comprising the nation. There are usually four elements included in every constitution: 1) Preamble expressing identity of the nation; 2) articulation of who qualifies as a citizen; 3) characterization of the relationship between the government and citizens; and 4) expression of who exercises power (e.g., three branches of government share power). Articulation of who qualifies as a citizen has become a critical component of tribal sovereignty because of how it shapes power limited by the U.S. government; particularly, blood quantum persists as a strategic tool of dispossession that plays out under the genocidal logics of whiteness as property.

According to Russell Thornton at the National Research Council Committee on Population,[124] some tribes after IRA elected to include blood quantum criteria for citizenship; however, the general trend has been towards

123. This overview was adapted from a lecture: Professor Melissa Tatum, James E. Rogers College of Law, Native American Law and Policy (Fall 2018).

124. Russell Thornton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans*, *in* CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH (Gary Sandefur et al. eds., 1996).

eliminating it. Based on his survey of 302 tribes, Thornton found that approximately 204 of Tribal Nations surveyed still included blood quantum to qualify for citizenship, 98 tribes did not. While some tribes may hesitate to eliminate blood quantum from their constitutions by virtue of it being a long-standing requirement, the recent treatment by SCOTUS of blood quantum as a potential equal protection violation may offer sufficient reason to eliminate it from their enrollment qualifications.

B. Blood Quantum Requirements of American Indian Tribes by Reservation Basis and Size

Blood Quantum Requirement:	**More than ¼**	**¼ or Less**	**No Minimum Requirement**
Number of tribes	21	183	98
Reservation based	85.7%	83.1%	63.9%
Median size	1022	1096	1185
Chart adapted from Thornton's Table 5-1.[125]			

To avoid further threats of dispossession to tribal sovereignty by the current SCOTUS, federally recognized tribes might consider making constitutional amendments, if their constitutions contain racialized membership criteria like blood quantum. Doing so would both insulate tribal governments from equal protection claims as well as diminish the colonizing influence of liberal ideologies of federal Indian law; since the writing of the Constitution, SCOTUS has often contradicted long-standing legal principles with regard to "Indians" when it suited the political climate of the time. Considering that "[a]fter more than a century of defining 'Indian' based on citizenship in a Tribal Nation. . .the United States federal government, for the first time, altered the legal definition of 'Indian' to be contingent upon a minimum amount of blood quantum" during the allotment era, ideological decolonization requires elimination of blood quantum criteria.[126] *Oliphant* and, more recently, the ICWA cases have revived the threat of blood quantum as determining Indian status and threatening to further limit tribal sovereignty. The return of the conservative members of SCOTUS to fixation upon blood quantum in the *Adoptive Couple* case is indicative of a revival of questioning the inherent sovereignty of Tribal Nations.

While the way in which the *Oliphant* court "flipped the script" to create

125. Thornton, *supra* note 124, at 107.
126. Fain & Nagle, *supra* note 104, at 840–41.

ex nihilo federal Indian law precedence limiting recognition of territorial sovereignty over tribal lands was a further act of colonizing Tribal Nations, federally recognized tribes can elect to remove blood quantum from their constitutions to begin further distancing themselves from the tradition of liberalism as well as prioritize self-identified and culturally specific criteria. This exercise of sovereignty intersects with the ways in which the federal government treats "Indians" as a political group and the translation of those group rights to individuals. By exercising this inherent sovereignty to self-determine citizenship, Tribal Nations reaffirm the very sovereignty that otherwise is contested by SCOTUS.

Furthermore, by ensuring that tribal constitutions embody culturally appropriate citizenship criteria based on their nation's spiritual practices, ways of being and knowing, cultural sovereignty is reaffirmed. Amended criteria would be less likely to be subject to strict scrutiny by the SCOTUS. In addition, it's likely that doing so will help tribes to better align their cultural beliefs with citizenship criteria, a potentially decolonizing change that could reclaim tribes' views of whom should be included in their own tribal communities.

The Cherokee Nation did not include blood quantum criteria when it became a federally recognized tribe under the Dawes Act of 1887[127] and recognizes citizens who are lineal descendants of any person listed on the Dawes rolls.[128] Whereas most tribes included some percentage of blood quantum requirement because of its inclusion in the IRA, tribes already federally recognized possess the authority to revise their constitutions subject to approval by the BIA. Tribal councils and members should assess the impact this kind of change could have on the day-to-day government operations and include mitigation planning processes. However, through the act of asserting sovereignty with regard to how citizenship may be defined, tribes can further reaffirm their political and cultural sovereignty. The group right of self-determination must govern the autonomy of all U.S. Tribal Nations to determine their membership *qua* citizenship as fundamental to their inherent sovereignty.

IV. CONCLUSION

Whether or not inclusion of a blood quantum requirement could jeopardize future sovereignty is a pressing concern that may warrant reconsideration of these outdated forms of internalized colonization imposed

127. General Allotment (Dawes) Act of 1887, Pub. L. No. 49–105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–333) (repealed 2000).

128. *Frequently Asked Questions*, CHEROKEE NATION, https://www.cherokee.org/all-services/tribal-registration/frequently-asked-questions/ (last visited Oct. 14, 2020).

by the U.S. government during the General Allotment Act era. While Native Hawaiians are unique in their classification outside the boundaries of "Indian" because they are not federally recognized, J. Kēhaulani Kauanui draws upon her cultural traditions to propose a persuasive alternative to blood quantum criteria in *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity*.[129] Kauanui suggests a reversion to kinship relationships is appropriate, explaining the Hawaiian view that "genealogies frequently serve as a device intended to *aid in cultural memory*. They are metaphorical in that they are both allegorical and symbolic, but they are also literal since Hawaiian kinship is based on a system of common descent."[130] Kauanui's kinship basis serves as an example of a decolonizing method that might redefine identity on terms that arise from within the cultural group, setting aside colonizing and genocidal logics intending only to assimilate, obliterate Native peoples' traditions, and homogenize difference into one normative, fictionalized U.S. citizen. U.S. Tribal Nations might, instead, build upon their cultural sovereignty to redefine citizenship in ways reaffirming and expanding both cultural and political sovereignty through self-determination. The political status of federally recognized tribes possesses a privilege that affords them the opportunity to decolonize their citizenship criteria to exclude blood quantum and redefine communities based on current kinship beliefs. Doing so can disrupt the historical reproduction of whiteness as property, genocidal logics disaffirming the sovereign right to include and exclude for Native peoples. The approximately 98 federally recognized tribes that do not utilize blood quantum in their constitutions today are insulated from these genocidal logics of SCOTUS if they were to continue along the path demonstrated in the ICWA cases.

129. J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (2008).

130. *Id.* at 38 (emphasis added).