Recognition

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The passage of the Indian Gaming Regulatory Act (IGRA) in 1988 served as a catalyst for renewed political opposition to Native sovereignty movements throughout the United States.[1] Integral to this opposition has been the use of reverse racism arguments to challenge laws recognizing Native rights to sovereignty and self-determination. The opposition has been articulated through numerous coalitions including church and neighborhood groups, non-profit citizen and property rights organizations, state representatives, gaming industry executives, and political lobbyists. While these different groups and individuals have unique political agendas, interests, and objectives, on the question of Native rights they have shared an argument that treaty and federal Indian law provide Native peoples with unfair economic opportunities, means and access to lands, and tax loopholes solely on the basis of race. Reflecting anti-civil rights perspectives, and often paralleling anti-affirmative action efforts, their specific objective is the repeal of these laws. As the Citizens for Equal Rights Alliance/ Citizens for Equal Rights Foundation's website asserts, "Federal Indian policy is unaccountable, destructive, racist and unconstitutional. It is therefore CERA and CERF's mission to ensure 'the equal protection of the law' so that this nation of many cultures may be one people living under one constitutional system of laws."[2]

Drawing from Native legal and critical race studies, this article examines the discourse of reverse racism constituting anti-Native sovereignty movements in the post-IGRA moment of U.S. politics. It pays attention to how the movements have gained momentum through calls for the repeal of treaty and federal

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Indian laws on the grounds that they provide racially discriminatory resources, services, benefits, and advantages to Native peoples. It argues that the racialization[3] of Native peoples as both "special interest groups" and as ethnic minorities undermines their unique legal status under U.S. and international law as "indigenous peoples." The article hopes to provide a forum for thinking through oppositional strategies needed to reaffirm and reassert Native rights to sovereignty and self-determination.

I. Legal Foundations

The Constitution of Recognition

Informed by international law regarding the rights of "indigenous peoples" to self-government and territorial integrity, the United States Constitution, which was ratified in 1791, recognized that "Indian tribes" had a unique legal status and commensurate rights as "sovereigns."[4] Article 1, Section 8 stipulated that Congress had the power to regulate commerce—that is, was required to maintain a direct relationship—with Indian tribes for the purposes of negotiating the terms of trade, jurisdiction, territorial rights, military alliances, and passage. It inferred that this relationship could not be interfered with by states or foreign nations. Article 1, Section 2 acknowledged the separation of tribal governments and their citizens from the United States.[5] Given that tribes were without representation in Congress, they were also recognized to be exempt from taxation by Congress.

Equally important, the Constitution provided that treaties were to be regarded, along with the Constitution and Congressional legislation, as the "supreme Law of the Land" that demanded respect by "Judges in every State." Through the ratification of 371 treaties with tribes from 1778 to 1871, the United States Congress affirmed the status of tribes as sovereigns and obligated U.S. courts to adhere to the terms of the treaties.[6]

The U.S. Constitution established the legal foundations for what is now known as federal recognition policy. Recognition refers to that body of law that has acknowledged that Indian tribes possess certain rights based on and emanating from their unique legal status as tribes. These rights have been enumerated in treaties, Congressional legislation, and Supreme Court rulings to establish a guarantee by the United States of a direct tribal-federal relationship, non-interference by states and foreign nations in matters of tribal self-government and territorial integrity, and tribal exemption from federal and state taxation. Following the early nineteenth-century Supreme Court decisions known as the Marshall Trilogy,[7] the obligation of the United States to guarantee and protect these rights has been known as the trust responsibility.[8]

The Bureau of Indian Affairs (BIA) is charged with administering the terms of this responsibility to "Indian tribes" and "Alaskan Native villages"[9] (herein tribes).[10] The responsibility, as defined in treaties and federal law, includes the protection of tribal rights to self government, the management of tribal lands

and assets, and the provision of particular services, programs, and funds to aid tribes in economic development, government operations, and cultural preservation.[11] Those specific tribes with whom the United States has acknowledged a trust responsibility are said to be recognized. Currently, there are 561 tribes with federal recognition status.[12]

However, an estimated one-third of the tribes within the United States are without federal recognition status.[13] Some of the reasons why tribes are unrecognized include the fact that they have never signed a treaty with the United States, that treaties that they had signed have never been ratified by Congress, or that they have lost appeals for recognition to Congress, the Supreme Court, or the BIA (the specific mechanisms by which recognition is said to be established).[14] Moreover, about 110 tribes lost recognition under House Concurrent Resolution (HCR) 108, known as the Termination Act, of 1953, including sixty-two tribes in Oregon, the Flathead Tribe of Montana, the Menominee Tribe of Wisconsin, the Potowatami Tribes of Kansas and Nebraska, the Ponca Tribe of Indians of Oklahoma, and the Turtle Mountain Chippewa Tribe of North Dakota.[15] (Forty-one tribes in California were terminated under a related state law passed in 1958.) These acts dissolved tribal governments by unilateral cession of their relations with the BIA. They also liquidated all tribal assets and reservation lands for per capita distribution. Terminated tribes have to appeal directly to Congress for reinstatement. According to the General Accounting Office (GAO), as of October 2001, only 37 of the 110 terminated tribes have had their status restored by Congress.

In 1978, the BIA established regulations for granting recognition to tribes who had never been recognized. Administered by the Branch of Acknowledgement and Research (BAR), the Federal Acknowledgement Program (FAP) determines the eligibility of tribes for recognition on the basis of seven criteria, including that the tribe is identified by reliable external sources as a continuous entity since 1900; has maintained itself as a distinct, historically continuous community; has maintained political authority over its members from "historic times until the present"; has a governing document describing its operations and membership criteria; and that current members are descendants of a historic or amalgamated tribe that has functioned as an autonomous political unit.[16] Despite FAP changes in 1994, 1997, and 2000, FAP's requirements have been unevenly applied. While decisions have been made quickly for some tribes, recognition applications for others have had to wait for several years only to be denied recognition without an explanation as to what would be required to succeed upon appeal.[17]

In 1994, Congress enacted the Federally Recognized Indian Tribe List Act, which requires that the BIA "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (since amended to include Alaskan Natives and Native Hawaiians). The act stipulates that tribes may be recognized by an act of Congress, follow-

ing FAP administrative procedures, or by a decision of a United States court. Recognized tribes are placed on a BIA list that is "used by various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States." These services include housing and business loans, health care funding through the Indian Health Service, and education grants. Inclusion on the list also requires federal consultation with tribal representatives on the development and implementation of policies and programs that affect tribes. Included among these are conservation projects managed by United States Fish and Wildlife Services, management of an emergencies with the Federal Emergency Management Agency (FEMA), programs of the Federal Highway Administration, and the National Parks Service's oversight responsibilities for the Native American Graves Protection and Repatriation Act of 1990. In the development of policy, programs, and their implementation, Executive Order (EO) #13175 requires federal agencies to consult with tribes who are included on the BIA's list of recognized tribes. Accordingly, tribes who lose their recognition by Congressional act or court decision are to be removed from the list, and so are removed from all services and consultation procedures required by the law.

As a result of inconsistencies in the determination and application of federal recognition policies, hundreds of Native groups within the United States are without legal standing as tribes. In California alone, the state with the largest population of Native peoples in the United States, this involves about 50 of the state's approximately 150 tribes. Unrecognized tribes and their members do not qualify for any of the services, benefits, protections, or exemptions provided to recognized tribes. This prevents them from being able to claim legal rights of access to lands (territories, resources, sacred sites), means to economic development (business loans), funding for cultural retention programs (education, language, repatriation), social services (health care, day care, housing), and political participation in the multiple forums within the United States where policies affecting Native peoples are developed.

Recognition by Gaming

During the 1970s and 1980s, tribal gaming facilities on reservation lands led to an increasing number of legal conflicts between tribes and states.[18] These conflicts focused on questions about the extent of state jurisdiction over tribal lands,[19] but in a broader sense they were really about the scope of tribal sovereignty in relationship to states. If a state did not permit gambling, could tribes, as sovereigns, ignore state law and establish gaming facilities if they desired? In both *Seminole Tribe of Florida v. Butterworth* (1981),[20] and *California v. Cabazon Band of Mission Indians* (1987),[21] the U.S. Fifth Circuit Court of Appeals and the U.S. Supreme Court said that they could.

In response to state concerns about tribal gaming, and tribal concerns over maintaining jurisdiction over reservation lands, Congress enacted IGRA. IGRA

mandates that states enter into "good faith" negotiations with tribes interested in opening high-stakes gaming facilities.[22] Generally, the resulting agreements, or compacts, allow tribes to establish gaming facilities under existing or amended state law, provided that the tribes pay a percentage of their annual profits to the state to compensate infrastructure costs. IGRA also strictly regulates how tribes can spend gaming revenue. Moneys must be used to fund tribal government operations and programs, provide for the general welfare of the tribe and its members, promote tribal economic development, donate to charitable organizations, or help fund operations of local government agencies. Tribes can pay per capita amounts to enrolled members, provided that the tribe has prepared a plan to allocate the revenue, the plan is approved by the Secretary of the Interior, and the interests of minors are protected and payments are disbursed to parents or legal guardians. To monitor compliance, IGRA established the National Indian Gaming Commission (NIGC).[23]

Initially, controversies over IGRA were dominated by players in the gaming industry. Since 1988, tribal gaming economies have grown to almost $19 billion annually. Anti-gaming efforts have likewise grown to include a much more diverse range of constituencies. Despite that diversity, anti-gaming movements have shared an appeal to "reverse racism" arguments that racialize Natives as "special interest groups" and/or disadvantaged ethnic minorities out to "play the race card" in order to "take advantage" of "unfair" federal laws enabling them to practically monopolize economic opportunities in gaming.

For instance, in California in 1999, Governor Gray Davis signed 61 gaming compacts. Under these agreements, which expire in 2020, tribes can operate facilities with up to a total of 2,000 slot machines. In 2000, Proposition 1A, the Indian Self-Reliance Act, amended the state's constitution to allow for other Class III operations by Indian tribes. The act also created the Revenue Sharing Trust Fund, which is administered by the California Gambling Control Commission. Tribes with more than 350 slot machines pay a percentage of their quarterly profits from slots into the fund, which are then distributed to tribes without gaming facilities and tribes that operate fewer than 350 machines. Approximately 70 percent of all tribes are eligible to receive payments because only about 30 percent operate facilities that require revenue sharing. According to the November 2005 Commission's report on the quarter ending September 30, 2005, $8.14 million had been deposited. Distributions to non-compact tribes were $116,413 each. From July 1, 2000 to June 30, 2005, a total of $146.38 million had been distributed.[24]

As a result of gaming profits and revenue sharing, California tribes have been able to reacquire a modest amount of lost lands, establish cultural centers and museums, expand businesses, support local governments, donate to charitable organizations, hire upwards of 200,000 employees (the majority of whom are non-Native), and provide housing, education, and health care to their members. However, Natives in California remain among the state's most economi-

cally diverse communities. As has been the case throughout the country, while a few tribes have done extraordinarily well since 1999, many are still without electricity, water, phone/cable lines, paved roads, or even access to emergency care or medical facilities. Despite this, tribes have experienced a "backlash" against not only their gaming activities but all issues related to their economic development, land reacquisition, and increasing clout in state politics.[25]

In 2003, California's gubernatorial recall campaign was focused sharply by public outrage over the state's energy crisis and feelings of having been fleeced by Enron and state politicians whose fraud contributed to if not caused the state's escalating budget deficit and bleak economic outlook.[26] Republican candidate Arnold Schwarzenegger won quick popular support by promising to bring about a true, "no-nonsense," reform of state politics and economics led by and for "the people." This came as he was able to distance himself from Governor Gray Davis and Democratic opponent Lt. Governor Cruz Bustamante on a number of key issues that he focused on tribal gaming.[27] Tribal gaming allowed Schwarzenegger to share in the moral outrage and righteous indignation that characterized public debate over the state's economic crisis while deflecting attention onto tribes and away from his own circle of influence, which included a number of President George W. Bush's advisors and Enron and other energy executives who were directing and funding the recall effort.[28]

Schwarzenegger promised to put an end to what he characterized as the corruption and conniving of influence of gaming tribes on state politics and politicians. As Bustamante was being denigrated and eventually discredited by the media for taking campaign contributions from some of the more affluent gaming tribes, Schwarzenegger used the 1999 compacts as an example of Davis' failure to make good decisions that would have helped to balance the state budget—why, after all, hadn't Davis secured a 25 percent share of gaming revenue as had Connecticut, whose budget was now well in the black?[29] Instead, Schwarzenegger asserted, Davis allowed himself to be manipulated by a powerful "special interest group" now positioned by gaming money to buy further influence with politicians like Davis and Bustamante.[30]

These assertions were encapsulated in a television ad in which Schwarzenegger accused gaming tribes of not being willing to pay their "fair share" of taxes at a time when the state was facing a severe economic crisis. He blasted tribes for using their revenue instead to buy off politicians so that they could avoid taking financial responsibility in the state. He then promised that if elected he would not be manipulated by such powerful "special interest groups" and would instead ensure that tribes were properly taxed.[31] By misrepresenting tribes as greedy and selfish, and misinforming the public of the legal basis for tribal exemptions from federal and state taxes, Schwarzenegger presented himself as a powerful political player who would be immune to "special interest groups" or their money. Appropriating public criticisms of Davis, Bustamante, Enron, and the entire state's energy industry, Schwarzenegger focused attention on tribes and tribal gaming revenue in order to skirt the real causes for California's

economic crisis and to obscure his own alliances with President Bush and the energy industry as well as the political and corporate sources of his campaign financing.[32]

The rhetoric was successful. Davis was removed from office and Schwarzenegger elected. In his January 2004 State of the State address, Schwarzenegger dropped the talk about imposing taxes on tribes (which he could not do) and claimed that he "respect[ed] the sovereignty of our Native American tribes" but stated that he "believed" that tribes needed to "respect the economic situation that California faces."[33] Formally, he wanted tribes to renegotiate the terms of their 1999 compacts to pay a greater share of their revenue to the state, suggesting Connecticut's 25 percent as a model, and he announced that he would appoint a negotiator to work towards those ends. Aides echoed this by frequently emphasizing that Connecticut had earned upwards of $400 million annually from their share of tribal gaming money. In less formal settings, Schwarzenegger stated cavalierly that tribes in California were "ripping us off" by not paying higher percentages of their revenue to the state: "We want them to negotiate and pay their fair share."[34]

Schwarzenegger quickly announced the appointment of Daniel Kolkey to renegotiate the 1999 compacts. Kolkey had worked on the compacts in 1998 as legal-affairs secretary to Governor Pete Wilson.[35] In interviews with the press, Kolkey identified Schwarzenegger's goal as securing $1 to $2 billion annually from the tribes, claiming that it was time for them "to pay their fair share" because they "have a monopoly on taking gambling proceeds from California citizens."[36] In 2003, California tribes had earned a total of $4.7 billion from gaming, so $1 to 2 billion would have meant a considerable share of their revenues. With both tribes and some legislators criticizing the amount as unrealistic, Schwarzenegger modified it to $500 million and later to $300 million, promising to use the money specifically on the state's education and transportation needs.[37]

In July 2004, Schwarzenegger signed compacts with five tribes that had amended their 1999 agreements: the United Auburn Indian Community, the Rumsey Band of Wintun Indians, the Pauma Band of Mission Indians, the Pala Band of Mission Indians, and the Viejas Band of Kumeyaay Indians. The compacts increased tribal payments to the Revenue Sharing Trust Fund ($2 million per year) in exchange for allowing the tribes to operate as many slot machines as they desired. However, tribes agreed to pay on a progressive scale of up to $25,000 per machine based on the total number of machines that they had. Additionally, the tribes agreed to pay a $1 billion bond over 18 years, amounting to about $150 to $200 million per year, until the compacts expire in 2030.[38]

Almost immediately, the Rincon Band of Luiseño Mission Indians attempted to secure a temporary restraining order against the state from ratifying the compacts, arguing that they would lead to "mega-casinos" that would severely hurt existing tribal businesses. U.S. District Court Judge Thomas J. Whelan denied

the request, arguing that the governor and the tribes had the authority to negotiate such compacts under IGRA. The legislature and then the BIA almost immediately ratified the agreements.[39]

Concurrently, the state negotiated four compacts with tribes that did not have 1999 compacts: the Lytton Band of Pomo Indians (which would have meant an off-reservation casino in the San Francisco Bay area), the Buena Vista Rancheria of Me-Wuk Indians, the Ewiiaapaayp Band of Kumeyaay Indians, and the Fort Mojave Tribe. Under enormous political pressure over the question of off-reservation casinos, the Lytton compact was rescinded. The other three were then approved by the legislature and sent to the BIA for approval.[40]

In the November 2004 election, the card club and race track industries sponsored Proposition 68, which would have allowed them to install slot machines. The Agua Caliente Band of Cahuilla Indians countered with Proposition 70, which was immediately co-sponsored by the San Manuel Band of Mission Indians and endorsed by the California Indian Nations Gaming Association (representing 64 tribes). Proposition 70 would have cancelled 68 if both had passed, allowed slot machines at non-Indian card clubs and race tracks, and fixed tribal gaming revenue shares at 8.84 percent.[41]

Schwarzenegger mounted huge anti-Proposition 68 and 70 campaigns. In the midst of his assault, the sponsors of Proposition 68 stopped their campaign efforts and pulled their ads. Schwarzenegger then turned his attentions to Proposition 70, which he claimed belonged in the "special interest hall of fame."[42] "For years, [tribes] have taken advantage of the state. . . . They've ripped off the state."[43] Now, the state was seeking "the right to open up those casino books" and betray tribal campaign financing and tax loopholes. He wanted Californians to trust him to negotiate compacts that would ensure "environmental protection, labor unions and audits, all while providing millions in revenue for state education, health care and transportation." He boasted frequently that the five compacts he had already signed were going to garner upwards of $300 million a year for the state, a figure he would later have to admit was closer to $16 million.[44] However, the bravado worked and both measures were defeated.[45]

After the elections, Schwarzenegger invited gaming tribes back to the negotiating table. However, all of the more affluent tribes, including Agua Caliente and Morongo, ceased negotiations that they had begun that September and demanded a public apology for Schwarzenegger's characterization of them as greedy, selfish, and corrupted special interest groups out to evade taxes. Schwarzenegger refused.[46]

With the renegotiations of the 1999 compacts stalled, in May 2005 Schwarzenegger issued a Proclamation on Tribal Gaming, which spelled out a strict policy with regards to signing new gaming compacts with urban-based and other landless tribes. Essentially, the state would not negotiate gaming compacts with landless tribes without a strict "buy in" of relevant local, state, and federal agencies.[47]

Given the history of California's genocide and dispossession of tribes,[48] and its refusal to fulfill its Public Law 280 obligations to provide police, ambulance, fire, and other social services to tribes, it is nothing short of hypocritical for the state to want money from tribes to help balance its own budget.[49] State claims to being entitled to a greater share of tribal revenue because of a tribal monopoly on gaming in the state further disguise the enormous contributions to the state's economy that gaming tribes have made as well as the education, health care, and other social services that they now provide to their members, greatly alleviating the state's financial "burdens" to tribes and tribal peoples.

Histories Displaced

Tribal gambling operations have contributed dramatically to the state-wide growth of revenues from gaming.[50] Nationally, approximately two-thirds of tribes with gaming now operate Class II facilities, primarily bingo; and about another one-third of gaming tribes run some form of Class III gaming, including slots, cards, and racing. In July 1999, the National Gambling Impact Study Commission reported that tribal gaming revenues had nearly doubled from 1995 to 1999, from $5.5 to $9.8 billion. Of the 561 tribes with recognition status, however, only 193 (34 percent) participated in gaming and only 27 (5 percent) generated more than $100 million annually. Those 27 tribes accounted for about two-thirds of all tribal gaming revenue, $6.4 billion of the $9.8 billion total.[51] In a review of the National Indian Gaming Commission Accountability Act of 2005 ordered by the U.S. Senate Committee on Indian Affairs, the Congressional Budget Office issued a cost assessment that claimed that over the 2000-2004 period, tribal revenue from gaming has increased an average of 14 percent per year to about $19 billion total in 2004.[52]

These impressive numbers make it difficult to challenge the now all powerful image of the rich gaming Indian. The image is so pervasive that it has become commonplace, including everything from Indians selfishly living a life of luxury while states struggle for economic reform (Schwarzenegger's recall campaign), tribes using their new money to buy political influence and skirt taxation while the majority of tribes suffer on in poverty (*Time* magazine's controversial coverage of tribal gaming),[53] to banter like the Comedy Network's *South Park*'s April 30, 2003 episode, "Red Man's Greed," in which a rich gaming tribe tries to put a superhighway through the town, issuing blankets infected with SARS to residents in order to stop their protests.

These myriad images—misinformed, distorted, satirical, stupid—greatly distort the economic reality confronting the majority of Natives in the U.S. According to the United States Census 2000, American Indians and Alaskan Natives report a 24.5 percent poverty rate compared to the national average of 11.6 percent. Still, exaggerated representations of the rich gaming Indian persist, fueled by everything from moral outrage over gaming to the "fairness" of the legal and economic "benefits" "enjoyed" by gaming tribes. Percolating

throughout is a deep resentment of these "rich Indians" because gaming revenues have undermined stereotypes not only of what Indian people should look like but what real Indian culture should be, as with Donald Trump's now infamous declaration before a Congressional hearing on IGRA in 1993 that the Mashantucket Pequots "don't look like Indians to me. They don't look like Indians to me, Sir. And they don't look like Indians to other Indians."[54] This statement reflects a gross lack of information—or even basic understanding—of the broadest strokes of Mashantucket Pequot history, culture, and identity. But then, that has never been the point. Or, rather, it *is* the point. Stereotypes are put to work not to contribute to an understanding of the diversity and complexity of tribal histories, cultures, and identities. They are invoked to perpetuate racism against Native peoples and to challenge the laws that recognize their rights to sovereignty as racist.[55]

II. The Deal With Race

Whiteness

Cheryl I. Harris's "Whiteness as Property," Tomás Almaguer's *Racial Fault Lines*, Ian F. Haney López's *White By Law*, and George Lipsitz's *The Possessive Investment in Whiteness* are some of the works within critical race theory that address the politics of "white supremacy" or "white privilege."[56] They argue that the historical origins of white supremacy lie in the deep cultural sense of entitlement and privilege that U.S. law has provided to "whites."

As Lipsitz notes, it is important to keep in mind that "white" is a legal and social construct and not a stable referent to a biologically discrete unit or population.[57] For example, Almaguer has pointed out that, although Mexicans were originally granted "white" status in California's State Constitution of 1850, the social forces of racialization would disenfranchise Mexicans from that status and all commensurate entitlements as soon as the rush to gold brought a disproportionate number of "white" men into the state.[58] In other words, "white" is historically and culturally contingent and thus inconsistent with present notions of race or racial identity. It has been racialized within the processes of social formation to privilege European-American descendants, men, heterosexuals, and citizens over and against non-whites (including Jews), immigrants, women (and children), gays, lesbians, and other third gendered or two-spirit people.[59] As Harris demonstrates, the result is not merely the perpetuation of the legal protections of privilege for whites but the legitimation of the sense of entitlement to those protections for whites so identified.[60]

The ideologies and institutions of white privilege have deeply informed the political perspectives and agendas of movements opposing Native sovereignty. The primary aim of the groups and individuals participating in these movements is to protect existing colonial relations of power between whites and Natives over lands, resources, and economies. The movements, linked in powerful ways with anti-affirmative action and anti-immigrant efforts, have

rearticulated a discourse of civil rights to reassert the legal protections of whites to privileged positions over jobs, education, public funding, and lands. In this discourse, Native treaties and federal Indian laws have been redefined as discriminating against whites by providing benefits, services, and funds for Natives solely on the basis of race. As if Native treaty and federal law emerged out of a historical vacuum, the reverse racism argument reflects a gross level of ignorance about ongoing histories of oppression and discrimination that Native peoples live within. It also perpetuates resentment and fear over the loss of political and economic privilege so firmly entrenched within the law for whites as to seem normal and earned.

In California multiple political campaigns in the 1990s resulted in a number of statutes that reversed existing state civil rights laws because they were perceived to be unfair or to provide services to undeserving populations. In 1994, Proposition 187 suspended illegal-immigrant access to public education and particular social services, including health care, on the grounds that illegal-immigrants were putting an unfair drain on ever-dwindling state resources.[61] Also in 1994, Proposition 184 enforced a "three strikes you're out" measure against "repeat offenders"—primarily affecting members of the lower-class and communities of color—on the grounds that the "criminal element" was threatening the safety of good, hard-working, taxpaying citizens.[62] In 1996, Proposition 209 suspended affirmative action policies "in the operation of public employment, public education, or public contracting." In terms of public education, which focussed media attention and student movements during the campaign, the promise was to liberate people of color and women from the bonds of special treatment and to provide the same opportunities to all faculty, staff, and students for hiring, admission, and funding on the grounds of proven ability.[63] In 1998, Proposition 227 ended bi-lingual education with English-only immersion programs in primary schools under a "one nation under God" slogan that promised to establish equal opportunities for immigrants to fully enter United States society as good, hard-working taxpayers.[64]

In 1999, Proposition 5, the Indian Casino Gaming Initiative, passed, but it was quickly challenged by hotel and restaurant labor unions and a consortium of self-identified "business and property owners." These groups filed two separate lawsuits claiming that the proposition was unconstitutional. The unions argued that the measure did not adequately address labor rights issues for tribal employees (having failed to effectively organize among tribal casinos, which had restricted union access on tribal lands). The consortium of "business and property owners" argued that the measure was a form of racial discrimination because it provided a virtual monopoly of economic opportunities—and, relatedly, the means and access to land acquisition—to Natives solely on the basis of race.

One of the more vocal organizations involved in that suit was Stand Up for Californians, which claimed that it "unites over 30 grass roots, citizens' action

groups from every corner of California and is widely supported by law enforcement, religious, environmental, business, city council members, county supervisors and other political leaders."[65] In their suit Stand Up maintained that the Proposition violated the "constitutional rights of the property and business owners" to fair and equal access to land acquisition and economic development based solely on race. As would Schwarzenegger in his recall and anti-Proposition 70 campaigns in 2003-2004, Stand Up rejected outright the validity of the status of tribes as sovereigns with rights to self-determination under U.S. law. Instead, they treated Native peoples as an ethnic minority group being provided with racially discriminatory benefits and opportunities.

Proposition 5 was overturned by the California Supreme Court, which ruled that the Proposition was illegal because it permitted forms of gambling that were not legal under the state's constitution.[66] It did not, in other words, respond directly to the complaint of racial discrimination though Stand Up claimed victory.

Californians for Indian Self-Reliance, a coalition of some 40 tribes spearheaded by Chairman Mark Macarro of the Pechanga Band of Luiseño Indians and Chairwoman Mary Ann Martin-Andreas of the Morongo Band of Mission Indians, was successful in getting Proposition 1A, the Indian Self-Reliance Act, passed in March 2000 by a strong majority vote (64.5 percent). The act amended the state's constitution to allow for gambling, affirmed existing compacts, and allowed for new ones to commence. It also permitted union organizing at tribal hotels and restaurants. But the reverse racism argument instanced by Stand Up's lawsuit in 1999, and later by Schwarzenegger's recall and anti-Proposition 70 campaigns in 2003-2004, was well entrenched in a broader political terrain of movements against tribal sovereignty.[67]

Affecting Discrimination Against Whites

As noted, the Citizens for Equal Rights Alliance (CERA)[68] maintains that the very notion of Native sovereignty within the law establishes discriminatory differences between United States citizens and Native peoples that make it impossible for everyone to have equal access to constitutionally-defined and guaranteed rights. But while claiming that they are seeking to protect the constitutionally protected civil rights of all U.S. citizens, CERA maintains that it is whites who are being discriminated against or adversely affected by federal Indian law. This anti-Native sovereignty stance is forcefully represented by CERA's support of Harold Fred Rice's lawsuit against the State of Hawai'i in *Rice v. Cayetano*.[69]

In 1893, ignoring the terms of previous treaties with the United States affirming Native Hawaiian sovereignty, U.S. military and businessmen illegally annexed the islands from the Hawaiian Kingdom and deposed and incarcerated Queen Lili'uokalani.[70] In 1894, the military-business alliance, with support from missionaries, established a provisional government.[71] This government claimed jurisdiction over the islands, including the control of 1.8 million acres defined

by treaties as Hawaiian Kingdom and Crown Lands, and ceded these lands to the United States government in the Newlands Resolution of 1898.[72] The cession came with the stipulation that any moneys derived from the lease of the lands would be reserved "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[73] In doing so, the Resolution recognized that the lands were being held in a trust status by the United States government for the benefit of the "inhabitants of the Hawaiian islands." This was affirmed in the Organic Act of 1900, which incorporated Hawai'i as a territory of the United States.[74]

In 1920, the Hawaiian Homes Commission Act reserved 200,000 acres of the Hawaiian Kingdom and Crown Lands for the express "use and occupancy" of Native Hawaiians.[75] The act provided that those who were qualified to "use or occupy" the lands would be those "'native Hawaiians' defined as 'descendents with at least one-half blood quantum of individuals inhabiting the Hawaiian Islands prior to 1778.'"[76] The blood quantum criterion was designed to distinguish between the land rights of the descendants of the original Native Hawaiian inhabitants living in the islands before 1778 and those who claimed to be "native" to the islands as descendants of immigrants born in Hawai'i after 1778.[77]

As J. Kehaulani Kauanui (Native Hawaiian) observes in her generative work on Native Hawaiian sovereignty, Hawai'i was included among the United Nations's list of non-self-governing territories in 1946.[78] Under UN policy, this inclusion made Hawai'i eligible for decolonization. Contravening UN policy, the United States held a referendum in Hawai'i in 1959 that allowed residents to vote only on whether or not to continue as a territory or to be incorporated as a state. As Kauanui points out, according to UN criteria for decolonization, independence should also have been an option. The election went to statehood.

The Admissions Act of 1959 transferred the management of the 200,000 acres for Native Hawaiians from federal to state control and provided that the lands should be "held by the State as a public trust for the native Hawaiians and the general public."[79] In 1978, as a result of Native Hawaiian political protest over the mismanagement of their resources by the state, the Office of Hawaiian Affairs (OHA) was established to administer the terms of relations between the United States and Native Hawaiians and, specifically, to manage the trust lands and revenue.[80] As an affirmation of Native Hawaiian self-government, the nine trustees who direct OHA are elected by Native Hawaiians and must be of Native Hawaiian descent.[81]

The Apology Bill of 1993, sponsored by Senator Daniel Akaka (D-Hawai'i), recognized that the overthrow of the Hawaiian Kingdom had been illegal. It asserted that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."[82]

Thus, the treaty history between the United States and the Hawaiian Kingdom recognized and affirmed Native Hawaiian rights to self-government, territorial integrity, and cultural autonomy as specific exercises of a soverign power. Recognition of Hawaiian sovereignty was explicitly acknowledged by the Newlands Resolution, the Organic Act, the Hawaiian Homes Commission Act, the Admissions Act, and the Apology Bill. In each instance, while Native Hawaiians were being denied their sovereign rights in actions that violated existing international treaties and U.S. federal statutes, they were also being recognized as possessing a unique legal status and trust relationship with the U.S. government that afforded them protections of their rights as sovereigns. Thus, the OHA was clearly established with the purpose of administering the terms of this relationship. Moreover, over 160 federal statutes have further acknowledged that Native Hawaiians possess a status and relationship with the U.S. government that is akin to the status and rights of American Indians and Alaskan Natives.

In summary, Native Hawaiian treaty history with the United States firmly established the recognition of Native Hawaiian rights to self-government and territorial integrity by the United States. Recognition of Hawaiian sovereignty was acknowledged further in the Newlands Resolution, the Organic Act, the Hawaiian Homes Commission Act, the Admissions Act, and the Apology Bill. Concurrently, over 160 federal statutes have acknowledged that Native Hawaiians possess a status and relationship with the United States government that is akin to the status and rights of American Indians and Alaskan Natives. Thus, when OHA was established, its purpose was to administer the terms of the U.S. treaty and federal laws acknowledging and protecting Native Hawaiian sovereignty and self-determination.[83]

In 1996, Harold Fred Rice applied to vote in the OHA elections and was denied on the grounds that he is not Native Hawaiian. Rice sued Governor Benjamin J. Cayetano (D-Hawai'i), as the highest representative of the state, for violating his Fourteenth and Fifteenth Amendment rights. He argued that OHA's restriction of voting to Native Hawaiians amounted to a denial of his right to vote for a state elected office and discriminated that right on the basis of race. He cited the Hawaiian Homes Commission Act's definition of Native Hawaiians by a 50 percent blood descent as defining Native Hawaiians as a race and not as a sovereign people—because blood proxied for race. He lost the case at both the state and appeal levels on the grounds of *Morton v. Mancari* (1974).[84]

In 1974, non-Indian employees of the Albuquerque, New Mexico, branch of the BIA brought a class-action suit against the BIA's hiring preference for qualified American Indians as provided for by the Indian Reorganization Act of 1934. Morton et al. argued that Indian-preference contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972 and deprived them their rights to due process under the Fifth Amendment of the U.S. Constitution. The New Mexico District Court held that Indian-preference was repealed by the 1972 statute and ordered that the BIA cease implementing it.

Upon appeal, the U.S. Supreme Court reversed the order on two grounds. First, the Court found that Congress did not intend to repeal Indian-preference hiring in the BIA with the 1972 statute and that Indian-preference was a "longstanding, important component of the Government's Indian program."[85] Second, the Court ruled that Indian-preference did not constitute "invidious racial discrimination" as argued by the plaintiffs but was "reasonable and rationally designed" to further Indian self-government:

> The Indian preference does not constitute "racial discrimination" or even "racial" preference, but is rather an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. 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.[86]

In this case, the Supreme Court interpreted "American Indians" as a legal, not a racial category. This decision affirmed the unique legal status of American Indians in relationship to the U.S. government and recognized that their distinctive status afforded Indians inalienable rights to self-government as affirmed by the Indian Reorganization Act. The Court acknowledged that Congress is obligated to protect those rights by not passing legislation that impedes the abilities of American Indians to exercise them.[87]

The District Court and Ninth Circuit Court of Appeals found similarly in *Rice v. Cayetano*. Both courts ruled that "Native Hawaiians" was not a racial, but a legal, category owing to Native Hawaiian status and rights to self-government based on the historical precedents of relations with the United States. Following *Morton v. Mancari*, they found enormous legal precedent in 160 federal statutes for recognizing that Native Hawaiians had a legal status akin to American Indians and Alaskan Natives. This, they reasoned, necessitated the restriction of the vote for the OHA trustees to Native Hawaiians in a manner analogous to the Indian Reorganization Act's Indian hiring preference within the BIA.

However, in February 2000, the Supreme Court reversed. The Supreme Court reasoned that "Native Hawaiians" were not akin in status or rights to American Indians and that, by implication, the OHA was not akin to the BIA. This was based on the Court's interpretation of the Hawaiian Homes Commission Act's definition of "Native Hawaiians." The 50 percent blood quantum criterion, the Supreme Court said, functioned as a definition of descent that proxied for race.[88] Therefore, the Court concluded, the OHA elections were unconstitutionally discriminating the right to vote for OHA trustees on the basis of race.

Rice v. Cayetano has provided precedent for further legal challenges of Native Hawaiian self-government. In 2002, U.S. District Judge Susan Oki Mollway denied a temporary restraining order filed against the Office of Hawaiian Affairs and the Hawaiian Homes Commission.[89] Sixteen plaintiffs[90] filed suit against both agencies for providing "race-based programs" for Native Hawaiians (i.e., for using state moneys to fund programs restricted on the basis of race). *Arakaki v. Lingle* has since been filed in federal court, followed by *Doe v. Kamehameha Schools* in 2005.

The U.S. Supreme Court's opinion in *Rice v. Cayetano* contributed to the reracialization of Native Hawaiian status and rights in direct negation of Native Hawaiian sovereignty and self-determination. The ideologies and practices of racialization are a foundational element of anti-Native sovereignty movements. By configuring Native status and rights as a matter of race and racially-derived benefits and privileges, Native peoples are alienated from their status as sovereigns under international and constitutional law and resituated as ethnic minorities under federal/state agency.

It is not merely coincidental or curious, then, that CERA supported Rice's appeal to the U.S. Supreme Court. The history of Native Hawaiian annexation and subjugation to the United States is a history of the legal-military establishment and protection of white privilege in Hawai'i –within both the state government and over the economy, lands, and resources of Hawai'i.[91] Disavowing this history,[92] CERA and Rice have claimed that Native Hawaiian voting rights for OHA trustees was racially discriminatory. They would have everyone believe that equality existed in Hawai'i before Native Hawaiians were given special rights to self-government and special benefits of access to the lands over and against those of whites. They would like to see the legal distinctions between Native Hawaiians and whites erased so that this once pristine equality under the law can return to the state. Unsurprisingly, CERA has not taken up with similar passion the cause of Arakaki et al., no doubt because the plaintiffs include Asian Americans.

The anti-Native arguments in Hawai'i are markedly similar to and intricately connected with anti-recognition efforts throughout the United States. These efforts are aimed at the dissolution of Native self governments, economic self-determination, and land rights. They have evolved into "reform" movements contesting treaty and federal Indian laws on the grounds that they provide "unfair" legal advantages and economic monopolies to tribes on the basis of race. The "sovereign immunity" of tribes from civil lawsuits,[93] the exemption of tribes from state taxation,[94] and the protection of tribes from certain aspects of state jurisdiction[95] have each been of particular concern to elected officials who have argued that tribes enjoy "too many" legal protections, resulting in unfair legal immunities, tax breaks, and juridical exemptions from state and local controls—as if those "protections" unsettled an existing equality between Natives and non-Natives in the United States.

III. Reckoning Trust

Racist ideologies and practices of white privilege are a permanent feature of processes of social formation within the United States.[96] As have affirmative action laws for communities of color and women, the provision of Native rights to sovereignty and self-determination in treaty and federal law represent recognition that the long-term social inequities under which Native peoples have lived are a direct result of histories of oppression and discrimination.[97] Thus, the provisions for Native self-government, territorial integrity, and cultural autonomy within United States law not only conform to constitutional and international laws regarding the status and rights of "indigenous peoples" to self-determination.[98] They also recognize that the historical realities and structures of racism within the United States have made these legal protections necessary.

Anti-Native sovereignty movements reject the historical legacies, practices, and effects of racism on Native peoples. Anti-gaming and anti-recognition efforts have relied heavily on a discourse that is dismissive of the impact and legacy of colonialism on Natives. The entire logic of "reverse racism" is dependent on the negation of the realities of racism. Only within such a negation can the privileges, benefits, and entitlements of whiteness be made to appear normal, and even earned. This has all been made painfully clear, yet again, in the proposed reforms of the federal trust responsibilities to tribes initiated by *Cobell v. Norton* (1996).[99]

In 1996, Elouise Cobell (Blackfeet), co-founder and chair of the Blackfeet National Bank and then treasurer of the Blackfeet Nation, filed a class-action lawsuit against the Department of the Interior (DOI) and the BIA. Cobell questioned the efficacy of the BIA's management of Blackfeet reservation and individual trust lands. Unable to secure an accurate record of leases, sales, and individual trust land payments from the BIA, Cobell decided to join forces with the Native American Rights Fund (NARF) to address these issues on a national scale. The aim was to secure BIA records on their leasing of reservation and individual trust lands for agriculture, grazing, timber, and resource extraction and the gross inconsistencies in BIA payments to the individuals in whose names those leases had been signed.[100]

The leasing of tribal lands originated with the General Allotment Act of 1887, which broke up reservations and issued single parcels to individuals who were determined to be members.[101] There was a 160-acre norm for determining the size of a parcel but other factors were also taken into consideration, like the value of the land and the status of the individual with regards to age, marriage, and dependency. Consequently, parcels ranged in size from about 40 to 700 acres, with "heads of households" receiving more than "widows" and "orphans" and desert lands being given more liberally than lands deemed valuable in terms of agriculture, timber, oil, and mineral deposits.[102]

Because only tribal members could receive allotments, rolls were instituted by the BIA to record the names of all legitimate members. These rolls

identify an individual's paternal and maternal blood degree, age, marriage status, number of dependents, and orphan status. BIA agents were directed to use this information, as well as personal evaluations of the "competency" of individuals ascertained from interviews, to determine the size and location of the parcels and the type of titles to be issued to individual tribal members.[103] Those who were deemed "competent" were issued fee patents. With fee patents came U.S. citizenship and thus obligations to pay state and federal taxes. Fluency in English became a key device in determining "competency" because it was interpreted to mean the individual understood the demands of private property ownership, taxation, and citizenship.

Those tribal members who were deemed "incompetent" were issued trust patents, which indicated that an individual did not speak English or was an orphan or widow with dependents requiring federal assistance. Those who were issued trust patents were not granted U.S. citizenship. Trust patents were supposed to be held in trust for a period not to exceed twenty-five years, or until that time that individuals proved themselves "competent."[104]

The key administrative issue in the distribution of the patents was expediency. Overwhelmed by the number of applicants from around the country,[105] the demands of interviewing and evaluating all applicants to determine their eligibility for tribal enrollment and then their qualifications for managing private property ownership, as well as regional and congressional pressure to hasten allotment and so statehood out of Indian territories, BIA agents came to rely on blood quantum and English fluency to determine patent type.[106] Generally speaking, those enrolled with less than 50 percent Indian blood and who spoke English were taken to be assimilated enough that they no longer required federal "guardianship" and were issued full land title and U.S. citizenship. Those enrolled with 50 percent or more Indian blood and who did not speak fluent English were assumed to be still too much tied to their tribal customs that they were in need of federal assistance and so were issued trust patents. Because the rolls did not include a record of language fluency, blood degree became a more expeditious means to issuing land titles.[107] The record of blood degree, however, was dependent on a myriad of social factors, including everything from federal agents guessing or making visual evaluations of physical features to the false testimony of those who turned over the names of tribal members for cash payments.[108]

The Burke Act of 1906 suspended trust patents in favor of fee titles in order to hasten the allotment process.[109] However, the rolls and, in particular, the record of blood degree that they preserved, had served to institute federal enrollment policies. Despite evidence of extensive errors and omissions in the information recorded on the rolls, Congress consistently upheld their legal status. In the context of several court cases well into the 1930s, Congress ruled that the rolls were "conclusive evidence" of tribal membership, solidifying all of the information on them as legal proof of tribal identity.[110] Consequently, all of the prob-

lems with the production of the rolls were legally secured, as were the land titles and leases that had been issued on their basis.

Once the allotment process was completed for a given reservation, the "surplus," or unallotted lands, were opened up for sale and leasing. The notorious result was the reduction of tribal reservation lands from about 138 to about 48 million acres from 1887 to 1934,[111] with the overwhelming majority of those 90 million acres being bought by federal agents, oil and mineral companies, and U.S. citizens for agricultural and timber operations.[112]

Lesser known outside of Indian country, at least until *Cobell v. Norton*, was how allotment brought about the leasing out and sale of individually-held trust lands. Non-members were able to buy up or secure insanely long leases on allotments that the BIA was supposed to be holding in trust for a period not to exceed 25 years on behalf of individuals whom the BIA was supposed to be educating in the demands of private property ownership and U.S. citizenship.[113]

In each sale or lease, the BIA claimed to be fulfilling the best of its trust obligations. However, the BIA used allotment to assume an even greater level of control over tribes, tribal members, and their lands. As the plaintiff's attorneys in *Cobell* have argued, the BIA used allotment to seize management of tribal lands[114] in the name of fulfilling its trust obligations to protect individual members from fraud or failure to pay taxes. BIA agents—not buying up "surplus" lands for themselves!—leased out individual trust lands for periods that far exceeded what the law allowed and for fees that were nominal at best. Moneys owed on the leases were supposed to be collected by the BIA on behalf of the allottees and deposited into Individual Indian Money (IIM) accounts with the Department of the Treasury. After the BIA took a lion's share of the money to cover "administrative expenses," the rest (a small percentage) was supposed to be paid to the individuals, or their legal guardians or heirs, in whose names the leases had been signed and the IIM accounts created.[115]

The original purpose of Cobell's 1996 lawsuit was to force the DOI and the BIA to produce records of names of all leasees and allottees, an account of all of the moneys collected from the leases, and a record of the amounts distributed to the allottees. From the beginning, however, the DOI and the BIA have been unable to produce the required documentation. Instead, what has been revealed is that roughly 44 million annual transactions in IIM accounts have taken place since 1887 without any record or accounting systems to assess the accuracy of the transactions—both in and out of the IIM accounts.[116]

When originally filed in 1996, there were about 50,000 plaintiffs in *Cobell*. That number has since grown to about 500,000, as individuals have come forward to report suspected fraud in the loss or misuse of their family's allotments and trust moneys. From the original estimate of $2.5 billion in missing funds, NARF now believes that the total amount is closer to $175 billion. These are moneys that have come into IIM accounts and have not been paid out to tribal members. Instead, preliminary DOI and BIA documents show that the moneys

have been diverted from IIM accounts to cover other DOI expenses, such as the construction of federal highways and dams.

In response to contempt of order charges and penalties for failing to produce court-ordered documentation, and in an attempt to avoid being placed in receivership by presiding Judge Royce C. Lamberth, in 2001 the DOI and BIA made a proposal for the reform of federal trust responsibilities and administration. It was first presented to tribal representatives at the November general assembly meeting of the National Congress of American Indians (NCAI) in Spokane, Washington.[117] Secretary of the Interior Gale Norton and then Assistant Secretary Neal McCaleb proposed to create an entirely new Bureau of Indian Trust Assets Management (BITAM) under the DOI. BITAM would be responsible both for the overhaul of the leases and IIM accounts implicated in *Cobell* and for the administration of all relevant tribal financial and land assets. The BIA would, then, be relieved of its trust responsibilities and reformed to administrate "social services" to tribes.

NCAI delegates voted unanimously to reject the proposal. Their response was based on several factors. One of the most compelling of these was that the DOI and BIA had developed their proposal without any tribal consultation, violating EO #13175. While McCaleb reassured the assembly that he was there, in fact, to consult with the tribes, several tribal representatives insisted that the principles of tribal consultation required by EO #13175 demanded their involvement in the development of the proposal, not merely in its modification.

An equally charged issue informing the NCAI's rejection of the proposal was its separation of trust and social services. Several tribal representatives argued that to divide these two central aspects of the U.S. government's trust obligations to tribes would lead to the final erosion of tribal sovereignty. In other words, differentiating trust from social services would shift Native status from that of sovereigns to that of ethnic minority. Rearticulating Natives as ethnic minorities would have the effect of reracializing them as beneficiaries of public services under federal administration. This, in turn, would negate constitutional and federal laws that recognized tribal sovereignty and rights to self-determination. Tribal representatives, then, perceived the restructuring of the BIA as a "social service" provider, with BITAM functioning as a land management agency, as the final straw in the collapse of tribal rights.

This concern had been heightened by the release of a 2001 GAO report on the FAP (less than a month before NCAI's meeting). Initiated by Congressional members from the northeast and their political allies, themselves allied in anti-recognition as anti-gaming efforts throughout New England,[118] the GAO report was supposed to address problems with FAP. In that vein, it made several important observations about under-funding and under-staffing, inconsistencies with what kinds of documentation were required to fulfill the seven criteria for recognition, and the various discrepancies in time to decisions. However, the weight of the report was addressed to gaming—to how many recognized tribes

game, how much money they earn from gaming, how many tribes had recently applied for recognition solely to open Class III facilities, and how recognized tribes qualify to share in what was represented to be an extravagant amount of federal dollars reserved exclusively for them (in 2001, a mere $4 billion to support federal and treaty responsibilities to 562 tribes and their 2 million members). Invoking a now familiar reverse racism argument, the report indicted the lack of fairness in gaming laws that allowed people with dubious claims to tribal identity to open lucrative enterprises operating at unfair economic advantage and legal immunity over other U.S. citizens.[119]

IV. A Call for Deracialization

Schwarzenegger's recall and anti-Proposition 70 campaigns, *Rice v. Cayetano*, and the BIA's proposal of trust reform in light of *Cobell v. Norton* are all instances of anti-Native sovereignty movements within the United States. These movements are articulated through a discourse of reverse racism that works to maintain the privileges and benefits of whiteness. Claims that Natives are now taking advantage of legal loopholes and unfair tax breaks, lapping up economic monopolies and undue political influence—all while maybe not even being really Native at all!—depends on a disingenuous and conveniently misinformed disavowal of the law and the histories, structures, and institutions of oppression and discrimination within which Native peoples live. The decimation of 98 percent of the Native population, the dispossession from 99 percent of the lands in the United States, the continued poverty, unemployment, and high-school drop-out rates that characterize Native life, the disproportionate incarceration, death, and suicide rates among Native communities. . . .[120] These are the material realities that define Native social relations and conditions within the United States. The survival of Native populations, the reacquisition of tribal lands post-allotment (less than 10 million acres), and the all-too-modest moves towards some economic self-sufficiency provided by gaming are hardly the stuff of the privileges, benefits, and entitlements that come with whiteness.

Native oppositional strategies to the ideologies and institutions of whiteness, and towards the decolonization of Native social relations and conditions, demand an active deracialization of Native status and rights. As the ruling in *Rice v. Cayetano* warns, and *Arakaki v. Lingle* and *Doe v. Kamehameha Schools* forebode, Native peoples must continue to assert their unique legal status as sovereign nations under the precepts and provisions of international and constitutional law. Natives must reject any laws or administrative practices that have racialized or validated the racialization of Native status and rights. As *Rice* and *Arakaki* demonstrate, this must include a rejection of blood quantum requirements for determining tribal membership or land rights. For while the U.S. Supreme Court affirmed in *Morton v. Mancari* that "American Indian" was a legal category and remanded questions of membership to tribal courts on the matter

of gender-based discrimination under the Indian Reorganization and Civil Rights Acts of 1934 and *Santa Clara Pueblo v. Martinez* (1978),[121] it is not as clear in the post-*Rice* moment that they would do so if the complaint was race-based. Native peoples must take proactive measures to prepare themselves for such challenges.

But even more importantly to the decolonization of Native communities, Native peoples must deracialize their concepts of membership, belonging, and relatedness. The ideological force of race and racism within Native communities and governance must be taken on directly, thoughtfully, and responsibly with the aim of decolonizing Native social relationships and governance structures and policies. This must be done not only as a proactive measure against possible legal threats, but as the necessary, ethical thing to do for the intellectual and spiritual health and well-being of Native peoples.

Still, any time someone argues against racism and implies that tribes do away with blood quantum membership criteria, the responses invariably include accusations or concerns that what is being proposed is an "anybody can be an Indian" mentality. This is incredibly disingenuous. Native customary laws for determining the interrelated concepts of membership, relationship, and responsibility are incredibly discriminating and absolutely do not—despite the clichés about the Wannabe Tribe—invite everyone in. Genealogical practices, relationships to ecosystems and specific lands, inheritance laws, customs regarding adoption, marriage and naturalization, and beliefs about social responsibilities within extended family units are radical concepts of membership that are neither open-ended nor non-discriminating. So, why not treat these practices, and the cultures and epistemologies in which they are defined and from which they emanate, as the authority for determining who is and who is not Native?

It could begin with dismantling the discourse. Instead of "tribal membership"—implying tribes are like clubs with dues and operating hours—why not create tribal citizenship, naturalization, and immigration laws? Why can't tribes use the language of nations and regulate citizenship and immigration accordingly? Why can't tribes base these laws on their own genealogical practices, inheritance laws, customs regarding adoption, marriage and naturalization, and beliefs about relationships to ecosystems, specific lands, and extended family units? Imagine the possibilities for a truly radical reform of tribal governance and social relations if "blood" and "race" were made irrelevant?

This is not to imply that Native peoples are not confronted with myriad social forces of oppression and discrimination. These forces include an incredible surge and fraud in new applications for membership, particularly in tribes with gaming, and have resulted not only in questions about the legitimacy of Native identity and culture but also an entire mire of legal pressures for tribes to revisit-towards-restricting their membership requirements.

The challenge for Native peoples is not to allow these social forces of oppression and discrimination to determine the terms or concepts of their governance, membership, and social relationships. Decisions with such important

long-term consequences must be thoughtfully considered, mindful of recent political movements to racialize Native status as a means of refuting Native treaty and land rights and accountable to the customs and traditions that define Native identity and culture.

The GAO report and the BIA's proposal for reform clearly demonstrate that recognition policies are a target of anti-Native forces and their concerted attacks on Native sovereignty. Because of the political pressures on the BIA at this time, reforms will be made in FAP and to the trust relationship. The question is, to what ends? Will the institutions of white supremacy inform the structure of the reforms to affirm and reinforce, yet again, white privileges over Native governments and lands? These are difficult questions that demand political vigilance and inter-tribal alliance.

Perhaps Native governments and organizations should establish their own mechanisms for recognizing one another and financially and legally assisting in one another's efforts at land reacquisition and economic development. Imagine the political implications if a powerful organization like the NCAI were to defederalize their criteria for membership and allow unrecognized tribes to participate as voting delegates, along the lines of non-governmental organizations within the United Nations. Or what if the Blackfeet National Bank were to begin a loan program to federally unrecognized tribes for land reacquisition and economic development projects? The point is to get outside the political legacies of plenary power doctrines, colonialism, and racism and to reimagine the possibilities for Native governance and social relationships. Only then will the possibilities for Native sovereignty and self-determination—and any real kind of decolonization—be realized.

Notes

1. I use "Native" to include the three main legal categories of indigenous peoples within the United States: American Indians, Alaskan Natives, and Native Hawaiians.

2. Citizens for Equal Rights Alliance/Citizens for Equal Rights Foundation, "Many Cultures. One People. One Law," http://www.citizensalliance.org (8 November 2005).

3. My discussion here is drawn from Stuart Hall's observation that race is "a permanent feature" of the processes of social formation. See Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1980s* (New York: Routledge, 1986), 63.

4. For analysis of the impact of international customary law on the United States Constitution, see S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996); Glenn T. Morris, "International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples," in *The State of Native America: Genocide, Colonization, and Resistance*, edited by M. Annette Jaimes, (Boston: South End Press, 1992), 55-86; and, *Exiled in the Land of the Free: Democracy, Indian Nations, and the United States Constitution* (collectively edited by contributing authors). (Santa Fe: Clear Light Publishers, 1992).

5. In 1924 the United States unilaterally extended U.S. citizenship to all American Indians with the Indian Citizenship Act, 43 Stat. 253, but the law did not dissolve the separation of federal and tribal governments, and it was not meant to imply a dissolution of tribal membership.

6. See Francis Paul Prucha, *American Indian Treaties: The History of a Political Anamoly* (Berkeley: University of California Press, 1994) and Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1974).

7. *Johnson v. M'Intosh*, 21 US 543 (1823), *Cherokee Nation v. State of Georgia*, 30 US 1 (1831), *Worcester v. State of Georgia*, 31 US 515 (1832).

8. The trust responsibility is also known as the fiduciary or protectorate responsibility; for an analysis of the trust doctrine, see David Wilkins and K. Tsianina Lomawaima, *Uneven Ground:*

American Indian Sovereignty and Federal Law (Norman: University of Oklahoma Press, 2001), 64-97.

9. The Alaskan Native Claims Settlement Act, 43 USC 1601-1624 - Public Law 92-203 (1971), extended the legal status and rights of "American Indians" to "Alaskan Natives."

10. The Office of Hawaiian Affairs (OHA), as an agency of the State of Hawai'i, performs an analogous responsibility for Native Hawaiians, though recent legislative attempts seek to move Native Hawaiians under the administration of the BIA as a recognized tribe (see discussion below).

11. *Worcester v. Georgia* (1832); the Alaskan Native Claims Settlement Act of 1971; President Clinton's Executive Order #13175, "Consultation and Coordination With Indian Tribal Governments" (November 6, 2000). See Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1989) and David E. Wilkins, *American Indian Politics and the American Political System* (Lanham, MD: Rowman and Littlefield, 2002). Natives of Puerto Rico, Guam, American Samoa, and other United States' territories have related treaty, legislative, and policy histories that similarly define their unique political status as "indigenous peoples" under United States jurisdiction. See Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*. Contemporary Indigenous Issues Series. (Lincoln: University of Nebraska Press, 2006).

12. The December 5, 2003 list of federally recognized tribes filed with the Federal Registrar under the provisions of the 1994 Federally Recognized Tribe List Act (USC Title 25, Section 479a) includes 562 tribes. The November 25, 2005 list filed with the Federal Registrar includes 561, reflecting the termination of the Delaware Tribe of Indians by a 10th Circuit Court ruling (*Cherokee Nation v. Norton*, 389 F.3d 1074, 2004).

13. O'Brien, *American Indian Tribal Governments*, 83-86.

14. Not all of the Nez Perce, for instance, were part of treaty agreements with the United States; none of the treaties signed with tribes in California were ratified by Congress. For some of the specific complexities of state recognition issues, beyond the scope of this paper, see the New York District Court's decision in the *State of New York, Town of Southhampton v. The Shinnecock Tribe* (filed November 7, 2005).

15. The Menominee Termination Act (HR 2828) of 1954, (reversed in 1973); the Klamath Termination Act (PL 587) of 1954, (reversed in 1986); Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986); Nicholas C. Peroff, *Menominee Drums: Tribal Termination and Restoration, 1954-1974* (Norman: University of Oklahoma Press, 1982).

16. For a review and analysis of the criteria, see David E. Wilkins, *American Indian Sovereignty and the United States Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 166-67; United States General Accounting Office (GAO), "Improvements Needed in Tribal Recognition Process" (Report #GAO 02 49; Washington, D.C.: GAO, October 2001), 10-14; Renée Ann Cramer, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgement* (Norman: University of Oklahoma Press, 2005).

17. According to the 2001 GAO report, of the then 561 recognized tribes, 47 (8 percent) had been recognized since 1960 by Congress (16) and the BIA (31). Of the 31 tribes recognized by the BIA, 14 of the 250 that had applied were recognized through the FAP, 10 through decisions before 1978, and 7 through decisions after the FAP and outside of the process (GAO, "Improvements Needed in Tribal Recognition Process," 2-5).

18. *Seminole v. Butterfield* 658 F.2d 310 (5th Cir. 1981); *California v. Cabazon Band of Mission Indians* 480 United States 202 (1987).

19. These conflicts have evolved into questions about whether tribes can operate gaming facilities off-reservation. Richard Pombo, a Republican from the 11th District of northern California and Chair of the House Resources Committee, has submitted a bill that would greatly limit off-reservation gaming by preventing tribes from moving across state lines and requiring tribes to secure state and local approval. Pombo has accepted thousands of dollars in campaign money from gaming tribes. While some tribes support the measure in efforts to curtail any urban tribal casino development, many oppose and seek amendments to IGRA that would better regulate BIA consultation with tribes on casino proposals, including the National Indian Gaming Association. See Matthew Daly, "Off-Reservation Gambling Bill Splits Tribes." *San Francisco Chronicle*, 9 November 2005, http://SFGate.com.

20. In *Seminole Tribe of Florida v. Butterfield*, (491 F. Supp [1980]),the 5th Circuit Court of Appeals granted an injunction preventing the county sheriff from interfering with high stakes bingo games conducted by the Seminole on Seminole lands. The county argued that the games awarded prizes that exceeded amounts allowed under state law and that Florida had jurisdiction over reservation lands under Public Law 280.

21. The Cabazon Band of Mission Indians and the Morongo Band of Mission Indians, both located in Riverside County, California, operated bingo games on their reservations. The Cabazon also operated card games. Since the facilitities were open to the public, both Riverside County

and the state of California sought to apply their laws governing the operations of gaming. The Cabazon and Morongo filed for declaratory relief in federal District Court, holding that neither the county nor the state had any authority to enforce its gambling laws on reservations. The Court of Appeals affirmed (*California v. Cabazon Band of Mission Indians*, 480 US 202 [1987]).

22. IGRA defined three types of gaming: Class I includes all traditional social gaming, like the Seneca's peach pit game; Class II includes bingo, pull tabs, punch boards, tip jars, and card games; Class III includes everything else, like horse and dog racing, casino gambling, and slot machines.

23. The National Indian Gaming Commission (NIGC) is composed of a Chairman and two Commissioners, each of whom serves on a full-time basis for a three-year term. The Chairman is appointed by the President and must be confirmed by the Senate. The Secretary of the Interior appoints the two Commissioners. Under IGRA, at least two of the three must be enrolled members of a federally recognized Indian tribe, and no more than two members may be of the same political party. The NIGC maintains its headquarters in Washington, D.C., with five offices in Portland, Oregon; Sacramento, California; Phoenix, Arizona; St. Paul, Minnesota; and Tulsa, Oklahoma. Currently, Philip H. Hogen (Oglala Sioux Tribe of the Pine Ridge Indian Reservation) serves as Chairman, and Cloyce V. Choney (former Special Agent of the Federal Bureau of Investigation) and Nelson W. Westrin (former Executive Director of the Michigan Gaming Control Board) serve as Commissioners. The NIGC website is located at http://www.nigc.gov/nigc/index.jsp.

24. The California Gambling Control Commission, *Report to Legislature for Distribution of Funds from Indian Gaming Revenue Sharing Trust Fund* (November 3, 2005). The commission's website is located at http://www.cgcc.ca.gov.

25. Tom Wanamaker, "Let the Games Begin: Victims of Success?" *Indian Country Today*, 4 February 2004, http://indiancountry.com; Jim Adams, "Anti-Indian Groups Fail at Ballot Box," *Indian Country Today*, 1 April 2004, http://indiancountry.com.

26. For a glimpse at the seriousness of the outrage, see Bethany McLean and Peter Elkind, *Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (New York: Portfolio Hardcover, 2003) and Kurt Eichenwald, *Conspiracy of Fools: A True Story* (New York: Broadway Press, 2005), both of which includes an analysis of media coverage on public reactions to the energy crisis.

27. Erica Werner, "Money from Casino-Owning Tribes Could Play Big Role in California Recall Campaign," *Associated Press*, August 24, 2003; Charlie Leduff, "The California Recall," *New York Times*, October 2, 2003, Late Edition, Section A: 28; John M. Broder, "More Slot Machines for Tribes; $1 Billion for California," *New York Times*, June 22, 2004, Late Edition, Section A: 15; Elisabeth Bumiller and Sheryl Gay Stolberg, "The 2003 Campaign," *New York Times*, August 7, 2004, Late Edition, Section A: 12; John M. Broder, "As Schwarzenegger Tries to Slow It, Gaming Grows," *New York Times*, October 10, 2004, Late Edition, 1: 22; Chet Barfield, "Governor Delights Diners in Old Town: Scharzenegger Pushes Gaming Initiatives Defeat," *San Diego Union Tribune*, October 15, 2004; "States Not Willing to Credit Tribes for Sharing," 17 December 2004, http://Indianz.com, December 17, 2004).

28. See McLean and Elkind, *Smartest Guys in the Room*. Schwarzenegger's anti-tribal gaming stance also garnered contributions from Las Vegas, with the family-owned Palms Resort raising $1 million for his efforts (Don Thompson, "Schwarzenegger Fund-Raiser: Maloofs Deny Buying Favor: Palms Owners Reportedly Raising Campaign Funds While Negotiating Deal to Run Casino," *The Las Vegas Review Journal*, 1 September 2004, http://reviewjournal.com.

29. Zachary Coile and Paul Feist, "Tribe Plans $2 Million Campaign Donation; Bustamante Called a Good Friend," *San Francisco Chronicle*, 3 September 2003, http://SFGate.com.

30. Christian Berthelsen, "Bustamante Told Not to Use Loophole: Judge Bars Transfer of Campaign Finance Funds," *San Francisco Chronicle*, September 23, 2003, SFgate.com; George Raine, "Actor Denies Going Negative in His New Ad, But Critics Say He's Gone Back on Pledge," *San Francisco Chronicle*, September 23, 2003, SFgate.com.

31. Philip Matier, "Recall Rumble Gets Going in Earnest as Clock Ticks Down, Tribes at the Center of Campaign Money Barbs, Accusations," *San Francisco Chronicle*, September 24, 2003, SFgate.com.

32. See McLean and Elkind, *Smartest Guys in the Room*.

33. "Schwarzenegger Seeks Revenues from Gaming Tribes," 7 January 2004, http://Indianz.com.

34. *Ibid.*; Raine, "Actor Denies Going Negative in His New Ad"; Matier, "Recall Rumble Gets Going in Earnest as Clock Ticks Down."

35. Associated Press, "Ex-Wilson Aide to Negotiate Tribal Gambling Compacts," *Reno Gazette-Journal*, 7 January 2004, http://RGJ.com.

36. *Ibid.*; see also Michelle DeArmond, "Ex-Wilson Aide to Head Tribal Talks," *The Press Enterprise*, 8 January 2004, http://PE.com.

37. "California Tribes Confront 'Dangers' Facing Gaming," 15 January 2004, http://Indianz.com.

38. Edward Sifuentes, "Local Tribes Part of $1 Billion Deal with State," *North County Times*, 21 June 2004, http://NCTimes.com.

39. Chet Bartfield, "Rincon Beset by Suits, Infighting; In Latest Setback, Challenge to New Compacts Hits Snag," *Union Tribune*, 8 July 2004, http://SignOnSanDiego.com.

40. James P. Sweeney, "Proposal Would Enable Joint Casino Projects—Legislation to Add Barriers to Gaming off of Reservations," *San Diego Union*, November 11, 2005.

41. "California Tribe Proposes Own Gaming Initiative," 22 January 2004, http://Indianz.com. James Sweeney, "Tribe Offers Tax Deal to Ease Limits on Gaming," *Copley News*, 22 January 2004, http://SignOnSanDiego.com; "California Tribes Endorse Gaming Initiative," 19 July 2004, http://Indianz.com.

42. John Ellis, "Governor Fights Initiatives in Clovis: He Warns of Gaming Threat if Two Measures Pass," *The Fresno Bee*, 13 October 2004, http://fresnobee.com.

43. John Ellis, "Governor Fights Initiatives in Clovis"; "Schwarzenegger Says Tribes Ripped Off State," 14 October 2004, http://Indianz.com.

44. "Schwarzenegger Wants Gaming Tribes to Open Books," 20 October 2004, http://Indianz.com.

45. Steve Wiegand, "Governor Spells Out His Ballot Views," *The Sacramento Bee*, 8 July 2004, http://sacbee.com.

46. See David Hermann and Jim Miller, "Governor Targets Inland Ballot Measure," *The Press-Enterprise*, 27 October 2004, http://PE.com for discussion of Schwarzenegger's particular public assault against the Agua Caliente. See also "Schwarzenegger Days Deal with Tribes Almost Ready," 31 March 2004, http://Indianz.com; Jim Miller, "Tribal agreement Said Close," *The Press-Enterprise*, 31 March 2004, http://PE.com; Kevin Yamamura, "Governor's Remarks Draws Ire: Gaming-tribe Group, NAACP call Schwarzenegger's 'Ripping Us Off' Campaign Utterance Insensitive," *Sacramento Bee*, 20 October 2004, http://Sacbee.com; Jim Miller, "Tribes Want Governor's Apology," *The Press-Enterprise*, 19 October 2004, http://PE.com.

47. Posted on http://www.schwarzenegger.com, 18 May 2005.

48. Jack D. Forbes, *Native Americans of California and Nevada*, Revised Edition. (Happy Camp, CA: Naturegraph Publishers, 1982); Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (Contemporary American Indian Issues Series No. 6. American Indian Studies Center. Berkeley: University of California, 1997).

49. For the seminal analysis on the failures of Public Law 280 in California, see Goldberg-Ambrose, *Planting Tail Feathers.*

50. W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* (Norman: University of Oklahoma Press, 2000), 44.

51. Commission report quoted in GAO, "Indian Issues: Improvements Needed in Tribal Recognition Process." (Washington, D.C.: General Accounting Office, Report #GAO-02-49, 2001), 9.

52. Report available on the NIGC website, dated June 2005.

53. Donald L. Barlett and James B. Steele, "Special Report on Indian Casinos: Wheel of Misfortune: Casinos Were Supposed to Make Indian Tribes Self-sufficient. So Why are the White Backers of Indian Gambling Raking in Millions while Many Tribes Continue to Struggle in Poverty?" *Time Magazine*, Cover Story, December 16, 2002. See also "Playing the Political Slots: How Indian Casino Interests Have Learned the Art of Buying Influence in Washington," *Time Magazine*, December 23, 2002. See also the press-releases on the "backlash" against tribes from the Pechanga Band of Luiseno Indians, the California Indian Nations Gaming Association, the National Indian Gaming Association, the National Congress of American Indians, the Center for the Integration and Improvement of Journalism (some of which are archived by the Native American Studies Department at the University of California, Riverside, at http://americanindian.ucr.edu/discussions/gaming/press_releases/).

54. As quoted on *60 Minutes* in a report entitled "Wampum Wonderland," correspondent Steve Kroft reporting, aired September 18, 1994.

55. Native American Rights Fund (NARF), "Dispelling the Myths About Indian Gaming," http://www.narf.org 2002.

56. Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106:8 (June 1993): 1710-91; Tomás Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (Berkeley: University of California Press, 1994); Ian F. Haney López, *White By Law: The Constructions of Race* (New York: New York University Press, 1996); George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (Philadelphia: Temple University Press, 1998). See also Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, *Critical Race Theory: The Key Writings That Have Formed the Movement* (New York: The New Press, 1995).

57. Lipsitz, *The Possessive Investment in Whiteness*, vii.

58. Almaguer, *Racial Fault Lines*, 45-74.

59. Sue-Ellen Jacobs, Wesley Thomas, and Sabine Long, eds., *Two Spirit People: Native American Gender Identity, Sexuality, and Spirituality* (Urbana: The University of Illinois Press, 1997).

60. Harris, "Whiteness as Property," 1710-1791.

61. Kent Ono and John M. Sloop, eds., *Shifting Borders: Rhetoric, Immigration, and Californa's Proposition 187 (Mapping Racisms)* (Philadelphia: Temple University Press, 2002).

62. David Shichor and Dale K. Sechrest, eds., *Three Strikes And You're Out: Vengeance As Public Policy* (Thousand Oaks, CA: Sage Publications, 1996); Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes And You're Out In California* (New York: Oxford University Press, 2001).

63. Ward Connerly, *Creating Equal: My Fight Against Race Preferences* (San Francisco: Encounter Books, 2000); Jack D. Forbes, *Proposition 209: Radical Equalizer Or Racist Trick?: An Independent Analysis* (Davis, CA: J.D. Forbes, 1997).

64. See One Nation/One California's website, http://onenation.org, for information on the Yes Proposition 227 campaign.

65. Stand Up for Californians had a website, no longer up http://standup.quiknet.com/about.html. All quotes taken from there, accessed November 25, 2002.

66. *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585 (1999).

67. Jim Adams, "Anti-Pequot Politicians Will Appeal Recognition," *Indian Country Today*, 13 September 2002, http://indiancountry.com; Editorial, Indian Country Today, "Norton Speaks: Interior Secretary on Tribal Recognition, Gaming Regulation, and the Trust Fund," *Indian Country Today*, September 17, 2002, indiancountry.com; Tom Wanamaker, "Who's Next for Class III Gaming," *Indian Country Today*, June 12, 2002, indiancountry.com; Tom Wanamaker, "Recognition, Unions and a Joint Venture," *Indian Country Today*, July 3, 2002, indiancountry.com; Tom Wanamaker, "Anti-gamers Rail Against Recognition: Threaten Tribal Economics," *Indian Country Today*, September 4, 2002, http://www.indiancountry.com; Tom Wanamaker, "No Casinos in My Backyard," *Indian Country Today*, September 26, 2002indiancountry.com.

68. CERA is closely related to the Upstate Citizens for Equality (UCE) in New York and the United Property Owners (UPO) in Washington, all of which focus attention on Native land rights and gaming activities. Websites for these organizations are at the following locations: CERA http://citizensalliance.org.

69. *Rice v. Cayetano*, 528 US 495 (2000).

70. United States treaties with the Hawaiian Kingdom were ratified in 1826, 1842, 1849, 1875, and 1884. These treaties addressed the terms of trade relations between the nations and navigation rights for the United States within the islands. The Kingdom also entered into treaties and agreements for peace, trade, and alliance with England (1836, 1846), France (1839, 1853), Denmark (1846, 1848), Hamburg (1848), Bremen (1854), Sweden and Norway (1852), Belgium (1862), the Netherlands (1862), the Swiss Confederation (1864), Italy (1863), Russia (1869), Spain (1863), Japan (1871), New South Wales (1874), Germany (1879), Portugal (1882), and Samoa (1887).

71. Haunani-Kay Trask, *From A Native Daughter: Colonialism & Sovereignty in Hawai'i* (Maine: Common Courage Press, 1993), 17-20.

72. Kauanui, "The Politics of Blood and Sovereignty in *Rice v. Cayetano*," 110-111.

73. Quoted in *Ibid.*, 112.

74. *Ibid.*

75. The lands were reserved for Native Hawaiians for "residential, pastoral, and agricultural purposes" (*Ibid.*, 114), somewhat akin to the logics of "aboriginal title" articulated in *Johnson v. McIntosh* (1823).

76. *Ibid.*, 114. This provision echoed the regulations developed for the enforcement of the General Allotment Act of 1887 (Joanne Barker, "Indian™ *U.S.A.*" *Wicazó Úa Review: A Native American Studies Journal* 18:1, [Spring 2003], 1-55).

77. A date determined by Captain James Cook's alleged "discovery" of the islands. Real colonial settlement, however, did not progress until the 1820s, when missionaries arrived, followed by land developers and the United States military to protect them (Trask, *From a Native Daughter*).

78. Kauanui, "The Politics of Blood and Sovereignty in *Rice v. Cayetano*," 112.

79. Hawai'i State Constitution, Article 7, Section 4; Kauanui, "The Politics of Blood and Sovereignty in *Rice v. Cayetano*," 112.

80. Kauanui, "The Politics of Blood and Sovereignty in *Rice v. Cayetano*," 110-16.

81. *Ibid.*, 114-16. On March 9, 2005, the Senate Indian Affairs Committee voted to support the Akaka bill. The fourth revised version of the bill clarified that it does not authorize eligibility of Native Hawaiians for federal Indian programs and services. The bill is now on the calendar for a Senate and House vote, both pending.

82. Quoted in *Ibid.*, 113-114.
83. *Ibid.*, 117.
84. *Morton v. Mancari*, 417 US 535 (1974).
85. *Ibid.*
86. *Ibid.*
87. *Morton v. Mancari* was cited in subsequent decisions that addressed the parameters of tribal self-government. In *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978), the Supreme Court determined that tribes had "sovereign immunity" from civil lawsuits because neither the Indian Reorganization Act of 1934 nor the Indian Civil Rights Act of 1968 had established federal jurisdiction over civil rights complaints against tribes. This remanded such complaints to tribal courts as an "internal matter" of "self government."
88. This has disturbing parallels in federal Indian law with the administration of the General Allotment Act and the establishment of the *Certificate of Degree of Indian Blood*, as well as, tribal constitutions that include membership requirements based on blood quantum.
89. See Pat Omandam, "Judge Denies Bid to End Native Hawaiian Funding," *Honolulu Star Bulletin*, March 13, 2002, 1.
90. The sixteen plaintiffs include Earl F. Arakaki, Evelyn C. Arakaki, Edward U. Bugarin, Sandra P. Burgess, Patricia Carroll, Robert M. Chapman, Brian L. Clarke, Michael Y. Garcia, Roger Grantham, Toby M. Kravet, James I. Kuroiwa Jr., Fran Nichols, Donna M. Scaff, Jack H. Scaff, Allen Teshima, and Thurston Twigg-Smith.
91. Trask, *From a Native Daughter*, 1-40.
92. Kauanui, "The Politics of Blood and Sovereignty in *Rice v. Cayetano*."
93. *Nevada v. Hicks* 533 US 353 (2001); *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma* 532 US 411 (2001).
94. *Atkinson Trading Post v. Joe Shirley, et. al.*, 532 US 645 (2001).
95. Wilkins, *American Indian Politics and the American Political System*, 78-81.
96. Omi and Winant, *Racial Formation in the United States*, 63.
97. Harris, "Whiteness as Property."
98. Anaya, *Indigenous Peoples in International Law.*
99. *Cobell v. Norton*, No. 1: 96CV01285 (D.D.C.), 1996. In 1996, when the suit was originally filed in the U.S. District Court for the District of Columbia, Bruce Babbitt was Secretary of the Interior, Lawrence Summers was Secretary of the Treasury, and Kevin Gover was Assistant Secretary of the Bureau of Indian Affairs. Then, it was Gale Norton, John Snow, and Michael Olson, respectively. With Norton's resignation in March 2006, Dick Kempthorne has been appointed.
100. For background and a documentary history of the case, see http://www.indiantrust.com.
101. United States, *General Allotment Act and Amendments* (Washington, D.C.: Government Printing Office, 1909); D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman: University of Oklahoma Press, 1973); Wilcomb E. Washburn, *The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887* (Philadelphia: Lippincott, 1975); Samuel Thomas Bledsoe, *Indian Land Laws* (New York: Arno Press, 1979 [formerly *Indian Land Laws; being a treatise on the law of acquiring title to, and the alienation of, allotted Indian lands. Also a compilation of treaties, agreements and statutes applicable thereto.* Kansas City, Mo.: Pipes-Reed Company, 1909]); Leonard A. Carlson, *Indians, Bureaucrats and the Land: The Dawes Act and the Decline of Indian Farming* (Westport, CT: Greenwood Press, 1980); Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington: Indiana University Press, 1991); Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994); Jeffrey Burton, *Indian Territory and the United States, 1866-1906* (Norman: University of Okalahoma Press, 1995); Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914* (Utah: Ancestry.com, 1999); Barker, "IndianÔ *U.S.A.*"
102. See McDonnell, *The Dispossession of the American Indian*, and Carlson, *Indians, Bureaucrats and the Land* for details on the complexities within the administrative processes in how lands were divided and patents issued.
103. McDonnell, *The Dispossession of the American Indian*, 19-25.
104. *Ibid.*, 87-102; Carlson, *Indians, Bureaucrats and the Land*, 51.
105. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (New Jersey: Princeton University Press, 1940); Theda Perdue, *Nations Remembered: An Oral History of the Five Civilized Tribes, 1865-1907* (Westport, CT: Greenwood Press, 1981).
106. Bledsoe, *Indian Land Laws*, 868-894; McDonnell, *The Dispossession of the American Indian*, 87-102.
107. McDonnell, *The Dispossession of the American Indian*, 87-102; Carlson, *Indians, Bureaucrats and the Land*, 51.
108. See Debo, *And Still the Waters Run*, and Perdue, *Nations Remembered.*
109. The Indian Citizenship Act of 1924 unilaterally extended U.S. citizenship to all Indians irrespective of the types of land titles that they had been issued under allotment. United

States, *The General Allotment Act and Amendments*; McDonnell, *The Dispossession of the American Indian*, 61-62, 68-70, 88-89.

110. Bledsoe, *Indian Land Laws*, 75-76; Debo, *And Still the Waters Run*, 90.

111. The Indian Reorganization Act, also known as the Wheeler-Howard Act, 48 Stat. p. 984 (1934), revoked allotment.

112. See Debo, *And Still the Waters Run*.

113. There were incredible differences at both the regional and tribal levels in how allotment policy was carried out; some areas were targeted more strongly than others, some neighboring tribes not selected at the same time or at all, and some reservations not completely allotted. See United States, *Allotment of lands to Delaware Indians* (Washington, D.C.: Government Printing Office, 1904); Elizabeth Green, *The Indians of Southern California and Land Allotment* (Long Beach, California, 1923); Mark Keller, *The Chippewa Land of Keweenaw Bay: An Allotment History* (Baraga, Mich: Keweenaw Bay Tribal Council, Keweenaw Bay Tribal Center, 1981). Therefore, any standardized description of allotment is inadequate to the task of indicating the great differences between regions and tribes for understanding the effects of allotment. For these reasons, studies of allotment tend to be weighted towards its ideological or political significance or on specific regions and/or tribes, such as McDonnell's emphasis on the Plains or Debo's work on Indian Territory. It is beyond the scope of this paper to provide the kind of careful descriptive analysis of these important regional and tribal differences.

114. See the Blackfeet Reservation Development Fund (BRDF)'s http://www.indiantrust.com for an archive of all court documents and press releases related to the case.

115. See Kroft, "Wampum Wonderland"; see also NARF's archives at http://indiantrust.com.

116. Kroft, "Wampum Wonderland."

117. I attended the NCAI meetings that year, including all general assemblies and breakaway sessions related to discussion of the proposal.

118. These attitudes were powerfully reflected in Kroft's "Wampum Wonderland," 1994 and 2000, which indicted the entire system of gaming with facilitating an "ethnic fraud" that set up unfair economic advantages against "white" citizens. See also Jeff Benedict, *Without Reservation: How a Controversial Indian Tribe Rose to Power and Built the World's Largest Casino* (New York: Harper Perennial, 2001); Kevin Gover, "How the Eastern Pequots Overcame The Big Lie," *Indian Country Today*, 12 July 2002, http://indiancountry.com.

119. Norton and McCaleb failed to convince tribes of their proposal. But others would follow. In July 2005, Senators John McCain (R-Arizona) and Byron Dorgan (D-North Dakota), as Chairman and Vice-Chairman of the Senate Indian Affairs Committee, introduced the Indian Trust Asset Management Demonstration Project Act (ITAMDP). There are six main sections of the bill that would: 1) settle all claims in *Cobell et al.*; 2) create a twelve-member commission to review all current trust resource management laws and the DOI's management practices; 3) initiate an eight-year project during which time tribes would be able to negotiate their own trust management plans; 4) allow the DOI to purchase lands at fair market value that have excessive "fractionated interest" (allotments with twenty or more legal heirs holding title); 5) create a new Under Secretary for the BIA that would assume control over the BIA and the Office of the Special Trustee; 6) perform a yearly audit of the Individual Indian Money (IIM) trust and each individual tribal trust account. The bill is still pending but has not been well received by tribes who feel that its proposed settlement of *Cobell* is unfair.

120. See Lenore A. Stiffarm with Phil Lane, Jr., "The Demography of Native North America: A Question of Indian Survival," in *The State of Native America: Genocide, Colonization, and Resistance*, edited by M. Annette Jaimes (Boston: South End Press, 1992), 23-54; Forbes, *Native Americans of California and Nevada*; Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Austin: University of Texas Press, 1998).