SIX | Mark Rifkin

Making Peoples into Populations
The Racial Limits of Tribal Sovereignty

> Hence there was an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations, marking the beginning of an era of "bio-power."
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> . . . If the development of the great instruments of the state, as *institutions* of power, ensured the maintenance of production relations, the rudiments of anatomo- and bio-politics, created in the eighteenth century as *techniques* of power present at every level of the social body and utilized by very diverse institutions (the family and the army, schools and the police, individual medicine and the administration of collective bodies), operated in the sphere of economic processes, their development, and the forces working to sustain them.
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> —Michel Foucault, *The History of Sexuality,* vol. 1

What defines a population as such? This question could mean something like how particular populations are coded within existing discourses. Alternately, challenging the idea that populations are given entities, it could be asking how groups of people are constituted as a population or populations—how the contours of a population are determined, by whom, and through what institutional and ideological mechanisms. From the former perspective, one could explore how Indigenous populations are represented within the administrative rhetorics of the settler state or, from the latter perspective, the ways the U.S. government produces "Indians" as a racial population in ways that facilitate the promulgation of regulations that encompass all Indigenous people. Both of these approaches could employ Michel Foucault's conception of biopolitics to address how techniques of governance are (re)cast as necessarily following from innate

bodily qualities (such as *Indian* "blood"), how such strategies are presented as simply supplementing or reflecting biological impulses and imperatives. Moreover, Foucault suggests that biopolitics "effects distributions around the norm," and "the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory," "a technology of power centered on life."[1] The positions various groups of people occupy within the political and economic configuration(s) that sustain the norm, then, are validated as merely expressive of their collective bodily dispositions, qualities that make them—as populations—less able to participate in the promise of augmented life represented by the norm.

However, the question with which I began has another dimension that largely is left unaddressed within a biopolitical framework, namely the issue of geopolitics. If a population is not given but produced in order to locate particular groups of people within a system of control that operates through distributions around a biologically imagined norm, what kinds of social organization and collective self-representation does the idea of the population supplant? Moreover, if biopolitics comes to be exercised through an already existing institutional matrix of the state that seeks to manage political and economic relations, as suggested in the epigraph, how is the reach of the state defined and justified? How is the space over which normalizing techniques of governance operate determined, or what institutional and ideological processes are at play in outlining the juridical contours of "the social body"? The concept of population, as articulated by Foucault, presumes the geopolitics of the nation-state, its existence as a clearly bordered entity with centralized authority over subjects understood as within its exclusive jurisdiction. While scholarship in queer studies has sought to extend the scope of Foucauldian biopolitics as a critical imaginary, to explore its usefulness in addressing forms of imperialism old and new, this work has not thought much about the struggle among competing systems, the relation between the interpellation of groups of people as populations subject to imperial rule, and their existing ways of conceptualizing collectivity, governance, and territoriality.[2] What were they before they were a population—a biopolitically (and potentially racially) imagined unit under the purview of the state? What happens to prior modes of identification and sociospatiality in that (continuing) process of population making? What geopolitical work does the idea of the population perform in rendering obvious the dimensions of state rule, or, put another way, what role might population play in translating prior geopolitical formations and

contemporary jurisdictional tensions into biopolitical terms, such that they no longer appear as issues of jurisdiction or as challenges to the authority of the state to define what constitutes viable modes of political process, structure, and representation?

These questions seem particularly pressing in considering the kinds of sovereignty exercised by settler states. The settler state is premised on intimate belonging to the space it claims as its own, requiring that the friction between state mappings and already existing Indigenous formations be disavowed.[3] The fusion of the politics of state nationality to Indigenous place involves the careful management of Native governance so that it does not conflict with the terms of settler occupation, and in the case of the United States, as Vine Deloria and Clifford M. Lytle argue, the recognition of forms of Native "self-government" remains contingent on what "the federal government deems acceptable and legitimate exercises of political power," a framework that is not what "Indian people themselves have demanded or appreciated."[4] The categories of "Indian" and "tribe," then, can be understood as generated within U.S. political discourses and institutions, as (mis)translations of Indigenous polities. Representing Indians as a racial population enables the U.S. government to insert them into the matrix of federal jurisdiction, defining them not as polities whose existence precedes that of the settler state itself but instead as a collection of persons whose shared identity and status is measured through U.S.-produced terms and norms.[5] Deloria and Lytle indicate that the distance between "self-government" and "self-determination" can be measured in terms of federal efforts to regulate what will count as a legitimate kind of political claim, and the biopolitical production of populations can be understood as a tactic, or technique of rule, within that larger and ongoing geopolitical project. Coding Indigenous polities as an "Indian" population, aggregated into "tribes," displaces not just specific Indigenous modes of governance and land tenure but the authority of Indigenous peoples to decide for themselves how they should be governed.

Indigenous intellectuals and activists have used the topos of *peoplehood,* along with *self-determination,* as a way of challenging states' claims to exclusive sovereignty *within* their borders, drawing on those terms' meanings within existing international law and UN covenants to insist that indigeneity cannot be reduced to the terms of settler governance.[6] The concept of peoplehood can provide a way of leveraging the unexamined geopolitical assumptions at play in existing ways of analyzing biopolitics, while also helping highlight the role that biopolitical forms of power play within the

geopolitical project of legitimizing and exercising settler-state authority over Indigenous space and polities. In particular, a focus on kinship can aid in illustrating and developing that double-sided critical movement, since it functions as an ideological switch point between biopolitics and geopolitics. Kinship provides an idiom through which to cast the operation of the state apparatus as merely an extension or recognition of instinctive familial bonds of affection and care.[7] As a term and concept, *kinship* emerges out of a Euramerican anthropological tradition that seeks to remake Indigenous social formations as an older/other version of the social sphere of *family,* measuring the former within the normative frame of the latter.[8] In this vein, Indigenous peoples can be narrated as a population defined by reproductively transmitted Indianness. The discourse of kinship can cast Indigenous principles of geopolitical organization—the contours and character of peoplehood—as, instead, characteristics that attach to a (racially imagined) population, such that *tribes* as collections of *Indians* are offered diminished, circumscribed forms of collective recognition (self-government as tribes) rather than fully acknowledged as peoples (self-determination). As I will show through discussion of two U.S. Supreme Court decisions—*United States v. Rogers* (1846) and *Santa Clara Pueblo v. Martinez* (1978)—this process of creating an Indian population not only subjects Native peoples to a biopolitical regime but reaffirms the obviousness of the territoriality and jurisdiction of the settler state. Alternative Indigenous conceptions of collectivity are portrayed either as merely expressions of racial Indianness or as indicating a specific kind of legally recognized yet circumscribed cultural difference—as tribes—that attaches to Indians as an anomalous population within the nation-state. An attention to questions of kinship helps in tracking the threshold between geopolitics and biopolitics and the ways issues of jurisdiction and sovereignty are interpellated as innate characteristics of a racialized population. More specifically, such an approach traces how the assertion of the obviousness of U.S. jurisdiction leads to the biologization of peoplehood, even in the absence of an explicit discourse of racial difference in situations where the United States seems to acknowledge the distinctness and political autonomy (self-government) of Indian tribes.

Race, Space, and Sexuality

Before turning to the legal dynamics of U.S. population making, and the complex role of kinship in that process, I want to address more fully the ways that Foucault's conception of biopolitics has been extended to questions of empire and to consider how a focus on peoplehood can raise

questions about the representation of spatiality and sovereignty in those accounts. In particular, Ann Laura Stoler's *Race and the Education of Desire* and Jasbir K. Puar's *Terrorist Assemblages* provide useful examples of how scholars have rethought the dynamics of Foucault's analysis as laid out in *The History of Sexuality*. Both offer crucial qualifications and elaborations that can be immensely useful to Native studies in understanding the process by which Indigenous social formations are inserted into the ideologies and institutions of the settler state. They explore how modes of racialization depend on discourses of sexuality, generating a kind of interpretive framework that attends to the central importance of representations of family, desire, and homemaking within imperial imaginaries. However, in demonstrating how populations are produced as such within biopolitical projects, these works tend to lose track of countervailing geopolitical formations to those of the imperial power. In emphasizing the pervasiveness of biopower—its extension into all areas of life—these accounts tend to treat space as a kind of inert backdrop across which imperial authority extends, bracketing tensions or frictions between imperial governance and the already existing sociospatialities of those over whom such governance is extended.

In Foucault's account, biopolitics supplants an older model of rule organized around the unilateral power of the sovereign to kill, and this royalist vision of absolute authority enacted in limited circumstances gives way to a more pervasive notion of power as circulating through the social body, imagining the subjects of a given government as a kind of organic entity out of which the state develops and, thus, making the state into the protector and facilitator of popular well-being in ways that suggest the necessary penetration of governance into all areas of life (including health, sanitation, reproduction, education, and child care). Without challenging the importance of discourses of sexuality to this transformation in European social life, Ann Laura Stoler suggests that Foucault's field of vision is far too limited because he implicitly accepts the fiction produced within colonial policy of a "home" country whose residents are de facto *the people* of which the government is the expression. The separation between home and colony, she argues, does not in fact precede the colonial encounter but instead postdates it—a retrospective projection constituted through interwoven discourses of sexuality and race: "In this age of empire, the question of who would be a 'subject' and who a 'citizen' converged on the sexual politics of race."[9] For Stoler, Foucauldian biopolitics serves as a means of understanding how colonial governance produces and maintains the crucial boundary

around citizenship that allows for the continued validation of the state as representative in the face of its subjection of other people and places to potentially unlimited regulations and interventions. Also, racial and sexual differentiation provides an alibi for such domination by portraying subject *populations* as a potential threat to the welfare/life of the national people and thus in need of extensive and intrusive management.

Stoler explores the ways that the attempt to regulate domestic relations in the colonies served as a central part of state strategies to construct and police a distinct Europeanness that remained quite murky in practice. She argues, "The self-affirmation of white, middle-class colonials thus embodied a set of fundamental tensions between a culture of whiteness that cordoned itself off from the native world and a set of domestic arrangements and class distinctions among Europeans that produced cultural hybridities and sympathies that repeatedly transgressed these distinctions."[10] The legally sanctioned "culture of whiteness" relied on discourses of sexuality to link together potentially discrepant social activities, such that family and household formation can be taken to signify something coherent and innate about those partaking in particular practices. In this way, racialized conceptions of domesticity provide the basis for distinguishing the nation from the colonies, serving as the basis for determining who belongs to the national people. The making of middle-class sensibilities, then, which for Foucault operate as the horizon of normalization within the European nation-state, actually occurs within the colonies, and discourses of kinship and residency operate as core tools through which state policy engages in the production of noncitizen populations, whose supposed innate difference justifies their status as alien subjects of state jurisdiction.[11]

One of the most compelling and helpful aspects of Stoler's reformulation of Foucault is her emphasis on how the institutionalized production of racialized populations generates geopolitical distinctions (home versus colony, citizen versus subject), but in a register that appears not to be about space and sovereignty at all. Such categorizations appear as if they were derived from the natural facts of health, reproduction, and racially differentiated embodiment. While she does not develop this point, Stoler's argument gestures toward the ways the interpellation of persons and places into the terms of imperial governance performed by the concept of the population displaces discussion of the translation and supplants already existing governmental structures and modes of land tenure among the colonized. For example, Stoler refers at several points to "cultural hybridities" that threaten the racial and sexual logic of whiteness: what happens if one

figures these hybridities not simply as ambiguities internal to the colonial system but as evidence of a struggle between a European social system and a prior one? How might such hybridities be interpreted as traces of forms of sociospatiality that certainly are affected by imperial presence and policy but are not reducible to them? How might those principles and practices often characterized as kinship be understood as modes of collectivity and place making, as part of a non-European geopolitical imaginary whose contours remain at odds with those of imperial policy?

Within Native studies, such an analysis can allow for investigation of how the racialized category of "Indians" administratively was constructed through discourses of sexuality (kinship, courtship, marriage, homemaking, child rearing), and this methodology further enables examination of how that process translated Native peoples as a population in ways that bracket or disavow questions about the supersession of Indigenous modes of collectivity and sovereignty (such as decision making, land tenure, resource distribution) by the logics and mappings of settler-state policy. From this perspective, the critical juxtaposition of *population* with *peoplehood* offers a way of tracking the process of interpellation, of marking the discursive and institutional threshold for translating Native geopolitical formations into the terms of settler governance.[12] If used from a critical position that is attentive to Indigenous peoplehood, a biopolitical analytic can help highlight the role that discourses of sexuality play in transposing and displacing Native sovereignty and self-determination, attending to how such discourses recast these issues as ones of population management within the orbit of state jurisdiction.

In *Terrorist Assemblages,* Jasbir Puar points to the continued complex twining of sexuality and race within imperial projects in the contemporary moment, illustrating the ways biopolitical tactics deployed in and by the United States depend on shifting processes of normalization, which regulate access to privileged forms of political subjectivity. The thrust of her argument is that the extension of rights and positive recognition to certain homosexual subjects within the United States is indissolubly enmeshed in the interpellation of so-called terrorists and Muslims and Arabs more broadly as queer populations whose detainment and death makes possible the safety of the nation—the construction of the terrorist as "a body almost *too perverse to be read as queer.*"[13] The provisional acceptance of sexual minorities remains "contingent upon ever-narrowing parameters of white racial privilege, consumption capabilities, gender and kinship normativity, and bodily integrity," which when endorsed by such minorities is described

by Puar as "homonationalism."[14] This apparent embrace of particular kinds of sexual deviance is accompanied by "the ascendancy of whiteness," which though not "strictly bound to heterosexuality[,] . . . is bound to heteronormativity," creating "differences between queer subjects who are being folded (back) into life and the racialized queernesses that emerge through the naming of populations."[15] From this perspective, in ways similar to Stoler's account, racialized population making is dependent on the perception of particular social practices as violating heteronormative principles; such subjects "refuse to properly assimilate," which Puar places in "contrast to the upright homosexuals engaged in sanctioned kinship norms."[16] Noting that "the ascendancy of whiteness and the ascendancy of heteronorms are biopolitical comrades," Puar suggests that queer abjection attaches less to particular forms of homoerotic desire (since gays and lesbians can become good homonational subjects) than to violations of a national liberal ideal—one ordered around proper family making, intimacy, household formation, and consumerism.[17]

Yet such population making relies less on existing categories of identity than "assemblages." This "mapping of race through aggregates and disaggregates" "establishes the individual as imbricated in manifold populations (not community—the designation to a dehumanizing population instead of the communalism of community is significant)."[18] The terrorist is not part of a community, a collectivity with a sense of itself as such. Instead of describing persons as mutually participating in something, this mode of racialization entails the construction of a kind of acommunal aggregation of traits that ostensibly indexes persons' failure to meet the heteronormative standards of "life."[19] Not having a determinate collectivity that could make political claims, terrorists exist in the U.S. policy imaginary as deterritorialized bodies whose very lack of national location makes them both inherently threatening and an exception to the normal rules of law and international warfare. In this sense, race marks the gap between the formal legal limits of U.S. sovereignty and the exercise of imperial power, providing a rationale for the extension of state authority over nonstatist actors operating anywhere. Biopolitical discourses manage the disparity between the legalities of nation-state boundaries and terrorist mobilities. As Puar suggests, the formulations and formations of the "war on terror" exude "the anxiety of managing rhizomic, cell-driven, nonnational, transnational terrorist networks that have no self-evident beginning or finite end," with "the terrorist serv[ing] as the monstrous excess of the nation-state."[20] Puar further suggests that the United States seeks to validate the war on terror by

casting its policies as conducive to greater gender and sexual freedom either in the United States or in regimes modeled on the United States. She argues that this "sexual exceptionalism" facilitates the construction of a "state of exception" for "terrorist" populations, in which the protection of the life and freedom of privileged subjects legitimizes state action to kill those envisioned as threatening such freedom.[21] Heteronormative ideologies provide the basis for differentiating between normal and queerly racialized populations, presenting the latter as possessing inherent characteristics that make them the appropriate target for state authority acting in "excess" of—or in the necessary "exception" to—domestic and international law.

The state's biopolitical narration of the terrorist as a deterritorialized actor constituted by an assemblage of traits casts the population to which she or he belongs as unmoored from any particular (sense of) place—as having no spatial identity, claims, or mappings of its own. Such modes of queer racialization can be understood as a tactic through which the United States seeks to foreclose discussion of the limits of its own jurisdiction, the sociospatiality of the terrorists (in terms of inhabitance, alliance, or aspiration), and the sovereignty of other nation-states whose borders are seen as meaningless in the supposed war on terror. However, rather than engaging with the erasure (or perhaps deferral) of geopolitics performed by universalizing heteronormative discourses that define worthwhile life and lives, Puar accepts the idea of the diffuse assemblage as a model for political praxis. She suggests that "the paradigm of queer diaspora retools the notion of diaspora to account for connectivity beyond or different from sharing a common ancestral homeland," "allowing for queer narratives of kinship, belonging, and home."[22] In response to the administrative deterritorializations of state power that characterize the war on terror, she advocates a move away from "the defense of the integrity of identity" and toward "a queer praxis of assemblage [that] allows for a scrambling of sides that is illegible to state practices of surveillance, control, banishment, and extermination," turning the imperial logic of assemblage back on itself so as to proliferate forms of association and organization that cannot be easily located within state mappings.[23] If the modes of racialization deployed against terrorists cast them as lacking a determinate community and spatiality, does the acceptance of this model provide much of an alternative? Doesn't doing so reaffirm the state-managed paradigm of heteronormative whiteness and population making as the only basis by which to define what constitutes a legitimate collectivity for articulating a politics for exercising sovereignty and self-determination?

Drawing on Puar's analysis, one can interpret the history of U.S. Indian policy as a process of coding Native peoples as terrorist populations, as queer deviations whose failure to adhere to normative structures of homemaking and land tenure threaten the safety and welfare of the (white) nation.[24] Further, a heteronormative framework can be seen as having regulated the conditions for political intelligibility, in terms of shaping what would be seen as a viable form of governance and sociality as well as providing the basis for racializing Native peoples as Indians (their deviations from bourgeois homemaking marking them as nonwhite).[25] However, even in critiquing the ways U.S. power is exerted through the state of exception, Puar tends to naturalize the geopolitics of U.S. nation-statehood by failing to acknowledge that the kinds of sexual exceptionalism she addresses not only legitimize the extension of jurisdiction but also interpellate the political mappings of nonstatist actors (including Native nations) as merely a perverse absence of normative nationality. Puar overlooks how political geographies and processes of governance not modeled on U.S. liberalism are treated as merely the unnatural impulses/tendencies of a racial population.[26] Puar and Stoler illustrate the importance of discourses of sexuality to imperial projects, showing how these discourses help make possible racializing forms of rule that contradistinguish citizens from populations that are subject to virtually unlimited state regulation and intervention. Both scholars, though, lose track of the geopolitical formations that biopolitical techniques work to efface or to translate into more manageable terms. Such an oversight ends up eliding other extant modes of collectivity, place making, and sovereignty, including those of Indigenous peoples.

Kinship and Geographies of Jurisdiction

Biopolitical analyses can be immensely useful for Native studies, drawing attention to the ways that deviations from an emergent or established heteronorm can serve as the basis for the settler state's construction of a racialized population, which then is targeted for particular kinds of regulation. However, while these accounts intimate that biopolitical discourses perform geopolitical work, such scholarship does not explore the forms of spatial self-representation, mapping, and sovereignty that are displaced through imperial population making. Given that the state's assertion of its own territorial self-evidence is critical to the exertion of settler authority over Indigenous peoples-cum-populations, addressing how biopolitics works to render national space self-evident is crucial in incorporating this

Foucauldian concept into Native studies. The case of *United States v. Rogers* helps reveal how the exertion of U.S. jurisdiction is legitimized by reference to a racializing heteronorm, and the case shows how Native kinship functions as a threshold at which peoplehood is interpellated as population within the legal discourses of the settler state. The representation of Indianness as an inherited (set of) characteristic(s) serves as a necessary supplement to the naturalization of U.S. legal geography. The decision uses the concept of Indian to transpose Native sociopolitical processes into a discourse about kinds of bodies in which legal boundaries and jurisdiction are addressed in terms of racial reproduction rather than extant Native forms of (political) self-identification. In this way, the decision makes tribal self-governance logically and legally contingent on determining who possesses Indian blood.

The decision centers on the extent of U.S. jurisdiction over acts occurring in Indian Territory, specifically within the boundaries of the Cherokee Nation. William S. Rogers had been tried in a U.S. Circuit Court for the murder of Jacob Nicholson, and the indictment had described both as "white men and not Indians." In his plea, Rogers contended that while he and Nicholson had been "native-born free white male citizen[s] of the United States," the fact that both had become citizens of the Cherokee Nation through marriage to Cherokee women meant that U.S. courts had no authority over them.[27] The basis for this legal claim was the provisions of the Indian Trade and Intercourse Act passed in 1834, which had limited the exertion of federal power to crimes in which non-Indians were involved.[28] Given that they were "incorporated with the said tribe of Indians as one of them," Rogers and Nicholson, Rogers asserted, each was "a Cherokee Indian," and thus the killing could not be adjudicated in U.S. courts. The prosecution argued that "the proviso of the act of Congress . . . was never intended to embrace white persons," and since the justices were divided on certain central legal issues, the Circuit Court sent the case to the Supreme Court, asking among other questions, "Could the accused . . . so change and put off his character, rights, and obligations as a citizen of the United States, as to become in his social, civil, and political relations and conditions a Cherokee Indian?"[29] While the lower court focused mostly on whether and under what circumstances a U.S. citizen could renounce that status, the Supreme Court majority opinion by Chief Justice Roger B. Taney largely ignored this line of inquiry, instead taking up the prosecution's suggestion that to be simultaneously "white" and a "Cherokee Indian" was a legal impossibility.[30] On this basis, the court declared that

neither Rogers nor Nicholson was Indian within the terms of the 1834 act, and, thus, Rogers could be tried in a U.S. court.[31]

Other scholars have focused on the implications of the decision's apparent choice of race over politics as a way of defining Cherokee identity,[32] but instead of suggesting that Taney's narration of Native peoples as a racial population displaces or brackets acknowledgment of the Cherokees as a polity, I want to suggest that his racialization crucially supplements the geopolitics of U.S. sovereignty by marking the limits of such political recognition. Put another way, race does not so much take the place of what might be termed *politics,* but rather it serves as a crucial way of defining and circumscribing *tribe* when the United States recognizes limited Native self-governance. The insertion of racial Indianness here works to cast whatever might be characterized as Cherokee politics as necessarily subordinate to U.S. jurisdiction because Cherokees, as part of a racial population, are all subjects within the sphere of U.S. rule. After rehearsing the basics of the case and the claims in Rogers's plea, the opinion immediately turns to the geopolitical status of Cherokee lands: "The country in which the crime is charged to have been committed is a part of the territory of the United States. . . . It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority."[33] If the meaning of "Indian" in the 1834 statute is the central issue of the plea, and ultimately of the decision itself, why begin with the discussion of the scope of U.S. space?

The process of determining who is Indian appears to require presenting the relation between the Cherokees and their "place of domicile" as inherently mediated by official U.S. will ("assign," "assent"). The term domicile suggests (contingent) habitation rather than the immutable fusion of land and *authority* that attaches to the U.S. government. The decision further asserts that "native tribes . . . have never been acknowledged or treated as independent nations." Yet while insisting on the fact that such "tribes" have been and are "subject to [the] dominion and control" of Euro-derived regimes, Taney demurs a bit, observing that "it would be useless at this day to inquire whether the principle thus adopted is just or not": the United States has "maintained the doctrines upon this subject which had been previously established by other nations."[34] The pause here intimates that something about the "principle" of failing to treat "tribes" as "independent nations" may be un-"just," that the invocation of precedent (simply doing what others have done) seeks to hold at bay a challenge to the legitimacy of U.S.

mappings of the nation's own "dominion and control."[35] Later in the same paragraph, Taney insists, "we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority," but if so, why does the decision actively have to decry the effort to "inquire" into the basis for such "authority"?[36] If the territoriality of the United States is a self-evident and self-sufficient explanation for the exertion of jurisdiction over tribes, what question could be raised about the *justice* of that geopolitical fact? The presumptive coherence of U.S. legal geography seems to depend on deferring this issue, declaiming the *uselessness* of investigating it. The hyperbolic, and somewhat hysterical, reiteration of the obviousness of the contours of U.S. territory testifies to a sense of the logical and normative tenuousness of that very claim in light of prior Native occupancy.

The decision seeks to cover this gap through introducing the figure of race. After observing that the United States has merely "maintained the doctrines" that preceded the existence of the nation as such Taney notes: "Yet from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices."[37] To be Indian is to be a member of a particular race, rather than to belong to a political entity, an "independent nation"—a status that would put in crisis the territory—authority complex of U.S. jurisdiction (*disputing* the contours of U.S. "dominion and control"). While the opinion does rehearse the rhetoric of the civilization program (enlightening minds and saving Natives from their vices), this moment is the only one of this kind, and the decision lacks the usual images of Native brutality, wildness, wandering, and inhabitance of a wilderness.[38] One could read this moment as the one where race displaces politics, substituting a distinct and inferior Indian corporeality for an engagement with Native people as *peoples,* as autonomous and self-determining. Such an interpretation, however, overlooks the ways that characterizing being Indian as belonging to a race serves less as a way of erasing the existence of tribes as polities than differentiating "tribes" from "independent nations." Racializing Native peoples as Indians, or reciprocally understanding "Indian" as a racial designation, defines them primarily as a population, presenting them in biopolitical terms. Taney says of Rogers that "whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws

of the United States remains unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress" for Indian-on-Indian crime.[39] "Indian" and "white" are incommensurable; being one a person cannot become the other. Yet the opinion does not deny that Rogers, or Nicholson for that matter, could "becom[e] a Cherokee" and acquire distinct "obligations" in doing so. That "adoption," though, cannot alter or erase *race,* which is given at birth and immutable. While Cherokee here is not (necessarily) a racial identity, it must be subordinated to the facticity of being white (or Indian) inasmuch as that status marks an underlying and incontestable "responsibility to the laws of the United States." Here we reach a bit of an aporia. The term *tribe* includes yet exceeds the category of "Indian" because the latter designates belonging to a race, and Indianness anchors tribal identity in U.S. law, evidently confirming the overriding importance of U.S. "assent" to tribal actions despite the absence of any explanation for why this would be the case.

Distinguishing Indian from tribe and racializing the former displaces two threatening propositions. If to be Indian simply is to be recognized as a member of a tribe by the tribe, the terms and contours of Native peoplehood do not have reference to U.S. law and are not subject to it, de facto making tribes "independent nations."[40] Reciprocally, if tribes are solely collections of Indians rather than political entities, then there is no basis for the treaty system, leaving the United States with no way of justifying its acquisitions of Native-occupied lands except brute force. The importance of casting the extension of U.S. authority over Native territory as both obvious and consensual is illustrated in the decision by the reference to the Treaty of New Echota (1836), which legitimized the removal of the Cherokees from their traditional lands.[41] While the document was signed by people unauthorized by the Cherokee national government after it had been rejected twice in formal council, that Taney feels the need to argue that the 1834 Indian Trade and Intercourse Act is not at odds with the treaty indicates the treaty's significance for him as a marker of the legitimacy of U.S. policy, due to its ability to indicate Cherokee agreement to federal law and its application to them.[42] Asserting that the term *Indian* must refer to race, then, does not so much erase Native polities as constrain them. U.S. national space is constructed through, in Stoler's terms, a "racial grammar," but in this case, rather than offering a means of separating home from colony, this ideological system works to secure the self-evidence of the nation's "territorial limits" by making the dynamics of tribal governance distinct from while still contingent on a supposedly underlying Indianness.

To what, though, does *race* refer in the decision? Although viciously circular incoherence is one of the most prominent generic features of Supreme Court decisions focused on Indian law and policy, Taney's attempt to define Indian deserves some kind of prize (making it well worth quoting in full):

> And we think it very clear, that a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.[43]

It's hard to know where to begin in addressing the baffling involutions of this passage. Setting aside the odd qualification indicated by the phrase "at a mature age,"[44] the opinion here states unequivocally that "a white man . . . is not an Indian" and that the impossibility of one ever being the other has to do with "belonging" to a "race." Indian refers "to those who by the usages and customs of the Indians are regarded as belonging to their race," therefore race itself appears to be predicated less on inherited bodily traits than specific "usages and customs," dynamics of Native sociality. Why, then, couldn't someone categorized as white at birth become Indian if the latter race is dependent on tribal principles and practices? As noted earlier, both Rogers and Nicholson seem to have been "regarded" as "Cherokee Indians" by the Cherokees themselves. The decision, however, distinguishes between the *privileges,* and even *laws,* of a tribe and the "usages and customs" of "the race generally." This latter phrase presents race as inclusive of membership in tribes but as exceeding that kind of belonging, as providing a more "general" and encompassing rubric.

If the explicit or implicit aim is to substitute race for politics, the stuttering invocation of "usages and customs" significantly undermines that effort by indexing social formations that disjoint the discursive soldering of "Indian" to a bodily type. Instead, the opinion casts race as the generic standard against which to assess the particular features of a given tribe's laws, for the purposes of evaluating their relation to—and viability within—U.S. policy. The 1834 law, the opinion declares, does not mean to interpose U.S.

authority among members of a tribe, so long as that matrix conforms to "Indian usages and customs." The term *Indian* delimits the threshold of U.S. intervention, suggesting the existence of a field of purely internal tribal matters, but one whose dimensions and processes are not defined simply by reference to the tribe's own self-chosen laws and usages. While portrayed as transparently indicative of a set group of persons (the ostensibly self-evident *their* that provides the syntactic hinge rendering Indians and race equivalent), Indianness actually works topologically, enfolding Native people(s) within the sphere of U.S. authority by positing a basis for identification neither putatively defined by the United States (their own "customs") nor in competition with it ("intended to leave them" alone in their *general* character). Race functions as a limit on what will constitute Native politics from the perspective of the settler state, enfolding tribal governance within the geopolitics of overarching U.S. jurisdiction while speaking as if Native people—Indians—are simply being left to govern themselves.

Still unaddressed, though, is the reason race should be taken as primary, as logically prior to tribe, especially when it depends on "usages and customs" rather than immutable traits. Or put another way, what can explain the apparent attribution of immutability to Indianness (such that whites can never become one)? The key to this question can be found in Taney's seemingly passing allusion to kinship. In attempting to explain the meaning of the phrase "race generally," he calls forth the notion of "the family of Indians." This formulation condenses an array of interdependent assumptions, alluding to the privatizing model of nuclear homemaking, which already had achieved dominance in the United States as the normative ideal for residency, reproduction, and property holding by the 1840s.[45] Foucault argues, "At the juncture of the 'body' and the 'population,' sex became a crucial target of a power organized around the management of life"—"a bio-politics of the population."[46] This framework solders to each other eroticism, household formation, child care, and a specific gendered division of labor in the privileged figure of conjugal couplehood. In addition, politics by definition is separated from the personal sphere of love and sexuality; legitimate governance works to preserve the sanctity of that space from intrusion, deformation, and perversion. While the decision's yoking of family and Indians does not directly conjure the image of sentimental domesticity for reasons I will address, this heteronormative ensemble serves as the ideological prism through which to approach Native socialities and to interpellate them within U.S. jurisdictional logics. If *family* names something distinct from the institutions of governance and yet internal to their

sphere of operation, as that which animates them (the thing they should promote and protect), categorizing Indians in this way positions the term as indicating something foundational, which is neither an effect of political discourses and decisions nor challengeable in and by them. Moreover, if the contours of Indian identity are not a product of U.S. law, such identity's status as the *general* condition for the existence of tribes also means that they ultimately cannot be considered as having (geo)political dynamics at odds with federal policy, since they are the epiphenomenal expression of a nongovernmental set of relations. In other words, the trope of family does the discursive work of gesturing toward a content for Indian that can fill the otherwise empty distinction between *tribe* and *independent nation* at the center of the opinion's logical and legal acrobatics. Foucault asserts that in modern regimes of power, "the question is no longer the juridical existence of sovereignty; at stake is the biological existence of a population."[47] However, the biologization of Native peoples—as a race of Indians—through appeal to a discourse of kinship itself aims to bracket anxieties about U.S. sovereignty and the difficulty of legitimizing the juridical claim to exert control over Native lands.

Making tribal laws contingent on racial Indianness depoliticizes Native forms of collectivity by casting them as indicative of inborn tendencies rather than of sovereignty. The opinion's chiastic linkage of family to race emphasizes the latter's dependence on a particular vision of reproduction while presenting Native sociality, especially in its difference from Euramerican norms, as a set of inherited dispositions. The idea of race as an ensemble of characteristics transmitted in the blood was well established by this period, and the conceptualization of Indianness in this way reaffirms the heteronormative logic discussed earlier, in that personal identity is imagined in relation to, in Foucault's terms, "the deployment of sexuality" through which "each individual has to pass in order to have access to his own intelligibility (seeing that it is both the hidden aspect and the generative principle of meaning)."[48] Put another way, the notion of race as a quality that inheres at birth in individual bodies, at play in the decision's declaration that a person "of the white race" cannot become Indian, depends on an ideology of family centered on conjugal, reproductive couplehood as the self-evident building block of social life.

Conversely, deviations from the model of sentimental domesticity, itself taken as a natural expression of how best to maximize human life, can be treated as symptomatic of an underlying, ingrained set of propensities, testifying to a population's racial identity. Stoler captures this dialectic in

her discussion of how whiteness is forged in European colonies: "Cultural competencies and sexual practices signaled the lines of descent that secured racial identities and partitioned individuals among them." She later notes, "The most basic universalistic notions of 'human nature' and 'individual liberty' elaborated by Locke and Mill rested on combined notions of breeding and the learning of 'naturalized' habits that set off those who exhibited such a 'nature' and could exercise such liberty from the racially inferior—and in their cases—South Asian colonized world."[49] Only those expressing certain "cultural competencies," or "middle-class sensibilities" centered on the appropriate forms of sexual expression and homemaking, could count as fully white.[50] There are two symmetrical corollaries of this association of particular behaviors and practices with racially differentiated "lines of descent": sociopolitical dynamics that do not fit a liberal conception of human nature can be understood as symptomatic of nonwhite racial identities; and the socialities of those deemed nonwhite can be interpreted as unnatural, as failing to fulfill the prepolitical requirements of liberty, of being recognized as full political subjects—individual or collective.[51] Discourses of race, then, extend beyond bodies to social formations, especially those that do not conform to heteronormative mappings of affection, eroticism, residency, and property holding, so Taney's decision can refer to Indian "usages and customs" without speaking about something other than biological inheritance, since discourses of sexuality forge naturalized connections between reproduction and other facets of life defined as inherently nonpolitical.

Taney's equation of "the race generally" with "the family of Indians" implicitly subsumes Native modes of collectivity under the rubric of race, treating formulations and processes of peoplehood as mostly expressive of Indian *descent* and, thereby, a priori disqualifying them as geopolitical principles and claims on the basis of which one could dispute U.S. "dominion and control." In the decision, tribes have laws and function as political entities in the sense of entering into agreements with the United States and regulating their own internal matters, but the echo between tribal "laws and usages" and Indian "usages and customs" indicates that *tribe* as a concept and status within U.S. jurisdictional logics can never break free from the orbit of racial Indianness, from the *family* connection to it. Any principle or act of governance at odds with U.S. interests and imperatives can be dismissed as either merely an expression of customs that symptomize racial breeding (and thus are not truly governance) or an extension

beyond the limited *exception* made by the United States for such Indian eccentricities. This kind of management can be seen in Taney's repeated depiction of Rogers and Nicholson as having been incorporated among the Cherokees through "adoption." Portraying their relation to the tribe in this way alludes to the history of captivity in which non-Natives became part of Native peoples through inclusion in their kinship systems.[52] This way of making family was marked as generically Indian in official and popular print discourse, both distinguished from Euramerican practices and seen as applying across tribal differences, and in its deviation from bourgeois norms, it could be, and was, taken as pointing toward racial identity, as expressive of the ingrained absence of an understanding of the natural benefits of true home and family. Reciprocally, the decision's portrayal of Rogers and Nicholson suggests that the extension of Cherokee tribal membership to them involves a misunderstanding of the difference between law and custom, a particularly Indian inability to appreciate the necessary distinction between governance and family that leads to overstepping the proper bounds of the former. Put another way, the trope of adoption implies that the tribe exceeded the sphere of law, but in a way that uniquely testifies to Rogers's and Nicholson's underlying Indianness.

However, these two men actually were not adopted; they were naturalized through marriage to Cherokee women. Laws regulating the political status of white men in the Cherokee Nation began to be passed in the 1820s as part of the larger bureaucratization and constitutionalization of Cherokee governance in the preremoval period.[53] This inclusion of white husbands in the tribe was less custom than the result of a formal legislative process largely modeled on that of the United States. That institutional apparatus was created by the Cherokees in order to have a centralized government that would be recognized by the United States, so as to refuse ongoing insistence that they cede more of their lands. Once that statist structure was in place, legislators began to transform the conditions of membership in the nation, from matrilineally transmitted clan belonging to a more heteronormative and slavery-friendly model: whites were admitted to citizenship if legally married to Cherokees; the children of non-Native women were granted citizenship; people of African descent were denied it, regardless of whether the mother was part of a Cherokee clan; and inheritance flowed through the patriarchally oriented nuclear family unit.[54] Thus, the trajectory of Rogers and Nicholson "becoming Cherokee" needs to be situated within a reformulation of Cherokee kinship, at least

in its legalization by the incipient constitutional government, which itself was part of the broader effort to coalesce and legitimize Cherokee sovereignty by bringing it in line with principles of U.S. governance. In other words, rather than indicating the ongoing efficacy of customs of family formation that bespeak Cherokee tribal identity's suffusion by underlying, inbred Indian tendencies, the presence of Rogers and Nicholson testifies to a profound shift in Cherokee self-representation. In suggesting the role that institutionalizing a privatizing, nuclear conception of kinship plays in efforts to validate Native governance as governance for the United States, the Cherokee example actually highlights the importance of ideologies of family to the struggle over what will be acknowledged as a political system, instead of family marking that which is before, outside, or beyond the sphere of politics.

Euramerican discourses of kinship provide the grid of intelligibility for the decision's deployment of the figure of race. They naturalize the centrality of heteroreproductive inheritance to personal identity (imagined as given at birth), the agovernmental character of home and family, the inherent value of sentimental nuclear domesticity, and the attribution of alternative modes of sociality to unnatural inclinations. Within this frame, Native "customs and usages" at odds with dominant U.S. norms and jurisdictional imperatives can be understood as separate from issues of sovereignty due to the fact that they emanate from Indian breeding, making them expressive of proclivities that are not political in character. As such, they must be regulated by the legal system rather than potentially constituting an autonomous system of governance not reducible to that of the settler state. Therefore, while tribes persist as polities of a sort, with laws of their own pertaining to internal matters, they ultimately are limited by their general Indianness, and any dispute with the United States over the contours and scope of their authority can be resolved through the invocation of Indianness—of their biopolitical status as a population—as the necessary limit to tribal authority. The question of the justice of U.S. narrations of national geopolitics, of the potential for Native peoples to be "independent nations," can be displaced by the citation of the (reproductive) self-evidence of Indianness. Race serves here less as a way of proclaiming Native inferiority (although it also does so) than providing a topos through which to mark Indians' interiority to the settler state while still recognizing the existence of tribes as political entities—of a diminished, domestic kind.

Preserving Indian Distinctness

Tracking the ways the production of Indians as a population stands in for, and thus defers, a substantive engagement with their status as peoples becomes even more pressing with respect to modes of U.S. recognition that do not explicitly mention race and that appear to affirm tribal self-governance. In *United States v. Rogers,* the employment of racial difference is central to the decision's logic. The decision minimally circulates the stereotypes often attached to Native peoples and thus offers a good example of the structural function of race as trope or topos within federal Indian policy (transposing geopolitical struggle into a biopolitical register) separate from specific racist aspersions (e.g., of wandering, wildness, inhabiting a wilderness). By contrast, *Santa Clara Pueblo v. Martinez* does not rely on an evident rhetoric of Indian racial identity, and it seems to work from the assumption that Native peoples should be treated as such—as independent political entities whose organizing structures should not be superintended and regulated by the United States. Within an interpretive frame that equates racialization with racist denigration or that dichotomizes race and politics, this case may appear as the opposite of *United States v. Rogers.* However, if one attends to the ways that the decision narrates federal jurisdiction, its dual emphasis on Congress's plenary power and tribes' cultural difference (especially as formulated through reference to kinship) comes to the fore. Rather than being at odds, these lines of discussion crucially supplement each other, presenting limited tribal autonomy as a gift granted by the U.S. government to Indians due to their anomalous cultural formations, and this beneficent gesture brackets Native geopolitics in an affirmative mode that often characterizes contemporary modes of settler power.

The case itself concerned Santa Clara Pueblo's membership code. Passed in 1939, under a constitution adopted through the provisions of the Indian Reorganization Act (1934), it specified that the children of member fathers and nonmember mothers would be part of the community but that the children of member mothers and nonmember fathers would not. The original plaintiff, Audrey Martinez (the respondent in the Supreme Court case on appeal), was a recognized member of the Pueblo who had married a Navajo man and whose children, who had grown up and continued to reside on the reservation, had no claims to tribal citizenship or landholding under the 1939 act, and she sued to have it declared null and void under the provisions of the Indian Civil Rights Act (ICRA). That federal statute, passed in 1968, made most of the provisions of the Bill of Rights applica-

ble to Native peoples, requiring that tribal governments extend these protections to their citizens.[55] Among them is the Fifth Amendment's equal-protection clause, and Martinez sued under this provision, alleging that the Santa Clara Pueblo code violated her rights on the basis of gender. The case began in the federal district court, in which the justices found that while the court did have jurisdiction, the ability of the Pueblo to define its own membership was "basic to the tribe's survival as a cultural and economic entity."[56] The court of appeals also found that it had jurisdiction to hear the case, but it reversed the lower court's decision, finding that a main intent of the ICRA was to protect American Indians (also U.S. citizens from 1924 onward) from the arbitrary exercise of tribal authority. Given that the distinction made by the Pueblo was based on sex, the justices held that this determination of membership required greater judicial scrutiny and that the tribal interests served by the requirement did not outweigh its discriminatory impact. The Pueblo appealed that decision to the Supreme Court, but rather than ruling on the merits of Martinez's claim, the Court found that federal courts did not have jurisdiction to hear the case in the absence of the Pueblo's agreement to have the matter tried. The opinion argued that the ICRA included a provision for federal-court oversight only with respect to habeas corpus petitions, extending more broadly to criminal prosecution, but not for what might be termed civil matters. In the absence of clear congressional intent to extend federal jurisdiction, the Pueblo's sovereign immunity from suit still holds, so even though the ICRA applies to all acts by tribal governments, possible violations of a noncriminal nature cannot be remedied through the federal-court system.[57]

The decision seems to offer a portrait of tribal autonomy that fully recognizes the existence of Native peoples as polities in ways that are not dependent on the positing of an underlying (racial) Indianness, but the line of thought privileging sovereignty seems at odds with the opinion's running reiteration of Congress's plenary power over Indian affairs.[58] The majority opinion, authored by Thurgood Marshall, emphasizes the ways Native governments are separate from those of the United States, quoting from earlier cases that describe them as "distinct, independent political communities, retaining their original natural rights," and as a "separate people, with the power of regulating their internal social relations."[59] After indicating the ways Indigenous peoplehood precedes the U.S. Constitution, the decision finds that the ICRA had a double purpose. While "strengthening the position of individual tribal members vis-à-vis the tribe," the law "also manifest[s] a congressional purpose to protect tribal sovereignty from un-

due interference," so the courts should be loathe to "interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."[60] Yet Marshall, in equal measure, highlights Congress's plenary authority in Indian policy. Dating from *United States v. Kagama* (1886), this doctrine holds that Congress essentially can do whatever it will with respect to Native peoples without any of the restraints present in other aspects of U.S. law. Not only does Marshall rehearse the narrative of this unfettered absolutism, it often is invoked in the same sentence as the declaration of tribal independence from U.S. rule. In addition to quoting from *United States v. Kagama* early in the *Santa Clara Pueblo v. Martinez* decision, he observes of tribes' sovereign immunity that "this aspect of tribal sovereignty, like all others, is subject to the plenary control of Congress," and in outlining why such immunity cannot be presumed to have been abrogated, he indicates the need for "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress."[61] The two appear consistently yoked to each other in ways that suggest the projection of tribal authority from congressional will, but in a displaced way. Describing Native sovereignty as "the powers of local self-government," the decision immediately adds, "however, Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess," noting that the ICRA is in part "an exercise of that authority."[62] While Native sovereignty is characterized as distinct from and anteceding U.S. control, it structurally appears as a potentially temporary pause in the exercise of unrestricted and unrestrictable congressional power.[63] There appears to be a direct proportion between the Court's insistence on the distinctness of Native sovereignty and the complete and utter subordination of that sovereignty to congressional whim and fiat.

Rather than being antagonistic, the Court's portraits of Native politics and U.S. jurisdiction are interwoven and interdependent, suggesting that the term *sovereignty* means something radically different when applied to Native peoples. However, that translation from geopolitics to another discursive register in the use of the same term is disavowed. Marshall emphasizes the importance of "a tribe's ability to maintain itself as a culturally and politically distinct entity," but what sort of differentiation is being made through the term *distinct?* While in one sense it can refer to the separateness of a tribe as its own polity not incorporated within the United States, a meaning toward which the decision sometimes gestures ("separate sovereigns pre-existing the Constitution"), *distinct* also can indicate an entity of a different sort than the United States, and that slippage, across

which tribal sovereignty is stretched, is signaled by Marshall's description of tribes as occupying an "anomalous" position within U.S. governance.[64] They are cast as an exception to the usual dynamics of federal law, in the sense of occupying a position that crosses the threshold between law and some other kind of entity.

This placing of Native peoples within a legal limbo resonates with the assertion in earlier decisions that same session that certain political powers are at odds with the status of Indian tribes, a formulation first offered in *Oliphant v. Suquamish* (1978). That case concerned the Suquamish tribe's effort to prosecute a non-Indian, Mark David Oliphant, under their law and order code, and the Court found that "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States."[65] Such "overriding sovereignty" follows from the notion, quoting *United States v. Rogers,* that "Indian reservations are 'a part of the territory of the United States,'" producing an inherent *dependence* on U.S. governance.[66] This claim itself inheres in generating a status for Native peoples that can bracket the challenge they continue to pose to the United States's geopolitical narration of its own territoriality.

If tribes are *distinct* and yet, returning to *Santa Clara Pueblo v. Martinez,* not "possessed of the full attributes of sovereignty," and thus not in *United States v. Rogers*'s terms "independent nations," what sort of entity are they?[67] Or, put another way, how does the Court manage the logical and legitimacy crisis of U.S. jurisdiction by presenting the displacement of prior Native sovereignty as an engagement with the special qualities of tribes? *Status* is cast as being derived from the characteristics of tribes themselves rather than symptomizing the geopolitical aporias produced by settler imperialism. In justifying the existence of a tribal sovereignty irreducible to the will of Congress, *United States v. Wheeler,* also decided in the 1978 session, observes that tribes "have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions," and in *Santa Clara Pueblo v. Martinez,* Marshall notes that "the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar."[68] More than acknowledging the potential discrepancy between Indigenous peoples' modes of governance and those of the United States, the trope of tradition provides a content for tribe that appears to explain why it occupies an exceptional status within the law. The priorness of Native peoples requires the United States to recognize *in* the law what is not *of* the law, a kind of entity not fundamentally legal or govern-

mental in character, but the production of that categorical distinction also seeks to preserve the (territorial) realm of law from mediation by the presence of tribal entities. Tradition marks tribes as a kind of collectivity that can exercise some political/legal functions but is not ultimately political/legal in nature, as partaking of attributes of sovereignty but not occupying it in the ways that the United States does while doing so contingently at the discretion of the United States.[69]

Given that the traditions of various tribes may differ, what do tribes share such that they all can occupy the same status? In addressing the ICRA's effort "to protect tribal sovereignty," the *Santa Clara Pueblo v. Martinez* opinion observes that the law "provides that States may not assume civil or criminal jurisdiction over 'Indian country' without prior consent of the tribe," and later, Marshall reminds that the Court "repeatedly" has found that "Congress' authority over Indian matters is extraordinarily broad."[70] While the decision uses the term *Indian* in colloquial and somewhat commonsensical ways, the very obvious ordinariness of the concept allows it do a great deal of uninterrogated discursive work. Indianness binds the tribes to each other, providing cohesion for this category in ways that allow *tribe* to indicate something other than either a fully sovereign polity or the disjunctive incoherence of settler jurisdiction. As in *United States v. Rogers,* the figure of the Indian in *Santa Clara Pueblo v. Martinez* covers over the conceptual chasm generated by the difficulty of fitting Native peoples into the United States's own narrative of its territorial identity and jurisdictional authority, but unlike in *United States v. Rogers,* here it appears in the service of affirming a tribe's authority to define itself, the ability of the Pueblo to set its own membership criteria (or at least not to be sued in federal court for doing so in a way that substantively violates federal law). In light of the decision's recognition of Pueblo traditions within a legal frame that declares its choice of politics over race, is there an object of scholarly or political critique? In the absence of the expression of racist sentiment or the diminution of tribal authority, is Indianization even an issue? Is there reason to balk at the politics of sovereignty inthe case?

If one wanted to argue for politics over race, *Santa Clara Pueblo v. Martinez* could be celebrated as a rejoinder to *Oliphant v. Suquamish*'s constriction of sovereignty, but the former is constituted out of the elements of the latter, just in a different key. *Oliphant v. Suquamish* notably distinguishes between Indians and non-Indians rather than between Indians and whites, and if one holds off on reading the former as merely euphemizing the latter, as a code for conventionally conceived racial categories, the Indianness that

surrounds and makes intelligible the acknowledgment of tribal sovereignty in *Santa Clara Pueblo v. Martinez* takes on a different cast. The decision's insertion of *tradition* in the breach between the representation of U.S. sovereignty and of Native sovereignty positions it as the kinder, gentler conceptual companion to congressional plenary power, presenting such power as a necessary corollary of the uniqueness of tribes rather than the preeminent sign of the imperial illegitimacy of settler rule.[71] Scholarly discussion of *Santa Clara Pueblo v. Martinez* has tended to cluster around four positions: the decision honors patriarchal tradition over protecting women's rights; it respects tradition, or at least tribal autonomy, in ways that bolster Native sovereignty against settler imposition; it reaffirms as tradition a set of patriarchal practices largely instituted by U.S. policy or in direct response to government mandates; and it accepts a dichotomy between universal rights and relative cultural distinctiveness that denies the complexity of Santa Clara Pueblo's history—the existence of multiple, changing traditions and a layered and shifting field of self-governance.[72] These approaches, though, do not examine the ways that in the decision the rhetorical and ideological condition of possibility for recognizing Native sovereignty is Congress's "authority to limit, modify, or eliminate [tribes'] powers of local self-government."[73] Tribe designates a kind of entity completely at the mercy of Congress, which can decide at what point some (set of) practice(s) denominated *tradition* can enter into the field of politics—as *sovereignty*—from the nonpolitical sphere of social life in which it otherwise resides. The threshold the Court repeatedly posits, in *Santa Clara Pueblo v. Martinez* and elsewhere, for that congressional act of will is the line between matters *internal* to the tribe and *external* to it. That distinction transposes anxiety about the topology of U.S. jurisdiction into the process of determining the boundaries of tribal authority—or the line at which tribal cultural customs can become transmuted into (a simulation of) sovereignty.

However, while sounding like a geopolitical differential, the Court's distinction between internal and external and, thus, its definition of tribal identity turns on Indianness. More than indicating a racial category whose contours are already clearly established, Indian here functions as, in Puar's terms, a biopolitical assemblage. She addresses the ways that contemporary modes of racialization work through the construction of a "data body" out of statistical aggregations of traits: "These 'surveillant assemblages' . . . create the sameness of population," generating an "informational profile [that] works to accuse in advance of subject formation."[74] Although staged as something other than racial, following the rejection of that rhetoric in

Morton v. Mancari (1974), later cases such as *Santa Clara Pueblo v. Martinez* create a tribal profile (an aggregation of elements for what a tribe is) that is justified as an expression of an apolitical Indianness that itself provides the apparent referent for adjudicating inside and outside, internal versus external matters.[75] As Dan Gunter argues, the U.S. government employs a "technology of tribalism" in which Native peoples "in order to obtain tribal status . . . must demonstrate instead that they have a European sense of tribal identity."[76] While he is addressing the formal process a group must go through to gain status as a "federally recognized tribe," his observation is broadly applicable to the *tribalization* of peoplehood, which translates the geopolitics of indigeneity into the biopolitics of shared *Indianness*. The guidelines instituted by the Bureau of Indian Affairs for such recognition, adopted in 1978, testify to the circular, self-identical, and seemingly original quality of being Indian that appears to precede and undergird identity as a tribe: "tribal existence" depends on, among other things, "longstanding relationships with State governments based on the identification of a group as Indian"; "identification as an Indian entity by anthropologists, historians, or other scholars"; and "repeated identification and dealings as an Indian entity with recognized Indian tribes."[77] One knows a tribe as such because it fits the characteristics of an "Indian entity," but more than referring to a specific (stereotypical) ensemble of elements, Indian here marks and enacts a dynamic of interpellation and iteration. While particular qualities can be added or subtracted, they all signify as if they pointed back to a subjectivity-identity matrix that provides a decisive and self-evident means for adjudicating who is and who is not Indian—the line between internal and external. In Puar's terms, "What is at stake here is the repetition and relay of . . . ubiquitous images, not their symbolic or representational meaning."[78] The name given to this assemblage that makes it not *race* is *tradition,* but as I've argued, tradition is inapplicable to so-called non-Indians, defining *inside* and *outside* in other than territorial terms and casting that distinction as a *unique, special, peculiar* tribal deviation from governance and law proper.

The issue of tribal membership can occupy this not-quite-political space of anomaly due to its linkage to kinship, which provides a key intermediary concept between race and sovereignty. Although not directly conveying a notion of racial inheritance, and in many ways rejecting such a logic of identification by tying belonging to patrilineal descent rather than blood quantum, Santa Clara Pueblo's membership requirements do link tribal identity to reproduction in ways that allow them to be read as a variation

within dominant, liberal notions of family. The fact that the Pueblo's code departs from the standard of nuclear couplehood does not disqualify it from being recognized by the United States but instead helps testify to Indian cultural distinctiveness. The idea that Indian identity is acquired at birth is not challenged by the Pueblo's rules: the Pueblo draw on the kind of biologization at play in discourses of race without the Court having to mandate racial blood as the gradient of belonging (still implicit, though, in the accepted and a priori distinction between Indian and non-Indian). Lucy A. Curry observes, "In the arena of 'intra-tribal' matters, including membership, marriage, and family matters, tribal activities go unobstructed, whether or not the Indian involved is a member."[79] This comment suggests how federal law and the courts construe the tribal through reference to an Indianness that exceeds the specific dimensions of any given tribal polity. In *United States v. Rogers* being "members of a tribe" is separate from, yet logically and legally subordinate to, being part of "the race generally." As in that decision's rendering equivalent of racial identity with "the family of Indians," the term *Indian* in *Santa Clara Pueblo v. Martinez* continues to signify within a heteronormative nexus formed by the association of reproduction, marriage, household formation, and privacy. These are components of, in Foucault's terms, an "artificial unity"—or, in Puar's terms, an assemblage—that provides the context for tribal internality—for drawing the line between inside and outside and thus defining the kind of population to which tribes belong.[80]

The choice by Santa Clara Pueblo to limit membership to the children of Santa Clara Pueblo fathers may function for the Pueblo as an act of self-determination in the shaping of their own governance, potentially breaking from a dominant Euramerican model based on bilateral inheritance and the (apparent) separation of lineage from political status.[81] However, from the perspective of the U.S. settler state, this arrangement still enables citizenship in the Pueblo to be conceptualized as an extension of lineage and domesticity, in ways that trying to include non-Indians or to extend jurisdiction over them could not.[82] Unlike in *United States v. Rogers,* Indianness is not directly coupled to a transmission of racial blood, but the version of tradition for which *Santa Clara Pueblo v. Martinez* makes allowance also remains within the bounds of such identification. While this ideological framework acknowledges a version of Native difference, it is interpellated as a deviation from Euramerican family rather than an alternative model of governance at odds with (rather than encompassed within) U.S. sovereignty. Puar argues that "certain Orientalist queernesses (failed heteronormativity, as signaled

by polygamy, pathological homosociality) are a priori ascribed to terrorist bodies," and a certain queerness attaches to Indian traditions in U.S. legal discourses, in the sense that they are narrated as a kind of sanctioned perversion of liberal homemaking localized within a specific population. Puar further describes the construction of "the (queer) terrorist" as "the never-ending displacement of the excesses of perverse sexualities to the outside, a mythical and politically and historically overstated externality [that is] fundamental to the imaginative geographies at stake."[83] Similarly, recoding the excesses of tradition as properly belonging to the private sphere of sexuality (family, parentage, inheritance), given limited political efficacy as tribal sovereignty by Congress, constructs an ostensibly obvious internality (for the tribe and the nation-state) that is crucial to the jurisdictional geography of the United States. If terrorists are "the monstrous excess of the nation-state," Native peoples lie at the settler state's aporetic center.[84]

Yet rather than endorsing deterritorialization, as in Puar's account, my analysis seeks to mark the ways that Indianness serves as the biopolitical trace of an ongoing displacement of Indigenous peoplehood. The possibility of Native sovereignty not entirely superintended, regulated, bounded, and ordered around the plenary will of Congress appears impossible in *Santa Clara Pueblo v. Martinez,* despite the decision's apparent endorsement of tribal autonomy. While none of the three decisions from the 1978 session that I've discussed address racial identity per se, all of them rely on Indianness. One could argue that "Indian" is inherently a racial category and that its use enacts modes of racialization regardless of whether race is explicitly invoked as such. This claim often works as a way of calling on the Court to refuse to employ racist stereotypes of Native peoples or to focus on tribes as (semi)sovereign polities rather than as members of a racial group.[85] However, my analysis is askew with respect to both these lines of critique. Both seem to miss the stakes of the settler state's racialization—or, more to the point, biopolitical interpellation—of Native peoples as a population. If the call to choose politics over race with respect to *United States v. Rogers* misses how the decision actually does recognize tribes as polities, but in ways subordinated to U.S. geopolitics, such a call seems even more problematic for *Santa Clara Pueblo v. Martinez,* which already seems to have divorced race from politics and chosen the latter as its frame. This dichotomy displaces the ways that Indianness functions less as a code for racial inferiority than as an ideological placeholder for the ultimately non(geo)political character of tribes that supposedly explains their political *status.*

Failing to attend to the dialectical role biopolitics plays within the broader geopolitics of settlement can result in different but equally limiting modes of analysis. Within the forms of critique common to queer studies, the challenge to Indianization does not necessarily yield an appreciation for place-based collectivity, foregrounding the kinds of racialization performed by discourses of sexuality and their role in bolstering state sovereignty and national identity without investigating how they displace and foreclose alternative mappings. Within Native studies, the tendency either is to argue that race is being substituted for politics or to understand the circumscription of Indigenous self-determination as due to a racist imaginary. The first overlooks how the population-making dynamics of racialization provide a limit for what will constitute sovereignty when tribes are treated as polities, and the second leads to critique of discourses of Indian savagery and innate inferiority. Such antiracism, though, does not address how Indianness functions as a biopolitical tactic within an encompassing assertion of the jurisdictional coherence of the settler state. The stakes of Indianization are less in the creation of a population understood as inherently subordinate to whites than in the substitution of population for peoplehood, the continual renarration of crises in U.S. jurisdiction as if they were the result of tendencies among a group defined in terms of family. The trope or topos of Indianness allows principles and practices at odds with settler "dominion and control" to be cast as a function of kinship, itself taken as something other than what properly belongs to the sphere of politics.

In both *United States v. Rogers* and *Santa Clara Pueblo v. Martinez,* the Court recognizes tribes as polities, because to do otherwise would undermine the political functions of the treaty system and recast Indian policy as merely coercion. At the point at which such recognition would foreground the tenuousness of U.S. legal geography, though, tribes' status as polities is qualified by presenting them as an epiphenomenal extension of a fundamentally shared (set of) qualities understood in reproductive terms—shared, underlying Indianness. A critical approach focused on biopolitics can trace the dynamics and effects of such Indianization, and the relative biologization of tribal entities, but it also threatens to redouble the biopolitical maneuver whereby struggles over boundaries and jurisdiction fade into the background. Similarly, conflating the legitimation of settler occupancy with racism can overlook the ways that the official engagement with tribes as political entities is limited less by invidious assumptions of Indian incapacity than the displacement of Native geopolitics (or, perhaps more precisely, of the legal and logical incoherence of settler geopolitics). Ad-

dressing how Indianness is imagined and circulated in U.S. policy through figurations of family—in a heteronormative matrix in which whatever is classified as kinship cannot belong to the domain of politics—provides a more capacious way of charting imperial modes of population making, drawing on the insights of queer studies while staying focused on the occlusion, preservation, and regeneration of peoplehood.

Notes

1. Michel Foucault, *The History of Sexuality,* vol. 1, trans. Robert Hurley (New York: Vintage Books, 1990), 144.
2. In particular, I am thinking of the work of Ann Laura Stoler and Jasbir K. Puar.
3. See Lisa Brooks, *The Common Pot: The Recovery of Native Space in the Northeast* (Minneapolis: University of Minnesota Press, 2008); Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007); Scott Morgensen, "Settler Homonationalism," GLQ, nos. 16.1–2 (2010): 105–31; Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002); and Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space* (New York: Oxford University Press, 2009).
4. Vine Deloria Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984), 18–19.
5. See Jodi Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011).
6. See James S. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996); Maivân Clech Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, NY: Transnational Publishers, 2000); Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003); and Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'I* (Honolulu: University of Hawai'i Press, 1999).
7. Scholars have addressed the ways that family ties, particularly marriage and reproduction, can be used to naturalize nation-statehood and to exert (variegated kinds of) authority over particular spaces and subjects. For examples, see M. Jacqui Alexander, *Pedagogies of Crossing: Meditations on Feminism, Sexual Politics, Memory, and the Sacred* (Durham, NC: Duke University Press, 2005); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000); Elizabeth Freeman,*The Wedding Complex: Forms of Belonging in Modern American Culture* (Durham, NC: Duke University Press, 2002); Rosemary Hennessey, *Profit and Pleasure: Sexual Identities in Late Capitalism* (New York: Routledge, 2000); Jacqueline Ste-

vens, *Reproducing the State* (Princeton, NJ: Princeton University Press, 1999); Alys Eve Weinbaum, *Wayward Reproduction: Genealogies of Race and Nation in Transatlantic Modern Thought* (Durham, NC: Duke University Press, 2004).

8. See Janet Carsten, *After Kinship* (New York: Cambridge University Press, 2004); Jane Fishburne Collier and Sylvia Junko Yanagisako, *Gender and Kinship: Essays Toward a Unified Analysis* (Stanford, CA: Stanford University Press, 1987); Susan McKinnon, "The Economies in Kinship and the Paternity of Culture: Origin Stories in Kinship Theory," in *Relative Values: Reconfiguring Kinship Studies,* ed. Sarah Franklin and Susan McKinnon (Durham, NC: Duke University Press, 2001); Mark Rifkin, *When Did Indians Become Straight? Kinship, The History of Sexuality, and Native Sovereignty* (New York: Oxford University Press, 2011); David M. Schneider, *A Critique of the Study of Kinship* (Ann Arbor: University of Michigan Press, 1984); and Thomas R. Trautmann, *Lewis Henry Morgan and the Invention of Kinship* (Berkeley: University of California Press, 1987). For discussion of the ways kinship can serve as a more capacious idiom for Native self-identification, especially against restrictive U.S. legal standards, see Daniel Heath Justice, "'Go Away, Water!' Kinship Criticism and the Decolonization Imperative," in *Reasoning Together: The Native Critics Collective*, ed. Janice Acoose et al. (Norman: University of Oklahoma Press, 2008).
9. Ann Laura Stoler, *Race and the Education of Desire: Foucault's* History of Sexuality *and the Colonial Order of Things* (Durham, NC: Duke University Press, 1995), 133.
10. Stoler, *Race and the Education of Desire,* 112.
11. Stoler, *Race and the Education of Desire,* 99.
12. In her use of these terms, Stoler replicates the elision I'm addressing. She suggests, "As populations were being enumerated, classified, and fixed, 'peoples' were being regrouped and reconfigured according to somatic, cultural, and psychological criteria that would make such administrative interventions necessary and credible." She presents peoplehood as a differently configured kind of biopolitical categorization through which "a racial grammar tying certain physical attributes to specific hidden dispositions played a crucial role" (*Race and the Education of Desire,* 39–40). While using *population* and *people* to mark different kinds of positionings within an imperial biopolitics, Stoler's account leaves no term to describe forms of collective self-understanding and political organization not already colonized or not reducible to the logics of imperial governance.
13. Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007), 169.
14. Puar, *Terrorist Assemblages,* xii. Puar is building on Lisa Duggan's notion of "homonormativity," the endorsement of the principles of neoliberalism by certain gays and lesbians as the price of admission into forms of straight privilege. See Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism." In *Materializing Democracy: Toward a Revitalized Cultural*

Politics, ed. Russ Castronovo and Dana D. Nelson (Durham, NC: Duke University Press, 2002).

15. Puar, *Terrorist Assemblages,* 31, 35.
16. Puar, *Terrorist Assemblages,* 20.
17. Puar, *Terrorist Assemblages,* 148.
18. Puar, *Terrorist Assemblages,* 162.
19. Puar observes, "Perversity is still withheld for the body of the queer Muslim terrorist, insistently deferred to the outside. This outside is rapidly . . . congealing into a population," one mapped through "statistical racisms that see some populations [those that conform to the homonormative ideal of health, welfare, and democracy] as worthy of life and others as decaying, as destined for death" (*Terrorist Assemblages,* 113, 200).
20. Puar, *Terrorist Assemblages,* 52, 99.
21. On the "state of exception," see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life.* Trans. David Heller-Roazan (Stanford, CA: Stanford University Press, 1998). On the use of strategies of exception in Indian policy, see Byrd, *The Transit of Empire;* Philip P. Frickey, "(Native) American Exceptionalism in Federal Public Law," *Harvard Law Review* 119 (2005); and Mark Rifkin, "Indigenizing Agamben: Rethinking Sovereignty in Light of The 'Peculiar' Status of Native Peoples," *Cultural Critique* 73 (2009).
22. Puar, *Terrorist Assemblages,* 171. This apparent embrace of deterritorialization eerily resembles her earlier critique of what she characterizes as "queer secularity," the idea that queerness entails a "freedom from norms" especially with respect to home, family, and religion (13–25).
23. Puar, *Terrorist Assemblages,* 215, 221.
24. For a different reading of this relation in terms of Puar's work, see Scott Morgensen, "Settler Homonationalism," *GLQ: A Journal of Lesbian and Gay Studies* 16, nos. 1–2 (2010).
25. See Mark Rifkin, *When Did Indians Become Straight?*
26. On the ways that Native nations' policies are critiqued as illiberal, see Angela Riley, "(Tribal) Sovereignty and Illiberalism," *California Law Review* 95 (2007).
27. United States v. Rogers, 1846 U.S. Lexis 413, 1–3.
28. For the text of the law, see Francis Paul Prucha, ed., *Documents of United States Indian Policy,* 3rd ed. (Lincoln: University of Nebraska Press, 2000), 63–68.
29. Rogers, 1846 U.S. Lexis 413, 5, 7–8.
30. For discussion of the discrepancy between the circuit court's questions and the Supreme Court decision, see David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 40–43.
31. The fact that by this point Rogers was dead should have prevented the case from going forward, a point never raised in the Supreme Court hearing. See Bethany R. Berger, "'Power over This Unfortunate Race': Race, Politics, and Indian Law in *United States v. Rogers,*" *William and Mary Law Review* 45

(2004): 1963, 1998–2003; Wilkins, *American Indian Sovereignty and the U.S. Supreme Court,* 40.

32. See Berger, "'Power over This Unfortunate Race'"; Eric Cheyfitz, "The (Post) Colonial Construction of Indian Country: U.S. American Indian Literatures and Federal Indian Law," in *The Columbia Guide to American Indian Literatures of the United States since 1945,* ed. Eric Cheyfitz (New York: Columbia University Press, 2006), 20–23; and Wilkins, *American Indian Sovereignty and the U.S. Supreme Court,* 38–51. These accounts tend to posit a break between a period in which the United States recognized Native peoples as geopolitical entities and when it ceased to do so. While disagreeing with aspects of her interpretation, I should note that Bethany R. Berger offers an incredibly detailed account of the events leading up to and surrounding the case, presenting an immensely archivally rich portrait of that history. For a very astute discussion of the ways the pro-sovereignty argument to choose politics over race as a way of framing U.S. policy toward Native peoples can undermine laws that use blood quantum as a means of distinguishing Native people for specific legal privileges and protections with respect to land, such as Native Hawaiians, see Rose Cuison Villazor, "Blood Quantum Land Laws and the Race Versus Political Identity Dilemma," *California Law Review* 96 (2008).
33. Rogers, 1846 U.S. Lexis 413, 13.
34. Rogers, 1846 U.S. Lexis 413, 13, 13–14.
35. Taney's framing here echoes similar kinds of statements in the foundational cases of *Johnson v. McIntosh* (1823) and *Cherokee Nation v. Georgia* (1831). For discussion of that pattern, see B. Berger, "'Power over This Unfortunate Race.'"
36. Rogers, 1846 U.S. Lexis 413, 14.
37. Rogers, 1846 U.S. Lexis 413, 14.
38. On the commitment in U.S. public policy to *civilizing* the Indians in the first half of the nineteenth century, see Reginald Horsman, *Expansion and American Indian Policy, 1783–1812* (East Lansing: Michigan State University Press, 1967); Theda Perdue, *Cherokee Women: Gender and Cultural Change, 1700–1835* (Lincoln: University of Nebraska Press, 1998); Timothy Sweet, *American Georgics: Economy and Environment in Early American Literature* (Philadelphia: University of Pennsylvania Press, 2002); and Anthony F. C. Wallace, *Jefferson and the Indians: The Tragic Fate of the First Americans* (Cambridge, MA: Harvard University Press, 1999).
39. *Rogers,* 1846 U.S. Lexis 413, 17–18.
40. See Berger, "'Power over This Unfortunate Race,'" 2034–35; Cheyfitz, "The (Post)Colonial Construction of Indian Country," 22.
41. See William G. McLoughlin, *Cherokee Renascence in the New Republic* (Princeton, NJ: Princeton University Press, 1986); Gary E. Moulton, ed., *The Papers of Chief John Ross,* vol. 1, *1807–1839* (Norman: University of Oklahoma Press, 1985), 332–85; Rifkin, *Manifesting America,* 37–74; Thurman Wilkins,

Cherokee Tragedy: The Ridge Family and the Decimation of a People (Norman: University of Oklahoma Press, 1986), 264–90.

42. *Rogers,* 1846 U.S. Lexis 413, 16–17. On the importance of simulating consent within antebellum U.S. imperialism, see Rifkin, *Manifesting America.* One can think of treaty-mediated consent and the kinds of racialization I discuss here as parallel, sometimes intersecting, modes of imperial interpellation, suggesting questions about the interpretation of U.S. Indian policy as shifting between race and politics in easily periodizable ways.
43. Rogers, 1846 U.S. Lexis 413, 15–16.
44. See Cheyfitz, "The (Post)Colonial Construction of Indian Country," 22–23.
45. See Jeanne Boydston, *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic* (New York: Oxford University Press, 1990); Gillian Brown, *Domestic Individualism: Imagining Self in Nineteenth-Century America* (Berkeley: University of California Press, 1990); Stephanie Coontz, *The Social Origins of Private Life: A History of American Families, 1600–1900* (New York: Verso, 1988); Cott, *Public Vows;* Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985); Lori Merish, *Sentimental Materialism: Gender, Commodity Culture, and Nineteenth-Century American Literature* (Durham, NC: Duke University Press, 2002).
46. Foucault, *The History of Sexuality,* vol. 1, 147, 139.
47. Foucault, *The History of Sexuality,* vol. 1, 137.
48. Foucault, *The History of Sexuality,* vol. 1, 155.
49. Stoler, *Race and the Education of Desire,* 45, 131.
50. Stoler, *Race and the Education of Desire,* 99.
51. On this dynamic with respect to representations of blackness in the United States, see Cathy J. Cohen, "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *GLQ: A Journal of Lesbian and Gay Studies* 3, no. 4 (1997); Roderick A. Ferguson, *Aberrations in Black: Toward a Queer of Color Critique* (Minneapolis: University of Minnesota Press, 2004); and Marlon B. Ross, "Beyond the Closet as Raceless Paradigm," in *Black Queer Studies: A Critical Anthology,* ed. E. Patrick Johnson and Mae G. Henderson (Durham, NC: Duke University Press, 2005).
52. On the captivity narrative as a cultural phenomenon, see Michelle Burnham, *Captivity and Sentiment: Cultural Exchange in American Literature, 1682–1861* (Hanover, NH: University Press of New England, 1997); Christophe Castiglia, *Bound and Determined: Captivity, Culture-Crossing, and White Womanhood from Mary Rowlandson to Patty Hearst* (Chicago: University of Chicago Press, 1996); Gary L. Ebersole, *Captured by Texts: Puritan to Postmodern Images of Indian Captivity* (Charlottesville: University of Virginia Press, 1995); June Namias, *White Captives: Gender and Ethnicity on the American Frontier*

(Chapel Hill: University of North Carolina Press, 1993); Pauline Turner Strong, *Captive Selves, Captivating Others: The Politics and Poetics of Colonial American Captivity Narratives* (Boulder, CO: Westview Press, 1999). For discussion of the ways that tradition continues to influence understandings of tribal membership, see Audra Simpson, "From White into Red: Captivity Narratives as Alchemies of Race and Citizenship." *American Quarterly* 60.2 (2008): 251–58.

53. Rogers and Nicholson married their wives in the Cherokee Nation prior to removal (and were in fact brothers-in-law), so the laws of the Cherokee Nation before reunification with Cherokee "Old Settlers" in what would become Indian Territory would have been determinative of the men's status. See Berger, "'Power over This Unfortunate Race'," 1982–84.
54. See Cherokee Nation, *Laws of the Cherokee Nation Adopted by the Council at Various Periods, Printed for the Benefit of the Nation* (Wilmington, DE: Scholarly Resources Inc., 1973), 10, 37–38, 53, 57, 120–21. See also Berger, "'Power over This Unfortunate Race'"; McLoughlin, *Cherokee Renascence in the New Republic;* Perdue, *Cherokee Women;* and Rifkin, *Manifesting America,* 37–74.
55. For the text of the ICRA, see Prucha, *Documents of United States Indian Policy,* 250–53. On the case, see Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011), 98–145; Bethany R. Berger, "Indian Policy and the Imagined Indian Woman," *Kansas Journal of Law and Public Policy* 14 (2004); Lucy A. Curry, "A Closer Look at *Santa Clara Pueblo v. Martinez:* Membership by Sex, by Race, and by Tribal Tradition," *Wisconsin Women's Law Journal* 16 (2001); and Shefali Milczarek-Desai, "(Re)Locating Other/Third World Women: An Alternative Approach to *Santa Clara Pueblo v. Martinez*'s Construction of Gender, Culture and Identity," *UCLA Women's Law Journal* 13 (2005).
56. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) at 54.
57. The Pueblo changed their membership criteria in 2012 to allow for the enrollment of children from both Santa Clara mothers and fathers. See "Report: Santa Clara Pueblo Votes to Change Membership Rule," http://www.indianz.com/News/2012/005521.asp.
58. For a reading of the decision as testifying to Native sovereignty in exercising control over tribal membership, see Riley, "(Tribal) Sovereignty and Illiberalism."
59. *Martinez,* 436 U.S. 49 at 55.
60. *Martinez,* 436 U.S. 49 at 62–63, 72.
61. *Martinez,* 436 U.S. 49 at 58, 60.
62. *Martinez,* 436 U.S. 49 at 56.
63. A decision earlier in that same session, *United States v. Wheeler,* underlines this dynamic even more forcefully. Finding that the prosecution of an Indian at the tribal level for a lesser offense emanating from a single action does not preclude federal prosecution under the double-jeopardy clause, a conclusion based on the idea that tribes' sovereignty does not derive from the federal gov-

ernment, the majority opinion declares that Native peoples retain "attributes of sovereignty" "only at the sufferance of Congress," later adding that the "problem [posed by the case] would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether." (United States v. Wheeler, 435 U.S. 313 [1978], 323, 331.

64. *Martinez,* 436 U.S. 49 at 72, 56, 71. The term appears as part of a quote from *Kagama.* On the work of such figures of *peculiarity* in U.S. Indian law, see Rifkin, "Indigenizing Agamben."
65. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), 210. Here we see another reference to Native collective choice, such as in the reference to the treaty system in *Rogers.* While I am not focusing on this aspect of the Indian law decisions in the 1978 session, they do repeat claims about tribes choosing to come under U.S. jurisdiction, which forms a parallel (if sometimes logically incompatible) strategy in Indian policy to the biopolitics of Indianization that I am addressing here.
66. *Oliphant* 435 U.S. 191 at 209, 199.
67. *Martinez,* 436 U.S. 49 at 55.
68. *Wheeler,* 435 U.S. 313 at 331; *Martinez,* 436 U.S. 49 at 72.
69. For discussion of Native peoples as extraconstitutional polities, such that the exertion of U.S. plenary authority over them is logically incoherent, see Frickey, "(Native) American Exceptionalism in Federal Public Law"; Riley, "(Tribal) Sovereignty and Illiberalism"; David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).
70. *Martinez,* 436 U.S. 49 at 63–64, 72.
71. Because tradition and culture can provide a crucial supplement for efforts to cast tribes as a different, lesser, or not-quite-fully-governmental entity, and thus justify U.S. superintendence, I am wary of appeals to culture as a means of bolstering assertions of Native sovereignty and self-determination. For such a strategy, see Wallace Coffey and Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law and Policy Review* 12 (2001). For discussion of the perils of this approach in an international framework, see Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham, NC: Duke University Press, 2010).
72. See Barker, *Native Acts,* 98–145; Curry, "A Closer Look at *Santa Clara Pueblo v. Martinez*"; Milczarek-Desa, "(Re)Locating Other/Third World Women"; and Riley, "(Tribal) Sovereignty and Illiberalism."
73. *Martinez,* 436 U.S. 49 at 56.
74. Puar, *Terrorist Assemblages,* 155, 198.
75. Indianization occurs even in *Morton v. Mancari,* which explicitly articulates Native identity as political rather than racial. Finding that preference for "Indians" in Bureau of Indian Affairs (BIA) hiring under the Indian Reorganization Act violates neither the Equal Employment Opportunity Act (1972) nor

the due-process clause of the Fifth Amendment, the decision indicates, "The preference as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities . . . governed by the BIA in a unique fashion," which itself derives from "Congress' unique obligation toward the Indians." Morton v. Mancari, 417 U.S. 535 (1974) at 554–55. Disowning a racial lens, the opinion implicitly derives the uniqueness of "tribal entities" from their shared possession of Indianness.

76. Dan Gunter, "The Technology of Tribalism: The Lemhi Indians, Federal Recognition, and the Creation of Tribal Identity," *Idaho Law Review* 35 (1998): 108.
77. Prucha, *Documents of United States Indian Policy,* 290. On the process of federal recognition, see also Barker, *Native Acts;* Les W. Field with the Muwekema Ohlone Tribe, "Unacknowledged Tribes, Dangerous Knowledge: The Muwekema Ohlone and How Indian Identities Are 'Known.'" *Wicazo Sa Review* 18, no. 2 (2003); Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003); Kirsty Gover, "Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States," *American Indian Law Review* 33 (2008–9); Anne Merline McCulloch and David E. Wilkins, "'Constructing' Nations within States: The Quest for Federal Recognition by the Catawba and Lumbee Tribes." *American Indian Quarterly* 19, no. 3 (1995); Mark Edwin Miller, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process* (Lincoln: University of Nebraska Press, 2004); and Allogan Slagle, "Unfinished Justice: Completing the Restoration and Acknowledgement of California Indian Tribes," *The American Indian Quarterly* 13, no. 4 (1989).
78. Puar, *Terrorist Assemblages,* 201.
79. Curry, "A Closer Look at *Santa Clara Pueblo v. Martinez,*" 200. "Powers of Indian Tribes," an opinion by the solicitor general of the Interior Department in the wake of the passage of the Indian Reorganization Act, which sets out the framework for Native self-governance largely still operative to this day, actually cites the practice of matrimonial management as exemplary of the nature of Native jurisdiction. "The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself controversies involving such relationships. So, too, with other fields of local government." *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917–1974,* vol. 1 (Washington, DC: Government Printing Office, 1979), 471.
80. Foucault, *The History of Sexuality,* vol. 1, 154.
81. See Cott, *Public Vows;* Elizabeth Povinelli, *The Empire of Love: Toward a Theory of Intimacy, Genealogy, and Carnality* (Durham, NC: Duke University

Press, 2006); Winona Stevenson, "'Ethnic' Assimilates 'Indigenous': A Study in Intellectual Neocolonialism," *Wicazo Sa Review* 13, no. 1 (1998); and Weinbaum, *Wayward Reproduction.*

82. My argument, then, is not about whether the United States should allow for tribes to have diverse, and possibly illiberal, membership requirements but about the ways such requirements remain contingent on a racializing imaginary that provides the condition of intelligibility and legitimacy for them from the perspective of U.S. law—whether or not blood quantum is the basis for belonging.
83. Puar, *Terrorist Assemblages,* 76.
84. Puar, *Terrorist Assemblages,* 99.
85. For a pronounced version of this argument, see Robert Williams Jr., *Like a Loaded Weapon* (Minneapolis: University of Minnesota Press, 2005).