

Race and American Indian Tribal Nationhood

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Introduction

As American Indian tribal nations develop the capacity to govern their own citizens, and engage in substantial economic and political activities with non-citizens, they are heading toward major roadblocks. Tribal nations, like other nations, seek to regulate the activities of all persons within their territorial jurisdictions, including the power to tax and prosecute those persons, citizen or not. The United States Supreme Court has expressed strong skepticism about the possibility of tribal nations asserting this authority and has placed tight controls on the authority of tribal nations to regulate the activities of non-tribal citizens.

While the Supreme Court's statements about its reasoning are often unclear, a recurring theme involving citizenship runs throughout its opinions. The Court is concerned that persons who cannot vote or participate in the tribal political process have not consented to the judgments of tribal sovereigns in a Lockean sense. Moreover, since non-Indians might never be allowed to become tribal citizens on account of their race, the

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The historical summary in Part II derives from a nearly-completed book project by the author that summarizes the legal and governmental history of the Grand Traverse Band. Some text in Part IV first appeared in different form in Matthew L.M. Fletcher, *An immigration policy solution for tribal governments*, INDIAN COUNTRY TODAY, Sept. 14, 2007, http://works.bepress.com/matthew_fletcher/21/.

Court appears to be concerned that such persons could *never* be in a position to consent, unlike, for example, citizens of one American state who travel and later take up residence in another state. And, since this limitation largely is based on race, the Court's skepticism is further heightened.

The impacts of this skepticism are real. A non-Indian man married to an Indian woman, living on the woman's home Indian reservation, cannot be prosecuted for misdemeanor domestic violence by the American Indian nation that governs the reservation.¹ That same non-Indian man who owns and operates a business on the reservation selling alcohol and tobacco to reservation residents is virtually immune from regulation or taxation by the American Indian nation that governs the reservation,² regardless of the impacts of that non-Indian's activities upon Indian lands and people, impacts that may include the destruction of tribal sacred sites³ and the pollution, even destruction, of tribal lands.⁴

This paper seeks to bridge the gap between the perception and reality of American Indian tribal nation citizenship. The United States and its federal Indian law encouraged, and in many instances mandated, Indian nations to adopt race-based tribal citizenship criteria. Even in the rare circumstance where an Indian nation chose for itself whether or not to adopt a race-based citizenship rule, the nation invariably did, with the belief and expectation that Indian nations had no choice.

In fact, Indian nations do have a choice.

¹ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); Sarah Deer, *Federal Indian and Violent Crime: Native Women and Children at the Mercy of the State*, 31(4) SOCIAL JUSTICE 17 (2004).

² See *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

³ See *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc).

⁴ See *Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767 (9th Cir. 2003).

American Indian tribes strive toward nationhood, but race-based citizenship rules hold them back. Prior to the imposition by the United States of race-based citizenship rules in the nineteenth and twentieth centuries, Indian nations accepted persons as citizens using a combination of ancestry and residence, and other criteria including, for example, advocacy on behalf of the tribal nation. If Indian nations are to develop as true nations within the United States, then these nations must reach a solution to the problem identified by the Supreme Court.

Part I of this paper summarizes the complex and inconsistent character of race and federal Indian law. This part examines federal and state law as it applies to individual American Indians and to Indian nations, and identifies how those laws leave open the possibility that non-Indians can become citizens of American Indian tribal nations.

Part II examines the history and development of a group of modern American Indian tribal nations – the Michigan Anishinaabe tribes.⁵ In particular, this paper focuses on the history of the Grand Traverse Band of Ottawa and Chippewa Indians, both the Band’s development from family group to treaty tribe to a federally-recognized Indian tribe; and its citizens, who have progressed from tribal membership to state and federal citizenship to tribal nation citizenship. The purpose of this part is to ground the broad statements of the first part in the actual history and the practical reality of American Indian nations and their citizens.

Part III examines the paradox of race and modern American Indian tribal nation citizenship. On one hand, the United States has demanded tribal citizenship criteria that

⁵ “Anishinaabe” is the singular version of the name that the Ottawa (Odawa), Chippewa (Ojibwe), and Potawatomi (Bodewadomi) nations of the Great Lakes use to refer to themselves. “Anishinaabek” is the plural. “Anishinaabe” means “original people.” Benjamin Ramirez-Shkwegnaabi, *The Dynamics of Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J. 53, 72 n. 1 (2003).

exclude virtually all non-Indians, creating political entities that are wholly racial in character. On the other hand, the Supreme Court, or at least several Justices, believes that such a political entity is an anomaly in modern American Constitutional law. As a result, the Court refuses to sanction the exercise of tribal authority over non-tribal citizens.

Part IV offers a clear potential solution and, in the alternative, a long-term strategy for helping American Indian tribal nations achieve their desired status as true sovereign nations with primary regulatory and adjudicatory authority. This paper offers the very first pragmatic solutions to the very serious problems created by the Supreme Court's narrow view of tribal sovereignty by directly addressing the legal and political characteristics of American Indian tribal citizenship that so worry the Court.

I. Race and Federal Indian Law

Indian tribes and individual Indians featured in the original United States Constitution, followed by a surprising sequel in the Fourteenth Amendment. The Indian Commerce Clause reserved to Congress the exclusive authority to regulate commerce with Indian tribes.⁶ And the “Indians Not Taxed” clause excluded American Indians who were not American or state citizens from the suffrage, or from being counted for representation purposes.⁷ Considering that some states, such as Michigan, had extended the suffrage to certain American Indians by the 1860s,⁸ it was somewhat surprising that the Fourteenth Amendment expressly retained the “Indians Not Taxed” language. In general, throughout the first 150 years or so of federal and state Indian law and policy,

⁶ CONST. art. I, § 8, cl. 3.

⁷ CONST. art. I, § 2, cl. 3; CONST. amend. XIV, § 2.

⁸ *E.g.*, MICHIGAN CONSTITUTION (1850), art. 7. *See generally* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880, at 131-33 (2007).

the racial character of American Indians played a secondary role to legal and political determinations of whether an individual Indian was “civilized” or not, however that term might have been defined.

The Indian Commerce Clause, along with the hundreds of Indian treaties executed by the United States, served to empower Congress and the Executive branch with exclusive and plenary power to deal *with* Indian tribes.⁹ Although there is much powerful scholarly literature decrying this authority,¹⁰ the United States also successfully asserted power to control the *internal* affairs of American Indian tribal nations. The first federal statutes implementing the Indian Commerce Clause as well as laying the framework for Indian treaties – the Trade and Intercourse Acts – dealt almost exclusively in the field of relations with Indian tribes, not individual Indians.¹¹ Following European precedents in Indian affairs, Congress drew a bright-line between the affairs of American citizens and state governments and Indian tribes, requiring that any “intercourse” with Indian tribes be conducted in accordance with federal law and policy and through federal actors.¹²

The federal and state legal treatment of the racial identity of American Indians from the beginning of the American Republic to recent decades was inconsistent, confusing, and irrational. Some states that banned miscegenation between Whites and Blacks, allowed marriage between Whites and American Indians, while other states did not.¹³ Some states extended the vote to American Indians early on, while others barred

⁹ See *United States v. Lara*, 541 U.S. 193, 200-02 (2004).

¹⁰ E.g., Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002).

¹¹ See generally Matthew L.M. Fletcher, *Trade and Intercourse Acts*, in 2 ENCYCLOPEDIA OF UNITED STATES INDIAN LAW AND POLICY 762-64 (Paul Finkelman and Tim Alan Garrison eds. 2009).

¹² See 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 89-114 (1984)

¹³ See generally Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351, 359-65 (2007).

American Indian voters until the 1940s.¹⁴ Some places applied Jim Crow laws to American Indians, while some did not.¹⁵ Some states barred American Indians from bringing suit or testifying in state courts.¹⁶ American Indian blood quantum created additional questions for state lawmakers, as did the fact that the Constitution foreclosed most, if not all, state authority to deal with Indians and Indian tribes.¹⁷ Importantly, while state governments experimented with Black and Indian blood quantum laws and requirements from the inception of the United States, Congress did not begin to define who was an American Indian for purposes of federal law until the late nineteenth century.¹⁸

Early Supreme Court decisions that formed the foundation of federal Indian law, along with many provisions in Indian treaties, formed the backdrop of race in federal Indian law. The Marshall Trilogy¹⁹ of cases that continue to form the foundations of federal Indian law to this day did not reach a holding on the racial character of American Indians, but did infuse race into the question of Indian tribe legal status and tribal legal

¹⁴ Compare MICH. CONST. art. 7 (1850) (authorizing American Indians who were “civilized” and not a member of any Indian tribe to vote in Michigan elections), with *Porter v. Hall*, 271 P. 411 (Ariz. 1928) (rejecting the rights of American Indians to vote in Arizona elections), *rev’d*, *Harrison v. Laveen*, 196 P.2d 496 (Ariz. 1948).

¹⁵ See generally Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241, 1243-53 (2005).

¹⁶ Compare Richard B. Collins and Karla D. Miller, *A People Without Law*, 5 INDIGENOUS L. J. 83, 108-10 (2006) (discussing two New York state court cases denying the capacity of Indians to sue), and *People v. Hall*, 4 Cal. 399 (1854) (holding American Indians may not testify against a white man in court) with Collins and Miller, *supra*, at 110-12 (noting several United States Supreme Court cases where the tribal capacity to sue was presumed).

¹⁷ See *United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that Congressional Indian affairs power is “plenary and exclusive”) (citations omitted); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

¹⁸ See generally Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 47-48 (2006).

¹⁹ *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

authority. Some Justices argued in the various cases that Indian nations were nothing more than loose, disorganized collections of uncivilized, animal-like beasts,²⁰ while others treated Indian nations as retaining most of the sovereign authority of foreign, international governments.²¹ Here, questions of the “civilized” status of the American Indians came to the forefront.

The first explicit decision involving race and American Indians was *United States v. Rogers*,²² where a White man who had married a Cherokee citizen and had himself acquired Cherokee citizenship under tribal law asserted that federal courts had no criminal jurisdiction over him for crimes committed in Cherokee territory.²³ The Supreme Court rejected that claim, asserting that the White man’s race could not be obscured or eliminated through the acquisition of tribal citizenship.²⁴

A few years later, the Taney Court in the notorious Dred Scott case analyzed the Constitutional provision involving “Indians Not Taxed” and concluded that it was theoretically possible for American Indians to become American citizens.²⁵ This allowed the Court to conclude that Blacks, who did not appear in the Constitution at all except as a euphemism and did not enjoy the same status, could therefore never become American citizens under the Constitution.²⁶ Chief Justice Taney’s opinion, like the Marshall Court,

²⁰ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 25 (1831) (Johnson, J., concurring) (“Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?”).

²¹ See *id.* 30 U.S. at 52-55 (Thompson, J., dissenting).

²² 45 U.S. 567 (1846).

²³ See *id.* at 571.

²⁴ See *id.* at 572-73 (“And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian.... 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.”).

²⁵ 60 U.S. 393, 403-04 (1856).

²⁶ See *id.* at 403 (“The situation of this population [African-Americans] was altogether unlike that of the Indian race.”).

referred to a lack of civilization in American Indians, but that question did not necessarily form the basis of his decision.

The Fourteenth Amendment did nothing to affect the American citizenship regime available to American Indians.²⁷ The question of whether American Indians could be “civilized,” and how they could prove or demonstrate “civilization” began to be explicitly incorporated into the constitutional jurisprudence of citizenship. In *Elk v. Wilkins*, the Supreme Court held that Congress must make an affirmative decision to grant American citizenship to American Indians.²⁸ In that case, the Court held that an American Indian born within the boundaries of the United States did not automatically acquire American citizenship. Like the political discussion of the times involving American Indians, and following the rhetoric of previous Supreme Court decisions, the *Elk* Court implied that Congress could confer American citizenship upon American Indians, but only if Congress make an express finding that the Indians were “fi[t] for a civilized life.”²⁹

While tied to race and racial characteristics, the question of “civilization” took questions of American Indian citizenship and the application federal and state laws in a different direction than race. It is likely that most commentators and even statutory enactments by Congress and state governments intended the “civilization” of Indians to apply a more subjective standard, but whether or not an American Indian was “civilized” under the law often depended on whether the Indian had relinquished his or her tribal nation citizenship, or aspects of that citizenship, such as the right to exercise treaty rights. “Civilization” sometimes even depended on whether an American Indian was loyal to an

²⁷ See generally George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed”*, 28 AM. INDIAN CULTURE & RES. J. 37 (2004).

²⁸ 112 U.S. 94, 99 (1884).

²⁹ *Id.* at 100.

Indian tribe (by definition, uncivilized) or a state government or the United States. Several late nineteenth century Supreme Court cases invoked loyalty to a particular government as a test of American Indian civilization.³⁰

Congress and the Executive branch complicated questions of citizenship and the concomitant questions of “civilization” during the period of federal Indian policy called the Allotment Era, which ran from the 1880s to the 1920s.³¹ Congress passed dozens of tribe or region-specific statutes breaking up many of the large, tribally owned Indian reservations in the western United States, allotting lands to individual Indians.³² Congress usually allowed a period of time during which the United States would hold the land in trust for individual Indians, after which the government would transfer the land in fee to Indians.³³ During this period, Congress often tied American Indian land ownership and tenure questions to whether or not the Commissioner of Indian Affairs determined an individual Indian was “civilized” or not.³⁴ Congress sometimes tied American citizenship to “civilization” as well.³⁵

By the 1920s, however, Congress and the Executive branch drifted away from the allotment of Indian reservations. In 1921’s Snyder Act, Congress authorized the Secretary of Interior to provide federal services to half-blood American Indians,

³⁰ *E.g.*, *Elk v Wilkins*, 112 U.S. 94, 119 (1884) (noting that Indians do not automatically owe “allegiance” to the United States).

³¹ *See generally* CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 19 (1987); Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1024-25 (1997).

³² *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 559 (1903) (discussing specific Act of Congress (Act of Congress of June 6, 1900 (31 Stat. 677, chap. 813)) designed to allot the reservation created by the Treaty of Medicine Lodge, 15 Stat. 581, 589 (1867)).

³³ *E.g.*, 25 U.S.C. § 348.

³⁴ *E.g.*, *In re Heff*, 197 U.S. 488, 500-01 (1905) (construing the General Allotment Act, February 8, 1887 (24 Stat. 388, chap. 119, § 6), *overruled in* *United States v. Nice*, 241 U.S. 591 (1916)).

³⁵ *See* Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall’s Indian Law Jurisprudence*, 26 ARIZ. L. J. 495, 522-23 (1994).

regardless of their citizenship status or their “civilization.”³⁶ And in 1924, Congress extended American citizenship to all American Indians born within the United States borders.³⁷ In 1934, Congress ended allotment forever, and reaffirmed its half-blood definition of American Indian.³⁸ After 1934, with some major exceptions not relevant here, Congress and the Executive branch began to defer to tribal citizenship criteria.³⁹

American Indian tribal nation citizenship has now replaced blood quantum and race as the key component of federal and tribal government activity in federal Indian law. In recent decades, tribal citizenship is the key indicator whether or not an American Indian qualifies for federal, tribal, and to a lesser extent state services such as educational scholarships, preference in employment, and housing and health care, for example.⁴⁰

There are two reasons explaining this shift from blood quantum to tribal citizenship. First, the federal government has recognized or restored to recognized status dozens upon dozens of Indian tribes.⁴¹ The number of American Indians associated with nonrecognized tribes has declined significantly from the 1970s.⁴² Second, and perhaps more importantly, the Supreme Court’s changing view of federal government racial classifications has compelled the federal government to rethink the programs it provides

³⁶ 25 U.S.C. § 13.

³⁷ Act of June 2, 1924, 43 Stat. 253. On the “clerical error” associated with the published title of the Act, see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 14.01[1], at __ n. 7 (2005 ed.).

³⁸ 25 U.S.C. § 479.

³⁹ See Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 962-63 (2002). For examples of exceptions, see *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J. L. & POL’Y 273, 279-88 (2005)

⁴⁰ E.g., 42 CFR § 136a.16 (procedure to verify tribal citizenship by the Indian Health Service); 7 CFR § 253.6(b)(1) (same for food stamps eligibility). Cf. 25 CFR § 23.71(b) (implying importance of tribal citizenship for government service eligibility).

⁴¹ See, e.g., Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 498-516 (2006) (describing federal recognition of several tribes since 1978).

⁴² See generally Task Force Ten: Terminated and Nonfederally Recognized Indians, Final Report to the American Indian Policy Review Commission (October 1976) (finding many American Indians who were not members of federally-recognized tribes).

to American Indians who qualify solely on the basis of their American Indian blood quantum.⁴³ Congress does not expand or fund these programs much anymore.

Finally, in the area of criminal law, Congress's enactments as to federal criminal laws and criminal jurisdiction over Indians have often been even more overtly racial. Persons who are half-blood or descendants of tribal citizens are subject to federal criminal jurisdiction in Indian Country, regardless of their tribal citizenship status. Ironically, the Supreme Court's view of tribal court criminal jurisdiction was based on a member-nonmember / citizen-noncitizen dichotomy.⁴⁴ Congress's recognition of tribal criminal jurisdiction blurred that line by incorporating the racial classification of "nonmember Indian."⁴⁵ But this appears perhaps to be a blip in the road as Congress considers several proposals to expand its recognition of tribal criminal jurisdiction over non-Indians for some crimes.⁴⁶

In sum, federal Indian law is both about race and not about race. Race and racism underscore virtually all aspects of federal Indian law and policy, but the United States and the American non-Indian public often has recast race into a discussion about citizenship, with less of an emphasis on skin color and the civilized or savage character of American Indians. In federal law, blood quantum was a late addition to the mix, and is an

⁴³ Compare *Morton v. Mancari*, 417 U.S. 535, 553 n. 24 (1974) (recognizing that Congressional acts and Executive actions relating to Indian affairs are based on the "political status" of Indian tribes), with *Williams v. Babbitt*, 115 F.3d 657, 663-66 (9th Cir. 1997) (applying strict scrutiny to a statute benefitting Alaskan Natives), *cert. denied*, 523 U.S. 1117 (1998).

⁴⁴ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205 (1978) (quoting S. Rep. No. 1686, 86th Cong., 2d Sess., 2-3 (1960)); *Montana v. United States*, 450 U.S. 544, 547 & passim (1981); *Duro v. Reina*, 495 U.S. 676, 679 & passim (1990).

⁴⁵ See 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193, 199 (2004) (describing "Duro fix" in 25 U.S.C. § 1301(2)).

⁴⁶ E.g., Matthew L.M. Fletcher, *Empowering American Indian Victims of Domestic Violence*, unpublished manuscript (2009).

important component, but now American Indian *tribal nation citizenship* is by far the most important element.

II. The Racialization of Indian Nationhood

Because of the dominance of the United States over American Indian affairs, tribal nations mostly followed federal trends in relation to the tribal understanding of citizenship. Traditional and customary Indian communities prior to United States intervention were able to avoid the explicit racialization of tribal nations,⁴⁷ but nearly all of them have followed the federal government into the morass of race and its close proxy, blood quantum.⁴⁸

Since each tribal community is literally a separate nation, this paper will focus on a small group of tribal nations that are representative of the movement from nationhood to Indian tribe and back into nationhood. Generally, this paper will review the relevant history of several Michigan Indian tribal nations; and more specifically, this paper will analyze the development and interpretation of the tribal citizenship laws of the Grand Traverse Band of Ottawa and Chippewa Indians in Peshawbestown, Michigan. The purpose of this method is to create a link between the concentration of most scholarship in this area, which looks almost exclusively at federal and state views of race and

⁴⁷ “[An Indian tribe] is a group of people living pretty much in the same place who know who their relatives are.” Vine Deloria, Jr., Trial Transcript at 17:127-28, *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977) (No. 76-3190), quoted in JACK CAMPISI, *THE MASHPEE INDIANS: TRIBE ON TRIAL* 32 (1991).

⁴⁸ See Joseph P. Kalt, *The Role of Constitutions in Native Nation Building: Laying a Firm Foundation*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 78, 84-85 (Miriam Jorgensen, ed. 2007).

American Indian tribal nationhood,⁴⁹ and the developing scholarship focusing on the internal workings and policies of tribal nations.⁵⁰

A. A Brief History of Michigan Ottawa Nationhood

The nineteenth century Anishinaabek of Michigan might or might not be characterized as a nation in the sense understood by Europeans and Americans.⁵¹ The primary government structure, which retained much of the characteristics one would expect from a Westphalian sovereign, has been described as a family hunting unit, borrowing a loaded term from anthropologists.⁵² These entities owned sovereign property, including hunting, fishing, farming, gathering, and trade routes extending far outside the bounds of the villages or camps where the individual members of the communities lived.⁵³ A leader or leaders (ogema or ogemuk⁵⁴) who were prominent family leaders, spoke for the community and were empowered and required to enforce the property rights of the community. It is this family hunting unit that would later transform into what are now Michigan Indian tribal nations.

The Michigan Anishinaabek comprised three tribal groups, the Ottawa, Potawatomi, and Ojibwe, who spoke similar languages, with the Potawatomi language differing in dialect more than the Ottawa and Ojibwe, which were very similar. Their

⁴⁹ E.g., Bethany R. Berger, *Red: Racism and American Indians*, __ UCLA L. REV. __ (forthcoming 2009), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269527.

⁵⁰ E.g., Christine Zuni, *Strengthening What Remains*, 7 KAN. J. L. & PUB. POL'Y 18 (1997); Kirsty Gover, *Constitutionalizing Tribalism: States, Tribes and Membership Governance in Australian, Canada, New Zealand and the United States*, S.J.D. dissertation, New York University School of Law (2008).

⁵¹ Cf. *Cherokee Nation v. Georgia*, 30 U.S. 1, 52-55 (1831) (Thompson, J., dissenting) (reviewing the international law understanding of “nation”).

⁵² See Frank G. Speck, *The Family Hunting Band as a Basis of Algonkian Social Organization*, 17 AM. ANTHROPOLOGIST 289 (1915).

⁵³ See ALEXANDER HENRY, *TRAVELS AND ADVENTURES* 149 (University of Michigan 1968), quoted in ROBERT DOHERTY, *DISPUTED WATERS: NATIVE AMERICANS & THE GREAT LAKES FISHERY* 13 (1990).

⁵⁴ “Ogema” is the name of the person authorized to speak on behalf of Anishinaabe political groups; “ogemuk” or “ogemaag” is the plural. See Ramirez-shkwegnaabi, *supra* note 5, at 56.

ways of living and sustaining themselves were very similar, with some exceptions. The Potawatomi, who lived in the more southern areas of Michigan, were more agrarian, while the Ojibwe, who lived near Lake Superior in the Upper Peninsula, tended to rely more on hunting and fishing. The Ottawa, who lived between them, were known as the traders, moving goods back and forth between the other two groups, and even controlled the entire trading economy of the western Great Lakes for a time.⁵⁵ But, depending where in Michigan they lived, they would rely more on agriculture or hunting and fishing.⁵⁶ All three tribal groups engaged in trading, hunting, fishing, gathering, and trading.

These three tribal groups, collectively the Anishinaabek,⁵⁷ collaborated in international relations in many ways. In numerous treaty councils with European nations or with the United States, the Anishinaabek gathered together, often along with many other nations, to negotiate with common interests.⁵⁸ But not all Anishinaabe communities participated in every treaty or war council because some Anishinaabe communities did. Michigan Anishinaabek did not participate in treaty negotiations over the lands of the Minnesota Anishinaabek. And not all Michigan Anishinaabe community participated in a war or treaty council involving other Michigan Anishinaabe communities. The foundational 1795 Treaty of Greenville and the 1821 Treaty of Chicago involved the southwestern Michigan Potawatomi communities, but few other Michigan Anishinaabek communities participated.⁵⁹ Similarly, the Potawatomi communities had no interest and

⁵⁵ See James M. McClurken, *The Ottawa, in* PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI, AND OJIBWAY OF MICHIGAN 1, 14 (1986).

⁵⁶ See Peter Dougherty, *Diaries*, 30 JOURNAL OF THE PRESBYTERIAN HISTORICAL SOCIETY 95, 109 (June 1952).

⁵⁷ See JAMES M. MCCLURKEN, GAH-BAEH-JHAGWAH-BUK: THE WAY IT HAPPENED, A VISUAL CULTURE HISTORY OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS 3 (1991).

⁵⁸ See generally Ramirez-shkwegnaabi, *supra* note 5 (studying five such treaty councils).

⁵⁹ Treaty with the Wyandots, etc., Aug. 3, 1795, 7 Stat. 49 (Greenville); Treaty With the Chippewas, etc., Sept. 26, 1833, 7 Stat. 431 (Chicago).

therefore no right to participate in the major Michigan land cession treaty involving Ottawa and Chippewa lands in the 1836 Treaty of Washington.⁶⁰

The 1836 Treaty council is worth examining in detail for the purpose of defining the Michigan Anishinaabe understanding of nationhood.⁶¹ Secretary of War Lewis Cass instructed Michigan Indian agent and treaty commissioner Henry Schoolcraft to gather the relevant tribal leaders together for the purpose of extinguishing title to the southern half of the Lower Peninsula of Michigan and the eastern half of what would become the Upper Peninsula of Michigan. In general, the Lower Peninsula lands were the lands of the Michigan Ottawa communities and the Upper Peninsula lands were the lands of the Michigan Ojibwe communities. Schoolcraft knew this, but he also knew that the more influential Upper Peninsula Ojibwe leaders were unlikely to respond to his calls for a treaty council. He called the Lower Peninsula Ottawa leaders (along with a few Lower Peninsula Ojibwe leaders) and a smattering of non-influential Upper Peninsula Ojibwe leaders, mostly very old men who had lost their influence and young men who had not yet acquired much influence.

During the treaty council, which was led by the Lower Peninsula Anishinaabe leaders, the negotiations had led to a stalemate of sorts. The Lower Peninsula Ottawas and Chippewas, who had arrived in Washington with the expectation that they would be able to accomplish their major goals with the cession of a few islands and some land in the Upper Peninsula, would not consent to the large land cession proposed by Schoolcraft. The treaty council, in short, was split, with the Upper Peninsula and Lower Peninsula Anishinaabek negotiating separately. Each of these groups had appointed a key

⁶⁰ Treaty with the Ottawas, etc. Mar. 28, 1836, 7 Stat. 491.

⁶¹ This history is taken from Matthew L.M. Fletcher, *A History of the Grand Traverse Band of Ottawa and Chippewa Indians*, unpublished book manuscript (2009) (chapter on the 1836 Treaty).

spokesperson, who had the authority to speak to Schoolcraft, but not the authority to bind the other group, *or even the disparate communities within the speaker's group.*

Here is the complicated rub. The Lower Peninsula Anishinaabe communities may have appointed a lone speaker to represent them at the treaty council, but each community brought its own representatives. And so the Lower Peninsula Anishinaabe had representatives from the Grand River Ottawas, the Grand Traverse Ottawas and Chippewas, the Little Traverse Bay and Cross Village Ottawas, and the Burt Lake Ottawas and Chippewas. In fact, in the years leading up to the 1836 treaty council, the Grand River and Little Traverse Ottawa bands had clashed over whether any land at all should be ceded, with the Grand River group (a victim of earlier treaties with the United States) refusing to cede any land whatsoever. While it might not have appeared as such to outsiders such as Secretary Cass, each of these disparate communities was a tribal nation, with its own land base, its own extended territory and trade routes, and its own interests. Schoolcraft, married to an Ojibwe woman (the remarkable Jane Johnston Schoolcraft), knew better.

But Schoolcraft was crafty as well, and knew how to play off the two major groups – the Lower and Upper Peninsula communities – off each other. He knew the Upper Peninsula Anishinaabe leaders would be malleable and willing to sign virtually any document. He had, after all, handpicked them in some cases over the objection of the more influential leaders, who had refused to show. And so when the Lower Peninsula Anishinaabe refused to budge on a major land cession, he threatened to conclude the land cession treaty with the Upper Peninsula representatives. Schoolcraft likely knew that the Lower Peninsula representatives were aware of previous Indian treaty negotiations had

gone off like this, such as the 1795 Treaty of Greenville. And he also knew that the Senate and the President did not really care who signed the treaty, just so long as someone with apparent authority to sign the treaty did so. For the United States, Indian leaders were interchangeable. The Lower Peninsula Anishinaabek knew the reality, and so they executed the treaty. They were successful in achieving many of their goals, including permanent reservations, and so the major land cession was not so catastrophic.

The post-1836 Treaty Grand Traverse Band group demonstrates the transition of the community from a tribal group to a nation. The individual *ogemuk* who traveled to Washington – Aishquagonabe, Aghosa, and Oshawun Epenaysee – represented villages. Aishquagonabe and his nephew Aghosa were Ojibwe, the leaders of their respective villages located on the eastern shore of the Grand Traverse Bay. They were the leaders of their village because they were the heads of the major families in those villages. The rest of the villages were Ottawa and located mostly in what is now Leelanau County, or the western side of the Grand Traverse Bay. These villages collectively selected Oshawun Epenaysee, a prominent family and community leader, to represent them all in the treaty council. At the council, surely Aishquagonabe, who had taken scalps in the War of 1812, was the most influential Grand Traverse *ogema*, and likely the most influential Lower Peninsula *ogema*. His nephew, Aghosa, and Oshawun Epenaysee would have followed his lead, but they had individual responsibilities to the communities that appointed them as representatives, and so they would not be required to follow Aishquagonabe.

This form of governmental structure remained intact through and beyond the next major treaty council that negotiated the 1855 Treaty of Detroit.⁶² In that treaty council, Aghosa for a second time, Onawmoneese, and Peshawbe represented the Grand Traverse Bay bands. Several other lesser Grand Traverse Bay Anishinaabe leaders participated and signed the treaty as well. In a replay of the 1836 treaty council, the Lower Peninsula and Upper Peninsula Anishinaabe again selected separate speakers, preferring to negotiate as separate alliances. The American treaty commissioners, George Manypenny, the Commissioner of Indian Affairs, and Henry Gilbert, Michigan Indian agent did not have the same wherewithal of Henry Schoolcraft, but still succeeded in forcing the various Anishinaabe bands to execute a treaty favoring the United States and its non-Indian constituents.

The terms of the treaty were disastrous to the Michigan Anishinaabek and forced some significant, unplanned, and yet incremental changes to tribal government structures. The key result of the treaty was to dispossess the Anishinaabek of their lands even as federal agents attempted to implement the terms of the treaty.⁶³ This forced the Anishinaabe villages that existed on the perimeters of the various reservations to become the primary land base of the various bands. This consolidation helped to transform village government from a basis in family structures to more of a municipal government, although that process took at least five or six decades.

By the 1870s, the United States had misinterpreted the 1855 Treaty language to mean that the Lower Peninsula bands that signed the treaty had voluntarily agreed to

⁶² For histories of the 1855 treaty council, see Ramirez-shkwegnaabi, *supra* note 5, at 67-71; Richard White, *Ethnohistorical Report on the Grand Traverse Ottawas*, unpublished manuscript, at 24-57 (1979), available at <http://turtletalk.files.wordpress.com/2008/09/white-ethno-report-pages-1-55.pdf>.

⁶³ See generally Bruce A. Rubenstein, *Justice Denied: Indian Land Frauds in Michigan: 1855-1900*, 2:2 THE OLD NORTHWEST 131 (1976).

disband and abandon their tribal relations.⁶⁴ Interestingly, the United States continued to recognize the Upper Peninsula bands. The treaty provision at issue appeared first in the 1836 Treaty, which identified the Indians that sat in the treaty council as a united Ottawa and Chippewa “nation.” Obviously, this was not the case, in that there was a clear division between the Lower and Upper Peninsula tribal communities. The 1855 Treaty formally eliminated the fictional “nation,” at the request of the tribal negotiators. Federal officials not present at the treaty council interpreted the provision to mean that the treaty signatories had agreed to self-terminate. Thus, administrative termination was born.⁶⁵

And so from the 1870s to the passage of the 1934 Indian Reorganization Act (IRA), the Lower Peninsula band governments focused on reconstituting the federal-tribal relationship begun in the 1836 Treaty and terminated in the 1870s. Meanwhile, in one instance, the band governments sued the United States to recover funds allocated under the 1855 Treaty for the tribes but never paid.⁶⁶ The combination of these efforts formalized a government structure based on regional territories rather than family relationships. The tribal efforts in the 1930s and 1940s pressing for the right to reorganize under the IRA and the decades-long Indian Claims Commission claims ending in the 1970s⁶⁷ all but perfected the transformation of family hunting units to modern

⁶⁴ See *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*, 369 F.3d 960, 921-22 n.2 (6th Cir. 2004).

⁶⁵ For a longer history of administrative termination, see Fletcher, *supra* note 41, at 502-16.

⁶⁶ See *MCCLURKEN, GAH-BAEH-JHAGWAH-BUK*, *supra* note 57, at 82 (discussing *Petoskey et al. v. United States*, No. 27,978). Under the law of the time, the Anishinaabek had to convince Congress of the validity of their case before bringing suit, after which Congress passed a statute allowed the Indians to sue the government. See *Ottawa and Chippewa Indians of the State of Michigan v. United States*, 42 Ct. Cl. 240, 1097 WL 888 (March 4, 1907); Act of March 3, 1905, § 13, 33 Stat. 1048, 1081-82 (authorizing the “Ottawa and Chippewa Indians of the State of Michigan” to sue).

⁶⁷ See generally White, *supra* note 62, at 147-91, available at <http://turtletalk.files.wordpress.com/2008/09/white-ethno-report-pages-56-195.pdf>.

governments. Finally, in 1980⁶⁸ and in 1994,⁶⁹ the United States recognized the three Lower Peninsula Ottawa bands who signed the 1836 and 1855 Treaties.

These federally recognized Indian tribes – American Indian tribal nations – retain much of their character as family hunting groups, especially in that all of them require some sort of blood lineage in order to qualify as citizens. And perhaps because of this close relationship, many Anishinaabe customs and traditions – including the language and culture – remain intact, even if narrowly so. But in virtually all other respects, these Indian tribes are nations.

B. A Brief History of Michigan Ottawa Nation Citizenship

Extended family relationships formed the backbone of traditional Anishinaabe governments – family hunting units – with membership in a community based on family relationships almost exclusively. The key rules regulating the relationships of these communities, which were very small in populations, derived from a clan system. For example, one could not marry into one's same clan, which provided some assurance that one was not marrying a close relative. This meant that innumerable Anishinaabek would marry outside of their small communities, creating complicated family relationships that extended beyond villages. In this way, largely, since so many Ottawas from Grand Traverse Bay married Chippewas from Sault Ste. Marie, for example, the family relationships cemented political relationships between the bands. However, residence determined final membership in a community, so that an Anishinaabekwe (Anishinaabe

⁶⁸ See Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

⁶⁹ See Pokagon Band of Potawatomi Indians Act, Pub. L. No. 103-323 (Sept. 21, 1994) (codified at 25 U.S.C. § 1300j); Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324 (Sept. 21, 1994) (codified at 25 U.S.C. § 1300k).

woman) who moved in with her spouse's family in another village became a member of that community.

The classic Anishinaabe example is the story of Leopold Pokagon. Leopold, born into an Ottawa or Ojibwe community in the late eighteenth century in northern lower Michigan, and who married a Potawatomi woman from the St. Joseph River basin.⁷⁰ He moved south to live with her family, which was one of the more prominent families in the region.⁷¹ Leopold developed influence and authority over time, was adopted by the local tribe,⁷² and eventually represented his community in the fateful 1833 treaty council that resulted in the forced removal of all the Michigan and northern Indiana Potawatomis to Kansas and later Oklahoma, except for Leopold's band, which the United States allowed to remain in Michigan due to his negotiating tactics and skills.⁷³ And so the federally recognized Indian tribe known as the Pokagon Band of Potawatomi Indians is named for an Ottawa or Ojibwe Indian.

This traditional form of family and village membership survived until the early part of the twentieth century, when the United States began to interject blood quantum requirements into federal-Anishinaabe relations. The government accomplished this feat in a couple ways. First, the United States incorporated a blood quantum requirement into the 1836 treaty. The treaty language appears to assume that most Indians subject to the treaties were full-blood Indians, but the treaty had provisions for half-blood Indians,⁷⁴ likely at the request of the *ogemuk*. From the point of view of the Anishinaabek, these

⁷⁰ See VIRGIL J. VOGEL, INDIAN NAMES IN MICHIGAN 54 (1986).

⁷¹ See *id.*

⁷² See JAMES A. CLIFTON, THE PRAIRIE PEOPLE: CONTINUITY AND CHANGE IN POTAWATOMI INDIAN CULTURE 1665-1965, at 229-30 (1977).

⁷³ See JAMES A. CLIFTON, THE POKAGONS, 1683-1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY 43-51 (1984); R. DAVID EDMUNDS, THE POTAWATOMIS, KEEPERS OF THE FIRE 266 (1978).

⁷⁴ See Treaty with the Ottawas, etc. Mar. 28, 1836, art. VI, 7 Stat. 491.

half-blood Indians were family members. From the point of view of the federal government, these half-blood Indians were problems. They were not true Indians, and might not even be Indians anymore. And they were not white, either. This mixed racial status, combined with requests from the *ogemuk* to include them in the benefits of the treaty, appears to have confused the Americans. Moreover, especially during the 1855 treaty council, these half-blood Indians participated in the treaty negotiations as English-speaking, educated Indians, making more trouble for the American treaty commissioners.⁷⁵

Second, after the administrative termination of the Ottawa tribes in the 1870s, the federal government continued to informally recognize these tribes on an off-and-on basis as half-blood or more Indian communities.⁷⁶ Statutes in 1921 and 1924 referenced earlier formalized the duty of the Department of Interior to provide services to all half-blood or more Indians, and the 1934 IRA continued this requirement.

Third, after the Ottawa communities sued the United States for an accounting of treaty annuities promised under the 1855 Treaty, the federal government ordered the creation of a judgment roll for the purpose of paying out the judgment on a per capita basis. This roll, the Durant Roll, finalized in 1910, created two classes of individuals – full-bloods and half-bloods.⁷⁷ The federal agent who created the roll, Henry Durant, relied upon the representations of the various regional *ogemuk* for purposes of determining who was eligible for inclusion on the roll. In this way, the federal

⁷⁵ For one history of such an Ottawa half-blood, see James M. McClurken, *Augustin Hamlin, Jr.: Ottawa Identity and the Politics of Persistence*, in BEING AND BECOMING INDIAN 85 (James A. Clifton, ed. 1989).

⁷⁶ See Commissioner of Indian Affairs to Secretary of Interior (January 25, 1910), *quoted in* White, *Ethnohistorical Report on the Grand Traverse Ottawas*, *supra* note 62, at 79.

⁷⁷ See MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 57 **Error! Bookmark not defined.**, at 82; White, *Ethnohistorical Report on the Grand Traverse Ottawas*, *supra* note 62, at 77-78.

government once again recognized the importance of the tribal village structure and ogema duties as family-oriented.

But the recognition of blood quantum in these three areas created a crisis of Indian citizenship that undermined the family orientation of Anishinaabek identity and forced the creation of an American-style citizenship regime based on blood quantum, as opposed to tribal membership based on family relationships.

For example, the American treaty negotiators would have dealt with Indians of less than half-blood, like the children of Henry Schoolcraft, Michigan Indian agent and treaty commissioner during the 1836 treaty council, as outside the application of the treaty terms. These Indians still retained their tribal membership – as family members – from the point of view of the Anishinaabek, but Indians appear to have accepted that these quarter-blood Indians would become more a part of American families, and therefore American citizens. It made sense from a family perspective. By definition, a quarter-blood Indian had more non-Indian family members than a half-blood or full-blood Indian. And so Indians accepted that these Indians would stay with their relations. But Americans did not always accept their quarter-blood Indian relations. While the federal government dealt with these less than half-blood Indians as not being eligible for treaty rights and annuities or federal services available to Indians, the United States still did not grant these Indians American citizenship until 1924. So from the federal perspective, these Indians were neither Americans, nor tribal.⁷⁸ It was natural that these quarter-blood Indians would return to their tribal communities, the only welcoming place they knew.

⁷⁸ Cf. Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty through Sexual Assimilation*, 2007 WIS. L. REV. 409, 447-53.

Complicating this federal citizenship and tribal membership dichotomy was the decision of Michigan's citizens in 1850 to extend state citizenship to "civilized" Indians in the state.⁷⁹ Leaving aside the obscure state motivations for extending the suffrage to "civilized" Indians, the state Attorney General opined that the provision meant that Indians who had abandoned their tribal relations were civilized.⁸⁰ In other words, Indians who chose to abandon their treaty rights, for example, could vote.⁸¹ Federal officers interpreted the state constitution to mean that there was no need to continue to provide federal services to Michigan Indians.

The presence of quarter-blood Indians, even a relatively small number of them, complicated tribal membership and tribal government. The presence of persons who were more non-Indian than Indian both in terms of blood relations and in terms of culture may have complicated the tribal (family) character of Anishinaabe communities during the late nineteenth and early twentieth centuries.

At this same time, the deforestation of Michigan's lands and the concomitant destruction of tribal hunting, fishing, and gathering territories forced the scattering of Anishinaabe people, who had relied upon the forests, rivers, and lakes for their subsistence and trading economy. The destruction of the forests ended that culture, and forced the Anishinaabek to find wage labor in the region. The family structure that had held, under the leadership of ogemuk, collapsed.

⁷⁹ See MICHIGAN CONSTITUTION (1850), art. 7.

⁸⁰ See White, *Ethnohistorical Report on the Grand Traverse Ottawas*, *supra* note 62, at 61.

⁸¹ See Fletcher, *supra* note 61, at __ (quoting A.B. Page to R.M. Smith (Aug. 1, 1866), reporting that Peshawbestown Indians could not vote in local elections because "they were not citizens, they were receiving pay [annuities] from the Government and were consequently minors, besides they were not subject to the Draft, neither did the Game Laws of the state prohibit their killing Deer and other wild game").

In these circumstances, coupled with administrative termination, Anishinaabek governments went underground in a way. And they survived by adopting American-style government structures and processes, and especially by recognizing an early form of what is now known as tribal citizenship. The Anishinaabek, still attached more ever more tenuous family relations, came to identify more as citizens of tribal political entities tied to a specific region. In this way, for example, the Northern Michigan Ottawa Association formed with various geographic units.⁸² The Little Traverse Bay bands constituted Unit 1, the Grand Traverse Bay bands constituted Unit 2, the Grand River bands constituted Unit 3, and so on. Eventually, these “units” of the Northern Michigan Ottawa Association would become federally recognized tribes, or at least the entities seeking federal recognition.

C. Modern Michigan Ottawa Tribal Government

The final legal event that transformed the Michigan Anishinaabe communities from family governments to national governments was the federal recognition of the various Michigan governments as Indian tribes. Those Michigan tribes that the federal government had administratively terminated began to regain federal recognition in 1980, with the recognition of the Grand Traverse Band of Ottawa and Chippewa Indians, the first tribe to be recognized under the new federal acknowledgment process.⁸³

⁸² See MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 57 **Error! Bookmark not defined.**, at 85-86; White, *Ethnohistorical Report on the Grand Traverse Ottawas*, *supra* note 62, at 179.

⁸³ See *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*, 369 F.3d 960, 962 (6th Cir. 2004); Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

Federal recognition meant that the Grand Traverse Band became eligible to participate in the major treaty rights litigation of the time, *United States v. Michigan*,⁸⁴ became eligible for federal services and grants, and later became eligible to exercise the right to game on reservation lands.

In general, federal Indian law reserves the exclusive and plenary authority of determining tribal citizenship to tribal governments.⁸⁵ As with any nation, American Indian tribal nations retain the right to decide citizenship criteria. The famed case, *Santa Clara Pueblo v. Martinez*,⁸⁶ where the United States Supreme Court refused to disturb a citizenship rule that plainly discriminated against an Indian woman and her children, applied this rule to striking effect.

But the rule is riddled with historical exceptions, places and times where the United States intervened in tribal citizenship decisions. The prototype example is where the federal government would define criteria for Indian people who would be eligible for federal judgment or annuity rolls. The Michigan Ottawa nations borrow from a list in this vein – the 1910 Durant Roll – which appears in each Ottawa constitution.⁸⁷

⁸⁴ The key decision in that case, the so-called Fox Decision, 471 F. Supp. 192 (W.D. Mich. 1979), came in 1979 after the United States argued successfully to keep the Grand Traverse Band out of the case until they achieved federal recognition. See Memorandum of the United States Relating to Treaty Fishing Rights of the Ottawa Tribes, *United States v. Michigan*, No. M26-73 (W.D. Mich.), reprinted in Appellee's Brief, *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*, 369 F.3d 960 (6th Cir. 2004), available at <http://turtletalk.files.wordpress.com/2008/01/gtb-turtle-creek-brief-ca6.pdf>.

⁸⁵ See *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); see also *Martinez v. Romney*, 402 F. Supp. 5, 42 (D. N.M. 1975) (“To abrogate tribal decisions, particularly in the delicate area of membership, for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it.”).

⁸⁶ 436 U.S. 49 (1978).

⁸⁷ See CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1(a)(2) (Mar. 29, 1988); CONST. OF THE LITTLE RIVER BAND OF OTTAWA INDIANS art. II, § 1(a) (July 10, 1998); CONST. OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS art. III(G) & art. V(A)(1)(b), (A)(3)(a) (Jan. 26, 2007).

For the Grand Traverse Band, the exception to the general rule proved to apply. The Band's first citizenship list accompanied the petition for federal recognition filed in 1978 by Leelanau Indians, Inc., a nonprofit entity standing in the place of the Band.⁸⁸ The first list included a few hundred individuals who lived in or near Peshawbestown, the small village in Leelanau County.⁸⁹ The petition also included a draft constitution, and that document included proposed citizenship criteria.⁹⁰ The petitioners did not intend the original citizenship list to be exhaustive, and the proposed constitution made that clear in its expansive language.⁹¹ In short, any Ottawa Indian who was an American citizen and not a citizen of any other federally recognized Indian tribe who could demonstrate lineage from a person on the Durant Roll and had at least one-quarter Indian blood was eligible for citizenship in the Grand Traverse Band. The petitioners intended to include anyone who might have been a part of the Northern Michigan Ottawa Association, and not only Grand Traverse Band community members.

After federal recognition in 1980, the Department of Interior and the Grand Traverse Band engaged in a sustained legal and political war over whether or not the Band could use the proposed expansive citizenship criteria.⁹² The government retained a legal duty to review and approve a newly-recognized tribe's first tribal constitution,⁹³ and often used that authority to craft tribal law to its liking.⁹⁴ In this case, Interior officials asserted that the Bureau of Acknowledgment and Research had recommended the

⁸⁸ See Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of the Interior for Acknowledgment of Recognition as an Indian Tribe, unpublished document (1979).

⁸⁹ See *id.* at ___.

⁹⁰ See *id.* at ___.

⁹¹ See *id.* at ___.

⁹² For a longer description of this legal battle, see Fletcher, *supra* note 39, at 279-83.

⁹³ 25 U.S.C. § 476(a)(2).

⁹⁴ Cf. generally Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81 (1993-94).

recognition of the Grand Traverse Band only, and that the original citizenship list was exhaustive from the federal government's point of view.⁹⁵ In 1983, an Interior official informed the Band's chairman that the Secretary would rescind the Band's federal recognition if it did not comply with the demand to change the citizenship criteria to exclude other Ottawa Indians.⁹⁶ After the Band sued in 1985,⁹⁷ the parties compromised on citizenship criteria that would exclude non-Grand Traverse Ottawas but allow some authority to the Grand Traverse Band tribal council to "adopt" many of the outsider Ottawas.⁹⁸ In 1988, the Band's citizens voted on the proposed constitution and approved it by a wide margin.⁹⁹

The dispute and its culmination demonstrate in stark detail the changed character of the Grand Traverse Bay Indians' tribal government from one of a family-based citizenry to one more like a national citizenry, while retaining traits of both types. The key change is the provision allowing the Grand Traverse Band tribal council to "adopt" persons who do not meet the citizenship criteria. "Adoption" is not normally a kind of citizenship-related action taken by nations, but in this context adoption is simply a form of naturalization. This naturalization provision keeps open the possibility that individuals that do not reside in the Grand Traverse Bay region, and that do not have specific Grand Traverse Anishinaabe ancestors might still become citizens of the Band.

At the same time, the minimum American Indian blood quantum requirement present in the Grand Traverse citizenship criteria, as well as in virtually all American

⁹⁵ See Fletcher, *supra* note 39, at 281-82.

⁹⁶ See *id.* at 281 (quoting Letter from Deputy Assistant Sec'y, Indian Affairs (Operations), to Joseph C. Raphael, Chairman Grand Traverse Band of Ottawa and Chippewa Indians (Nov. 4, 1983))

⁹⁷ See Complaint (on file with author).

⁹⁸ See CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1(b)(3) (Mar. 29, 1988).

⁹⁹ See *id.* art. XVII (certifying results of election).

Indian tribal nation citizenship requirements, means that the primary citizenship criteria is still family-based.

The Grand Traverse Band citizenship provision is typical for many, many Indian tribes throughout the United States. And it is similar in two ways to aspects of American citizenship law. First, persons born to an American citizen are American citizens, similar to the family character of tribal nation citizenship. Second, many persons who are not automatically American citizens can become American citizens. Most Indian nations do not allow persons without the requisite ancestry to become tribal citizens, but the Grand Traverse Band does, to a limited extent.

III. The Modern Racial Paradox of Federal Indian Law

Modern federally recognized Indian nations face a number of key big-picture paradoxes. For example, American Indian nations continue to expect the United States to act as a kind of trustee in tribal relations with states, non-Indian business interests, and even certain federal agencies, while at the same time demanding additional authority to govern without federal interference.¹⁰⁰ Another example involves American Indian tribal courts, who struggle between developing court systems and jurisprudence that retains customary and traditional law while mirroring state and federal court substantive and procedural law.¹⁰¹

¹⁰⁰ See Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NATURAL RESOURCES J. 317 (2006).

¹⁰¹ See FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995).

This paper is concerned with yet another paradox – the question of race and tribal citizenship.¹⁰² The paradox is not easy to define at its most complicated. But on a superficial level, which is what outsiders see and analyze, the issues are easier. First, it appears that American Indian tribal nations are groups of persons who are all of the same race – American Indian. This is a troubling question for most Americans, since a government that exercises coercive authority over individuals within the United States is not supposed to be composed entirely of one race of people.¹⁰³ For the Michigan Anishinaabe tribes, and especially the Grand Traverse Band, this perception has arisen in multiple contexts. For example, during the 1970s and 1980s, when the rights of Grand Traverse Indian treaty fishers was at stake, non-Indian opponents complained that in modern American law and society, where all Indians and non-Indians are American citizens, it was unfair to recognize “special rights” of some American citizens. The same non-Indians have made the same arguments about Indian gaming, individual Indian and tribal immunities from federal, state, and local taxation and regulation, and education.

Second, it also appears that American Indian tribal nation citizens also are many races, most predominantly White or, in many instances, African-American or Latino/a. In other words, for some outside observers, Indian tribes are not really Indian. Tribal nations in the eastern United States and nearer to metropolitan areas are more often to count as citizens persons who have intermarried with non-Indians, sometimes for several generations, so that many tribal citizens cannot claim a large blood quantum. Many non-Indian residents of Leelanau County and surrounding counties, where the Grand Traverse Band is located, claim to have been unaware that there were any Indians in the region,

¹⁰² See, e.g., Rose C. Villazor, *Blood Quantum Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008).

¹⁰³ See CONST. amend. XIV.

implying that the local Indians had either disappeared or moved away, or assimilated into the local communities, losing their Indian character.

The paradox, then, given these perceptions of outsiders, is that an American Indian tribal nation is either too “Indian” to be constitutional in this modern American legal regime, or it is not “Indian” enough to sustain its status as a separate sovereign. The paradox, as is obvious, is based on a racialist view of American Indian tribal nations.

The Supreme Court recently has brought this racialist view of tribal nations into prominence in cases like *Rice v. Cayetano*¹⁰⁴ and, more importantly, *Duro v. Reina*¹⁰⁵ and *Nevada v. Hicks*.¹⁰⁶ *Cayetano* introduced the Rehnquist Court’s Reconstruction Amendments jurisprudence into federal Indian law, a strange development considering that the Fourteenth Amendment by its very terms appears to exclude American Indians (and likely tribal nations) from its application.¹⁰⁷ Justice Kennedy wrote the majority opinion in *Cayetano*, which turned on the application of the Fifteenth Amendment and technically not a case involving American Indian nations, instead involving Native Hawaiians, who do not enjoy recognition by the federal government as an Indian tribe.¹⁰⁸ The *Cayetano* Court made two statements that could have dramatic import in federal Indian law. First, Justice Kennedy noted, “Ancestry can be a proxy for race.”¹⁰⁹ One state supreme court has adopted that language in analyzing a Fourteenth Amendment challenge to a state statute extending the application of the federal Indian Child Welfare Act to “ethnic” Indians; that is, American Indians who are not citizens of federally

¹⁰⁴ 528 U.S. 495 (2000).

¹⁰⁵ 495 U.S. 676 (1990).

¹⁰⁶ 533 U.S. 353 (2001).

¹⁰⁷ See CONST. amend. XIV, § 2 (“excluding Indians not taxed”).

¹⁰⁸ See generally Office of Hawaiian Affairs, *Correcting the Record: The U.S. Commission on Civil Rights and Justice for Native Hawaiians* (Oct. 2007), available at <http://www.oha.org/images/stories/071113correcting.pdf>.

¹⁰⁹ *Cayetano*, 528 U.S. at 514.

recognized tribes.¹¹⁰ In some ways, this state supreme court may presage challenges to federal statutes directed for the benefit (or detriment) of non-tribal citizen American Indians. Second, Justice Kennedy asserted, “Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.”¹¹¹

The Executive branch has followed the Supreme Court’s lead in this context by arguing for restricting the authority of Congress to recognize Indigenous nations such as Native Hawaiians. The Bush Administration’s white paper on the Akaka Bill exemplifies this new line of argumentation.¹¹² The key argument against the federal recognition of a Native Hawaiian tribal government is that it would “grant broad governmental powers to a racially-defined group of ‘Native Hawaiians’ to include *all* living descendents of the original, Polynesian inhabitants of what is now modern-day Hawaii” whether or not they “have any geographic, political, or cultural connection to Hawaii, much less to some discrete Native Hawaiian community.”¹¹³

Duro v. Reina’s majority opinion,¹¹⁴ also authored by Justice Kennedy,¹¹⁵ as well as a concurring opinion in *Nevada v. Hicks* authored by Justice Souter,¹¹⁶ raised citizenship to the forefront in cases involving the adjudicatory jurisdiction of tribal nations. These last two opinions dealt with Indian nations as racial cabals, and in the most

¹¹⁰ See *In re A.W.*, 741 N.W.2d 793, 809-10 (Iowa 2007).

¹¹¹ *Id.* at 516-17.

¹¹² See Executive Office of the President—Office of Management and Budget, *Statement of Administration Policy: H.R. 505—Native Hawaiian Government Reorganization Act of 2007* (Oct. 22, 2007), <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr505sap-r.pdf>.

¹¹³ *Id.* at 1 (emphasis in original).

¹¹⁴ 495 U.S. 676 (1990).

¹¹⁵ Justice Kennedy’s experience with this issue dates back to the 1970s, when he sat as a Circuit Judge in *Oliphant v. Schlie*, 544 F.2d 1007, 1014-19 (9th Cir. 1976) (Kennedy, C.J., dissenting), which held that Indian tribes have criminal jurisdiction over non-citizens, but was later reversed by the Supreme Court. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹¹⁶ 533 U.S. 353, 375 (2001) (Souter, J., concurring).

negative light possible. *Duro* involved the authority of Indian nations to prosecute non-tribal citizens who were citizens of other American Indian nations for misdemeanors.¹¹⁷ Justice Kennedy's *Duro* opinion, followed by an enlightening paper from citizenship expert Alexander Aleinikoff, raised the question of the consent of the non-citizens to tribal nation jurisdiction.¹¹⁸ Never before had the Court or even Congress considered this question, perhaps since it rarely arises in the context of, say, state jurisdiction over non-state citizens. But thanks to this opinion and Professor Aleinikoff's paper, which introduced the notion of a "democratic deficit" in tribal politics, it may have become a key political theory in favor of limiting, even eliminating, tribal nation jurisdiction over non-citizens.¹¹⁹ The key argument, it appears, is that non-Indian persons who find themselves within the clutches of tribal nation authority cannot and could not ever have participated in the political processes that created the tribal laws and regulations at issue.¹²⁰ Non-Indians, the argument goes on, cannot by virtue of their race ever vote in a tribal election or otherwise become citizens of an Indian tribe. Justice Souter's *Hicks* opinion added a pragmatic reason for protecting non-Indians from tribal jurisdiction – tribal laws are "unusually difficult for *outsiders* to sort out."¹²¹ These two opinions draw the line squarely at race, all but labeling Indian nations racial cabals. As a result, the Supreme Court remains extremely skeptical that the Constitution could ever allow for tribal nation jurisdiction over non-citizens.

¹¹⁷ See *Duro*, 495 U.S. at 679.

¹¹⁸ See *Duro*, 495 U.S. at 693; T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 108-22 (2002). See also L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

¹¹⁹ *But cf.* *Plains Commerce Bank v. Long Family Land and Cattle Co.* 128 S. Ct. 2709 (2008) (rejecting tribal civil jurisdiction over a non-citizen-owned bank, but not focusing directly on Justice Kennedy's consent theory).

¹²⁰ The irony should be too obvious to mention. *But see* Matthew L.M. Fletcher, *Consent and Resistance* (working paper).

¹²¹ *Hicks*, 533 U.S. at 384-85 (Souter, J., concurring) (emphasis added).

The impact on tribal communities is harsh, as to be expected. Tribal governments have very little authority to impose taxes on nonmembers, even if they do business or reside in Indian Country, reducing the ability of governments to provide adequate services to all residents.¹²² As such, a nonmember-owned gas station doing business on tribal lands is all but exempt from tribal taxes.¹²³ Tribal governments have little authority to regulate the land use patterns of Indian Country,¹²⁴ ruining the chances of creating a cohesive and effective environmental protection scheme in parts of Indian Country where nonmember businesses such as mining or timber companies own significant chunks of land. Nonmember businesses can (and have) set up mines and other environmentally unfriendly operations right next door to tribal sacred sites¹²⁵ – with the tribe being powerless to stop it.

Indian victims of car wrecks and defects in consumer goods have little chance of recovering damages in tribal courts where nonmembers are the defendants. Burlington Northern and Ford Motor are multinational corporations who have successfully avoided tribal court jurisdiction over personal injury claims in recent years.¹²⁶ Without the capacity to adjudicate serious problems in tribal courts, Indian people living in rural reservations must travel hundreds of miles just to file a simple complaint in non-Indian courts, which often serves to deny them relief if they can't travel.

¹²² The Supreme Court rejected the Navajo Nation's argument in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), that an Indian tribe may tax nonmembers that are covered by tribally-provided governmental services such as police, fire, ambulance, and so on. *See id.* at 654-55.

¹²³ *Cf.* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (holding that tribal taxation of nonmembers does not preempt state taxation of nonmembers, even on tribal lands).

¹²⁴ *E.g.*, *Brendale v. Confederated Yakima Tribes*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

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¹²⁶ *See Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999); *Ford Motor Co. v. Todecheene*, 221 F. Supp. 2d 1070 (D. Ariz. 2002).

At the heart of this jurisdictional paradox is a related paradox – the presence of sovereign nations within the borders of the United States that are neither state governments nor the federal government. As the Supreme Court notes with regularity, Indian nations did not participate in the framing or ratification of the Constitution. But as Joseph Singer notes, pointing out that which should be obvious, Indian tribes are expressly included in the Constitution and their nationhood cannot lightly be discarded by the Supreme Court.¹²⁷ So the paradox that confounds the Supreme Court, to the extreme detriment of American Indian tribal nations, is that Indian nations are by definition racial, but they cannot be eliminated from the American political structure.

Throughout the history of federal Indian law and policy, or at least since the enactment of the Fourteenth Amendment, the racial paradox has been a troubling but not a destabilizing issue. The Supreme Court’s jurisprudence on the different track that federal Indian law takes from race law has relied upon the political status of American Indian tribal nations to avoid confounding Indian law in this manner.¹²⁸ Since the wide majority of Indian nations are treaty tribes, meaning they have been a part of formally ratified treaties with the United States, the legal relationship between Indian nations and the federal government is one between nations – a political relationship. Moreover, even those American Indians who are not citizens of treaty tribes come within this political relationship because Congress and the Executive branch have come to formally recognize some non-treaty tribes, again as a political matter.¹²⁹ The Grand Traverse Band is one of the few Indian nations that have been in both circumstances. The Band’s leaders

¹²⁷ See Joseph William Singer, *Double Bind: Indian Nations vs. The Supreme Court*, 119 HARV. L. REV. F. 1, 2 (2005).

¹²⁸ See *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Antelope*, 430 U.S. 641 (1977); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

¹²⁹ Cf. *Miami Nation of Indians of Indiana v. United States Dept. of Interior*, 255 F.3d 352 (7th Cir. 2001).

negotiated and executed two foundational treaties in 1836 and 1855 that placed the nation in the firm category of treaty tribe. But since the Department of Interior administratively terminated the nation in the 1870s and then later administratively recognized the nation in 1980, the Grand Traverse Band also fits the second category.

The Supreme Court's recognition of this political relationship has taken two tacks. First, from the nineteenth century until the 1970s, the Court's official position on the questions relating to federal legislation in Indian affairs (both involving Indian nations and individual Indians) was that they were non-justiciable political questions.¹³⁰ During this period, since the Court refused to cabin Congressional and Executive branch authority, a form of robust, if not absolute, plenary federal authority in Indian affairs rose.¹³¹ As such, in the 1870s when the Department of Interior terminated the Grand Traverse Band without legal authority, the Band had no legal recourse against the Indian Affairs Office except to complain to Congress, which did nothing. Second, from at least 1974, the Court has declined to apply strict scrutiny to federal laws and regulations that single out American Indians on the theory that these laws are based on the political status of American Indians, not the race of American Indians.¹³² And so, despite not being a federally recognized tribe, half-blood or more Grand Traverse Band members could take advantage of the limited federal Indian affairs services that were available to them, including education and employment.

Both of these answers to the race paradox of federal Indian law are in jeopardy. As prominent commentators have observed, the Rehnquist Court's take on federal Indian

¹³⁰ *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 383 (1886).

¹³¹ See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25-81 (2002).

¹³² See *Mancari*, 417 U.S. 535.

law was to remove the “exceptionalism” from that subject area and incorporate more and more “mainstream” constitutional public law principles into the field.¹³³ And so two key areas of federal Indian law and policy are at risk to great change and disruption: first, the federal government’s treatment of Indian nations and individual Indians may become subject to the Fourteenth Amendment “colorblind” jurisprudence of the Rehnquist and Roberts Courts; second, the inherent sovereign authority of Indian nations to regulate the activities of non-citizens within tribal territories will shrink even further.

IV. A Theory of Nationhood for American Indian Tribal Nations

At the core of modern American Indian law and policy, and at the core of modern American Indian tribal nations, is citizenship. The primary relationship between the United States and both individual Indians and Indian nations began in Indian treaties and in federal laws relating to those treaties. Congress usually did not take action to regulate individual Indians as citizens of Indian nations until the late nineteenth century, and did not extend federal citizenship to all American Indians until the 1920s.

In late twentieth century, Congress began to focus away from Indian nations and directly on individual Indians, especially during the era of allotment. But in 1934, Congress restored its relationship to Indian nations by urging them to reorganize under federal law.¹³⁴ This brief recap of history is not intended to imply that federal policy was clear and consistent during this period. It was not, but despite innumerable

¹³³ See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005); David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

¹³⁴ See 25 U.S.C. §§ 476-477; FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS (David E. Wilkins, ed. 2006); GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-945 (1980).

inconsistencies and confusions throughout the twentieth century, it clear that Congress now hopes to regulate Indian affairs through Indian nations, through its policy of “self-determination.”¹³⁵ As a matter of politics and pragmatism, federal actions relating to Indian affairs have moved away from directly regulating American Indian people by empowering and encouraging the developing of American Indian tribal nations as the primary government entity in Indian Country.¹³⁶ In many ways, through the Indian Self-Determination Acts,¹³⁷ Indian nations are implementing and administering federal Indian policy.

American Indian tribal nations have welcomed this change, and are working to develop their government and economic infrastructures, but this process is different for each of the 561 federally recognized Indian tribes. Some tribes have enjoyed massive infusions of cash from Indian gaming and are moving toward a form of self-reliance, and even independence from federal assistance.¹³⁸ But wealth guarantees nothing, and many so-called wealthy Indian nations are muddled and stagnant in old ways of governing. Most Indian nations enjoy modest or even no gaming revenues, and in these cases, the wide spectrum of success and failure is evident.

The extreme success of a few Indian nations, juxtaposed with the extreme failure of many more Indian nations, skews the analysis of the character of American Indian

¹³⁵ See generally Matthew L.M. Fletcher, *U.S. Indian Policy: Congress and the Executive, 1960—*, in 1 ENCYCLOPEDIA OF UNITED STATES INDIAN LAW AND POLICY 39-43 (Paul Finkelman and Tim Alan Garrison eds. 2009).

¹³⁶ Perhaps this is best demonstrated by the rising tide of political and legal commentary asserting that continued American Indian poverty can be traced back to federal control over lands held in trust by the Secretary of Interior for the benefit of American Indians or Indian nations. *E.g.*, Terry L. Anderson, *How the Government Keeps Indians in Poverty*, WALL ST. J., Nov. 22, 1995, at A10 (“Indeed, a study of agricultural land on a large-cross section of Western reservation indicates that tribal trust land is 80% to 90% less productive.”).

¹³⁷ *E.g.*, Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 et seq.; Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101 et seq.

¹³⁸ See generally STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2006).

tribal nationhood. Non-Indians (and perhaps some Indians) subject Indian nations such as the Mashantucket Pequot Tribal Nation to harsh criticism on the grounds that there is little or nothing racially “Indian” about the nation.¹³⁹ These critics maintain several arguments; that the Pequots became extinct or lost all cultural identity after the seventeenth century Pequot massacres, that so few of them exist so as to render the tribal character of the community insignificant, or that the entire Indian nation is fraudulent. If any of these assertions won the day, it would be extremely difficult for Congress to continue to recognize the Mashantucket Pequot as an Indian tribe because there would be no racial or ancestral component to the tribal government. And commentators subject other wealthy Indian nations, such as some of the small California gaming tribes, to intense scrutiny for being *too* Indian because of their small populations and territories, and for moving to disenroll tribal citizens.¹⁴⁰

These commentaries drift into the federal and state court cases involving Indian nations. A Second Circuit panel adjudicating the authority of a non-gaming New York Haudenosaunee nation to banish tribal citizens weighed the import of its decision to future disputes that might involve gaming tribes in New York.¹⁴¹ A recent D.C. Circuit opinion asserted that an Indian nation acting as a business owner was not acting in the scope of an Indian tribe because the business enterprise was not sufficiently tribal in character.¹⁴² And across the nation, state courts take it upon themselves to second-guess

¹³⁹ See LIGHT & RAND, *supra* note 138, at ____.

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¹⁴¹ See *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, ____ (2d Cir. 1996).

¹⁴² See *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306, ____ (D.C. Cir. 2007).

the tribal citizenship of Indian children, over the objection of Indian nations seeking to intervene in Indian child welfare cases.¹⁴³

Whatever the circumstances, these American Indian tribal nations have one element in common – nationhood – and they should behave as nations. Most nations around the world adopt citizenship rules and criteria without regard to race and ancestry, and Indian nations should consider doing the same. Citizenship involves a two-way action: the agreement of a nation and of a person that the person will become part of the nation’s polity, with all of the benefits and duties associated with that status. Both parties must expressly consent to the relationship (although, ironically, many American Indians who became citizens of the United States by Act of Congress in 1924 did not have that option¹⁴⁴).

There are two ways to proceed for Indian nations in this vein. The first is to change tribal citizenship criteria to immediately create an avenue for non-citizens to become citizens, regardless of race or ancestry. This may not be palatable for many Indian nations for a host of reasons. First, the federal government from Congress to the Executive branch to the federal judiciary might not be ready for such a radical change in how the United States deals with Indian nations.¹⁴⁵ Second, Indian nations might not be ready for this change, either, for these reasons and many others.¹⁴⁶ The Grand Traverse

¹⁴³ See B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 415-16 (1997) (citing *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. App. 1996)).

¹⁴⁴ See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the American Indians: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. REV. 107 (1999).

¹⁴⁵ *Cf., e.g., United States v. Cruz*, ___ F.3d ___, 2009 WL 310906 (9th Cir., Feb. 10, 2009) (discussing tribal community recognition versus blood quantum for purposes of determining whether a criminal defendant is an “Indian” under 25 U.S.C. § 1153).

¹⁴⁶ It should be noted that there are dozens of Indian nations that count among their citizenry persons who are not American Indian by ethnicity. *E.g., Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (litigation

Band, for example, has zealously defended the decisions of its enrollment committee to deny citizenship to community members who do not meet the current citizenship criteria.¹⁴⁷ The Band is not alone in this regard, with other Indian nations involved in similar litigation.

There is a second way, one that requires Indian nations to follow the old maxim to plan seven generations into the future.¹⁴⁸ There is a way, potentially, to incorporate nontribal citizens into the tribal citizenry without destroying the tribal character of American Indian nations. It can be done, but it will take a great deal of time; perhaps even generations.

The Supreme Court has stated that nonmembers could *consent* to tribal jurisdiction, at least in a commercial context.¹⁴⁹ This exception offers an objective strategy for preserving tribal jurisdiction – a nonmember can consent to tribal jurisdiction by executing a document stating explicitly that they consent to tribal jurisdiction. These documents will be business-related, such as where a tribe borrows money from a bank, requiring the bank to consent to tribal court jurisdiction over any disputes that may arise from the transaction.¹⁵⁰ But the problem with that form of consent is that the nonmember

involving the proposed disenrollment of the Cherokee Freedmen, at least some of whom have no American Indian ancestry). Cf. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS CONST. art. III, § 1(c) (1975) (allowing adoption of non-Chippewa Indians through enactment of tribal law).

¹⁴⁷ E.g., *DeVerney v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 96-10-201 (Grand Traverse Band Tribal Court, December 21, 1999), *aff'd in part*, No. 96-10-201 CV (Grand Traverse Band Court of Appeals, November 15, 2000), *modified*, February 7, 2001, *modified*, August 27, 2001; *In re M.*, No. 97-12-092-CV (Grand Traverse Band Tribal Court, May 5, 2004); *Bailey v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 99-08-299-CV (Grand Traverse Band Tribal Court, November 8, 1999).

¹⁴⁸ See, e.g., Oren Lyons, *An Iroquois Perspective*, in AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 171, 173 (Christopher Vecsey & Robert W. Venables eds., 1980); Ronald Trosper, *Traditional American Indian Economic Policy*, 19(1) AM. INDIAN CULTURE AND RESEARCH J. 65, 67 (1995).

¹⁴⁹ See *Montana v. United States*, 450 U.S. 544, 560-61 (1981).

¹⁵⁰ See Oversight Hearing on Tribal Sovereign Immunity, Hearing Before the Senate Indian Affairs Committee (March 11, 1998) (Testimony of Mark A. Jarboe, Partner, Dorsey & Whitney LLP), http://www.senate.gov/~scia/1998hrgrs/0311_mj.htm#N_10; Mark A. Jarboe, *The Gaming Industry on*

is consenting to tribal jurisdiction only in relation to the subject matter of the transaction – in this example, the loan. If that same bank in a separate transaction invested in a nonmember-owned company that polluted the reservation, the consent from the first transaction likely would not transfer over to the second transaction.¹⁵¹ The “consents” are piecemeal.

Moreover, most nonmembers in Indian Country are not banks or other businesses. They are individuals who live and work on tribal lands or visit tribal business operations. Some tribes, but likely not many, require tribal employees to consent to tribal court jurisdiction in the event of a dispute, but tribes generally have no means of forcing nonmember customers to consent to tribal court jurisdiction. Again, these “consents” are piecemeal.

But Indian tribes are timeless entities. The immigration policy of the United States and other nations offers a new way of looking at this problem. Every person seeking work or live in another country must acquire some sort of permission to do so. Indian tribes should do this each time they can. Any nonmember hired by the tribe or any tribe or tribal member-owned business should consent to full tribal civil jurisdiction, not just in cases arising under the business relationship, as a condition of employment. Any nonmember seeking to live in tribal housing or on tribal lands should consent to full tribal jurisdiction as a condition for residence. And, as described above, anyone doing business

American Indian Lands: Financing and Development Issues, Practising Law Institute Corporate Law and Practice Course Handbook Series, PLI Order No. B4-7077, 872 PLI/CORP 161, at *182-83 (Dec. 1994); Hearing on Capital Investment in Indian Country, Senate Banking, Housing, and Urban Affairs Committee (June 6, 2002) (Testimony of Franklin Raines, Chairman and CEO, Fannie Mae, http://www.senate.gov/comm/banking_housing_and_urban_affairs/general/02_06hr/060602/raines.htm).

¹⁵¹ Cf. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, ___ (2008).

with the tribe should consent. This consent is no different in principle from requiring non-citizens from seeking a visa or work permit from a host country.¹⁵²

Of course, these are piecemeal actions as well. But consider that on many reservations, about half of the population consists of nonmembers who haven't consented. Maybe in a decade or two, an additional one quarter or one third of the population will have consented to full tribal civil jurisdiction. Maybe in 50 years, all but a few nonmembers will have consented. If enough tribes take these actions, the Supreme Court's reasoning on tribal jurisdiction will seem completely out of touch with the realities on the ground in Indian Country, even to the Justices. If enough nonmembers consent to tribal jurisdiction over time, then the rule may fall by the wayside.

Conclusion

Tribal governments are nations and should act like nations. For Indian nations to progress into self-governing, independent nations within a larger nation, they will need to find a way to include non-Indians in the political processes of the tribal government while still maintaining a distinctive tribal character. This is no easy feat. But given the limitations placed upon tribal governments in the modern era, the benefits will outweigh the risks.

¹⁵² Cf. Philip Ferolito, *Weighing in on Workers*, YAKIMA HERALD-REPUBLIC, Oct. 20, 2008, <http://www.yakima-herald.com/stories/2008/10/20/10-21-08-guestworkers> (reporting on a guest-worker reporting program being implemented by the Yakama Indian Nation).