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RACE AND AMERICAN INDIAN TRIBAL NATIONHOOD

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I. INTRODUCTION

As American Indian tribal nations develop the capacity to govern their own members and engage in substantial economic and political activities with non-members, they may encounter major roadblocks. Tribal nations, like other nations, seek to regulate the activities of all persons within their territorial jurisdictions by exercising the power to tax and prosecute those persons, whether members or not. The United States Supreme Court has expressed strong skepticism about the possibility of tribal nations asserting authority over nonmembers and has placed tight controls on the authority of tribal nations to regulate the activities of non-tribal members.[1]

While the Supreme Court's reasoning is 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

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[1] *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

consented to the judgments of tribal sovereigns in a Lockean sense.[2] Moreover, since non-Indians might never be allowed to become tribal members on account of their race, the Court appears 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 is largely 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 governing American Indian nation.[3] 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 governing the reservation, regardless of the impact of that non-Indian's activities upon Indian lands and people.[4] Such impacts may include the desecration of tribal sacred sites[5] and the pollution, even the destruction, of tribal lands.[6]

This article bridges the gap between the perception and reality of American Indian tribal nation membership. The United States and federal Indian law encouraged, and in many instances mandated, Indian nations to adopt race-based tribal membership 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.

American Indian tribes strive toward nationhood, but race-based membership rules hold them back. Prior to the United States' imposition of race-based membership rules in the nineteenth and twentieth centuries, Indian nations accepted persons as members using a combination of ancestry, 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 consent issue identified by the Supreme Court and Professor Alex Aleinikoff as a "democratic deficit."[7]

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[2] See Justice Kennedy's opinions in *Duro v. Reina*, 495 U.S. 676 (1990), and *United States v. Lara*, 541 U.S. 193 (2004), as the best exemplars of this view.

[3] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Sarah Deer, *Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State*, 31 SOC. JUST., no. 4, 2004 at 17.

[4] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

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

[6] *See* Burlington N. & Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767 (9th Cir. 2003).

[7] T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115 (2002); *see infra* notes 142–45.

Part II of this article 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 members of American Indian tribal nations.

Part III examines the history and development of a group of modern American Indian tribal nations—the Michigan Anishinaabe tribes.[8] In particular, this article focuses on the history of the Grand Traverse Band of Ottawa and Chippewa Indians (Band), both the Band's development from family groups and clans to a treaty tribe to a federally-recognized Indian tribe, and its members, who have progressed from autonomous Indians to state and federal citizens to tribal members. 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 members.

Part IV introduces the paradox of race and modern American Indian tribal nations and their members. On one hand, the United States has demanded tribal membership criteria excluding 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, seems to believe 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 nonmembers.

Part V 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 within their respective territories. This article suggests the 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 membership that so worry the Court.

II. RACE AND FEDERAL INDIAN LAW

Indian tribes and individual Indians are featured in the original United States Constitution—in the Indian Commerce Clause and in the "Indians Not Taxed" Clause, followed by a surprising sequel in the Fourteenth Amendment. The Indian Commerce Clause reserved Congress's plenary and exclusive authority

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[8] *See* Benjamin Ramirez-Shkwegnaabi, *The Dynamics of American Indian Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J., no. 4, 2003 at 53, 72 n.1. "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. *Id.* "Anishinaabek" is the plural. *Id.* "Anishinaabe" means "original people." *Id.*

to regulate commerce with Indian tribes.[9] And the "Indians Not Taxed" Clause excluded American Indians who were not American or state citizens from the right to vote and from being counted for representation purposes.[10] Considering some states, such as Michigan, extended the suffrage to certain American Indians by the 1860s,[11] it is 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, 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.[12]

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* (as opposed to *over*) Indian tribes.[13] The United States also successfully asserted power to control the internal affairs of American Indian tribal nations, although there is abundant scholarly literature decrying this authority.[14] The first federal statutes implementing the Indian Commerce Clause as well as laying the framework for the Trade and Intercourse Acts dealt almost exclusively in the field of relations with Indian tribes, not with individual Indians.[15] Following European precedent 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 through federal actors in accordance with federal law and policy.[16]

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

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[9] U.S. CONST. art. I, § 8, cl. 3. Congress has delegated significant authority to the President and the Secretary of the Interior as well. *See* 25 U.S.C. §§ 2, 9 (2006).

[10] U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

[11] *E.g.*, MICH. CONST. of 1850, art. VII. *See generally* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880, at 131–33 (Durwood Ball ed., 2007).

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

[13] *See* United States v. Lara, 541 U.S. 193, 200–02 (2004).

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

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

[16] *See* 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 89–114 (1984).

Indians, while other states did not.[17] Some states extended the right to vote to American Indians early on, while others barred American Indian voters until the 1940s.[18] Some places applied Jim Crow laws to American Indians, while some did not.[19] Some states barred American Indians from bringing suit or testifying in state courts.[20] American Indian blood quantum[21] 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.[22] Importantly, while state governments had experimented with black and Indian blood quantum laws and requirements since the United States' inception, Congress did not begin to define who was an American Indian for purposes of federal law until the late nineteenth century.[23]

Early Supreme Court decisions that generated the foundational principles of federal Indian law, along with many provisions in Indian treaties, formed the backdrop of race in federal Indian law. The Marshall Trilogy 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 authority.[24] In these cases, some Justices argued Indian nations were nothing more than loose, disorganized

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[17] *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).

[18] *Compare* MICH. CONST. of 1850, art. VII (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), *overruled by* Harrison v. Laveen, 196 P.2d 496 (Ariz. 1948).

[19] *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).

[20] *Compare* Richard B. Collins & 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 & Miller, *supra*, at 110–12 (noting several United States Supreme Court cases where the tribal capacity to sue was presumed).

[21] "Blood quantum" is a term of art used to describe descendancy from American Indian ancestors, with "one-quarter blood quantum" or "one-quarter Indian blood" used to describe a person who has one grandparent that is a "full-blood" American Indian, for example.

[22] *See* United States v. Lara, 541 U.S. 193, 200 (2004) (citations omitted) (noting that congressional Indian affairs power is "plenary and exclusive"); Worcester v. Georgia, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community . . . 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.").

[23] *See generally* Spruhan, *supra* note 12, at 47–48.

[24] *Worcester*, 31 U.S. 515; Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

collections of uncivilized, animal-like beasts,[25] while others treated Indian nations as retaining most of the sovereign authority of foreign governments.[26] Questions of the "civilized" status of the American Indians came to the forefront.

The first important decision involving race and American Indians was *United States v. Rogers*,[27] where a white man who had married a Cherokee member and had himself acquired Cherokee membership under tribal law asserted that federal courts had no criminal jurisdiction over him for crimes committed in Cherokee territory.[28] The Supreme Court rejected that claim, holding that the white man's race could not be obscured or eliminated through the acquisition of tribal membership.[29]

A few years later, the Taney Court in the notorious *Dred Scott* case analyzed the constitutional provision involving "Indians Not Taxed" and concluded it was theoretically possible for American Indians to become American citizens.[30] This allowed the Court to conclude blacks, who were referred to in the Constitution in the form of a euphemism and who were not awarded the same constitutional status as American Indians, could therefore never become American citizens under the Constitution.[31] Chief Justice Taney's opinion, like the Marshall Court's opinions, referred to a lack of civilization in American Indians, but that question did not necessarily form the basis of his decision.[32]

The Fourteenth Amendment did nothing to affect the American citizenship regime available to American Indians.[33] The question of whether American Indians could be "civilized," and how they could prove or demonstrate "civilization" began

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[25] *See Cherokee Nation*, 30 U.S. at 25 (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?").

[26] *See id.* at 52–55 (Thompson, J., dissenting).

[27] 45 U.S. 567 (1846).

[28] *See id.* at 570–71.

[29] *See id.* at 572–73. The Court stated:

> 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.

Id.

[30] Scott v. Sanford, 60 U.S. 393, 403–04 (1856).

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

[32] *Id.*

[33] *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., no. 4, 2004 at 37.

to be explicitly incorporated into the constitutional jurisprudence of citizenship. In *Elk v. Wilkins*, the Supreme Court held Congress must make an affirmative decision to grant American citizenship to American Indians.[34] The Court further held an American Indian born within the boundaries of the United States did not automatically acquire American citizenship.[35] Like the political discussion of the time 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 made an express finding that the Indians were "fi[t] for a civilized life."[36]

While tied to race and racial characteristics, the focus on American Indian "civilization" took American Indian citizenship and the application of federal and state laws in a different direction than in questions of race. For example, 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.[37] "Civilization" sometimes even depended on whether an American Indian was loyal to an Indian tribe (by definition, uncivilized), to a state government, or to the United States.[38] Several late-nineteenth-century Supreme Court cases, for instance, invoked loyalty to a particular government as a test of American Indian "civilization."[39]

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 1934.[40] During that Era, 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 those lands to individual Indians.[41] 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.[42]

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[34] 112 U.S. 94, 99 (1884).

[35] *See id.* at 109.

[36] *Id.* at 100.

[37] *See* Daniel McCool, *Indian Voting*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105, 114 (Vine Deloria, Jr. ed., 1985).

[38] *See* JON REYHNER & JEANNE EDER, AMERICAN INDIAN EDUCATION: A HISTORY 145 (2004) (quoting Captain Richard Pratt).

[39] *E.g.*, *Elk*, 112 U.S. at 119 (noting that Indians do not automatically owe "allegiance" to the United States).

[40] *See generally* CHARLES F. 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).

[41] *E.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 559–61 (1903) (discussing the Act of June 6, 1900, ch. 813, 31 Stat. 677, designed to allot the reservation created by the Treaty of Medicine Lodge, 15 Stat. 581, 589 (1867)).

[42] *E.g.*, 25 U.S.C. § 348 (2006).

During that 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.[43] Congress sometimes linked American citizenship to "civilization" as well.[44]

By the 1920s, however, Congress and the executive branch began drifting away from the allotment of Indian reservations. In the Snyder Act of 1921, Congress authorized the Secretary of the Interior to provide federal services to half-blood American Indians, regardless of their citizenship status or "civilization."[45] And in 1924, Congress extended American citizenship to all American Indians born within the borders of the United States.[46] In 1934, Congress ended allotment forever but incorporated a definition of American Indian that required half-Indian blood quantum.[47] After 1934, with some major exceptions not relevant here, Congress and the executive branch began to defer to tribal membership criteria.[48]

American Indian tribal membership has replaced blood quantum and race as the key component of federal and tribal government activity in federal Indian law. In recent decades, tribal membership is the key indicator of 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.[49]

Two reasons explain this shift from blood quantum to tribal membership. First, the federal government has recognized or restored to recognized status dozens upon dozens of Indian tribes.[50] The number of American Indians associated

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[43] *E.g.*, *In re* Heff, 197 U.S. 488, 500–01 (1905) (construing the General Allotment Act, ch. 119, § 6, 24 Stat. 388 (1887)), *overruled by* United States v. Nice, 241 U.S. 591 (1916).

[44] *See* Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 522–23 (1994).

[45] 25 U.S.C. § 13.

[46] 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 895 n.7 (Nell Jessup Newton et al. eds., 2005).

[47] 25 U.S.C. § 479.

[48] *See* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 962–63 (2002). For examples of exceptions, see Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL'Y 273, 279–88 (2005) [hereinafter *The Insidious Colonialism of the Conqueror*].

[49] *E.g.*, 42 C.F.R. § 136a.16 (2010) (outlining the procedure to verify tribal citizenship by the Indian Health Service); 7 C.F.R. § 253.6(b)(1) (same for food stamps eligibility); *cf.* 25 C.F.R. § 23.71(b) (implying the importance of tribal citizenship for government service eligibility).

[50] *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) [hereinafter *Politics, History, and Semantics*] (describing the federal recognition of several tribes since 1978). "Federal recognition" is a term of art indicating that the United States recognizes the continuing sovereignty of an American Indian tribe.

with non-recognized tribes has declined significantly from the 1970s.[51] 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 to American Indians who qualify solely on the basis of their American Indian blood quantum.[52] Congress does not expand or fund these programs much anymore, urban Indian health programs being a prime example.[53]

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 members are subject to federal criminal jurisdiction in Indian Country, regardless of their tribal membership status. Ironically, the Supreme Court's view of tribal court criminal jurisdiction was based on a member-nonmember dichotomy.[54] Congress's recognition of limited tribal criminal jurisdiction incorporated an additional racial classification of "nonmember Indian."[55] But this appears 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.[56]

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

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[51] *See generally* AM. INDIAN POLICY REVIEW COMM'N, TASK FORCE TEN, TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS, FINAL REPORT (Oct. 1976), *as microformed on* CIS No. 77-J892-11 (Cong. Info. Serv.) (finding many American Indians who were not members of federally-recognized tribes).

[52] *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).

[53] *See generally* Beverly Graleski, *The Federal Government's Failure to Provide Health Care to Urban American Indians in Violation of the Indian Health Care Improvement Act*, 82 U. DET. MERCY L. REV. 461 (2005); Caryn Trombino, Note, *Changing the Borders of the Federal Trust Obligation: The Urban Indian Health Care Crisis*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 129 (2005).

[54] *See* Duro v. Reina, 495 U.S. 676, 679 (1990); Montana v. United States, 450 U.S. 544, 547 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 205 (1978) (quoting S. REP. NO. 86-1686, at 2–3 (1960)).

[55] *See* 25 U.S.C. § 1301(2) (2006); United States v. Lara, 541 U.S. 193, 199 (2004) (describing "Duro fix" in 25 U.S.C. § 1301(2)).

[56] *E.g.*, Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, 3 ADVANCE: J. ACS ISSUE GROUPS, no. 1, 2009 at 31.

III. THE RACIALIZATION OF INDIAN NATIONHOOD—"DOMESTIC RACIAL NATIONHOOD"

Because of the dominance of the United States over American Indian affairs, tribal nations mostly followed federal trends in their understanding of tribal membership. Traditional and customary Indian communities prior to United States intervention were able to avoid the explicit racialization of tribal nations[57] but nearly all of them have followed the federal government into the morass of race and its close proxy, blood quantum.[58]

Since each tribal community is literally a separate nation, this article focuses on a small group of tribal nations that represent the movement from nationhood to Indian tribe and back to nationhood. Generally, this article reviews the relevant history of several Michigan Indian tribal nations; more specifically, this article analyzes the development and interpretation of the tribal membership laws of the Grand Traverse Band of Ottawa and Chippewa Indians in Peshawbestown, Michigan. The purpose of this 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 American Indian tribal nationhood,[59] and the developing scholarship focusing on the internal workings and policies of tribal nations.[60]

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.[61] The primary government structure, which retained many of the characteristics one would expect from a Westphalian sovereign, has been described as—to borrow a loaded term from anthropologists—a family hunting unit.[62] These units

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[57] *See* JACK CAMPISI, THE MASHPEE INDIANS: TRIBE ON TRIAL 32 (1991) (quoting Vine Deloria, Jr., Trial Transcript at 17:125–28, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977) (No. 76-3190) ("[An Indian tribe] is a group of people living pretty much in the same place who know who their relatives are.")).

[58] *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).

[59] *E.g.*, Bethany R. Berger, *Red: Racism and American Indians*, 56 UCLA L. REV. 591 (2009).

[60] *E.g.*, Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17 (1997); Kirsty Gover, Constitutionalizing Tribalism: States, Tribes and Membership Governance in Australia, Canada, New Zealand and the United States (2008) (unpublished S.J.D. dissertation, New York University School of Law) (on file with author). *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW ch. 4 (2011).

[61] *Cf.* Cherokee Nation v. Georgia, 30 U.S. 1, 52–55 (1831) (Thompson, J., dissenting) (reviewing the international law understanding of "nation").

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

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.[63] A leader or leaders (*ogema* or *ogemuk*[64]) 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 so-called family hunting unit that later transformed into what are now Michigan Indian tribal nations.

The Michigan Anishinaabek comprised (and still does) three tribal groups: the Ottawa, Potawatomi, and Ojibwe. These groups speak similar languages, with the Potawatomi language differing in dialect somewhat more than the Ottawa and Ojibwe. Their ways of living and sustaining themselves were very similar, with some exceptions. For example, 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.[65] But, depending on where in Michigan they lived, they would rely more on agriculture, or hunting and fishing.[66] All three tribal groups engaged in hunting, fishing, gathering, and trading.[67]

These three tribal groups, collectively the Anishinaabek,[68] collaborated in international relations in many ways. In numerous treaty councils with European nations or with the United States, the Anishinaabek gathered together, often with many other Great Lakes Indian nations, to negotiate based upon common interests.[69] But not all Anishinaabe communities participated in every treaty or war council because other Anishinaabe communities did. Michigan Anishinaabek generally did not participate in treaty negotiations over the lands of the Minnesota Anishinaabek. And not all Michigan Anishinaabe communities participated in a war or treaty council involving other Michigan Anishinaabe

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[63] *See* ROBERT DOHERTY, DISPUTED WATERS: NATIVE AMERICANS & THE GREAT LAKES FISHERY 13 (1990) (quoting ALEXANDER HENRY, TRAVELS AND ADVENTURES 149 (1968)).

[64] "Ogema" is the name of the person authorized to speak on behalf of Anishinaabe political groups; "ogemuk" or "ogemaag" is the plural form. *See* Ramirez-Shkwegnaabi, *supra* note 8, at 56.

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

[66] *See* Peter Dougherty, *Diaries*, 30 J. PRESBYTERIAN HIST. SOC'Y 95, 109 (1952).

[67] *See generally* A.E. Parkins, *The Indians of the Great Lakes Region and Their Environment*, 6 GEOGRAPHICAL REV. 504, 506–07, 509 (1918) (describing the economic activities of the Michigan Ottawas, Chippewas, and Potawatomis).

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

[69] *See generally* Ramirez-Shkwegnaabi, *supra* note 8 (studying five such treaty councils).

communities. The 1795 Treaty of Greenville and the 1821 Treaty of Chicago involved the southwestern Michigan Potawatomi communities, but few other Michigan Anishinaabe communities participated in meaningful ways.[70] Similarly, the Potawatomi communities had no interest and therefore no right to participate in the major Michigan land cession treaty involving Ottawa and Chippewa lands in the 1836 Treaty of Washington.[71]

The 1836 Treaty of Washington council is worth examining in detail for the purpose of defining the Michigan Anishinaabe understanding of nationhood.[72] United States 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 reached a stalemate of sorts. The Lower Peninsula Ottawas and Chippewas, who arrived in Washington, D.C., with the expectation 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.[73] 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 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*.

Importantly, while the Lower Peninsula Anishinaabe communities may have appointed a lone speaker to represent them at the treaty council, each regional community brought its own representative. And so the Lower Peninsula Anishinaabe had representatives from the Grand River Ottawas, the Grand

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[70] Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49; Treaty of Chicago, Sept. 26, 1833, 7 Stat. 431.

[71] Treaty of Washington, Mar. 28, 1836, 7 Stat. 491.

[72] *See* MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS (forthcoming 2011).

[73] *See generally* FLETCHER, *supra* note 72, ch. 1.

Traverse Ottawas and Chippewas, the Little Traverse Bay and Cross Village Ottawas, the Burt Lake Ottawas and Chippewas, and perhaps others. 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.[74] 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[75]), knew better.

But Schoolcraft was crafty as well and knew how to play 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, he selected the Anishinaabe leaders over the objection of the more influential leaders who refused to travel to Washington, D.C., 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 the Lower Peninsula representatives were aware that previous Indian treaty negotiations had gone off like this, such as the 1795 Treaty of Greenville.[76] 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 understood the realpolitik and so they executed the treaty. The Indian treaty negotiators were successful in achieving many of their goals, including permanent reservations, and therefore the major land cession was not so catastrophic.

After the 1836 Treaty of Washington, the Grand Traverse Band group transitioned from a tribal group to a nation. The individual *ogemuk* who traveled to Washington D.C.—Aishquagonabe, Aghosa, and Oshawun Epenaysee—represented villages. Aishquagonabe and his nephew Aghosa likely were Ojibwe (though they might have been Odawa), the leaders of villages located on the eastern shore of the Grand Traverse Bay. They were each the leader of their village because they were each the head of the major families in those villages. The rest of the villages were Ottawa and located mostly in what is now Leelanau

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[74] *See* McClurken, *supra* note 68, at 74 (noting the 1821 treaty negotiations became a debacle for many Indian tribes, including the Grand River Band).

[75] *See generally* The Sound the Stars Make Rushing Through the Sky: The Writings of Jane Johnston Schoolcraft (Robert Dale Parker ed., 2007).

[76] *See generally* Barbara Alice Mann, *The Greenville Treaty of 1795: Pen-and-Ink Witchcraft in the Struggle for the Old Northwest*, *in* Enduring Legacies: Native American Treaties and Contemporary Controversies 135 (Bruce E. Johansen ed., 2004).

County, or the western side of the Grand Traverse Bay. These villages collectively selected Oshawun Epenaysee, a prominent Leelanau Peninsula family and community leader, to represent them 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 nephews, Aghosa and Oshawun Epenaysee, would have followed his lead, but they had individual responsibilities to the communities that appointed them as representatives, and therefore they were not required to follow Aishquagonabe.

This form of Indian nation governmental structure remained intact beyond the next major treaty council responsible for negotiating the 1855 Treaty of Detroit.[77] In that treaty council, Aghosa (for a second time), Onawmoneese, and Peshawbe represented the Grand Traverse Bay bands. Several other 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, who served as the Commissioner of Indian Affairs, and Henry Gilbert, the 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 1855 Treaty of Detroit 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.[78] This forced the Anishinaabe villages on the perimeters of the various reservations to become the primary land base of the various bands. This consolidation helped transform village government from a basis in family and clan structures to more of a municipal government structure, although that process took at least five or six decades to fully develop.

By the 1870s, the United States Department of the Interior had misinterpreted the 1855 Treaty of Detroit language to mean that the Lower Peninsula bands that signed the treaty had voluntarily agreed to disband and abandon their tribal relations.[79] Ironically, the United States continued to recognize one Upper

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[77] For histories of the 1855 treaty council, see Ramirez-Shkwegnaabi, *supra* note 8, at 67–71; Richard White, Ethnohistorical Report on the Grand Traverse Ottawas 24–57 (1979) (unpublished manuscript), *available at* http://turtletalk.files.wordpress.com/2008/09/white-ethno-report-pages-1-55.pdf.

[78] *See generally* Bruce A. Rubenstein, *Justice Denied: Indian Land Frauds in Michigan: 1855–1900*, 2 OLD NORTHWEST, no. 2, 1976 at 131.

[79] *See* Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich., 369 F.3d 960, 961–62 n.2 (6th Cir. 2004).

Peninsula band (the Bay Mills Indian Community) that had executed the same treaty. The treaty provision at issue first appeared in the 1836 Treaty of Washington, 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 and still further division between the various regional communities on each peninsula. The 1855 Treaty of Detroit 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.[80]

Between the 1870s and the passage of the 1934 Indian Reorganization Act (IRA), the Lower Peninsula band governments focused on reconstituting the federal-tribal relationship which started with 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 were never paid.[81] 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 other events all finalized the transformation of family units to modern governments.[82] Finally, in 1980[83] and 1994,[84] the United States recognized three of the Lower Peninsula Ottawa bands who signed the 1836 and 1855 treaties.

These federally recognized Indian tribes retain much of their character as family groups, especially since all of them require some sort of blood lineage in order to qualify as members. 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.

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[80] For a longer history of administrative termination, see *Politics, History, and Semantics*, *supra* note 50, at 502–16.

[81] *See* McClurken, *supra* note 68, at 82 (discussing *Petoskey 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 that allowed the Indians to sue the government. *See* Act of Mar. 3, 1905, § 13, 33 Stat. 1048, 1081–82 (authorizing the Ottawa and Chippewa Indians of the State of Michigan to sue); Ottawa & Chippewa Indians of the State of Mich. v. United States, 42 Ct. Cl. 240 (1907).

[82] *See generally* White, *supra* note 77, at 147–91.

[83] *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).

[84] *See* Pokagon Band of Potawatomi Indians Act, Pub. L. No. 103-323, 108 Stat. 2152 (1994) (codified at 25 U.S.C. § 1300j (2006)); Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (1994) (codified at 25 U.S.C. § 1300k).

B. A Brief History of Michigan Ottawa Nation Membership

Extended family relationships formed the backbone of traditional Anishinaabe governments with membership in a community based almost exclusively on family relationships. The key rules regulating the relationships of these communities, which were very small in population, derived from a clan system. For example, one could not marry into one's own clan, which provided some assurance that one was not marrying a close relative. This meant that innumerable Anishinaabek married outside their small communities, creating complicated family relationships that extended beyond villages. In this way, because 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 woman) who moved in with her spouse's family in another village became a member of that community and vice versa.

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, married a Potawatomi woman from the St. Joseph River basin.[85] He moved south to live with her family, which was one of the more prominent families in the region.[86] Leopold developed influence and authority over time, was adopted by the local tribe,[87] 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[88]—except for Leopold's band, which the United States allowed to remain in Michigan due to his negotiating tactics and skills.[89] 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 racialized federal-tribal affairs in this manner through a series of apparently inadvertent steps. First, the United States incorporated a blood quantum

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[85] *See* VIRGIL J. VOGEL, INDIAN NAMES IN MICHIGAN 54–55 (1986).

[86] *See id.*

[87] *See* JAMES A. CLIFTON, THE PRAIRIE PEOPLE: CONTINUITY AND CHANGE IN POTAWATOMI INDIAN CULTURE 1665–1965, at 229–30 (1977).

[88] *See* Treaty of Chicago, Sept. 26, 1833, 7 Stat. 431 (ceding vast Indian landholdings and agreeing to move to lands west of the Mississippi River).

[89] *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, 274 (1978).

requirement into the 1836 Treaty of Washington. The treaty language appears to assume that most Indians subject to the treaties were full-blood Indians, but the treaty included provisions for half-blood Indians as well,[90] likely at the request of the *ogemuk*. From the point of view of the Anishinaabek, certain half-blood Indians were family members. From the federal government's point of view, these half-blood Indians were problems: they were not true Indians and might not even be Indians anymore, but 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, many of these half-blood Indians participated in the treaty negotiations as English-speaking, educated Indians, making more trouble for the American treaty commissioners.[91]

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.[92] The Snyder Act of 1921[93] formalized the duty of the Department of the Interior to provide services to Indians, and the 1934 IRA continued this requirement utilizing a half-blood quantum requirement.[94]

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.[95] This roll, deemed the Durant Roll, finalized in 1910, created two classes of individuals—full-bloods and half-bloods.[96] 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 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 membership that undermined the family orientation of Anishinaabek

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[90] *See* Treaty of Washington art. VI, Mar. 28, 1836, 7 Stat. 491.

[91] 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: BIOGRAPHICAL STUDIES OF NORTH AMERICAN FRONTIERS 82, 104–08 (James A. Clifton ed., 1989).

[92] *See* White, *supra* note 77, at 79 (quoting Letter from Comm'r of Indian Affairs to Sec'y of the Interior (Jan. 25, 1910)).

[93] 25 U.S.C. § 13 (2006).

[94] *See* Spruhan, *supra* note 12, at 47 (citing the Indian Reorganization Act, ch. 576, § 19, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006))).

[95] A "judgment roll" is a list of tribal members eligible to receive a per capita share of a court judgment fund.

[96] *See* MCCLURKEN, *supra* note 68, at 82; White, *supra* note 77, at 77–78.

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 be considered 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. Indians therefore accepted that these quarter-blood Indians would stay with their non-Indian relations, but they were always free to come home to Anishinaabe communities if their non-Indian relatives did not accept them. While the federal government dealt with these less-than-half-blood Indians as not eligible for treaty rights and annuities or federal services available to Indians, the United States did not grant these quarter-blood Indians American citizenship until 1924. So from the federal perspective, these Indians were neither American nor tribal.[97] It was natural that these quarter-blood Indians would return to their tribal communities, the only welcoming place they knew.

Complicating this federal citizenship and tribal membership dichotomy was the 1850 decision of Michigan citizens to extend state citizenship to "civilized" Indians.[98] Leaving aside the 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."[99] In other words, Indians who chose to abandon their treaty rights, for example, could vote.[100] Federal officers incorrectly interpreted the Michigan Constitution to mean there was no obligation to continue to provide federal services to Michigan Indians, regardless of whether any Indians had relinquished their tribal relations or treaty rights.[101]

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[97] *Cf.* Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 447–53.

[98] *See* MICH. CONST. of 1850, art. 7.

[99] *See* White, *supra* note 77, at 61.

[100] *See* FLETCHER, *supra* note 72 (quoting Letter from 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").

[101] This leaves aside the question of *how* a Michigan Indian could relinquish treaty rights and the even more complicated question of whether Indians could relinquish treaty rights *at all*.

The presence of quarter-blood Indians living in this gray zone, 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 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.[102] The family structure that had held under the leadership of *ogemuk* collapsed.

These circumstances, coupled with administrative termination, caused Anishinaabek governments to go, in a way, underground. They survived by adopting American-style governmental structures and processes, and especially by recognizing an early form of what is now known as tribal membership. The Anishinaabek, with attachments to family relations becoming more tenuous, came to identify as political constituents of a geographically bound *band*. In this way, for example, the Northern Michigan Ottawa Association formed with various geographic units.[103] 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 entities seeking federal recognition.

C. Modern Michigan Ottawa Tribal Government

The final legal event that transformed the Michigan Anishinaabe communities from family-based governments to nations 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.[104] Federal recognition meant the Grand Traverse Band

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[102] *See* James M. McClurken, *Wage Labor in Two Michigan Ottawa Communities*, *in* NATIVE AMERICANS AND WAGE LABOR: ETHNOHISTORICAL PERSPECTIVES 66 (Alice Littlefield & Martha C. Knack eds., 1996).

[103] *See* MCCLURKEN, *supra* note 68, at 85–86; White, *supra* note 77, at 179.

[104] *See* Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich., 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).

became eligible to participate in the major treaty rights litigation of the time, *United States v. Michigan*;[105] 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 membership to tribal governments.[106] As with any nation, American Indian tribal nations retain the right to decide membership criteria. The famed case, *Santa Clara Pueblo v. Martinez*,[107] where the United States Supreme Court refused to disturb a membership rule that plainly discriminated against an Indian woman and her children, applied this rule to striking effect.

The rule, however, is riddled with historical exceptions in which the United States intervened in tribal membership decisions.[108] The prototypical 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.[109]

For the Grand Traverse Band, this prototypical exception to the general rule proved to apply. The Band's first membership list accompanied the petition for federal recognition filed in 1978 by Leelanau Indians, Inc., a nonprofit entity standing in the place of the Band.[110] The first list included a few hundred individuals who lived in or near Peshawbestown, a small village in Leelanau County.[111] The petition also included a draft constitution, which included

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[105] 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. Sept. 6, 1979), *reprinted in* Appellee's Brief, *Grand Traverse Band of Ottawa & Chippewa Indians*, 369 F.3d 960, *available at* http://turtletalk.files.wordpress.com/2008/01/gtb-turtle-creek-brief-ca6.pdf.

[106] *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, 19 (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.").

[107] 436 U.S. 49 (1978).

[108] *See generally Politics, History, and Semantics*, *supra* note 50, at 219–69 (cataloguing repeated federal government interventions into tribal membership decisions).

[109] *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), V(A)(1)(b), V(A)(3)(a) (Jan. 26, 2007).

[110] *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 (1979) (unpublished document) (on file with author).

[111] *See id.* at 35–36.

proposed membership criteria.[112] The petitioners did not intend the original membership list to be exhaustive, and the proposed constitution made that clear in its expansive language.[113] In short, any Ottawa Indian who was an American citizen and not a member of any other federally recognized Indian tribe, who could demonstrate lineage from a person on the Durant Roll, and who had at least one-quarter Indian blood was eligible for membership 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 the 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 membership criteria.[114] The government retained a legal duty to review and approve a newly-recognized tribe's first tribal constitution,[115] and often used that authority to craft tribal law to its liking.[116] In such a case, Interior officials asserted that the Bureau of Acknowledgment and Research had recommended the recognition of the Grand Traverse Band only and that the original membership list was exhaustive from the federal government's point of view.[117] In 1983, an Interior official informed the Band's chairman that the Secretary of the Interior would rescind the Band's federal recognition if it did not comply with the demand to change the membership criteria to exclude other Ottawa Indians.[118] After the Band sued in 1985,[119] the parties compromised on membership 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.[120] In 1988, the Band's members voted on the proposed constitution and approved it by a wide margin.[121]

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[112] *See id.* at 41–42.

[113] *See id.*

[114] For a longer description of this legal battle, see *The Insidious Colonialism of the Conqueror*, *supra* note 48, at 279–83.

[115] 25 U.S.C. § 476(a)(2) (2006).

[116] *Cf.* Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81 (1993–1994).

[117] *See The Insidious Colonialism of the Conqueror*, *supra* note 48, at 281–82.

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

[119] *See* Complaint, Grand Traverse Band of Ottawa & Chippewa Indians v. Bureau of Indian Affairs, No. G85-382 CA7 (W.D. Mich. Apr. 25, 1985) (on file with author).

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

[121] *See id.* art. XVII (certifying the results of an election).

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 community 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 membership criteria. "Adoption" is not normally a kind of membership-related action taken by nations, but in this context adoption is simply a form of naturalization. This naturalization provision retains the possibility that individuals not residing in the Grand Traverse Bay region without any specific Grand Traverse Anishinaabe ancestors might still become members of the Band.

At the same time, the minimum American Indian blood quantum requirement present in the Grand Traverse membership criteria, as well as in virtually all American Indian tribal nation membership requirements, means that the primary membership criteria is still family-based.

The Grand Traverse Band membership provision is typical for many Indian tribes throughout the United States. The provision is also similar to two aspects of American citizenship law. First, persons born to an American citizen are American citizens, like the family character of tribal nation membership. Second, 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 members, but the Grand Traverse Band does, to a limited extent, in its procedure for the adoption of certain Indians as members.[122]

IV. THE MODERN RACIAL PARADOX OF FEDERAL INDIAN LAW

Modern federally recognized Indian nations face a number of critical 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 demand additional authority to govern without federal interference.[123] Another example involves American Indian tribal courts, which struggle between developing court systems and jurisprudence retaining customary and traditional law while mirroring state and federal court substantive and procedural law.[124]

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[122] *See id.* art. II, § 1(b)(3).

[123] *See* Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317 (2006).

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

This article is concerned with yet another paradox—the question of race and tribal membership.[125] The paradox is not easy to define, but on a superficial level, which is what outsiders see and analyze, the issues seem simple. First, it appears that American Indian tribal nations are groups of persons who all are of the same race: American Indian. This is a troubling question for most Americans, because a government that exercises coercive authority over individuals within the United States is not supposed to be composed entirely of one race of people.[126] For the Michigan Anishinaabe tribes, and especially for the Grand Traverse Band, this perception has arisen in multiple contexts. For example, during the 1970s and 1980s, when the treaty rights of Grand Traverse Indian fishers were 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.[127] Many like-minded 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 appears that American Indian tribal nation members 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 closer to metropolitan areas more often count as members persons who have intermarried with non-Indians, sometimes for several generations, so that many tribal members 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 there were any Indians in the region, implying that the local Indians had either disappeared, moved away, or assimilated into the local communities, thus losing their Indian character.

The paradox then, given these outsiders' perceptions, 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.

In cases such as *Rice v. Cayetano*,[128] more importantly, *Duro v. Reina*,[129] and *Nevada v. Hicks*,[130] the United States Supreme Court has recently brought

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

[126] *See* U.S. CONST. amend. XIV.

[127] *Cf.* Anderson v. O'Brien, 524 P.2d 390, 399 (Wash. 1974) (Hale, C.J., dissenting).

[128] 528 U.S. 495 (2000).

[129] 495 U.S. 676 (1990).

[130] 533 U.S. 353 (2001).

this racialist view of tribal nations into prominence. *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.[131] Justice Kennedy wrote the majority opinion in *Cayetano*, which turned on the application of the Fifteenth Amendment and was technically not a case involving American Indian nations but instead Native Hawaiians, who do not enjoy recognition by the federal government as an Indian tribe.[132]

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."[133] The Iowa 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 members of federally recognized tribes.[134] In some ways, this state supreme court may presage challenges to federal statutes directed for the benefit (or detriment) of non-tribal member 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."[135]

The executive branch has followed the United States Supreme Court's lead in this context by arguing to restrict 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.[136] 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."[137]

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[131] *See* U.S. CONST. amend. XIV, § 2 ("excluding Indians not taxed").

[132] *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.

[133] *Cayetano*, 528 U.S. at 514.

[134] *See In re* A.W., 741 N.W.2d 793, 809–10 (Iowa 2007).

[135] *Cayetano*, 528 U.S. at 516–17.

[136] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENTS OF ADMINISTRATION POLICY: H.R. 505—NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2007 (Oct. 22, 2007).

[137] *Id.* at 1.

The *Duro v. Reina* majority opinion,[138] also authored by Justice Kennedy,[139] as well as a concurring opinion in *Nevada v. Hicks* authored by Justice Souter,[140] 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, in the most negative light possible. *Duro* involved the authority of Indian nations to prosecute nonmembers who were members of other American Indian nations (typically called nonmember Indians) for misdemeanors.[141] Justice Kennedy's *Duro* opinion, followed by an enlightening paper from citizenship expert Alexander Aleinikoff, raised the question of the consent of the nonmembers to tribal nation jurisdiction.[142] 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 work, which introduced the notion of a "democratic deficit" in tribal politics, a key political theory arose in favor of limiting, even eliminating, tribal nation jurisdiction over nonmembers.[143]

The important argument in this political theory is that nonmembers 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.[144] Nonmembers, the argument goes on, cannot by virtue of their race ever vote in a tribal election or otherwise become members of an Indian tribe. Justice Souter's *Hicks* concurring opinion added a pragmatic reason for protecting non-Indians from tribal jurisdiction—tribal laws are "unusually difficult for *outsiders* to sort out."[145] 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 nonmembers.

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[138] 495 U.S. 676 (1990).

[139] 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. This case was later reversed by the Supreme Court. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[140] 533 U.S. 353, 375 (2001) (Souter, J., concurring).

[141] *See Duro*, 495 U.S. at 679.

[142] *See id.* at 693; ALEINIKOFF, *supra* note 7, at 108–21 (2002); *see also* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

[143] *But cf.* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (rejecting tribal civil jurisdiction over a non-citizen-owned bank but not focusing directly on Justice Kennedy's consent theory).

[144] The irony should be too obvious to mention. *But see* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010).

[145] *Hicks*, 533 U.S. at 384–85 (Souter, J., concurring) (emphasis added).

As to be expected, the impact on tribal communities is harsh. Tribal governments have very little authority to tax nonmembers, even if they do business or reside in Indian Country, thus reducing the ability of governments to provide adequate services to all residents.[146] As such, a nonmember-owned gas station doing business on tribal lands is, for example, all but exempt from tribal taxes.[147] Tribal governments have little authority to regulate the land use patterns of Indian Country,[148] 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 amounts of land. Nonmember businesses can (and have) set up mines and other environmentally unfriendly operations right next door to tribal sacred sites[149]—with the tribe powerless to stop them.

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 Santa Fe Railway Company and Ford Motor Company are examples of multinational corporations that have successfully avoided tribal court jurisdiction over personal injury claims in recent years.[150] 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, often practically denying them relief.

At the heart of this jurisdictional conundrum is a related problem—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.[151] So the

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[146] Atkinson Trading Co. v. Shirley, 532 U.S. 645, 645–55 (2001) (rejecting the Navajo Nation's argument that an Indian tribe may tax nonmembers covered by tribally-provided governmental services such as police, fire, ambulance, and so on).

[147] *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).

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

[149] *Cf.* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc) (involving the use of treated sewage effluent to make snow for a privately owned ski resort on tribal sacred lands), *cert. denied*, 129 S. Ct. 2763 (2009).

[150] *See* Burlington N. R.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).

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

paradox that confounds the Supreme Court, usually 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 recognizes that federal Indian law avoids race law issues by relying upon the political status of American Indian tribal nations with a special relationship somewhat analogous to what veterans and diplomats enjoy.[152] Since most 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, because Congress and the executive branch have come to formally recognize some non-treaty tribes, once again as a political matter, even those American Indians who are not members of treaty tribes come within this political relationship.[153] The Grand Traverse Band is one of the few Indian nations that has been in both circumstances. The Band's leaders negotiated and executed the 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.[154] During this period, Congress and the executive branch authority exercised a robust, if not absolute, plenary federal authority in Indian affairs.[155] 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

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

[153] *Cf.* Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior, 255 F.3d 342 (7th Cir. 2001).

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

[155] *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).

and not on the race of American Indians.[156] 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.

However, these important applications of federal Indian law are in jeopardy. As prominent commentators have observed, the Rehnquist Court's take on federal Indian law was to remove the "exceptionalism" from that subject area and incorporate more and more "mainstream" constitutional public law principles into the field.[157] As a result, two key areas of federal Indian law and policy are at risk of 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-members within tribal territories will shrink even further.

V. A THEORY OF NATIONHOOD FOR AMERICAN INDIAN TRIBAL NATIONS—"DOMESTIC NATIONHOOD"

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 Indian individuals and nations began in Indian treaties and in federal laws relating to those treaties. Congress usually did not take action to regulate individual Indians as members of Indian nations until the late nineteenth century and did not extend federal citizenship to all American Indians until the 1920s.

In the late nineteenth 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 with Indian nations by urging them to reorganize under federal law.[158] 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 inconsistencies and confusions throughout the twentieth century, it is clear that Congress now hopes to regulate Indian affairs through Indian nations and its policy of "self-determination."[159] As a matter of politics

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[156] *See Mancari*, 417 U.S. 535.

[157] *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).

[158] *See* 25 U.S.C. §§ 476–477 (2006); 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, 1934–1945 (1980).

[159] *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, *supra* note 15, at 39–43.

and pragmatism, federal actions relating to Indian affairs have moved away from directly regulating American Indian people by empowering and encouraging the development of American Indian tribal nations as the primary government entity in Indian Country.[160] In many ways, through the Indian Self-Determination Acts, Indian nations are implementing and administering federal Indian policy.[161]

American Indian tribal nations have welcomed this change and are working to develop their government and economic infrastructures. This process, however, is different for each of the 565 federally recognized Indian tribes.[162] Some tribes, for example, have enjoyed massive infusions of cash from Indian gaming and are moving toward a form of self-reliance and even independence from federal assistance.[163] 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 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.[164] 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 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

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[160] 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 the 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 reservations indicates that tribal trust land is 80% to 90% less productive.").

[161] *E.g.*, Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450–450e-3; Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243.

[162] *See* Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810-01 (Oct. 1, 2010).

[163] *See generally* STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005).

[164] *See id.* at 108–09.

tribes, to intense scrutiny for being *too* Indian because of their small populations and territories and for moving to disenroll tribal citizens.

These commentaries drift into federal and state court cases involving Indian nations. A United States Court of Appeals for the 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.[165] A recent United States Court of Appeals for the District of Columbia 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.[166] And across the nation, state courts second-guess the tribal membership of Indian children, often over the objection of Indian nations seeking to intervene in Indian child welfare cases.[167]

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 membership rules and criteria without regard to race and ancestry, and Indian nations should consider doing the same. Membership is a two-way street: both parties must expressly consent to the relationship (although, ironically, many American Indians who became citizens of the United States through an act of Congress in 1924 did not have that option[168]).

There are two ways for Indian nations to proceed in this vein. The first is to change tribal membership criteria to immediately create an avenue for nonmembers to become members, regardless of race or ancestry. This may not be palatable 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.[169] Second, Indian nations might not be ready for this change, either.[170] The Grand Traverse Band, for example, has zealously defended the decisions of its enrollment committee

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

[166] *See* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007).

[167] *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 (App. 1996)).

[168] *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.J. 107, 123–27 (1999).

[169] *Cf., e.g.*, United States v. Cruz, 554 F.3d 840 (9th Cir. 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 (2006)).

[170] 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.

to deny membership to community members who do not meet the current membership criteria.[171] 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.[172] This way could potentially incorporate nonmembers into the tribal membership without destroying the Indian or 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 nonmembers could *consent* to tribal jurisdiction, at least in a commercial context.[173] This exception offers an objective strategy for preserving tribal jurisdiction—a nonmember can consent to tribal jurisdiction by executing a document explicitly stating that they consent to tribal jurisdiction. These documents will be business-related, such as when 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.[174] But the problem with that form of consent is the nonmember 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 a reservation, the consent from the first transaction likely would not transfer to the second transaction.[175] Consequently, the "consents" are piecemeal.

Cir. 2008) (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 the adoption of non-Chippewa Indians through an enactment of tribal law).

[171] *E.g.*, *In re* Menefee, 2004 WL 5714978 (Grand Traverse Band Tribal Ct. May 5, 2004); DeVerney v. Grand Traverse Band of Ottawa & Chippewa Indians, 2000 WL 35749822 (Grand Traverse Band Ct. App. Nov. 15, 2000); Bailey v. Grand Traverse Band of Ottawa & Chippewa Indians, 1999 WL 34986342 (Grand Traverse Band Tribal Ct. Nov. 8, 1999).

[172] *See, e.g.*, Oren Lyons, *An Iroquois Perspective*, *in* AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 171, 173–74 (Christopher Vecsey & Robert W. Venables eds., 1980); Ronald L. Trosper, *Traditional American Indian Economic Policy*, *in* CONTEMPORARY NATIVE AMERICAN POLITICAL ISSUES 139, 140, 142 (Troy R. Johnson ed., 1999).

[173] *See* Montana v. United States, 450 U.S. 544, 560–61 (1981).

[174] *See Oversight Hearing on Tribal Sovereign Immunity: Hearing Before the S. Indian Affairs Comm.*, 105th Cong. (1998) (statement of Mark A. Jarboe, Partner, Doresey & Whitney, LLP); *Hearing on Capital Investment in Indian Country Before the S. Banking, Hous., & Urban Affairs Comm.*, 107th Cong. (2002) (statement of Franklin Raines, Chairman and Chief Executive Officer, Fannie Mae); Mark A. Jarboe, *The Gaming Industry on American Indian Lands: Financing and Development Issues*, 872 PLI/CORP. 161, at *182–83 (1994).

[175] *Cf.* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).

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 require tribal employees (usually management 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 to work or live in another country must acquire some sort of permission to do so. Indian tribes should do this whenever they can. As a condition for employment, any nonmember hired by the tribe or any tribe or tribal member-owned business should consent to full tribal civil jurisdiction, and not just in cases arising under the business relationship. Any nonmember seeking to live in tribal housing or on tribal lands should consent to full tribal jurisdiction as a condition of residence. And, as described above, anyone doing business with the tribe should consent. This consent is no different in principle from requiring non-citizens to seek a visa or work permit from a host country.[176]

Of course, these are piecemeal actions as well. But consider that on many reservations, about half of the population consists of nonmembers who have not 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 fifty 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 reality in Indian Country, even to the Justices. If enough nonmembers consent to tribal jurisdiction over time, then the rule may fall by the wayside.

VI. 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. Federal Indian policy first recognized Indian nations as ancestry-based groups and all but

[176] *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).

constitutionalized that recognition in the founding documents. Indian "tribes" became "domestic racial nations," to corrupt a phrase first offered by Chief Justice Marshall.[177] Indian nations need to consider moving toward simply "domestic nations," like Monaco or The Vatican.[178] This is no easy feat. But given the limitations placed upon tribal governments in the modern era, the benefits will outweigh the risks.

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[177] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("domestic dependent nations").

[178] Justice Thompson's concurring opinion in *Cherokee Nation* treated Indian nations this way, *id.* at 34 (Thompson, J., concurring), as did Chief Justice Marshall's majority opinion in *Worcester v. Georgia*, 31 U.S. 515, 556 (1832) ("independent political communities").