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# TRIBAL MEMBERSHIP AND INDIAN NATIONHOOD

*Matthew L.M. Fletcher\**

American Indian tribes are in a crisis of identity. No one can rationally devise a boundary line between who is an American Indian and who is not.<sup>1</sup> And yet, each federally recognized tribe has devised a legal standard to apply in deciding who is a member and who is not.<sup>2</sup> Despite some ambiguity and much litigation, these are relatively bright lines. Some Indians are eligible for membership, and others are not eligible. In rare circumstances, some non-Indians are eligible to become members as well. However, these bright line rules are crude instruments for determining identity, and often generate outcomes that conflict with legitimate Indian identity.

Membership rules are a tribal prerogative. As a matter of foundational federal Indian law, the United States Supreme Court has recognized that Indian tribes have a right to define tribal membership as each tribe sees fit.<sup>3</sup> With relatively few exceptions, tribes robustly exercise this right to decide the criteria for tribal membership.<sup>4</sup>

It is impossible to avoid the fact that racial ancestry is critical to tribal membership criteria. Indian tribes are *tribes* first and foremost, and tribal membership criteria must reflect this tribal character. An Indian tribe

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1. See Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J. L. REFORM 275, 278 (2000); Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. GENDER RACE & JUST. 109, 122-26 (2012); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 241, 244 (2010); C. Matthew Snipp, *Who Are American Indians? Some Observations About the Perils and Pitfalls of Data for Race and Ethnicity*, 5 POPULATION RES. & POL'Y REV. 237, 243-44 (1986); cf. Russell Thornton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans*, 16 POPULATION RES. & POL'Y REV. 33, 35 (1997) (suggesting that tribal enrollment alone determines who is American Indian and who is not).

2. See generally KIRSTY GOVER, *TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP* 108-56 (2010) (discussing the landscape of tribal membership governance).

3. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

4. E.g., MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 219-70 (2011) (collecting tribal court cases on the subject of tribal membership).

composed of a large percentage of non-Indian members is no tribe at all. Historically, federal, state, and tribal governments have struggled mightily with this key point.<sup>5</sup> Moreover, the federal government played a key role in developing the membership criteria for many hundreds of tribes, leading to allegations that part of the government's interest was literally to breed Indians out of legal existence.<sup>6</sup> Tribes with stringent membership rules limit their own population growth and, in some extreme instances, could shrink their membership down to nothingness, just as federal bureaucrats and policymakers may have envisioned decades or centuries ago.

The relevant question is when does an Indian tribe cease to exist as an Indian tribe and legally dissipate? Can it reconstitute itself after a time and how does it do so?

Meanwhile, federal Indian law's recognition of the anomalous character of Indian tribes as race-based entities<sup>7</sup> appears even more anomalous and possibly illegitimate in the modern era of American constitutional law that strives to achieve the conflicting values of race and color-blindness.<sup>8</sup> Commentators and courts struggle with the evolving paradox of government programs and legal doctrines that exist for the benefit (and occasionally to the detriment) of persons of a certain race and ethnicity.<sup>9</sup>

What federal and state government programs and rules, applicable only to Indian tribes and individual Indians, are constitutionally viable in the

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5. E.g., James D. St. Clair & William F. Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91, 98-99 (1979); L.R. Weatherhead, *What Is an "Indian Tribe"? The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 5 (1980).

6. See Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 2-3 (2006).

7. See *Morton v. Mancari*, 417 U.S. 535 (1974); see also *United States v. Antelope*, 430 U.S. 641, 644 (1977) (interpreting the Major Crimes Act as applied against two tribal members, even though the defendants were subjected to a lower standard of proof based entirely on their status as tribal members, and would not apply to non-Indians in the same situation); *Fisher v. Dist. Court*, 424 U.S. 382, 390 (1976) (denying tribal members access to state court in an adoption proceeding because the tribal court has exclusive jurisdiction); *Am. Fed. of Gov't Emps. v. United States*, 330 F.3d 513, 522-23 (D.C. Cir. 2003) ("We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional."), *cert. denied*, 540 U.S. 1088 (2003).

8. See *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 318-19 (2001).

9. E.g., *Mancari*, 417 U.S. at 554-55; David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 761 (1991).

current era of American constitutional law? How can a race-based, membership-oriented government hope to assert power over nonmembers who do not share the same race?

The purpose of this article is not to answer these questions. Much thought-provoking ink has already been spilled and will continue to be spilled by law professors and others about these questions.<sup>10</sup> Instead, this article advances a conversation about how to avoid these questions. It is about Indian *tribes* and Indian *nations*. For purposes of this discussion, *there is a difference* between the two. This article will discuss how Indian *tribes*, shackled to some extent by these intractable questions, can develop into Indian *nations*, for which there is room in the American constitutional structure.

Part I defines an Indian tribe, and notes that tribal membership criteria, tribalism, and recent developments in federal Indian law complicate any clear meaning of Indian tribe. Part II asserts that tribalism, while helping to save American Indian communities from extinction and/or assimilation, is reaching the limits of its usefulness. Tribalism prevents tribal governments from exercising adequate control over Indian lands and people within their territories, and is a worrisome circumstance for American constitutional theorists and policymakers.

Part III defines what Indian Nationhood means, drawing from pre-contact and early post-contact Anishinaabe history to reinvigorate the traditional meaning of nationhood. This part argues that Indian nations must allow nonmembers some form of political power, leaving specific details on how to accomplish this feat to others. Part IV concludes that Indian nationhood, in the long-run, is a laudable and perhaps even mandatory goal for modern tribal communities' survival.

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10. On the problem of preferential government treatment of Indians and tribes, see Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165 (2010); Carole Goldberg, *What's Race Got to Do with It? The Story of Morton v. Mancari*, in INDIAN LAW STORIES (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011); Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 843 (2002) [hereinafter Goldberg, "Preferential" Treatment]; Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, WASH. L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2169402](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169402); Addie Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 9958 (2011). On the problem of lack of nonmember consent to tribal jurisdiction, see Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

### *I. Indian Tribes Defined*

There are 566 Indian tribes recognized by the American government as sovereign entities eligible for federal services.<sup>11</sup> There are also a handful of non-federally recognized Indian tribes recognized by state governments in various forms.<sup>12</sup> Then, there are hundreds of other groups claiming to be legitimate Indian tribes; possibly a few of them will eventually win federal recognition.<sup>13</sup>

With few exceptions that tend to prove the rule, either an Indian group is a federally recognized tribe or not. Congress and the Department of Interior generally treat each and every federally recognized tribe the same.<sup>14</sup> But cracks are developing in this clear in-out dichotomy for two reasons. The first is the varying legal criteria used by Indian tribes to define tribal membership. The second is the Supreme Court's decision in *Carciari v. Salazar*.<sup>15</sup>

#### *A. Membership and Tribalism*

Indian tribes tend to define tribal membership according to either (a) blood quantum, or (b) lineal descendance.

*Blood quantum.*<sup>16</sup> Without going into the history of blood quantum rules, Indian tribes with blood quantum requirements have chosen from a menu of "blood" percentages. These tribes very typically define membership as "quarter-blood," "half-blood," "one-eighth," or "one-sixteenth." The qualifying blood quantum must be at least partly derived from Indian ancestors who were members of the relevant tribe. Some tribes adopt permutations of the quantum rule in that their qualifying blood quantum can come from any number of tribal groups.

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11. See Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,868 (Aug. 10, 2012).

12. Steven Pevar helpfully compiles a list of tribes recognized in some form or another by states. See STEVEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 343-66 (4th ed. 2012).

13. See 25 C.F.R. Part 83.

14. Compare 25 U.S.C. § 478(a) (2012) (applying the statute to "all Indian tribes" without differentiating), with 25 U.S.C. § 353 (2012) (specifying that the provisions of the Act do not apply to all Indian tribes).

15. 555 U.S. 379, 382 (2009).

16. See generally FLETCHER, *supra* note 4, at 237-52 (discussing cases involving tribal blood quantum membership requirements).

While blood quantum, or any kind of racial ancestry, is a terrifically scary way to define membership in a political group in modern America,<sup>17</sup> it is also comically arbitrary.

Consider a man — his name is Nimkee Manitowoc. He's a man with one-sixteenth Ottawa blood who lives in Peshawbestown, Michigan, the center of the Grand Traverse Band of Ottawa and Chippewa Indians (known by its inhabitants as the center of the universe). Nimkee's great-great grandparent's name is on the so-called Durant Roll<sup>18</sup> as a full blood Ottawa from the Grand Traverse Band Ottawas, but he has no other source of Ottawa Indian blood. He is ineligible for tribal membership with the Grand Traverse Band, which requires one-quarter Grand Traverse Band Ottawa or Chippewa Indian blood.<sup>19</sup> Despite his ineligibility for tribal membership, Nimkee speaks Anishinaabemowin and participates in the tribal ceremonies. He is a cultural leader of the Grand Traverse Band community. He is so well respected as a cultural leader that the tribal council and judiciary selected him to serve as the Band's peacemaker, one of the most respected tribal justice officers on the reservation.<sup>20</sup>

Compare Nimkee to Ellis Short, an enrolled Grand Traverse Band tribal member who has not once set foot in Peshawbestown or anywhere on the Grand Traverse reservation. Ellis is a resident of California, a lawyer, and every six months receives a check from the Band in the form of a gaming per capita payment. Ellis's father was a full-blood Grand Traverse Band Ottawa Indian who left home for college in the 1960s and never came back, preferring the far west. Politically, Ellis is a tribal member, although he does not self-identify as Indian, or hold himself out to others as Indian. He passes for white, or perhaps Asian or Latino.

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17. Cf. Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241, 1255-56 (2005) (suggesting that limiting membership to those people who are lineal descendents prevents people who may have a cultural connection to a tribe from becoming members); Kimberly TallBear, *DNA, Blood, and Racializing the Tribe*, WICAZO SA REV., Spring 2003, at 81, 93 (vol. 18, no. 1) (arguing that the use of blood quantum as a prerequisite to membership undermines kinship).

18. The Durant Roll is a creature of the nineteenth century treaties executed by the northern Michigan Ottawa and Chippewa tribes and litigation related to those treaties. See MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 54-55, 91-93 (2012).

19. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art. II, § 1(b)(1)(b)(iii)-(iv), available at <http://thorpe.ou.edu/constitution/GTBcons3.html>.

20. See generally Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 885-86 (1999) (describing the role of the peacemaker).

Nimkee, by anyone's general estimation, would seem to be more "Indian" than Ellis, but legally Ellis is the Indian and Nimkee is not. This illustrates how bright line blood quantum rules create strange, if not downright untenable, outcomes.<sup>21</sup>

*Descendancy.* Other tribes utilize a form of tribal membership criteria known as lineal descendancy.<sup>22</sup> These tribes have no minimum blood quantum. In Michigan, the Sault Ste. Marie Tribe of Chippewa Indians, centered in Sault Ste. Marie, Michigan, has adopted this legal rule.<sup>23</sup> Like Grand Traverse Band, the Sault Tribe's membership derives, at least in part, from the Durant Roll.<sup>24</sup> If Nimkee and Ellis were Sault Tribe descendants, then both would be eligible for Sault Tribe membership, regardless of their blood quantum.

Lineal descendancy, however, also generates strange outcomes relating to tribal identity, just as the blood quantum definition does; and in some cases, these outcomes are even more exaggerated. Lineal descendancy casts a much wider net to include tribal members, but it may also be dramatically over-inclusive. Sault Tribe counts as many as 40,000 members,<sup>25</sup> while Grand Traverse Band counts more than 4000 members.<sup>26</sup> The "Indianness" of these tribes must, as a matter of logic, differ dramatically. There may be far more Ellis Short types in a lineal descendancy regime than in a blood quantum regime because of the over-inclusiveness — but there may also be fewer Nimkee Manitowoc types.

These dramatic differences in tribal identity exist regardless of how the federal government treats these tribes.

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21. See David Treuer, *How Do You Prove You're an Indian?*, N.Y. TIMES, Dec. 20, 2011, <http://www.nytimes.com/2011/12/21/opinion/for-indian-tribes-blood-shouldnt-be-everything.html?r=1&pagewanted=print>.

22. See generally Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2008-2009) (discussing changes in tribal membership criteria and movement toward descent rules).

23. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS CONST. art. III, § 1 (1975).

24. *Id.* art. III, § 1(a).

25. See *Tribal Enrollment*, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, <http://www.saulttribe.com/membership-services/tribal-enrollment> (last visited Aug. 20, 2012).

26. Loraine Anderson, *GT Band to Elect New Chairman and Three Council Members Wednesday*, TRAVERSE CITY RECORD-EAGLE, May 15, 2012, <http://record-eagle.com/local/x227513883/GT-Band-to-elect-new-chairman-and-three-council-members-Wednesday>.

*B. Indian Tribes as Historical Actors — The Carcieri Effect*

The second crack developing in the bright line federal recognition rule is historical in nature. For many decades, the Department of Interior dealt with Indian tribes on an *ad hoc* basis.<sup>27</sup> Tribes with large populations received the most attention from the Department (and from Congress), both good and bad, and smaller tribes flickered in and out of the Department's radar.

In Michigan, for example, the Department "administratively terminated" six of the now-federally recognized Indian tribes, all of whom were signatories to multiple Senate-ratified treaties.<sup>28</sup> While the government eventually restored or reaffirmed each of these tribes to recognized status in the 1980s and 1990s, the Department either ignored these tribes or offered them miniscule government services for more than 100 years.<sup>29</sup>

The notion of federal recognition is a relatively new concept in Indian affairs, appearing as a codified legal concept in 1978 with the Department of Interior's promulgation of rules for the administrative recognition of Indian tribes.<sup>30</sup> Prior to 1978, "Indian tribe" was defined, for most purposes, in the Indian Reorganization Act of 1934.<sup>31</sup> But the IRA still allowed enormous discretion to the Department of Interior to decide which Indian tribes it would recognize, as the era of administrative termination proved. Typically, but not always, the Department of Interior administered recognition to Indian tribes that were signatories to Senate-ratified treaties or that were beneficiaries of congressional acts. Federal common law provided a subjective definition of what constituted an Indian tribe throughout this period for tribes that were not treaty signatories or identified in specific congressional acts.<sup>32</sup> With the relatively recent congressional enactment requiring the Department to administer recognition to Indian tribes equally, this historical context faded into the background.

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27. In addition to the *ad hoc* basis, the DOI dealt with tribes in coercive, manipulative, and paternalistic ways. See C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty*, 23 OKLA. CITY U. L. REV. 175, 175-76 (1998).

28. See Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502-04 (2006).

29. E.g., FLETCHER, *THE EAGLE RETURNS*, *supra* note 18, at 91, 98-101.

30. Now codified at 25 C.F.R. § 83.7 (2011). See also Fletcher, *supra* note 28, at 491-92 (discussing the 1978 regulations).

31. 25 U.S.C. § 479a(2)(2012).

32. See *Montoya v. United States*, 180 U.S. 261, 265-67 (1901).



In *Carcieri v. Salazar*,<sup>33</sup> the Supreme Court upended the definitional regime for Indian tribes by eliminating the Narragansett Indian Tribe of Rhode Island from inclusion in the Indian Reorganization Act.<sup>34</sup> Like dozens, and perhaps more than a hundred now federally recognized tribes, the Department of Interior did not list the Narragansetts as an Indian tribe in 1934. *Carcieri* held that the Department of Interior therefore could not take land into trust for the benefit of the tribe under section five of the Act.<sup>35</sup>

The multiple definitions of Indian tribes used by Congress, the Department of Interior, and the Supreme Court — all formed by historical accident — have come back to haunt Indian Country. The tribes not listed by the Department in 1934 tend to be landless, as well as the most economically and politically vulnerable.<sup>36</sup> *Carcieri* is especially troubling for these tribes.

## II. Death Spiral?

Ironies abound in American Indian law. One of the greatest ironies is tribalism.

Tribalism helped to save many (but not all) Indian tribes from extinction.<sup>37</sup> The helpful federal policy of measured separatism,<sup>38</sup> while not

33. 555 U.S. 379 (2009).

34. *Id.* at 395-96.

35. *Id.*

36. Plaintiffs utilizing *Carcieri* to challenge affected tribes do so (almost) exclusively in federal trust acquisition cases. *E.g.*, Complaint for Declaratory and Injunctive Relief, *Villa v. Salazar*, 2012-CV-1086 (D.D.C. June 29, 2012), available at <http://turtletalk.files.wordpress.com/2012/07/villa-v-salazar-complaint.pdf>; Complaint for Declaratory and Injunctive Relief, *No Casino in Plymouth v. Salazar*, 2012-CV-1748 (E.D. Cal. June 29, 2012), available at <http://turtletalk.files.wordpress.com/2012/07/ncip-v-salazar-complaint.pdf>; Plaintiff's Motion for Summary Judgment, *Confed. Tribes of the Grand Ronde Cnty. of Or. v. Salazar*, No. 11-CV-00284 (D.D.C. June 20, 2012), available at <http://turtletalk.files.wordpress.com/2012/06/grand-ronde-brief.pdf>; Plaintiffs' Motion and Memorandum of Points and Authorities in Support for Summary Judgment, *Clark Cnty. v. U.S. Dep't of Interior*, No. 11-CV-00278 (D.D.C. June 20, 2012), <http://turtletalk.files.wordpress.com/2012/06/clark-co-v-salazar.pdf>. One potential example involves immunity from state taxation. See Adrea Korthase, *County May Attempt to Subject Poarch Band of Creek Indians to Taxation Under Carcieri*, TURTLE TALK (Apr. 16, 2012), <http://turtletalk.wordpress.com/2012/04/17/county-may-attempt-to-subject-poarch-band-of-creek-indians-to-taxation-under-carcieri/>.

37. See D'ARCY McNICKLE, *NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS* (1973). Here, I define "tribalism" to mean the development of political units bound by shared culture, language, and often lineage. See RICHARD WHITE, *THE MIDDLE*

always honored, preserved tribal languages, cultures, and traditions, and to some extent tribal resources. Tribalism was the best option for unrecognized tribes, encouraging otherwise unassociated Indian people to associate with other Indian tribes. The only alternatives to tribalism were assimilation into the greater U.S. culture or, worse, death of tribal identity.

Tribalism continues to have currency in the modern era, and Indian people continue to identify as members of Indian tribes with, of course, the exception of those Indians not eligible for membership anywhere. Indian tribes offer government services to tribal members, including health and public safety, housing and utilities, justice systems, and all manner of other governance activities.<sup>39</sup> In addition, tribes provide economic opportunities to tribal members, including employment.<sup>40</sup> Indian tribes are at their best when protecting and preserving tribal cultures — ceremonies and language — and concomitant treaty rights. And tribal organizations provide a *place* for Indian people to live and to be.<sup>41</sup>

However, in the modern era's greatest irony, tribalism also acts as an anchor, weighing Indian people down. In part, because of tribalism, Indian tribes cannot assert criminal jurisdiction over non-Indians<sup>42</sup> and tribes have extremely limited ability to regulate nonmember conduct in Indian country.<sup>43</sup> Tribalism is exclusive, so nonmembers have little to no political rights in tribal governments. In most but not all Indian polities, nonmembers cannot vote, run for political office, serve on juries, or receive

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GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815, at 16-20 (1991).

38. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 14-19 (1987); Robert A. Williams, *The Hermeneutics of Indian Law*, 85 MICH. L. REV. 1012, 1015 (1987) (reviewing WILKINSON, *supra*).

39. See generally HARVARD PROJECT ON AM. INDIAN ECON. DEV., *THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 197-273 (2008) (surveying government service provision in Indian Country); DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 51-82 (3d ed. 2011) (surveying the development of tribal governments).

40. See generally KAIGHN SMITH, JR., *LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY* (2011) (reviewing labor and employment law as it pertains to Indian Country).

41. See Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246 (1989).

42. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

43. See *A-1 Contractors v. Strate*, 520 U.S. 438, 445 (1997); *Montana v. United States*, 450 U.S. 544, 565 (1981); see also Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

government benefits.<sup>44</sup> Nonmembers usually cannot own or control parcels of reservation land.<sup>45</sup> Problematically, because membership is based on race and ancestry, the factual predicate for excluding nonmembers is also based on race and ancestry.

Until Indian tribes adapt tribalism to the modern era, by taking the best and leaving the worst of tribalism in the past, American courts and policymakers have plenty of reason to view tribal governments with extreme skepticism.<sup>46</sup> Two aspects of this skepticism deserve specific attention: (1) preferential treatment of Indians and tribes, and (2) tribal governmental authority over nonmembers.

The first concern — preferential treatment, such as immunity from state taxes and regulation — contradicts the American constitutional tradition of color-blindness and extreme suspicion of laws based on race.<sup>47</sup> Tribal advocates argue that preferential treatment is based on the political status of Indians and tribes, not race.<sup>48</sup> The Supreme Court agreed with this theory in

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44. *But see* Means v. Dist. Court of Chinte Judicial Dist., 7 Navajo Rptr. 383, 387-88 (Nav. Sup. Ct. 1999) (discussing some political rights available to nonmembers on Navajo lands).

45. *E.g.*, 12 BLACKFEET TRIBAL LAW AND ORDER CODE § 4 (“A [tribal land] exchange ... between the Blackfeet Tribe and a member or members of such Tribe is good only as between the two parties and the Blackfeet heirs of the member-exchange. Land acquired herein by an exchange with the Blackfeet Tribe cannot be sold or otherwise go into the possession of a non-member of the Blackfeet Tribe.”), available at <http://www.narf.org/nill/Codes/blackfeetcode/blkftcode12land.htm>; COLORADO RIVER INDIAN TRIBES LAND CODE § 7.102(b) (“Tribal lands may be assigned to members of the Colorado River Indian Tribes....”); *id.* § 7-106(a) (“[Exchange assignments] may not be reassigned to any heirs or devisees who are not members of the Tribes, except that a life assignment may be made to the surviving widower or widow of the holder of an assignment.”), available at [http://www.crit-nsn.gov/crit\\_contents/ordinances/Land-Code-ART\\_7.pdf](http://www.crit-nsn.gov/crit_contents/ordinances/Land-Code-ART_7.pdf); WHITE MOUNTAIN APACHE TRIBE LAND CODE § 2.4 (“Applicants [for tribal land assignments] must be members of the White Mountain Apache Tribe as defined in Article III of the amended Constitution and By-Laws of the White Mountain Apache Tribe....”), available at <http://thorpe.ou.edu/codes/wmtnapache/landcode.html#c24>.

46. *E.g.*, S. REP. NO. 112-153, at 40-41, 51-55 (2012) (reporting minority views of Senators arguing against expansion of tribal court jurisdiction); H. REP. NO. 112-480, pt. 1, at 58-59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

47. *See* Getches, *supra* note 8, at 318; *see also* Jeb Rubinfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L. J. 1141 (2002) (arguing that an “anti-antidiscrimination” paradigm could help explain the Rehnquist Court’s decisions regarding racial preferences).

48. *See* Goldberg, “Preferential” Treatment, *supra* note 10, at 943.

the 1970s in a series of cases,<sup>49</sup> but has not had occasion to either cement or reconsider the political status theory since.

The second concern — tribal civil jurisdiction over nonmembers — contradicts the American constitutional tradition of access to the democratic process, or what one commentator calls a “democratic deficit” in tribal governance.<sup>50</sup> Nonmembers cannot vote in tribal elections, run in tribal elections, serve on juries (usually), or otherwise participate in the political process.<sup>51</sup> Compare a nonmember in Indian Country to an American resident of Michigan who crosses state lines. The Michigan resident could, over time, become eligible to vote in another state. A nonmember in Indian Country, however, will never have that luxury.<sup>52</sup>

The concerns of preferential treatment and civil jurisdiction over nonmembers may not weigh heavily in the day-to-day considerations of a tribal leader, but these concerns have significant potential to harm tribal interests. Intergovernmental agreements with state and local governments that constitute the foundation of tribal governance could fall to equal protection challenges.<sup>53</sup> Nonmembers engaging in questionable activities could avoid tribal, state, and federal regulation.<sup>54</sup> Thus, preserving the purest aspects of tribalism may come at too high a price for Indian Country.

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49. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672-73 (1979); *United States v. Antelope*, 430 U.S. 641, 646-47 (1977); *Fisher v. Dist. Court*, 424 U.S. 382, 390-91 (1976); *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

50. T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 115 (2002).

51. See *id.*

52. Whether this is a fair comparison (frankly, it is not) is another question. See generally Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 *FED. LAW.*, Mar./Apr. 2006, at 38, 40 (“The so-called democratic deficit problem is an illusion. To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though he or she is not a citizen of that state. The Court focuses on the possibility that the Colorado resident has legal status sufficient to some day acquire citizenship in Utah, in contrast to a non-Indian, who might not have that status. But at the time the Colorado citizen's loan is adjudicated, the person is not a citizen of Utah. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, the change in status could not alter the result of the Utah courts' adjudication of the loan at issue.”).

53. See, e.g., Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 *TULSA L. REV.* 529, 548-51 (2012) (canvassing cases where challengers successfully undercut tribal-state agreements).

54. See, e.g., N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* 6-7 (2008) (canvassing several cases involving jurisdictional questions arising from torts of nonmembers against Indian people and property).

### III. Indian Nations Defined

Indian tribes must evolve into Indian nations. "Nation" means a legal entity with membership criteria somewhat broader than the purely race and ancestral-based rules now in place. This would include at least some non-Indians in the mass of tribal people. But the Nation classification is not such a foreign concept to Indian communities; in fact, that is how as Indians were historically classified. With careful application, the Nation classification could preserve the best aspects of tribalism, and therefore Indian culture.

#### A. Historical Tribalism

Before blood quantum and lineal descendancy were used to define Indian tribes, there were traditional and customary ways of identifying Indians in a particular Indian political group, having more flexibility than modern tribal membership criteria. The story of Leopold Pokagon, the man who gave his name to the modern Pokagon Band of Potawatomi Indians, illustrates this system. Pokagon was the leading *ogema* for the St. Joseph River Indians during the early part of the nineteenth century. He helped negotiate treaties and other political agreements that preserved the right and ability of the Pokagon Band to remain on their land as the federal government removed other Potawatomi bands to the west.<sup>55</sup> Pokagon was born and raised an Ottawa Indian (or perhaps Chippewa)<sup>56</sup> in the territory of the Grand Traverse Band. He met a Potawatomi woman and moved in with her and her family in the St. Joseph River Valley.<sup>57</sup> Over time, Pokagon became an *ogema* (leader or headman) for the community.

Pokagon's story could not be repeated in the modern era. Tribal membership criteria prohibit members of one tribe from acquiring membership in a second tribe. And, more importantly, Pokagon was an Ottawa or Chippewa from Grand Traverse and did not have the requisite blood quantum (or lineal descendancy) to qualify for membership at the modern day Pokagon Band.

Anishinaabe history is replete with Michigan Indian communities taking in outsiders as "members" regardless of blood quantum. Perhaps the most famous is the nineteenth-century capture of John Tanner, a white boy who

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55. See James A. Clifton, *Leopold Pokagon: Transformative Leadership on the St. Joseph River Frontier*, MICH. HISTORY, Sept./Oct. 1985, at 16-23.

56. See JAMES A. CLIFTON, *THE POKAGONS, 1683-1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY* 56-57 (1984).

57. *Id.* at 60.

grew up in Michigan Indian Country with the Anishinaabeg.<sup>58</sup> We know a great deal about Tanner because he left the community after he grew up and wrote a book about his experiences.<sup>59</sup> Tanner's captivity may have been typical in a time of great uncertainty and difficulty for Michigan Indians. Michigan Indian bands, especially after a military confrontation, occasionally took prisoners and incorporated those individuals into their own polity.<sup>60</sup> There were pragmatic reasons for doing so — manpower being short at the time, Indian bands needed as many people as possible to hunt, fish, farm, trade, and defend. Every individual lost due to killing, disease, kidnapping, or other predicaments had to be replaced, or else the entire community's viability would be threatened. It appears that slavery was a solution to these threats.<sup>61</sup>

In short, outsiders could become members of an Indian polity over time, regardless of their race or ethnicity. Modern tribal membership criteria, derived from the listing of individual Indians in treaty annuity or judgment award rolls, effectively put an artificial end to those practices. Now Indians are zealously protective of blood quantum and some even judge each other by blood quantum ("FBI: Full Blooded Indian" tee shirts abound) and skin color. Such is the irony of modern tribalism.

### *B. Introducing Nonmembers into Modern Tribes*

Nonmembers surround tribal members in most areas of Indian Country due to the impressive historic dispossession of Indian lands.<sup>62</sup> In some reservations, non-Indians outnumber Indians and own most of the land. In most reservations, Indian and non-Indian land ownership is mixed, creating checkerboard land ownership patterns. Indian tribes and local units of government negotiate away the jurisdictional problems arising from checkerboard land patterns, with varying degrees of success.<sup>63</sup> Despite a

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58. See A NARRATIVE OF THE CAPTIVITY AND ADVENTURES OF JOHN TANNER (Edwin James ed., 1830).

59. See *id.*

60. See generally E.A.S. Demers, *John Askin and Indian Slavery at Michilimackinac*, in INDIAN SLAVERY IN COLONIAL AMERICA 391-92 (Alan Gallay ed., 2009).

61. See *id.*

62. See generally HARVARD PROJECT ON AM. INDIAN ECON. DEV., *supra* note 39, at 95-98 (summarizing the history of dispossession of Indians from their native lands).

63. See P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 384 (1994); Frank Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L. REV. 239, 274-75 (1991); Rebecca A. Tsosie, *Negotiating Economic Survival: The*

few setbacks from local courts in recent years, negotiating jurisdiction is the future.

Alongside this development, nonmembers continue to be excluded from tribal membership. Anti-tribal groups use this situation to attack Indian rights — tribal members are still American citizens after all, and so it appears to others they have “special rights.”<sup>64</sup> This special status, and the perceptions that follow, generate continuing problems for Indian affairs.

There are few methods for incorporating non-Indians into the American Indian polity.<sup>65</sup> For example, many Indian tribes already allow “adoption” of nonmembers into tribal membership, regardless of American Indian ethnicity. The Grand Traverse Band’s adoption regime has a dramatic history relating to its federal recognition story. But more recently, the Grand Traverse Band tribal court held in *Ance v. Grand Traverse Band of Ottawa and Chippewa Indians* that a non-Indian by blood adoptee was legally a tribal member entitled to all tribal membership benefits.<sup>66</sup>

Less dramatic, but probably more effective, will be the subtle incorporation of nonmembers into the tribal polity through economic and governance measures, such as employment and housing, and government services. Many nonmembers are already incorporated into tribal economies without dispute. Tribal employees agree to litigate wrongful termination and other employment or labor claims in tribal court. Tribal housing lessees agree to comply with tribal regulatory agencies and to litigate their claims in tribal court. Nonmembers just visiting Indian Country routinely comply — though maybe not comprehensively — with tribal civil regulatory jurisdiction (perhaps in response to threats of federal prosecution). Over time, Indian tribes could use these contacts to establish a codified form of tribal nationalization. Nonmembers could nationalize in the same way that non-citizens can nationalize into Americans.

### *C. Reimagining Indian Tribes as Indian Nations*

Indian tribes and their advocates already use the rhetoric of nationalism. Discussions of “Indian nations” abound. Tribal leaders and advocates prefer

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*Consent Principle and Tribal State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 34-43 (1997).

64. E.g., Stephen Cornell, *The New Indian Politics*, 10 WILSON Q. 113, 124-26 (1986) (describing activism against Indian treaty rights).

65. See Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 324-26 (2011).

66. No. 2011-1914-CV-CV (Grand Traverse Band of Ottawa & Chippewa Indians Tribal Ct., Feb. 13, 2012) (on file with author).

using the term “nation” to describe their political entities over terms like “tribe,” “band,” or “community.” The preference for “nation” is symbolic, and perhaps derives from a throwaway line by then-Justice Rehnquist in the 1970s, where he described Indian tribes as “a good deal more than ‘private, voluntary organizations . . . .’”<sup>67</sup>

Tribal advocates describing Indian tribes as nations likely misread what it means to be a nation. The rhetoric of tribal nationhood focuses almost exclusively on the subjective notion of tribal sovereignty. Tribal sovereignty is a concept used as a mantra by tribal leaders and advocates and is in dire need of modernization.<sup>68</sup> Tribal sovereignty, as described by tribal interests, aligns with Chief Justice Taney’s description of southern states’ sovereignty in *Dred Scott*.<sup>69</sup> The modern understanding of sovereignty has moved beyond, and tribal leaders and advocates must as well.<sup>70</sup>

First, Indian nationhood must have some big-picture limitations. Unless the American Constitution is amended dramatically, Indian tribes will never be equivalent to states or foreign nations.<sup>71</sup> Indian tribes will not be forming treaties with foreign countries on significant geo-political subject matters absent congressional consent, or maintaining their own armies or militias. Indian tribes cannot legalize slavery or illegal drugs either. And Indian

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67. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

68. See Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 *SAN DIEGO L. REV.* 567, 617-19 (2012).

69. See *id.* at 618 n. 247 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 484 (1856) (quoting in turn Vattel on the absolute freedom of a sovereign from external judgment) (“[I]n section 20: ‘A nation, then, is mistress of her own actions, so long as they do not affect the proper and perfect rights of any other nation — so long as she is only internally bound, and does not lie under any external and perfect obligation. If she makes an ill use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are free, independent, and equal, and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue, in order to fulfill her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, a perfect equality of rights between nations, in the administration of their affairs, and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment.’”))).

70. See Gerald Taiaiake Alfred, “Sovereignty” — *An Inappropriate Concept*, in *THE INDIGENOUS EXPERIENCE: GLOBAL PERSPECTIVES* 322 (Roger Maaka & Chris Anderson eds., 2008).

71. See *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1, 16-20 (1831).



tribes will be unsuccessful when asserting the “dignity” of a constitutional sovereign before the Supreme Court in federalism cases.<sup>72</sup>

Therefore, tribal sovereignty is robust, but limited by the preferences of the outside American culture. Expansions of tribal sovereignty — a key point to any discussion of Indian affairs — *must be earned*. Tribal advocates frequently point out that the federal government did not give tribal sovereignty to Indian tribes — it was retained in treaties with the federal government.<sup>73</sup> They are right to do so, but there is more to tribal sovereignty than retained rights in our federal Indian law. Tribal sovereignty must be exercised by Indian governments in order to mean anything; and concomitantly, where outsiders have acted to limit tribal sovereignty, tribal governments must earn back that governmental power.

That is the essence of nationhood.

#### *IV. Evolving into Nationhood*

The evolution of Indian tribes into (domestic) Indian nations is a long-term project. Earning nationhood — that is, earning the presumptive right to govern all people and territory within Indian Country subject only to limitations necessitated by greater interests of the United States — will not be easy. The first step is a revolution in our understanding of tribal membership. Such a revolution is not possible in modern tribal governments because there is an enormous amount of reliance on political exclusion by tribal leaders and members. Many tribal members around the country have almost nothing *but* their tribal membership, and to allow nonmembers and non-Indians to share in that political right is not viable.

But some tribes can and should evolve. Some tribes, intentionally or not, are already doing it. Tribes that utilize a lineal descendancy tribal membership rule are already there to a large extent. Other tribes (White Earth Band of Ojibwe, for example) are considering how to introduce territorial and cultural requirements into their tribal membership criteria.

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72. See *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“The States thus retain ‘a residuary and inviolable sovereignty.’ They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.” (citation omitted) (quoting *THE FEDERALIST* No. 39, at 245 (James Madison) (Jacob E. Cooke ed., 1961))); see also *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”).

73. See DAVID W. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 117-42 (2001).

Tribes cannot — as a practical matter — allow everyone to meet tribal membership criteria. Tribalism, and the culture and language that tribalism protects, is the spirit that binds tribes together now and forever. A serious reconsideration of how tribal membership criteria can best protect and advance tribalism is necessary. Indian lawyers won't get it done. Neither will most tribal leaders, whose election chances depend on current tribal membership criteria. But it must be done.

*Miigwetch.*

