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American Indian Sovereignty and Naturalization: It's a Race Thing

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There's a predator that came, like a disease, with the European to the tribes that were here on this land. Columbus was a virus representing a diseased spirit that affects human perceptions.

....

We need to evolve past the disease. There is an antibiotic to it. It is us. It's our minds and how we use our thought processes. It's what we create with our energy.¹

John Trudell

The people that fled a ravaged Europe brought to America an unhealthy belief that it was permissible to involuntarily exploit or annex the lands of another people (usually of another deeper color) and to take without consent political control over those people, displacing their way of life and governance.²

This belief and its manifestation in the colonization of one people by another is the foundation of federal Indian law and it is perpetuated in the current law that distributes legal power, sovereignty, or jurisdiction between the Indian nations, the federal government, and the states.³

This Article will not explore in depth the assertion that federal Indian law is rooted in colonialism and racism. Other scholars have made this argument and the reader should look to them to consider

². See Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 Ark. L. Rev. 77, 86 (1993) (proposing an understanding of colonialism); see also Albert Memmi, Attempt at a Definition, in Dominated Man: Notes Towards a Portrait, 185-89 (1968) (describing racism as stressing real or imagined differences, valuing these to the advantage of the racist, generalizing these as absolutes, and using them to justify aggression and privilege of the racist).
the truth of the matter. Here the focus will be on the power to determine membership in the Indian nations, particularly what Anglo law calls naturalization. The power to determine membership is at the heart of sovereignty. What is found in this heart will most likely be spread throughout the body.

"The courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." The Native nations may seemingly grant, deny, revoke, or change the rights and obligations of membership at will. As with every legal proposition, however, there are exceptions. Whatever the Indian sovereign may decide as to the membership rights of any particular person for purposes of the Native nation, federal Indian law usually requires some quantum of Indian blood or descent before recognition of the person as a citizen or member of the nation for purposes of questions of Indian sovereignty. That is, there is a racial criteria at the center of federal recognition of membership in an Indian nation whenever that membership is raised in the context of which nation's law shall apply to a controversy.

Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.

At the center of sovereignty is the power to define the criteria of national citizenship and its rights and obligations. Currently there is considerable discussion about this matter within the United States.
And, in recent years the number of people seeking naturalization has reached new heights. In this context the chair of the U.S. Commission on Immigration Reform, Barbara Jordan, called for programs to "Americanize" new immigrants hoping to reclaim the word and the process of its manifestation from the racists and xenophobes who had tarnished its reputation in the 1920s.

Several scholars from a variety of disciplines discussed the implications of the notion of Americanization of naturalized citizens and the meaning of American national identity in a recent collection of essays, *Immigration and Citizenship in the Twenty-First Century.* Professor Charles Kesler argued for a conception of citizenship that stresses agreed upon concepts such as a work ethic, affection for the Constitution, and a common language which might overcome the threat of division in multiculturalism by consolidated public opinion expressed in broad principles. For Professor Kwame Anthony Appiah, less may be more. He seemed to believe that balkanization is a less serious threat than the coercion of moral sentiment and that the liberal vision of making up your own life should trump a requirement to know the plot of *Moby Dick.* And so it went as a dozen scholars batted around the plate of citizenship issues.

None of the essays, whether seeking more or less in the process of naturalization, a thinner or thicker notion of national identity, dual or single citizenship, argued for any explicit racial criteria. Nevertheless, such criteria may be implied in the statements of others in the citizenship debates. For instance, Professor Pickus quoted Peter Brimelow: "[A] nation-state is 'a sovereign structure that is the political expression of a specific ethno-cultural group.'" And, Pickus referred to the remarks of Patrick Buchanan asking whether a million Zulus or Englishmen would more easily assimilate into Virginia. If immigration system today, the courts and immigration, the politics of immigration, citizenship and community, and current policy debates involving citizenship; Rogers M. Smith, Civic Ideals: Conflicting Visions of Citizenship in U.S. History (1997) (examining the development of American citizenship laws and the influence of politically influenced civic ideals on those laws).


15. Id.
these statements urge explicit racial criteria for United States citizenship, then the authors, at least, believe their refutation is self-evident in current American political speech even if not in habits of mind and action. They will not be further discussed here.

What will be discussed is whether or not federal Indian law would or should recognize an adopted or naturalized member of an Indian nation, particularly one who is without any Indian blood or descent, as a citizen thereof when the question arises in the context of Indian sovereignty. And, a foundational question of sovereignty is jurisdiction; which nation's law shall apply? Descent and blood quantum are a particularly European fascination used most often to justify and maintain the oppression of others. Like colonialism, its hand-maiden, racism is generally prohibited among the world's nations. As a result:

[Subterfuge designed to create false appearances are an essential aspect of maintaining and perfecting the order of colonial rule. Hence, it is necessary for the colonizer not merely to preempt the sovereignty of the colonized, but to co-opt it, inculcating a comprador consciousness among some segment of the subaltern population in which the forms of dominion imposed by colonization will be advocated as a self-determining expression of will emanating from the colonized themselves.

The United States would not refuse to recognize a citizen of France because that citizen was of Asian descent, nor refuse to recognize a person with African blood as a citizen of China, nor a person of European ancestry as a citizen of Kenya. If, in matters of American Indian sovereignty, federal Indian law refuses to recognize an adopted or naturalized member of a Native nation who is without some Indian blood or descent, then one should ask whether this disrespect of sovereign power is anything more than a mask for colonialism and racism.

This Article will proceed in four parts. Part I will recount the history of naturalization in England, its American colonies, and the United States. Part II will describe historical naturalization processes in Native nations as told by historians of the nations. Part III will examine the federal Indian law that responds to questions of Indian citizenship in matters of sovereign jurisdiction. It will be seen that race and blood are at the center of federal Indian jurisprudence in a way that the United States has outgrown in other contexts and that

was never a part of original Indigenous understanding. Part IV will consider signs of the future.

I. A SKETCH OF NATURALIZATION IN THE UNITED STATES

Angela and Boniface Eguzouwa came to America from Nigeria eight years ago, seeking freedom and opportunity.

The couple had two children after they arrived here in Lancaster County [Pennsylvania]. They named the girl, who is 8, Fortunate, and the boy, who is 11 months old, Prosper.

Today, Mrs. Eguzouwa became an American citizen, along with 140 other people from countries ranging from Germany to Vietnam.

"I am happy to be one of you," she said, her face beaming.

"I came here to be free, to be able to do things," Mrs. Eguzouwa, a city resident said. "In most other countries you have limitations on things you do. America gives you opportunity . . . the good things that everyone wants to have in life."

Whatever their reasons, immigrants have come to the United States in steady streams throughout the history of the country. Naturalization is the process by which an immigrant becomes a United States citizen. The concepts of citizenship and naturalization are inextricably intertwined. The procedures by which immigrants are naturalized reflect the community's notion of membership.

Naturalization in the United States is a matter of statutory entitlement, conferring on those who satisfy the requirements the full benefits of citizenship. The naturalization process in the United States embodies the concept of consent, rather than the competing notion of ascription. While there has been little attention paid to possible justifications of the naturalization process by legal scholars, one scholar has suggested four normative perspectives on the process.

A. The Historical Background of Naturalization in the United States

1. English Roots: The Theory of Natural Allegiance

The concept of American citizenship and the concomitant process of naturalization derived from English roots. The English notion of the process of naturalization flowed from the common law theory of


19. See SCHUCK, supra note 8, at 161 (arguing that all of immigration law and policy can be viewed as an effort to implement one or another vision of citizenship).

20. See infra notes 116-128 and accompanying text.

natural subjectship, or birthright citizenship. Early English law held that persons born within the royal dominions were the king's subjects.\footnote{22. Id. at 13. Kettner asserts that the principle was true in practice long before it was made explicit in 1368. Id.} In addition, the statute De natis ultra mare provided that foreign-born children of English subjects could inherit in England, thus giving such children the status of English subject.\footnote{23. See id. at 14.} Despite inconsistent interpretation of the statute De natis, English jurists consistently maintained that either birth or descent could identify the natural-born subject.\footnote{24. See id. at 15.} In modern analytical terms, the system combined the principles of \textit{jus soli}\footnote{25. Under \textit{jus soli}, nationality is acquired through mere fact of birth within the territory of the state. See Polly J. Price, \textit{Natural Law and Birthright Citizenship in Calvin's Case (1608)}, 9 YALE J.L. \\& HUMAN. 73, 77 (1997).} and \textit{jus sanguinis}\footnote{26. Under \textit{jus sanguinis}, nationality is acquired by descent following the status of at least one parent, regardless of place of birth. Id.} in determining subjectship.

It was not until the early seventeenth century that a theory of allegiance and subjectship was fully articulated by Sir Edward Coke, in \textit{Calvin's Case,}\footnote{27. 7 Co. Rep. 1a (1608) [hereinafter \textit{Calvin's Case}].} or the \textit{Case of the Postnati}. The case was a test case brought primarily to determine the nature of the union that had been forged between Scotland and England by the accession of James I, who was already James VI of Scotland.\footnote{28. See KETTNER, supra note 21, at 16.} The litigation involved disputes over land titles. Two suits were introduced in the name of Robert Calvin, an infant born in Scotland in 1606, after the accession (\textit{a postnatus}). Calvin's counsel argued that their client had been prevented from taking possession of lands to which he was lawfully entitled. Opposing counsel contended that Calvin was an alien and as such could neither inherit nor sue for lands in England.\footnote{29. See id. (citing \textit{Calvin's Case}).}

The opinion of Lord Coke in \textit{Calvin's Case} emerged as the definitive statement of the law regarding birthright subjectship. Coke began his analysis by noting that English law encompassed a number of different kinds of "ligiance" describing various kinds of relationships.\footnote{30. See id. at 17.} Coke's primary concern was with the "\textit{ligeantia naturalis}" that characterized the natural-born subject.\footnote{31. Id. at 17.} Coke broadly defined this allegiance as the ""true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born, he oweth by birth-right ligeance and obedience to his sovereign.""\footnote{32. Id. at 17-18 (quoting \textit{Calvin's Case,} 4b).} Thus, Coke viewed one's
political identity, and hence one's allegiance as a subject to a sovereign, as automatically assigned by the circumstances of one's birth.\textsuperscript{33}

According to Coke, the object of the subject's natural allegiance was the sovereign, who protected a person at the time of his birth.\textsuperscript{34} This protection, like allegiance, was a natural obligation, owed by the superior to the inferior and by the sovereign to the subject.\textsuperscript{35} Coke conceived of the bond between the subject and the sovereign as involving reciprocal obligations, "for as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects."\textsuperscript{36} Being imposed by the eternal law of nature, which was prior to all man-made law, the bond between subject and sovereign was perpetual and immutable.

Through his theory, Coke established once and for all the English preference for \textit{jus soli} and common membership of Scots and Englishmen in one united community of allegiance, regardless of any contrary indications in any past or future man-made law. But Scots and Englishmen were not the only members of the community; aliens born out of the protection of the English king and owing their natural allegiance to another sovereign could become adopted subjects and share the rights that others enjoyed as their natural inheritance.

By the seventeenth century, English law provided two procedures for incorporating aliens into the community.\textsuperscript{37} Parliamentary acts of naturalization incorporated foreigners on terms that generally conferred the full rights of subjectship.\textsuperscript{38} The rights and benefits conferred upon aliens through naturalization by parliamentary act had a large scope because the authority of parliament was itself so broad. The parliamentary act operated retrospectively to the birth of the party. It enabled him to inherit land; take lands by descent, purchase, or devise; and naturalized his alien-born children.\textsuperscript{39} In contrast to the parliamentary acts, royal patents of denization granted only limited rights, making the denizen a sort of halfway member who ranked above the alien, yet below the native-born or naturalized subject.\textsuperscript{40}

\begin{itemize}
  \item[33.] SCHUCK, \textit{supra} note 8, at 208.
  \item[34.] KETTNER, \textit{supra} note 21, at 17.
  \item[35.] Id. at 18.
  \item[36.] Id. (quoting Calvin's Case).
  \item[37.] See id. at 29.
  \item[38.] See id.
  \item[39.] See id.
  \item[40.] Id. Kettner asserts that the differences between alien and native-born subject were articulated as disabilities suffered by those who did not enjoy subject status, the most important being the restriction on real property rights that began to emerge in the fourteenth century. Non-subjects could acquire and use land, but they did so only at the sufferance of the king and for the use of the king. An alien could convey his title in land to another, but it remained subject to royal challenge, as the alien could not convey better title than the one by which he held. An alien could not inherit real property or transmit it to his children, even though
\end{itemize}
The limited nature of the rights and benefits conferred upon aliens through denization resulted from the view that denization was a grant of royal prerogative or grace.\textsuperscript{41} Denization did not operate retrospectively;\textsuperscript{42} the denizen could purchase and own lands, but he could not inherit them and his children could inherit his land only in limited circumstances.\textsuperscript{43}

Through a series of intricate legal cases between 1656 and 1670, English jurists, starting with Coke's theory of natural allegiance, insisted that the allegiance of the naturalized member must be considered as perfect and complete as that of the native subject.\textsuperscript{44} The essential purpose of naturalization was, therefore, to make the alien legally the same as the native Englishman. The alien, through naturalization, was "reborn" as a natural subject. Naturalization conferred upon the alien a fictional status of natural subject.\textsuperscript{45} Kettner asserts that while English law envisioned various types of subjectship, ranging from the natural status of the native-born to the legally acquired status of the naturalized citizen, all varieties of membership were thought to mirror permanent hierarchical principles of the natural order.\textsuperscript{46}

2. The Colonial Experience: The Theory of Volitional Allegiance Emerges

In the colonies, the English theory of naturalization was turned on its head. That is, the colonists came to see the allegiance of adopted members as reflecting the character of the naturalization process, rather than viewing the process as a reflection of the allegiance of the native-born subject. The colonists perceived the naturalization procedure as a legal one that involved a form of contract between an alien who chose a new allegiance and a community that consented to adopt

\textsuperscript{41.} See id. at 30.
\textsuperscript{42.} Id. at 32.
\textsuperscript{43.} See id. at 31. If the children had been born abroad, they were aliens and could not inherit land in England. If specifically included in the denization, they, like their father, could not inherit but only purchase. If born in England, they were subjects by birth, personally qualified to take by descent; but, they could inherit their father's property only if born after his denization. Id.
\textsuperscript{44.} See id. at 36-41 (discussing the legal cases involving the estate of John Ramsey, earl of Holderness).
\textsuperscript{45.} See id. at 43.
\textsuperscript{46.} Id. at 8.
him as a subject, and viewed the allegiance that resulted as volitional and contractual.\textsuperscript{47}

Perhaps the colonial policy on naturalization was dictated by the practical needs of the emerging country, rather than a concern for doctrinal consistency. In order to survive, the new communities needed to be militarily secure and economically viable. The colonists believed they needed to have liberal naturalization procedures, and cared little about how the alien became a member as they knew their own interests would be served when immigrants were naturalized quickly and on easy terms. Accordingly, they accepted as fellow members of their polity persons admitted by a variety of agencies. By whatever means, the focus was on choice and consent, and naturalization familiarized for all a volitional relationship between the new member and the community.\textsuperscript{48}

To both the alien and the native-born settler, the most crucial benefits conferred by naturalization were full rights in real property.\textsuperscript{49} Moreover, since most colonies required land ownership for suffrage, the conferral of the right to own land to naturalized citizens carried with it the right to vote.\textsuperscript{50} And while the law in England clearly prohibited it, many colonial governments permitted naturalized subjects to be elected to local office.\textsuperscript{51}

In 1773, English authorities banned local admissions in the colonies.\textsuperscript{52} The colonists reacted with anger to the order and a few years later, in the Declaration of Independence, they included the matter in their list of grievances against George III: "He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriation of Lands."\textsuperscript{53}

\textsuperscript{47} \textit{Id.} at 9. The colonists' perception that naturalization was a contractual relationship based on consent and choice had as its origin the influential works of John Locke and William Blackstone. Kettner further asserts that the colonists took the model of the naturalized subject as their starting point, and ultimately concluded that all allegiance ought to be considered the result of a contract resting on consent. \textit{Id.}

\textsuperscript{48} \textit{See id.} at 126-28.

\textsuperscript{49} \textit{Id.} at 49.

\textsuperscript{50} \textsc{John Palmer Gavit}, Americans by Choice 71 (1922).

\textsuperscript{51} Kettner asserts that England's fixed policy after 1701 was to exclude naturalized subjects from high political office. However, an example of a colonial legislative act permitting naturalized citizens to hold office was Pennsylvania's election law of 1706 which permitted persons "naturalized in England or in this province and territories' to elect and to be elected." \textit{Kettner, supra} note 21, at 123 (quoting \textit{Pa. Stat.}, II, 212-221 (1700)).

\textsuperscript{52} \textit{Id.} at 105.

\textsuperscript{53} \textit{Gavit, supra} note 50, at 72 (quoting the Declaration of Independence).
3. Defining the Qualifications for Naturalization After Independence

After Independence, the old bonds of personal allegiance that had once united men in a common subjectship under the British king were replaced by new contractual terms by which civil and political rights in the community were to be exchanged for support of republican principles, adherence to the Constitution, and responsible and virtuous behavior under enlightened forms of self-government.\(^{54}\) Under the Articles of Confederation, no specific action was taken by Congress to provide for naturalization.\(^{55}\) There were, however, provisions for an oath of allegiance for office-holders and offers of land and citizenship for deserters from the British military ranks.\(^{56}\) After the Revolution, a number of individual states enacted naturalization statutes that provided for easy acquisition of citizenship, usually requiring only an oath of allegiance, without any specific length of residence.\(^{57}\)

The need for uniformity was obvious to the framers of the United States Constitution. As a result, the Constitutional Convention adopted with little discussion article I, section 8, clause 4, which provides: “Congress shall have the power . . . to establish an uniform rule of naturalization.”\(^{58}\) Congress has addressed the question of who should be offered citizenship in two ways: first, the law addresses what categories of immigrants should be offered United States citizenship; and second, the law addresses what characteristics and abilities individuals within those categories should have to be eligible for naturalization.\(^{59}\)

In 1790, Congress passed a law that addressed both the categories of immigrants eligible for naturalization and the individual qualifications the eligible immigrant had to possess. Congress extended the privilege of naturalization to all “free white persons.”\(^{60}\) Among white immigrants, individuals had to have resided in the United States for two or more years and in the state of application for one year.\(^{61}\)

54. KETTNER, supra note 21, at 247.
55. GAVIT, supra note 50, at 72.
56. Id.
57. Massachusetts, Delaware, Maryland, New York, South Carolina, and Virginia all had such statutes; Virginia did require a formal declaration of intention to remain in the U.S. and South Carolina required a previous residence of one year. Id. at 73.
59. Id.
60. See id. at 68.
61. Id.
cants were required to be of "good character," and take an oath or affirmation to support the Constitution. 62

The nineteenth century was characterized by Congress paying little attention to the individual qualifications of immigrants seeking naturalization, while slowly expanding the categories of immigrants eligible to naturalize. In 1870, Congress extended naturalization eligibility to aliens of African ancestry. 63 The legislation was part of the "radical republican" efforts to legislate equal rights for blacks in one of the few policy areas controlled exclusively by the federal government. Congress did not, however, extend eligibility to all nonwhites. In 1882, the Chinese Exclusion Act barred the Chinese from naturalization. 64 Over the next forty years, this prohibition on naturalization was extended to other Asians, including nationals of India and other West Asians. 65

In the twentieth century Congress expanded the categories of immigrants eligible for naturalization and increased the individual qualifications. In 1906, Congress mandated that citizenship applicants must have speaking knowledge of English, state an intention to reside permanently in the United States, and provide two "credible" United States citizen witnesses who would provide affidavits stating that the naturalization applicant was of good moral character and had resided in the United States for five years. 66 In that same legislation Congress also addressed categories of immigrants not eligible for naturalization, excluding anarchist and polygamists. 67

The 1920s may be seen as a period of steady liberalization in naturalization policy. In 1922, Congress allowed women to apply for and be naturalized on their own, ending the previous practice whereby foreign-born women were naturalized only upon marriage to an United

62. Id. A detailed history of how white was white enough and the legal construction of white privilege may be found in LÓPEZ, supra note 16.

63. DESIPI & DE LA GARZA, supra note 58, at 69 (citing 16 Statutes at Law 254, enacted July 14, 1870). This change at first affected few people, as it initially applied mostly to Afro-Caribbeans who had little incentive to immigrate prior to 1865. It should be noted that the Fourteenth Amendment to the Constitution, also proposed and ratified in this era, granted immigrants' children citizenship based on their birth in the United States. U.S. Const. amend. XIV, § 1 provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." With the Amendment, Congress sought to mandate citizenship and equal protection of the laws regarding the recently freed slaves.

64. DESIPI & DE LA GARZA, supra note 58, at 69.

65. Id. (citing Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58).

66. Id. at 70-71.

67. Id. at 71 (citing Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596). The authors assert that these statutory exclusions signaled a pattern of statutory exclusion of small categories of immigrants with beliefs or behaviors outside the mainstream of American society. Id.
States citizen or upon the naturalization of their husband. The 1922 law also provided that female United States citizens no longer lost their citizenship upon marriage to a foreign male. And, citizens of Indian nations who were not constitutional citizens under the Fourteenth Amendment because they were not born "subject to the jurisdiction" of the United States were made United States citizens by the Citizenship Act of 1924.

After largely ignoring the naturalization laws for two decades, Congress revisited the area when wartime pressures forced an acknowledgment that the provisions of the Chinese Exclusion Act were incompatible with wartime alliances. Accordingly, in 1943 Congress repealed the Chinese Exclusion Act and added Chinese to the categories of immigrants eligible to naturalize. Congress eliminated the final national-origin, racial, or ethnic group exclusion in 1952 when it extended access to naturalization to all Asians and explicitly to all races.

At the same time Congress was generally expanding the categories of immigrants eligible for United States citizenship, it was adding to the requirements with which immigrants seeking citizenship had to comply. In 1950, Congress mandated that naturalization applicants had to demonstrate a knowledge and understanding of the fundamentals of the history and principles of the forms of the American government. In addition, Congress increased the language requirement; applicants had to read, write, and speak "words in ordinary usage in the English language." The 1950 law also created additional categorical classes of immigrants ineligible for naturalization based on beliefs. Members of Communist organizations and those who advocated or taught that the United States government should be overthrown joined the polygamists, anarchists, and draft evaders already excluded. These changes were virtually the last changes to the catego-

68. Id.
71. DeSipio & de la Garza, supra note 58, at 70-71 (citing 57 Stat. 600 (1943)).
72. Id at 71. (citing Immigration and Nationality Act, June 27, 1952, ch. 477, 66 Stat. 163). The current statutory scheme provides: "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married." 8 U.S.C. § 1422 (1994).
73. DeSipio & de la Garza, supra note 58, at 72.
74. Id.
75. Id.
ries of immigrants eligible to naturalize and individual qualifications. 76

B. Current Naturalization Criteria

Naturalization in the United States is, for the most part, a matter of statutory entitlement conferring on those who satisfy the requirements the full benefits of citizenship. 77 Any immigrant who is eighteen years of age or older may apply for naturalization as a United States citizen. Applicants for naturalization can expect to follow a regulated process that consists of completing an Application for Naturalization, paying the appropriate fee, 78 an interview at the local INS office, an English and civics test, and an oath of allegiance. 79

In order to be eligible for naturalization, immigrants must meet certain statutory requirements. There are five basic requirements for naturalization. First, the applicant must be lawfully admitted for permanent residence in the United States and be in "continuous residence" for five years. 80 Unless the alien can prove otherwise, the alien's "continuous residence" in the United States is disrupted if the alien is absent from the United States for more than six months. 81 In almost every case, an absence of one year or more disrupts an alien's continuous residence. 82

76. Id.

77. The only exception being only native born citizens are eligible for the Presidency. See, e.g., United States v. Schwimmer, 279 U.S. 644, 649 (1929), rev'd on other grounds, 328 U.S. 61 (1946) (stating that except for eligibility to the Presidency, naturalized citizens can acquire equality with native-born citizens according to uniform rules prescribed by Congress); see also Schneider v. Rusk, 377 U.S. 163, 165 (1964) (stating that the rights of citizenship of the native born and the naturalized person are of the same dignity and coextensive, except for eligibility to the Presidency); Knauer v. United States, 328 U.S. 654, 658 (1946) (stating that citizenship obtained through naturalization is not a second-class citizenship, rather it carries with it all the rights and prerogatives of citizenship obtained by birth, except for eligibility to the Presidency); Baumgartner v. United States, 322 U.S. 665, 673 (1944) (stating that under the Constitution, a naturalized citizen stands on equal footing with native citizens in all respects save that of eligibility to the Presidency).

78. For an application received after January 15, 1999, the fee for filing a naturalization application is $225 and the fee for having fingerprints taken is $25, for a total of $250. See IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, CURRENT NATURALIZATION (1998).


80. 8 U.S.C. § 1427(a) (1999). The required period is three years if the alien was married to a U.S. citizen throughout the period. 8 U.S.C. § 1430(a) (1999).


82. See id.
Second, the applicant must be a person of good moral character. When determining whether an applicant is a person of good moral character, INS will consider several factors. In particular, INS will consider: the applicant's criminal record, with particular attention paid to any crime against a person with intent to harm; any crime against property or the Government that involves "fraud" or evil intent, and commission of two or more crimes for which the aggregate sentence was five years or more; the violation of controlled substance laws of the United States, any state or any foreign country; habitual drunkenness or drunk driving; illegal gambling; prostitution; polygamy; lying to gain immigration benefits; failing to pay court-ordered child support or alimony payments; confinement in jail, prison, or similar institution for which the total confinement was 180 days or more during the past five years (or three years if the applicant was married to a United States citizen); the failure to complete any probation, parole, or suspended sentence before the applicant applies for naturalization; terrorist acts; and the applicant's persecution of anyone because of race, religion, national origin, political opinion, or social group.

Third, an applicant must be able to demonstrate her ability to speak, read, and write English. The applicant's English will be assessed in one of the following ways: (1) in order to test reading ability, the applicant will be asked to read out loud parts of the Application for Naturalization form, a set of civics questions, or several simple sentences; (2) in order to test the writing ability, the applicant will be asked to write one or two simple sentences; (3) in order to test speaking ability, the applicant will be asked to answer personal questions and questions about the application during the interview. Exceptions to the English requirement are available for certain applicants based on age or disability.

Fourth, applicants must be able to demonstrate a knowledge and understanding of the fundamental history, principles, and form of government of the United States. During the personal interview, the applicant will be asked either to verbally answer a set of civics questions or to take a written multiple-choice test with up to twenty questions. As with the English requirement, exceptions to the civics requirement are available for certain applicants based on age or disability.

84. A GUIDE TO NATURALIZATION, supra note 79, at 25.
86. A GUIDE TO NATURALIZATION, supra note 79, at 37.
89. A GUIDE TO NATURALIZATION, supra note 79, at 37.
Finally, an applicant must show an attachment to principles of the United States Constitution and that she is well disposed to the good order and happiness of the United States. An applicant declares her “attachment” to the United States and its Constitution when making the Oath of Allegiance at the naturalization ceremony. As stated in the Oath of Allegiance, the applicant must also renounce all foreign allegiances to become a United States citizen. In addition, as stated in the Oath, the applicant must be willing to support and defend the principles of the United States Constitution and the laws of the United States. This means that, when required by law, the applicant must be willing to (1) fight in the U.S. Armed Forces; (2) perform non-combatant service in the U.S. Armed Forces; and (3) perform civilian service for the U.S.

C. Values and Justifications of the Naturalization Process

1. The Concepts of Ascription and Consent

The naturalization process embodies different values as it existed in the common law and as it exists in the United States. The difference is best explained by the competing principles of ascription and consent.

Generally, and in its purest form, the principle of ascription holds that one's political membership is entirely and irrevocably determined by some objective circumstance—in this context, birth within a particular sovereign's allegiance or territory. According to this principle, individual preference does not affect political membership; only the natural, immutable circumstances of one's birth are considered relevant. Sir Edward Coke's theory of natural allegiance embodied the

92. The Oath of Allegiance is: “I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will perform noncombatant service in the Armed Forces of the United States when required by law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.” A GUIDE TO NATURALIZATION, supra note 79, at 28.
93. Id. The INS may exempt an applicant from these requirements if she, because of religious teachings and beliefs, is against fighting or serving in the military and the applicant follows the appropriate procedure.
95. See SCHUCK, supra note 8, at 207.
ascriptive view of membership. English jurists viewed the naturalization process in their country as reflecting Coke's ascriptive framework. That is, they viewed the naturalization process as conferring a "fictional" ascriptive status upon the alien.\footnote{96}

The principle of consent, on the other hand, holds that political membership can result only from free individual choices. According to this principle, the circumstances of one's origins may influence one's preferences for political affiliation, but they are not determinative.\footnote{97}

The consent theory emerged from challenges made by seventeenth and eighteenth century Enlightenment theorists against the feudal social institutions.\footnote{98} The most influential exposition of the theory was John Locke's \textit{Second Treatise of Government}.\footnote{99} Locke based the theory on the consent of free individuals to enter into society and establish government to preserve their natural rights.\footnote{100} According to Locke, individuals are not naturally subject to a sovereign. The state of nature is a "State of perfect Freedom, where each individual is free to act as he thinks fit, without depending on the will of others or any Subordination or Subjection."\footnote{101} However, in a state of nature, an individual often lacks the power to defend herself, rendering her "very insecure" in the enjoyment of her rights.\footnote{102}

Individuals thus voluntarily form a compact, a community "for the mutual Preservation of their Lives, Liberties and Estates."\footnote{103} Under the terms of the consensual compact, each individual foregoes her natural freedom of action "to be regulated by the Laws made by Society."\footnote{104} In turn, the individual "engages [her] natural force . . . to assist the Executive Power of the Society, as the law thereof shall require," and receives "protection from [society's] whole strength."\footnote{105} The community, therefore, as the body that protects the individual's rights and receives her allegiance, is the political sovereign. Thus, although Locke agreed with Coke that the subject owed allegiance to the sovereign who embodied and controlled the legal means of protection, Locke insisted that the community, not the king, was the ultimate

\begin{footnotes}
\footnote{96}{See id. at 208.}
\footnote{97}{See id. at 207.}
\footnote{99}{See id. (citing John Locke, \textit{Two Treatises of Government} (Peter Laslett ed., Cambridge Univ. Press. 1988) (3d ed. 1698)).}
\footnote{100}{Id. at 674.}
\footnote{101}{Id.}
\footnote{102}{Id.}
\footnote{103}{Id.}
\footnote{104}{Id.}
\footnote{105}{Id.}
\end{footnotes}
sovereign. The resulting allegiance was not the product of nature, but rather arose from the original compact.\footnote{See id. at 675.}

Jonathan Drimmer asserts that by the eighteenth century, courts had unequivocally embraced Coke's \textit{jus soli} view of birthright citizenship and continued to apply the principles enunciated in \textit{Calvin's Case}, while legal theorists accepted the Lockean view of the nature of the community.\footnote{See id.} It was, according to Drimmer, William Blackstone's \textit{Commentaries on the Law of England} that synthesized these divergent legal and philosophical views.\footnote{See id. (citing 1 WILLIAM BLACKSTONE, \textit{COMMENTARIES ON THE LAW OF ENGLAND} 357 (1979)). Drimmer asserts that Blackstone was generally recognized as the authoritative source of the common law by the American colonists. \textit{Id.}}

Blackstone argued that it is "a maxim in the law, that protection and subjection are reciprocal" and arise from an individual's birth within the dominion of the crown.\footnote{Id. at 675-76.} However, following Locke, he analyzed the "mutual bond" between subject and sovereign in terms of "the original contract of society."\footnote{Id. at 676.} Blackstone, like Locke, stated that individuals formed a society for mutual protection, and argued that:

\begin{quote}
[T]he whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community without which submission of all it was impossible that protection should be certainly extended to any.\footnote{Id.}
\end{quote}

Thus, Blackstone proposed that communal association itself constituted the sovereign, and the individual owed allegiance to "the community" in exchange for its protection.\footnote{See id.}

As Drimmer asserts, the colonists viewed their independent polities as "Lockean associations formed by communal consent for the mutual preservation of fundamental individual rights."\footnote{See id. at 677-78.} In this context, the colonists viewed the legal process of naturalization as a form of contract between an alien who chose a new allegiance and a community that consented to adopt him as subject.\footnote{See Kettner, \textit{supra} note 21, at 9.}

\section*{2. Normative Justifications of the Naturalization Process}

It is clear that the naturalization process is the means by which immigrants are made United States citizens. A necessary inquiry,
however, is the justification or purpose of United States naturaliza-
tion policies. Although legal scholarship is thin on this topic, Gerald Neuman has set forth four normative justifications of the naturalization process: unilateral liberal, bilateral liberal, thin repub-
lican, and thick communitarian.

In a liberal model, the individual's desire for naturalization is broadly motivated by the desire to achieve the benefits and protections that come along with citizenship. The motivating benefits may include rights of political participation, but in an extreme liberal vision, the individual would view political participation instrumentally as a means of safeguarding or advancing his private interests. The model of "unilateral liberalism" would recognize that society's motivation for admitting individuals to citizenship is the need to disseminate its citizenship broadly to ensure that the protections of citizenship are available to all residents who desire them and who are willing to undertake the concomitant obligations. According to this model, naturalization would be considered prima facie as a right for those who satisfy certain objective criteria of need, and who desire it, although the right could be denied to those who present serious dangers to the society.

The model of "bilateral liberalism" would recognize that the society's consent to membership is as necessary as the individual's consent. The society's motivation to consent would be based on a "wide-ranging instrumental calculation of net benefits it would gain from acquiring the applicant as a member." The political participation of the individual would be a factual input into these calculations, but it would not be afforded greater weight than the competitive advantages in the fields of trade, technology, military service, or sports.

The "thin republican" model "places primary emphasis on political participation as the purpose of citizenship and views political participation as committed engagement in the life of the polity rather than as self-interested protection of private interest." According to this perspective, the "individual seeks naturalization in order to enjoy the

115. The focus of most legal scholarship on naturalization has been on the constitu-
tionality of naturalization criteria and the question of whether congressional power over naturalization is "plenary." For discussions of that issue, see gener-
ally Michael T. Hertz, Limits to the Naturalization Power, 64 Geo. L.J. 1007 (1976); Note, Constitutional Limitations on the Naturalization Power, 80 Yale L.J. 769, 796-98 (1971); Note, Constitutional Limitations on the Power of Con-
gress to Confer Citizenship by Naturalization, 50 Iowa L. Rev. 1093 (1965).
117. Id. at 238-39.
118. Id. at 239.
119. Id.
120. Id. at 239-40.
121. Id. at 240.
good of republican citizenship in that polity; the polity seeks to naturalize those resident aliens who apply for the proper reasons, and who demonstrate a sufficient likelihood of living up to the requirements of republican citizenship in that polity." 122

The "thick communitarian" model views citizenship as a reflection, and not a definition, of the identity of the community and its members. 123 Thus, according to this perspective, the "individual seeks to naturalize at some stage in her assimilation to the group identity, to confirm that she is becoming a true member of the community and to attach the appropriate legal consequences to that fact." 124 Likewise, the "community offers naturalization to those individuals who meet its criteria of identity or are making satisfactory progress toward that goal." 125

Neuman argues that the thin republican model of naturalization fits the current United States naturalization criteria. The naturalization criteria emphasize the public, rather than the private, aspect of citizenship. 126 The ideological qualifications for naturalization are defensible, for example, from the republican perspective. Under the republican model, the purpose of naturalization is to admit the applicant to the political project of republican self-government, and therefore the applicant's acceptance of the republican framework is a central qualification for admittance. 127 Further, the criteria aims at a civically virtuous citizenry. The English language requirement, Neuman argues, is also defensible from the thin republican perspective. He argues that the language requirement can be understood as an educational qualification rather than a linguistic qualification in the sense that, like the civics requirement, it requires applicants to invest time and effort in acquiring knowledge as a prerequisite for naturalization. 128 From the thin republican perspective, then, the prospective citizens investment in acquiring knowledge that will im-

122. Id. at 240-41. Neuman asserts that the "thinness" of this model lies in its rather abstract emphasis on political socialization as the polity does not reject the participation of individuals who have not adopted a fuller set of dominant culture values. Id. at 241.
123. Id. at 241.
124. Id.
125. Id. Neuman asserts that this model is "thick" because it treats some degree of assimilation to dominant cultural values or practices as a prerequisite to naturalization, on grounds of community identity. While a liberal society might regard all its residents as necessarily members, it would not be thick in this sense. Id.
126. See id. at 278.
127. See id. at 260-61.
128. See id. at 266. Neuman asserts that the existence of exceptions for categories of persons who are considered unable to acquire a new language underscores the proposition that the criterion sets forth a task for the applicant rather than a test of an inherent characteristic of the applicant. Id.
prove their political participation represents the exercise of at least a thin civic virtue.

Whether unilateral or bilateral, thin or thick, all of Neuman’s models reflect an Anglo-European perspective which is not the only relevant point of view. Section II presents two additional accounts of naturalization from the perspectives of two Indigenous nations. These accounts represent the understandings of those traditions.

II. INDIGENOUS NATURALIZATION

A. Tribal Sovereignty and “Membership Selection”: Blood Quantum as Fiction Among the Sovereign Umo"ho" Nation

1. Origins and Treaties

The Maha, or Umo"ho" (Omaha) Nation, an Indigenous people of what has become known as the Americas, along with the Osage, Quapaw, Kansa (Kaw), and Po"ca, were once part of a much larger body politic called the Great Ho"ga (leader) Ni kashi"ga (people) Wi" (one), or “One Leader People.” At one time the Ho"ga Ni kashi"ga Wi" must have numbered in the hundreds of thousands.

For reasons unknown, the Ho"ga Ni kashi"ga Wi" (often erroneously called “the Osage” in Indo-European/American, or IEA literature) broke up into smaller groups and left the region by waterways, moving in a westwardly direction. After they crossed what is now called the Mississippi River and began to travel up what has become known as the mighty Missouri River, the Quapaw and Osage remained behind and went their separate ways. Later the Kansa left the Hu’thuga (tribal circle), settling in present-day Kansas. The Po"ca and Maha were the last to separate, the Maha being the last to pitch their tents in the Hu’thuga. To this day the Umo"ho" hold in their possession many sacred relics that date back beyond anyone’s memory.

It has been said that the French may have been the first Indo-European people to have met what were to be known as the Maha by the 1630s; mathe (winter) gthebo" (ten) no"ba (two) or (twenty), or (20 winter) later, such contact was documented on a map made by the French. By that time the Maha were established along portions of the mid-Missouri River basin.

One and a half centuries later, through presentation of a medal of friendship and an accompanying document, the Spanish were the first Indo-European sovereign to establish formal ties with the Maha in 1796. At this time the Maha were overseen by a “non-traditional” chieftain, Waji"ga-sabe (Blackbird), who by all accounts—both wa’xe (non-Native) and Maha—was an autocratic leader, and thus, not in keeping with the more ancestral ways of decision-making and govern-
ance known and practiced among the Maha Ni kashi"ga ("Umo"ho" People). It can now be claimed by the Umo"ho" that the 1800 epidemic of di'xe (smallpox) that killed Waji"ga-sabe and decimated much of the Nation was ironically a means through which Ni kash-

Through a series of Treaties authorized under its Constitution, the U.S. Government, at its insistence, entered into a formal relationship with the Maha as early as July 18, 1815, when the Maha, under Article 3 of what was to be called the "Portage Des Sioux" Treaty, did so "hereby acknowledge themselves and their tribe or nation to be under the protection of the United States, and of no other nation, power, or sovereign whatever."

The Maha may or may not have understood the "full meaning" of what was being said here, but even if they did not, the impetus for this and all subsequent Treaties was totally at the behest of the United States, who were, according to the preamble of the Portage Des Sioux Treaty, "desirous of reestablishing peace and friendship" between the two parties "on the same footing upon which they stood before the late war between the United States and Great Britain."

The motivation of the Maha in entering the Treaty process with the United States even as early as 1815 was most likely simple survival. Even in translation the meaning of the Treaties from the beginning must have been clear to them. Perhaps at this time the outlines of subsequent agreements were not, but the language used in each Treaty was "offered" by the Americans, and is not of Maha construction. Thus, careful readings of the Treaties reveal (in English) a tone of humiliation for the Maha that must have been very hard for them to take. Take for example, Articles 1 and 2 of the "Fort Atkinson" Treaty (October 6, 1825):

from Article 1

The United States agree to receive the Maha tribe of Indians into their friendship and under their protection, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States.

from Article 2

Subsequent Treaties entered into, again at the continuing insistence of the U.S. Government, with the (this term imposed) "domestic dependent nation" of the Maha or Umo"ho"—including those of the "Platte Purchase" of October 15, 1836; the "Treaty with the Omaha" of March 16, 1854; and the "Treaty with the Omaha" of March 6, 1865—"reaffirmed" this relationship between the "two sovereigns" as established by Article 3 of the Portage Des Sioux Treaty (1815).
In the Prairie Du Chien Treaty of 1830, the Umo\textsuperscript{ho}, Santee, Yankton, Iowa, Oto-Missouri and Po\textsuperscript{ca} urged the United States to establish a separate reservation for the mixed blood Natives belonging to the foregoing nations. It was thought that these mixed bloods should be together since they were progressing toward assimilation at a more rapid pace. Such a reservation was established and the land allotted to the mixed bloods. However, it was eventually sold and the mixed bloods returned to their respective reservations to be close to their kinship.

Eventually the Umo\textsuperscript{ho} ceded as much as 11,000,000 acres of land prior to the Treaty of 1854 which established the Reservation, but even then the American Government would not leave them alone. Mathe gthebo\textsuperscript{n} (ten Winter) later in the Treaty of 1865, one-third of the Reservation itself was sold as a new home for Ho-Chuck (Winnebago), and in subsequent mathe the remaining land base was "legally" parceled out through the Omaha Allotment Act of 1882 in tribal allotments (agreed to by the Umo\textsuperscript{ho} only out of concern that they would be moved south to "Indian Territory," as the Po\textsuperscript{ca} in 1878 had been forced to move), with an additional 50,000 acres of unallotted land later offered for sale by the Federal Government, and thrown open to the Indo-European/Americans as "surplus land."

Yet in no other provision of any Treaty entered into between these two sovereigns between 1815 to 1865, do either sovereign relinquish any further rights of their sovereignty to subordinate territories or states whatsoever, including self-governance, but held inviolate their relationship as sovereigns, including the right of either sovereign to construe its membership subject to its own social, economic, political, legal, cultural, and spiritual practices.

Such rights include certain traditions and practices whose origins, nurturance, exercise and teaching remain distinctly their own, as it is with the expressed ways of the Umo\textsuperscript{ho} with respect to the Four Hills Of Life—infancy, youth, adulthood and elder. These particular Umo\textsuperscript{ho} ways encompass child-rearing practices (including use of the cradleboard); the assumption of responsibilities by the individual, both for themselves and the Hu\textsuperscript{thuga}, as an expression of the manifestation of clanship through the cohesiveness of the family kinship organizational structure; the use of the iye (speech) as an expression of religious supplication of Wako\textsuperscript{da} (the Great Unseen Power); and observance of certain ceremonial rites, including those embracing each passage through the Four Hills of Life, a spiritual expression of the Umo\textsuperscript{ho} belief in the interrelationship and sacredness of life.

Here remains the essence, the kernel of intent for what it means to be Umo\textsuperscript{ho}, even in our own time. Briefly spoken, the Umo\textsuperscript{ho} continue to believe in the indestructibility of matter being transformed through the dispensation of energy into new forms of matter and life,
a view shared by much of Western science today, but whose origin in Umo"ho"n cosmology is much more old. Mathe gthebo" hi" wi" gthebo" no"ba (130 winter) ago the Washis'ka (shell) Athi" (they have) (together—"those who have the shell") were still known to practice changeling, transforming from human to animal form and back, while other ancient Umo"ho"n societies were known through oral tradition to have transformed weather. With such a modern and ancestral history, the powers and forces of nature remain for the Umo"ho"n part of their daily experience.

The wa'xe attempted to take away the vestiges of what it was to be Native, what it was to be Umo"ho"n, by discouraging tribal dress and the speaking of Umo"ho"n iye (Omaha speech, or language), and offering wa'xe clothing and English. The disruption of the extended family unit through the imposition of boarding schools and the prohibition of ancestral spiritual practice while exalting the virtues of Christianity completed these efforts.

2. Adoption as a Kinship Practice

As far back as historic times, the Umo"ho"n have used adoption as a kinship practice. This goes back to the Umo"ho"n in relation with other nations, with whom it has friendly relations. Later when Umo"ho"n shi"ga zhi"a (children, youth) were sent off to boarding schools some of them married (e.g. Seneca, Chippewa, Bannock, Osage, Po"ca, Pawnee, Ho-Chunk, Oto-Missouria, Iowa, Yankton, Oglala (Lakota) Sioux, as well as a mixture of mainly French extractions).

Adoption was usually done on a personal basis; that is, an Umo"ho"n man would adopt another person as a brother, father, grandfather, or uncle. A woman would adopt a mother, aunt, sister or grandmother. Or they would go outside the Hu'thuga and adopt someone from another nation. People outside the Umo"ho"n who married into Hu'thuga and followed the customs and traditions were more readily accepted as Umo"ho"n then the ones who made no effort to learn the ways.

It was regarded a high honor for someone in good standing to adopt one as a relative. Anyone who came among the Umo"ho"n for a good reason was honored by an adoption ceremony and these, too, were not taken lightly. Many Umo"ho"n were part Po"ca and over the years took adoption seriously. One not only became the best of friends, but also had an obligation to treat the adoptive person as one's own blood relative. Once adoption by ceremony was solemnized, the relationship became as kin and respected. Adopted persons always remembered special events and gave gifts to each other.

The Umo"ho"n never adopted anyone in the name of the Umo"ho"n Ni kashi"ga. It was always done on a personal basis.
Onpa Tonga (Big Elk) adopted Joseph LaFleshe, part French, as his son and left the chieftainship to LaFlesche when he died near Omaha in 1844. LaFlesche went on to become principal chief of the Umo"ho", the last chief under the traditional rule. The principal chief, Onpa Tonga, adopted Joshua Pilcher's only mixed blood son, John, as his own son. John married into the Omaha Tribe and cast his lot with the Omahas.

When the Umo"ho" in 1882 first received allotments of land in severalty, several allottees were non-Umo"ho", but had lived with them long enough to be counted as tribal members through adoption.

3. Blood and Proportionality

Proportionality is a concept of total artificiality in political affairs and came into vogue during the "Great Compromise" of the Constitutional Convention held in secret at Independence Hall, Philadelphia in the hot summer of 1787. It was at this juncture of impasse between the agriculturally-oriented slavetrading South and the tepid industrialism of string-settlements North that representation within the Federal House of Representatives would be premised, in part, on "excluding Indians not taxed, three-fifths of all other Persons" and encoded in the Constitution.

Following this early pattern, with the creation of the Bureau of Indian Affairs in 1824, it became customary and later established by the Federal Department of the Interior that anyone claiming to be an Indigenous person, in order to qualify as eligible for government benefits, was required to possess at least one-fourth degree (any mixture if "Indian") Aboriginal blood.

Under the paradigms of this law the "Indian" nations who accepted the Indian Reorganization Act (Howard/Wheeler Act) of 1934 for convenience sake used the same formula of one-fourth Native blood for tribal enrollment. In order for the Secretary of the Interior to approve the enrollment of the Umo"ho" Nation, the Umo"ho" had to follow the blood quantum laid out by the Secretary.

In 1961, the Umo"ho" won two judgment awards from the United States Government for lost lands taken from the Umo"ho" Nation in a series of Treaties made during the 1800s. Using the two allotments of 1882 and the Dawes Severalty Act of 1887 as baseline documents to determine degree of Indigenous Umo"ho" blood, in addition to the ten clan (five earth and five sky) divisions of the Umo"ho" Hu'thuga, the Umo"ho" were able to register, through an enrollment process in 1961, all who then qualified for tribal membership. In short, one had to trace ancestry back to an original allottee.

At that time, several original allottees were living, some born in the 1870s, that could attest to a tribal member's degree of Umo"ho" blood.
In the second judgment award in 1962, the sovereign Umoⁿhoⁿ Nation changed its rules on membership to one-half Umoⁿhoⁿ blood quantum on the father's side, but the Secretary of the Interior would not sign the document, and the Umoⁿhoⁿ had to return to an enrollment criteria of one-fourth Umoⁿhoⁿ blood from either mother or father. This brought in more enrolled members, and really was a disadvantage to the U.S. Government in its overall plan to eventually terminate Federal service to an Aboriginal Nation, Indian tribe or band. Yet there were several Natives who had applied for membership but did not qualify for enrollment. Although they were almost full-blooded, they did not have enough of one particular Indian tribe or Indigenous Nation. Today they hold no tribal affiliation with any tribe or nation that still uses the one-fourth Indian blood rule established by the BIA to qualify for Federal benefits. Many Indian children whose parents met and married at off-reservation inter-tribal boarding schools got left out of tribal per capita payments and even membership in a tribe due to being ineligible for enrollment.

Most Indian tribes and Aboriginal Nations have their own enrollment criteria for membership, but it used to be that the Umoⁿhoⁿ were the only sovereign having a blood roll.

4. Conclusion

The United States Government disrupted Indigenous cultures, “Rounding up the Injuns” in the 1800s and placing them on Reservations—in effect treating them as prisoners. This cruel and unusual punishment took away from them their food source, their lifestyles, religion, social life, and in its place subjected them to numerous diseases and mental/ emotional anguishes. Mathegtheboⁿ cat° (50 winter) or more of deteriorating physical health and grievous psychological injuries have created a populace overwhelmed with poverty, low self esteem, and depression that has resulted in escalating domestic violence and crime among juveniles.

The Umoⁿhoⁿ wonder why it must be that all Aboriginal Nations, Indian tribes, bands and groups share poverty and severe health problems. When an entire race of people living scattered in a land of plenty share low living standards, something major is wrong and must be corrected. The United States Government has kept Native people locked into a system that prevents them from exercising their sovereign rights in becoming self-sufficient.

The Maha believe that pursuant to the treaties it relinquished only its lands but none of its sovereignty and established a trust relationship with the government. The Maha believe that any action taken by Congress should have its consent before becoming law. Its right of sovereignty should always be protected, although it may not be in the best interest of outsiders.
The Maha believe they have respected the provisions of the treaties in good faith, but that the government through Congress and the federal courts continue to erode and violate the treaties due to pressure from the States and special interest groups.

In controlling a subjected but undefeated people, greed of any nature perpetuates disrespect and disregard for land, water, air, resources and well being of a society's citizens. The United States as a government is motivated by personal, corporate and political greed and lacks the morals, values, or spiritual insights required to develop a productive, peaceful society, where everyone respects the other and where money does not separate the people into classes.

Since the wa'xe came upon these shores nothing has gone right.

B. Winnebago Naturalization

The term naturalization to the Winnebago people means adoption of another people into their own. This meaning is centuries old. Most of the adoption was along clan lines. There are twelve clans among the Winnebago people, arranged into two divisions; the air family, and the earth family. The air family consists of the Thunder, Eagle, Hawk, and Pigeon. The Bear, Buffalo, Water Spirit, Wolf, Deer, Elk, Snake, and Fish make up the earth family.

Each clan had its own chiefs. Before contact with the Europeans, the Winnebago tribe was very large, consisting of 35,000 people. In those days each clan was subdivided into four. For example, the Bear Clan would have the Black Bear, Brown Bear, Grizzly Bear, and Black Bear with White Nose. Another example would be the White Headed Eagle, Brown Eagle, Black Eagle, and White Eagle.

The four sub-chiefs of a clan then appointed a head chief of that clan to participate in the Grand National Council which was composed of all twelve clans. The other thirty-six sub-chiefs sat in the smaller village council and heard matters concerning adoption, blood feuds, marriage, divorce, and other matters dealing with people in the community or village level. The Grand National Council only dealt with matters such as warfare, treaties with other nations, land issues, water issues, clan disputes, murder, and any other matters that concerned all the people on the national level. A Council usually preceded an important undertaking. The members of the Council did not vote on issues, but those present always presented their opinions in speeches. The smaller village council only appeared before the Grand National Council when their discussion on smaller issues became dead-locked and only the Grand National Council had the authority to deal with the issue. Their final say was law.

As a rule, the appointed head chief led the discussion. Sometimes they sat all night deliberating on some important matter, continuing for several nights until they decided the outcome of the case. The peo-
ple as a mass had very little influence on the council, and they never appeared before it until they were summoned, as the people had no voice in electing chiefs because these were hereditary positions. If a chief at his death had no heir, he appointed some other qualified member of his clan to succeed him as chief.

There were two types of adoption or naturalization into the Winnebago tribe. One was on the national level and one was on the clan or sub-clan level. Naturalization of a person of another people into the Winnebago tribe was a very serious matter. The earliest record dealing with naturalization on the national level comes from oral tradition. When the Winnebago people met the upper Mississippian people on the Rock River eleven hundred years ago they were enemies. After a series of battles they decided to call a truce and become allies. They did this by intermarrying with each other. The Grand National Council then made the marriage partner of a Winnebago male member a Winnebago, but in name only. They could never belong to one of the twelve clans and their sub-gens. But all offspring of the mating would become clan members of their fathers. A Winnebago woman marrying a Mississippian man would become a Mississippian member and her offspring would be members of his father's clan.

Before the Winnebagos became depopulated in 1640, naturalization or adoption into a clan or sub-clan was very common. This was different than when the Grand National Council adopted a large group of people into the tribe. At the clan level an adopted person could become a member of the clan. On the other hand, members of another Tribe adopted by the Grand National Council could never become clan members, only Winnebago in name. Of course, at the clan level there were certain requirements and tests that had to be met before a person could become a clan member. If a war-party brought back women and children from a raid, they were first taken to the lodge of the Hawk Clan Chief. He and his three sub-chiefs would then decide what to do with the prisoners.

The three sub-chiefs then sent word out through the village and surrounding villages that they had some prisoners who could be adopted if any family had lost members due to disease or battle and wanted them to take the place of their own dead. These tribal members would then come and tell the chief and his aids why they wanted the prisoners. The family who got one or two of the prisoners would then take them back to their own lodge and inform the sub-chief of their clan that they were going to have adoption ceremonies.

The medicine man of the sub-clan would perform the appropriate ceremonies and the prisoner would become a member of that household, but not a clan member. That would have to wait for a year. In the meantime the adopted member would learn the language, customs, and culture of his/her adopted people. If a male prisoner was
adopted and not killed, he would become a servant to his future wife for one year.

After learning what was required of them, the adopted prisoners would then go through clan ceremonies and become members of that family and clan, but they could never carry a clan name. Only clan members born into a clan could do so. Adopted, naturalized persons were now Winnebagos and had to obey the laws and customs of their new people.

After 1640, when the Winnebagos became depopulated because of disease and warfare, adoption ceremonies began to involve white Europeans. In 1670, the Grand National Council adopted the French trader, Nicolas Perrot, to be a member of the tribe. The family that wanted to adopt him was none other than Chief Thunder's own Thunder Clan. Nicolas Perrot received a Winnebago name and he learned the language and customs of his adopted people. His naturalization as a member of the Winnebago tribe was complete.

Because of the depopulation of the tribe, the original arrangements of the smaller village councils had ceased to exist. Only the larger Grand National Council functioned in its traditional manner, and they now began to hear village matters at council meetings. In 1729, Chief Hopoe-Kaw married Sabrevoir DeKarry, a French man. According to clan law he could have become a co-ruler or even chief of the tribe if he had wanted. He had learned the language and customs of his wife's people and he received a Winnebago name. But he knew that if he went through ceremonies he could never leave his wife's people. So he chose not to be adopted through ceremonies. He left the Chief in 1736, and moved back to Quebec, Canada.

Other French and Scots-Irish men were adopted into the tribe as the years passed. Many of these men became war-leaders because they had the culture and knowledge of two peoples. Other Indian people were still being adopted into the tribe up to the reservation period. They could now participate in clan ceremonies and dances. Many Lakota became inter-mixed with Winnebago people as would the Omaha later in the 1900s.

Then federal Indian law stepped in and said, "only we have the authority to decide who's Winnebago or not." As years went by, they returned this authority to the tribe, but by that time the Winnebagos had become acculturated. As a result, the Winnebago took for their own the federal rule of quarter-blood. One-quarter of Winnebago blood allowed enrollment. There were no longer tests or ceremonies of asking or promising. To be a Winnebago became a matter of a pedigree in a strange world.

A return to the old ways of adoption and naturalization would require that the Winnebago change the Constitution and code provisions currently in place. A choice in the matter is for the Winnebago people
and should not be controlled by federal interests. Skin color, race, and blood were not issues in the way of the Winnebago, but were forced upon them by the federal government. Nevertheless, blood and race are commonly used in Indian country all across the United States.

What does it mean to be a Winnebago and why would the federal government look to blood? Is it to limit the obligations of the government to the Winnebago? These obligations result in promises and some provision of health care, dental care, education, and trust land. Would a person seeking only these understand the Winnebago? The obligations also include a promise to protect Winnebago sovereignty. Is a racial difference required to command respect as a sovereign or does a racial criteria prohibit that respect? It is the Winnebago that now must look to the past and the future. We are a people, human beings, not a breed.

III. VAMPIRE LAW

The history of the "Indians" begins with the arrival of this person Columbus, but the history of the People goes back to the beginning of time. This predator, civilization, confuses us about our identity.\textsuperscript{129} John Trudell

A. The Origins of Federal Blood Law

The issue to be considered is whether or not the United States would recognize a person, without some Indian blood or descent, who is an adopted or naturalized member of an Indian nation as a member of that nation for purposes of federal laws distributing sovereign authority, jurisdiction. The foundational case is United States v. Rogers.\textsuperscript{131}

William S. Rogers was indicted in the Circuit Court of the United States for the District of Arkansas which geographically included at that time the Cherokee Nation. The charge was the murder of Jacob Nicholson. Both Rogers and Nicholson, white men and onetime citizens of the United States, had long before the acts in question become

\begin{itemize}
\item[129.] Trudell, supra note 1, at 2.
\item[130.] Grandchildren of one of the authors were born in Korea. They became kin/family when first held in the arms of the author's daughter and son-in-law. They were legally adopted under the laws of the State of Nebraska and thereafter naturalized under the laws of the United States. Indian nations prior to European contact did not generally make the distinction between the people and the state which is now fundamental to western thought. See Roberto Mangabeira Unger, Law in Modern Society 58-61 (1976). Consequently, what many would call naturalization Indian people often call adoption. See John Phillip Reid, A Law of Blood, 191-200 (1970); Russel Lawrence Barsh, The Challenge of Indigenous Self-Determination, 26 U. Mich. J.L. Reform 277, 297 (1993) ("What makes a political system "tribal?" By definition, it is one that is based on kinship.").
\item[131.] 45 U.S. (4 How.) 567 (1846).
\end{itemize}
by marriage adopted members of the Cherokee and entitled to all
rights and privileges under the nation's laws. Both were domiciled in
Indian country where the acts took place.\textsuperscript{132}

Federal authority came under the act of Congress on the 30th of
June, 1834, entitled, "An act to regulate trade and intercourse with
the Indian tribes, and to preserve the peace of the frontiers."\textsuperscript{133} A
provision to the twenty-fifth section of the act stated that the section
"shall not extend to crimes committed by one Indian against the per-
son or property of another Indian."\textsuperscript{134} Rogers put in a plea to the in-
dictment arguing against jurisdiction and the Circuit Court, being
divided, certified the record to the Supreme Court.

Were Rogers and Nicholson Indians? Chief Justice Taney au-
thored the opinion of the Court: "Whatever obligations the prisoner
may have taken upon himself by becoming a Cherokee by adoption,
his responsibility to the laws of the United States remained un-
changed and undiminished. He was still a white man, of the white
race, and therefore not within the exception in the act of Congress."\textsuperscript{135}

Every lawyer knows that law is, as is the world, a mixture of idea
and fact. Some legal concepts, "Indian" (perhaps), seem to denote an
existential reality and connote legal relations. Other legal concepts,
"Indian" (perhaps), seem to denote jural rights, duties, powers, or lia-
bilities, while carrying a connotation of the usual factual circum-
stances.\textsuperscript{136} Legal thought understands, as did Chief Justice Taney,
that the question is never, "Is Joshua an Indian?" Rather the proper
question is, "Whether or not Joshua is an Indian for the purpose of a
principle, rule, goal, or policy recognized by the law." The law reflects
both purposive ordering and the reality of existing chaos. What pur-
posive vision appears in the Taney opinion? And what values inform
that purpose?

The circuit court had certified three questions to the Court. First,
could a citizen of the United States expatriate himself without some
kind of form or condition imposed by the federal government? Second,
could the Cherokee Nation or other Indian nations exercise the sover-
eign power to naturalize citizens of other nations and to make them
exclusively citizens of the Indian nation? Third, does the provision
apply only to "natives of the Indian tribes of full blood or also to Indi-
ans (natives), or others adopted by, and permanently resident within,

\textsuperscript{132} Id. at 567-71.
\textsuperscript{133} Id. at 572.
\textsuperscript{134} Id. The statutory authority originated in the Trade and Intercourse Act of 1790.
The current statute is the Indian Country Crimes Act or, as it is also known, the
The actual statute at issue here was 4 Stat. 733 (1834).
\textsuperscript{135} Id. at 573.
\textsuperscript{136} See JOHN C.H. WU, CASES AND MATERIALS ON JURISPRUDENCE 554 (1958).
the Indian tribes” or also to “progeny of Indians by whites or by negroes, or of whites or negroes by Indians, born or permanently resident within the Indian tribes and limits,” or also to “whites or free negroes born and permanently resident in the tribes, or to negroes owned as slaves, and resident within the Indian tribes, whether procured by purchase, or there born the property of Indians?”

Chief Justice Taney began by stating that “native tribes” had never been treated as independent nations. Following the lead of Chief Justice Marshall, he noted the uselessness of raising any questions of justice, and at any rate:

[F]rom the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.

He next asserted the power of Congress to make law for Cherokee country that would be applicable to any person, and then turned to the provision in question finding it clear that a white man adopted at mature age did not come within the Indian against Indian crime exception. The Chief Justice said that such a person may by adoption become a member of the Cherokee subject to their laws and usage, but the federal statute spoke of Indians. “Yet he is not an Indian; and the


138. Id. at 572. Here Chief Justice Taney built upon the Marshall Trilogy: Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). These cases were and remain part of the foundation of federal Indian law.

In Worcester, Marshall recognized that treaties with the Cherokee Nation honored the Cherokee right to self-government and that laws of the state of Georgia claiming authority within the Cherokee Nation violated the power (plenary power) of the federal government to be the exclusive entity to interfere with Indian nations. See id. at 555.

Cherokee Nation named Indian sovereign status to be that of “domestic dependent nations,” id. at 17, distinct from other foreign states, and characterized the relation (the trust relation) of Indian nations and the United States as “a ward to his guardian.” Id. Marshall also imagined the legal assertion of a right and prayer for just treatment by an Indian nation: “their appeal was to the tomahawk.” Id. at 18.

Johnson recognized the sovereign nature of Indian nations and their capacity to engage in treaties, but assigned them an inferior status due to the “actual state of things,” id. at 590, and their character as “fierce savages.” Id. at 589. The “discovery doctrine” also stems from Johnson. By this doctrine the first European “discovery” gave legal title to all the land to the discovering European nation subject to an Indian “title of occupancy” which could only be transferred to the European discoverer. See id. at 563-593.

exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians . . .”

Chief Justice Taney then moved beyond the statutory language and argued that peace would be difficult to preserve if white men of every description might “at pleasure settle among [the Cherokee], and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States.” Yet adoption or naturalization was in the arena of Cherokee law and no one could become a Cherokee citizen without its authority. And, the Cherokee had an effective police and judicial system. Perhaps, of most importance was Chief Justice Taney’s final axiological, value driven argument: Congress could not have intended to grant exemption from federal criminal jurisdiction “to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.”

The proviso then did not apply to Rogers and Nicholson. Indian nations, domestic dependent sovereigns by federal legal ascription, were spoken of only as native tribes. Indians, the justice of federal relations put aside, were an unfortunate race now under the care of the United States who would enlighten their minds and save them from the consequences of vice. Federal law, at least the statute here, did not use “Indian” as a short hand for many nations, but as a racial classification. The “tribes” could not control their own internal affairs with the needed skill, particularly if they were so stupid as to allow a white man to live among them. Finally, any white man who would leave his nation and his race must be a degenerate.

But, did not the Cherokee have a treaty with the United States that promised to honor and protect their independence?

The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or

140. Rogers, 45 U.S. (4 How.) at 572-73.
141. Id. at 573.
142. See Karen M. Woods, A “Wicked and Mischievous Connection”: The Origins of Indian-White Miscegenation Law, 23 LEGAL STUD. F. 37, 61-68 (1999). Woods describes the long concern of the Cherokee about intermarriage and Cherokee citizenship. For instance, “Socrates” wrote in an 1828 article for the Cherokee Phoenix that stricter laws were needed to exclude the thief, robber, vagabond, tippler, and adulterer from the privilege of intermarrying with Cherokee women. The Cherokee Nation took to the idea and heavily regulated the matter. The Cherokee also strictly prohibited Cherokee-black marriages, allowing only one narrow exception, and, along with the Catawbas, turned against blacks in an effort to seek succor of their white neighbors. Id.
144. Rogers, 45 U.S. (4 How.) at 573.
Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.145

Chief Justice Taney might have concluded that the treaty and its particular promises to the Cherokee, “their people, or such persons as have connected themselves with them,” controlled the general language of the Trade and Intercourse Act of 1834. However, Chief Justice Taney did not imagine nations, but rather races. He thus read the treaty stipulation that Cherokee law not be inconsistent with federal law as indicating that the treaty was not intended to alter any part of the act passed just a few months earlier. Yet, he did not specify what would be inconsistent.

It would have seemed an honorable and coherent notion to protect Cherokee sovereignty by reading the treaty and statute as recognizing Cherokee jurisdiction over their people, as defined by the Cherokee Nation. And, it would have been consistent with federal policy to do so. Certainly it would have been consistent with federal policy to encourage Indian nations that adopted ever more European legal forms. Inconsistency must have arisen in the imagination of race. “He was still a white man, of the white race . . . .”147

The circuit court’s first question was not race-based and the Supreme Court did not offer any answer relating to rights of expatriation. The circuit court’s second question was not answered regarding exclusive citizenship in the naturalizing nation, and the idea of dual citizenship was not considered.148 Rogers could be a Cherokee for Cherokee purposes, but federal law would only see his citizenship in the United States, which was presumed without arguments to continue. As to the many who is an Indian issues, the Supreme Court’s response to the Circuit Court’s third question only made clear that for federal purposes race was going to be the determinant.

146. Rogers, 45 U.S. (4 How.) at 573.
147. Id.
"Indians and Whites do not exist . . . . Indian and White represent fabled creatures, born as one in the minds of seventeenth- and eighteenth-century European thinkers trying to make sense of the modern experience . . . ."149 There is not a White nation nor any Indian nation, though there is Greenland and India. There are today more than 556 Indigenous nations recognized by the United States.150 And, although "courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership,"151 every instance of federal law distributing jurisdictional sovereign authority includes a question of racial criteria for those to whom it applies. The Rogers case is not an isolated and narrow manifestation of federal Indian law, but rather a fourth pillar which with the Marshall Trilogy152 is the base of current understanding.

One year after the Rogers decision, the Circuit Court for the District of Arkansas was again faced with a jurisdictional question involving an adopted Cherokee in United States v. Ragsdale.153 Thomas Ragsdale, a Cherokee Indian, was indicted for the murder of Richard Newland, a white man who became a Cherokee by marriage to a Cherokee woman in 1835. When the Cherokee were removed from the Mississippi area in 1835, Newland was removed with them and continued to be recognized as a Cherokee at the time of the alleged murder. Ragsdale entered a plea of not guilty and an issue of a prior pardon under the second article of the Treaty of Washington concluded with the Cherokee on August 6, 1846.154

All difficulties and differences heretofore existing between the several parties of the Cherokee nation are hereby settled and adjusted, and shall, as far as possible, be forgotten and forever buried in oblivion. All party distinctions shall cease, except so far as they may be necessary to carry out this convention or treaty. A general amnesty is hereby declared. All offences and crimes committed by a citizen or citizens of the Cherokee nation against the nation, or against an individual or individuals, are hereby pardoned.155

The issue was whether both Ragsdale and Newland were Cherokee for the purpose of the pardon provision of the treaty. District Judge Johnson started off with reference to Rogers, but he had a focus that recognized the sovereign, even if diminished, status of the Cherokee. They were dependent nations and always had the power to adopt

151. HANDBOOK, supra note 5, at 20.
152. See cases cited supra note 138.
153. 27 F. Cas. 684 (C.C.D. Ark. 1847) (No. 16,113).
154. Id. at 685.
others as members. And, Judge Johnson quoted language in *Rogers* as expressly affirming such power in the Cherokee.\(^{156}\)

Chief Justice Taney had said that a white man may become a member of an Indigenous nation, but they were not “Indian” for purposes of the exception to federal criminal jurisdiction. Judge Johnson did not miss the distinction. He looked to the purpose and language of the treaty pardon provision which referred not to “Indian” but to “citizen or citizens of the Cherokee Nation.”\(^{157}\) One of the treaty purposes was to restore peace among hostile factions of the Cherokee and to bury past differences in oblivion. Thus he concluded:

In this plenary pardon to all native born Cherokees, why should it not also extend to adopted members of the tribe? After adoption they became members of the community, subject to all the burdens, and entitled to all the immunities of native born citizens or subjects; and it is reasonable, in my judgment, to suppose that they were intended to be included in the general amnesty.\(^{158}\)

It would be fifty years before another issue of a naturalized or adopted non-racial citizen of an Indigenous nation came before the Supreme Court in a matter of Indian nation or United States jurisdiction. However, two cases of “Indian” identity and jurisdiction in the early 1890s should be noted. First, *In re Mayfield*\(^{159}\) held that an adultery prosecution against a Cherokee defendant was a proceeding in which a Cherokee was the “sole party” and that Cherokee courts consequently had exclusive jurisdiction.

John Mayfield was convicted of adultery with a white woman under a federal statute. Mayfield claimed to be a Cherokee by blood and the prosecution stipulated that he was one-fourth Indian by blood, and a citizen of the Cherokee tribe of Indians. Mr. Justice Brown held for the Court that Mayfield was a member of the Cherokee Nation, “by adoption, if not by nativity.”\(^{160}\) Consequently, statute and treaty provisions gave exclusive jurisdiction to the Cherokee.

An 1890 act of Congress for the Territory of Oklahoma provided in its thirtieth and thirty-first sections that Indian nations or “the civilized nations” should have exclusive jurisdiction where “members of the nation by nativity or adoption shall be the only parties,”\(^{161}\) or “wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties.”\(^{162}\) These statutes confirmed for the Court the continuing force of an earlier treaty with the Cherokee in 1866

\(^{156}\) United States v. Ragsdale, 27 F. Cas. 684, 685-86 (C.C.D. Ark. 1847) (No. 16,113).

\(^{157}\) Treaty with the Cherokees, Aug. 6, 1846, art. 2, 9 Stat. 871, 872.

\(^{158}\) Ragsdale, 27 F. Cas. at 686.

\(^{159}\) 141 U.S. 107 (1891).

\(^{160}\) Id. at 116.

\(^{161}\) Id. at 115 (quoting Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94 (codified at 18 U.S.C. § 1152 (1994))).

\(^{162}\) Id. at 26 (quoting Act of May 2, 1890, ch. 180, § 31, 26 Stat. 81, 94).
which promised that Cherokee Courts would be the single jurisdiction for cases where the only parties are "members of the nation, by nativity or adoption."\footnote{163}

The Court did not explain why Mayfield was the sole party. However, it did note in reference to another treaty provision that the person with whom the adultery was claimed to have been committed was not adverse, but consenting. Further, the case was not brought by Mayfield's wife if the crime of adultery could be considered as against her.\footnote{164}

The second case, \textit{Famous Smith v. United States},\footnote{165} involved the Indian against Indian crime exception to federal jurisdiction. Famous Smith, convicted of murder, was an undisputed Cherokee. The question focused on his victim, Kajo Gentry. The trial judge had instructed the jury that they must find that Gentry was "a white man"; meaning by this a "jurisdictional citizen of the United States." That if he were, notwithstanding the defendant was an Indian, the court still had jurisdiction.\footnote{166}

The facts showed Gentry's father to have been "either of Cherokee blood or mixed Creek and Cherokee."\footnote{167} He was "recognized as an Indian," and was enrolled, and participated in the payment of "bread money" to the Cherokees.\footnote{168} The prosecution offered that Gentry had been denied participation in a Cherokee election, had lived for some time in Arkansas, and had come to the Cherokee Nation by way of the Choctaw Nation. The prosecution's theory was that Gentry had severed his relation with the Cherokee.\footnote{169}

Mr. Justice Brown held for the Court that the prosecution must prove Gentry was, "a white man and not an Indian," and concluded that the prosecution's evidence failed to do so.\footnote{170} The conviction was set aside.

\footnote{163}{Treaty with the Cherokee Indians, July 19, 1866, art. 13, 14 Stat. 799, 803. In 1854 Congress put the final touches on what is today the Indian Country Crimes Act, 18 U.S.C. \S\ 1152 (1994). Of importance here it added a provision exempting from federal jurisdiction, "any case where, by treaty stipulations, the exclusive jurisdiction over such offenses [is or] may . . . be secured to . . . [the] Indian tribes, respectively." Act of Mar. 27, 1854, ch. 28, \S\ 3, 10 Stat. 269, 270. \textit{See generally HANDBOOK, supra note 5, at 287-300 (describing 18 U.S.C. \S\ 1152 (1994)).}

\footnote{164}{In re Mayfield, 141 U.S. 107, 113 (1891); \textit{cf.} United States v. Quiver, 241 U.S. 602 (1916) (holding relations of Indians among themselves only controlled by Congress when clearly expressed).

\footnote{165}{151 U.S. 50 (1894).}

\footnote{166}{Id. at 54.}

\footnote{167}{Id.}

\footnote{168}{Id.}

\footnote{169}{Id.}

\footnote{170}{Id. at 55. The disallowed vote was due to a residency requirement in the particular Cherokee voting district and living for a while in Arkansas did not by itself establish abandonment of Cherokee citizenship.}
Mayfield and Famous Smith did not involve non-racial members of Indigenous nations, but they do indicate some change and some continuity in the problem of who is an “Indian” for jurisdictional purposes. Federal statutes dealing with a particular territory had jurisdictional rules phrased in terms of members by nativity or adoption. Treaties, always nation to nation, also referred to citizens or members. Consequently, the argument that “Indian” in a general jurisdictional statute means race, not nationality, might sometimes be avoided. And, no question was raised against a naturalized (perhaps) member that was a racial “Indian.” However, since 1871 treaty relations have been prohibited with Indian nations. Consequently, the opportunity to secure jurisdiction for all Indigenous nation citizens by treaty is no longer available.

The Courts continued to look at “Indian” as the opposite of a “white man.” Although the Supreme Court in Famous Smith found that the United States had not met its burden of proof, it was not bothered by the trial court’s or its reference to a jurisdictional citizen of the United States as “a white man.” Little had changed from the pre-civil war role of race in Rogers. Those owing allegiance to or receiving protection from the federal or Native sovereigns were racial phantoms rather than flesh and blood political actors.

From 1895 to 1897, four cases came before the Supreme Court with jurisdictional issues involving adopted or naturalized, but non-racial members of Indian nations. In Westmoreland v. United States, Thomas Westmoreland was convicted of the murder of Robert Green. The only records before the Court were the indictment, the judgement, and the motion in arrest thereof. The indictment described Westmoreland and Green as “white person[s] and not... Indian[s], nor... citizen[s] of the Indian Territory.” The events took place within the Chickasaw Nation and the trial was in the Circuit Court of the United States for the Eastern District of Texas.

The defendant argued the Indian against Indian exception to federal jurisdiction. Mr. Justice Brewer began with the Rogers holding that “Indian” is a racial term for purposes of the Indian against Indian exception. But, Westmoreland had one more card to play. The Treaty of 1866 with the Choctaws and Chickasaws provided that:

Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punish-

172. 155 U.S. 545 (1895).
173. Id. at 546.
Consequently, Westmoreland claimed that the indictment should have negated the possibility of membership by marriage or adoption to avoid the treaty exclusivity provision that was now in the Federal jurisdictional statute: "This section shall not extend to . . . any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."175

The Court held that the indictment was sufficient to negate all possible citizenships in the Chickasaw Nation. It had charged that Westmoreland was a "white person, and not an Indian, nor a citizen of the Indian Territory." As a result, the sufficiency of the indictment being the only issue, the conviction was affirmed.176

In Alberty v. United States,177 Alberty had been convicted in federal court for the murder of Phil Duncan, an illegitimate child of a Choctaw Indian and a Negro woman who was at the time of Duncan's birth a slave in the Cherokee Nation. The Court determined that Duncan was, "a colored citizen of the United States."178 Alberty would also seem to have been a Negro; however, by a treaty provision Alberty was a citizen of the Cherokee Nation.179 Justice Brown started with the now well settled notion that Alberty, although Cherokee, was not Indian.180

The 1866 treaty also had a jurisdictional provision that gave the Cherokee exclusive jurisdiction in all cases where "members of the nation, by nativity or adoption, shall be the only parties."181 And, the most recent legislation to provide for the Territory of Oklahoma contained a similar promise of exclusive Cherokee jurisdiction where "members of said Nations, whether by treaty, blood, or adoption are the sole parties."182

The Court concluded that the "sole" or "only parties" language referred to the actual people involved in the crime.183 Justice Brown

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175. Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94 (codified at 18 U.S.C. § 1152 (1994)); Act of Mar. 27, 1854, ch. 26, 10 Stat. 269; see also In re Mayfield, 141 U.S. 107 (1891) (granting writ of habeas corpus because petitioner was amenable only to the courts of the Cherokee Nation).
177. 162 U.S. 499 (1896).
178. Id. at 501.
179. The Treaty with the Cherokee Indians, July 19, 1866, art. 9, 14 Stat. 799, 801, provided that all freedmen who were at the time residents of the Cherokee Nation would have all rights of native Cherokees.
182. Act of May 2, 1890, ch. 182, § 31, 26 Stat. 81, 96.
183. Alberty, 162 U.S. at 504-05.
attempted to distinguish *In re Mayfield* as being a case where there was no adverse party due to the consent of the woman to the charged adultery.\(^{184}\) As a result, federal jurisdiction was upheld, but Alberty's conviction was overturned due to errors in the trial court's instructions regarding self-defense and flight.\(^{185}\)

A little more than a month after *Alberty*, the Court decided *Lucas v. United States*.\(^{186}\) Lucas, a Choctaw, was convicted in federal court for the murder of Levy Kemp, who was alleged in the indictment to have been "a negro and not an Indian."\(^{187}\) An 1866 treaty with the Choctaw provided in article three that the Choctaw would receive a sum of $300,000 for cession of territory to the United States conditional upon the Choctaw giving residents of African descent full citizenship in the nation.\(^{188}\) In 1883, the legislature of the Choctaw Nation adopted its freedmen as citizens.\(^{189}\) The same statute for the Territory of Oklahoma at issue in *Alberty* was applicable here, and the issue for the Court was whether the only parties were members of the Choctaw Nation by nativity or adoption.

Justice Shiras found that the trial court had instructed the jury to presume that Kemp, a Negro, was not a member of the Choctaw.\(^{190}\) The Court found this error, as the question should have been one of fact for the jury without any presumption.\(^{191}\) Along the way it was noted that *Rogers* was easily distinguished since in that case, "there was no statute in terms extending jurisdiction of the Indian courts in civil and criminal cases over their adopted citizens."\(^{192}\) *Westmoreland* was never mentioned.

In January of 1897, the Court issued its opinion in *Nofire v. United States*.\(^{193}\) Nofire and others, "full-blooded Cherokee Indians,"\(^{194}\) were convicted in the federal court and sentenced to hang for the murder of Fred Rutherford. The indictment charged that Rutherford was "a white man and not an Indian."\(^{195}\) However, evidence was offered to prove that he was an adopted member of the Cherokee Nation by mar-

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184. Id. at 504.
185. Id. at 510-11.
186. 163 U.S. 612 (1896).
187. Id. at 612.
188. Treaty with the Choctaws and Chickasaws, Apr. 28, 1866, art. 3, 14 Stat. 769, 769.
190. Id. at 615-16.
191. Id. at 617.
192. Id. at 616. Actually *Rogers* itself would seem to recognize that Indian institutions would have authority over adopted members. Rather, it was a statutory exception to federal jurisdiction for adopted non-racial citizens that distinguished the cases.
193. 164 U.S. 657 (1897).
194. Id. at 658.
195. Id.
riage. The federal jurisdictional law was the same as in Albery, i.e., specific treaty and statutory provisions promised that the Cherokee courts would have exclusive jurisdiction when all parties were members of the nation, by birth or adoption.

The jurisdictional issue being clear, the only question before the Court was the sufficiency of the evidence regarding Rutherford's marriage. The Court reversed the trial court and found that the facts established Rutherford's marriage in accord with Cherokee law and thereby his membership in the nation. The case was remanded with instructions to surrender the defendants to the authorities of the Cherokee Nation.

Nofire is the last Supreme Court case dealing with jurisdictional authority over naturalized or adopted non-racial citizens or members of an Indian nation. And, it might seem that it signals a recognition that such a person would be treated by federal law as an "Indian" for jurisdictional purposes. However, the cases just considered make it clear that "Indian" in federal criminal jurisdiction statutes remained a racial term. Adopted or naturalized non-racial members of Indigenous nations would be recognized by federal law only when a treaty and/or statute specifically referred to citizens or members of the nation by blood or adoption. Today such treaty provisions are forbidden and relevant primarily as history; only indirectly offering insight to jurisdiction matters.

196. Id. The opinion details the constitutional and statutory law of the Cherokee that controlled citizenship and marriage.

197. Id.

198. Id. at 659-62. Raymond v. Raymond, 83 F. 721 (8th Cir. 1897), applied the same Cherokee treaty and specific statutory jurisdictional provisions to a civil case, finding that only Cherokee courts had jurisdiction in a divorce involving a non-racial adopted Cherokee. See generally Cyr v. Walker, 116 P. 931 (Okla. 1911) (recognizing divorce by law of the Pottawatomie Nation as to non-racial naturalized Pottawatomie and non-Indian wife).

199. This argument is made in Robert N. Clinton, Criminal Jurisdiction Over Indian Land: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503, 516 n.60 (1976).

B. The Rogers Legacy—Racial Jurisdiction

Chief Justice Taney's opinion in United States v. Rogers201 remains a vital part of current federal Indian law. With the Congressional decision to end treaty relations with the Indian nations in 1871, any opportunity for treaties referencing "citizens"202 of the particular Indian nation or promising exclusive Indian jurisdiction in cases where all parties are "members . . . by nativity or adoption,"203 was ended. Today jurisdictional questions turn on "Indian" in the criminal jurisdiction statutes and that term is understood as it was by Chief Justice Taney: "It does not speak of members of a tribe, but of the race generally."204

1. Federal Criminal Cases

Federal courts begin with a citation to Rogers, usually stating a version of the following: "[T]he term 'Indian' has not been statutorily defined but instead has been judicially explicated over the years. The test, first suggested in United States v. Rogers and generally followed by the courts, considers (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian."205

The "Indian" test then contains two questions: (1) how much blood; and (2) what counts as tribal or government recognition? The focus in this Article is on naturalization and blood, or descent, but it is necessary to look briefly at the second issue—recognition. The Supreme Court tells us:

[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "racial" group consisting of "Indians . . . ." Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe.206

201. 45 U.S. (4 How.) 567 (1846).
202. See Ragsdale, 27 F. Cas. at 685.
205. United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996) (citation omitted) (quoting United States v. Broncheau, 597 F.2d 1260, 1283 (9th Cir.), cert. denied, 444 U.S. 859 (1979)).
Experience would give truth to these words if jurisdictional laws distinguishing "Indians" from others looked to the law of the Indigenous peoples' political institutions. However, the Court in a footnote to the quoted passage reminds us that enrolled membership is not a requirement.207

Two recent federal cases use the Rogers test, blood and recognition, to determine whether a child victim of abuse by a non-Indian defendant was an "Indian" for the purpose of jurisdiction under the Indian Country Crimes Act.208 In United States v. Lawrence, the Eighth Circuit found the child victim not to be an "Indian" and affirmed a dismissal of the indictment.209 The victim was an "11/128ths Oglala Sioux Indian," and the district court had presumed that to be within the "requisite quantum of Indian blood."210 However, the victim failed the recognition test: (1) enrollment, (2) federal government recognition formally or informally through assistance reserved only for Indians, (3) enjoyment of benefits of tribal affiliation, or (4) social recognition via residence and participation in Indian social life.211 The child was not enrolled, and eligible for enrollment only after completing a one-year residency. Yet, the Oglala had intervened through their courts to rescue the child from abandonment in Las Vegas, made her a ward of the Oglala court, and placed her in the custody of her Oglala grandmother. The court concluded that there was not sufficient recognition.212

In United States v. Keys, the child victim was the daughter of an enrolled member of the Colorado River Indian tribe who was "one-half Indian blood," while the defendant father was "African-American."213 The conviction was upheld despite the defendant's argument that since the victim was not enrolled, a finding that she was "Indian" would be based on race and in violation of the Equal Protection Clause.

The Keys court used the Rogers test, the issue being the second part thereof, recognition:

Enrollment is not the only means to establish membership in a tribal political entity. Here, the daughter's "Indian" status is based on the recognition by

207. Antelope, 430 U.S. at 646 n.7.
208. The Indian Country Crimes Act, 18 U.S.C. § 1152 (1994) (also known as the General Crimes Act, the Federal Enclaves Act, and the Interracial Crime Act) was in early versions involved in all the foundational cases. It requires that either the defendant or the victim be "Indian" and that the other not be. Id. See generally United States v. Prentiss, 206 F.3d 960, 966 nn.3-4 (10th Cir. 2000) (stating that "interracial" is technically inaccurate, the better term being "inter-sovereign").
209. 51 F.3d 150 (8th Cir. 1995).
210. Id. at 152.
211. Id. at 152-54.
212. See id.
213. 103 F.3d 758, 759 (9th Cir. 1996). There is not any notation of the father's quantum of "African" blood or "American" blood.
tribal institutions of her membership in the tribe. Her classification as an "Indian" is not race-based and, consequently, Keys' prosecution under §1152 does not violate the Equal Protection Clause. \(^{214}\)

In *Keys*, the tribal recognition was established by the mother's calls to Tribal Social Services, treatment of the child by Indian Health Services, and the filing of a "child in need of care" petition in tribal court. \(^{215}\)

Though sharing contrary results, *Lawrence* and *Keys* are recent examples of the continuing use of *Rogers* to determine "Indian" status. \(^{216}\) The issue here is the federal law's focus on blood, but the recognition factor is also telling. Blood and enrollment end the matter, but what of the idea that recognition may be found without enrollment? Native nations all have some law determining membership in the polity. If "Indian" status is political, how can the law of Native nations be supplanted by a federal court's view of "recognition"? If the political lens looks to the actions of the United States, why should federal action towards a person be determinative of that person's status in another nation for purposes of jurisdiction?

2. *State Criminal Cases*

The federal criminal jurisdiction statutes deny states jurisdiction in matters where they are applicable, and state convictions have been challenged for jurisdiction in both federal \(^{217}\) and state courts. State cases also employ the *Rogers* definition of "Indian." In *State ex rel. Poll v. Montana Ninth Judicial District Court*, \(^{218}\) the Montana Supreme Court dealt with a situation that was close, but distinct from the old cases. One of the defendants, Don Juneau, was born of non-Indian parents. However, under the law of Montana he was legally adopted by a member of the Blackfeet Nation, Benton Juneau, and he lived and worked all of his life in the Blackfeet Nation. He attended Indian schools, practiced Indian religion, participated in Blackfeet culture, married a member of the Rocky Boy Nation, had Indian friends, and had Indian children. He was not enrolled, did not vote in Blackfeet elections, did not hold any Blackfeet office, and did not receive any federal benefits. \(^{219}\)

\(^{214}\) *Id.* at 761.

\(^{215}\) *Id.* at 760.

\(^{216}\) See United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); United States v. Lossiah, 537 F.2d 1250, 1251 (4th Cir. 1976).

\(^{217}\) See *Ex parte Pero*, 99 F.2d 28 (7th Cir. 1938) (granting federal habeas to Indians convicted in Wisconsin courts when Major Crimes Act, 18 U.S.C. § 548, was applicable).

\(^{218}\) 851 P.2d 405 (Mont. 1993).

\(^{219}\) *Id.* at 407.
The Montana court cited Rogers and found that Don Juneau failed both prongs of the “Indian” test; he did not have significant Indian blood and did not have tribal or federal recognition. Thus, Montana had jurisdiction.\(^{220}\)

The case is particularly interesting for several reasons. First, there are no cases in the criminal jurisdiction context raising an issue of a naturalized non-racial member of an Indian nation after the 1897 case of Nofire v. United States.\(^{221}\) Poll\(^{222}\) concerned an adopted child, but by the late twentieth century Indigenous culture made the European distinction between adoption and naturalization,\(^{223}\) and Don Juneau had not been naturalized by the Blackfeet. Of course, that raises questions of whether that was either possible or desirable.

Second, a concurring and dissenting opinion by Justice Trieweiler agreed that the defendant failed the Rogers test, but argued that the test was “antiquated” and failed to realize that “an inherent element of tribal sovereignty is to enroll members, regardless of their degree of Indian ancestry.”\(^{224}\) Then, Justice Trieweiler argued that a proper analysis in the case would have looked to federal preemption and a balancing of federal, tribal, and state interests. The crimes involved gambling offenses on the Blackfeet Nation’s land and consequently federal law and tribal interests should have prevailed to deny state jurisdiction.\(^{225}\)

The state cases rather uniformly use the Rogers test of “Indian” for criminal jurisdiction.\(^{226}\) Yet, as in Poll, a judge sometimes questions its appropriateness. In Vialpando v. State, the Wyoming Supreme Court affirmed the conviction of Dennis Vialpando, holding that one-eighth Indian blood is not a “substantial amount of Indian blood” and that he did not have “a racial status in fact as an Indian.” Vialpando was “by blood one-eighth Shoshone Indian”; not an enrolled member; had been treated at the Bureau of Indian Affairs hospital; lived in the Shoshone Nation for many years; hunted under an Indian

\(^{220}\) Id. at 407-08. The Montana courts had earlier adopted the Rogers test. See State v. La Pier, 750 P.2d 383 (Mont. 1990).

\(^{221}\) 164 U.S. 657 (1897).

\(^{222}\) 851 P.2d 405 (Mont. 1993).

\(^{223}\) See id. at 407; see also In re Nelson, 327 N.Y.S.2d 774 (1972) (holding that adoption is not naturalization as a member of an Indian nation).

\(^{224}\) Poll, 851 P.2d at 410 (Trieweiler, J., concurring in part and dissenting in part).

\(^{225}\) Id. at 411-15.


\(^{227}\) 640 P.2d 77, 80 (Wyo. 1982). The “racial status in fact” language comes from Ex parte Pero, 99 P.2d 28 (7th Cir. 1938), and is used as the recognition part of the Rogers test.
permit; attended Shoshone cultural events; and had suffered racial discrimination as an Indian.\footnote{Vialpando, 640 P.2d at 81.} He failed the Rogers test.

In another less than sanguine acceptance of race based status, Justice Rooney concurred that Vialpando was not “Indian” for jurisdictional purposes.\footnote{Id. (Rooney, J., concurring).} Nevertheless, Justice Rooney said, “racism is an improper factor upon which to resolve matters such as this. Indian sovereignty would be a more satisfactory basis. . . .”\footnote{Id.} However, Justice Rooney also thought Indian sovereignty was “only a facade which hides the true status of Indians.”\footnote{Id.} Justice Rooney’s views of Indian sovereignty notwithstanding, he believed that tribal sovereignty did provide that a tribe could determine its own nationals. Consequently, as the Shoshone had not enrolled the defendant and he was not eligible for enrollment, the state conviction was permissible.\footnote{Id. at 82-83.}

C. The Disappearance of the Non-Racial Naturalized Indian

Although the law of United States v. Rogers\footnote{45 U.S. (4 How.) 567 (1846).} remains a vital part of federal Indian law, the factual circumstance of adopted or naturalized non-racial citizens of Indian nations has disappeared from reported cases and perhaps no longer exists. There is little, if any, scholarly writing devoted to the phenomenon, but a few recent works discuss the federal role in Indian identification. M. Annette Jaimes argues that it is an inherent element of sovereignty to determine a nation’s citizenry or membership and that federal policy defining Indigenous nation membership by “blood quantum” or “degree of Indian blood” is “racist” and has “genocidal implications.”\footnote{See M. Annette Jaimes, Federal Indian Identification Policy, in The State of Native America 123, 126, 133, 136 (M. Annette Jaimes ed., 1992); cf. Russell Thornton, American Indian Holocaust and Survival: A Population History Since 1942, at 186-224 (1987) (discussing the role of census population definitions in counting Indians).} Ward Churchill has described federal definitions of membership, foisted upon and adopted by Indian nations, as the “most advanced and refined iteration of imperialism.”\footnote{Churchill, supra note 17, at 40.} Both Jaimes and Churchill refer to the 1887 General Allotment Act as a crucial moment in the implementation of federal Indian identity policy.\footnote{Id. at 50; Jaimes, supra note 234, at 126.}

The General Allotment Act parceled out land in severalty to individual Indians.\footnote{General Allotment Act, Feb. 8, 1882, ch. 119, 24 Stat. 388.} The congressional reformers hoped to assimilate
Indians into a small agrarian culture by having them become landowners and by associating with new non-Indian neighbors who would be allowed to homestead on unallotted land. A similar program was later applied to the Indian nations of Oklahoma. Justice Scalia has said, "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into society at large." The foundation of allotment was the production of formal rolls listing the members of each nation that would be eligible for an allotment of land. The federal agent sent to each Indian nation was responsible for these rolls and they relied heavily on blood-quantum. Not less than one-half degree of blood was a typical standard and rarely did the standard slip below quarter-blood. Blood also was used to expand or contract the restrictions on the land allotted, with the preferences to those of less Indian blood.

By the first years of the twentieth century, Indian nations had their polity determined by federal administration. Moreover, blood had been made an engine of destruction turning Indigenous citizens against each other. Today blood is a membership requirement in many Indian nations. The Indian Reorganization Act of 1934 ended the allotment policy and provided for the establishment of federally approved tribal governments with constitutions and bylaws drafted by federal lawyers. The Indian Reorganization Act of 1934 also focused on blood and descent:

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

240. See Churchill, supra note 17, at 50; Jaimes, supra note 234, at 126.
241. In a letter from Mr. Duane T. Bird Bear, Chief, Division of Tribal Government Services, Office of Tribal Services, Bureau of Indian Affairs (June 18, 1999) to John R. Snowden, Professor of Law, University of Nebraska, Mr. Bird Bear stated that the BIA does not keep a table or chart of tribal membership criteria. However, he reported that in 1991 a partial listing of 155 tribes (excluding Alaska, California, and Oklahoma) indicated that 97 tribes had a one-fourth degree requirement, 16 had one-half degree, 11 had one-eighth, 3 had one-sixteenth, 1 had three-eighths, 1 had one-sixty fourth, and 26 did not set any minimum.
243. See HANDBOOK, supra note 5, at 149-51.
John Collier, Commissioner of Indian Affairs at the time of the IRA, was a proponent of blood and descent as the earmark of Indian identity. In a circular to Superintendents and Field Agents doing IRA work, Collier stressed that the policy of the federal government would be to give close scrutiny to constitution and bylaw membership provisions. Further, provisions for adoption of non-members should require approval by the Secretary. "It is important that the Indians not only shall understand this policy but shall appreciate its importance as it applies to their own welfare through preventing the admission to tribal membership of a large number of applicants of small degree of Indian blood."245

As the Indian nations adopted IRA constitutions with the federal model of blood-quantum membership, the last step was completed for the internalization of colonial racial identity law. Now the federal government could rely on the Indian nations to articulate its race laws and point to the nations as being responsible for their existence. "A more perfect shell game is impossible to imagine."246

The last cases involving non-racial naturalized citizens of the Indian nations all stem from struggles over who would be entitled to allotment parcels of land. In the so-called Cherokee Intermarriage Cases, the Supreme Court construed Cherokee laws of citizenship and naturalization as excluding non-Indian adopted members from property rights and thus from allotment.247 The Cherokee law, after an 1875 amendment, allowed non-racial adopted members political participation, but denied such citizens rights of soil or interest in the vested funds of the nation.248 The Court recognized that an Indian nation could change its citizens' status, and as it had once been in England there could be distinct classes of citizens.249

In United States ex. rel. West v. Hitchcock,250 a naturalized non-Indian member of the Wichita Nation sought mandamus to compel the

245. OFFICE OF INDIAN AFFAIRS, U.S. DEPT OF THE INTERIOR, CIRCULAR No. 3123; MEMBERSHIP IN INDIAN TRIBES (1935) (signed by Commissioner, John Collier, on file with author); see also TASK FORCE No. 9, AMERICAN INDIAN POLICY REVIEW COMM'N I, FINAL REPORT 108-09 (1977) (discussing the recognition of defining "Indian" as a member of an Indian tribe).
246. Churchill, supra note 17, at 53.
248. Id. at 82-86. Congress provided in 1888 that a white man could not, solely by intermarriage, share in tribal property. See Act of Aug. 9, 1888, ch 818, § 3, 25 Stat. 392 (codified at 25 U.S.C. § 181 (1994)). This statute did not apply to the Cherokee.
249. Red Bird, 203 U.S. at 85; see also Roff v. Burney, 168 U.S. 218 (1897) (stating Chickasaw Nation may take away citizenship of non-Indian naturalized member). For discussion of the English practice of distinct classes of citizens, see supra text accompanying note 40.
250. 205 U.S. 80 (1907).
Secretary of the Interior to approve selection of an allotment. Justice Holmes held that the Secretary's decision was unreviewable by stating, "some one must decide who the members are." It seemed clear that the petitioner had been adopted by Wichita law. However, the Secretary apparently denied the selection because the adoption had not been approved by the Indian Office as required by regulations.

The relator contends that the validity of the adoption was a matter purely of Indian law or custom, and that the Department could not take it under control. Probably it would have been unfortunate for the Indians if such control had not been exercised, as the temptation to white men to go through an Indian marriage for the purpose of getting Indian rights is sufficiently plain. We are disposed to think that authority was conferred by the general words of the statutes. Rev. Stats. §§ 441, 463. By the latter section: 'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of the Indian relations.' We should hesitate a good deal, especially in view of the long-established practice of the Department, before saying that this language was not broad enough to warrant a regulation obviously made for the welfare of the rather helpless people concerned.

Justice Holmes' view of Indian people and of whites who would associate with them was identical to that of Chief Justice Taney who had sixty years before called Indians "this unfortunate race" and naturalized whites "the most mischievous and dangerous inhabitants of the Indian country."

The Supreme Court of Oklahoma decided two of the last three reported cases involving naturalized non-racial members of an Indian nation. Reed v. Clinton held that a contract of conveyance from a naturalized white member of an Indian nation was void. The court reasoned that the Congressional prohibition of conveyance of allotments was plain and that they therefore could not examine the purpose of the prohibition.

In Franklin v. Lynch, a white woman had become a naturalized member of the Choctaw Nation. The United States Supreme Court held that she could not convey an expectancy of an allotment by a warranty deed executed before she had been officially naturalized by Choctaw law and the allotment made. Congress had removed alienation restrictions on allottees of the Choctaw Nation who were "not of Indian blood." However, a prior statute stated that allotted lands should not be affected by any deed made before patent of the

251. Id. at 86.
252. Id. at 84-85.
255. Id.
256. 233 U.S. 269 (1914).
257. Id. at 272.
258. Id. at 271; see Act of Apr. 21, 1904, ch 1402, 33 Stat. 189, 204.
The Court then concluded that the woman, Emmer Sisney, "cannot be treated as a white woman, for the purpose of conveying an expectancy, and an Indian for the purpose of securing an allotment."260

The last case involving a naturalized non-racial member of an Indian nation is *In re Hawkins' Estate*.261 Margaret Hawkins, a white naturalized member of the Choctaw Nation died intestate and without issue. The laws of intestate succession would have resulted in an escheat to the state. However, the Oklahoma Supreme Court held that Margaret's husband, a Choctaw citizen, should inherit because of the purpose of Congress to preserve Indian property and the law's disfavor of escheats.262 And with that, non-racial naturalized members of Indian nations disappeared from the reported cases.

D. Blood Beyond Jurisdiction

In short, when the concept is membership, the interpretation should hinge on whether the term is used as part of congressional power to control the property of Indian tribes, in which case the congressional definition will govern, or whether it is part of a statute designed to strengthen or protect tribal sovereignty, in which case the tribal definition must be ascendant.263

Sovereignty is the focus here and particularly the sovereign power to define citizenship. Sovereignty manifests itself in jurisdiction, the authority to make and apply law. If Indian nation sovereignty is second class, perhaps that is due to the racial nature of federal Indian law. In this part a brief account will be offered of the role of blood and descent in that law when the issue is not jurisdiction, but rather federal benefits or disadvantages for the people of the Indian nations. When Congress controls the property of Indian nations, blood is in the foundation.

The federal policy of racial identification of citizens of Indian nations was formalized in the allotment era as field agents prepared membership rolls of Indian nations for entitlement to allotment parcels of land. That policy, however, remains alive and well. In *Simmons v. Eagle Seelatsee*,264 the plaintiffs hoped to acquire an interest in an allotment despite a statute which provided that "only enrolled members of the Yakima Tribes of one-fourth or more blood of such

261. 223 P. 396 (Okla. 1924).
262. *Id.* at 398.
263. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 86 (3d ed. 1991). The authors agree that sovereignty issues which focus on membership should be determined by the law of the Indian nations. However, sovereign power must also extend to the control of property.
trikes shall take by inheritance or by will any interest.\textsuperscript{265} The Court held that Congress had full power to determine who gets what and as to blood said:

It is true that in doing so it specified a minimum quantum of Yakima Indian blood, but it seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood. What was done here was in line with what Congress had previously done.

\dots Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of a criterion of race. Indians can only be defined by their race.\textsuperscript{266}

Can you imagine: "Whenever Congress deals with Europeans, or citizens of France, Germany, Spain, etc., it must refer to French blood. Germans can only be defined by their race." Blood runs rampant in federal Indian law. The sovereignty of a people will neither be respected nor protected if they are imagined as racial ghosts.

Perhaps the single greatest federal benefit is recognition as an Indian nation. However, after Congress established the Indian Reorganization Act in 1934, the policy of the Department of Interior was to instruct its field agents and lawyers doing IRA work to create "Indian" constitutions defining membership by blood.\textsuperscript{267} Consequently, citizenship or membership provisions in Native nation constitutions regularly require a blood-quantum or descent.

The constitutions of four Native nations neighboring Nebraska are good examples of blood based membership.

\textbf{CONSTITUTION OF THE OMAHA TRIBE OF NEBRASKA}

\textbf{Article II - Membership}

\textbf{SECTION 1.} The membership of the Omaha Tribe of Nebraska shall consist of all living persons whose names appear on the official
roll of the tribe prepared pursuant to Section 1 of the Act of September 14, 1961 (74 Stat. 508).

SECTION 2. Any person possessing aboriginal Omaha blood of the degree of one-fourth or more, and not enrolled with any other tribe of Indians, who is born after September 14, 1961, to a member of the Omaha Tribe of Nebraska, shall be enrolled as a member of the tribe upon the filing by or on behalf of such person, with the secretary of the tribal council, of a membership registration form prescribed by the tribal council. In determining the degree of aboriginal Omaha blood, the blood of any tribe other than Omaha shall be excluded.

SECTION 3. Any person who being a member of the Omaha Tribe of Nebraska becomes a member of any other tribe of Indians shall automatically lose his or her membership in the Omaha Tribe of Nebraska. Any person who loses membership in the Omaha Tribe of Nebraska shall not thereafter be entitled to membership in the Omaha Tribe of Nebraska, except as may be authorized by an ordinance promulgated pursuant to Section 4 of this Article II.

SECTION 4. The tribal council shall have the power to promulgate ordinances, subject to the approval by the Secretary of the Interior, governing future membership, including adoption and loss of membership.268

CONSTITUTION OF THE PONCA TRIBE OF NEBRASKA

Article II - Membership

SECTION 1. The membership of the Ponca Tribe of Nebraska shall consist as follows:

(a) All persons listed and their lineal descendants on the tribal rolls of April 1, 1934, January 1, 1935, and June 18, 1965, as compiled by the Bureau of Indian Affairs.

(b) All persons entitled to be listed on the membership roll of June 18, 1965 who were not listed on the roll, notwithstanding the application or appeal deadline dates of P.L. 87-629.

(c) No individual is eligible for enrollment to membership if at the time they make application for membership in the Ponca Tribe of Nebraska they are currently enrolled with another federally recognized Tribe, Band or group unless an application for relinquishment is made with the other Tribe contingent upon enrollment with the Ponca Tribe of Nebraska.

(d) Any person not otherwise eligible for enrollment for membership in the Ponca Tribe of Nebraska shall be entitled to appeal a denial of membership by the Enrollment Committee to the Ponca Tribal

Council and submit at such appeal clear and convincing evidence they possess some degree of Ponca Tribe of Nebraska blood. After hearing the appeal, membership shall be granted if the Ponca Tribal Council, by a two-thirds vote, approves the application of said person for enrollment into the membership of the Tribe. The decision of the Ponca Tribal Council shall constitute a final determination.

SECTION 2. The Ponca Tribal Council shall have the power to enact and promulgate resolutions and ordinances governing future enrollment of members and reinstatement of membership into the Ponca Tribe of Nebraska.

SECTION 3. The Ponca Tribal Council shall establish an honorary roster for persons adopted by the Tribe who do not meet the requirements for membership in the Ponca Tribe of Nebraska. Honorary members shall not have the right to vote, hold office, or otherwise exercise the rights or receive benefits of the members of the Ponca Tribe of Nebraska.269

CONSTITUTION OF THE Santee SiouX
TRIBE OF NEBRASKA

Article II - Membership

SECTION 1. The membership of the Santee Sioux Tribe of Nebraska shall consist as follows:

(a) All persons of Indian blood whose names appear or are entitled to appear, on the official census roll of the Santee Sioux Tribe of Nebraska as of April 1, 1934, with the supplement thereto of January 1, 1935, provided that within one year from the adoption and approval of this constitution and bylaws, additions and eliminations may be made in said roll and supplement by the tribal council subject to the approval of the Secretary of the Interior. Persons enumerated in the "McLaughlin roll" made under the act of March 4, 1917 (39 Stat. 1195), or their descendants, shall not be considered, by virtue of such enrollment, to have established membership in the Santee Sioux Tribe of Nebraska under this section.

(b) All children born to any member of the Santee Sioux Tribe of Nebraska who is a resident of the Santee Sioux Reservation at the time of the birth of said children.

(c) All children of any member who is not a resident of the reservation at the time of the birth of said children may be admitted to membership by the tribal council under ordinances made by the tribal council and subject to review by the Secretary of the Interior, provided such children reside on the reservation at the time they made application.

SECTION 4. Reinstatement. Request for reinstatement of tribal members shall be made by written application to the membership committee whose decision shall be subject to the approval of the tribal council.

SECTION 5. Adoption. Request for adoption of an Indian who is a nonmember of the tribe shall be made by written application to the membership committee who shall make recommendation to the tribal council. The decision of the tribal council shall be subject to popular vote at the next annual election.

SECTION 6. The right of the issue from the marriage of descendants with nonmembers to membership in this organization shall not apply to those having less than one-fourth degree Indian blood; provided that this section shall not apply to any such issue whose names appear on the official tribal and census rolls as of April 1, 1934, with the supplement thereto of January 1, 1935.270

REVISED ENROLLMENT ORDINANCE

SECTION 2. FILING OF APPLICATIONS FOR ENROLLMENT. Applications for enrollment with the Tribe must be made by all persons whose names appear on the basic roll of April 1, 1934 and the January 1, 1935 supplement and their descendants, on forms authorized by the Tribe and must be accompanied by a birth or baptismal certificate of the applicant. If a tribal official or the Superintendent has knowledge of a minor or mental incompetent for whom an application has not been filed, such official shall file an application for such person. Applications for minors or mental incompetents who are living with persons other than parents or legal guardians may be filed on their behalf by the person responsible for their care. Applications for enrollment must be filed with the Membership Committee which shall screen or review all applications.

SECTION 3. APPEALS. A person rejected for enrollment shall be advised in writing of the reasons for the action of the Tribal Council and that the decision may be appealed to the Area Director of the Bureau of Indian Affairs, within sixty (60) days following receipt of a rejection for enrollment notice. If the Area Director sustains the decision of the Tribal Council, he shall notify the applicant of his decision and that his decision may be appealed to the Commissioner of Indian Affairs within sixty (60) days following receipt of the Area Director's decision. If the Area Director cannot sustain the decision of the Tribal Council he shall instruct the Tribal Council to place the applicant's name on the roll. The Tribal Council may appeal the decision of the Area Director to the Commissioner. Appeals to the Area

270. Santee Sioux Const. art. II, §§ 1, 4-6 (1936).
Director shall be filed with the Superintendent for forwarding to the Area Director. Appeals from the decision of the Area Director shall be filed with the Area Director within sixty (60) days from the date of notice of his decision for forwarding to the Commissioner.

SECTION 4. BURDEN OF PROOF. The burden of proving eligibility and entitlement for enrollment with the Santee Sioux Tribe of Nebraska shall be upon the applicant. The April 1, 1934 and January 1, 1935 supplement official membership roll of the Santee Sioux Tribe shall be the authoritative document to be used in establishing blood quantum provided that blood quantum as shown on this roll be properly determined by the Tribal Enrollment Clerk with the guidance and assistance of the Area Tribal Enrollment Officer through research of all available Government records and documents.

...  

SECTION 7. CHILDREN BORN OUT OF WEDLOCK. If an applicant is born out of wedlock, he shall be deemed to possess one-half (½) of the total degree of Santee Sioux Indian blood possessed by one or both parents who are members of the Santee Sioux Tribe, the father shall acknowledge paternity by signing a statement properly witnessed and filed with the Membership Committee. Further, if the father is a member and the mother is a non-member of the Santee Sioux Tribe of Nebraska, the application must be accompanied by a written, properly witnessed acknowledgment of paternity signed by the father of the applicant. Orders by Courts of competent jurisdiction shall also be considered as proof of paternity.

SECTION 8. REINSTATEMENT. That Article II, Section 4, be properly satisfied and provides further that a condition of reinstatement to tribal membership shall be the possession of 1/4 or more of Santee Sioux Indian blood by all applicants.

SECTION 9. ADOPTION. In satisfaction of Article II, Section 5 of the Constitution, “Non-members” shall mean those persons of Santee Sioux ancestry not otherwise able to meet the constitutional membership requirements, provided that a condition of adoption to tribal membership shall be the possession of 1/4 or more of Santee Sioux Indian blood by all applicants.271

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CODE OF THE WINNEBAGO TRIBE OF NEBRASKA

Title 5 - Tribal Government  
Article II - Membership  
SECTION 1. The membership of the Winnebago Tribe of Nebraska shall consist as follows:

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(a) All persons of Indian blood whose names appear, or are entitled to appear, on the April 1, 1934 official census roll of the Winnebago Tribe of Nebraska, or the January 1, 1935 supplement thereto: Provided that those persons who possess Winnebago blood and blood of another tribe have not elected to be enrolled with the other tribe; and provided further that those persons of Indian blood of tribes other than Nebraska Winnebago, whose names appear on the basic roll as "N.E.", shall not be considered as members of the Winnebago Tribe of Nebraska; and provided further that persons of Winnebago Indian blood born after the date of the basic roll and prior to the date of this amendment may be enrolled if by January 1, 1967 they submit to the tribal council a request, in writing, accompanied by such evidence as is necessary to determine their qualifications for enrollment; and provided further that any Indian who may be eligible for membership in the Winnebago Tribe of Nebraska, who has received an allotment of land or received financial benefits as a member of another tribe, shall not be enrolled.

(b) All persons who have been validly adopted as members of the Winnebago Tribe of Nebraska prior to the date this amendment is approved by the Secretary of the Interior.

(c) All children born to a member of the Winnebago Tribe of Nebraska after the date this amendment is approved by the Secretary of the Interior, provided said children possess at least one fourth degree Winnebago Indian blood.

SECTION 2. Any person who has been rejected as a member of the Winnebago Tribe of Nebraska, except those rejected under section 1(b), shall have the right to appeal his case to the Secretary of the Interior within ninety days from the date written notice of the rejection is issued to him/her, and the decision of the Secretary of the Interior shall be final.

5-102 Filing of applications for enrollment. Applications for enrollment with the tribe must be made on forms authorized by the tribe and must be accompanied by a birth or baptismal certificate of the applicant. If a tribal official or the superintendent has knowledge of a minor or mental incompetent for whom an application has not been filed, such official shall file an application for such persons. Applications for minors or for mental incompetents who are living with persons other than parents or legal guardians may be filed on their behalf by the person responsible for their care. Applications for enrollment must be filed with the enrollment committee which shall screen and review all applications.

5-103 Appeals. A person disapproved for enrollment shall be advised in writing of the reasons for the action of the tribal council and that its decision may be appealed to the area director of the Bureau of Indian Affairs within thirty days following receipt of a rejection for
enrollment notice. If the area director sustains the decision of the tribal council, s/he shall notify the applicant of his/her decision and that his/her decision may be appealed to the commissioner of Indian Affairs within thirty days following receipt of the area director's decision. If the area director cannot sustain the decision of the tribal council s/he shall instruct the tribal council to place the applicant's name on the roll. The tribal council may appeal the decision of the area director to the commissioner. Appeals to the area director shall be filed with the superintendent for forwarding to the area director. Appeals from the decision of the area director shall be filed with the area director within thirty days from the date of receipt of notice of his/her decision for forwarding to the commissioner.

5-104 Burden of proof. The burden of proving eligibility for enrollment with the Winnebago Tribe of Nebraska shall be upon the applicant. The April 1, 1934 official membership roll and the January 1, 1935 supplement thereto shall be the authoritative document to be used in establishing blood quantum, provided that errors in blood quantum as shown on this roll may be corrected upon submission of substantiating evidence.

... 5-107 Children born out of wedlock. If an applicant is born out of wedlock, s/he shall be deemed to possess one half of the total degree of Winnebago Indian blood possessed by one or both parents who are members of the Winnebago Tribe of Nebraska. If both are members of the Winnebago Tribe of Nebraska, the father shall acknowledge paternity by signing a statement properly witnessed and filed with the enrollment committee. Further, if the father is a member and the mother is a non-member of the Winnebago Tribe of Nebraska, the application must be accompanied by a written, properly witnessed acknowledgment of paternity signed by the father of the applicant. Orders by court of competent jurisdiction shall also be considered as proof of paternity.

... 5-110 Adoptions. Persons of one fourth or more degree Winnebago Indian blood may be adopted into tribal membership, provided application is made in writing to the tribal council. The tribal council after proper investigation, shall submit to a vote of the tribal members at the next tribal election the names of all applicants for adoption determined to be of at least one fourth degree Winnebago Indian blood. These applicants approved by a majority vote of the tribal membership voting in the election shall be accepted as members of the tribe.272

As a result of the Indian Reorganization Act constitutions, even those federal statutes that define Indian beneficiaries as a "member of an Indian tribe,"273 are based on blood or descent.

During the "termination era," the federal government ended federal recognition and the trust relation between itself and the terminated nations.274 In 1970 President Nixon, convinced of the error of termination policy, urged Congress to restore recognition to terminated nations. The restoration acts in the following years usually mandated descent or blood requirements for the membership of the restored Indian nations.275 For example, the Menominee restoration legislation required one-quarter blood,276 and the legislation for the Yseltal del Sur Pueblo of Texas required one-eighth blood.277 Many other restoration acts required descent.278

When Native nations have won claims against the United States, the congressional distribution of judgment funds usually require descent or blood. For example, distribution to the Duwamish required descent from members as the nation existed in 1855.279 Distribution of funds to the Omaha required one-quarter blood.280 Interestingly, when the Omaha changed their constitution at this time to a one-quarter blood membership requirement, it resulted in the loss of some two hundred members at a time when the Omaha Nation was struggling against the policies of the termination era.281

Blood flows in strange places. In United States v. Curnew,282 Randolph Curnew appealed his conviction on a charge of being unlawfully present in the United States. Curnew based his defense on a statutory right of "American Indians born in Canada" to pass freely over the federal border. However, the right extends only to "persons who

273. See, e.g., 25 U.S.C. § 450b(d) (1994); see also Allison M. Dussias, Geographically-based and Memberships-based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U. PITT. L. Rev. 1, 82-83 (1993) (referring to varied statutory definitions of “Indian” based on ancestry or membership as they appear in several federal programs).

274. See HANDBOOK, supra note 5, at 152-80.

275. Id. at 185-87, 317-18.


282. 788 F.2d 1335 (8th Cir. 1986).
possess at least 50 per centum of blood of the American Indian race."\textsuperscript{283} Curnew had no idea of his blood quantum, but would have testified that he believed himself to be and was considered by others "a full blooded Indian."\textsuperscript{284}

Curnew retained a cultural anthropologist as an expert witness. The expert testified that Curnew had some blood, but that it would be irresponsible for her to opine as to the quantum of Indian blood without more evidence. The court affirmed Curnew's conviction.\textsuperscript{285}

Chief Judge Lay dissented, believing that the blood quantum question should have been left for a jury (Curnew entered a conditional plea of guilty) and raised a pointed question about blood and race:

The initial burden placed on a defendant to even identify the members of a family tree encompassing only three or four generations is prohibitively onerous. However, under the majority's literal reading of the statute, going back even four generations would likely not be sufficient since tracing ancestry that far would hardly begin the process of tracing a "blood line" back to the pre-Columbian age. The majority also leaves unanswered the question of how the racial make-up of a defendant's more distant ancestors is to be determined, even assuming the highly questionable premise that sufficient "bloodline" evidence of his or her ancestors' identities would reasonably be available.\textsuperscript{286}

Finally, how about a job with the Bureau of Indian Affairs? In \textit{Morton v. Mancari},\textsuperscript{287} the United States Supreme Court held that "Indian" employment preferences in the BIA as required by the Indian Reorganization Act\textsuperscript{288} were neither repealed by the Equal Employment Opportunities Act of 1972 nor prohibited by the Due Process Clause of the Fifth Amendment.\textsuperscript{289} It was, said the Court, not a racial preference, but one designed to further Indian self-government.\textsuperscript{290} Yet, the preference eligibility criteria at the time required that an individual must be one-fourth or more Indian blood and a member of a federally recognized tribe.\textsuperscript{291}

The Indian Reorganization Act defined "Indian" and the BIA has refined its preference criteria to better match the IRA.\textsuperscript{292} Nevertheless, both definitions require at least descent; some blood, but not too much:

\textsuperscript{283} Id. at 1337 (quoting 8 U.S.C. § 1359 (1994)).
\textsuperscript{284} Id. at 1339-40.
\textsuperscript{285} Id. at 1339.
\textsuperscript{286} Id. at 1340 (Lay, J., dissenting); see also United States ex rel. Goodwin v. Karnuth, 74 F. Supp. 660 (W.D.N.Y. 1947) (leaving determination question open, but interpreting plain statutory language as requiring blood).
\textsuperscript{287} 417 U.S. 535 (1974).
\textsuperscript{289} Mancari, 417 U.S. at 545-55.
\textsuperscript{290} Id. at 554.
\textsuperscript{291} Id. at 553 n.24.
For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal Jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; and

(e) For one (1) year or until the Osage Tribe has formally organized, whichever comes first, effective January 5, 1989, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.293

In 1976, the Final Report of Task Force No. 9 of the American Indian Policy Review Commission recommended that the preference criteria required by the IRA be changed to require membership and one-fourth degree Indian blood or that there be a two-tiered preference of first members and one-quarter blood; then if none in that tier, members and descent.294 The proposal argued that just a little blood, descendancy, conflicted with congressional intent and the vision of John Collier, the “prime architect” of the IRA, who had urged that Indian welfare depended on “preventing the admission to tribal membership of a large number of applicants of small degree of Indian blood.”295 As a preference criteria this was to assure that the preferred applicants would have knowledge of their nation and Indian affairs.296 One might, however, think that domicile in their Indian nation, ability to speak their native language, references from fellow members, or testing of understanding of their nation’s history and culture might provide a better gauge than blood.

IV. NOW: LOOKING TO THE PAST; STEPPING TO THE FUTURE

When we called ourselves the People we had harmony within our tribes. It was after this other identity, of being the “Indians,” was put upon us, that the disharmony started within the tribes.297

John Trudell

From the beginning those who came to this place should have treated the Indian nations and Indian people with respect. There are not any rules, principles, or promises of limit that can justify or excuse

295. Id. at 200 (quoting Office of Indian Affairs, United States Department of the Interior, Circular No. 31, supra note 245.
296. Id. at 199.
297. Trudell, supra note 1, at 4.
ideas and actions that treat another as one of less than equal dignity.\textsuperscript{298} However, federal Indian law pretends to be just such a body of doctrine, a redeeming ideal for the masking of colonial dominion and racist arrogance. If federal Indian law is to become something other than such a mask, it must see within itself the role played by race and blood. Federal Indian law contaminated by blood confuses Indian nation sovereignty with discredited notions of race and induces Indian nations and Indian people to accept a European disease as a manifestation of health.

We imagine that all people desire peace, love, and happiness; and that they expect independence, freedom, and respect. These are expectations of sovereignty, the power of a people to determine the values of personhood, kinship, and right action. Sovereignty is manifested in the peoples' institutions of social structure, the formation and articulation of public purposes, and the making of political decisions. It is the contrary to federal Indian law.

Federal Indian law attempts to justify the colonization of the Indian nations. Its foundation, the Marshall trilogy, posits the discredited doctrines and concepts of “discovery,” “right of occupancy,” “domestic dependent nations,” the “guardian-ward” relationship of the trust doctrine, and congressional plenary power.\textsuperscript{299} Marshall's law was based on the “actual state of things” and the “character and habits” of the Indigenous people.\textsuperscript{300} It remains rooted in colonial desire and racism.

United States v. Rogers\textsuperscript{301} has been overlooked. However, it too is foundational and like the trilogy exists as a vampire; using the blood of the living to sustain the obscene undead. The vampire's illusion of humanity makes human beings easy prey. Rogers and the strong currents of blood throughout federal Indian law trick both Indian and non-Indian into seeing racial ghosts rather than embodied citizens of separate sovereign nations who have promised to live in peace.\textsuperscript{302}

\textsuperscript{298} But cf. Exodus 21:2-6. Here Moses tells of the judgments from God regarding sale and usage of servants. Perhaps this story, or its misunderstanding, is the source of the idea that unjustified dominion may be tolerated if kept constant with rules.

\textsuperscript{299} See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 240, 543 (1823) (discussing the discovery doctrine and the right of occupancy); see also Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832) (holding that state law does not apply in Indian country, but Congressional power is plenary); Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1 (1831) (discussing the domestic dependent nation concept and the relation of ward to guardian which yields the trust doctrine).

\textsuperscript{300} McIntosh, 21 U.S. (8 Wheat.) at 260-61.

\textsuperscript{301} 45 U.S. (4 How.) 567 (1846).

The problem of Indians and the constitutional promise of equal protection is handled by the premise that federal Indian law is based on a political rather than racial relation. While we do not believe that federal Indian law has legitimate authority to define by statute or judicial ruling the sovereign status of Indian nations, the plenary power of Congress and the status decisions of the United States Supreme Court remain an embarrassment to the law of the United States. Were we to accept that law, however, Rogers and its progeny give the lie to the political relation premise.

Court decisions interpreting the federal criminal jurisdiction statutes do not focus on the political citizenship or membership of the parties. Rather, they try to measure phantoms; race, substantial blood, and recognition. That focus shows racial discrimination rather than a respect for political relations. And, of equal import, it denigrates the residue of sovereignty that federal Indian law has not destroyed. Benefits and disadvantages given to Indian people on the basis of blood or descent may affirm in their minds that they are a racial minority instead of citizens or potential citizens of separate sovereigns whose existence depends on their political energy and imagination for a future.

Today treaties with Indigenous nations are forbidden. However, statutes might promise that the federal distribution of jurisdiction will look to the political decision of Indian sovereigns as to who are their citizens. The Indian nations concerned should decide citizenship issues for themselves, and statutes should be the result of consultation and agreement between the federal and Indian governments. Until such government to government agreements become statute law, the courts should end their reliance on Rogers and its focus on race.


304. See Porter, supra note 302. Professor Porter argues that the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b) (1994)), was a genocidal act creating "Native Americans," a racial group, out of the citizens of the Indian nations. As a result the individual's citizen-energy is dispersed and Indigenous sovereignty is put at risk by the colonial nation's diminishment of the role of the Indian nation in daily life and consciousness.
The Supreme Court's assertion in *United States v. Antelope*\textsuperscript{305} that federal criminal jurisdiction is based not on the persons' Indian race, but rather the parties' political relation as enrolled members of an Indian nation, is not the law. It is clear that the statutes' use of "Indian" continues to be given the racial meaning acquired in *Rogers*. The Due Process clause of the Fifth Amendment should prohibit that interpretation. If "Indian" refers to political relations, then federal law must look to the membership laws of the nations with whom such relations exist.

In civil jurisdiction the law is not shackled by a precedent similar to *Rogers*, and jurisdiction is not distributed by federal statutes. In *Williams v. Lee*\textsuperscript{306} the Supreme Court recognized that Indian nations have all sovereign rights not given away by treaty, taken by federal statute, or lost by Supreme Court decisions which define their sovereign status as diminished.\textsuperscript{307} The Court then held that a non-Indian plaintiff may not bring a civil suit in state court against a member of an Indigenous nation when the member resides in the nation and the cause of action arose in the Indian nation.\textsuperscript{308} Such a suit would infringe on Indian sovereignty and may be permitted only if authorized by Congress. The non-Indian plaintiff must sue in the courts of the Indian nation. If there is a non-racial naturalized member of an Indian nation, they have not appeared in any civil jurisdiction case. And, unlike the criminal cases, only one case has been found where the Indian defendant is under the *Williams v. Lee* principle, although not a citizen of the Indian nation in which the action arose.\textsuperscript{309}

When cases of jurisdictional distribution arise which turn on the nationality of a party, Indian nationality should be a matter of the law of Indian nations. Jurisdiction is a matter of sovereignty and it is well past the time for federal law to recognize that Indians are, like Europeans, citizens of distinct nations.

There are signs that the Indigenous nations are looking with renewed interest at the make-up of their polity. A particularly noteworthy development in the citizenship law of Indian nations is found in

\textsuperscript{305} 430 U.S. 641 (1977).
\textsuperscript{306} 358 U.S. 217 (1959).
\textsuperscript{307} Id. at 222-23.
\textsuperscript{308} Id. at 223.
\textsuperscript{309} See *Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975). In *Nelson* the defendant, Dubois, was an enrolled member of the Turtle Mountain Band of Chippewa, but the incident occurred within the boundaries of the Dakota Lake Sioux Tribe of the Fort Totten Indian Reservation where Dubois resided. See also *Found. Reserve Ins. Co., Inc. v. Garcia*, 734 P.2d 754 (N.M. 1987). In *Garcia* the defendants were husband and wife. Both were citizens of Indian nations, but only the husband was a citizen of the Indian nation in which they resided and the incident arguably arose. The court applied the *Williams v. Lee* principle, but held that the action, an insurance coverage dispute, did not arise within the Indian nation.
the recent case of Means v. The District Court of the Chinle Judicial District from the Supreme Court of the Navajo Nation. Russell Means, a citizen member of the Oglala Sioux Nation, resided in the Navajo Nation and was married to an enrolled Navajo, Gloria Grant. Means was charged with threatening and battering Leon Grant, a member of the Omaha Nation and battering Jeremiah Bitsui, a member of the Navajo Nation. All events were within the Navajo Nation. Means argued that the Navajo courts lacked jurisdiction, and that if jurisdiction was found, it would violate equal protection of the law because jurisdiction was based on race rather than political membership in the Navajo Nation.

The Navajo Supreme Court found jurisdiction in the June 1, 1868 Treaty between the United States of America and the Navajo Nation. The Treaty promised that “this reservation” is “set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them...” Consequently, though the Navajo Nation may not have had inherent criminal jurisdiction over non-member Indians, criminal jurisdiction was established in the Treaty of 1868.

The Navajo Supreme Court then turned to the promise of equal protection of the law. Chief Justice Yazzie noted the Navajo Supreme Court had earlier held that the Nation had criminal jurisdiction over individuals who “assume tribal relations.” Turning to Navajo common law, the Chief Justice held that there were several kinds of membership in the Navajo Nation. Means' citizenship was that of an hadane (in-law), one who marries or has an intimate relation with a Navajo. An hadane assumes a clan relation to a Navajo when the intimate relationship is conducted within the Navajo Nation. As a result, Means was not a non-member Indian subjected to criminal jurisdiction because of race, but rather an hadane member of the Navajo Nation.


312. Treaty with the Navajo Indians, June 1, 1868, art. 1, 15 Stat. 667.

313. Treaty with the Navaho Indians, June 1, 1868, art 2, 15 Stat. 668 (emphasis added).


315. Id.

316. Id.; see generally Paul Spruhan, Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law, TRIBAL L.J. (Fall 2000), available at http://tlj.unm.edu/articles/means/INDEX.HTM.
The opinion's two parts, jurisdiction and membership, raise interesting questions. First, may any person become an hadane member? Nothing suggests that hadane membership is only for racial "Indians." Rather it is founded on an intimate relationship with a Navajo and "longtime residence within the Navajo Nation."317 Second, is marriage the only intimate relationship that with continued residency may lead to hadane membership? The opinion said, "An individual who marries or has an intimate relationship with a Navajo is a hadane (in-law)."319 Finally, since jurisdiction was based on the 1868 Treaty promise that the Nation was for the Navajo and "other friendly tribes or individual Indians," would a non-Indian hadane be such an "Indian" or a Navajo for jurisdictional purposes?

Hadane membership brings a seeming disadvantage by subjection to Navajo jurisdiction. However, the Means court notes that all people within the Nation's boundaries have the advantage of being called for jury duty.319 Would hadane membership have any other seeming advantages? Just as English law at one time distinguished between the fully naturalized citizen by parliamentary act and the denizen by royal patent who had only limited nights, Native nations might also grant distinct status to different classes of citizens.320 Perhaps, just as they currently often distinguish among those members who live within and without Indian country, native nations might distinguish today, as at least the Cherokee once did, types of citizenship or membership.321

Perhaps there should be only one class of citizen, first class. However, as the Native nations look to their traditions, customs, and visions for the sustenance and nurture of the people, distinctions might be considered.322 If a person was not to be a full-tilt member, might that person, with an appropriate legal process, be able to serve on an administrative board, serve on a jury, be entitled to a tribal public defender, vote or run for some offices, and be eligible for some tribal services?323

317. Id. The court also says that, "One can be of any race or ethnicity to assume tribal relations with Navajos." Id. at 6088.
318. Id.
319. Id. at 6085.
320. See supra text accompanying note 40.
321. See supra text accompanying note 248.
323. See Pommersheim, supra note 322, at 463-67; see also Jennifer Edwards, Two Plans Offered for Revised SRST Constitution, 1 Lakota Nat. J., Oct. 23-29, 2000, at B1 (reporting that a group from Running Antelope District has submitted a constitutional proposal allowing non-Indians married to an enrolled member to vote in elections); Kootenai to Decide Tribal Membership, 20 Indian Country To-
Perhaps today is the time to consider citizenship or membership questions in light of the current values of Indian nations. What is often seen, however, are stories describing recent disenrollments in the Indigenous nations. The Seminole Nation in Oklahoma recently voted to require a one-eighth Seminole blood enrollment requirement and to change membership status from "Seminole Citizens" to "Seminole Indian citizens by blood." Freedmen, descendants of runaway slaves who lived with the Seminole, were enrolled members before the recent vote and made-up 1,927 persons of the 13,000 enrolled Seminoles. The citizenship status of these people is uncertain after the change, but Seminole Enrollment Officer, Jane McKane, is quoted as saying that if the BIA approves the election changes, "There will be no Freedmen members at all in the tribe." Jane McKane is reported to have said that part of the reasoning behind the Seminole change was that the blood quantum was so low that people enrolling were not interested in the nation. We are unsure of the relationship of blood and interest. We do understand the ravages of greed.

From California come tales of Indian people disenrolling members to apparently acquire more of the lucre from gaming. The Table Mountain Rancheria has 120 people who claim to have been disenrolled. At Berry Creek Rancheria 30 some people fear disenrollment. In Picayune Rancheria, Jane Wyatt, a disenrolled member, is reported as saying that the Rancheria had disenrolled 500 people to get some individuals a bigger slice of the pie. To the south, the Las Vegas Paiute Nation is reported to have disenrolled fourteen members, almost one-fourth of the adult population in a similar fight over distributions of the nation's income from a tax-free smoke shop. Surely, Indian nation sovereignty and the human make-up of the polity might be directed to a vision beyond material wealth.

Citizenship carries the right to participate in the actions of a sovereign state and contributes to making the character of a nation. To

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325. Id. at A2.
326. Id. at A1.
327. Janes May, California: To be Indian or not to be, 20 INDIAN COUNTRY TODAY, Aug. 9, 2000, at C1.
328. Id.
329. Id.
what principle or principles do the different Indian nations look as they consider their national character? Ascription as a citizenship principle looks to matters of fate, place of birth, or descent. The ascription principle seems also to carry traces of allegiance to a naturally superior authority. Consent, on the other hand, looks to the free choice of human beings to form community for the pursuit and protection of shared values.\textsuperscript{331} There is fate and an authority beyond the self. There is also freedom and giving rather than owing of allegiance. The United States of America continues to work with the tension and may look upon its memory and dreams to consider its current and future existence. Indigenous nations should have the same opportunity to choose freely their response to the quandary of freedom and solidarity.\textsuperscript{332}

Race was at one time an important excluding factor in United States naturalization and was not entirely eliminated until 1952.\textsuperscript{333} Today few, if any, justifications could be imagined for its return as a federal citizenship criteria. Nevertheless, federal policy has placed race at the center of citizenship in Indigenous nations, and many Indian nations may view it as a crucial matter of national character. We believe it is time for Native nations to look to their memory and dreams to ask questions, to discuss citizenship.

What about old lady Jones celebrating a thirtieth wedding anniversary here in Indian country? What about Sally and Sam, her child and grandchild, who dance at all the pow-wows? What about Dick and Jane teaching in the nation's schools for the last ten years? Might an Indian nation look at residence, character, an oath of allegiance, language ability, references from the people, cultural and historical knowledge, understanding of principles, and realities of attachment to grant naturalized citizenship?\textsuperscript{334} Could there be an adopted clan relationship so that the people know their relatives? Do the Indian nations ever imagine a person or a family who might be happy to be one of the people and who the people might be happy to recognize as part of their relations?

People of the Indian nations may like to believe that their cultures are distinct and opposed to the greed, individualism, and materialism of the United States.\textsuperscript{335} Hopefully this may be true, but they need to move beyond the rhetoric of Indian values and the actions of European colonialism. When Indigenous nations begin a new discourse on citizenship considering with their memories and dreams whether to allow

\textsuperscript{331.} See supra text accompanying notes 97-106.

\textsuperscript{332.} See generally Roberto Unger, Law In Modern Society, 206-216 (1976).

\textsuperscript{333.} See supra text accompanying notes 60, 72.

\textsuperscript{334.} See supra text accompanying notes 80-93.

some kind of naturalization and on what principles, they should remember that race has always been a tool of oppression in the distribution of scarce resources. "Culture is not genetic and does not come without effort." And, it seems that a kinship community would hope to develop human beings before capital, and distribute good feelings before material goods.

In the meantime, the Bureau of Indian Affairs is engaged in rule making to formalize the policy, procedures, and documentation requirements for the filing, processing, issuing, amending and invalidating of a Certificate of Degree of Indian or Alaska Native Blood.337

336. Id. at 312.