

Expanding Tribal Citizenship Using International  
Principles of Self Determination

By  
Copyright 2008

Jancita C. Warrington  
B.A., Haskell Indian Nations University, 2002

Submitted to the Indigenous Nations Studies Program and the Faculty of the Graduate School of the University of Kansas in partial fulfillment of the requirements for the degree of Master of Arts.

---

Professor Stacy Leeds, Chair

---

Professor Anglique EagleWoman  
Committee Member

---

Dr. Stephanie Fitzgerald  
Committee Member

Date Submitted: 4-7-08

The Thesis Committee for Jancita C. Warrington certifies that this is the approved Version of the following thesis: Expanding Tribal Citizenship Using International Principles of Self-Determination.

Committee:

---

Professor Stacy Leeds, Chair

---

Professor Angelique EagleWoman  
Committee Member

---

Dr. Stephanie Fitzgerald  
Committee Member

Date Approved: 4-7-08



## ABSTRACT

Jancita C. Warrington, M.A., Indigenous Nations Studies  
Center for Indigenous Nations Studies, May 2008  
University of Kansas

The purpose of this research is to provide Tribal Nations of mid-North America with an alternative approach to revising IRA tribal constitutions. In particular this research focuses on the citizenship and/or membership criteria of Tribal Nations that have blood quantum standards firmly embedded in Tribal law. Blood quantum standards continue to de-humanize the traditional customs and culture of Tribal Nations. Tribal Nations must make a collective move to change their membership standards to reflect traditional tribal standards of collective citizenship based on international principle of self-determination.

Chapter one establishes international law as the foundation of United States colonial law. I have included various documents of international law as supporting components to establish the right to a nationality and citizenship are basic rights extended to all peoples of humanity.

Chapter two analyzes the United States' influence on the concept of Tribal Nations. Tribal Nations customarily did not define their citizenship affiliated with any kind of race-based component. Colonial laws which established United States as an absolute sovereign continues to severely impair Tribal Nations from exercising true self-determination.

Chapter three gives an overview of tribal constitutions from 1934 to the present day. U.S. congressional plenary power has domesticated, assimilated and sometimes even

terminated the recognition of Tribal Nations. Tribal Nations fearing the ultimate power of congressional plenary power have established their Tribal governments and citizenship guidelines attempting to fit congressional notions of sovereignty.

Chapter four provides an alternative approach to Tribal enrollment by recognizing the need to separate the internal and external citizenship components of Tribal Nations.

## Table of Contents

Abstract .....	i
Table of Contents .....	iii
Chapter 1 International Principle of Self-Determination .....	1
Charter of the United Nations.....	1
Universal Declaration of Human Rights.....	1
International Covenant on Economic, Social, and Cultural Rights.....	2
International Covenant on Civil and Political Rights.....	2
International Labor Organization Conventions No. 107 & 109.....	3
Declaration on the Rights of Indigenous Peoples.....	3
Chapter 2 United States Influence on the Concept of Tribal Citizenship/Membership .....	6
Chapter 3 Tribal Constitutions 1934-Present .....	16
Federal Termination .....	23
Civil Rights Act of 1964 .....	26
Indian Civil Rights Act of 1968 .....	27
A Challenge to Equal Protection Under Federal Law .....	28
The Issue of Tribal Membership is Challenged .....	29
Blood Quantum Pedigree, A Gross Violation of Human Rights.....	34
The Problem With Tribal “Membership” .....	38
Chapter 4 Creating a New Standard of Tribal Citizenship and Revising Tribal Membership Standards .....	42
A New Standard of Tribal Citizenship .....	42
A Revised Standard of Tribal Membership .....	43
Conclusion .....	44

### *International Principles of Self-Determination*

Indigenous peoples<sup>1</sup> in the United States should be accorded the exclusive ability to determine their own citizenship standards. Indigenous authority arises out of the basic concept of self-determination.<sup>2</sup> As Indigenous nations' authority has been hindered by the United States, Indigenous nations may draw upon International human rights concepts of self-determination when determining their citizenship.

The Charter of the United Nations (UN Charter)<sup>3</sup> entered into force on October 24, 1945, following World War II. The UN Charter promotes and encourages respect for fundamental human rights and freedoms regardless of race. The preamble established conditions for justice and respect of treaty obligations and other sources of international law. The strongest supporting statement is reflected in Article 55 which holds self-determination as a universal right for peoples under International law.

In 1948, the Universal Declaration of Human Rights (Universal Declaration)<sup>4</sup> was adopted by the United Nations General Assembly. The Universal Declaration established basic human rights the world over. The Universal Declaration recognized

---

<sup>1</sup> Indigenous for this paper is defined as a group of people with a common racial identity, culture, history, language, and territorial home lands.

<sup>2</sup> Self determination for this paper includes the right of a tribal people collectively to freely determine political status while pursuing economic, social and cultural development thus determining Indigenous peoples destiny. Political status further includes the right govern lands, territory, resources and citizenship according to traditional laws and customs.

<sup>3</sup> U.N. Charter art. 55. Article 55 called for the creation of international stability among nations based on the respect of equal rights and self determination of all peoples.

<sup>4</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N Doc. A/810 (Dec. 12, 1948).

basic human rights are afforded to every person based on their shared characteristics of humanity. These rights are not granted or delegated by any state or government.<sup>5</sup>

The rights upheld in the Universal Declaration are intended to be the rights of individuals. While not speaking directly to self-determination, the Universal Declaration was the starting point for all other international human rights instruments.

In International law, the process of creating an area of law is to begin with a declaration and then to create binding treaties or conventions. Following the Universal Declaration, two international covenants were constructed to bind ratifying parties to uphold these human rights. The International Covenant on Economic, Social and Cultural Rights<sup>6</sup> recognizes the inherent dignity and equality of all humans. In promoting universal respect for human rights and freedoms, Article 1 establishes the right to self-determination. The International Covenant on Civil and Political Rights<sup>7</sup> recognized these kinds of rights are derived from the inherent dignity of humanity as well. The right to self-determination is likewise established in Article 1 of the International Covenant on Civil and Political Rights.

In recognizing the aspirations of Indigenous peoples to exercise control over their ways of life needed to maintain and develop their identities, the International Labor Organization (ILO) was the first international body to take action precisely recognizing the rights of Indigenous peoples. In 1957, the International Labor

---

<sup>5</sup> Id.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, art.1, Jan. 3, 1976. 993 U.N.T.S 3.

<sup>7</sup> International Covenant on Civil and Political Rights, art.1, Mar. 23, 1976. 999 U.N.T.S. 171.



Organization adopted Convention No. 107<sup>8</sup> which focused on assimilating Indigenous peoples into mainstream societies of nation-states. In 1989, the ILO revised the former Convention No.107 and adopted Convention No.169.<sup>9</sup> The revised convention focused on removing assimilation and recognized Indigenous self-determination as the new policy. Convention No.169 classified and supported rights initiated in Indigenous customs, traditions and languages distinguishable from the rest of the national society.<sup>10</sup> Convention No. 169 further recognized Indigenous self-determination by recognizing the distinct contributions of indigenous and Tribal peoples to the cultural diversity of humankind. General rights to citizenship free of discrimination or prejudice are upheld for indigenous peoples in Article 4 of Convention No.169.<sup>11</sup> Ultimately, the ILO proved to be an instrumental organization firmly committed to upholding and protecting basic human rights for Indigenous peoples.<sup>12</sup>

As International law has developed, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (Indigenous Declaration)<sup>13</sup> on September 13, 2007. The General Assembly clearly expressed worldwide support for the human rights of Indigenous peoples. The Indigenous

---

<sup>8</sup> Id. Convention No. 107 was the first international document expressly created to recognize equal individual rights of tribal peoples into mainstream societies.

<sup>9</sup> International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989. Convention No. 169 was a revised version of Convention 107. The purpose was to eliminate the previous objective of assimilation of Indigenous populations. The revised convention distinguished Indigenous peoples as having rights to self determination.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> See e.g., Barsh, A "New" Partnership for Indigenous Peoples: Can the United Nations Make a Difference? 17 AM. IND. CULTURE & RES. J. 197-227 (1993).

<sup>13</sup> The Universal Declaration of the Rights of Indigenous Peoples, Sept. 13, 2007.

Declaration is the only international declaration expressly supporting Indigenous rights to self-determination. Beyond basic individual human rights guaranteed in the Universal Declaration, Indigenous peoples are exclusively afforded collective rights to self-determination in the Indigenous Declaration.<sup>14</sup> Throughout the Indigenous Declaration, Indigenous peoples may draw upon several specific articles which support cultural practices and customs concerning citizenship.

Article 3 of the Indigenous Declaration established the right to self-determination. Indigenous peoples have continually maintained an autonomous form of government in matters affecting their internal and local affairs, although not always recognized as legitimate by colonizing governments.<sup>15</sup> It is imperative for Indigenous peoples to tenaciously exercise rights of self-determination in regards to their citizenship as it remains crucial to regulate and maintain a distinct Tribal identity.

Article 8 of the Indigenous Declaration clearly articulated that Indigenous peoples should not be subject to assimilation or destruction of their cultures.<sup>16</sup> Furthermore, Article 8 provides a mechanism from redress of policies depriving Indigenous peoples' integrity as distinct peoples of ethnic identities. For the last one hundred years the United States Congress has passed federal legislation intended to assimilate Indigenous peoples in mid-North America as primarily a U.S citizen.

---

<sup>14</sup> Self determination is a collective right held by a group of people rather than a right held by a government or individual.

<sup>15</sup> The Declaration on the Rights of Indigenous Peoples, Article 3 affirmed Indigenous peoples to be free in pursuing and maintaining a distinct form of government.

<sup>16</sup> Id.

Furthermore, Article 9 of the Indigenous Declaration established the right to a national or Tribal identity acknowledged in accordance with Indigenous customs and traditions. Customarily, Tribal citizenship was recognized by Tribal communities when an individual exhibited willingness to follow community law. Under the Indigenous Declaration all natural born tribal citizens should be governed according to customary international law.

Extensive approval of the International community was required to pass the Declaration on the Rights of Indigenous Peoples. In September 2007, the international community voted at the U.N General Assembly casting 143 votes for the Indigenous Declaration, with 11 abstaining and 4 opposing the vote. The United States was one of the four votes in opposition of the Indigenous Declaration. Although the Indigenous Declaration serves as monumental international support of self-determination, it is only a declaration and therefore non-binding.

### ***United States Influence on the Concept of Tribal Membership***

From time immemorial, Indigenous peoples of Mid-North America (Tribal Nations)<sup>17</sup> freely exercised the right to self-determination. The Doctrine of Discovery<sup>18</sup> founded on principles of international law<sup>19</sup> was used to implicitly limit Indigenous peoples from exercising these rights. European contact in the Americas carried negative ramifications by establishing colonial law as superior to Tribal law.

With the formation of the United States, Tribal Nations of mid-North America had to contend with a foreign colonizing power. Two early 1800's U.S. Supreme Court cases held that U.S. colonial laws relied on the Doctrine of Discovery to implicitly deny Tribal Nations full land rights. In the first case, the international principle of the Doctrine of Discovery was stated as depriving Indigenous Nations of their territorial sovereignty. Judicial interpretations established U.S. colonial law as absolute providing a means to diminish preexisting Tribal rights' to self-determination.<sup>20</sup> U.S. Supreme Court interpretations reduced pre-existing Tribal rights to a status of something less than.<sup>21</sup>

The U.S. Supreme Court did acknowledge Tribal Nations as distinct political societies capable of governing their own affairs, citizens, and territories while

---

<sup>17</sup> Indigenous peoples is the terminology used for tribal peoples in International law. When referring to Indigenous peoples of Mid-North America I will use the term Tribal Nations.

<sup>18</sup> The Doctrine of Discovery reserved exclusive rights to the discovering nation, to the exclusion of other European nations. In the Americas Indigenous-Tribal peoples were implicitly limited to only dealing with the discovering nation.

<sup>19</sup> Phillip Frickley, *Domesticating Federal Indian Law*, 81 MINN. L. Rev. 31 (1996).

<sup>20</sup> Federal Indian Law recognized colonial law as absolute which dispossessed tribal peoples of their political status, lands, and resources. This limitation adversely affected their inherent right to freely exercise self determination.

<sup>21</sup> *Johnson v. McIntosh* (1823) 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681

exercising powers to negotiate treaties.<sup>22</sup> Despite recognizing this unique political status of Tribal Nations, Justice John Marshall’s majority opinion of the second case concluded Tribal Nations did not constitute a foreign nation for purposes of the U.S. Constitution, but rather were characterized as “domestic dependent nations.”<sup>23</sup> The new term “domestic dependent nation” through judicial interpretation reduced Tribal rights to something less than the full self-determination they had previously known.<sup>24</sup> The Court went on to further characterize this unique Tribal-federal relationship as that of a ward-guardian relationship.<sup>25</sup> The next year, the U.S. Supreme Court contradicted its previous ruling by upholding Tribal rights to self-determination<sup>26</sup> by concluding prior treaty negotiations did not divest Tribal Nations of governmental powers.<sup>27</sup> Although federal Indian law<sup>28</sup> remains plagued with inconsistent recognition of Tribal Nations as sovereign nations, it is the body of law that continues to regulate the Tribal-federal relationship.

In 1871, as a result of bicameral pressures, the U.S. Congress passed legislation formally ending treaty-making with Tribal Nations.<sup>29</sup> By formally ending

---

<sup>22</sup> Id. Majority opinion by Justice Marshall, Dissenting opinion of Justice Thompson and Story.

<sup>23</sup> *Cherokee Nation v Georgia* (1831) 30 U.S. (5 Pet.) 1, 8 L.Ed. 25. In *Cherokee Nation v. Georgia* Chief Justice Marshall created the term domestic dependent nation but only provided a broad judicial interpretation of the new term. So my interpretation of a domestic dependent nation concluded, Domestic because Tribes were located within the boundaries of what the United States claimed under the Doctrine of Discovery, dependent because they made treaties forming alliances with the US government in exchange for protection of their military, and nation because Indigenous peoples were governed by distinct societies, in a distinct territory with a distinct citizenship.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> *Worcester v. Georgia* (1832) 31 U.S. (6 Pet.) 515, 8 L.Ed. 483.

<sup>27</sup> Id.

<sup>28</sup> Collectively the Executive, Legislative and Judicial branches of the United States government have constructed and regulate Federal Indian Law.

<sup>29</sup> Appropriations Act, ch. 120, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 71).

treaty-making Congress refused to recognize the Tribal-federal relationship as it had existed prior to 1871. Although formal treaty-making had ended the Tribal-federal relationship still reflected principles of sovereignty throughout the next decade as reflected through mutual agreements based on mutual consent that continued to occur.<sup>30</sup>

In 1883, the U.S. Supreme Court heard a case involving murder which occurred on Tribal lands, between two Tribal members. The Court confirmed Tribal Nations retained exclusive jurisdiction over the internal affairs that occurred within the jurisdiction of Tribal lands.<sup>31</sup> Public outcry resulted from the conclusion of the 1883 *Ex Parte Crow Dog* case which generated external pressure on the U.S. Congress, which took the first of many steps in engaging themselves in the internal affairs of Tribal Nations.

Congress passed the Major Crimes Act<sup>32</sup> in 1885, marking federal intrusion into the internal affairs of Tribal Nations. The Major Crimes Act was a federal statute that provided jurisdiction to the U.S. judicial system, to prosecute Tribal members

---

<sup>30</sup> Agreements, formally referred to as treaties, recognized mutual consent needed to bind the parties. This right was only exercised by a sovereign government. Therefore the tribal-federal relationship recognized tribal governments as sovereign. The ability to consent to a treaty also implied the right to abrogate also existed. Although treaty making had ended and Tribal Nations were characterized as a domestic dependent nation, the US government continued to recognize the tribal-federal relationship based on pre existing principles of self determination.

<sup>31</sup> *Ex Parte Crow Dog* (1883) 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030. In this case two tribal members, Crow Dog and Spotted Tail, both from the Sioux Nation were engaged in a personal conflict which resulted in the death of one tribal member. This altercation took place on tribal lands. Crow Dog was tried by the tribal government and sentence according to tribal traditions for the action he committed.

<sup>32</sup> Appropriations Act, ch. 341, 23 Stat. 362, 385 (1885). Commonly known as The Major Crimes Act. The MCA reaffirmed tribal jurisdiction of internal affairs and also extended criminal jurisdiction to the United States government over tribal citizens for committing the 7 named crimes against anyone within Indian Country. U.S. Congressional powers exercised prior to this act from a criminal context only applied to crimes committed by United States Citizens.

who commit any of the listed crimes on Tribal lands. Although Tribal Nations retained Tribal jurisdiction to prosecute Tribal citizens, this congressional legislation caused a major encroachment on Tribal rights to freely regulate the internal affairs of citizens.<sup>33</sup> Now the U.S. Congress regulated who was considered Indian<sup>34</sup> and what the Indian could and could not do within Tribal lands. The next year the legality of the Major Crimes Act was challenged.<sup>35</sup> The U.S. Supreme Court upheld Congress' authority to exercise plenary power over Tribal affairs. Federal encroachment, through congressional plenary power, impaired Tribal Nations from exercising exclusive authority over internal affairs and citizens.

Exercising plenary power again in 1887, Congress passed the General Allotment Act.<sup>36</sup> The General Allotment Act provided further congressional intrusion

---

<sup>33</sup> The Major Crimes Act impaired Tribal Nations from exercising true self-determination of its tribal government needed to exclusively control the internal affairs of tribal citizens. Providing concurrent jurisdiction over tribal members limited Tribal Nations from exclusively governing tribal citizens. It remains crucial for Tribal Nation to exercise exclusive governing jurisdiction over tribal members according to tribal laws as the action ultimately determines tribal citizen's destiny.

<sup>34</sup> *Elk v. Wilkins*, (1884), 112 U.S. 94. This case involved an Omaha tribal member, who tried to vote in a Nebraska election. He was denied the right to vote because he was not considered a U.S. citizen. The question tested reviewed if anyone born in the United States would be considered U.S. citizens regardless of their parents nationality. The U.S. Supreme Court held that children of "Indian" tribal members were not considered U.S. citizens despite being born in the United States. Elk then was denied the right to vote because his citizenship status was strictly that of a Omaha tribal member.

<sup>35</sup> *United States v. Kagama* (1886) 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228.

Congressional power to exercise plenary power derives from the guardian-ward relationship Justice Marshall defined in the *Cherokee Nation v. Georgia* case and is necessary for Indigenous peoples protection. Congress assumes plenary power is also delegated to them since it exists no where else in the tribal-federal relationship. Prior delegation to Congress to regulate this relationship was originally created to regulate commerce with Tribal Nations. This criminal act makes no reference to commerce, According to principles governing American Constitutional Law, the prior governance of Indian country lied almost exclusively with in the jurisdiction of Tribal Nations. The federal government exercised no role in the internal affairs of the nation with out obtaining tribal consent to do so. This case intrudes on Tribal Nations right to exercise exclusive self determination over their internal affairs and citizens.

<sup>36</sup> Dawes General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331 et seq.). The General Allotment Act was legislation passed by the U.S. Congress, dividing the tribal

into the internal affairs of Tribal Nations. Acting in the best interest of its “ward,” Tribal Nations, Congress made the decision to break up the communal Tribal land base and re-establish Tribal lands as individual allotments.<sup>37</sup> To determine distribution of the Tribal assets in land allotment parcels, a set of federal guidelines were established to identify “legitimate” individual Tribal members. Federal guidelines created a formal system of initial Tribal enrollment called the Dawes Rolls. The Dawes Rolls were formulated to divest Tribal members of the collective undivided interest in Tribal lands and assets. Tribal land allotments were issued in three categories: head of household was issued a 160 acre allotment parcel, 80 acres of land was granted to each single Tribal member over 18 years of age, and a 40 acre parcel of Tribal land was issued to individual Tribal members under 18 years of age.<sup>38</sup> The majority of tribal allotments were held in a special trust status by the federal government for a 25 year period.<sup>39</sup> The U.S. Congress soon passed legislation that allowed the Secretary of the Interior to shorten this period upon the determination the

---

land base into individual allotment parcels while automatically extending US citizenship to those individual tribal peoples who accepted a tribal allotment.

<sup>37</sup> The U.S. Congress exercised plenary power and acted in the best interest of Tribal Nations as its ward, and made the decision to break up the communal Indigenous land base while extending US citizenship to Indigenous citizens. The General Allotment Act recognized Indigenous consent was required to successfully allot the land. This recognition seems contradictory because when does a guardian make a decision in the best interest of its ward, then ask for permission from the ward to make such decision?

<sup>38</sup> Robert N. Clinton, Carole E. Goldberg and Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* p. 32. (4<sup>th</sup> ed. Lexis 2003).

<sup>39</sup> See Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 1.04 (2005 ed., Lexis 2005). The general trust period for protection of tribally allotted lands was a 25 year trust period. In some instances certain federal competency tests were administered to individual tribal members before the expiration of the trust period. The competency test measured, according to federal guidelines, the ability of individual tribal members to be deemed competent to acquire their share of the tribal interest allotted.



“Indian” allottee was competent to manage his own affairs.<sup>40</sup> Once Tribal lands were allotted to all qualified individuals the remaining lands were often declared surplus and sold to non-members “in the best interest” of the tribe.

The General Allotment Act produced devastating amounts of Tribal land loss. Tribal Nations’ ability to govern their citizens within their newly reduced territorial jurisdiction suddenly became severely impaired. The General Allotment Act altered a notion of collective Tribal membership as the act unilaterally extended U.S. citizenship to those Tribal individuals who accepted allotments. The U.S. Congress effectively damaged the conscious notion of collective Tribal identity after purporting the notion of federal BIA regulations as absolute.

In accordance with the federal allotment policy, individual allotment acts were passed for specific tribes. These individual allotment acts also contained express provisions extending U.S. citizenship to Tribal members accepting allotments. With the initial domestication of Tribal citizens having been accomplished Congress was well under way in implementing the next set of assimilation objectives.

In a 1903 case before the United States Supreme Court, a Kiowa/Comanche Tribal citizen was seeking to block congressional ratification of a plan to allot Tribal lands.<sup>41</sup> The Tribal position was that allotment distribution, as specified in the 1867

---

<sup>40</sup> See e.g., Act of May 29, ch. 216, 35 Stat. 444 (1908) (codified at 25 U.S.C. § 404); Act of Mar. 1, ch. 2285, 34 Stat. 1018 (1907) (codified at 25 U.S.C. § 405).

<sup>41</sup> *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). This case was brought by Kiowa/Comanche tribal member/landholders against the federal government claiming the allotment of tribal lands was unconstitutional because legislation lacked the signatures of  $\frac{3}{4}$  adult male tribal members needed to further allot tribal lands. This quantified signatory requirement can be found in the Treaty of Medicine Lodge, Article 12. The U.S. Supreme Court denied the tribal claim and upheld that congressional Plenary power included the right to abrogate treaties. The Court’s holding noted Article 12 of the

Medicine Lodge Treaty, required majority consent of adult male Tribal members before any further land cessions could occur. Therefore, the proposed congressional allotment plan for the Kiowa/Comanche Nations violated the 1867 treaty.<sup>42</sup> The U.S. Supreme Court unanimously concluded that Congress possessed plenary power over Tribal Nations<sup>43</sup> including the power to unilaterally abrogate treaties. This power was only subject to the requirement that congressional power be exercised in good faith towards its “wards,” the Tribal Nations.<sup>44</sup> The Court affirmed congressional plenary power over Tribal lands and property was fairly exercised as “guardianship” over Tribal interests. With the broad plenary power endorsed by the U.S. Supreme Court, Congress took further steps to regulate Tribal matters. Congress exercised plenary power as a political power, therefore not subject to judicial review. The 1903 case endorsed Congressional power as a virtually standardless trust authority over Tribal Nations. The U.S. Supreme Court set a damaging landmark for Tribal Nations treaty rights holding Tribal treaties were not immune from Congressional legislation. This ruling damaged both Tribal Nations and individual Tribal citizens setting a presence in federal law which undermined the legal supremacy of treaties, implying Tribal

---

Medicine Lodge treaty did not protect the Kiowa and Comanche’s from applicable congressional rulings.

<sup>42</sup> 1867 Treaty of Medicine Lodge. This treaty made between the Kiowa and Comanche Nations and the United States government created a large reservation for Kiowa/Comanche people in Indian Territory or what is known today as the State of Oklahoma. Article 12 of the Treaty stated no further land cessions would occur unless agreed and signed by  $\frac{3}{4}$  of the adult male members of the Tribe.

<sup>43</sup> *Lonewolf v. Hitchcock* 187 U.S. 553 (1903).

<sup>44</sup> *United States v. Sioux Nation* (1980) 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844. Congress abrogated its treaty with the Sioux nation, acquiring the Black Hills using imminent domain. Although the Sioux did not consent to such action, Congress exercised plenary power to do so and appropriated monies to justify the transaction. The U.S. Supreme Court affirmed the U.S. Congress justifiably exercised plenary power in the best interest of the Tribe.

treaties were no longer recognized as the supreme law of the land under the U.S. Constitution.<sup>45</sup>

Exercising plenary power once more in 1924, Congress passed the Indian Citizenship Act (ICA).<sup>46</sup> The ICA imposed an equal status of U.S. citizenship to each individual Tribal citizen located within the territorial boundaries of the United States. The unique dual citizenship<sup>47</sup> of Tribal citizens was created and automatically imposed upon all Tribal Nations by the U.S. Congress regardless of Tribal Nations consent or endorsement the unique dual citizenship status.

The ICA subjugated Tribal Nations to colonial law by imposing a foreign citizenship upon Tribal citizens of a distinct sovereign nation. Dual citizenship of Tribal citizens supported the federal goal of assimilation by establishing a direct relationship between the legislative branch of the federal government and individual Tribal citizens.<sup>48</sup> The Act individualized Tribal citizens by deconstructing the collective aspect of Tribal identity. Assimilating Tribal citizenship as a collective component of Tribal society by imposing a dual citizenship permitted a justifiable avenue for the U.S. Congress to freely negotiate with individual Tribal citizens justifiably bypassing Tribal governments. Dual citizenship of Tribal citizens endorsed

---

<sup>45</sup> U.S. CONST. art 6. This article established treaties are the Supreme Law of the Land.

<sup>46</sup> Indian Citizenship Act, Ch. 233, 43 Stat. 253 (1924). (Codified as amended at 8 U.S.C. § 1401 (b)). Most Tribal citizens had acquired U.S. citizenship as a stipulation when accepting allotments during the General Allotment Act. The Indian Citizenship Act was passed to conclude total assimilation of all Tribal citizens who were not granted US citizenship by any other means.

<sup>47</sup> Dual citizenship for the purpose of this paper refers to the relationship between one Tribe and the U.S. Congress.

<sup>48</sup> The Bureau of Indian Affairs, under the direction of the U.S. Congress, established a diplomatic relationship with Tribal Nations and its citizens. The BIA currently regulates payment of special federal services and benefits to individual tribal members for things such as housing, healthcare and education.

the presumption that Tribal Nations are “domestic dependent nations.” The “domestic dependent nation” term created the legal metaphor of Tribal Nations residing within the boundaries of the United States implied Tribal Nations were also under the jurisdiction of the United States government. The founders of the U.S. constitution<sup>49</sup> established specific guidelines to attain U.S. citizenship and explicitly recognized Tribal Nations as distinct and separate from U.S. citizens. Continually reaffirmed by U.S. Supreme Court rulings, congressional plenary power remained employed as a control mechanism which limited and sometimes even terminated Tribal Nations.<sup>50</sup> The legislation used to support the ICA is another astounding example of congressional plenary power overriding constitutional based law.

Tribal Nations’ rights had been tenaciously exercised prior to colonization. Congressional legislation over Tribal Nations and the idea of plenary power was continuously upheld by federal courts, reducing Tribal rights to only limited attributes of the full sovereignty and self-determination they had once exercised. In less than one hundred years, Tribal citizenship was revised and soon defined through colonial law to include a component of U.S. citizenship. These changes furthered the destruction of instrumental Tribal concepts of collectivity and community.

---

<sup>49</sup> U.S. CONST. art. XIV, § 1. This provision established all persons born or naturalized within the boundaries of the US are subject to the jurisdiction of the U.S. An individual had to meet the requirements of the fourteenth amendment to acquire federal and state citizenship. Section 2 specifically stated the language Indians not taxed. Since tribal peoples were not taxed within the U.S. system they could not join the federal union or acquire U.S. citizenship. Therefore tribal peoples were not born subject to the jurisdiction of the United States government, therefore should not have been obligated to accept a unilateral U.S. citizenship.

<sup>50</sup> Menominee Indian Termination Act of 1954 25 U.S.C §§ 891-902. The termination act was an exercise of Congressional legislation explicitly terminating the federal recognition of the Menominee Indian Tribe of Wisconsin and their citizens. By terminating a Tribal Nation, all tribal citizens lost their dual citizenship status and became a single citizen of the United States.

Furthermore, individualism gained a foothold with Tribal citizens' new identity including the U.S. citizenship component.

### **Tribal Constitutions 1934-Present**

The U.S. goal of getting rid of its "Indian problem" was furthered by the policies of assimilating Tribal citizens into mainstream U.S. society. Congress retained the ultimate power to dissolve federal recognition of Indigenous citizenship. Tribal citizens now served as prime targets in the federal government's goal for extinction; domestication, assimilation, and finally termination its Tribal population in mid-North America. Federal policies created to support assimilation reduced elements that made Tribal peoples a distinct people: their history, their languages, their traditional laws and customs of government.<sup>51</sup> Assimilation policies failed to dissolve Tribal citizenship and instead created a unique dual citizenship for Tribal citizens. With dual citizenship established, the U.S Congress now faced the daunting task of generating legislation to regulate the unique Tribal-federal relationship. The national policy of assimilation was replaced with re-organization of Tribal governments. Federal policies created various policy periods to deal with Tribal Nations. Many policies had failed and most were reversed. The one standard that has never been reversed is the use of blood quantum to determine legitimate Tribal identity under federal law.

---

<sup>51</sup>See, Roy Cook, *Heart of Colonialism Bleeds Blood Quantum*. American Indian Source (2003)

In 1933, a young lawyer by the name of Felix Cohen joined the Solicitor's Office of the Interior. He was assigned the drafting of Indian legislation for the reorganization of Tribal governments. Cohen's interpretations creating new Tribal governments were products of his own social pluralism, not necessarily suitable for the customs of Tribal Nations. Cohen's interpretations of what a self-governing tribe would constitute virtually erased Tribal sovereignty. Instead the sovereignty of Tribal Nations was limited and full recognition given to only the colonizing U.S as the absolute sovereign. In Cohen's view, a Tribal constitution's purpose was to reorganize Tribal Nations into that of a town government or municipality.<sup>52</sup>

With the passage of the Indian Reorganization Act (IRA),<sup>53</sup> the U.S Congress firmly asserted federal control within the internal affairs of Tribal Nations. The IRA effectively ended allotment of Tribal lands, extended trust restrictions on Indian lands, and restored Tribal ownership of unsold "surplus" lands under the trust protection of the U.S. federal government.<sup>54</sup> The IRA encouraged the political reorganization of Tribal Nations as self-governing entities claiming reorganization would assure better standards of living. This piece of legislation forcibly assimilated Tribes by imposing a

---

<sup>52</sup> Id. Further evidence supporting this town structure arrangement used in the boiler plate model constitution can be found in a nine-page "Bibliography for Use in Drafting Tribal Constitutions" in Cohen's personal notes that were used to draft the model constitution. This bibliography contains over seventy-five references to books, articles, and government documents that deal with administration, city planning, housing, and other matters pertaining to municipal governments.

<sup>53</sup> Wheeler-Howard Act (Indian Reorganization Act), ch. 576, 48 Stat. 984-988 (1934). (Codified as amended at 25 U.S.C. § 461-479). The Indian Reorganization Act was federal legislation which encouraged economic development and self-determination through reorganized tribal governments reflected in tribal constitutions.

<sup>54</sup> See Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 1.05 (2005 ed., Lexis 2005).

constitutional uniformity on Tribal governments.<sup>55</sup> This uniformity outright denied the truly diverse nature of Tribal governments.

Cohen's work furnished a model constitution the Bureau of Indian Affairs (BIA) and its Indian agents repeatedly used when facilitating the reorganization of Tribal governments.<sup>56</sup> The boilerplate model constitution portrayed a minimal resemblance to the United States Constitution. The model constitution depicted an organizational structure similar to a municipal government.<sup>57</sup> A new membership provision was introduced with the boilerplate model constitution that included blood quantum based membership eligibility.

IRA model constitutions included a final clause authorizing the Secretary of the Interior to remain the guardian over Tribal Nations by making final approvals of amendments to Tribal constitutions, once ratified by a majority of the tribe.<sup>58</sup> Once the Tribal constitution had approved a citizenship based on blood quantum, procedures established the constitutional amendment process required Secretarial approval. This secretarial approval mechanism extended power to the Secretary of the Interior to approve amendments denying citizenship to Tribal people entitled to it as a

---

<sup>55</sup> See Wilkins, *supra* n. 2, at Section 7, Form of Governing body. Cohen's notes reveal the purpose of implementing a unified government is so all powers of government become vested in a single governing body with ultimate authority.

<sup>56</sup> See Wilkins, *supra* n. 2, at Appendix A-Model Tribal Constitution. Personal notes from Cohen's work as drafter of the model constitution used to persuade and sometimes force compliance of tribal government reorganization.

<sup>57</sup> *Id.*

<sup>58</sup> See Wilkins, *supra* n. 2, at Appendix A- Model Tribal Constitution. The appendix provides the model constitution distributed to tribes by the BIA and other Indian agents in the field.

matter of federal statute or treaty.<sup>59</sup> The establishment of a secretarial approval mechanism seriously limited the expression of Tribal autonomy.<sup>60</sup>

Tribal Nations traditionally were sovereigns with internal and external relations prior to the Indian Reorganization Act. Governing structures varied and usually included consensus and full Tribal representation.<sup>61</sup> The boilerplate model constitution suppressed Tribal Nation's traditional forms of government<sup>62</sup> by narrowly articulating new powers of the reorganized Tribal government as bylaws.<sup>63</sup> The Indian Reorganization Act creatively extended an external source of power as absolute within the new Tribal government structure. Reorganized Tribal Nations who successfully met the vigorous process of acquiring federal approval were granted the status of federal recognition.<sup>64</sup> Federal recognition of each Tribal Nation remained essential to receive annual federal funding, guaranteed by treaty provisions, used to support the operation of Tribal governments.

The U.S Congress claimed the Tribal-federal relationship defined the political relationship that existed between the two sovereign governments. This political

---

<sup>59</sup> *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 126 (D.D.C. 2002) In this case the Secretary of the Interior rejected an amendment to the Seminole Nation of Oklahoma's constitution that excluded black Seminoles, who were entitled citizenship in the Tribe stemming from a 1866 treaty that extended their tribal citizenship.

<sup>60</sup> See Wilkins, *supra* n. 2, at Section 9. Cohen's notes state unless the new tribal constitution contained specific provisions thoroughly delegating express powers to traditional chiefs or headsmen it was impossible to guarantee the continued recognition of this traditional form of leadership in tribal government.

<sup>61</sup> See Wilkins, *supra* n. 2, at Section 13 Powers of Tribal Self Government. Bylaws similarly are used to govern a chartered corporation, with provisions are used to regulate its members and their shares in the corporation.

<sup>62</sup> See Wilkins, *supra* n. 2, at Section 17 By-Laws. According to Cohen's notes The Indian office purposely attempted to dissolve all traces of tribal customs used to guide leadership in traditional tribal government.

<sup>63</sup> Cohen's model tribal constitution allowed for only three categories or types of tribal governments.

<sup>64</sup> Indian Re-Organization Act of 1934, 25 U.S.C Sections 16-18



relationship was not intended to include a racial aspect of the Tribal people, only their membership affiliation within the Tribal political entity. The federal definition of an “Indian” according to the IRA is:

All persons of Indian descent who are members of any federally 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 an Indian reservation, and shall further include all other persons of one-half or more Indian blood.<sup>65</sup>

provision of membership expressly affiliated with race.<sup>66</sup> The model constitutions disregarded the value of collective Tribal citizenship and replaced it with narrowly defined individual membership criteria based on blood quantum. This was the beginning of reorienting Tribal peoples to define themselves as individual citizens. Establishing federal standards of blood quantum as legitimate, Congress created an ingrained paralyzing notion of race-based Tribal identity.

The new political characterization of Tribal citizenship formed a distinct division between the internal and external recognition of individual Tribal citizens. The status as an enrolled member of any federally recognized Tribal Nation is considered a direct link to important Tribal and federal benefits. Assimilating Tribal citizens to attain U.S. citizenship first then Tribal second, the federal government has created a system of recognition similar to U.S. citizens. U.S. citizenship of Tribal peoples is automatically extended to that individual upon birth. Although individual

---

<sup>65</sup> 25 U.S.C. 297, 1918.

<sup>66</sup> See Wilkins, *supra* n. 2, at Appendix A –Model Tribal Constitution

Tribal citizenship recognition remains plagued with strict guidelines of eligibility be met before Tribal citizenship is extended.

Currently each individual Tribal member is issued a Certification of Degree of Indian Blood (CDIB). Each CDIB is identified by a specific number, similar to a United States citizen's social security number. A U.S. social security number allows the U.S. citizen to work, pay the government taxes and qualify for social security benefits. A Tribal CDIB number is used to identify, qualify and track individual benefits received as a member of a federally recognized Tribal Nation. Without possession of a recognized Tribal enrollment number there is no federal recognition of individual Tribal citizens. Following reorganization, being recognized as an "Indian" citizen by the U.S. Congress and/or a Tribal Nations is viewed with special rights.<sup>67</sup>

Using congressional plenary power as an intimidating mechanism, the boilerplate model constitution was presented as an opportunity for Tribal Nations to

---

<sup>67</sup> The Snyder Act was legislation that permitted the Bureau of Indian Affairs to distribute financial support for the "benefit, care, and assistance of Indians through out the United States" (For further explanation of the Act see 25 U.S.C § 13). For this particular federal benefit, the Department of the Interior has defined an "Indian" for the explicit purpose of meeting eligibility guidelines found in the Snyder Act. Indian for this purpose was based on ancestral lineage. In 1957, the Bureau published a self imposed revised set of regulations which stated "funds appropriated by Congress for the education of Indians be used for making educational loans and grants to aid students of one-fourth or more degree of Indian blood attending accredited institutions of higher education" (for further explanation see 25 C.F.R. Section 40.1).

A tribal citizen of lineal descent applied for federal funding through the Act and was denied support. The Bureau stated the reasoning for his denial was failure to fulfill the stated blood quantum criteria. The tribal descendent brought a legal challenge against the Bureau's reasoning for denial in the ninth circuit court. The tribal descendent claimed unlike other federal statues, the Snyder Act did not contain any language stipulating a particular degree of "Indian" blood quantum be met as eligibility of the education benefit in question. The Ninth Circuit Court agreed with the reasoning, finding the requirement of one fourth degree of Indian blood implemented by the Bureau went beyond the scope of its authorizing statue (for a detailed explanation of the case see *Zarr v. Barlow*, 800 F.2d 1484 (9<sup>th</sup> Circ. 1986).

reorganize their Tribal governments. Initially Tribal IRA elections did not produce Tribal citizen's compliance. Many tribal members were confused about the purpose or implementation of the IRA and did not vote during IRA elections. The IRA required that absolute majority Tribal vote was needed to approve the new Tribal constitutions. The U.S. Congress soon amended the IRA to include a provision requiring only a specified majority of Tribal citizens need to vote to approve acceptance of the IRA.<sup>68</sup> Prior to the amendment absolute majority was required to approve IRA Tribal constitutions. In some cases, Tribal constitutions contained no Tribal input, nor were elections held to reject the new form of Tribal government, therefore were imposed because Tribes did not expressly exclude themselves. Although the IRA Tribal constitutions did not fit the prior organizational structure of government, Tribal Nations ultimately accepted the model<sup>69</sup> because their non-compliance instigated harsh treatment by Indian agents withholding rations and other manipulative tactics to assure compliance.<sup>70</sup>

The reorganization of Tribal governments proved to be fatal to the true expression of Tribal self-determination.<sup>71</sup> With the passage of the IRA, to some extent the standards of living of Tribal citizens improved although many remained confused and disoriented having suffered substantial land and identity loss in the new U.S.

---

<sup>68</sup> Act of June 15, ch. 260, 49 Stat. 378 (1935) (codified at 25 U.S.C. §§478a-478b).

<sup>69</sup> A total of 258 Tribal elections were held. 181 Tribes accepted it, then comprising 129,750 tribal citizens. 77 other tribes, comprising 86,365 tribal citizens, rejected the IRA. 14 more Tribes did not hold Tribal elections to vote on the IRA, therefore were included in those Tribes who accepted the IRA.

<sup>70</sup> Robert N. Clinton, Carole E. Goldberg and Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* p. 38. (4<sup>th</sup> ed. Lexis 2003).

<sup>71</sup> See Wilkins, *supra* n.2 at xii. Cohen an influential federal official later acknowledged how the Department of the Interior, namely the Bureau of Indian Affairs, had produced many questionable rules and regulations restricting civil and human rights of its Indigenous peoples.

social environment. The long range effects in terms of Tribal citizenship proved to be detrimental, as blood quantum regulations are now firmly embedded in Tribal law.<sup>72</sup>

### **Federal Termination**

In the 1940's a change in federal policies developed as the idea of termination was explored in depth. Both the House Committee on Indian Affairs and the Senate conducted their own measures of Indian progress and formulated similar recommendations to address the remaining "Indian problem."<sup>73</sup> Both recommendations encouraged further assimilation of Tribal citizens in the most expeditious manner possible. Tensions grew between those federal officials who supported Indian self determination and those officials who supported assimilation policies, as the way to deal with the "Indian problem." In 1945, relations between the Commissioner of Indian Affairs John Collier and U.S. Congress became unbearable causing the Commissioner to resign his position.<sup>74</sup> Congress and the BIA began working together to assess the social and economic status of Tribal Nations under federal supervision. Information collected was used to determine the nature of future policies used to regulate the Tribal-federal relationship.

Congress continued to develop the idea of termination as an experimental policy to be implemented on a limited number of Tribes. Congress undertook fact

---

<sup>72</sup> Within 12 years after the adoption of the IRA 161 Tribal constitutions and 131 Tribal corporate charters had been drafted and approved under IRA provisions.

<sup>73</sup> Charles F. Wilkinson & Eric R. Briggs, *The Evolution of The Termination Policy*, 5 Am. Indian L. Rev. 139 (1977).

<sup>74</sup> See Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 1.06 (2005 ed., Lexis 2005).

finding to support the justification for termination of these Tribal Nations. Congress identified specific tribes based on their economic progress toward and probability of achieving full U.S. assimilation. Federal termination of Tribal political entities would end the special Tribal-federal relationship and ultimately alleviate the federal government's legal and moral trusteeship responsibility to Tribal Nations. The executive branch of the federal government likewise endorsed the principle of gradual and systematic termination of its Tribal population.<sup>75</sup>

Termination became an official "Indian" policy in 1952 when the House of Representatives passed a resolution supporting the policy. In 1953, Congress adopted House Concurrent Resolution 108.<sup>76</sup> The very next year Congress voted to terminate 70 pre-identified Tribal Nations.

A prime example of this federal experimental policy, in 1954 the Menominee Indian Tribe of Wisconsin became identified as the first Tribal Nation on the list to become terminated.<sup>77</sup> The Menominee Nation had been identified as a prime example of a Tribal Nation whom had attained successful economic progression meeting the federal goal of assimilation. Termination had a devastating impact on the Menominee Nation politically, economically and culturally.<sup>78</sup> Termination of the Tribal political

---

<sup>75</sup> Id. See *e.g.* Comm'n on Organization of the Executive Branch of Government, Indian Affairs: A Report to Congress, H. R. Doc. No. 81-1 at 53 (1949).

<sup>76</sup> See Felix Cohen, *Cohen's Handbook of Federal Indian Law* §1.06 (2005 ed., Lexis 2005). See, H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953). This resolution was only a general statement declaring to make the Indians subject to the same laws, privileges and responsibilities as all other U.S. citizens. This resolution called for the end to the guardian-ward status of Tribal Nations by granting them all rights pertaining to American citizens.

<sup>77</sup> Menominee Indian Termination Act of 1954 25 U.S.C §§ 891-902. The termination act was an exercise of Congressional legislation explicitly terminating the federal recognition of the Menominee Indian Tribe of Wisconsin and their citizens.

<sup>78</sup> Nicholas C. Peroff, *Menominee Drums: Tribal Termination and Restoration, 1954-1974*

entity meant termination of individual Tribal citizen's membership status as well. Terminated Tribal citizens in a single stroke of plenary power became ordinary U.S. citizens. Termination ended the recognition of the Tribal-federal relationship which eliminated federal programs for both Tribes and individual citizens.

Responsibility of the newly terminated Tribal citizens fell under the state's authority and jurisdiction. State jurisdiction gave local and state legislative government's broad authority over Tribal citizens including land use and their regulations.<sup>79</sup> With termination ending the federal trusteeship over Tribal lands, most Tribal lands of those terminated tribes were ultimately relinquished or lost. This proved to be traumatic because the terminated Tribal Nations were unable to exercise governmental powers over their territory after losing their Tribal land base.<sup>80</sup>

Overarching congressional plenary power was used as a means to force all Tribal citizens to adhere to U.S. authority. Once under U.S. authority, the federal government created formal lists of legitimate Tribal citizens. As individual Tribal citizens were recognized as legitimate, the U.S. Congress took further measures to impose U.S. citizenship upon all Tribal citizens, creating a unique dual citizenship. Federal blood quantum standards are now firmly embedded in both in Tribal and federal governing documents, creating the foundation for Tribal law and citizenship. With BIA blood quantum standards firmly embedded in Tribal law, the federal government took the last step to assure full U.S. assimilation would be met,

---

<sup>79</sup> Various statutes were enacted as early as 1940, subjecting specific Tribes to State jurisdiction. *See, e.g.*, (All reservations in Kansas) Act of June 8, ch. 276, 54 Stat. 249 (1940) (codified at 18 U.S.C. § 3243); (Sac and Fox Reservation in Iowa) Act of June 30, ch. 759, 62 Stat. 1161 (1948).

<sup>80</sup> As a result of federal termination, Tribal Nations collectively lost over 1,362,155 acres of reservation lands.

termination. Termination of Tribal Nations as a distinct class within the U.S. government system was the final step in fulfilling the government's goal of Tribal assimilation. Termination subjected Tribal citizens freely to federal and state laws like any other U.S. citizen.<sup>81</sup>

### **Civil Rights Act of 1964**

By the 1960's segregation laws developed in the U.S. created a lower equality of life for African-Americans. Segregation issues were becoming increasingly challenged and it had become evident by the excessive outbreaks of violence, particularly in the southern United States, that change was needed. Repeated attacks on minorities continued and finally human rights violations caught the attention of President J.F. Kennedy. Under the direction of the Kennedy administration, the federal government began working on a solution to facilitate changes for recognition of basic human right standards and to address the increased violations occurring against minority populations. Legislation was passed by Congress in 1964 creating the U.S. Civil Rights Act (CRA).<sup>82</sup> The CRA was legislation intended to provide equal treatment for every U.S. citizen, regardless of race. The Act's purpose was to prevent discrimination based on race, religion and/or national origin. The law further was applied to address discrimination actions in employment, federal assistance programs, use of public facilities, educational access and voting rights. The CRA was

---

<sup>81</sup> As a result of the federal termination policy 109 tribes, containing 11,466 tribal citizens, were terminated

<sup>82</sup> U.S. Civil Rights Act, Pub. L. 88-352, 78 Stat. 241 (1964).

intended to create an environment in which equality of citizens could develop in the U.S.

### **Indian Civil Rights Act of 1968**

Also in the 1960's the federal government's termination policy of Tribal Nations had failed miserably and was quickly replaced with a new policy designed to expand the Civil Rights Act by extending social and economic assistance to Tribal Nations. In 1968 the U.S. Congress passed the Indian Civil Rights Act (ICRA).<sup>83</sup> The ICRA was an attempt to impose requirements of equal protection to Tribal citizens expressly subjecting them to several provisions and protections encompassed in the U.S. Bill of Rights. The ICRA attempted to impose Euro-American standards on the relationship between Tribal citizens and Tribal governments. While the ICRA provided many constitutional protections it did not impose protection in all areas.<sup>84</sup> The ICRA constrained Tribal sovereignty by deliberately undermining an earlier Supreme Court Case<sup>85</sup> reaffirming Tribal sovereignty excluded Tribal citizens from the U.S Constitution's Bill of Rights. The ICRA attempted to create uniformity in Tribal judicial systems meant to mirror the U.S. court systems by providing similar

---

<sup>83</sup> Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified in part at 25 U.S.C. § 1301 et seq).

<sup>84</sup> The ICRA did not provide all the same protections as the U.S. Bill of Rights. The ICRA lacked an establishment clause, failed to guarantee a republican form of government, no separation of church and state, and failed to provide individuals the right to a jury trial in civil cases or appointment to legal council in criminal cases.

<sup>85</sup> *Talton v. Mayes* 163 U.S. 376 (1897). This case found by virtue of the Cherokee Nation's inherent sovereignty, the Bill of Rights in the United States Constitution did not apply to the Cherokee Nation. This ruling affirmed the Cherokee Nation, as a separate nation, did not obtain its power of self government as delegated by the federal government, instead these powers remain inherent as they were never expressly taken away by U.S Congress or ceded through a treaty. Therefore this case affirmed Tribes remained under the plenary power of Congress and general provisions of the U.S. Constitution. Tribal citizens though were not guaranteed individual rights found in the fifth Amendment of the U.S. Constitution.



procedural mechanisms to address issues. The ICRA only developed two solid policies that were imposed upon Tribal governments. The first was a uniform Tribal court power that limited criminal sentencing to a \$5,000 fine and/or one year incarceration.<sup>86</sup> The second policy imposed habeas corpus relief in federal court to individuals being held in Tribal jails.

Congressional legislation used to create the ICRA, is an astounding example of plenary power used to override a Supreme Court decision upholding inherent Tribal sovereignty.<sup>87</sup> Contradictory policies and judicial interpretations continued to undermine true self-determination of internal Tribal affairs, affecting its citizenship.

### **A Challenge to Equal Protection Under Federal Law**

BIA employees in the early 1970's who were not Tribal members challenged federal hiring provisions that included "Indian preference" for employment in federal agencies. The opponents claimed the special rights afforded to Tribal Nations was based on their racial classification and constituted a racial discrimination against non-Indians. A 1974 case before the U.S. Supreme Court held that the unique legal status of Indians was created under federal law, as a political status, upon the plenary power of the U.S. Congress.<sup>88</sup> This unique legal status of "Indian" is based on a legal history of treaties and the assertion that Indians remained under the "guardian-ward" status of the U.S. Congress.

---

<sup>86</sup> Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. § 1302 (7)).

<sup>87</sup> Although the ICRA seemed to strengthen individual tribal citizen's rights, tribal courts were limited in the extent of their judicial powers, like minimum sentencing for violations occurring within tribal jurisdiction.

<sup>88</sup> *Morton v. Mancari*, 417 U.S. 535 (1974).

The U.S. Supreme Court found in the case that the employment preference did not constitute a racial classification of “Indian,” rather the classification was strictly political because membership was based in the Tribal government as a political entity.<sup>89</sup>

Based on this U.S. Supreme Court ruling, Tribal Nations should only be recognized by the federal government according to their status as a political classification. Current BIA regulations based on blood quantum requires Tribal citizens to authenticate themselves before they can access federal benefits of being “Indian.” Affirming the legal status of Tribal Nations as strictly political not racial, all blood quantum provisions should be eliminated in BIA regulations and federal laws as a determining factor of who qualifies as a legitimate “Indian”.

### **The Issue of Tribal Membership is Challenged**

Federal Courts held the ICRA did not provide a federal cause of action overtime, so the ICRA claims were dismissed. In 1978, a Tribal member challenged the Tribal government’s right to exercise its own Tribal sovereignty when determining citizenship.<sup>90</sup> A “full-blooded” female member of the Santa Clara Pueblo tribe was denied the right to enroll her natural born child as a member. According to a 1939 Tribal ordinance, enacted by the Santa Clara Pueblo Council pursuant to its

---

<sup>89</sup> Id. 535, 554.

<sup>90</sup> *Santa Clara Pueblo v Martinez*, 436 U.S. 58 (1978).

legislative authority under the Constitution of the Pueblo,<sup>91</sup> Tribal membership was established with set criteria. The four separate criteria for membership in the Santa Clara Pueblo were:

1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
2. That children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.<sup>92</sup>

Upon hearing the case the United States District Court for the District of New Mexico addressed the issue of the alleged civil right violation.<sup>93</sup> The Court stated that the 1968 Indian Civil Rights Act did not require Indian tribes to use U.S. concepts of equal protection and due process when determining membership in their nations.<sup>94</sup> Addressing the issue of an individual Tribal member's right to sue a Tribal Nation when civil rights become violated, the federal district court held that the ICRA implied a waived common-law or Tribal sovereign immunity from civil suits by individual Tribal members.<sup>95</sup> The case was appealed to the Supreme Court of the United States. The Supreme Court lacked jurisdiction to hear the case. The lack of

---

<sup>91</sup> The Constitution and Bylaws of the Santa Clara Pueblo New Mexico was approved by the Secretary of the Interior on November 23, 1935 and ratified by the Indians of the Santa Clara Pueblo on December 14, 1935.

<sup>92</sup> Robert N. Clinton, Carole E. Goldberg and Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System*. 483 (4<sup>th</sup> ed. Lexis 2003).

<sup>93</sup> *Id.*

<sup>94</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-72 (1978). Tribes being acknowledged as pre-existing the U.S Constitution are regarded as unconstrained by U.S. constitutional provisions.

<sup>95</sup> *Id.* This case affirmed how the U.S. Congress can freely exercise plenary power over Tribal Nations even by waiving their sovereign immunity without their consent. Noting that sovereign immunity like all other aspects of tribal sovereignty remained subject to congressional plenary power.

federal jurisdiction stemmed from the ICRA, which stated federal court review has limited only to civil rights violations alleging habeas corpus violations.<sup>96</sup> Ultimately, the Court held that all other ICRA civil rights violations could only be brought in a Tribal court forum.

Delivering the majority opinion of the Court, Justice Thurgood Marshall acknowledged the fact that the Martinez children possessed other characteristics of a Tribal citizen for practical purposes; by living within the Pueblo their entire lives, speaking the Tribal language, and participating in the cultural and social life of the Tribe.<sup>97</sup> The Court did reaffirm the tribe's exclusive right to determine citizenship for internal purposes based on the definition of Tribal citizenship found in the Tribal constitution, even when the denial of membership by the Tribe meant a denial of federal health and education benefits.<sup>98</sup> The Court concluded that the current federal policy encouraged Tribal self-government therefore it remained inherent right for the Tribal Nation to exclusively define internal citizenship because it remained central to Tribal existence.<sup>99</sup> Judicial interpretations of the case supported Tribal self-government by holding that Tribal institutions had the primary responsibility for resolving Tribal disputes over civil rights. The outcome of the case provided no

---

<sup>96</sup> Congressional intention of the ICRA was not to provide individuals a means for federal court review in the event tribal government's non-compliance with the ICRA. The one exception being federal court reviews in a criminal context of a habeas corpus allegation.

<sup>97</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

<sup>98</sup> *Id.* The U.S. Supreme Court concluded it is the inherent right of each Tribal Nation to determine tribal citizenship based on the Tribal definition of citizenship found in tribal constitutions under the membership provision.

<sup>99</sup> Other examples of the recognition of inherent rights to determine citizenship as central to tribal existence can be traced back to the late 1800's. In *Roff v. Burney* 168 U.S. 218 (1897) the court concluded tribal governments have the power to make their own substantive law for issues regulating their internal matters. *US v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978) reaffirmed exclusivity of determining tribal citizenship remained in the powers of tribal government.

federal remedy for Tribal members challenging IRA Constitution membership standards.

The problem with this decision is that the judicial system of both Tribal and federal courts liberally defer to the Tribal constitution's definition of membership when the issue becomes challenged. A majority of Tribes adopted Tribal constitutions that included a blood quantum provision to determine individual eligibility for Tribal membership.<sup>100</sup> According to the reorganized system of Tribal government, civil right actions against a Tribal government can only be brought in a Tribal forum. The Santa Clara case creatively says unless a tribe physically detains a person in jail there is no avenue for federal review of Tribal decisions under the ICRA. The court failed to address the specific issue of blood quantum, instead deferred back to the tribe as retaining inherent powers to define internal citizenship.

Based on the reorganized system of Tribal government those natural born children who fail to meet the new strict enrollment eligibility requirements are denied citizenship in the Tribal Nation. Tribal enrollment containing blood quantum provisions are racist in nature. Racism is the belief that race accounts for differences in human character and that one race is superior to another. Racism according to blood quantum based Tribal enrollment is rooted in the biological difference.

Although Santa Clara's ruling reaffirmed the inherent right of Tribal Nations to determine its internal citizenship for its own internal/Tribal purposes, this affirmation does not eradicate congressional plenary power to determine a distinct

---

<sup>100</sup> CONST. and Bylaws of the Menominee Indian Nation. art. 2., The CONST of the Ho-Chunk Nation. art 2.

definition of Tribal citizenship for federal purposes. Plenary power continues to suppress Tribal governments from expressing true self-determination because there is no legitimate constitutional reference extending an exercise of federal authority over Tribal Nations without their express consent.<sup>101</sup> Repeated federal intervention in the new Tribal sociopolitical organization now makes it difficult for every Tribal citizen to fit into a regulated membership category.<sup>102</sup> With blood quantum provisions deeply embedded into Tribal law, there is a limited legal avenue for an individual Tribal citizen to seek relief from narrow membership criteria. According to many IRA Tribal constitutions the only course of action is for the individual Tribal citizen to start the extensive process of amending the Tribal constitution.

IRA model Tribal constitutions list specific procedural requirements that must be met to amend any provision of the current constitution. The general procedure for a proposed amendment is carried out in three major steps. First, an individual Tribal citizen must either acquire a set amount of signatures from adult members or on a petition request an amendment by a majority vote of the current Tribal council.<sup>103</sup> Next having met the petition requirements, it is the duty of the Secretary of the Interior, delegated to the BIA to call a special election to address the proposed amendment(s). Finally, the amendment may be adopted when at least thirty percent (30%) of those entitled to vote in such an election cast a positive vote. Provided the thirty percent (30%) voting population is met, the Secretary of the Interior must give

---

<sup>101</sup> Id.

<sup>102</sup> See Carole Goldberg-Ambrose, *Of Native Americans and Tribal members: The impact of Law on Indian Group Life*, 28 L. & Soc'y Rev. 1123 (1994).

<sup>103</sup> Prairie Band Potawatomi Nation Tribal CONST. art. XIII.

a final approval of the proposed amendment(s). Upon this secretarial approval, the constitution will be changed to reflect the new amendment(s).

Constitutional amendment(s) making less restrictive Tribal enrollment requirements will not necessarily help an individual Tribal member to receive federal benefits associated with a Tribal membership status. Tribal members may be admitted into the tribe by less restrictive requirements, but federal BIA regulations for who is an “Indian” remain firmly embedded in the use of blood quantum.

### **Blood Quantum Pedigree, a Gross Violation of Human Rights**

While tenaciously fighting to preserve cultural integrity and a distinct lifestyle, Tribal Nations have survived federal policies of removal, assimilation, termination, and many forms of attempted cultural genocide.<sup>104</sup> A new form of genocide has emerged, identified as ethnocide. Ethnocide is defined as acts committed against a group of peoples motivated by ethnicity.<sup>105</sup>

Tribal peoples in the United States are the only kind of peoples in the world who must acquire formal recognition before they can be considered “Indian”. Tribal

---

<sup>104</sup> The Convention on the Prevention and Punishment of the Crime of Genocide- Adopted by the United Nations General Assembly on December 9, 1948. Article II, states in the present convention genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group; b) Causing serious mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; and e) Forcibly transferring children f the group to another group.

<sup>105</sup> For the purpose of this paper ethnocide is defined by the United Nations Convention on the Prevention of Crime and Genocide, adopted by the UN General Assembly December 1948 and became effective January 1951. Under the Convention some of the acts could also overlap with the legal definition of genocide.

citizens are uniquely defined by a pedigree of “Indian Blood” as a guideline of eligibility required for citizenship. Tribal peoples of the human race being defined by pedigree, having to prove themselves worthy, is a gross violation of human rights. Pedigree is used to determine an animal’s pureness or worth, not intended for use of the human race.

Some Tribal members will argue the only way to preserve the culture of the Tribal Nation is to maintain a pure blood line. This is not a strong argument because the culture of a Tribal Nation is not based on blood type, but rather learned customs and traditions of the collective Tribal society. Culture remains a vibrant, thriving self-identified part of Tribal identity. Blood quantum based citizenship makes the affluent identity and culture of Tribal Nations into a racial breed of peoples, eventually guaranteeing their extinction. The notion that Tribal peoples have to fulfill predetermined criteria to be recognized as Tribal citizens supports Justice Marshall’s creation of a “domestic dependent nations.” The domestic dependent nation theory recognized Indigenous peoples as existent as but less than the average citizen. To regulate the “domestic dependent” status of Tribal Nations the U.S. government created a formal system of federal recognition. The idea of federal recognition supported the notion of external federal recognition of Tribal members and superceded the internal Tribal definition of citizen.<sup>106</sup>

---

<sup>106</sup> Federal or external recognition of a tribal nation’s political entity is required for federal funding. The internal citizenship is implied to mean less than because with out the external recognition the internal recognition does not attain the same socio-political meaning. For example it is a common misconception that State recognized Tribes are not “real” Tribes because they have not attained federal recognition. Federal recognition only makes these Tribes eligible for federal funding monies, nothing more. The breakdown into the individual citizenship aspect is seen as holding a distinct difference. For



Federal recognition of an “Indian” is a policy that is racist in nature.<sup>107</sup> This formal recognition process assured Tribal citizens remained recognized as “less than” by continually having to prove themselves worthy enough to attain Tribal and federal citizenship recognition. Assimilation of Tribal citizens remained on-going as congressional control mechanisms almost guaranteed the eventual dissolution of Tribal citizens, at least in the sense they traditionally relied upon to understand themselves.<sup>108</sup>

Blood quantum based citizenship further fulfilled the congressional assimilation objective; the legal eradication of the Tribal population of mid-North America.<sup>109</sup> Oppressive in nature, assimilation policies remain racist in nature as Tribal enrollment standards based on a quantified racial degree of “Indian” blood continue to entirely eliminate the human and cultural characteristics of Tribal citizenship. Blood quantum based citizenship relies solely on the biological conception of race. This perception excludes the Tribal concept of identity being

---

example if an individual is enrolled in a federally recognized Tribe they will get more sociological benefits or opportunities than if they were enrolled in a state recognized Tribe. The same individual would be limited in opportunities available because of their citizenship status.

<sup>107</sup> The American Heritage Dictionary (4<sup>th</sup> Edition 2000) defines racism as “the belief that race accounts for differences in human character and that a particular race is superior to all others”. Therefore once the individual tribal citizen’s falls below the specified racial blood quantum, they are not pure enough to be considered and “Indian” therefore not recognized as such by the federal government nor their tribal Nation.

<sup>108</sup> The idea of blood quantum guaranteed a formula for extinction. The formula theorized at some point in the future Indians would lose their status and recognition by the federal government once their blood quantum statistically fell below ¼ in most cases. Loss of federal recognition means termination of treaty rights obligated to Tribal Nations.

<sup>109</sup> The idea of blood quantum guaranteed a formula that at some point in the future Indians would lose their status and recognition by the federal government once their blood quantum statistically fell below ¼ in most cases. Loss of federal recognition means termination of treaty rights obligated to Indigenous nations by the federal government.

directly linked to ethnicity.<sup>110</sup> The federal definition of Tribal citizenship continues to discourage and sometimes eliminate all distinct attributes of family, tribe, clan and finally Tribal individual identity.<sup>111</sup>

As a universal human right based on the shared characteristics of humanity, it remains the right of any natural born citizen to carry on the traditional lifestyle, family, religion and culture they descend from. Some Tribal citizens remain preconditioned to believe Tribal enrollment policies must reflect a standard degree of Indian blood quantum to qualify as legitimate members. This concept is far removed from Tribal citizenship ideas. It is a stated fact citizenship and the right to a nationality is a basic fundamental human right afforded to all people.

Inhumane blood quantum regulations are now liberally applied to Tribal citizens by the Tribal governments themselves, as IRA constitution membership provisions. Ethnocide becomes perpetuated as self inflicted cultural genocide as Tribal Nations continue to impose a blood quantum based requirement for Tribal citizenship. Pedigree based blood quantum further served the same purpose as the

---

<sup>110</sup> Tribal ethnicity contains social and cultural factors that collectively compose a distinct Tribal identity based on ethnicity not race. Raced based blood quantum membership implies that the “Indian” race has a fundamental genetic characteristic that determines an individual’s identity, marking the individual’s measured quality of “Indian-ness”.

<sup>111</sup> The Indian Barding School period has proved to be the most devastating of all assimilation policies applied to Tribal Nations. Richard Henry Pratt was the founded Carsile Indian School, the first Indian boarding school established to assimilate “Indians.” Pratt carried out what he firmly believed to be his Indian “educational” responsibilities with his notion of “kill the Indian and save the man”. When arriving at these boarding schools, against their will, the first thing many children were forced to do was cut their hair. Hair in most Tribal cultures has a very spiritual and sacred internal meaning. It is only cut drastically when a family member died. Therefore haircutting signified the Tribal mourning process. Therefore, having their hair cut off was extremely traumatic for many boarding school children. This trauma caused severe identity issues amongst Tribal children. These Tribal children having been removed from their tribal communities attained no means of tribal reconciliation and healing methods to deal with the impacts of the trauma. This intergenerational trauma continues to cause various levels of spiritual impoverishment, thus affecting individual identity and the level of Tribal participation or citizenship responsibilities associated with Tribal membership.

definition of genocide, to destroy a people and their culture so they are no able longer to exist and function as a distinct people.

### **The Problem With Tribal “Membership”**

Accepting and using blood quantum as criteria for Tribal citizenship is a detrimental concept as Tribal Nations struggle to retain a distinct identity. The current recognition of Tribal enrollment is designed like a membership and not citizenship. Tribal enrollment has become a colonized, self inflicted, disguised law of genocide.<sup>112</sup> Tribal Nations silently aid in the erosion of Tribal sovereignty by freely using the same blood quantum standard for Tribal citizenship often used by the federal government to define who and to what degree individuals qualify to be “Indian”.

Current enrollment guidelines recognize Tribal membership as an afforded right, extended to only those individual Tribal members who can prove themselves worthy of such membership. For those members who meet the set criteria, they are successfully inducted into the “secret society” known as the Tribal Nation. Tribal enrollment has become so colonized it has become more like a club rather than a distinct sovereign nation. Once an elite member of the club or nation, the individual Tribal member is afforded special rights and benefits associated with their membership status. This title of member does not accurately define who is a natural

---

<sup>112</sup> For the purpose of this paper genocide is defined from the 1998 Rome Statue of the International Criminal Court as a systematic destruction by a government of a racial, religious or ethnic group. The United Nations International Law Commission Report, issued in 1949, further defines several acts that constitute genocide: to cause serious bodily injury to mental harm to members of a group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part and forcibly transferring children from one group to another.

born citizen of that Indigenous nation, nor does it require Tribal citizens to maintain an allegiance to the Tribal Nation. Tribal Nations must re-traditionalize the definition of their members as citizens based on the ethnicity component found in the community.

As Tribal ethnicity prevails over a race-based definition of citizenship, Tribes may promote or emphasize the subjectivity of Tribal citizenship over the legal objectivity of race. Unlike a stereotypical “Indian” identity based on federal definitions of race and “Indian-ness,” an ethnicity based self-identified Tribal citizenship component allows the individual to decide which community they want to be a part of.

As citizens of Tribal Nations, individuals have a cultural responsibility to maintain and practice lifestyles that carry on the distinct Tribal heritage. Being defined by pedigree standards, Tribal citizens feel unrelated to the Tribal society. This alienation causes cultural degradation as cultural ties became severed and ultimately caused these citizens to devalue the cultural responsibility of a citizen in Tribal society.

As Tribal citizenship remains defined according to blood quantum it consciously supports principles of banishment or exile which caused Tribal citizens to feel alienated from their Tribal Nations. Blood quantum based citizenship exiles the natural born citizens of Tribal Nations who do not meet a specified pedigree from that primary nation. Exclusion comes as a self inflicted law of genocide as Tribal Nations continue to impose restrictive blood quantum based membership eligibility.

Federal assimilation objectives ensured Tribal citizens would encounter complex identity issues.<sup>113</sup> Influences of assimilation mentality are reflected as citizens of Tribal Nations find themselves describing their identities in quantified terms. Tribal Nations currently perpetuate their own colonization when defining Tribal citizenship, not as a citizenship but as a membership affiliation. Although Tribal Nations would like to believe they operate according to notions of self-determination in reality the federal government has influenced them to become a culture of dependency.

After only three generations some Tribal families are already faced with the harmful reality of a non-existent recognition by both their Tribal nation as well as the federal government due to implications of using blood quantum based citizenship. As a “full-blooded” Tribal member intermarries outside the Tribe, the child produced will only be recognized as having “½ Indian-blood” from that one specific Tribe the parent is enrolled in. Once the “½ blooded” Tribal citizen intermarries and produces a child, that child will only retain a recognized “¼ Indian-blood” from the one specific Tribe the parent was enrolled in. The Tribal fractionalization method rapidly continues to diminish the entire race of Tribal Nations. There is no justification for congressional plenary power that is applied to Tribal Nations nor have Tribal Nations given their consent to be dominated by western legal notions of power.

---

<sup>113</sup> Complex identity issues from an Indigenous perspective include the absence of Indigenous morals and values founded in traditional citizenship. The citizen’s sense of identity and belonging to the larger collective nation is distorted. Assimilated to US citizenship the Indigenous citizens’ understanding of the nation, clan, and traditional society become distorted. This disruption of the Indigenous paradigm distorts the individual’s place and identity within the larger collective nation.

### **Creating a New Standard of Tribal Citizenship and Revising Tribal Membership**

This thesis proposes Tribal governments must create and incorporate two distinct categories of Tribal recognition to the current Tribal membership provisions found in Tribal constitutions. Ultimately eliminating, and in some Tribal cases minimizing blood quantum as the sole criteria of Tribal citizenship. Expressing full self-determination of Tribal citizenship is about Tribal Nations making decisions in the best interest and protection of the collective tribal society, regardless of federal consequences.

Tribal governments, culture and citizenship of Tribal peoples have not remained static in time. Tribal culture has constantly evolved and adapted to fit the circumstances and adversity it faced. The proposed solution is for Tribal governments to incorporate Tribal “citizenship,” as a separate enrollment category of the Tribal constitution’s membership provision, by collectively amending it using standards of self-determination and international law as guiding principles.<sup>114</sup> The second option would be to recognize the Tribal “membership” component as a separate category of Tribal membership or general association of the Tribal Nation.

---

<sup>114</sup> See Williams Jr., *Frontier of Legal Thought III: Encounters On the Frontiers Of International Human Rights Law: Redefining The Terms of Indigenous Peoples’ Survival In The World*, Duke J.L 660 (1990).

### **A New Standard of Tribal Citizenship**

Tribal citizenship should be recognized as a separate internal component of the Tribal Nation. Specific Tribal citizenship criteria should collectively be determined according to Tribal values and customs traditionally used to guide each Tribal society. Tribal citizenship would entirely disregard the use of blood quantum as a means of eligibility into that nation. Citizenship would be inclusive, extended to all natural born children of Tribal members.

Tribal citizenship would be strengthened if Tribal Nations would require citizens to fulfill additional general social responsibilities to maintain citizenship within the nation.<sup>115</sup> Additional Tribal enrollment requirements could include contributing factors of eligibility such as components of the Tribal history, language, Tribal ceremonies and/or culture.<sup>116</sup> Maintaining a social responsibility to the larger society might include contributing factors such as participation in social and cultural community events, social responsibility to Tribal lands or voting consistently in Tribal elections.

Traditional Tribal laws and customs would be used to guide principles used to maintain the civil regulation of the internal citizenship of the Nation. Tribal law was established prior to Indian reorganization as a soft law all tribal citizens took

---

<sup>115</sup> See, e.g. Sac and Fox Nation of the Mississippi in Iowa otherwise known as Meskwaki Tribal Constitution. The articulated membership provision requires tribal members to hold and active and participatory role in the tribal government affairs. The Meskwaki's Constitution specifically required current tribal members to maintain an active membership status such as voting in tribal elections. According to the membership provision of the tribal constitution failure to do so after 10 consecutive years would require an automatic relinquishment of individual Meskwaki Tribal membership.

<sup>116</sup> Wallace Coffey & Rebecca Tsosie, *Rethinking The Tribal Sovereignty Doctrine: Cultural Sovereignty And The Collective Future of Indian Nations*, 12 Stanford L.REV 191 (2001).

responsibility to adhere to. Today these soft laws are written in the form of tribal constitutions, and further articulated in the bylaws of the Tribal Nation. Prior to reorganization there was no Tribal recognition of citizenship based on a racial component. Tribal citizenship was extended to all people who were natural born citizens of that nation. Current blood quantum based Tribal enrollment ignores the complex social and cultural factors that determine Tribal ethnicity. Tribal ethnicity and cultural identity are ultimately tied things such as Tribal history, cultural participation and foremost self-identity. Currently Tribal members are defined by what they are and not who they are. Those members who fail to retain cultural ties to their nations do not contribute to the cultural survival of their nations. Tribal citizenship must include a collective cultural responsibility of each Tribal citizen causing the long term cultural preservation of the tribe to become strengthened. With Tribal enrollment citizenship based rather than membership based the ethnic based approach will be more empowering, allowing Tribal Nations to build their identity around a common culture and lifestyle.<sup>117</sup>

### **A Revised Standard of Tribal Membership**

Tribal Nations must become aware of the need to include the external component as a membership category of Tribal enrollment. External Tribal

---

<sup>117</sup> S. James Anaya, *Indigenous Peoples in International Law* (2004). The author proposes a compelling argument that there is new customary international law governing the rights of Indigenous peoples.



recognition would be given to qualifying individuals in the form of a membership status. Tribal membership would be based on a biological connotation of race, and base eligibility according to pre-determined blood quantum. Primarily the membership component would be extended to individuals who qualify as “Indian” according to federal definitions. Tribal membership would allow individuals to meet eligibility guidelines for individual Tribal members to access federal benefits associated with the trust responsibility.<sup>118</sup> Tribal members would not be required to pledge their allegiance to their nation in any form.

Drawing upon international standards of self-determination, Tribal Nations have the opportunity to revise Tribal citizenship standards. The U.S. has actively pursued policies of assimilation to narrowly define Tribal members in terms of blood quantum. The U.S. has even gained a foothold in internal Tribal affairs with the passage of the ICRA setting Tribal membership blood quantum requirements in Tribal constitutions. Tribal Nations must become aware of the need to create the two distinct enrollment categories of Tribal recognition, citizenship and membership, is the best articulation to use when freely expressing true self-determination.

Tribal nations must now take the lead in reversing assimilation by amending their Tribal constitutions to disregard the use of a race based blood quantum requirement at the both the Tribal and federal levels. Primary use of blood quantum based Tribal enrollment only perpetuates a race-based notion of Tribal identity,

---

<sup>118</sup> Each federal funding benefit administered carried its own guidelines of eligibility and defined “Indian” for the purpose of the said benefit. Some federal guidelines required the tribal citizen to be recognized first by their nation as well as meet federal guidelines set forth to become eligible; others based the guideline on Indian ancestry alone.

presuming each person possesses a biological and measurable identity. Tribal citizens have become define by what they are and not who they are as a proud, distinct, collective Tribal Nation. When amending Tribal constitutions, Tribal peoples must consciously recognize the need to return to the concept of a citizen, who is a crucial component collectively composing the Nation, while recognizing that federal influences have created a distinct membership component of Tribal society. Recognizing both components exist in tribal societies in the twenty-first century is the first step toward exercising Tribal self-determination. Exercising full autonomy no two Tribal societies will be the same based on international principles of self determination.

