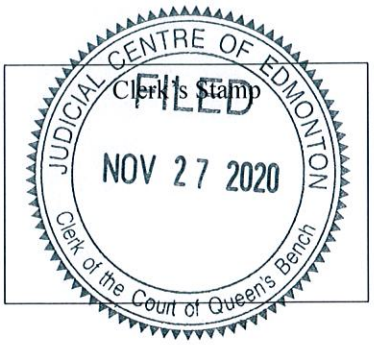

COURT FILE NO. 1103 14112

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, C. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985

APPLICANT **ROLAND TWINN, EVERETT JUSTIN TWIN, MARGARET WARD, TRACEY SCARLETT and DAVID MAJESKI, as Trustees for the 1985 Trust**

RESPONDENTS **THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN**

DOCUMENT **WRITTEN REPLY BRIEF OF SHELBY TWINN, 1985 TRUST BENEFICIARY,**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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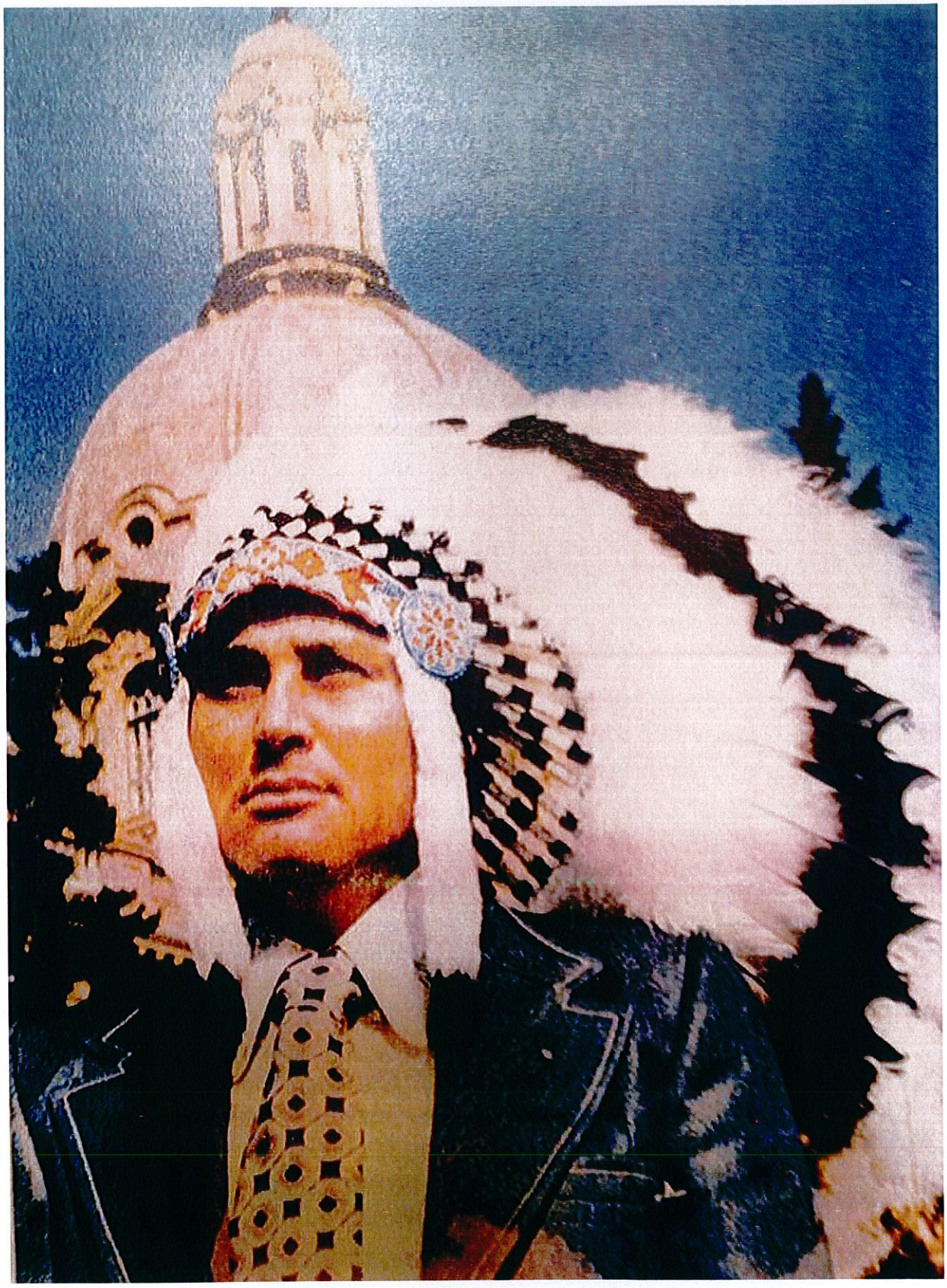

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1. I am self-represented and unable to afford counsel. I am not a lawyer and do not appreciate many of the legal nuances in this Action that was initiated in 2011. I know many facts that bear upon the creation of the 1985 Trust and my own personal experience with new forms of discrimination under the SFN Indian Act s.10 Band Membership system. I know right from wrong, and what is honest, just and fair.

2. My grandfather, Walter Twinn, the settlor of the 1985 Trust, has been described by many as a visionary. He was. He received man3y awards for his accomplishments. He was kind and generous. He was a great believer in education. He hoped that the generations following him would be afforded every opportunity to enjoy a good education. He only achieved Grade 8. My grandfather was a contributor. Sawridge Trust assets constituted the largest single taxpayer in the Town of Slave Lake. Every Christmas, he invited Indian and non-Indian people to enjoy a Christmas meal together. He built bridges. This is detailed in the video In Honor of All.[1]

3. From the early 1970's until his death in 1997, my grandfather built and preserved wealth culminating in the 1985 and 1986 Trusts. His intentions for us were contained within these Trusts as instruments to preserve and grow the wealth for our support and well being. He understood our losses given the history of colonialism and racism and the resultant trauma. He envisioned our becoming highly educated, productive and capable contributors. He understood the recovery process we faced – recovering our culture, language, identity, spirituality and healing our fractured souls, splintered families, divisive and addicted communities, and broken Nations. The real work of reconciliation is internal reconciliation.[2]

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[1] In Honor of All – Catherine Twinn Affidavit of Records

[2] Dr. Peter Menzies Chart pg 78, Intergenerational Trauma from a Mental Health Perspective, Native Social Work Journal, Vol 7, pgs 63-85

4. Beginning in the 1970's my grandfather challenged Indian Affairs including its policy that forbid Indian investment off the reserve. He built Companies at a time when Indian entrepreneurship was unheard of. He signed personal guarantees to secure loans. He devoted long hours to build viable Companies, not to enrich himself personally. He made many personal sacrifices, which may have led to later regrets where it harmed his children. When the Jasper Hotel opened in 1983 it was the largest, non-government funded, Indian project in North America. Governor General Schreyer opened the Jasper hotel. My grandmother Catherine Twinn has many photos and plaques that document this history.[3]

5. In the early 1980's other events - far away – were brewing that would change everything. Pierre Trudeau brought in the Constitution Act, 1982 and the Charter of Rights and Freedoms, transforming Canada from a system of Parliamentary sovereignty into a Constitutional democracy. Section 35 recognized and affirmed existing aboriginal and treaty rights. Section 15 took effect April 17, 1985, two days after the 1985 Sawridge Trust was settled. A very complex table was set in 1985, that leads to now: this Court questioning the 2016 Consent Order, by going beneath to question the validity of the 1982 Trust Asset Transfer to the 1985 Trust.

6. My grandfather was a fluent Cree speaker even though he attended Indian Residential School for many years. Of the 44 Sawridge Band Members, few speak Cree. My uncle Isaac Twinn is the only young Cree speaker and is self-taught. He is the youngest son of my grandfather and is an articling student at Mandell Pinder in Vancouver.

7. We have lost so much, most importantly our sense of kinship and how to live Nehiyaw laws. This loss is evident in this Action where I am pitted against my Uncle Roland Twinn in adversarial litigation. I am asserting continued recognition of my status based on a kinship definitional pool first recognized in 1850 Colonial legislation. My

[3] In Honor of All – Catherine Twinn Affidavit of Records

grandfather entrenched this pool into the 1985 Trust beneficiary definition.[4] My Uncle seeks to take my beneficiary status from me.

8. In this Action, my Uncle Roland Twinn has fought to eliminate the historic kinship definitional pool grandfathered, post Bill C-31, by s.6(1)(a) of the Indian Act. My grandfather denied Trustees any ability by simple majority vote to alter the definition of "Beneficiary" under the Trust Deed. Such definition goes to the core of the Trust and cannot be undermined by a simple majority vote on the part of the Trustees. My grandfather went further in this restriction: even a resolution sponsored by over eighty percent (80%) of the Beneficiaries whereby the Settlement may be amended would *not* be available should the result of such resolution "*changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined*".

9. My grandfather was definitive not only in the finite, rigid delineation of the Beneficiary class in the Trust Deed but also intentionally rigid in the prohibition against amendment of that Deed by Trustee vote where the intention or result of such vote is the replace the Beneficiary class with another beneficiary class (SDFN band members).

10. Bluntly, the seeking of consistency between the Beneficiary class under the 1985 Trust and the Sawridge class is a breach of duty on the part of the Trustees who serve the 1985 Trust. The only method for legitimizing such notion, **if at all**, is by way of Court Application with **full and frank righteous disclosure of the *animus* for so doing**, and it would be difficult for any Trustee, especially if serving both Trusts, to act *selflessly* in favour of the Beneficiaries of the 1985 Trust.

11. The April 27, 2019 Jurisdiction application would have answered the question of "**if at all**". In their submissions filed March 29, 2019 ("**Trustee Submissions**"), the trustees acknowledge that to grant the relief they are seeking, namely variation of the beneficiary

[4] Solicitor General Lewis Drummond – Memo - 1851

class of the 1985 Trust, would require the creation of new legal principles by this Court or at the very least, an extension of current principles.

12. The Jurisdiction application was adjourned to give way to this Court directed application. As a lay person my understanding is that the law currently prohibits the Court from changing the current beneficiary definition without unanimous approval of the current beneficiaries and that this is found in the Alberta Trustee Act; an Ontario Superior Court approved distribution of Trust property to beneficiaries that excluded persons admitted into membership post Bill C-31. Failure to settle legal questions and the creation of new legal questions is threatening and discouraging.

13. As set out, my grandfather was a visionary who wanted to preserve wealth and therefore opportunity, for persons with Sawridge kinship. He understood the relationship between restoring "Indian laws" as the foundation to the SFN membership system. Obvious problems could develop within the Band membership system if it lacked a principled and just foundation. The potential for abuse was great. Effort was required to reclaim, recover and apply ancient principles so that individuals, families and communities could thrive. The SFN has not done this work. It appears my grandfather's worries are coming to pass.

14. Since I filed my last brief, I continue to be concerned by the hostility of the current Sawridge Trustees towards the beneficiaries. I believe the Trustees are colluding with the SFN to further the SFN's desire to have complete control over the 1985 Trust and therefore its wealth. While I have always held these concerns, the recent questionings by the lawyers on Affidavits (February/March 2020) has fuelled them. The transcripts of these questionings raise the following concerns for me:

    - The Trustees acknowledge that this is adversarial litigation, despite telling the Court in the past that it is not:
        - Transcript of Paul Bujold from February 2020. Pages 120 Ms. Bonora acknowledges this is adversarial litigation
        - Ms. Bonora takes positions on behalf of the trustees that are not favourable to the beneficiaries, such as:
            - Denying that distributions to beneficiaries from the 1985 Trust have occurred. This is not

true. Whether the distribution was for tax purposes or not, it was still a distribution. See page 111

- Denying that the $12 million debenture ever formed part of the 1985 Trust even though there is paperwork that proves it did. See pages 50-54.

- The transcript is filled with objections from Ms. Bonora and attempts to limit the OPGT's queries. **I would plead with the Court to review this transcript in full in order to gain a sense of the tone and obstructionist approach the trustees have taken with the beneficiaries**

- The Trustees are adverse in interest to the beneficiaries:
  - See Transcript of C. Twinn March 12, 2020 pages 3-4 wherein Dentons puts on the record that the examination cannot proceed because the OPGT and C. Twinn are not adverse in interest. By implication Trustees must be adverse in interest to the OPGT (i.e. minor beneficiaries) to allow the P. Bujold examination to proceed

- The Trustees are asserting privilege against the beneficiaries which implies again that they are adverse in interest and gives the appearance that they are hiding something. I do not see what should be confidential as between the trustees and the beneficiaries in these proceedings!
  - Transcript of Paul Bujold from February 2020. Pages 93-96. Ms. Bonora states they are claiming solicitor/client privilege as against the OPGT in relation to questions about historical information on the 1985 Trust received by the trustees.
  - Transcript of Paul Bujold from February 2020. Pages 120 Ms. Bonora refuses to allow questions about Mr. Ewoniak's knowledge of the purpose and creation of the trust because it is covered by litigation privilege. See Undertaking 22 of Paul Bujold where this refusal is maintained. I understand that Mr. Ewoniak was involved in the creation of the 1985 Trust. This objection to allow Mr. Ewoniak's information to come out would mean the trustees have been planning litigation against the beneficiaries since 1985!
  - Transcript of Paul Bujold from February 2020. Pages 128-30. Vigorous objections by Ms. Bonora around historical documentation of the 1985 Trust and claiming litigation privilege against the beneficiaries. This is all despite the fact that the beneficiaries have been paying for all of the advice received by and work of the trustees – we get to pay for it, but according to the trustees we do not get to know the information about our own trust.

- While the Trustees object liberally and assert privilege against the OPGT, when it comes to the SFN questioning Mr. Bujold a similar approach was not taken. In

July 2016, Mr. Bujold was questioned by Mr. Molstad. **Ms. Bonora did not make a single objection to any of his questions**. Some notable distinctions between the approach taken by the Trustees as against the SFN vs. OPGT that I saw in this transcript are:

- Page 40 – SFN is allowed to ask questions about the legal advice the trustees received and what it was
- Page 23-24 – SFN is allowed to ask questions and receive answers about the legal advice provided by Maurice Cullity, but the OPGT was not allowed to ask such questions (see page 113 of February 2020 Transcript for Mr. Bujold where Ms. Bonora objects to questions about Mr. Cullity's advice)
- Page 59 and 60 – Once again Mr. Bujold is able to speak repeatedly about the legal advice received by the trustees from Donovan Waters

15. Given that the trustees are openly acknowledging that they are adverse in interest to the beneficiaries, it seems patently unfair that they are able to use the money in the 1985 Trust to further their objectives, while people like me are left unfunded. I believe that conduct such as this is what my grandfather was trying to prevent and he wanted to ensure that people like me were looked after as he could not trust future leaders of the SFN to do so.

16. Compounding this violation is the fact that the SFN is not a beneficiary of the Trust. Yet between 2012 and 2017 the Trust paid the SFN $562,530.22 to participate in this Action. The Trustees "end goal" is to divest our beneficiary status without grandfathering and entrench SFN membership under which Chief and Council, using s.10 of the Indian Act, decide who is or is not a beneficiary with power to divest status.

    Transcript of Paul Bujold March 7-10, 2017, at page 505 lines 19-26
    Affidavit of Catherine Twinn filed December 16, 2015 at para. 28, 31 and 33

17. The Trustees recognize and have even designed the litigation process to ensure that the affected beneficiaries are not assured of gaining membership in the First Nation. My membership application, along with others, sits in its 3rd year in the SFN Band office without response. Mr. Bujold admitted in questioning that the Trustees accept that there

is going to be some "collateral damage " and "winners and losers" as a result of the relief sought in the 2011 Action by the Trustees, meaning that some persons will lose their entitlement as a beneficiary.

18. The fact that the actions of the Trustees may be good for the Band generally, it is clearly a misplaced loyalty and contrary to the selfless duty the Trustees owe to the 1985 Trust.

19. It is astounding that after 9+ years of litigation and millions of 1985 Trust money spent, the fundamental question about the power of the Court was only set down for a hearing April 25, 2019 which was abruptly adjourned for this application. For years, the Trustees and Paul Bujold failed to file a constating application for these proceedings, even after it was requested by Catherine Twinn. It took 6 years and the Court of Appeal ordering the Trustees to state their claim, clearly defining the issues and what they were asking the Court to do. In 2018 they finally filed a document purporting to be a constating application.

20. Had the 2011 Action been initiated by a Constating application it ought to have provided a logical sequencing of questions for the Court to give advise and direction on. But the Trustees refused until told to by the Court of Appeal hearing the Appeal brought by me and Patrick Twinn. The Trustees sought and obtained solicitor client costs against us from Justice Thomas which the Court of Appeal set aside. Our funding application was denied on the legal presumption that Trustees act in the best interests of the beneficiaries.

21. In 2012, Catherine Twinn sought collaboration with the Public Trustee and the retention of independent counsel to advise the Trust against a backdrop of derision and discord amongst the Trustees. This was appropriate conduct on Catherine Twinn's part. The Trustees denied her suggestions without a *bona fide* rationale, rendering the situation unresolved and insoluble, which itself is a transgression of their fiduciary duty. If the Trustees had fulfilled their fiduciary duty, the costs and harm of this Action could have been avoided.

22. Much has been provided to the Court about the Trustees' breach of fiduciary duty. I urge this Court to consider this preponderance of evidence on the breaches when considering

how to exercise any discretion it may have in this application. I hope the Court is guided by Trust law principles and the duties owed by Trustees to the Trust. As a layperson, I understand those duties and principles to be:

a. the trustee owes her or his duty to the *property* of the trust, in this instance the trust fund. The corresponding obligation to deal *selflessly* with that fund on behalf of the beneficiaries *as a whole* compels the logic that the linear duty is towards the trust itself rather than the beneficiaries to that trust. While this may appear often as a distinction without a difference it is actually an imperative.

b. the obligation of trustees to that trust are obliged *qua* trustees to act with *utmost good faith* towards the trust. That duty--the highest known to law-- is not subject to interpretation or assuaged by *any* other influencer.

c. the trust-based nature of the Trustee's undertaking requires:
   - care
   - skill
   - diligence
   - integrity
   - impartiality
   - avoidance of conflict
   - even handedness
   - confidentiality
   - circumspection
   - fidelity
   - full, frank, righteous disclosure

   These are attributes of *selfless* behaviour required of a trustee who must demonstrate these attributes in their Trustee actions.

d. Each trustee has an *individual* obligation to act with *utmost good faith* (not "good faith": *utmost* good faith), complete fidelity and conduct directed by the trustee's own good conscience.

e. Fundamental to adherence with fiduciary obligation is avoidance of conflict including *the appearance* of conflict. This degree of faithfulness to the Trust is imperative; *any* departure from such allegiance, however slight, is considered a breach of fiduciary obligation. Often cited by the Supreme Court as a *strict ethic*, the only *selfish behaviour* countenanced for a trustee, and scrupulously policed, is the remuneration to which a trustee is entitled arising from services to the trust.

23. The conduct of the Trustees leading to this Application and prior has been adversarial and tragic. They have not made full and frank righteous disclosure of the facts surrounding the 1982 Trust transfer of assets to the 1985 Trust. Much has gone on, including tactics to silence evidence that Trustees should themselves bring forward and the fact that Ron Ewoniak was willing to swear an Affidavit until told otherwise by Deloitte, the firm engaged by the Trustees. This Court should consider this when it gives weight to "facts" alleged by the Trustees and the SFN.

24. The Trustees adversarial conduct is also **tragic.** It perpetrates and adds to the unhealed, historic trauma. I believe any right-minded person understands that the capacity determining the stewardship of the assets built by my grandfather rests with a more inclusive, diverse and broader pool of beneficiaries, as currently provided by the two beneficiary pools defined under each Trust.

25. The 1985 Trust widens and diversifies the tiny pool of 44 SFN members, up from 38 members in 1985. The fact the SFN membership has only increased by 6 members over 35 years indicates a distorted membership system. This distortion results from the political and personal interests of a powerful few animated by secrecy, discrimination, and procedural unfairness.[5] Such a tiny pool cannot grow or innovate asset stewardship

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[5] *Twinn v Sawridge First Nation, 2017 FC 407*

> [43] The SFN has a legal history of attempting to assert complete control over its membership. In *L'Hirondelle v Canada*, 2003 FCT 347, affirmed 2004 FCA 16 [*L'Hirondelle*], this Court held that SFN could not continue to ignore the legal requirements regarding membership imposed by the *Indian Act* and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [*Charter*] and the clear directions of the courts. In *L'Hirondelle*, the Federal Court of Appeal upheld an injunction mandating compliance, stating "For those persons entitled to membership, a simple request to be included in the band's membership is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant." Yet in 2008, SFN attempted to have the *Indian Act* provisions declared unconstitutional, an application that was dismissed: *Sawridge Band v Canada*, 2008 FC 322. Furthermore, the Court held in *Poitras v Twinn*, 2013 FC 910 that *L'Hirondelle* is not a legal barrier to an applicant's membership status. However, SFN continues to refuse to implement *L'Hirondelle* and, by doing so, corrupts its election process. By not adding entitled persons to the band list, there cannot be a fair election.
>
> [44] The corruption in the membership process is worsened by the queue jumping permitted to Roland's children, who were added to the list while others, such as Ms. Donald, are forced to

left by my grandfather. This Action results from Roland Twinn's worry that beneficiary status under the 1985 Trust will leverage into SFN membership.[6]

26. Membership distortion, also referred to disenrollment or disentitlement, is epidemic in Indian country across North America.[7] Disenrollment is the triumph of internalized colonial norms that split, divide and separate us:

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wait until the law is enforced. The evidence demonstrates that it is possible for an individual to be left hanging for years in a SFN membership process that is shrouded in secrecy. The SFN has adopted a stance and process that is the polar opposite of the enfranchisement purpose of the *Indian Act* and any truly fair and democratic electoral process.

Queue Jumping

[106] The Applicants complain that the election process is corrupted at SFN by the way that the Membership Committee allocates membership to applicants and controls the Membership Register and hence, the Electors List.

[107] There is no Membership Code decision before the Court in this application, but the Applicants' specific complaint appears to be that Chief Roland Twinn's son was granted membership in the 6-month period prior to the Election – thus effectively ensuring a vote for his father - while other applications for membership have been left hanging for years. The Applicants point out that the whole membership process is shrouded in secrecy and this undermines the democratic process, and did in this case because Chief Roland Twinn's son was granted membership in a way that was not transparent. It is also not disputed that Chief Roland Twinn chaired the SFN Membership Committee which controls applications and provides recommendations on membership to Chief and Council. It seems obvious, then, that Chief Roland Twinn could find himself in a conflict of interest when it comes to deciding any application for membership, and particularly when his own children are involved. Even if he abstains, that does not mean that his influence and his wishes will be disregarded.

[131] The Respondents have asked for their costs in this case, but I feel this is an appropriate case to require that both sides meet their own costs. As the jurisprudence shows, there is significant concern and confusion regarding membership and, thus, voting entitlement at SFN. As Justice Zinn pointed out, this application raises "serious matters that will affect the electoral process undertaken in 2015 and future elections." These are serious, public issues that affect all members of SFN and I do not think that individual members should be discouraged from coming before the Court on those occasions when their concerns have some justification. SFN is unique in being such a small and self-contained First Nation. It has also faced numerous disputes on the membership issue. Membership is a requirement which is tightly controlled and the process for granting and withholding membership is opaque and secretive. Hence, there is scope for abuse and the lack of transparency is bound to give rise to future disputes. This application is a function of the system in place at SFN. Although I cannot find for the Applicants on the facts of this case, it seems to me that this application is, to some extent at least, a response to a public need at SFN that will persist until membership issues are resolved.

[6] Catherine Twinn Indemnification Brief, 2017

[7] Galanda, Gabe and Ryan Dreveskracht. 2015. "Curing the Tribal Disenrollment Epidemic: In Search of a Remedy." *Arizona Law Review*. Vol.57:2, 383.

> Disenrollment is based upon colonial principles intended to terminate Indigenous values and norms, incentivize the solidification of economic and political clout, and to winnow out those who disapprove of the direction taken by individuals or subgroups aligned with the colonial government (Galanda and Dreveskracht 2015, 444). More particularly, disenrollment is either the removal of people from Indigenous community lists or disallowing or ignoring their applications—whether such individuals have a legitimate claim or not. Unless this disenrollment crisis is addressed, Indigenous peoples – who are fractionalizing themselves - could also end up legally terminating themselves. Gabriel Galanda and Ryan Dreveskracht argue that a result from the colonial process is that the concepts and assumptions of Indigenous identity reproduce the very social inequalities that have traditionally defined Indigenous oppression. Until these ideologies are disrupted by Indigenous peoples and their governments, the important projects for Indigenous decolonization and self-determination that define Indigenous movements and cultural revitalization efforts today are impossible" (Galanda and Dreveskracht 2015, 473-474).

27. In about 2002 the Heritage Community Foundation, developed a Web Site on Natures Laws with a large grant from the Alberta law Foundation. Natures laws contains over 500+ pages of texts and videos of Cree law keepers explaining our laws, including laws governing human kinship relations through the blood line: [8]

28. My grandfather's dark days experiencing colonialism and racism was enabled by rampant discrimination of Indians under the Indian Act. For him, Indians were the last to be hired and the first to be fired. When he was a young man working as a lumberjack, a tree fell on him leaving him paralyzed. The crew left him for dead. Someone returned and realized he was alive. Hospitalized for months, he struggled and overcame the paralysis, a large scar on his back a reminder of this near-death experience.

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[8] Natures Laws Web Site, 2004 Heritage Community Foundation, Partners Description

29. During this dark period, the crews he worked with would go into bars after work while he was denied entry. The Indian Act criminalized alcohol consumption by Indians. He knew many Indians who enfranchised so they could drink. This history is dark and complex with many nuanced and individual stories – all of them rooted in oppression and discrimination often with tragic results.

30. In the early 1970's the artist Alex Janvier, was commissioned by my grandfather to paint his art on structures in the Slave Lake Sawridge Hotel. Alex Janvier has his story of what it meant to be an Indian under the Indian Act:

> I am Alex Janvier. I represent death. I represent abuse. I am a survivor. Many of those who went to school here with me are now dead. Their spirits were twisted, broken or torn away from them. It was here where I learnt to shut down my feelings. When you're between 5 to 10 years old, and you're told day in and day out, "Christ died for your sins," this message repeated time and time again, messes up your mind and destroys any sense of cultural identity because you grow up with a deep sense of shame. Worst of all, you're made to feel ashamed of your parents and grandparents because you were repeatedly told they worshipped false gods. So when you return home, instead of feeling love, you feel confusion. Worse still, because your parents have turned to alcohol to cope with the trauma of losing their children, your shame at them becomes reinforced and you grow up hating everything Indian. We used to get beaten up regularly. I lost 60% of my hearing in one ear and 20% in the other because they used to slap us so hard. When I left here, my spirit was broken, and I turned to alcohol. Only when I discovered my gift of painting did I slowly recover my spirit and sense of self. I painted the pain of myself and my people for a long time. Through art I recovered the voice of our ancestors and their stories, for these stories were lost as there was nobody to tell them to when the children were taken away.

31. In 1989 my grandfather began his recovery from alcoholism. It was through the ceremonies that he began to heal the soul trauma. As he awakened, he often asked, "*why*

is it that everyone I went to Indian Residential School with is dead, drunk or in jail?" I've advised this Court about my father, who I have not seen since I was 5 years old when we fled the Sawridge Indian Reserve. My father is the youngest child of my grandfather's first marriage. My father **IS** the legacy of Indian Residential School and collective, unhealed historic trauma transmitted across generations. Today, there is greater awareness about trauma and how it affects the brain, setting people up for addiction and a whole host of adult onset health problems that dramatically shorten life spans.[9] My grandfather died young, age 63.

32. My father's addiction does not allow me to have a relationship with him. I cannot turn to him for support or guidance about any matter, let alone the 1985 Trust and my struggles for place within the pool of kinship beneficiaries.

33. The kinship pool defined in the 1985 Trust was first recognized in 1850 pre-Confederation legislation and continues to the present.[10] It is grandfathered by the current s.6(1)(a) of the Indian Act as the core status transmitting group. An example of an included individual in this pool is Trustee Margaret Ward, a non-Indigenous woman who married a Sawridge member before 1985, divorced, the husband enfranchised taking a large per capita share of Band funds while Margaret Ward and her son remained status Indians and SFN members.

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[9] ACE Study Robert F.Anda · Vincent J. Felitti · J. Douglas Bremner · John D.Walker ·Charles Whitfield · Bruce D. Perry · Shanta R.Dube · Wayne H. Giles, authors of article:**The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology (2006)**

- The **ACE Study** included 17,337 adult patients and assessed 10 adverse childhood experiences (ACEs) including abuse, witnessing domestic violence, and serious household dysfunction. The study makes a direct connection between a person's ACE score and later life chronic health conditions such as diabetes, heart disease, mental illness, and more
- *More common than we expect and rarely occur alone; if any one ACE is present, there is an 87% chance of at least one other ACE category is present, and 50% chance of 3 others.*
- *An adverse event is scored as 1 whether single or multiple episodes, still scores* ***1.***
- *The measure is not frequency of occurrence but whether it happened at all.*

[10] Ibid Drummond Memo

34. My grandfather was very concerned that the direction of Canadian law would fracture this historic, kinship pool of extended family, particularly by its efforts to redress past injustices. As a child, he trapped with his father and uncles. The 1918 flu epidemic killed many living in the Slave Lake area. My great grandfather survived along with a few men and many widows and children. These few surviving men, including my great grandfather, provided for the women and children. My grandfather experienced these tender bonds of customs, traditions and religious and spiritual values. This spirituality is the foundation to Nehiyaw laws. My grandfather understood the fragility of tender bonds, especially under the unrelenting onslaught of Western mechanical law. He was concerned for the future of existing "Indians." He supported redress for past injustices offering many suggestions to law makers how they could achieve fairness to both existing and acquired rights Indians.[11] In his world, there were no "winners and losers".

35. When it came to assets he had built, he took matters into his hands, as the 1982 Trustees were authorized to do. He established the 1985 Trust and shortly after, the 1986 Trust to receive post April 17, 1985, all persons "qualified under the laws of Canada," to be a SFN member. Taken together, the two Trusts achieve balance and justice, establishing a larger and more inclusive pool of beneficiaries maintaining historic continuity.

36. I work and go to school full time and the load is wearing on my health. Paul Bujold, relying on this Action, has denied my requests for educational support from the 1985 Sawridge Trust. I remind this Court that the Trustees, using this Action, have only permitted the distribution of benefits to SFN members and their family. Also, the Trustees have completely delegated their power to identify beneficiaries to the SFN membership system. The SFN membership system and the Trustees delegation to it is of great concern to me. It fits within the North America epidemic of tribal disenrollment and disentitlement by tribal governments.

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[11] Treaty 8 Brief, March 25, 1985, pg I, ii, iv, 3,8, 9

37. My studies require I learn about trauma and what it does to the brain. The "Brain Story" and the underlying science and studies relating to trauma, are providing answers to my grandfather's deep questions and my father's struggles. For this I am grateful. I can now make sense of our history and why relationships are so fractured and adversarial. But I want this to stop. I want my rights respected. I want my place in the kinship of Sawridge Beneficiaries. I want my ties to be allowed to ripen and bear fruit. I have something to contribute. I am a good person.[12]

38. I'm reaching a deeper understanding about addictive systems; the natural outcome from the dark and complex history experienced by my family and other Indian families under the Indian Act. Addictions cannibalize spirituality and relationships. Cree and Anishinaabe knowledge keepers explained the power and spread of cannibalization through teachings about Wihtiko, a spiritually cannibalized human defined by three internal traits, qualities, or attitudes:

    - severe loss or abandonment of self-control, or the manipulative control of others;
    - disconnect with or manipulation of reality; and,
    - abandonment, rejection or manipulation of relationship.

    The Wihtiko's attitude is that truth, reality, and others can be reduced to objects of self-serving power.[13]

39. My grandfather said that as a young Chief, he thought our challenge was economic, but in his later years, believed our challenge is spiritual. His identification of a spiritual problem was not just the spiritual problem of an individual, struggling with addiction. It

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[12] **Aboriginal Peoples and Historic Trauma: The processes of Intergenerational transmission. 2015,** William Agiuar and Regine Halseth, National Collaborating for Aboriginal Health (NCCAH)

[13] Cecil Chabot 2016, pg 84 https://ruor.uottawa.ca/bitstream/10393/33452/1/Chabot_Cecil_2016_thesis.pdf

was the cannibalized system that poisoned the spirit of the individual growing up and living within that cannibalizing system.

40. I have read the March 25, 1985 Brief presented by my grandfather with support from June Ross, Moe Litman, Catherine Twinn, David Brown, David Ward and Maurice Cullity. My grandfather detailed his concerns to both Houses of Parliament about the proposed amendments to the Indian Act, known as Bill C-31. This Brief is dated March 25, 1985, twenty days before he settled the 1985 Trust.[14]

41. The Brief and the larger record in the Committee transcripts is there for the reading. His concerns and considerations remain compelling. He left us a window into his mind – what he considered when creating the 1985 Trust. He faced a complex legal environment not of his making. He grappled with the complexity with thoughtful, careful and well reasoned consideration, balancing many factors. He sought top advice from many including Deloitte and Davies, Ward & Beck (now Davies, Ward, Phillip & Vineberg). He considered how best to preserve the wealth he built to benefit his love - our kinship system, culture, spirituality and healing.

42. The 1985 Trust is a **legal** entity (not a political entity) – protected by well established Trust principles – to shelter our journey to a future of possibilities where something meaningful, different and beautiful can emerge from our dark history and uncertain present.

43. He spoke about Canada's assimilation of Indians through enfranchisement provisions. He saw many Indian enfranchise. He understood the harsh consequences of Indian Status under the Indian Act. Each person who enfranchised took a per capita share from the Band's Capital and Revenue Account.

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[14] Ibid 11, Treaty Eight Brief, March 25, 1985

44. He believed it unfair and dangerous for people who enfranchised to return and take another share while those who had remained had not profited from per capita payments and had endured the many disadvantages being an Indian under the Indian Act. He was astute about human nature and frailties, meeting us where we are – that inequities will generate resentment, blame, hatred, strife and toxicity. His view was that:

- "Reinstated persons should not become band members until all amounts paid to such person on their enfranchisement have been repaid with interest." Pg v
- "The Minister has stated that this [repeal s.112] is to prevent individuals from applying for status and membership simply to re-enfranchise and cash in their per capita share of band funds. While we welcome the Minister's recognition of the difficulties that the Bill would impose on high impact Bands, the proposed solution is in our view an unnecessarily draconian reaction to the problems that will be created by the Bill." Pg 17
- "In recent years there have been distributions of very large sums of band funds to persons who have left these bands. In some cases, payments in excess of $150,000 have been made to each member of enfranchised families." Pg 31
- "Each payment to a departing band member reduces the funds available to remaining members that may be used to provide for the future needs of the Band. The capital of the band and thus its earning power is thereby diminished. To permit any person to regain band status without restoration of these funds will be very unfair to other band members. The by-law powers contained in section 81 should be further expanded to permit bands to determine whether payback is required as a condition of restoration of band membership." Pg 31
- "Mr. Crombie has said in both the Cabinet memo and his testimony before the Commons Committee that returning band members would not be eligible for current distributions of band funds until the amount foregone equals the amount previously paid out, plus interest. However, the Bill in its present form would only withhold distributions of capital funds derived from the sale of surrendered lands. All other distributions are not affected. Because bands rarely surrender lands for sale, this provision is virtually meaningless". Pg 31, 32

- "We have referred above to the proposed repeal of the provisions of the Indian Act dealing with the voluntary enfranchisement of bands. In order to deal with the possibility that reinstated members of high impact bands may seek enfranchisement of the band as a means of obtaining a distribution of band funds, the Government proposes to exclude the possibility of such distributions in the future upon the dissolution of the band. The proposal is paternalistic and fundamentally inconsistent with the responsibilities of the Crown with respect to Band funds.... We cannot accept any increase in the power of the Government to maintain control over band funds. Nor can we accept any attempt to prevent bands from determining their own future." Pg 32-33
- "The abolition of capital and revenue payments to the individual Indians who might become disenfranchised under the existing procedures or who otherwise cease to be members of a band is proposed for the same reason as the repeal of s.112. In addition, we do not believe that is in the interests of any of our bands to be forced to accept as band members individuals who have not maintained a commitment to the future of the band and who are prevented from leaving solely because of their inability to support themselves without the assistance of the per capita payments now available under subsection 15(1) of the Indian Act." Pg 33[15]

45. To ward off a super dependency on the Indian Act (under constant legal challenge and threats of repeal) to resolve complex inequities and problems, he did what other Canadians are free to do with wealth they have created. He created Two Trusts. He entrusted Trust principles to protect the Trusts; the 1985 Trust continued the historic kinship pool; the 1986 Trust would receive the new pool of beneficiaries who qualify for membership under the shifting "laws of Canada" however amended by ongoing court declarations.

[15] Ibid 11, Treaty 8 Brief, March 25, 1985

46. My grandfather wished to protect this wealth form politics, courtrooms and privilege that wins because it holds the power over the marginalized and disempowered. The 1985 Trust was intended to benefit me and the other beneficiaries.

47. My grandfather understood the heavy work of Reconciliation that lay ahead: to re-learn how to think like an Indian, to forge unity, inclusion and integration by recovering and applying fundamental Indian laws and customs to restore our societies:

> [T]he revitalization process should motivate many modern Indians to relearn how to think like their ancestors or to "think like an Indian." When modern Indians begin "thinking like Indians" many problems on reservations will disappear . . . Alcoholism, drug abuse, domestic violence, diabetes, obesity and other social and physical ills, and poor educational achievement of Indian children, confront Indian leaders on a daily basis. Instead of looking inward for potential solutions to these problems, Indian leaders tend to look to the non-Indian world for remedies. Problems afflicting Indian peoples on reservations should be seen as prime opportunities for revitalizing, discussing and relearning tribal customs and traditions and applying them as community problem solving tools . . . three foundational [intertwined] doctrines that form the nucleus of this work are described as follows: hozhq (glossed as harmony, balance and peace); k'e (glossed as kinship unity through positive values) and k'ei (Navajo Kinship or clan system) (Austin 2009, xvii-xxii)
>
> Navajo lawyer, professor, and former jurist, Raymond Austin, Navajo Courts and Navajo Common Law

48. As usual, my grandfather, the visionary, was way ahead of his time. He was actualizing internal reconciliation. Reconciliation is the purpose of s. 35. He used every tool at his disposal, including Trust instruments and Trust principles, in the belief that such enshrined legal instruments and tools would support Reconciliation, not destroy it.

49. At his funeral, November 4, 1997, the following Eulogy was given:

I am a teacher, and so I naturally look for lessons to be learned from the extraordinary life's work of Chief Walter Twinn. I first met Chief Twinn some seven years ago, when he came down to Arizona leading a delegation of Alberta band chiefs. The chiefs had come to Arizona to learn about Indian tribal courts in the United States. I was stuck by a number of things that. I learned about Chief Twinn during our first meeting.

In the space of a few minutes, Chief Twinn briefed me on exactly what he wanted to get out of his visit to Arizona; the Alberta bands these chiefs represented were building Indian sovereignty from the ground up. Their nations needed laws and just courts, and they had heard that Indian tribes in Arizona had been working on these same things for several decades now. They were here, as Chief Twinn explained to me, to learn and ask questions, and to report back to their people in Alberta on what they had seen on their trip to Arizona Indian County. How impressive I thought; an Indian chief with a vision of sovereignty as a Nation-building process, and who approached that task with an understanding that securing justice for Indian people is one of the most important responsibilities entrusted to an Indian leader.

I learned many lessons from Chief Walter Twinn since our first meeting, and all these things I learned have given me a much deeper understanding of the responsibility that is entrusted to an Indian leader by Indian people. Particularly in our time, when being an Indian leader means taking on the dominant society and it's racism and prejudices against Indian people; taking on its power to crush even the slightest resistance to its belief that Indians must be subservient to its desires, interests, and values and taking on its ignorance and fear when it sees an Indian leader with a vision of Indian sovereignty it does not want to understand or accept.

Chief Twinn took on all these responsibilities, and willingly paid the price for doing so. He understood that to be criticized, scorned, and even investigated for standing up for justice for Indian people is one of the responsibilities an Indian leader assumes in or day and age. It is one of the responsibilities that true Indian leaders have always had to assume throughout our history of conflict with the dominant society, it's a responsibility that comes with the territory.

Chief Twinn understood that he had been placed in a unique situation, with a unique set of abilities and blessings from the Great Spirit to meet the challenges of being an Indian leader in this day and age. He understood that the ancient traditions, wisdom and teachings of Cree culture had enormous value for him in meeting the challenges of being an Indian leader in modern-day Canada.

One of the things that I line learned from the life's work of Chief Walter Twinn is that we perhaps ask too much of our Indian leaders. We ask them to build our nations and to secure justice for us; we ask them to protect us and fight our battles with the dominant society, we ask them to build alliances with other Indian people, and to reach out to members of the dominant society who can perhaps help our cause, We ask them to administer the day to day affairs of our governments, to protect our lands, and to achieve economic Self-sufficiency for us all without sacrificing our values as Indian peoples. We ask them to be courageous, yet not fool-hearty in confronting the dominant society and demanding the basic human rights of cultural survival and self-determination that it denies to Indian people.

And after all these responsibilities have been taken on, we ask them to do more.

No wonder that we have so few real Indian leaders among us today. The few real Indian leaders that we do have are taken from us far too soon, for their life's work — the struggle for Indian sovereignty — takes a heavy toll and is never really completed. In death, it seems, the teeming contradictions generated by the life's

work of a great leader come to a brief state of repose for us, and at that moment, we can begin to glimpse the patterns of a great man's vision.

Chief Twinn saw that the long historic struggle for Indian sovereignty in Canada was entering one of its most critical and dangerous phases; that laws, and court decisions and political forces were aligning that threatened to destroy Indian sovereignty and extinguish traditional reserve communities in Canada. He saw that the struggle for Indian sovereignty had to be waged on many fronts; in the legislature, in the courts, in the business world, and on the reserves themselves.

He saw that the dominant society, and even some Indians who had grown comfortable and subservient in their dependence on the dominant society's government, feared a vision of Indian sovereignty achieved through economic self sufficiency and band control of reserve government and decision-making. He saw the dangers of entrusting the struggle for Indian cultural survival and self-determination to an "Indian industry" that supported itself through political connections to the dominant society's government, rather than through cultural connections to the Indian people who live in the traditional communities on the reserves.

And he saw that he would have to assume the responsibility of acting upon this vision as his own life's work, with an indomitable spirit and undaunted courage. He saw that he must lead this struggle with few friends and allies. He saw that he could only hope that others would follow in building Indian sovereignty in Canada from the ground up when his life's work came to an end.

As I said, in death the seeming contradictions of a great man's life briefly come to a state of repose for us, and we can begin to glimpse the problems of a great vision emerge. Generations from now, our children and our children's children will hear and learn about the life's work of Chief Walter Twinn, and ask us why we did not fully understand the power of his vision of Indian sovereignty while he

was alive. This is not an unusual fate for an Indian leader — Crazy Horse of the Lakota, Geronimo of the Apaches, Joseph Brandt of the Iroquois, Manuelito of the Navajo, Lone Wolf of the Kiowa, Joseph of the Nez Perce, — they were misunderstood, criticized, and despised by the dominant society, and even by other Indians during their lifetime. We now look back and see that the power of their vision is something that we only slowly learned to understand, and act upon.

When we resolve to take on the responsibility of leadership that their life's work teaches us, we resolve to take up their legacy. Chief Walter Twinn's life is now complete, but his work lives on. We are only beginning to understand the lessons that his life's work teaches us.

We have suffered a great loss, but we are enriched by the legacy of his life's work in the struggle for Indian rights. Now we must take on the responsibility to build upon this legacy which Chief Twinn has bestowed upon us, for our children still to come. We are therefore thankful to the Great Spirit, who has blessed us with many lessons to be learned from the life's work of Chief Walter Twinn.

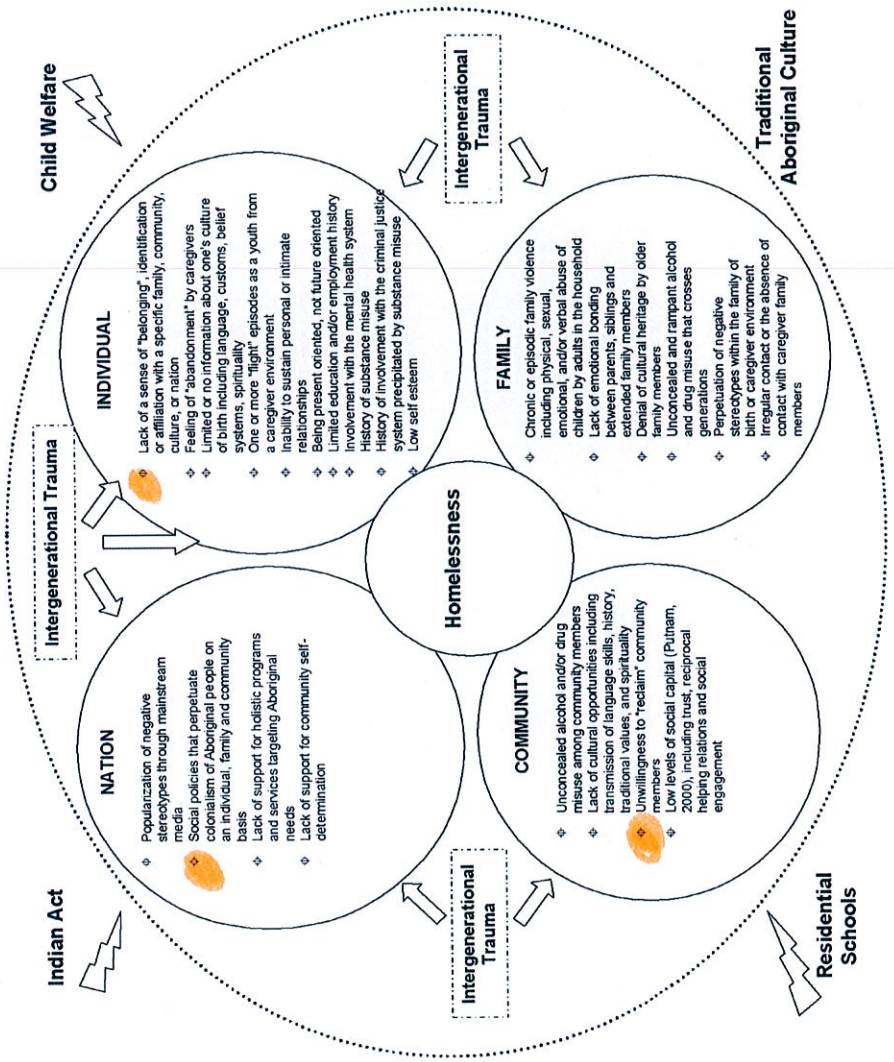
November 4, 1997, Eulogy to Walter Patrick Twinn by Robert A. Williams, Jr.
Regents Professor, E. Thomas Sullivan Professor of Law and
Faculty Co-Chair, Indigenous Peoples Law and Policy Program
The University of Arizona Rogers College of Law
Tucson, Arizona 85721

50. My hope is that this Court will honor my grandfather's work and fulfill his intentions by upholding the Consent Order that confirmed the validity of the assets transferred to the 1985 Trust from the 1982 Trust, and end this Action so beneficiaries can accept what my Grandfather worked so hard to leave to us.

52. All of which is respectfully submitted at the City of Edmonton, in the Province of Alberta this 27th day of November 2020.

Shelby Twinn
Self-Represented Litigant

Figure 1: The Intergenerational Trauma Model



DRUMMOND MEMO - 1851

On reference to the Attorney General (East) of a letter addressed by JM Napier, Sup. JA to Lt. Col. the Hon. R. Bruce Sup. Genl. JA on the 18th Septr. 1850 enclosing a letter from several Indians of St. Francois, complaining of certain provisions of the Act 13 and 14 Vict. Ch 42; and on reference by Mr. Chesley to the Solicitor General (East) of a copy of a petition presented to His Excellency the Governor General of several Indians of Sault St Louis on the same subject.

Crown Law Department Toronto, July 22, 1851

When these documents were referred to me in the City of Montreal I conceived it my duty to ascertain by every means within reach whether the complaints, preferred against the law of last session by some of the Indians, had any just foundation, and if so, to what extent the law might be amended so as to meet the views of the petitioners. For that purpose I placed myself in communication with the enlightened and zealous missionary of Sault St. Louis, as well as with some of the most intelligent of the inhabitants of that village, and invited the Chiefs to explain and discuss with me the objections raised against the Act. The Chiefs of the Iroquois Tribe stationed at Sault St. Louis, to the number of some six or eight, and a person deputed by the Abenaquis of St. Francois accordingly met at my office in Montreal, and from the information derived from them, as well as from previous investigation into the affairs of the various remnants of the Indian tribes residing in Lower Canada, I convinced myself of the following facts, without due consideration of which the law of last session cannot be appreciated:

1 stly That in several of the Indian villages of Lower Canada there are comparatively few persons of unmixed Indian blood. It is said that the old Huron Chief Koska, who died some few years ago, was at the time of his decease the only individual of pure Indian blood in the extensive village of Lorette. It is doubtful whether a score of persons of unmixed Iroquois blood could be found in the village of Sault St. Louis, and amalgamation with the white races has manifestly taken place to a lesser extent in all the other Indian villages.

2 ndly That for many years, extending in some instances to more than half a century past, persons of unmixed European blood have resided in these villages and have been recognized as Indians, receiving their share of the Government presents and occupying, in common with the Indians, the lands appropriated to the use of the latter. Several of this class of persons, some of whom are descended from prisoners made by the Indians in the times of their wars with the old colonists, have been elected Chiefs; - one of the Grand Chiefs of Sault St. Louis, Jean Baptiste _____ being, as it is alleged, the grandson of Genl. Bourgorgone, and the son of an American woman of the name of Tarbol.

3 rdly That it has become customary among the aboriginal tribes of North America, from time immemorial, to recognize as members of a tribe all persons adopted by it, and to pursue the Roman rule of making the child follow the condition of the mother, so that the children invariably formed part of the tribe or band to which their mother belonged.

4 thly That the question raised as to the rights of the whites and mixed breeds to participate in the advantages belonging to the tribe amongst which they had been born or brought up has been, for many years, a cause of constant strife in these villages - a strife in which some

individuals of European descent were not unfrequently loudest and most vehement in demanding the expulsion of the half-breeds.

A striking proof of this strange conduct was given by the two Chiefs who were deputed from Sault St. Louis to remonstrate with His Excellency the Governor General against the law of last session. For, although they came to seek for the expulsion of the whites and half-breeds from their villages, one of them (if I am correctly informed) Charles Lafosaie _____ has not a drop of Indian blood in his veins and the other Louis Tarbol _____ is the grandson of an American prisoner of war.

In this condition of things I felt that it was the duty of the Government to endeavour to put an end to those conflicts by passing a law defining clearly the rights of all persons residing in these villages, in accordance with the ancient customs and traditions of the Indians themselves. The Act of last session was framed with a strict view to equity and to these customs and traditions; that part of it which confers upon all persons intermarried with Indians the same rights as the Indians themselves is obnoxious to the latter. Moreover, assuming that the system of isolating these remnants of the Indian Tribes must, at least for a considerable time to come, be persisted in, without reference to the policy in which it originated, it may be considered as a violation of the rights of the present proprietors to allow the white man who marries an Indian woman to claim a share in the rights of her tribe. I, therefore, propose to amend that portion of the law so as to exclude the white man who marries an Indian woman and his descendants, without depriving the Indian who marries a white woman, or his heirs, from a share in the rights of the tribe.

Another provision of the Act which has been complained of, especially by the Indians of St. Francois is that which confers Indian rights upon persons adopted in infancy and their descendants. I cannot, however, advise the repeal of these clauses, which was framed to protect a numerous class of persons who according to Indian Custom as well as justice and equity, are entitled to enjoy Indian privileges; but I propose to alter so as to exclude all persons who have not been brought up and continued to reside amongst the Indians. This alteration will, I trust, have the effect of excluding from the enjoyment of Indian privileges the persons against whom the complaints of the Abenaquis of St. Francois are chiefly directed.

It is proposed also by the accompanying Bill to exclude from the category of persons whom may be removed from the Indian villages under the provisions of the Special Council Ordinance the various classes entitled to Indian rights as well as all persons employed by them as servants, masons and other artisans.

This proposed alteration has a double object in view -

1 st To remove an opinion suggested to the inhabitants of these villages, amongst whom it has created much apprehension and distrust; namely, that under the provisions of the Ordinance they are all liable to be expelled from their lands by the command of the Governor of the Province - and

2 ndly To enable them to make some progress in improving their villages and farms, by employing for that purpose persons of superior skill and industry, and to relive such persons from the apprehension of being liable to expulsion before the expiration of their term of service.

The amendments which I have the honour to submit with this report will probably satisfy the persons who have remonstrated against the Act of last session, but, owing to the doubtful origin of many of the inhabitants of the Indian villages, difficulties must necessarily arise hereafter in the application of this law to individual cases. These difficulties cannot be obviated, unless an enumeration of all the heads of families entitled to the enjoyment of Indian rights in each village be made out, under legislative sanction. The Indian Commissioner might be entrusted in the performance of this duty, and the names of the persons for whose benefit it would be undertaken should be consigned in Registers, one duplicate of which should be deposited in some place of safety in each Indian village and the other in the archives of the Indian Department. A measure of this character involving, as it must, numerous details, cannot be laid before the Legislature during the present session, but I would humbly submit to His Excellency the Governor General whether authority should not be given to the Law-Officers of the Crown to carry out this suggestion, if approved, at the next session of Parliament.

The whole, nevertheless, respectfully submitted.

Lewis D. Drummond
Solicitor General

CURING THE TRIBAL DISENROLLMENT EPIDEMIC: IN SEARCH OF A REMEDY

Gabriel S. Galanda and Ryan D. Dreveskracht*

This Article provides a comprehensive analysis of tribal membership, and the divestment thereof—commonly known as "disenrollment." Chiefly caused by the proliferation of Indian gaming revenue distributions to tribal members over the last 25 years, the rate of tribal disenrollment has spiked to epidemic proportions. There is not an adequate remedy to stem the crisis or redress related Indian civil rights violations. This Article attempts to fill that gap. In Part I, we detail the origins of tribal membership, concluding that the present practice of disenrollment is, for the most part, a relic of the federal government's Indian assimilation and termination policies of the late nineteenth and early twentieth centuries. In Part II, we use empirical disenrollment case studies over the last 100 years to show those federal policies at work during that span, and thus how disenrollment operates in ways that are antithetical to tribal sovereignty and self-determination. Those case studies highlight the close correlation between federally prescribed distributions of tribal governmental assets and monies to tribal members on a per-capita basis, and tribal governmental mass disenrollment of tribal members. In Part III, we set forth various proposed solutions to curing the tribal disenrollment epidemic, in hope of spurring discussion and policymaking about potential remedies at the various levels of federal and tribal government. Our goal is to find a cure, before it is too late.

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* Gabriel S. Galanda is an owner of Galanda Broadman, P.L.L.C., an American Indian-owned law firm dedicated to advancing and defending Indian rights. Ryan Dreveskracht is an associate at Galanda Broadman, P.L.L.C. Mr. Galanda is a descendant of the Nomlaki and Concow Tribes, who is a citizen of and otherwise belongs to the Round Valley Indian Tribes. The Authors would like to thank Gabriela M. Rios for her excellent research assistance, and Professors Eric D. Eberhard, Matthew L.M. Fletcher, Carla F. Fredericks, Robert Hershey, David Wilkins, and Robert A. Williams, Jr., for their thoughtful comments and suggestions on earlier drafts of this work. Any mistakes are our own.

INTRODUCTION

A. Overview

As sovereign nations with the right to "make their own laws and be ruled by them,"[1] tribal governments are free to define conditions of tribal membership.[2] "Disenrollment"—a term not known to exist in any traditional American Indian language[3]—is the other side of that coin; it is the divestment of tribal membership by a tribe after the "absolute right" of membership is conferred upon a person.[4]

Chiefly caused by the proliferation of Indian gaming revenue distributions to tribal members over the last 25 years,[5] disenrollment is rapidly expanding

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1. Williams v. Lee, 358 U.S. 217, 220 (1958).

2. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

3. Gabriel S. Galanda, *Disenrollment Is a Tool of the Colonizers*, INDIAN COUNTRY TODAY, (Jan. 16, 2015), http://indiancountrytodaymedianetwork.com/2015/01/16/disenrollment-tool-colonizers (recounting that when Eric Bernando, a Grand Ronde descendant of his tribe's Treaty Chief and fluent Chinook Wawa speaker, was asked "if there was a Chinook Wawa word or notion that means 'disenrollment,' he unequivocally answered, 'no'").

4. *Terry–Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01, 01-02, 10 (Las Vegas Paiute Ct. App. 2003).

5. Alto v. Black, 738 F.3d 1111, 1116 n.2 (9th Cir. 2013); *see also* Paige Cornwell, *'Nooksack 306' Fight to Remain in Tribe*, SEATTLE TIMES, Aug. 26, 2013, at B1. Although sometimes veiled as a discovery that a member's application material was "fraudulent or incorrect," in actuality these disputes often spring from "politics," "greed" and "infighting," all of which are tragically on the rise. Oscar Yale Lewis III, *The Shifting Sands of American Indian Policy*, *in* BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES: LEADING LAWYERS ON NAVIGATING TRIBAL MEMBERSHIP ENROLLMENT ISSUES 1, 8–9 (2013), 2013 WL 5293045; *see also Tribes Cutting Off Members in Bloodline Clashes*, SANTA MONICA DAILY PRESS, Mar. 20, 2012, at 8 ("Somewhere, as tribes have tried to reconstruct their sense of nationhood, particularly tribes with casino money, they hit upon disenrollment as a way to settle disputes over personality issues and money."); Tom Kizzia, *A Tribe Divided*, ANCHORAGE DAILY NEWS, Jul. 5, 1998, at A1 (tribal member stating that, "[i]f somebody disagrees with you, just disenroll them. You got no problem anymore").

throughout Indian country.[6] Tribal disenrollment is now of epidemic proportion.[7] And despite the evolution of tribal and federal Indian law and international human rights in the United States,[8] there is not yet a remedy to stem the crisis.[9]

There is also a dearth of common law and legal scholarship on the topic of tribal disenrollment.[10] Given the insular nature of tribal governments and the statutorily confidential nature of disenrollment proceedings,[11] many tribal disenrollment controversies go unnoticed by the American public—if not the greater

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6. David Wilkins, *Two Possible Paths Forward for Native Disenrollees and the Federal Government?*, INDIAN COUNTRY TODAY (Jun. 4, 2013), http://indiancountrytodaymedianetwork.com/2013/06/04/two-possible-paths-forward-native-disenrollees-and-federal-government; *see also generally* Cedric Sunray, *Disenrollment Clubs*, INDIAN COUNTRY TODAY (Oct. 14, 2011), http://indiancountrytodaymedianetwork.com/opinion/disenrollment-clubs-58494. It is estimated that "more than 60 tribes . . . have disenrolled their tribal members in the last 20 years," and "there exists a significantly larger number who have done so outside of the watchful eye of news reporters." Cedric Sunray, *Tribes Abandon Traditional Aspects of Inclusion*, INDIANZ (Oct. 20, 2014), http://www.indianz.com/News/2014/015388.asp. And not only are more and more tribal governments terminating their own, but tribes are jettisoning larger and larger swaths of tribal members—hundreds to thousands at a time. *See, e.g.*, John Ellis & Marc Benjamin, *Chukchansi Casino Brings Cash and Turmoil to Once Impoverished Tribe*, FRESNO BEE (Oct. 18, 2014), http://www.fresnobee.com/2014/10/18/4186204_casino-has-brought-cash-and-turmoil.html?rh=1 ("As the tribe shrunk from its peak of 1,800 to about 900 today, disenrollment became a weapon to get rid of political opponents."); *see also* Cornwell, *supra* note 5 (describing the disenrollment of 306 Nooksack Indians as "the largest tribal disenrollment in Washington history").

7. Gosia Wozniacka, *Natives Fight Disenrollment Effort: Tribes Have Kicked Out Thousands in Recent Years*, CHARLESTON DAILY MAIL, Jan. 21, 2014, at B11 (noting that disenrollment has recently reached epidemic proportion in the United States) (quoting Professor David Wilkins).

8. Jennifer R. O'Neal, "*The Right to Know": Decolonizing Native American Archives*, 6 J. W. ARCHIVES 1, 15–17 (2015).

9. STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 92–93 (2012).

10. *See* RENYA K. RAMIREZ, NATIVE HUBS: CULTURE, COMMUNITY, AND BELONGING IN SILICON VALLEY AND BEYOND 165 (2007) ("[S]ome Native Americans may be angry that I am writing about disenrollment, contending that I am 'airing' our community's 'dirty laundry.' There is strong pressure in Native American communities to keep our problems secret from outsiders . . . ."). As discussed in more detail below, where there are some scholars on the fringe who address the topic, many are not Indian law scholars, and of those who are many simply canvass the law on subject as is, rather than seek to determine its origin, effects, and solutions.

11. *See* Fite v. Confederated Tribes of Grand Ronde, No. C-14-009 (Grand Ronde Tribal Ct. Nov. 7, 2014) (Order Following Pre-Hearing Conference) (enrollment case restricting attendance at oral arguments to only parties and their legal representatives); Alexander v. Confederated Tribes of Grand Ronde, Case Nos. C-14-022 thru C-14-088 (Grand Ronde Tribal Ct. Jan. 27, 2015) (Order on Motion for Reconsideration on Motion to Shield Oral Argument) (enrollment case precluding attendance of general public at oral argument).

tribal public as well.[12] Those seeking legal relief from disenrollment efforts normally must turn to tribal courts,[13] which may not provide published trial court or appellate decisions.[14] Meanwhile, the greater American-Indian academic community has largely and inexplicably ignored the topic.[15] This has resulted in very little legal scholarship or other notable secondary authority on disenrollment.[16] And what disenrollment legal scholarship exists largely fails to address actual disenrollment litigation.[17]

This Article attempts to fill the gap between scholarly conjecture about tribal membership rights and remedies, and on-the-ground disenrollment controversy and litigation. It seeks to provide, in other words, grounded and empirical scholarship that will help to inform lawmakers and jurists about the realities of disenrollment.[18] In Part I, we detail the origins of tribal "membership,"

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12. Sunray, *supra* note 6 ("Sovereignty has become a smokescreen for illegitimate behavior, racism, nepotism, and narcissism.").

13. This is for jurisdictional reasons, discussed *infra* notes 493–501 and accompanying text.

14. *See, e.g.*, Reply Brief of Appellants, Jefferedo v. Macarro, No. 08-55037, 2008 WL 4205354 (9th Cir. Jul. 30, 2008) ("[T]he Pechanga Tribe has no tribal court. Indeed, this absence of a tribal court is at the core of the Enrollment Committee's ability to blatantly violate Appellants due process rights."); *see also generally* Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 L. LIB. J. 199, 200 (2014) (discussing the unavailability of published tribal court decisions). The National Native American Bar Association has recently issued a Resolution stating that "the American indigenous right of tribal citizenship is sacrosanct; at tribal common law, the right, once vested, is recognized as an 'absolute right,'" denouncing "any divestment or restriction of the American indigenous right of tribal citizenship, without equal protection at law or due process of law or an effective remedy for the violation of such rights," and declaring "that it is immoral and unethical for any lawyer to advocate for or contribute to the divestment or restriction of the American indigenous right of tribal citizenship, without equal protection at law or due process of law or an effective remedy for the violation of such rights." NAT'L NATIVE AM. B. ASS'N, RESOLUTION # 2015-06, Apr. 8, 2015, *available at* http://www.nativeamericanbar.org /wp-content/uploads/2014/01/2015-04-09-2015-06-NNABA-Resolution-Due-Process.pdf.

15. *See* David Wilkins, *Thoughts on How We Re-Member*, INDIAN COUNTRY TODAY (Jul. 30, 2014), http://indiancountrytodaymedianetwork.com/2014/07/30/how-do-we-re-member ("There are no easy answers but I believe academia deserves as much of the blame as anyone for not facing this reality and attacking it head on."); *see also* Galanda, *supra* note 3 (discussing "the dearth of teachings about disenrollment from today's Indian academic establishment.").

16. *See, e.g.*, Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, 2012 AM. INDIAN L. J. (TRIAL ISSUE) 41, 43. Much has been written about *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), though. *See, e.g.*, Francine R. Skenadore, Comment, *Revisiting* Santa Clara Pueblo v. Martinez*: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347 (2002); INDIAN CIVIL RIGHTS ACT AT FORTY 27–87 (Kristen A. Carpenter ed., 2012).

17. *See, e.g.*, Sepideh Mousakhani, *Seeking to Emerge from Slavery's Long Shadow: The Interplay of Tribal Sovereignty and Federal Oversight in the Context of the Recent Disenrollment of the Cherokee Freedmen*, 53 SANTA CLARA L. REV. 937 (2013).

18. Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey's Call*, 4 CAL. L. REV. CIRCUIT 1, 2 (2013); Phillip Parker, Reconciling

concluding that, at least in its modern form, the idea is not one inherent or innate to American Indians. The present practice of tribal disenrollment is, for the most part, a relic of the federal government's Indian assimilation[19] and termination policies of the late nineteenth and early twentieth centuries.[20] Disenrollment policy has become so engrained in the federal–tribal relationship that many tribal governments believe that the federally imposed idea of "disenrollment" was implemented on their own accord.[21] In reality, however, disenrollment is a nonindigenous construct and a power that has been delegated by the United States to tribes over time.

In Part II, we use case studies to argue that disenrollment accomplishes nothing to advance tribal sovereignty or self-determination. Indeed, when tribal governments disenroll their own people, at least in the current and most common manner, they are perpetuating the federal assimilationist and terminationist policies of the early twentieth century[22]—policies that the federal government long ago abandoned (at least ostensibly), and that tribal governments have always rebuked. Disenrollment erodes tribal existence as we know it by: (1) perpetuating federal policies that mandate an arbitrary, aberrant, and forced biological division between Indians and non-Indians, to the detriment of the former; (2) assimilating American Indians into mainstream society, resulting in the loss of the tribal land base and related Indian cultural identity; (3) promoting wholesale termination of the federal–tribal relationship; (4) encouraging a lack of redress to Indians aggrieved by tribal leaders; (5) creating intratribal fractionalization; (6) triggering Indian-on-Indian violence; and (7) disregarding the federal fiduciary duty to all American Indians.

Tribal History with the Future: The Impact of John Marshall & John Collier 35 (Aug. 15, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482413.

19. *See generally* JANE E. SIMONSEN, MAKING HOME WORK: DOMESTICITY AND NATIVE AMERICAN ASSIMILATION IN THE AMERICAN WEST, 1860–1919 at 71–110 (2006).

20. Federal policy dealing with Indian tribes during this era "focused primarily on ending the trust relationship between the United States and Indian tribes, with the ultimate goal being to subject Indians to state and federal laws on exactly the same terms as other citizens." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (Nell Jessup Newton, ed., 2012)

21. *See* Kelly M. Branam, Book Review, *Native Acts: Law, Recognition, and Cultural Authenticity Joanne Barker (Durham, NC: Duke University Press, 2011)*, 35 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 354, 355 (2012) ("[T]ribal councils defend their disenrollment practices using arguments invoking sovereignty and a desire to preserve their culture."); Galanda, *supra* note 3 ("[T]oday disenrollment is being taught to Indian Country as if the practice belongs, and has always belonged, to American indigenous peoples. . . . [C]olonialist teachings of Indian exclusion and assimilation are espoused, and believed, accomplishing disenrollment—and completing the modern circle of Indian self-termination.").

22. *See generally infra* Parts I.C & I.E. In this way, we pick up in the footsteps of Joanne Barker, who argues that federal "enrollment policies . . . were instituted within allotment agreements . . . [and] then carried into tribal constitutions established under the terms of the Indian Reorganization Act" and that under these policies tribal members "are only recognized as Native within the legal terms and social conditions of racialized discourses that serve the national interests of the United States in maintaining colonial and imperial relations with Native peoples." JOANNE BARKER, NATIVE ACTS: LAW, RECOGNITION, AND CULTURAL AUTHENTICITY 4–6 (2011).

Thus, when weighed against the alternative that is tribal self-determination, disenrollment is antithetical to tribal sovereignty—it is a concept forced upon tribal societies to diminish the exercise of tribal self-governance; and it has, since the federal advent of Indian rolls and mechanisms for removal therefrom, been accomplishing just that. We also observe the close correlation between federally prescribed distributions of tribal governmental assets and monies to tribal members on a per-capita basis, and tribal governmental mass disenrollment of tribal members, dating back to the early twentieth century.

In Part III, we propose various solutions to redress the problems associated with tribal disenrollment. Because the federal government has created and advanced the tribal disenrollment paradigm without affording remedies to aggrieved American Indian disenrollees, and because tribal governments have carried out federally delegated disenrollment powers in breach of their own peoples' human and civil rights, we hope that the proposed solutions will spur discussion and policymaking about reform, particularly at the various levels of federal and tribal government.

Ultimately, it is tribal governments that are responsible for today's disenrollment epidemic. It is tribal peoples who must help find the cure, and it is the federal government that has a trust obligation to help them do so. The fact that the United States has imposed unscrupulous laws and policies upon American Indian people for the sake of conquering them is nothing new. Nor is it new that tribal governments have adopted and imposed those laws of the conqueror, as if they represent the tribes' own norms. Yet what is new, or at least modern, is the real ability for tribal governments and societies to rebuke those colonial-turned-federal laws and return to the customs, traditions, and norms that have allowed American Indians to survive into the present era. Tribal peoples must do so, and the cure to the disenrollment epidemic must be found, before it is too late.

B. Background

It is crucial to understand that a tribal government's ability to determine, define, and limit the criteria for tribal membership,[23] is distinct from its ability to retract a previous determination that an individual has satisfied existing criteria for tribal membership.[24] While the former is properly defined as an aspect of inherent tribal sovereignty, the latter—disenrollment—is not. Disenrollment is entirely a

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23. *See, e.g.*, *In re* Menefee v. Grand Traverse Band of Ottawa & Chippewa Indians, No. 97-12-092-CV, 2004 WL 5714978, at *1 (Grand Traverse Tribal Ct. May 5, 2004) (dispute over interpretation of enrollment criteria—as distinguished from a dispute over disenrollment criteria); Graveratte v. Tribal Certifier, Nos. 09-CA-1040, 09-CA-1041 (Saginaw Chippewa Tribal Ct. App. Aug. 16, 2010) (same).

24. This distinction is lost on many. *See, e.g.*, Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941, 942–49, 970–79 (2011) (generally conflating tribal prerogative over membership decisions, and disenrollment and banishment decisions, under banner of inherent tribal sovereignty).

construct of federal law, not of American indigenous norms.[25] Thus, in regard to federal Indian notions of tribal "membership" or "enrollment," those concepts are distinguishable, and must be distinguished, from normative American indigenous tenets of tribal "belonging," "kinship," or "citizenship." As it stands, however, these concepts are conflated and such critical distinction is lost in the federal-tribal lexicon.[26] In the end, tribes must move past federally imposed notions of tribal "membership" and "enrollment." The mere fact that tribal governments have been delegated federal authority to determine these matters does not mean that they must accept them as normative. As sovereigns, tribes set limits on citizenship, and as indigenous peoples, tribes should base these limits on norms of indigenous belonging and kinship. Indeed, indigenous persons enjoy an inherent "right to belong to an indigenous community or nation, *in accordance with the traditions and customs of the community or nation concerned*"—not the imposed concepts of the conqueror.[27]

Yet even defined under the colonial rubric, tribal membership is sacrosanct. As explained by the Little River Band of Ottawa Indians Tribal Court of Appeals:

> Tribal membership for Indian people is more than mere citizenship in an Indian tribe. It is the essence of one's identity, belonging to community, connection to one's heritage and an affirmation of their human being place in this life and world. In short, it is not an overstatement to say that it is everything. In fact, it would be an understatement to say anything less. Tribal membership completes the circle for the member's physical, mental, emotional and spiritual aspects of human life.[28]

To forcibly disenroll an American indigenous person, in other words, is to destroy their identity—their everything.[29] Disenrolled persons lose not only their indigenous identity, but they may also be practically forced to vacate their ancestral

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25. *See* COHEN, *supra* note 20, at § 3.03 ("[F]ederal law has constrained and molded tribal membership provisions."); Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLINE L. REV. 97, 99 (2007) (noting that "[a]lthough the federal government recognizes the right of tribes to make this determination, Congress retains the power to supersede that authority when it deems necessary" and that "[t]hrough federal legislation such as the Indian Civil Rights Act, the Indian Reorganization Act, and the Indian Gaming Act, coupled with regulations imposed by the Bureau of Indian Affairs, over time the federal government has influenced what it means to be a tribal member.").

26. *See, e.g.*, MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 219 (2011) (using the terms "citizenship" and "membership" interchangeably).

27. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), at Art. 9 [hereinafter UNDRIP].

28. Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n, 2007 WL 6900788, at *2 (Little River Ct. App. Jun. 24, 2007).

29. Ryan Seelau, *Disenrollment Demands Serious Attention by All Sovereign Nations*, INDIAN COUNTRY TODAY (Dec. 10, 2013), http://indiancountrytodaymedianetwork.com/2013/12/10/disenrollment-demands-serious-attention-all-sovereign-nations ("[D]isenrollment may be the ultimate coercive act a government can take against an individual.").

lands and are otherwise alienated from their indigenous community.[30] In the most egregious instances, tribal elders, who have spent their entire lives self-identifying as tribal members and learning and teaching indigenous cultural traditions, are summarily jettisoned from their tribal communities because of some alleged "error" in either their own or their ancestors'[31] enrollment files.[32] Needless to say, disenrollment—the loss of "the most important civil right" of American Indians—causes extreme and irreparable legal harm and personal pain and heartache.[33]

Under the constructs and restraints of federal law, tribal membership is "the foundation for individual rights within a tribe—a necessary prerequisite from which all tribal rights and benefits flow."[34] Disenrollment deprives an affected person of

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30. James Dao, *In California, Indian Tribes With Casino Eject Thousands of Members*, N.Y. TIMES, Dec. 13, 2011, at A20 ("Sometimes, disenrolled Indians are forced to leave tribal land . . . ."); James D. Diamond, *Who Controls Tribal Membership? The Legal Background of Disenrollment and Tribal Membership Litigation*, *in* BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES: LEADING LAWYERS ON NAVIGATING TRIBAL MEMBERSHIP ENROLLMENT ISSUES 37, 37 (2013); Jana Berger & Paula Fisher, *Navigating Tribal Membership Issues*, *in* EMERGING ISSUES IN TRIBAL-STATE RELATIONS 61, 67 (2013). *But see* Gabriel S. Galanda, *The Unintended Consequences of Disenrollment*, INDIAN COUNTRY TODAY (Feb. 2, 2015), http://indiancountrytodaymedianetwork.com/2015/02/02/unintended-consequences-disenrollment ("[J]ust because an Indian is disenrolled it does not mean that person can categorically be excluded from tribal territories—as history proves, it is just not that easy to eradicate Indians.").

31. Not only are living tribal members being disenrolled en masse, but deceased American indigenous persons are being posthumously disenrolled, often times without any notice to those ancestors' living descendants. *Dead or Alive - Grand Ronde Tribe Terminates Tribal Citizenship*, NATIVE NEWS ONLINE (Jul. 26, 2014), http://nativenewsonline.net/currents/dead-alive-grand-ronde-terminates-tribal-citizenship; *see also* Elizabeth Larson, *Robinson Rancheria Evicts Five Disenrollees and Their Families*, LANE COUNTY NEWS (May 9, 2012), http://www.lakeconews.com/index.php?option=com_content&view=article&id=24947:robinson-rancheria-evicts-five-disenrolled-families&catid=1:latest&Itemid=197; Valerie Taliman, *Las Vegas Paiutes Oust Entire Council*, INDIAN COUNTRY TODAY (Jul. 26, 2002), http://indiancountrytodaymedianetwork.com/2002/07/26/las-vegas-paiutes-oust-entire-council-87917; David Wilkins, *We Must Stop Gruesome Postmortem Dismemberment*, INDIAN COUNTRY TODAY (Mar. 20, 2015), http://indiancountrytodaymedianetwork.com/2015/03/20/we-must-stop-gruesome-postmortem-dismemberment; *Chippewa Tribal Leaders Expel Three Dead*, ARGUS-PRESS, Aug. 15, 2001, at 9.

32. Diamond, *supra* note 30.

33. Wabsis v. Little River Band of Ottawa Indians, Enrollment Comm'n, No. 04-185-EA, 2005 WL 6344603, at *1 (Little River Tribal Ct. Apr. 14, 2005), *order clarified.*, Wabsis v. Little River Band of Ottawa Indians, Enrollment Comm'n, No. 04-185-EA, 2005 WL 6344563 (Little River Tribal Ct. July 28, 2005).

34. Brendan Ludwick, *The Scope of Federal Authority Over Tribal Membership Disputes and the Problem of Disenrollment*, 51 FED. LAW. 37, 37 (2004). An explanation of the benefits of tribal membership is included in Cohen's Handbook as follows:

> [C]haracterization of an individual as an "Indian" has a wide range of consequences under federal law, including being subject to federal or tribal rather than state criminal jurisdiction; eligibility for federal benefits and employment preferences; exemption from state taxation, child

various rights guaranteed by the federal government in fulfillment of treaty and other federal legal obligations, such as rights to hunt, fish, gather, and worship on aboriginal lands; to own and occupy real property under federal stewardship and protection; and to receive healthcare, education, and housing.[35] Still, tribal membership is far more than the sum of its legal parts—it is "a sacred state of being and belonging, understood only by those who are akin to it";[36] it is being a "part of a group whose roots go back to pre-historic times, and that has carried forward its language, customs, and belief systems to the present day, despite terrible travails."[37] In other words, tribal membership is "an individual's most basic and important legal affiliation"—"an inviolable right."[38] Such a legal right, when violated, deserves a remedy.

Regrettably, there is generally no domestic forum to have tribal membership right violations or disenrollment abuses remedied.[39] Since the 1940s, there has been an international movement away from using nation–state sovereignty as a shield against redress and toward an understanding that governments must be held legally accountable for the illegal or inhumane treatment of their citizens.[40] But tribal governments have not witnessed this change. As Professor Wenona Singel explains, the "dramatic changes" that sovereignty underwent in the international arena "were never translated to the Indian law context" and, "[a]s a result, tribal sovereignty has remained caught in a time warp, frozen in the form it took when the Supreme Court began to articulate the tribal sovereignty doctrine in the nineteenth century."[41]

While "federal Indian law," particularly at common law, sets the outer contours of tribal sovereignty, that law is primarily used to define the relationship between the federal government and tribal governments, and between tribes, state

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welfare, and other civil authority; participation in distributions of proceeds from tribal economic development, such as gaming; and entitlement to inherit certain trust or restricted lands.

See COHEN, *supra* note 20 at § 3.03[1].

35. *See, e.g.*, Shenandoah v. U.S. Dep't. of Interior, 159 F.3d 708, 714 (2d Cir. 1998) (discussing benefits lost when a member is disenrolled).

36. Berger & Fisher, *supra* note 30, at 62.

37. John E. Jacobson, *Tribal Government Structures and Powers, the Rights of Tribal Members, and Tribal Enrollment and Disenrollment*, *in* BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES: LEADING LAWYERS ON NAVIGATING TRIBAL MEMBERSHIP ENROLLMENT ISSUES, *supra* note 30, at 26–27.

38. Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power Over Membership*, 92 VA. L. REV. 793, 795, (2006).

39. As discussed *infra* notes 450–78 and accompanying text, although independent tribal judiciaries do provide a great domestic forum, they are often not a viable option because they either do not exist or do not provide de novo review of a tribal council's decision to disenroll.

40. Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 608 (2012).

41. *Id.*

governments, and non-Indians.[42] Federal Indian law, therefore, has not yet enveloped human rights law vis-à-vis tribal sovereignty. This domestic human rights vacuum supports Vine Deloria, Jr.'s forecast that tribal sovereignty has "lost its political moorings" and is thus "adrift on the currents of individual fancy."[43] Tribal governments have faced similar criticism from the federal judiciary,[44] Congress,[45] and indigenous law scholars,[46] for using their sovereignty in a manner that is "anachronistic and an affront to human rights."[47] Domestic violations of human rights vis-à-vis disenrollment now demand a remedy.

I. ORIGINS OF TRIBAL "MEMBERSHIP"[48]

"Tribal membership is the foundation of tribal political rights."[49] When modern tribal governments set membership criteria, they are certainly exercising their sovereign authority to, for example, preserve tribal resources[50]—similar to what most countries do when setting nationalization and citizenship criteria.[51] It

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42. *Id.*

43. Vine Deloria Jr., *Intellectual Self-Determination and Sovereignty: Looking at the Windmills in our Minds*, 13 WICAZO SA REV. 25, 26–27 (1998).

44. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Thomas, J., dissenting); Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751, 766 (1998) (Stevens, J. dissenting).

45. *American Indian Equal Justice Act, S. 1691, 105th Cong. (1998); Sovereign Immunity: Oversight Hearing to Provide for Indian Legal Reform Before the S. Comm. on Indian Affairs*, 105th Cong. (1998).

46. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 114–16 (2001); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 25–42 (2002); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1144–67 (2002).

47. Singel, *supra* note 40, at 618.

48. Upfront, the discussion of this Article must be distinguished from that of the Cherokee Freedmen. That matter involved the interpretation of an 1866 treaty between the United States and the Cherokee Nation and whether that treaty vested Cherokee freedmen with rights of citizenship in the Nation, including the right of suffrage. Letter from Larry Echo Hawk, Assistant Sec'y of Indian Affairs, to Joe Crittenden, Acting Principal Chief of the Cherokee Nation (Sept. 9, 2011), *available at* http://www.nativetimes.com/news/tribal/6005-letter-from-echo-hawk-regarding-cherokee-freedmen-upcoming-election. There, interpretation of a treaty triggered a federal cause of action. Vann v. U.S. Dep't of Interior, 701 F.3d 927, 929–30 (D.C. Cir. 2012).

49. Dennis R. Holmes, *Political Rights Under the Indian Civil Rights Act*, 24 S.D. L. REV. 419, 428 (1979).

50. Ryan W. Schmidt, *American Indian identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. ANTHROPOLOGY 1, 7 ("[T]ribes need to control population growth to apportion the benefits of gaming to deserving tribal members and sustain reservation economic development."). The Pechanga Band of Luiseno Indians, for example, saw an increase from approximately 15–30 membership enrollment requests per year prior to gaming, to more than 450 after the Tribe opened its lucrative casino. Danna Harman, *Gambling on Tribal Ancestry*, CHRISTIAN SCI. MONITOR, Apr. 12, 2004, at 15.

51. *See, e.g.*, General Requirements for Naturalization, 8 C.F.R. § 316 (2015).

bears repeating that when tribal governments disenroll their people, however, they are exercising a nonindigenous concept that has been developed by the federal government, and delegated to tribes in an effort to "wipe out Indian culture, traditions, and ways of life."[52] Indeed, disenrollment is an invented aspect of "sovereignty" that the U.S. government itself does not even possess.[53] In this Part, we provide positive proof for this assertion.

A. Post-Contact and Pre-Constitutional Development (1492–1789)

Generally, "Native Americans relied on the concept of kinship for purposes of identity."[54] As noted by Professor Raymond J. DeMallie:

> Membership in bands was by choice; by residing in a particular band, individuals could decide to count themselves as members of it. Children were considered to belong to the band of the father or mother, but residence, rather than descent, seems to have been the operative category. Each band was governed by a council of adult males who had achieved prominence in warfare . . . . [W]hen various bands congregated during the summer, their councils combined into one and recognized a variety of tribal leaders which in a sense acted as the symbolic fathers of the camp, putting aside individual and band interests for those of the tribe at large.[55]

Professor Raymond D. Fogelson, has also noted:

> Kinship not only included those with whom one could trace familiar common descent, but could be extended to include more ramifying groups like clans, moieties, and even nations. Moreover, besides biological reproduction, individuals and groups could be recruited into kinship networks through naturalization, adoption, marriage, and alliance. Identity encompassed inner qualities that were made manifest through social action and cultural belief.[56]

Similar to the citizenship rules implemented by the United States and most other countries today,[57] the right of belonging or kinship has historically been permanent

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52. Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1827 (1990).

53. Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (holding that under the Fourteenth Amendment, government had no power to rob a citizen of his citizenship as "the Fourteenth Amendment was designed to . . . protect every citizen against congressional forcible destruction of his citizenship, whatever his creed, color, or race.").

54. Laughlin, *supra* note 25, at 101.

55. Raymond J. DeMallie, *Kinship: The Foundation for Native American Society*, *in* STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS 331 (Russell Thornton ed., 1998).

56. Raymond D. Fogelson, *Perspectives on Native American Identity*, *in* STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS, *supra* note 55, at 44–45.

57. Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Isarel*, 13 NEW CRIM. L. REV. 404 (2010).

and could not be lost involuntarily.[58] Quite simply, in traditional American indigenous society the casting out of one's own relatives did not occur.[59]

The exception to this rule was "banishment," a punitive sentence under which an indigenous person was sent out of his or her community, and forced to live away from the community for a prescribed period of time.[60] In most American indigenous societies, individuals were held accountable for their transgressions by being forced to restore stability and harmony within the family and tribal community by compensation and seeking forgiveness.[61] An individual's delinquent behavior was thus of concern to both his or her own family, as well as the local community.[62] An individual's kin would impose an initial reprimand; the community could impose further sanctions, and might also admonish the kin if the original discipline was not appropriate.[63] Banishment of the individual was only considered as a last resort, if familial and community penal efforts failed,[64] and reserved for serious crimes, such as murder or incest.[65] In order to effect banishment as a punishment, a consensus of the community was generally required; such consensus was most often established through the presentation of oral testimony about an individual's character and wrongdoing to a tribal governing body, if not the entire community.[66] Yet given

58. *E.g.*, *Afroyim*, 387 U.S. at 253; Vance v. Terrazas, 444 U.S. 252, 260 (1980); *see also* Perez v. Brownell, 356 U.S. 44, 78 (1958) (Warren, C.J., dissenting), *overruled by*, *Afroyim*, 387 U.S. at 268 ("[T]his priceless right [U.S. citizenship] is immune from the exercise of governmental powers."); Berger & Fisher, *supra* note 30, at 66 ("Membership cannot be a political decision. Tribal communities must be able to rely on decisions made by past tribal councils. Without consistency in the law, there can be only chaos and . . . injustice."); Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power Over Membership*, 92 VA. L. REV. 793, 841 (2006) ("Membership is a minimum set of rights, but it cannot be the null set. Where everything an individual gains from an association can be instantly and summarily withdrawn, the community is a failure, and a drag both on the resources of the membership and on those who bear the externalities imposed by a defunct polity."); *see also* Seelau, *supra* note 29 ("[D]isenrollment should have extremely high procedural safeguards and strong systems of governance to uphold those protections . . . . One source of inspiration for such protections might be the United States, where the safeguards are nearly absolute and in favor of an individual citizen's right to remain a citizen.").

59. Wozniacka, *supra* note 7 (quoting Professor Wilkins).

60. Clare E. Lyon, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 AVE MARIA L. REV. 211, 221–22 (2006).

61. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 92 (2007).

62. *Id.*

63. *Id.*

64. *Id.* at 93.

65. Colin Miller, *Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards*, 80 N.D. L. REV. 253, 255 (2004). The formal procedure for coming to this decision varied from tribe to tribe.

66. *Id.*

indigenous notions of belonging, even a banished person was typically allowed to return to the community conditionally after serving his or her time away.[67]

As opposed to belonging- or kinship-based notions of citizenship, the European colonizers of today's United States generally defined the status of American Indian persons by bloodline.[68] Degrees or percentages of "Indian blood" became the definitional standard for American Indians.[69] Such was articulated in terms of "the number of generations from an unmixed Indian ancestor," especially because that is how the early colonies limited American Indians' rights; for example, "unmixed" American Indians were ineligible to testify in court proceedings or marry Euro-Americans.[70] It was also held that those of mixed descent might serve as a "'civilizing' force."[71] "Mixed bloods" were thus defined in a category of their own, because it was thought that they would more rapidly assimilate into what would become American society.[72]

Notions of indigenous persons' "mixed blood" eventually became matters of their "blood quantum,"[73] all by the colonial advent[74] of a policy to further divide and negate American Indians.[75] Under such a policy, American Indians were deemed biologically inferior and required segregation (or sometimes

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67. THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION 28–29 (Bruce Elliott Johansen ed., 1998); *see also* Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 538 ("Banishment functions as rehabilitation for the offender who . . . is required to remain apart from society for a prescribed period of time and must build great self sufficiency in order to survive.").

68. ROBERT A. WILLIAMS JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 226–27 (1990).

69. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 4–5 (2006). One of the earliest examples is a 1705 Virginia statute defining a "mulatto" as "the child of an Indian and child, grandchild or great grandchild of a negro" and barring such a person from holding public office. *Id.*

70. *Id.*

71. *Id.*

72. John Rockwell Snowden et. al., *American Indian Sovereignty and Naturalization: It's A Race Thing*, 80 NEB. L. REV. 171, 193 (2001).

73. The term "blood quantum" is defined as "the relative amount of ancestry one can trace back to one specific tribe." Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 669 n.123 (2013). As Sarah Krakoff has noted, while the term has become naturalized in recent years, it is necessarily a racialized term. Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1132 n.77 (2012) (citing ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 3 (2006)).

74. Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L. J. 323, 323–24 (2014).

75. Cornel Pewewardy, *To Be or Not to Be Indigenous: Identity, Race, and Representation in Education*, 4 INDIGENOUS NATIONS STUD. J. 69, 87 (2003).

extermination).[76] As discussed below, the perpetuation of blood-quantum notions has only served to extend this Eurocentric philosophy, by subjugating American Indian notions of belonging and kinship, and replacing those indigenous norms with racialized criteria that serve "federal objectives for Native government dissolution and land dispossession."[77] And despite efforts to purge these policies from modern federal policy, these underpinnings remain as a central tenet of federal Indian law—and in turn have become part and parcel of tribal law too.[78]

B. The Formative Years (1789–1871)

In fulfillment of Manifest Destiny, the colonial period was rife with land-hungry settlers and spectators.[79] As those persons encroached upon American Indians' aboriginal lands, violent skirmishes erupted between colonizers and settlers and American indigenous peoples.[80] After the revolutionary war, the new American nation was thought to be too weak to enforce its sovereignty over American Indians,[81] so it instead employed a system of peace negotiation and treaty making, under compulsory tenets of international law.[82] At this time the federal government took an active interest in defining who exactly was an "Indian,"[83] primarily to determine a tribe's "chief" for the sake of legitimizing the transfer of lands to colonizers and settlers by treaty.[84] It was under that circumstance that the federal government first began to regulate ethnicity and determine the criterion for tribal

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76. Margaret D. Jacobs, *The Eastmans and the Luhans: Interracial Marriage Between White Women and Native American Men, 1875–1935*, 23 FRONTIERS 29, 37 (2002).

77. BARKER, *supra* note 22, at 93–94.

78. If relied upon alone, tribes would be gone in several generations because of intermarriage issues, which was likely purposeful. *See generally* Duane Champange, *Are Ethnic Indians a Threat to Indigenous Rights?*, INDIAN COUNTRY TODAY (Dec. 27, 2014), http://indiancountrytodaymedianetwork.com/2014/12/27/are-ethnic-indians-threat-indigenous-rights-158308.

79. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997).

80. *See generally* PETER SILVER, OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA (2008).

81. Charles Radlauer, *The League of the Iroquois: From Constitution to Sovereignty*, 13 ST. THOMAS L. REV. 341, 359 (2000).

82. *See* Scott Richard Lyons, *Rhetorical Sovereignty*, 51 C. COMPOSITION & COMM., 447, 451 (2000) ("European states were compelled to recognize and engage Indian nations as political actors in their diplomatic activities. They did this in a large part through making treaties . . . ." (citation and internal quotation omitted)).

83. George P. Castle, *The Commodification of Indian Identity*, 98 AM. ANTHROPOLOGIST 743, 744 (1996).

84. *Id.* While some treaties were entered into fraudulently, with groups whose authority to act on behalf of the relevant tribe was highly questionable, others were entered into for the purpose of ceasing hostilities between several warring tribes and other western states and otherwise providing protection. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 170–80 (1994).

enrollment[85]—a right it would actively exercise until the turn of the twenty-first century, and not shirk until circa 2009, as discussed below.

The federal government, however, was not especially concerned about the accuracy of any tribal-membership edict because it was then thought that Indian identity would soon disappear. As such, there was little point in keeping accurate track of tribal members.[86] In fact, the notion of determining who was and was not an Indian—as opposed to who was a tribal chief with treatymaking authority—was so relatively unimportant in settlement of land transfers, that it was relegated to that of nascent state law, rather than federal law.[87]

By 1828, the year that Andrew Jackson became a presidential candidate, the topic of transferring Indian land to non-Indians had become a national hot topic.[88] Jackson's favor for Indian removal was well known.[89] Thus, one of Jackson's top priorities after his election was to legislate a federal priority of Indian removal and land exchange.[90] In 1830, Congress passed the Removal Act[91] to relocate all Indians to west of the Mississippi River.[92]

During the ensuing Indian removal period, wherein American Indians were removed onto "reservations," the federal government began using Indian bloodlines as the "principal tool of genocidal extermination."[93] Federal officials began to identify individual Indians by blood in specific amounts, such as "'one-fourth Indian,' three-fourths 'white,' 'full-blooded,' or by the general term 'half-breed.'"[94] In turn, as the U.S. government consummated cession treaties with American Indians, federal treaty negotiators imported notions of Indian blood quantum in

85. Castle, *supra* note 83.

86. *Id.*

87. In Ohio, for instance, the question of who was an Indian was determined at state law by "preponderance of blood." *See* Doe *ex dem.* Lafontaine v. Avaline, 8 Ind. 6, 14 (1856) ("Persons of Indian . . . extraction, who have a preponderance of white blood, are declared to be 'free white citizens,' within the meaning of the constitution and laws of Ohio." (internal citations omitted)). In Tennessee and Indiana, status was determined by "habits and *quo animo* of the party," i.e., whether one personally identified as an Indian and was regarded as one, regardless of his or her race or blood. *Id.* (citing Tuten's Lessee v. Martin, 11 Tenn. 452, 452 (1832)).

88. GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 21 (1972).

89. *Id.*; PRUCHA, *supra* note 84, at 446–85.

90. FOREMAN, *supra* note 88, at 21–22.

91. Act of May 28, 1830, ch. 148, 4 Stat. 411–12 (1830).

92. *See generally* Alfred A. Cave, *Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830*, 65 HISTORIAN 1330 (2003).

93. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 715 (1986). At the time, it was thought that Indian "half-breeds"—with heightened cognitive ability bestowed by their Caucasian blood—were causing trouble by encouraging resistance to removal and needed to be identified and weeded out from those full-bloods who cold be easier controlled. Spruhan, *supra* note 69, at 9–11.

94. *Id.* at 10.

those accords.[95] Treaty references to Indian blood or blood quantum did not typically go so far as to define tribal membership—at that time, "membership" still remained wholly incompatible with American Indian notions of belonging and kinship.[96] These references did, however, "set an important pattern for later federal uses of blood quantum."[97]

Treaty making persisted as the principal method of dealing with tribal governments until 1871, when Congress terminated the process,[98] instead granting the authority to govern Indian affairs to itself, via legislation.[99] Still, the seeds of blood quantum-based tribal membership requirements had been planted, through the sowing of Indian treaties—the supreme law of the land.[100]

C. Allotment and Assimilation (1871–1928)

Following the Civil War, theories of "civilizing" Indians gained prominence.[101] Proponents of this policy maintained that if Indians "adopted the habits of a civilized life," they would not need large swaths of land, which would make land available to white settlers.[102] In addition, the lands to which American Indians had been removed also became objects of non-Indian avarice, as valuable minerals had been discovered in several of these territories.[103] To advance Indian assimilation and civilization,[104] Congress passed the General Allotment Act

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95. *Id.* at 11.

96. *Id.* at 11 n.74.

97. *Id.* at 11; *but see id.* at 12 ("The United States does acknowledge mixed-bloods explicitly as tribal members in a few treaties. Treaties with the Chippewa, Omaha, Pawnee, Ponca, and Winnebago each contain provisions recognizing mixed-bloods as tribal members." (citations omitted)).

98. Act of Mar. 3, 1871, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1988))*:* Note, *Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 72 (1992).

99. United States v. Kagama, 118 U.S. 375, 382 (1886); *see also, e.g.*, The Cherokee Tobacco, 78 U.S. 616, 618 (1870) (holding that a "treaty may supersede a prior act of Congress and an act of Congress may supersede a treaty"); *Ex Parte* Crow Dog, 109 U.S. 556 (1883).

100. U.S. CONST. art. VI.

101. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENVTL. L. REV. 1, 10 (2012).

102. *Id.* In 1868, the U.S. Commissioner of Indian Affairs thus posed the following question: "How can the Indian problem be solved so as best to protect and secure the rights of the Indians, and at the same time promote the highest interests of both races?" ROLAND W. FORCE & MARYANNE T. FORCE, THE AMERICAN INDIANS 123 (1991) (internal quotation omitted). The answer required "a radical reversal of thinking . . . : if you [could] no longer push Indians westward to avoid contact with civilization, and it [was] inhumane to conduct wars of extermination against them, the only alternative [was] to assimilate them." VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 8 (1983).

103. Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609, 614 (2011).

104. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 9 (1995) (describing the policies of the allotment and assimilation era).

("GAA")[105] in 1887. Termed "the most important period in the evolution of tribal enrollment,"[106] the GAA divided large reservation-land tracts into much smaller parcels of land, and deeded those parcels to Indian individuals in trust for a period of 25 years.[107] The purpose of the GAA was to convert individual Indians into farmers.[108] Indians who resisted or refused to accept allotments were imprisoned.[109]

More generally, supporters of the GAA hoped it would cause mass tribal assimilation into the newly dominant non-Indian society.[110] In 1896, Congress created enrollment commissions to compile rolls that codified each tribe's citizenry.[111] Legislation instructed the commissions to: (1) determine the membership status "of all persons who may apply . . . for citizenship" in any of the allotted tribal lands[112] in respect to "blood quantum";[113] (2) "respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and . . . give due force and effect to the rolls, usages, and customs of each of said nations or tribes"; and (3) administer oaths, issue process and compel witnesses, and to collect evidence "for the purpose of determining the rights of persons claiming [tribal] citizenship [and] to protect [tribal] nations from fraud or wrong."[114] Congress gave the commission only six months to issue a "complete roll of citizenship" for all known tribes; these rolls were then deemed complete and final for the purpose of determining who would receive a parcel.[115]

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105. 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331–381 (2012)).

106. Melissa L. Meyer, *American Indian Blood Quantum Requirements: Blood is Thicker than Family*, *in* OVER THE EDGE: REMAPPING THE AMERICAN WEST 232 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999).

107. 25 U.S.C. § 348 (2012). "Surplus" lands—those lands within the boundaries of a tribal reservation not yet allotted to individual Indians—were also "opened to non-Indian settlers," to further the goal of assimilation via Indian land dispossession. Stella Saunders, *Tax Law-Tribal Taxation and Allotted Lands:* Mustang Production Company v. Harrison, 27 N.M. L. REV. 455, 460 (1997).

108. *See* Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 1–2 (1997) ("The [GAA] had as its philosophical mandate[] the creation of the Indian farmer.").

109. Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 394 (1998).

110. The Bureau of Indian Affairs assumed the function of improving Indians' "educational interests and sanitary condition" under its "Civilization Division." WEBSTER ELMES, THE EXECUTIVE DEPARTMENTS OF THE UNITED STATES AT WASHINGTON 450–52 (1879).

111. Act of June 10, 1896, ch. 398, 29 Stat. 321 (1896).

112. *Id.* at 339.

113. *See* Rose Cuison Villazor, *Reading Between the (Blood) Lines*, 83 S. CAL. L. REV. 473, 480 (2010) ("Individual allotment depended on tribal membership, which in turn relied on an enrollment process that, from the beginning, aimed to distinguish those Indians with 'true' Indian blood ('Indian by blood') from those Indians with [other] ancestry . . . .").

114. Act of June 10, 1896, ch. 398, 29 Stat. 321, 339 (1896).

115. *Id.* at 339–40. The statute did give aggrieved individuals who had been omitted from a final roll six months to appeal the omission to the local U.S. District Court. After the six-month statute of limitations ran, the rolls would be deemed final. *Id.* at 339.

Critically, the tribes themselves did not compile the rolls. Thus, the federal government's "official" tribal membership rolls were littered with mistakes (e.g., incorrect individuals' names and tribal affiliations, whole cloth exclusions of absent individuals, and visitor inclusion).[116] In addition, and as described in more detail below, many American Indians "resisted enrollment and hid[] from the enrollment parties because [they] did not believe that the tribal land base should be broken up."[117] The impact of these omissions intensified with each successive generation[118] because eventually the Bureau of Indian Affairs ("BIA") would generally require that persons of tribal ancestry trace their lineage to a GAA roll.[119] In 1899, the U.S. Supreme Court upheld Congress's authority to have the final say on tribal membership rolls.[120]

Blood quantum became a determinative factor for arbitrarily cancelling the trust status of Indian allotment lands. In 1906, Congress passed the Burke Act,[121] which in conjunction with the GAA, instituted a system for canceling individual Indians' trust allotments through the issuance of "fee patents"[122] to tribal members who had become "competent and capable of managing his or her affairs"[123] through "education and civilization."[124] Blood quantum served as the seminal factor in determining whether a patent should be issued,[125] even though the GAA rolls did not always list the blood quantum of the individual, "and if they did, did not necessarily do so accurately."[126]

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116. Angelique A. EagleWoman & Wambdi A. Wastewin, *Tribal Values of Taxation Within the Tribalist Economic Theory*, 18 KAN. J.L. & PUB. POL'Y, 1, 7 (2008).

117. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 457–58 (2002) (citing Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11, 15 (2000)).

118. *Id.*

119. Davis v. United States, 192 F.3d 951, 955 (10th Cir. 1999).

120. Stephens v. Creek Nation, 174 U.S. 445, 488 (1899).

121. 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349 (2012)).

122. A "fee patent" is a patent for an estate in fee simple; distinguished from a "trust patent," which refers to land held in trust by the United States for an Indian tribe or land owned by an Indian or Indian tribe and subject to restrictions against alienation. 25 U.S.C. § 1703(9)(A)–(B). Title 25 U.S.C. 349 provided that the U.S. government can issue a fee patent to an Indian whenever it "determines that the Indian allottee is competent and capable of managing his own affairs." Bacher v. Patencio, 232 F. Supp. 939, 942 (S.D. Cal. 1964), *aff'd*, 368 F.2d 1010 (9th Cir. 1966).

123. 25 U.S.C. § 349.

124. 25 U.S.C. § 348.

125. *See generally* John P. LaVelle, *The General Allotment Act "Eligibility Hoax": Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 WICAZO SA REV. 251 (1999).

126. Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIRCUIT 23, 29 (2013); *see also* Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 345 (2010).

In all, the U.S. government's allotment regime forced American Indians to part with 90 million acres of land over a 50-year period.[127] A large portion of the Indian population was landless, and many reservations were suddenly crowded with non-Indians.[128] Although federal allotment policy was later repudiated by Congress, the federal government's legacy of tribal land allotment and dispossession, and Indian assimilation, still lives on through disenrollment.[129]

The imposition of blood-quantum rules was also destructive to tribal survival in general. Whereas community belonging focused on having close ties and relationships, the idea of blood quantum, conversely, tied membership to the vaguest genealogical roots possible.[130] Just as blood quantum was used to divest land and resources from tribes and tribal members, the introduction of blood quantum encouraged tribal members to view membership as a restricted resource, like land, minerals, and money, rather than as a political status.[131] Blood quantum, in other words, encouraged venal exclusion instead of traditional inclusion.[132]

D. Indian Reorganization (1928–1942)

In 1934, Congress passed the Indian Reorganization Act ("IRA").[133] Although the goal of the IRA was "to encourage . . . self-determination, cultural pluralism, and the revival of tribalism," the federal government continued to actively frame tribal membership rules.[134] Based on federal notions of governance, rather than American indigenous norms,[135] the IRA mandated that only descendants of persons residing on a reservation in 1934 and persons "of one-half or more Indian Blood" were entitled to tribal membership.[136] The federal government's intent was to limit membership "to persons who reasonably can be expected to participate in tribal relations and affairs,"[137] which was assumed to be those persons of "ancestral or blood" relation to other members.[138]

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127. Auth. of the Sec'y of the Interior to Restore Lands in San Carlos Mineral Strip to Tribal Ownership, 69 INTERIOR DEC. 195, 198 (Nov. 28, 1962).

128. *Id.*

129. *See* BARKER, *supra* note 22, at 4 (2011) ("While originating in federal policy, blood degree criteria were folded into tribal governance and enrollment policies.").

130. Miller, *supra* note 74, at 341.

131. *Id.* at 346.

132. *Id.*

133. 25 U.S.C. § 476 (2012).

134. COHEN, *supra* note 20, at § 1.05.

135. *Id.*

136. 25 U.S.C. § 479.

137. Office of Indian Affairs, U.S. Dep't of the Interior, Circular No. 3123 (1935), *reprinted in* 2 Am. Indian Policy Review Comm'n, 94th Cong., Task Force No. 9 Final Report app. at 334 (Comm. Print 1977).

138. Clay R. Smith, *"Indian" Status: Let A Thousand Flowers Bloom*, 46 ADVOCATE 18, 19 (2003).

The IRA also urged tribes to adopt boilerplate constitutions defining what it meant to be "Indian" in terms of ancestry and blood quantum requirements.[139] Because tribal constitutions were subject to federal approval, those notions found their way into most tribal IRA constitutions.[140] Over time, even those tribes that opted to forego adopting an IRA constitution were often persuaded by the federal government to adopt this definition of "Indian" somewhere in their own law.[141] Thus, "while it is true that membership in an Indian tribe [wa]s for the tribe to decide, that principle is dependent on and subordinate to the more basic principle that membership in an Indian tribe is a bilateral, political relationship" under which the federal government had dictated the terms.[142]

In sum, although the IRA ostensibly took a different route—i.e., modeling a constitutional form of tribal governance rather than terminating tribal sovereignty and self-governance altogether[143]—the federal government's paternalistic control over tribal governance persisted, especially as to tribal membership. Nearly 80 years after the original imposition of IRA constitutions upon tribal governments, many tribes remain "colonial institutions"; many more are plagued with "dysfunctional Indian national self-governance,"[144] characterized by "disruption and heightened intra-tribal disputes,"[145] most acutely due to tribal disenrollment.

E. Termination (1943–1961)

During the mid-twentieth century, the federal government's Indian policy began to shift from assimilation qua reorganization, to assimilation qua "termination." Through congressional termination policy, the federal government sought to eliminate the federal–tribal relationship altogether by terminating tribal governments' legal existence.[146] Various federal statutes eviscerated the relationship between certain tribal governments and the United States.[147] The abolishment of the federal–tribal relationship meant that tribal members suddenly became non-Indian, legally speaking, and thus immediately lost their ability to access federal services

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139. Notably, the Secretary urged tribes to adopt these regulations "based on the notion that it was paramount to their tribal welfare to weed out those Indians seeking membership who possessed a low blood quantum." Laughlin, *supra* note 25, at 116.

140. Painter-Thorne, *supra* note 126, at 341.

141. *Id.*

142. Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 307 (2001).

143. *See* COHEN, *supra* note 20, at § 1.05 (noting that under the IRA "[n]ative people were encouraged to organize or reorganize with tribal structures similar to modern business corporations").

144. Tink Tinker, *Redskin, Tanned Hide: A Book of Christian History Bound in the Flayed Skin of an American Indian*, 5 J. RACE, ETHNICITY, & RELIGION, Oct. 2014, at 11 n.12.

145. COHEN, *supra* note 20, at § 1.05.

146. ROBERT J. MILLER, NATIVE AMERICA DISCOVERED AND CONQUERED 171 (2006).

147. *See, e.g.*, Ponca Tribe of Nebraska: Termination of Federal Supervision, 25 U.S.C. §§ 971–80 (2012).

and programs for tribes and tribal members.[148] By legislative edict, a terminated tribe lost its sovereign status; tribal trust lands and assets were liquidated and the cash proceeds therefrom were paid to those individuals who were tribal members pre-termination.[149] Terminated tribal members became subject to the panoply of state laws and jurisdiction; again, they became non-Indian for legal purposes.[150]

Although the federal government quickly abandoned the termination policies,[151] the termination era serves as a constant reminder of Congress's plenary power to legislate the complete destruction of a tribe's sovereign status,[152] as well as "a strategy for forcing the disbanding of Native communities and, with them, Native identity and culture."[153] That strategy is merely dormant today but as discussed below, disenrollment threatens to enliven tribal termination, especially at the hands of Congress.

F. Self-Determination and Self-Governance (1961–Present)

In the 1960s and early 1970s, federal policy shifted from termination to self-determination. The shift began in earnest when President John F. Kennedy took office. During his campaign, President Kennedy ran on an anti-termination policy, promising that "[t]here would be no change in treaty or contractual relationships without the consent of the tribes concerned" and that "[n]o steps would be taken by the Federal Government to impair the cultural heritage of any group."[154] President Lyndon B. Johnson's Administration continued President Kennedy's anti-termination efforts,[155] and more profoundly, espoused a new federal Indian policy

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148. ROBERT T. COULTER, NATIVE LAND LAW § 8:2 (2014) (citation omitted); *see also* Marren Sanders, *De Recto, De Jure, or De Facto: Another Look at the History of U.S./Tribal Relations*, 43 SW. L. REV. 171, 184 (2013).

149. COULTER, *supra* note 148; *see, e.g.*, 25 U.S.C. § 973.

150. COULTER, *supra* note 148.

151. *See Remarks of Secretary of the Interior Fred A. Stanton*, 105 CONG. REC. 3105 (1959) ("It is absolutely unthinkable . . . that consideration would be given to forcing upon an Indian tribe a so-called termination plan which did not have the understanding and acceptance of a clear majority of the members of the affected tribe.").

152. *See* MARK N. TRAHANT, THE LAST GREAT BATTLE OF THE INDIAN WARS 12 (2010) ("[E]ven the word 'terminate' carries with it allusions of war, death, and destruction. The policy implemented the horrible idea that . . . culture had to be killed to save the person.").

153. HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF NATIVE NATIONS 18 (2008).

154. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1087 (1984) (quoting John F. Kennedy). The Administration largely stuck to its word. *Id.* at 1087–1110. In 1961, Kennedy's Department of the Interior's Task Force on Indian Affairs stated, "[t]he proper role of the Federal Government is to help Indians find their way along a new trail-one which leads to . . . maximum self-sufficiency . . . ." S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 189, 195 (1974) (quoting REPORT TO THE SECRETARY OF THE INTERIOR BY THE TASK FORCE ON INDIAN AFFAIRS, July 10, 1961, at 77).

155. *See* Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1191 n.51 (1983) ("The Johnson administration made no effort to increase the scope of termination.").

of "self-determination." In a Special Message to Congress in 1968, President Johnson stated: "I propose, in short, a policy of maximum choice for the American Indian . . . a policy expressed in programs of self-help, self-development, self-determination."[156] In 1970, President Nixon took self-determination to the next level, when he proclaimed the following to Congress in his own Special Message:

> Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . . Th[e] policy of forced termination is wrong . . . . Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.[157]

President Nixon's Special Message was chiefly effectuated by the passage of the Indian Self-Determination Education Assistance Act of 1975 ("ISDEAA").[158] But as alluded above, in order for tribes to receive certain federal benefits that allowed them to take over federal Indian programs,[159] ISDEAA required that tribal governments, subject to federal approval, devise formal membership and disenrollment regulations.[160] As such, IRA constitutional definitions of "Indian" vis-à-vis blood quantum, were imposed upon virtually every tribe in the land.

In 1978, the U.S. Supreme Court for the first time acknowledged Congress's tribal self-determination policy in the landmark *Santa Clara Pueblo v. Martinez*[161] decision. The plaintiff, Julia Martinez, was a female member of the Santa Clara Pueblo who was married to a nonmember Navajo Indian.[162] Ms. Martinez filed suit because her children were denied tribal membership pursuant to a 1939 Santa Clara Ordinance that prohibited children of women who married outside of the Tribe from becoming members.[163] Because the Ordinance did not impose the same prohibitions on the children of male Pueblo members, Martinez alleged that the Tribe had violated her right to equal protection, as guaranteed by the

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156. Special Message to the Congress on the Problems of the American Indians: The Forgotten American, 113 PUB. PAPERS 335, 336 (Mar. 6, 1968).

157. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564, 565 (July 8, 1970).

158. United Nuclear Corp. v. United States, 912 F.2d 1432, 1442 (Fed. Cir. 1990). On the efforts of getting the ISDEAA passed, see generally TRAHANT, *supra* note 152, at 66–71.

159. 25 U.S.C. § 450 (2012).

160. U.S. SEC'Y OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, SAMPLE CONSTITUTION OF THE EXAMPLE TRIBE, http://www.bia.gov/cs/groups/public/documents/text/idc-001884.pdf; *see also, e.g.*, Nooksack Tribal Code § 65.

161. 436 U.S. 49, 62–64 (1978).

162. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 7 (D.N.M. 1975), *rev'd* Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1042 (10th Cir. 1976) (citing Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975)), *rev'd*, 436 U.S. 49 (1978).

163. *Id.*

Indian Civil Rights Act of 1968 ("ICRA").[164] Relying on *Martinez v. Southern Ute Tribe of Southern Ute Reservation*,[165] the Pueblo argued "federal courts lack jurisdiction over intertribal controversies, particularly those involving membership disputes."[166]

The U.S. District Court for the District of New Mexico disagreed with the Pueblo. According to the court, while it may have been true that under *Martinez* intratribal controversies, among them membership disputes, did not "arise under" the Constitution, laws, or treaties of the United States, *Martinez* was decided before the enactment of the ICRA.[167] Under the ICRA, the court held, allegations that a membership ordinance is being applied in a discriminatory manner not only create a federal question, but also abrogate tribal sovereign immunity.[168] The U.S. Court of Appeals for the Tenth Circuit agreed.[169] Looking to the merits—by weighing the individual right to fair treatment under the law against the tribal interest in traditional Indian culture[170]—the court found that because "the ordinance was the product of economics and pragmatics" and not "Santa Clara tradition," Martinez's individual right necessarily outweighed that of the Pueblo.[171]

In its petition to the U.S. Supreme Court, the Pueblo again asserted that the ICRA did not authorize federal courts to review violations of its provisions except as they might arise on habeas corpus and, further, that the ICRA did not waive the tribe's sovereign immunity from suit.[172] The Court agreed, and disposed of the case *procedurally*:

> [E]fforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity . . . . A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters. . . . As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly

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164. *Id.* (citing 25 U.S.C. § 1302(a)(8) (2012)) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .").

165. 249 F.2d 915 (10th Cir. 1957).

166. *Santa Clara Pueblo*, 402 F. Supp. at 7.

167. *Id.*

168. *Id.*

169. Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1042 (10th Cir. 1976) (citing Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975)), *rev'd*, 436 U.S. 49 (1978).

170. *Id.* at 1045.

171. *Id.* at 1047.

172. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

> restrained. Congress retains authority expressly to authorize civil actions for injunctive or other relief . . . [b]ut unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.[173]

While *Santa Clara Pueblo* has been hailed as one of the "major wins for tribal interests [in] the modern era favoring Indian tribes,"[174] it is important to understand exactly why. First, under *Santa Clara Pueblo*, a valid act of Congress may impose rigorous duties on tribal governments, but it does not necessarily create a cause of action for an infringement or violation of those duties.[175] Second, congressional waivers of a tribe's immunity from suit to redress (e.g., civil or human rights violations) must be express, and cannot be implied.[176]

Santa Clara Pueblo did not and does not stand for the proposition that tribal membership is "a matter within the exclusive province of the tribes themselves"—a matter that the federal government absolutely lacks the authority to intervene in.[177] *Santa Clara Pueblo did not and does not* hold that the BIA has no "authority to intervene in internal tribal matters so to protect tribal autonomy and self government activities." [178] *Santa Clara Pueblo* is not "[t]he foundational case on tribal membership"[179]—its relatively narrow holding had absolutely nothing to do with enrollment or disenrollment; it was purely jurisdictional. Indeed, in 1988—ten years after *Santa Clara Pueblo*—the Department of the Interior ("DOI") continued to acknowledge that, while tribes do possess the authority to set tribal membership standards, their authority has always been subservient to the Secretary of the Interior:

> [W]hile it is true that membership in an Indian tribe is for the tribe to decide, that principle is dependent on and subordinate to the [DOI].

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173. *Santa Clara Pueblo*, 436 U.S. at 65, 65 n.32, 71 (citation omitted); *see also* DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 515 (8th Cir. 1989) ("In *Santa Clara* . . . , the Supreme Court held that federal court enforcement of the ICRA is limited to habeas corpus jurisdiction on behalf of persons in tribal custody [and that] the ICRA cannot be directly enforced against Indian tribes because they are shielded from suit by sovereign immunity."); Shefali Milczarek-Desai, *(Re)locating Other/Third World Women: An Alternative Approach to* Santa Clara Pueblo v. Martinez*'s Construction of Gender, Culture and Identity*, 13 UCLA WOMEN'S L.J. 235, 267 (2005) ("[T]he Supreme Court avoided the binary discourse altogether by holding that federal courts lacked jurisdiction to hear the case in the first place.").

174. Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 614, 616 (2008).

175. *Id.* at 617.

176. *Id.*

177. Cahto Tribe of the Laytonville Rancheria v. Pac. Reg'l Dir., 38 IBIA 244, 249, 2002 WL 32345916, at *4 (2002) (citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32).

178. Weimas & Dukic v. Sacramento Area Director, 24 IBIA 264, 267, 1993 WL 530308, at *3 (1993) (citing *Santa Clara Pueblo*, 436 U.S. at 49).

179. Lewis III, *supra* note 5, at 9.

> A tribe does not have authority under the guise of determining its own membership to include as members persons who are not maintaining some meaningful sort of political relationship with the tribal government. The DOI has concluded that it has broad and possibly nonreviewable authority to disapprove or withhold approval . . . regarding membership . . . .[180]

As "a delegated authority," any tribal authority to disenroll tribal members "must necessarily be subservient to the [agency] by which the delegation was made"—here, the BIA.[181] In fact, the Bureau of Indian Affairs Manual contains an entire section on how the BIA must go about approving or disapproving disenrollment decisions.[182] But as discussed below, the BIA now conveniently ignores federal law and even its own policies, to turn a blind eye to matters of tribal disenrollment.

G. Indian Gaming & Self-Termination (1988–Present)

Through the late twenty-first century, a new era of self-determination took hold, which Professor Charles F. Wilkinson describes as a "forced transition to a cash economy."[183] This "cash economy" began in earnest in 1988, when Congress passed the Indian Gaming Regulatory Act ("IGRA").[184] The purpose of the IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[185] In so doing, the IGRA set limits, for example, on: the type of

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180. Memorandum from Scott Keep, Ass't Solicitor, U.S. Dep't of the Interior, to the Chief of the Division of Tribal Government Services 6 (Mar. 2, 1988) [hereinafter Keep Memo]. The Keep Memo was cited as persuasive authority for the position that the BIA possesses the authority to regulate tribal membership in *Masayesva ex rel Hopi Indian Tribe v. Zah*, 792 F. Supp. 1178, 1181 (D. Ariz. 1992); *see also* KIRSTY GOVER, TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP 126 (2010) (citing the Keep Memo for the proposition that the federal executive may determine for itself whether or not to maintain a political relationship with certain individuals).

181. State v. Overton, 16 Nev. 136, 137 (1881).

182. U.S. Dep't of the Interior - Indian Affairs, *Historic Bureau of Indian Affairs Manual (BIAM)*, http://www.bia.gov/WhatWeDo/Knowledge/Directives/BIAM/ (last visited Dec. 17, 2014). "The Bureau of Indian Affairs Manual is an internal agency manual, largely codified in 25 C.F.R. pt. 38 pursuant to 25 U.S.C. § 2012, which gives guidance and lists procedures for the BIA . . . ." Flying Horse v. United States, 49 Fed. Cl. 419, 421 (Fed. Cl. 2001). As discussed in more detail *infra* note 549, BIA compliance with the Indian Affairs Manual is mandatory under the Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

183. CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 54 (2005).

184. 25 U.S.C. §§ 2701–21 (2012). It is important to note here that not all tribes are involved in gaming, and not all gaming enterprises are successful. Less than half of federally recognized tribes are involved in casino-style gaming. W. Gregory Guedel, *Sovereignty, Economic Development, and Human Security in Native American Nations*, 3 AM. INDIAN L.J. 17, 33 (2014). "Due to geographic and economic factors, particularly travel distances from reservations to major population centers, gaming is not a viable economic activity for many Native American nations." *Id.*

185. 25 U.S.C. § 2702(1) (2012).

gaming that tribal governments might provide; where Indian gaming may occur; and what gaming revenues might be used for. As to the latter, the IGRA mandates that revenues from Indian gaming be used only for: (1) funding tribal government services; (2) providing for the tribe's general welfare; (3) promoting economic and community development; (4) donating to charitable organizations; and (5) aiding local governments.[186] A tribe may request that it be allowed to make per-capita payments to tribal members after those enumerated expenditures have been accounted for.[187] Specifically, the IGRA "requires that a distribution plan be approved by the Secretary of the Interior before the Tribe can make per-capita payments to any members."[188]

While only one-fourth of gaming tribes have elected to distribute per-capita payments, many of those tribes have experienced heated internal dissent regarding "who qualifies for membership and thus is eligible for payments."[189] This has played the largest part in the current disenrollment crisis.[190] In some tribes, membership is the difference between rags and riches.[191] As of 2013, Indian gaming generated $28 billion in gross gaming revenues annually.[192] Indian casinos in California alone generated approximately $7 billion in gaming revenue in 2012, even amidst the Great Recession.[193] For example, the Table Mountain Rancheria recently brought in

186. *Id.* § 2710(b)(2)(B).

187. *Id.* § 2710(b)(3). While it was originally thought that per-capita payments fell within the IGRA's allowance of funding for "promoting . . . economic development," a recent study found that the opposite is true. According to W. Gregory Guedel, there is actually "an inverse correlation between per capita payments and poverty reduction." Guedel, *supra* note 184.

188. Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738, 746 (D.S.D. 1992).

189. Ted Jojola & Paul Ong, *Indian Gaming as Community Economic Development*, *in* JOBS AND ECONOMIC DEVELOPMENT IN MINORITY COMMUNITIES 213, 219 (Paul M. Ong & Anastasia Loukaitou-Sideris eds., 2006); *see also* Painter-Thorne, *supra* note 126, at 317 ("[P]er capita payments . . . , many critics allege, . . . are the root of tribal enrollment disputes.").

190. Berger & Fisher, *supra* note 30, at 70.

191. *See, e.g.*, Lynnette Curtis, *Cast out of Paiute Tribe, Disenrolled Confront Struggles*, LAS VEGAS REV.-J. (Apr. 22, 2012), http://www.reviewjournal.com/news/las-vegas/cast-out-paiute-tribe-disenrolled-confront-struggles (noting that many disenrolled from the Las Vegas Paiute Tribe "faced financial ruin, went bankrupt and lost their homes," and highlighting one disenrolled member was "sleeping with her meager belongings in front of an upholstery shop in the homeless corridor").

192. Press Release, Department of the Interior: National Indian Gaming Commission, 2013 Indian Gaming Revenues Increased 0.5% (July 21, 2014), *available at* http://www.nigc.gov/Media/Press_Releases/2014_Press_ Releases/PR-226_07-2014.aspx; *Casino City Releases 2015 Indian Gaming Industry Report: Indian Gaming Holds its Own Amidst a Slowdown of the Economy*, GAMINGSUPPLIES.COM (Mar. 30, 2015), http://www.igamingsuppliers.com/article/casino-city-releases-2015-indian-gaming-industry-report-indian-gaming-holds-its-own-amidst-a-slowdown-of-the-economy-212422/

193. Howard Stutz, *Indian Casinos Set New Revenue Record, Topping $28.13 Billion*, LAS VEGAS REV.-J. (Mar. 26, 2014), http://www.reviewjournal.com/business/indian-casinos-set-new-revenue-record-topping-2813-billion. Data suggests, however, that Indian

over $100 million,[194] roughly $380,000 of which was paid out in per-capita payments to its 60 members.[195] For small tribes like Table Mountain, the addition or subtraction of a single member can literally mean thousands of dollars added or subtracted from the remaining members' monthly per-capita checks—another's membership can literally be reduced to cash in hand.[196]

Prior to the imposition of federal policy, tribal governments were very inclusive.[197] But as tribes became more dependent on the free-market economic system, tribal mass disenrollment became a viable option to protect per-capita payments, thereby reinvigorating the federal government's assimilation and termination policies.[198] Indeed, due to Indian gaming qua "self-determination," commercialism, individualism, and greed have supplanted tribalism in many tribal communities.[199]

Ironically, disenrollment is antithetical to tribal self-determination and self-sufficiency via economic development.[200] In most instances, tribal disenrollment serves only to harm a tribe's bottom line by creating negative media and investor perceptions that indicate greed and corruption.[201] Potential business partners may also conclude that working with a tribal government engaged in deserting its own citizens is not worth the risk to investment.[202]

Despite its current hands-off approach to so-called internal matters, at times the federal government has been actively involved tribal disenrollment disputes in the past. In *Holloman v. Watt*, the plaintiffs sued the federal government for loss of

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gaming revenue may have reached "peak level with limited future growth potential." Guedel, *supra* note 184, at 26.

194. Jerry Bier, *Indians' Lawsuit Targets Rancheria*, FRESNO BEE, Jan. 30, 2005, at B1.

195. Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44, 47; Peter Osterlund, *You Bet Your Lifestyle*, L.A. MAG., Dec. 2000, at 118, 124.

196. *See* Painter-Thorne, *supra* note 126, at 319 ("Each additional member decreases the current members' revenue distributions . . . .").

197. *See supra* notes 54–56.

198. *See* Dao, *supra* note 30 ("For centuries, American Indian tribes have banished people as punishment for serious offenses. But only in recent years, experts say, have they begun routinely disenrolling Indians deemed inauthentic members of a group."). As described by Professor Wilkinson, "[t]he concept of sharing, integral to Indian societies, did not jibe well with the individualistic, materialistic attitude that drove the nation's economic system." WILKINSON, *supra* note 183.

199. *See* Painter-Thorne, *supra* note 126, at 313 ("To the extent these conflicts are about greed, it is surely implicated on both sides. Disputes over membership involve both claims by individuals seeking access to a portion of the gaming revenue pie, as well as efforts to exclude members to ensure the pie is not divided up quite as much and each member's share thereby reduced.").

200. Jared Miller, *Disenrollment is Bad for the Bottom Line*, INDIAN COUNTRY TODAY (Sept. 28, 2013), http://indiancountrytodaymedianetwork.com/2013/09/28/disenrollment-bad-bottom-line.

201. *Id.*

202. *Id.*

tribal privileges after they were disenrolled from the Colville Indian Tribe.[203] Decades after the plaintiffs were enrolled as members, the BIA learned that there was "a discrepancy in the blood degree" listed on the 1937 Colville tribal roll, and informed the Colville Tribal Council that those members were not in fact entitled to enrollment.[204] The Colville Tribe took no action, but the BIA urged the Tribal Council to disenroll them.[205] The Tribe eventually capitulated to BIA pressure and disenrolled them.[206] Years later, though, "the BIA discovered and corrected another error on the 1937 Tribal roll, [which] resulted in a determination that [the members] were eligible for tribal membership" after all.[207] The Tribal Council then re-enrolled the members, but only at the BIA's demand.[208]

The BIA remained involved in disenrollment disputes through the 1990s. For example, in *Allery v. Swimmer*,[209] the plaintiffs brought a class action suit against the U.S. Assistant Secretary of Indian Affairs in response to the BIA's attempt to recalculate blood quantum on the Turtle Mountain Band of Chippewa's roll.[210] If the BIA were allowed to have done so, the agency would have administratively disenrolled 752 members from the Band without its action or consent.[211] The plaintiffs filed the suit to prevent the proposed mass disenrollment, asserting that the BIA does not have the authority to determine tribal membership, or to reduce the blood quantum of those members listed on a 1943 Band roll.[212] The U.S. District Court for the Northern District of New York ruled in favor of the BIA, holding that "blood quantum figures may be corrected, even though the effect may be to disenroll some members and enroll others."[213] In other words, the *Allery* court affirmed the BIA's authority to involve itself in tribal disenrollment matters.

While *Santa Clara Pueblo* states that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community,"[214] it was not until 2009 that federal authority to disenroll tribal members and tribal authority to set limits on membership

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203. 708 F.2d 1399 (9th Cir. 1983).

204. *Id.*

205. *Id.* at 1401–02. The BIA urged: "[A]ction should be taken by the [Tribal] Business Council to remove their names from the roll as they are not eligible [to be] members of the Tribe." *Id.*

206. *Id.* at 1401.

207. *Id.*

208. *Id.*

209. 779 F. Supp. 126 (D.N.D. 1991).

210. *Id.* at 127.

211. *Id.*

212. *Id.*

213. *Id.* at 131; *see also* Thompson v. County of Franklin, 180 F.R.D. 216 (N.D.N.Y. 1998) (determining that an enrolled member of the St. Regis Mohawk Tribe was no longer entitled to membership, with no input from the Tribe).

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

were considered in tandem.[215] In *Timbisha Shoshone Tribe v. Kennedy*,[216] multiple factions of the Timbisha Shoshone Tribe became embroiled in a bitter dispute over casino management and revenue. As explained by the U.S. District Court for the Eastern District of California:

> In an attempt to gain leadership and control over the tribe, funded by dueling Casino prospecting businesses, [the] factions have held separate elections and run parallel and competing tribal governments since 2006 . . . . Each faction claiming to be authorized representatives of the Tribe, bank accounts are opened in the Tribe's name only to be closed or frozen once the bank becomes aware of the governance dispute. Adding to the confusion, [one] faction, after re-examining enrollment records, disenrolled over 70 people from the Tribe, including Plaintiffs . . . . These actions have caused harm to the parties, the Tribe, non-party Tribe members, former Tribe members, government agencies and their agents, and businesses in the area surrounding tribal lands.[217]

As to standing, the court needed to determine whether one faction's disenrollment of the other was valid, because arguably, only tribal members would have standing to petition the court for the relief sought.[218] To this, the court ruled as follows:

> Internal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government . . . . Based on these principles, the BIA will not interfere in the disenrollment issue. [I]n response to Plaintiffs' dispute of the disenrollment, the BIA wrote: "The BIA adheres to a policy of Indian self-determination and self-government . . . . The BIA carries out a government-to-government relationship with the Timbisha Shoshone Tribe that includes the administration of trust and federally appropriated funds for which we are held accountable. It has long been the policy of the Department of the Interior and the BIA, in promoting self-determination, not become involved in the internal affairs of tribal governments . . . ." Similarly, without authority, this Court will not interfere in the internal affairs of the Tribe.[219]

With the stroke of that judge's pen, the court sanctioned the BIA's supposedly long-held—but in reality, new—policy of non-involvement in membership disputes. The BIA has never looked back.

In reality, the BIA is confused—as was the *Timbisha Shoshone* court—in the agency's belief that its *authority* to interfere in disenrollment determinations has somehow been swallowed by a self-imposed BIA "policy" not to interfere in

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215. While cases such as *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004), surely discuss "disenrollment," they do so in the context of whether the individual has alleged a federal cause of action under the ICRA, 25 U.S.C. § 1301, not whether the BIA possesses the authority to intervene in disenrollment determinations.

216. 687 F. Supp. 2d 1171 (E.D. Cal. 2009).

217. *Id.* at 1175.

218. *Id.* at 1183–84.

219. *Id.* at 1185 (citation omitted).

disenrollment determinations. Without any tribal consultation or administrative rulemaking,[220] the BIA has for the last half-decade only proclaimed that its hands are tied because of "tribal authority to set limits on membership"[221] and thus the agency cannot make decisions pursuant to tribal law.[222] But this assertion misses the point. The BIA *does* have the authority to involve itself in disenrollment determinations, through its power—indeed, mandate—to establish a trust relationship with those individuals recognized as tribal members.[223] Policy is not law; enrollment is not disenrollment.

Meanwhile, despite the federal government's favor toward self-determination, little has been done to extricate termination and assimilation policy remnants from tribal governing documents and federal law[224]—all of which is wielded to disenroll tribal members en masse. Having caused the disenrollment epidemic over the last 200 years, Congress and the BIA must now do *something* to help find a cure.

II. CASE STUDIES

The following disenrollment case studies from the last 100 years demonstrate how the various federal policies at work during that span girder disenrollment, which ultimately operate in ways that are antithetical to tribal sovereignty and self-determination. These examples also demonstrate how for nearly a century before modern Indian gaming, and certainly ever since, there has been a close correlation between federally prescribed distributions of tribal governmental assets and monies to tribal members on a pro-rata or per-capita basis, and tribal governmental mass disenrollment of tribal members.

A. Disenrollment and the Effect of the U.S. Government's Assimilation Policies

Here, we provide two examples of the negative effect that federal assimilation policies had on tribal members and their governments. Specifically, we

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220. Gabriel S. Galanda, *Disenrollment IS a Federal Action*, INDIAN COUNTY TODAY MEDIA NETWORK (Mar. 10, 2015), http://indiancountrytodaymedianetwork.com/2015/03/10/disenrollment-federal-action ("Interior takes the position that it 'does not get involved in individual tribal matters [of disenrollment] unless the agency's participation is included in the tribal constitution.' That position results from a decision made by a few BIA career folks not even 10 years ago [who] simply decided from behind closed doors that the agency should no longer get involved in disenrollment controversies.") (brackets in original).

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

222. Winnemucca Indian Colony v. United States *ex rel.* Dep't of the Interior, No. 11-0622, 2012 WL 4472144, at *2 (D. Nev. Sept. 25, 2012).

223. *Id.*; *see also* Potter v. Acting Deputy Assistant Sec'y-Indian Affairs, 10 IBIA 33, 39, 1982 WL 42970, at *4 (1982) (Muskrat, J., dissenting) ("[W]hen BIA has information in its possession indicating that an enrollment decision is incorrect, ambiguous, or is based on incorrect facts or a mistake of law, BIA is obligated by its trust responsibility to inform the tribe of the problem and to seek clarification or correction of the individual's enrollment status.").

224. Philip Sam Deloria, *Foreword to* Mark N. Trahant, THE LAST GREAT BATTLE OF THE INDIAN WARS, at vi (2010).

focus upon the federal government's "disenrollment" invention and the intentional destruction that it caused the Osage and Creek Nations.

1. Case Study: Osage Allotment

In 1825, the federal government removed the "Great and Little Osage Indians" to an area along the southeast Kansas border as part of its removal campaign.[225] In 1870, Congress again removed the Osage, this time to Indian Territory held in trust for the Cherokee Nation.[226] What was unique about this act was that it required that Osage lands in Kansas be sold, and that, subject to federal approval, the Osage select and purchase new lands from the Cherokee.[227] The sale of the Osage's Kansas lands yielded roughly $7 million, which enabled the Osage to purchase roughly 1.4 million acres of handpicked Cherokee land.[228] The Osage was the only American Indian tribe to purchase its own reservation.[229] It was later discovered that the land selected by the Osage sat atop of one of the largest deposits of oil in the United States.[230] Leasing this land equated to new money for the Osage, and lots of it.[231]

Determined to ensure that this newfound wealth would not benefit the Osage Nation, Congress passed the Osage Allotment Act (the "Osage Act") in 1906.[232] The Osage Act caused a remarkable and unprecedented divestiture of Osage's beneficial interest in nearly all tribal lands, accrued funds, and future revenues, and—in furtherance of federal assimilation policies—transferred the beneficial interest in substantially all of these assets to individual Osage Indians.[233] The Osage Act: (1) provided for the sale of buildings used by tribal government; (2) transferred essentially all remaining Osage lands to 2,229 Osage Indians whose names were on a roll maintained by the U.S. Indian Agent at the Osage Agency, as of January 1, 1906, and to their children born by July 1, 1907; and (3) reserved the entire interest in the former Osage tribal mineral estate for the exclusive benefit of

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225. U.S. DEP'T OF THE INTERIOR, OFFICE OF INSPECTOR GEN., BIA NEEDS SWEEPING CHANGES TO MANAGE THE OSAGE NATION'S ENERGY RESOURCES 45 (2014) [hereinafter OIG REPORT].

226. Act of July 15, 1870, ch. 296, 16 Stat. 335, 362.

227. Kan. or Kaw Tribe of Indians v. United States, 80 Ct. Cl. 264, 321 (1934).

228. OIG REPORT, *supra* note 225.

229. *Id.*

230. ALISON OWINGS, INDIAN VOICES: LISTENING TO NATIVE AMERICANS 28 (2011). Osage tradition says divine intervention caused the Osage to select these particular lands to remove to. Dena L. Silliman, *The Osage Tribe—Post-Fletcher: The Key to the Future is Knowledge of the Past*, 9 KAN. J. L. & PUB. POL'Y 795, 796 (2000).

231. As of 2014, the Osage mineral estate was worth an estimated $4 billion. OIG REPORT, *supra* note 225, at 22. It is estimated that drilling additional wells between 2012 and 2027 will generate $13.6 billion in headright payments. *Id.* The federal government has, however, has grossly mismanaged these funds, however. Although a discussion of Osage headright mismanagement is beyond the scope of this Article, we note that even after a $380 million settlement in 2011, the federal government currently has in place an "ineffective program for managing the Osage Nation's mineral estate." *Id.* at 1.

232. *See* Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906).

233. *Id.* at 540–41.

those 2,229 individuals—so-called "headright" owners[234]—leaving the Nation only a small allowance to manage the minerals.[235] The Osage Act was intended to, and did, transform Osage tribal property to the individual.[236]

As to the designation of Osage headright owners vis-à-vis federal rolls, in *Logan v. Andrus* the U.S. District Court for the Northern District of Oklahoma found that Congress was "exercis[ing] its plenary power to control membership in Indian tribes" by "defin[ing] for all purposes the members of the Osage Tribe of Indians [and] g[iving] to the Principal Chief the authority to file with the Secretary of the Interior a list of names which the tribe claimed were placed upon the roll by fraud."[237] *Logan* made explicit that the federal government possesses the "plenary power" to set membership criteria and to oversee disenrollment actions.[238]

By 1920, the Osage were considered to be "the wealthiest group of people on the planet."[239] In 1925, the annual income from an Osage headright was $13,200—or $177,817 in 2014, adjusted for inflation.[240] But the combination of exorbitant, new individual wealth, and an Osage tribal government removed from its homelands, soon proved disastrous, prompting scholars to since proclaim that the Osage Act was "the most destructive . . . regulatory scheme . . . ever devised by Indian policymakers."[241]

First, the infusion of significant income from oil headrights led to violence and conflict within the Nation.[242] As described by Professor Rennard Strickland, "[t]he Osage Act of 1906 broke with the traditional property ownership and transfer system of the Osage people. It created a wealth transfer scheme that tempted unscrupulous whites to intermarry for the purpose of accumulating headrights

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234. A headright is statutorily defined as "any right of any person to share in any royalties, rents, sales, or bonuses arising from the Osage mineral estate." Pub. L. No. 98-605, § 11(2), 98 Stat. 3163 (1984); *see also* Shelton's Estate v. Okla. Tax Comm'n, 544 P.2d 495, 497 (10th Cir. 1975) ("[H]eadrights are interests in unaccrued royalties arising from mineral interests.").

235. Osage Allotment Act, 34 Stat. at 540–41; *see also* Fletcher v. United States, No. 02-0427, 2012 WL 1109090, at *2 (N.D. Okla. Mar. 31, 2012) ("The royalties received from the mineral estate, less certain amounts retained for tribal purposes, is paid per capita on a quarterly basis to the 2,229 persons on the tribal roll, their heirs, devisees, and assigns.").

236. *See also* Rennard Strickland, *Osage Oil: Mineral Law, Murder, Mayhem, and Manipulation*, 10 NAT. RES. & ENV'T. 39, 40 (1995).

237. Logan v. Andrus, 457 F. Supp. 1318, 1326 (N.D. Okla. 1978); *but see* Alex Tallchief Skibine, *The Cautionary Tale of the Osage Indian Nation's Attempt to Survive it's Wealth*, 9 KAN. J.L. & PUB. POL'Y 815, 822 (2000) ("There is nothing in the 1906 Act specifically giving the Secretary the power to determine the future membership of the Tribe . . . . Placement on the rolls was contingent on meeting the traditional tribal standards for membership and was done with the advice and consent of the Tribe.").

238. *Logan*, 457 F. Supp. at 1326.

239. OWINGS, *supra* note 230.

240. C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty*, 23 OKLA. CITY U. L. REV. 175, 186 (1998).

241. Strickland, *supra* note 236, at 42.

242. DONALD L. FIXICO, TREATIES WITH AMERICAN INDIANS: AN ENCYCLOPEDIA OF RIGHTS, CONFLICTS, AND SOVEREIGNTY 140 (2007).

through inheritance after murdering Osage allottees."[243] By the end of the infighting, as many as 300 Osages met unnatural deaths.[244] Here, the law failed to protect these individuals not because of its failure to offer a remedy—murder in in Indian country or elsewhere was clearly prohibited[245]—but because of the complicity of those charged with its enforcement.[246] The federal government stood idly by as Osage annuitants were treated with triviality and their deaths were ignored.[247] The federal government—the trustee charged with supervision of the mineral estate monies—"looked at the balance sheet of oil dollars and ignored the human devastation."[248]

Second, in order to maintain Osage headright payout amounts, headright holders had incentive to urge that the federal government disallow new Osage members,[249] regardless of authentic claims to Osage ancestry.[250] Under the headright structure, tribal membership was centered on a corporate model of headright shares.[251] Rather than permitting the Osage to act as a government, as they had in 1881, the headright structure sought to make the Osage nothing more than stockholders in a minerals corporation.[252] Osage peoples could not participate in tribal politics without inheriting a share in the mineral estate from somebody listed on the roll.[253] Thus, two classes of Osage Indians were created—one with money and membership, and one without. As noted by Professor Jean Dennison, due to the headright system being linked to quarterly financial payouts, "all attempts to open up membership were challenged as merely attempts to redistribute this money. By the twenty-first century, this form of government had left nearly 16,000 of the approximately 20,000 people with Osage ancestry without voting rights, alienating them from tribal politics."[254]

Finally, Osage headright holders were immediately motivated to disenroll other Osage members, by alleging that certain Osage families were "placed upon the

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243. Strickland, *supra* note 236, at 42.

244. *Id.* at 43.

245. *See, e.g.*, *Ex parte* Columbia George, 144 F. 985, 986 (W.D. Wash. 1906).

246. *Id.*

247. *Id.*

248. *Id.*

249. *See* Application of Irene Kohpay, Now Cornell, for Enrollment on the Roll of the Osage Tribe of Indians, 67 Interior Dec. 89, 1960 WL 8927 (Mar. 8, 1960) (holding that there can be no additions to the Osage rolls because "'[t]he Allotment Act makes the roll, as finally approved by the Secretary of the Interior, final and conclusive'" (quoting Jump v. Ellis, 22 F. Supp. 380, 382 (N.D. Okla.), *aff'd*, 100 F.2d 130 (10th Cir. 1938))). To this very day, headright owners have "significant influence over" the federal government's management of tribal resources in this regard. OIG REPORT, *supra* note 225, at 1.

250. *See* Strickland, *supra* note 236, at 41 ("Most persons of Osage Indian ancestry own no headrights . . . .").

251. Jean Dennison, Constituting an Osage Nation: Histories, Citizenships, and Sovereignties 69–70 (May 2008) (unpublished Ph.D. dissertation, University of Florida), *available at* http://etd.fcla.edu/UF/UFE0021912/dennison_j.pdf.

252. *Id.*

253. *Id.*

254. *Id.*

roll by fraud."[255] On August 16, 1907—barely a year after the Osage Act was passed—Osage headright holders submitted to the Secretary of the U.S. Department of the Interior the names of 244 persons from eleven families who they sought to have disenrolled.[256] Luckily for the Osage disenrollees, the Osage Act contained an appellate provision that left the ultimate determination to the Secretary of the Interior, provided the Osage Nation carry its burden by "affirmatively show[ing]," by "newly discovered evidence," that the "names have been placed upon said roll by fraud."[257]

After evidentiary hearings, the Osage's Allotment Commission transmitted its findings—that a number of Osage members had been fraudulently enrolled—to the Office of Indian Affairs for secretarial approval.[258] The Secretary, however, "found that the tribe failed to establish its claim of fraud and the enrollment of all contestees was sustained,"[259] deferring to the federal government's 1906 Osage rolls as "the names of persons whose rights had previously been investigated and . . . were found by the [U.S. Department of the Interior] to be entitled to enrollment."[260] The Secretary's decision was final and non-appealable.[261] Despite the aforesaid destruction to the Osage Nation, this case study demonstrates the federal government's longstanding role in tribal mass disenrollment controversies, and its ability to provide a remedy for disenrollees is not out of sight.

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255. Logan v. Andrus, 457 F. Supp. 1318, 1326 (N.D. Okla. 1978). *But see* DENNIS MCAULIFFE, BLOODLAND: A FAMILY STORY OF OIL, GREED AND MURDER ON THE OSAGE RESERVATION 224 (1999) (suggesting that disenrollment may have been warranted in this instance, due to "[t]he U.S. government . . . packing the Osages' membership roll with whites and non-Osage Indians who claimed to be mixed-blood Osages—and who favored allotment" in order to "one day soon tip the scale in a tribal vote on whether to accept the [GAA]"). When this scheme backfired, the BIA "suspended Osage government indefinitely" and the pro-allotment campaign was ramped up. *Id.* at 226. Between 1898 and 1906, the federal government had added roughly 1,370 pro-allotment persons to the roll. *Id.* The disenrollment provision of the Allotment Act was negotiated so that the Osage might undo the BIA's vote-packing. *Id.*

256. Berlin B. Chapman, *Dissolution of the Osage Reservation*, *in* 20 CHRONICLES OF OKLAHOMA 382 (Oklahoma Historical Society ed., 1942).

257. Osage Allotment Act, ch. 3572, 34 Stat. 540 (1906). As discussed *infra* notes 287–89 and accompanying text, many disenrollees are left without a neutral appellate body to review the disenrollment decisions of their tribal governments.

258. Chapman, *supra* note 256.

259. *Id.*

260. *Hearings Before the Sen. Comm. on Indian Affairs on Matters Relating to the Osage Tribe of Indians*, 60th Cong., 96 (1909).

261. *See id.* at 49 ("[R]esort had been originally permitted to the courts, but the experience had been so unsatisfactory that Congress rejected that and repealed the provisions as to court review and made the decision of the Secretary of the Interior final . . . ."); Skibine, *supra* note 237, at 821 ("[F]inal authority to remove such names was given to the Secretary of the Interior.").

2. Case Study: Creek Nation

In 1834, as part of the removal agenda, Congress designated the part of the United States west of the Mississippi River (excluding the states of Louisiana and Missouri and the Arkansas territory) as "Indian Territory."[262] The tribes of the area—also known as the "Five Civilized Tribes"[263]—had generally acknowledged American legal standards and had incorporated these standards within tribal law.[264] An influx of non-Indians westward created a jurisdictional problem, however, in that tribal governments generally could not assert their inherent jurisdiction over non-Indians.[265] Thus, in 1844, Congress passed an act that made it a crime to trade with Indians without a license, disturb the peace in Indian Territory, or injure the property of Indians,[266] and gave enforcement jurisdiction to federal courts.[267]

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262. Paul E. Wilson, *The Early Days*, *in* THE FEDERAL COURTS OF THE TENTH CIRCUIT: A HISTORY 3 (1992).

263. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 35 n.184 (2002).

264. Wilson, *supra* note 262, at 4; *see also* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 147 (2006) ("[T]he history of tribal court development is spotty. The first tribal courts for many reservations were the old Courts of Indian Offenses, later known as CFR Courts. These courts are Article II courts created by the Secretary of the Interior and run by the BIA to regulate the reservation activities of Indians."). On CFR Courts, *see generally* Vine Deloria, Jr. & Clifford M. Lytle, *Courts of Indian Offenses*, *in* INTRODUCTION TO TRIBAL LEGAL STUDIES 76–77 (Jerry Gardner ed., 2004).

265. Wilson, *supra* note 262, at 4. If they wished to, however, "tribes were generally assumed to have territorial authority over all persons living on or passing through reservations . . . ." Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1519 (2013). The Chickasaw Nation's imposition of an occupational license tax on non-Indians engaged as laborers, merchants, traders, and physicians within the Chickasaw territory in 1876 offers one example. ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 140–42 (1934); ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 110 (1877). In 1878 and 1879, Congress specifically considered and acquiesced to this exercise of tribal power over non-Indians. S. Rep. 698, 45th Cong., 3d Sess. 1–3 (1879); 7 CONG. REC. 2911 (1878); 8 CONG. REC. 929 (1879). Shortly thereafter, in 1881 and 1884, two Attorneys General gave formal opinions further approving of this exercise of tribal jurisdiction over non-Indians. 17 Op. Att'y Gen. 134, 135 (1881); 18 Op. Att'y Gen. 34, 35 (1884); *see also* 23 Op. Att'y Gen. 214, 216, 217 (1900). In *Crabtree v. Madden*, the Eighth Circuit Court of Appeals issued the first federal court order affirming tribal jurisdiction over non-Indians. 54 F. 426 (8th Cir. 1893); *see also* Maxey v. Wright, 105 F. 1003 (8th Cir. 1900); Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *cert. denied*, 203 U.S. 599 (1906).

266. Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139, 167 (1967) (citing Act of June 17, 1844, 5 Stat. 680).

267. *Id.*; Wilson, *supra* note 262, at 6. Until 1893, it was also assumed that the Indian Territory courts would replace any tribal adjudicatory bodies. Kerry Wynn, *The State of Oklahoma*, *in* THE UNITING STATES: OKLAHOMA TO WYOMING 978–79 (Benjamin F. Shearer ed., 2004).

One of the first tribal disenrollment actions that was appealed to a federal forum took place in the U.S. District Court for the Indian Territory.[268] In 1856, as part of the removal program, the Creeks signed a treaty with the United States that guaranteed them "the unrestricted right of self-government," full jurisdiction over persons and property within their borders, and a one-time payment of $400,000.[269] The money was to be paid per-capita, $25,000 per annum, to Creek members individually.[270] On June 14, 1866, the Creek Nation signed a second treaty, ceding and conveying a large portion of its land to the United States in exchange for, among other benefits, $600,000 in additional per-capita payments to each individual Creek member.[271]

In 1895, in the throes of the federal allotment era, the Creek Nation claimed that "by questionable and unjust methods and practices many noncitizens ha[d] been counted as citizens and participated in the per-capita distribution of the public funds of the Nation," allegedly causing "great injustice to *bona fide* citizens of the Nation."[272] In response, the Creek government created a Committee of Eighteen on Census Rolls to: (1) "take charge of the census rolls of the various towns and carefully examine the same and ascertain whether or not they are correct"; (2) expunge from the rolls all names of persons found to be incorrectly enrolled; and (3) "entertain and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship."[273] The Nation also established an appellate tribunal named the "Citizenship Commission" to "sit as a high court and try, determine and settle all . . . causes as shall involve the question of the right of citizenship."[274] All individuals brought before the appellate tribunal were granted the right to counsel, and "all other rights usual and incident to" all other actions "in a court of justice before th[e] Nation," including the right to file written briefs and to subpoena witnesses.[275]

In 1897, numerous Creek Indians filed a petition with the U.S. District Court for the Indian Territory, alleging that they were wrongly disenrolled by the Creek Committee of Eighteen.[276] A federal Special Master found the Committee's

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268. *See also* Roff v. Burney, 168 U.S. 218 (1897) (disenrollment appeal from a U.S. District Court for the Indian Territory).

269. Treaty of August 7, 1856, 11 Stat. 699.

270. *Id.*; *see also generally* Oklahoma v. Hobia, No. 12-0054, 2012 WL 2995044, at *16 (N.D. Okla. Jul. 20, 2012) (discussing the Creek treaties) *rev'd*, Nos. 12–5134, 12–5136, 2014 WL 7269688 (10th Cir. Dec. 22, 2014).

271. Treaty with the Creeks, art. III, 14 Stat. 785 (1866).

272. *Acts and Resolutions of the Creek National Council of the Sessions of May, June, October, and December, 1895*, *in* THE CONSTITUTIONS AND LAWS OF THE AMERICAN INDIAN TRIBES 3–4 (1973) (emphasis added); *see also id.* at 5 (noting that many Creek citizens had obtained citizenship "by the undue use of money and other fraudulent means").

273. *Id.* at 3–4.

274. *Id.* at 5.

275. *Id.* at 7.

276. Johnson v. Creek Nation, No. 56 (U.S. Ct. Indian Terr. Apr. 4, 1898).

decision to be "startling on account of the corruption and folly . . . ."[277] According to the Special Master:

> [T]here was no reason whatsoever for the actions of the committee, and . . . parties were stricken off the rolls who had lived in the Creek nation all their lives and were full blood Creek Indians, whose citizenship could not be disputed by any one . . . [One Committee member] had no reason for his action except that he wanted revenge, because certain of the members of his own town had been stricken off the rolls . . . . [T]he action of the committee was ridiculous and childish, and that I am of the opinion that no respect should be shown to their decisions.[278]

On review, however, the U.S. District Court for the Indian Territory declined to adopt the Special Master's decision as a matter of jurisdiction.[279] According to the court, tribes possess an unfettered right to "control the question of citizenship, and . . . when the nation has exercised its authority that authority and the method pointed out by it is not subject to correction by any direct appeal from the judgment of the tribal authorities."[280] Whether the Committee of Eighteen was correct in its analysis or its motives were "immaterial"[281]—the matter was "beyond the judicial determination of th[e] court."[282] The U.S. Supreme Court granted certiorari and upheld the district court's decision.[283] As courts of limited jurisdiction, federal courts generally did not possess jurisdiction to adjudicate disenrollment disputes—the Court held that the executive branch alone held the power to recognize or refuse to recognize the disenrollment actions of tribal governments.[284]

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277. *Id.* at 58.

278. *Id.* at 59.

279. *Id.* at 56.

280. *Id.* at 71; *see also id.* at 93 ("[I]t was within the power of the council to withdraw . . . all of the rights and privileges of citizenship . . . and that determination is not subject to correction by any direct appeal from the judgment of the Creek council.").

281. *Id.* at 79; *see also id.* at 86 ("The Court is not authorized to inquire into the motives which actuated the members of the council . . . .").

282. *Id.* at 89. Note that this did nothing to affect the BIA's ability to interfere in disenrollment disputes. As discussed *supra* notes 165–82 and accompanying text, federal courts are courts of limited jurisdiction—the fact that federal courts do not have jurisdiction to interfere in disenrollment disputes says nothing of the federal government's ability to do so.

283. Stephens v. Cherokee Nation, 174 U.S. 445 (1899); *see also* Roff v. Burney, 168 U.S. 218, 223 (1897) ("[W]ithdrawal from plaintiff of all the rights and privileges of citizenship in the Chickasaw Nation, has been practically determined by the authorities of that nation, and that determination is not subject to correction by any direct appeal from the judgment of the Chickasaw courts.").

284. *See* United States v. Holliday, 70 U.S. 407, 419 (1865) ("In reference to all matters of [Indian affairs], it is the rule of this court to follow the action of the executive and other political departments of the government . . . ."); W. Shoshone Bus. Council *ex rel.* W. Shoshone Tribe of Duck Valley Reservation v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993) (noting that "the [E]xecutive's exclusive power to govern relations with foreign governments"

3. Analysis

The plight of the Osage and the Creek Indians are just two stories of federal tactics used to assimilate and subjugate tribal governments. Notable in both examples is the element of federally prescribed per-capita payments to tribal individuals, as opposed to payments to the Osage and Creek tribal governments with whom the United States signed treaties.[285] This was not unintentional—it was a purposeful modus of the federal government's campaign to usurp tribal governments' social and economic institutions.[286]

Contributing to these breakdowns was the (un)reviewability of disenrollment decisions. As to the Creek, disenrollment decisions were generally not reviewable, even where there was no forum to contest the decision because a tribal court did not exist,[287] or where a tribal court did exist but "declined to entertain jurisdiction" over such decisions.[288] The Osage Act, on the other hand, made disenrollment decisions reviewable by the Secretary of the Interior—who found that his de novo review of disenrollment decisions by a politically charged tribal government was not what the law intended.[289]

But it was when the federal government began to pick and choose which faction to "recognize," that an American Indian group or subgroup's identity started to vanish at federal whim.[290] In turn, the federal government's mandate, in exercise of its "absolute authority" over tribal affairs, to define within its own narrative exactly what or who is "the tribe," escalated intratribal conflict.[291] The process of being recognized by the executive branch, in other words, became a zero-sum game within a tribe, with clear winners and losers. American Indians immediately internalized a dichotomous tribal worldview because they had no choice.[292]

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has always been understood to apply to "determinations of tribal recognition") (citing United States v. Rickert, 188 U.S. 432, 445 (1903)).

285. *See* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 394 (1998) ("[E]ven the small reservations were held in common by all members of a tribe, each of whom agreed that land was not intended to be privately owned.").

286. Russel Lawrence Barsh, *Progressive-Era Bureaucrats and the Unity of Twentieth-Century Indian Policy*, 15 AM. INDIAN Q. 1, 5 (1991).

287. *See, e.g.*, Petition for Writ of Certiorari, Salinas v. Lamere, 126 S. Ct. 2291 (2006) (No. 05-1189), 2006 WL 690661 at *7 (noting that the Tribe initiating disenrollment "has no duly constituted Tribal Court, and thus no forum for meaningful judicial review").

288. *Roff*, 168 U.S. at 223.

289. *Hearings Before the Sen. Comm. on Indian Affairs on Matters Relating to the Osage Tribe of Indians*, 60th Cong., 96 (1909).

290. BARKER, *supra* note 22, at 33.

291. *Id.*

292. *See id.* at 225 ("U.S. national narrations [of] Native cultures and identities . . . have their own political aims at Native disposition and disenfranchisement and work to discipline and otherwise coerce Native peoples to think of their legal and political options and cultural selves in those terms.").

Finally, the federal government's blatant disregard of its fiduciary duty[293]—via the failure to intervene in the face of palpable harm to tribal peoples—is clear from these case studies. While the federal government did finally intervene in the Creek matter, it took the deaths of over 100 Creek Indians before it did so.[294] Hundreds more Osage died at the hands of non-Indians seeking lucrative headrights.[295] What makes this particularly disconcerting is that federal policies were in fact *causing* the harm, and the federal government knew it,[296] but remained complicit until its hand was forced.[297]

Unfortunately, each and every one of these dynamics persist today, as demonstrated below.

B. Disenrollment and the Effect of the IRA

Here, we discuss a current mass tribal disenrollment dispute, chiefly catalyzed by federal Indian reorganization policies.

1. Case Study: Nooksack[298]

The Nooksack Tribe's disenrollment began in 1998 when "a 200-member family of mixed Filipino and Indian descent" obtained a majority vote on the tribal

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293. This duty was described in *United States v. Kagama* as follows:

> From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

118 U.S. 375, 384 (1886); *see also* Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 992 (1996) ("Indians regarded the duty to provide protection to a treaty partner . . . as a continuing legal and moral obligation. Changes in circumstance or the original bargaining positions of the parties were therefore irrelevant as far as Indians were concerned. . . . [A] treaty partner who had grown stronger over time was under an increased obligation of protection toward its now weaker partner.").

294. Daniel F. Littlefield, Jr. & Lonnie E. Underhill, *The "Crazy Snake Uprising" of 1909: A Red, Black, or White Affair?*, 20 ARIZ. & THE WEST 307, 309 (1978).

295. Today, as a result, "[o]f the 1.4 million acres that once constituted the Osage reservation, less than 0.04% remains in restricted tribal ownership." Barbara Moschovidis, Osage Nation v. Irby*: The Tenth Circuit Disregards Legal Precedent to Strip Osage County of Its Reservation Status*, 36 Am. Indian L. Rev. 189, 189 (2011).

296. *See* JEAN DENNISON, COLONIAL ENTANGLEMENT: CONSTITUTING A TWENTY-FIRST CENTURY OSAGE NATION 105 (2012) (noting that the Osage complained that their agency superintendent "was more greatly concerned about and favorable to the interests of big oil companies and men of large financial means and political influence than to the interests of the Osage people"); *see also generally* MCAULIFFE, *supra* note 255.

297. *See, e.g.*, *Militia Called to Fight Crazy Snake's Indians*, LEWISTON DAILY SUN, Mar. 22, 1909, at 1; *"King of Osages" is Convicted of Indian Murders*, SARASOTA HERALD-TRIBUNE, Oct. 30, 1926, at 1; *Government is Held Up in Osage Murder Quiz*, BEND BULLETIN, Jan. 13, 1926, at 1.

298. The Authors have represented the disenrollees in this dispute.

council.[299] Since then, there has been an unbridled political divide between non-Filipino Nooksacks and Nooksacks with mixed Filipino-Nooksack ancestry. Adding further complexity to the Tribe's member composition, Nooksacks were considered Canadian until 1973.[300] As such, a member of the various American-Nooksack subgroups also likely descends from, or is enrolled with, one of several related Canadian First Nations[301] today.[302] Still other Nooksack members have been adopted from other American tribes or Canadian First Nations, and lack any Nooksack blood quantum.[303] While the Filipino-Nooksacks maintain that they have just as much right to Nooksack membership as do the non-Filipino Nooksacks, the latter have claimed that the Filipino-Nooksacks are "large groups or families that have much weaker ties to Nooksack than the rest . . . who are currently enrolled."[304]

The disenrollment-fueled conflict came to a head on December 19, 2012, during a special meeting of the Nooksack Tribal Council.[305] The topic to be discussed at this special meeting was the enrollment of certain Filipino-Nooksack children who had applied for enrollment. Because the children's father was an enrolled Nooksack member, and because they possessed at least one-fourth Indian blood degree and were of Nooksack ancestry, the children should have been enrolled pursuant to the Nooksack Constitution.[306] The Tribe's Enrollment Office, however,

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299. Luis Cabbera, *Nooksacks Allege Filipino Family Has Conquered Tribe From Inside*, L.A. TIMES (Oct. 15, 2000), http://articles.latimes.com/2000/oct/15/local/me-36765; *see also* Liz Jones, *'We'll Always Be Nooksack': Tribe Questions Ancestry of Part-Filipino Members*, KUOW (Dec. 16, 2013), http://kuow.org/post/we-ll-always-be-nooksack-tribe-questions-ancestry-part-filipino-members (describing a "cross-cultural community of Filipino-American and Native American families").

300. *In re* Junious M, 144 Cal. App. 3d 786, 792 (Cal. App. 1983). The Nooksack Reservation is located in Deming, Washington, 12 miles south of the Canadian Border. *About Us*, NOOKSACK INDIAN TRIBE, http://www.nooksacktribe.org/about/ (last visited Jan. 12, 2015).

301. *See* EVE DARIAN-SMITH, NEW CAPITALISTS 14 (2004) ("First Nations is the term most often used in reference to the indigenous peoples of Canada . . . .").

302. *See, e.g.*, Charise Wenzl, *Mt. Baker High School's 2012-13 Junior Class President*, SNEE-NEE-CHUM, Oct. 2012, at 5.

303. Motion for Temporary Restraining Order at 4 n.1, St. Germain v. Jewell, No. 13-0945 (W.D. Wash. Jun. 17, 2013) [hereinafter Nooksack TRO Motion].

304. *Constitutional Election–FAQs–Section H*, NOOKSACK INDIAN TRIBE COMMUNICATIONS BLOG (May 9, 2013), http://nitcommunications.wordpress.com/2013/05/09/constitutional-election-faqs-section-h.

305. Amended Complaint at 4, St. Germain v. Jewell, No. 13-0945 (W.D. Wash. Jun. 17, 2014) [hereinafter Nooksack Federal Complaint].

306. As of 2012, the constitutional requirements for enrollment were as follows:

> The membership of the Nooksack Indian Tribe shall consist of: (a) All original Nooksack Public Domain allottees and their lineal descendants living on January 1, 1942; (b) All persons of Indian blood whose names appear on the official census roll of the tribe dated January 1, 1942 . . . ; (c) Lineal descendants of any enrolled member of the Nooksack Indian Tribe subsequent to January 1, 1942, provided such descendants possess at least one-fourth (1/4) degree Indian blood; . . . (h) Any persons who possess at least 1/4 Indian blood and who can prove Nooksack ancestry to

denied the childrens' enrollment, citing "incomplete files" and "missing documents."[307]

On January 8, 2013, the non-Filipino Tribal Council Chairperson met with the rest of the Tribal Council to discuss new "information" allegedly obtained from the BIA.[308] According to the Chairperson, not only did the BIA lack any documents or files that would support the Filipino-Nooksack children's eligibility, but also that "supporting documents and files" were missing from over 300 currently enrolled Nooksack's files—all 300-plus of whom are the same "family of mixed Filipino and Indian descent" that the non-Filipino faction had been trying to quell since 1998.[309]

On February 4, 2013, the Chairperson informed the Tribal Council that Nooksack Tribal Enrollment Office had began the process of disenrolling all of the Filipino-Nooksack members pursuant to the Tribe's IRA constitution.[310] On February 12, 2013, the Chairperson ordered Tribal Council Secretary Rudy St. Germain and Councilmember Michelle Roberts—both of whom are of Filipino-Nooksack ancestry—to excuse themselves from an executive Tribal Council session, as the topic of the meeting was their own disenrollment.[311] During the private executive session, the Tribal Council passed a resolution to disenroll the 306 Filipino-Nooksacks,[312] known as "the Nooksack 306."[313]

> any degree . . . . The tribal council shall, by ordinance, prescribe rules and regulations governing involuntary loss of membership. The reasons for such loss shall be limited exclusively to failure to meet the requirements set forth for membership in this constitution . . . .

NOOKSACK CONST., art. II, § 1 [hereinafter Constitutional Membership Requirements]; *see also* Petition for Fed. R. App. Proc. 40 Relief, *Lomeli v. Kelly*, No. 2013-CI-APL-002 (Nooksack Ct. App. Jan. 17, 2014) (discussing the Tribe's disenrollment scheme).

307. Nooksack Federal Complaint, *supra* note 305, at 6.

308. It is unclear why the Tribal Council met to discuss enrollment—the children were already denied. In all likelihood, the plan to disenroll was already in the works, as the dispute had been brewing for years.

309. Cabbera, *supra* note 299.

310. Federal Complaint, *supra* note 306, at 7.

311. *Id.* at 9.

312. On March 6, 2013, the Chairperson sent an "open letter" to the Nooksack tribal membership, regarding "the involuntary disenrollment of numerous members of the Nooksack Tribe." According to the letter:

> The Nooksack Constitution grants the Council the power to disenroll members if it is found that they do not meet the requirements of membership . . . . Many of the 300 people who will be affected by this action are individuals who you may know . . . . They will no longer be qualified for tribal housing, medical facilities, treaty-protected fishing or hunting rights, or any other rights reserved to Nooksack tribal members.

Letter from Robert Kelly, Jr., Chairperson, Nooksack Indian Tribe, to Tribal Membership (Mar. 6, 2013) (on file with authors).

313. Sanford Levinson, *"Who Counts?" "Sez Who?"*, 58 ST. LOUIS U. L.J. 937, 945, 981 (2014) (discussing the plight of the "Nooksack 306" generally); *see also* Cornwell, *supra* note 5 (same).

Nooksack Tribal Resolution No. 13-02 stated that "erroneous enrollments originated from lineal descendants of an original Nooksack Public Domain allottee."[314] According to the Resolution, none of the targeted Filipino-Nooksacks' ancestors were "original Nooksack Public Domain allottee[s]."[315] Additionally, the majority faction asserted that "each member who descended from" persons who were not lineal descendants to a public domain allottee and "claim[ed] right to membership through lineal descendancy" were subject to disenrollment.[316]

On February 14, 2013, the Nooksack Tribal Council majority faction commenced issuance of a Notice of Intent to Disenroll (the "Notice") to the Nooksack 306.[317] The Notice informed disenrollees that, according to the Nooksack Tribal Code, there could be no review of the tribe's disenrollment decision by court, or by any other type of independent third party[318]—in 2005, the Tribe's Enrollment Ordinance was modified to remove the jurisdiction of the Tribal Court to review the government's disenrollment decision and require that a Nooksack applying for enrollment must trace a lineal descendent back to an "original Nooksack Public Domain allottee" or a "person[] of Indian blood whose name[] appear[s] on the official census roll of the Nooksack Tribe dated January 1, 1942."[319] That each targeted Filipino-Nooksack clearly met the requirements for enrollment, at the time of enrollment, was now not enough.[320]

On March 1, 2013, the Nooksack Tribal Council majority faction passed a resolution calling for a general membership vote to delete the section of the Tribe's constitution that allowed for membership of "[a]ny person who possesses at least one-fourth (1/4) degree Indian blood and who can prove Nooksack ancestry to any degree" [321] On June 24, 2013, the Secretary of the Interior approved the constitutional amendment per the IRA.[322] In addition, the Nooksack Tribal Council

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314. Federal Complaint, *supra* note 305, at 10. It was not questioned that the targeted Filipino-Nooksacks were lineal descendants of an enrolled Nooksack. It just happened to be that the ancestor was one of the 170-plus who was not a public domain allottee and was not on the Tribe's original roll. *See* St. Germain v. U.S. Dep't of Interior at __, No. 13-0945, (W.D. Wash. Oct. 29, 2014) (expert opinion of Dr. Jay Miller, concluding that "Annie George-Mack-James . . . and her heirs are fully qualified to be enrolled Nooksack, as they have been for decades"); *see also id.* at ECF No. 5-4 (expert opinion of Dr. Bruce G. Miller, noting that the ancestor "regarded herself as fully Nooksack, and was taken to be so by others").

315. Declaration of Rudy St. Germain at 35–36, St. Germain v. U.S. Dep't of Interior, No. 13-0945 (W.D. Wash. Jun. 17, 2013).

316. *Id.*

317. Federal Complaint, *supra* note 305, at 10–11.

318. *Id.* at 11.

319. Nooksack Tribal Code § 63.00.004 (2004).

320. St. Germain v. U.S. Dep't of Interior, No. 13-0945 (W.D. Wash. Oct. 29, 2014). The requirements at that time were (1) enrolled parents; (2) possession of at least one-fourth Indian blood; and (3) Nooksack ancestry to any degree. *Id.*

321. Adams v. Kelly, No. 2014-CI-CL-006 (Nooksack Tribal Ct. Jun. 26, 2014).

322. Motion to Dismiss at 13, St. Germain v. U.S. Dep't of Interior, No. 13-0945 (W.D. Wash. Oct. 29, 2014). The Nooksack disenrollees are currently litigating whether the amendment was approved without the legal review required by The Nooksack disenrollees

majority faction promulgated a new Title 65 of the Nooksack Tribal Code, titled "Nooksack Indian Tribe Conflict of Interest and Nepotism Code," in order to prevent any of the Nooksack 306 from participating in government.[323]

On January 20, 2014, the Nooksack Tribal Council majority faction passed a resolution to remove Secretary St. Germain and Councilwoman Roberts from their positions on the Tribal Council.[324] The Nooksack Tribal Court upheld the two councilmembers' removal from office by the faction, holding that "[t]he function of removal from office . . . is the very definition of an allegation that concerns the establishment and functions of the tribal government over which this Court has no subject matter jurisdiction."[325] Although Mr. St. Germain and Ms. Roberts were voted into office by the Nooksack membership to serve four-year terms,[326] those terms were cut short by the majority faction—and to date, there has been no remedy for their removal.

On March 18, 2014, the targeted Nooksacks won their first victory, before the Nooksack Tribal Court of Appeals.[327] In *Roberts v. Kelly*,[328] a group of aggrieved Nooksacks challenged the Tribe's Disenrollment Procedures[329] by arguing that they "violate[d] the Nooksack Constitution in the manner [in] which [they] were enacted."[330] The court ruled that while that the Nooksack Constitution granted the Tribal Council the "exclusive authority to prescribe rules and regulations governing involuntary loss of membership, provided those rules and regulations are adopted by ordinance," this power was restricted by another provision of the

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are currently litigating whether the amendment was approved without the legal review required by 25 U.S.C. § 476(c)(2)(B) and § 476(d)(1).
. *See generally* St. Germain v. U.S. Dep't of Interior, No. 13-0945 (W.D. Wash. Oct. 29, 2014).

323. Nooksack Tribal Code § 65 provides in pertinent part:

> No member of the Tribal Council . . . shall take part in the deliberation upon or in the determination of, any matter affecting the member's [various blood relatives or in-laws]. Such member shall withdraw from the Tribal Council . . . meeting during the deliberation or determination of any matter with respect to which the member is disqualified and the minutes shall so state.

324. Declaration of Chairperson Robert Kelly, Jr. at 33–38, Adams v. Kelly, No. 2014-CI-CL-06 (Nooksack Tribal Ct. Jan. 29, 2014).

325. Adams v. Kelly, No. 2014-CI-CL-006 (Nooksack Tribal Ct. Feb. 7, 2014).

326. NOOKSACK CONST., art. 5, §4.

327. The Nooksack Tribal Court of Appeals is a function of the Northwest Intertribal Court System ("NICS"). "NICS administers the court of appeals of each tribe served by NICS according to that tribe's own codes, rules of procedure, and judicial eligibility criteria and appointments." *Appellate*, NORTHWEST INTERTRIBAL COURT SYSTEM, http://www.nics.ws/appellate/appellate.htm (last visited Dec. 18, 2014).

328. No. 2013-CI-CL-003 (Nooksack Ct. App. Mar. 18, 2014).

329. Blank Disenrollment Notice Redacted, NOOKSACK TRIBAL COUNCIL, Jan. 16, 2014, *available at* http://www.galandabroadman.com/wp-content/uploads/2014/01/Blank-Disenrollment-Notice_Redacted.pdf. "Disenrollment Procedures" were rules promulgated by the Tribal Council majority faction to govern the Nooksack 306's disenrollment hearings. *Id.*

330. *Id.* at 3.

Constitution that mandated that the "power to enact ordinances [was] subject to approval of the Secretary of the Interior."[331] Because the disenrollment procedures operated as a tribal ordinance (although deftly styled as "procedures"), but were disapproved by the Secretary of the Interior, they were not enforceable.[332] This staved off the disenrollment and sent the majority faction back to the drawing board.

In January 2015, the Secretary of the Interior approved a Nooksack disenrollment ordinance promulgated by the Nooksack Tribal Council majority faction.[333] It has been over two years since the Nooksack disenrollment crisis began, and despite the majority faction's "fast-tracking the disenrollment process at nearly every turn," the Nooksack 306 remain enrolled.[334] But the Nooksack courts have thus far refused to make any decision on the constitutionality of the mass disenrollment, and instead have left the majority faction with unfettered decision-making power.

2. Analysis

The negative aspects of the IRA are evident in the Nooksack disenrollment crisis. One of the central thrusts of the IRA was that it did not limit or expand the definition of who is and is not a tribal member. Rather, the IRA shifted that legal inquiry towards a determination of who has the authority to ask and answer membership questions about disenrollment: "'Who counts?' turns into the question, 'Sez who?'"[335] At Nooksack, the Tribe's Enrollment Ordinance was modified such that this determination, under tribal law at least, began and ended with the Tribal Council. Specifically, the provision stating that "[a]ctions of the Council to disenroll a tribal member shall be submitted to the superintendent of the Bureau of Indian Affairs for review and approval,"[336] was replaced with: "The Tribal Council shall determine if the member is to be disenrolled. The decision of the Nooksack Tribal Council is final."[337] Thus, disenrollees are limited in the causes of action they may bring before the Tribal Court. While the Nooksack 306 have been able to delay disenrollment through challenging the manner in which the Tribal Council provides procedural due process, it may be only a matter of time until the prevailing Tribal Council majority faction, through overzealous trial and error, gets it right—and once that happens, there may be no way to challenge a disenrollment decision on the merits.

Under the IRA, tribal factions have essentially limitless authority to disenroll members via revisions to their tribal code, constitution, and court rules, such that no tribal member that is targeted for disenrollment is allowed a meaningful

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331. *Id.*
332. *Id.* at 5.
333. Lomeli v. Kelly, No. 2013-CI-CL-001, at 8 (Nooksack Ct. App. Aug. 27, 2013).
334. *Id.*
335. Levinson, *supra* note 313, at 981.
336. Nooksack Tribal Code, tit. 63, § 6.1 (1996).
337. Nooksack Tribal Code § 63.04.001(B)(2) (2004).

chance to make his or her case for continued enrollment.[338] As Professor Suzianne Paniter-Thorne has noted:

> Fewer than half (approximately 275) of federally recognized tribes have any form of formal tribal court system. Rather, in some tribes the tribal leader is also the tribal judge and there is no written code. Even among those tribes that do have a formal court system, . . . the tribal court system may not provide for any review process. Indeed, in many tribes there is no judicial body with any oversight over membership decisions, an omission that essentially makes the enrollment committee's decision unreviewable. In other tribes, the tribal council may be entrusted with reviewing tribal court decisions. To the extent the tribal council is involved in enrollment decisions, it is essentially reviewing its own rules or decisions. Moreover, even in those tribes where there is tribal court oversight, the tribal court and tribal council may be comprised of all or some of the same members. Where tribal council, enrollment council, and tribal courts are comprised of either the same people or of people all with the same interests, there is at least the appearance of a lack of independent oversight . . . . For instance, in his dissent in *Santa Clara*, Justice White highlighted this conflict by noting that "both [the] legislative and judicial powers are vested in the same body, the Pueblo Council . . . . To suggest that this tribal body is the 'appropriate' forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress' desire to provide a means of redress to Indians aggrieved by their tribal leaders."[339]

Disenrollment disputes also highlight the challenges that result when one tribal group splits off from the majority, otherwise known as "tribal factionalization."[340] As Thomas W. Cowger has noted, this is nothing new, as "tribal factionalization often made the operation of tribal governments problematic" and allows tribal leaders to advance their own political goals, including endless tenure. This dynamic has allowed some tribal leaders to capitalize on the confusion, to advance their own political goals, including endless tenure on tribal council or as tribal chairman.[341]

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338. *See* Reitman, *supra* note 58, at 819 ("[E]ffecting disenrollments by changing citizenship guidelines often clothes an otherwise actionable disenrollment in a veneer of legality.").

339. Painter-Thorne, *supra* note 126, at 348.

340. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 58–59 n.7 (1994) (noting that "[i]n response to federal pressure, internal disagreement spread within the tribes over a wide variety of issues, including the relationship between traditional tribal laws and new laws needed to accommodate the rapid social change occurring," and that this caused a "process called 'factionlization'").

341. *Id.*

While some IRA constitutions have been amended to eliminate the blood quantum requirement, [342] BIA-imposed tribal membership and disenrollment standards persist.[343] Ties to the tribal community—even proven ancestral ties—notwithstanding, there are members and nonmembers; the ultimate determination of which is often dependent on arbitrary, antiquated, flawed, and often purposefully exploitive *federal* documents.[344] Instead of taking traditional ideas of membership into account—ideas that help support tribal survival and cause tribal governments to reflect on their cultural values, this criterion, like blood quantum, merely encourages exclusion as an incentive to cut membership numbers and increase benefits to remaining members.[345] Meanwhile, for the Nooksack, the entire mode of IRA governance superimposed upon the Tribe has almost entirely ceased to function as a result of the Nooksack 306 mass disenrollment controversy.[346]

C. Disenrollment and the Effect of the Termination

Here, we discuss one tribal disenrollment dispute, fueled by federal termination policies, which has caused the tribe at issue to remain in constant turmoil for over 60 years.

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342. David Wilkins, *Putting the Noose on Tribal Citizenship: Modern Banishment and Disenrollment*, Vine Deloria, Jr. Distinguished Indigenous Scholars Series, American Indian Studies, University of Arizona, Tucson, Arizona. November 13, 2008, *available at* https://nnidatabase.org/video/david-wilkins-putting-noose-tribal-citizenship-modern-banishment-and-disenrollment (discussing how his review of 318 tribal constitutions revealed that the non-American indigenous construct of "loss of membership" was still "found in 150 tribal constitutions").

343. *See* Dao, *supra* note 30 (noting that "[c]lan rivalries," "political squabbles," and "'political vendettas or family feuds'" that are "often triggers for disenrollment" today) (quoting Professor David Wilkins).

344. Recall prior to U.S. involvement in tribal membership, membership "was relatively fluid, and ancestry within the group was not always essential." COHEN, *supra* note 20, at § 3.03. Under the IRA, membership was based upon ancestry, determined by federal documents—documents that are riddled with error, "both by accident and malicious intent of US or tribal officials." Second Declaration of Gabriel S. Galanda at 10, Lomeli v. Kelly, No. 2013-CI-Cl-001 (Nooksack Tribal Ct. Mar. 29, 2013) (testimony of Dr. Jay Miller, Anthropologist, University of Washington).

345. Miller, *supra* note 74, at 341, 346 n.142.

346. *See, e.g.*., Ralph Schwartz, *Deming Levee Gets State Support, No Money from the Tribe*, BELLINGHAM HERALD (Dec. 28, 2014), http://www.bellinghamherald.com/2014/12/28/4047754_deming-levee-gets-state-support.html?rh=1 (discussing how "the tribal council was too preoccupied with a controversial effort to disenroll hundreds of tribal members to properly consider funding [a] levee" that would protect the Nooksack Reservation from flooding: "Apparently, the internal strife of expelling tribal members brought all other government affairs to an extreme slowdown'").

1. Case Study: Northern Ute

In 1950, the Northern Utes[347] were awarded $7.5 million from the federal government in compensation for the loss of tribal lands.[348] At the insistence of the United States, the monies were used to make an initial $1,000 per-capita payment to Northern Ute members.[349] Almost immediately, Northern Ute members became "dependent upon unearned income derived from land claims judgments."[350] Over the next couple of years, tribal per-capita payments increased, the total per capita distributions between 1951 and 1959, totaled over $11,000 per member.[351] As with the Osage and Creek Indians a half century before, tribal factionalization, and in turn mass disenrollment, rapidly commenced at Northern Ute.

A faction of supposed Northern Ute "full-bloods" immediately sought to have another group, the "mixed-bloods," disenrolled from the Tribe.[352] The BIA encouraged this action as the first step in terminating both groups from federal obligations.[353] In 1954, at the insistence of the "full-bloods," Congress determined that the criteria for Northern Ute membership was to include so-called "full" blood quantum: "one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice."[354] Roughly 500 "mixed-bloods" were instantly disenrolled from Northern Ute.[355]

2. Analysis

Per-capita payments at Northern Ute increased over time and, in turn, membership criteria tightened further, per tribal law.[356] Endless infighting and litigation ensued. Four decades later, a federal court concluded that the Tribe's per-capita-driven membership criteria were issued in order to complete Congress's goal

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347. The Northern Utes, also known as the "Ute Indian Tribe of the Unitah and Ouray Reservation Utah," adopted an IRA constitution in 1937. CONSTITUTION AND BYLAWS OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (1937), *available at* http://www.loc.gov/law/help/american-indian-consts/PDF/37026342.pdf.

348. Robert L. Bennett, *Building Indian Economies with Land Settlement Funds*, 20 HUM. ORG. 159, 159 (1962).

349. *Id.*; Clifford Duncan, *Chapter Five – The Northern Utes of Utah*, UTAH HISTORY TO GO, http://historytogo.utah.gov/people/ethnic_cultures/the_history_of_utahs_american_indians/chapter5.html (last visited Apr. 5, 2015).

350. JOSEPH G JORGENSEN, THE SUN DANCE RELIGION: POWER FOR THE POWERLESS 160 (1974).

351. Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity*, 4 RACE & ETHNIC ANC. L. J. 7, 22 n.227 (1998).

352. Brian L. Lewis, *So Close, Yet So Far Away: A Comparative Analysis of Indian Status in Canada and the United States*, 18 WILLAMETTE J. INT'L L. & DISP. RESOL. 38, 58 n.98 (2010).

353. JORGENSEN, *supra* note 350, at 152.

354. 25 U.S.C. § 677a(b) (2012); *see also* R. WARREN METCALF, TERMINATION'S LEGACY: THE DISCARDED INDIANS OF UTAH 181 (2002) ("The Ute Partition Act, passed in 1954 required three things, the first step called for the establishment of the tribal rolls to determine the exact number of members in the two groups.").

355. Henderson, *supra* note 351, at 22.

356. *Id.*

of tribal termination, without actually terminating the Tribe.[357] In *Chapoose v. Clark*,[358] the U.S. District Court for the District of Utah found that "Congress intended that the blood quantum requirements . . . be used only . . . to separate the full-bloods and mixed-bloods so that the mixed-bloods could be terminated."[359] Indeed, higher per-capita payment to the "full-bloods," and eventual termination of all Northern Utes, was what the federal government intended.

To this day, nearly 65 years after the Tribe's inaugural per-capita payment, membership, and disenrollment issues plague Northern Utes.[360] In addition, and despite decades of per-capita monies, 54% of Northern Ute families live in poverty and 40% of all adults residing on the Tribe's reservation are unemployed.[361] In addition, large tracts of Indian lands have passed into non-Indian hands,[362] benefiting non-Indian business interests, trimming the federal budget, and pushing the full range of state jurisdiction (including taxing jurisdiction) into Indian Country.[363] Disenrolled Northern Utes have been effectively forced to leave their ancestral land and move into mainstream American society; have become subject to state control without any federal restrictions or support; and special federal health, education, and general assistance for these members has ended.[364] Congress's goal of termination has largely been realized at Northern Ute, through disenrollment, without the federal government formally terminating the Tribe at all—through per-capita and disenrollment, the Northern Ute have self-terminated, and continue to do so.

D. Disenrollment in the Modern Era

Here, we provide one example of how federal policies have caused the disenrollment crisis to proliferate, even in this era of self-determination.

1. Case Study: Paskenta Disenrollment[365]

Nowhere has been hit harder by the disenrollment epidemic than California.[366] Since 1988, disenrollment has resulted in roughly a 10% drop in total

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357. *Cf.* South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 504 (1986) (discussing the wholesale termination of the Catawba Indian Tribe and the per-capita division of tribal assets among the enrolled members, per 25 U.S.C. § 933(f) (2012)).

358. 607 F. Supp. 1027 (D. Utah 1985).

359. *Id.* at 1034.

360. Lezlee E. Whiting, *Terminated Members of Ute Tribe Dispute Time Limits on Claims*, DESERET MORNING NEWS (Nov. 6, 2007), http://www.deseret news.com/article/695225253/Terminated-members-of-Ute-Tribe-dispute-time-limits-on-claims.html?pg=all.

361. Ojibwa, *Reservation Poverty*, NATIVE AM. NETROOTS (Dec. 5, 2012), http://nativeamericannetroots.net/diary/1411.

362. Dewakuku v. Cuomo, 107 F. Supp. 2d 1117, 1120 (D. Ariz. 2000).

363. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 139 (1977).

364. *Id.* at 139–40.

365. The Authors have represented the disenrollees in this dispute.

366. Dao, *supra* note 30.

tribal membership statewide.[367] And for each tribe that has disenrolled its own people, that tribe has lost anywhere between 10% to 50% of its total membership.[368] The roughly 250-member Paskenta Band of Nomlaki Indians provides just one example of how dramatically these disenrollment disputes unfold when there are also large-stakes Indian-gaming facilities in the mix, and how the federal government stands on the sidelines despite rampant violations of federal law.

The Paskenta own and operate a 70,000 square-foot casino just off of the Interstate 5 corridor in Northern California that brings in hundreds of millions of dollars a year.[369] In the summer of 2014, however, the casino's operation was put in crisis through a dispute that had "all the elements of a Hollywood blockbuster"—allegedly, a private jet, gold bars, a cyber-attack, a former FBI agent as tribal treasurer, multi-million dollar embezzlement, a blood feud, death threats, guns for hire, and semi-automatic weapons.[370] The dispute began, at least publicly, on April 12, 2014, at the Tribe's annual meeting.[371] There, the Paskenta Chairman diverged from the scheduled agenda and summarily suspended an elected member of the Tribal Council and began reading a prepared statement announcing that certain families, including the suspended tribal councilmember's family, were not legally enrolled Paskenta.[372] As a result of this attempted action, near-violent chaos ensued,[373] the Tribal Council Vice Chairperson adjourned the annual meeting, and local police were called to maintain the peace.[374] After four tribal councilpersons and various tribal members left the meeting room, the Chairperson proceeded to: (1) allege that three of those four councilpersons had "abandoned" the annual meeting, creating vacancies pursuant to the Tribe's constitution;[375] (2) appoint new

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367. BARKER, *supra* note 22, at 163.

368. *Id.*

369. Sue Gabel, *Indian Casinos Along I-5 in California*, USA TODAY, http://traveltips.usatoday.com/indian-casinos-along-i5-california-60602.html (last visited Apr. 10, 2015).

370. Stephen Magagnini, *Tribal Dispute Prompts Judge to Temporarily Ban Firearms at Rolling Hills Casino*, SACRAMENTO BEE (Jun. 20, 2014), http://www.sacbee.com/news/business/article2601838.html#storylink=cpyhttp://www.sacbee.com/news/business/article2601838.html#storylink=cpy.

371. First Amended Complaint at 4, Freeman v. Freeman, No. PTCV-14-001 (Paskenta Tribal Ct. May 7, 2014) [hereinafter Paskenta Complaint].

372. *Id*. at 5. This enrollment dispute had been ongoing. *See* Castillo v. Pac. Reg'l Dir., 46 IBIA 209, 2008 WL 723763 (2008) (alleging that "BIA had violated its duties to them by allowing the descendants of Ida Louella Henthorne-Pata to become enrolled members of the Tribe and to be included on a certified list of registered voters"); Swearinger v. Paskenta Band of Nomlaki Indians Tribal Bus. Council, No. 13-2642, 2013 WL 4567456 (N.D. Cal. Aug. 27, 2013) (same).

373. "[S]ecurity officers from the casino and law enforcement officers from the sheriff's office 'swarmed' the place and took up positions behind the tribal council." Gale Toensing, *Epic Paskenta Dispute Continues, Despite BIA Cease and Desist Letter*, INDIAN COUNTRY TODAY (Jun. 13, 2014), http://indiancountrytodaymedianetwork.com/2014/06/13/epic-paskenta-dispute-continues-despite-bia-cease-and-desist-letter-155285.

374. Paskenta Complaint, *supra* note 371, at 5.

375. *Id.* at 6–7. The Tribe's Constitution allows for the removal of Councilmembers for "[f]ailure . . . to attend a General Council meeting." *Id.*

councilpersons of his own liking; (3) raid the Tribe's headquarters in the middle of the night, using armed casino guards to remove tribal property and files, and destroy tribal fixtures;[376] (4) empower non-Indian casino management aligned with him to control the Tribe's casino; and (5) cease gaming per-capita payments to the abandoned councilpersons and about 75 members of their families.[377]

Literally overnight, a tribal leadership dispute was born; two separate tribal council factions held "council" meetings, passed resolutions, and disclaimed the actions of the other.[378] As the parties attempted to determine which leadership faction should govern the tribe, litigation would ensue in two separate courts, both claiming to be the Paskenta Tribal Court.[379] Meanwhile, the Chairperson's chosen casino management team used guards armed with semi-automatic rifles to keep the Original Tribal Council out of the casino and other tribal properties, including the tribe's health clinic, and commenced suspension and disenrollment efforts against those Councilpersons and their families.[380] A retired sheriff for neighboring Tehama County described the situation as follows:

> It's become very clear that laws are being broken and money is being mishandled at the Rolling Hills Casino, leaving the tribe in jeopardy of being robbed of millions of dollars, and potentially being forced to shut down their casino . . . . But frankly I'm even more concerned about the seriousness of the situation with regard to the safety of tribal members, the public, and employees. Weapons violations, millions of dollars at stake, and regulators being systematically and physically removed from their posts is a recipe for a violent altercation. What has become clear is that the Paskenta Tribe is under siege, completely

376. *Id*. at 6–15.

377. *Id.; see also* Toensing, *supra* note 373 ("[B]y mid-April Andrew Freeman and his faction, which includes some casino executives who are not tribal members, were in control of the casino.").

378. Paskenta Complaint, *supra* note 371, at 13–19.

379. *Compare* Paskenta Band of Nomlaki Indians v. Swearinger, No. CV-2014-001 (Paskenta Tribal Ct. May 17, 2014) (noting "the creation of an unauthorized and unlawful 'tribal court'"), *with* Motion for Preliminary Injunction and Default Judgment, Freeman v. Freeman, No. PTCV-14-01 (Paskenta Tribal Ct. May 27, 2014) ("On or about May 10, 2013, Defendants purported to create their own court . . . in violation of the TRO's mandate that Defendants not interfere in Paskenta Tribal governmental affairs, including purporting to take action as members of the Tribal Council. (quotation omitted)); *see also* Julie R. Johnson, *Paskenta Tribal Battle Continues, Escalates*, CORNING OBSERVER (May 13, 2014), http://www.appeal-democrat.com/corning_observer/paskenta-tribal-battle-continues-escalates/article_fea7dcee-db09-11e3-a877-001a4bcf6878.html.

380. *In re*: David Swearinger, Order Re: Temporary Suspension of Benefits (May 28, 2014) (on file with authors); Colin Steiner, *Tribal Tensions Escalate in Rolling Hills Dispute*, KRCR NEWS (Jun. 9, 2014), http://www.krcrtv.com/news/local/tribal-tensions-escalate-in-rolling-hills-dispute/26410206.

> out of control of its casino, and unless a federal agency steps in, this could truly turn violent.[381]

The Original Tribal Council urged the BIA to issue an advisory letter to interested parties and argued that the BIA must recognize and name the last undisputed officials.[382] On April 15, 2014, the BIA issued a letter to local non-tribal law enforcement and to the Tribe's bank, providing them with a BIA document listing the tribe's "last Tribal Council of Record."[383] But the BIA disclaimed that it "does not get involved in internal tribal disputes"[384]—even though it had previously done so in other similar disputes (i.e., the Creek and Osage Nations).[385] The BIA's caveat had the effect of rendering its letter meaningless.[386]

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381. *Tribe's Police Chief Says Federal, State Laws Violated at Corning Casino*, RED BLUFF DAILY NEWS (May 27, 2014), http://www.redbluffdailynews.com/news/ci_25845129/tribes-police-chief-says-federal-state-laws-violated#.

382. While "it is well-established that 'the ultimate determination of tribal governance must be left to tribal procedures,' . . . [i]t is equally well-established . . . that 'when an intra-tribal dispute has not been resolved and the [BIA] must deal with the tribe for government-to-government purposes, the Department may need to recognize certain individuals as tribal officials on an interim basis . . . .'" Alturas Indian Rancheria v. Acting Pac. Reg'l Dir., 54 IBIA 1, 8 (2011) (quoting Wasson v. W. Reg'l Dir., 42 IBIA 141, 158 (2006); George v. E. Reg'l Dir., 49 IBIA 164, 190 (2009)). When the latter occasion arises—when the BIA is forced to recognize certain individuals as tribal officials for government-to-government purposes—the rule is that the BIA must "recognize the last undisputed officials." *Id.* Numerous cases reiterate and affirm this rule. *See, e.g.*, *id.* at 186 ("The policy of recognizing particular individuals when necessary for government-to-government relations is normally applied 'by recognizing the last undisputed officials.'") (quoting Poe v. Pac. Reg'l Dir., 43 IBIA 105, 112 (2006)); Rosales v. Sacramento Area Dir., 32 IBIA 158 (1998) (applying last uncontested election results).

383. Letter from Troy Burdick, Superintendent, U.S. Dep't of Interior, Bureau of Indian Affairs to City of Orland Police Dep't & Connerstone Community Bank, Red Bluff Branch (Apr. 15, 2014) (on file with authors).

384. *Id.*

385. *See, e.g.*, *In re* Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003); Wasson v. Acting W. Reg'l Dir., 52 IBIA 353, 358 (2010).

386. In addition, on April 21, 2014, the National Indian Gaming Commission ("NIGC") director of compliance wrote to the Chairperson's faction, expressing concern "that the tribal government recognized by the BIA is not in control of the tribe's gaming operation and remains excluded from the premises" and "that the gaming at the Casino is not being conducted by the tribe—that is, by the governmental authority recognized by the Secretary of the Interior—or by an entity licensed by the tribal government pursuant to NIGC regulations." Toensing, *supra* note 373 (quotation omitted). "If true," the NIGC wrote, "the federally recognized tribal government is being deprived of the sole proprietary interest in and responsibility for the gaming operation." *Id.* However, this still was not enough to cause any outside governmental intercession because, according to local and state officials and other interested parties, neither the BIA nor the NIGC letters clearly recognized one faction or the other as "the Tribe." *See, e.g.*, Julie R. Johnson, *Tribal Conflict Escalates, Casino Shutdown Attempted*, CORNING OBSERVER (Jun. 9, 2014), http://www.appeal-democrat.com/corning_observer/tribal-conflict-escalates-casino-shutdown-attempted/article_7aed8b94-f056-11e3-80dd-0017a43b2370.html ("The sheriff's office said

With federal and local authorities sitting on the sidelines, the stakes were raised. Given the lack of action by any tribal or federal entity, the pre-April 12, 2014 Tribal Council "decided to take matters into [their] own hands" by causing a remote shutdown of the casino's computer system.[387] The Chairperson's faction retaliated by publically accusing the Original Tribal Council of "embezzling millions from tribal accounts" and increased hostile "encounters between tribal members and belligerent hired armed guards" at the casino and elsewhere.[388] Meanwhile, the Original Tribal Council continued to plead to the BIA, fearing that increased and continued violence would occur until the BIA, and in turn other outside law enforcement, intervened. On May 6, 2014, the BIA finally answered that Tribal Council's pleas—by refusing to answer. The BIA wrote:

> Previous decisions, or acknowledgments, concerning leadership disputes or identification of tribal officials may have been issued . . . ; however, recent [DOI] law reflects that the [BIA] is precluded from taking action on your request . . . . This Office recognizes that there are internal issues within the Tribe; however, . . . BIA lacks authority to intervene . . . as these issues are considered internal tribal matters and are to be resolved in a tribal forum, not by the [BIA].[389]

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in a press release, 'the Tehama County Sheriff's Office is dedicated to preserving public safety and has elected not to align itself with any particular group in this situation.'").

387. Third Party Complaint at 9, California v. Paskenta Band of Nomlaki Indians, No. 14-1449 (E.D. Cal. Jun. 26, 2014).

388. Toensing, *supra* note 373.

389. Letter from Dale Risling, Deputy Regional Director, Bureau of Indian Affairs, Pacific Regional Office, to David Swearinger, et al. (May 6, 2014) (on file with authors). Likewise, the NIGC sat idle, despite its responsibility to ensure peace at Paskenta through enforcement of the IGRA. Sandra J. Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545, 549–50 (2003). By late May 2014, Ken Many Wounds, a former NIGC regional director, issued an investigatory report based on an independent investigation he had conducted at the Tribe's casino, which concluded:

> In all, based on what I witnessed and learned . . . I am surprised that the NIGC has not taken swift action to shut down the Rolling Hills Casino, or at least issued a Notice of Violation by now. I know past NIGC Chairman who issued closure orders based on a much lesser degree of gaming law violation than what I saw during my visit. I am also surprised by the rather nonchalant pace of the NIGC's investigation, and the wholly improper lines of questioning; especially given the federal, state and tribal gaming law violations I saw from the casino floor and the potential for many more. I remain particularly astonished by the unprecedented show of force by armed guards currently on display at Rolling Hills Casino, and the palpable potential for violence, and the fact that this endangerment to the public has been allowed to continue by federal gaming regulators and other authorities for nearly nine weeks.

Paskenta Band of Nomlaki Indians' Third Party Complaint at 12, State v. Paskenta Band of Nomlaki Indians, No. 14-1449, (E.D. Cal. Jun. 26, 2014). Mr. Many Wounds' opinions were corroborated by the retired Tehama County sheriff, whose own report confirmed that "since April 12, 2014, armed guards were brought in. . . . [T]hey carried pepper spray, Tasers,

On June 9, 2014—almost two months after the dispute began—an armed standoff erupted between the two factions involving roughly 30 police from each faction, some "bearing masks with rifles, . . . extended magazines, and a canine."[390] The sheriff's reports stated that there was "no indication that the stand-off will conclude at any time soon."[391] Indeed, the Original Tribal Council indicated that "by and through its Tribal Police, [it] intend[ed] to . . . physically repossess and close Rolling Hills Casino."[392] During the standoff, an employee of the Chairperson's faction was arrested when he pulled a baton on a member of the Original Tribal Council.[393] Other employees reportedly "pointed rifles at Sheriffs deputies and threatened to 'send the dog' on them."[394] In response, the BIA finally flipped course and issued an administrative cease and desist order, stating that the BIA recognized the Original Tribal Council and that it would continue to do so until the "internal dispute can be resolved by the Tribe, pursuant to the Tribe's own governing documents and processes."[395] However, the order was immediately appealed by the

handguns, knives in boots and holsters, the K-9 unit had an AR-15 and the guards at the back of the building had AR-15s. . . . [T]he people in possession of the casino are willing to resort to violence to maintain the possession of the casino." *Id.* at 11. Meanwhile, upon the Sheriff's inquiry regarding whether the Tribe, through at least the Chairperson, "was running the casino," a witness "stated that 'he's not in charge of anything and that [a non-Paskenta casino general manager] is running everything.'" *Id.* In other words, the Tribe was, as NIGA feared on April 15, 2014, still not in control of the casino and the gaming was not being conducted by the Tribe, in violation of the IGRA. Declaration of Vice Chairman David Swearinger, California v. Paskenta Band of Nomlaki Indians at 6–7, No. 14-1449 (E.D. Cal. Jun. 18, 2014). Yet the NIGC did nothing to remedy that problem. In addition, the Chairperson's faction denied payment of gaming per-capita monies to the pre-April 12, 2014 Tribal Council and their families in violation of federal law, 25 CFR § 290.14 (2015); the NIGC also refused to take any enforcement action in that regard, feigning that "the tribal council is responsible for reviewing any disputes related to the distribution of gaming revenues." Letter from Douglas Hatfield, Director of Compliance, Nat'l Indian Gaming Comm'n, to David Swearinger, et al. (Oct. 6, 2014) (on file with authors).

390. Declaration of Joginder Dhillon in Support of Motion for Temporary Restraining Order at 3, California v. Paskenta Band of Nomlaki Indians, No. 14-1449 (Jun. 17, 2014).

391. *Id.* at 69.

392. *Id.* at 73.

393. *Id.* at 78.

394. *Id.*

395. United States Department of the Interior: Bureau of Indian Affairs, Administrative Cease and Desist Order, June 9, 2014.

Chairperson's faction, and, in accordance with 25 C.F.R. 2.6(b),[396] the effect of the order was stayed pending a determination on appeal.[397]

On June 17, 2014, the State of California, which too had sat on the sidelines for two months despite its own public safety obligations,[398] filed a complaint with the U.S. District Court for the Eastern District of California. The state alleged that that the Tribe was in breach of its gaming compact (and therefore the IGRA) by failing to ensure the "physical safety of Gaming Operation patrons and employees, and any other person while in the Gaming Facility," and by conducting "Class III gaming in a manner that endangers the public health, safety, or welfare."[399] The next day, the court issued a Temporary Restraining Order, enjoining both factions from: (1) "[a]ttempting to disturb, modify or otherwise change the circumstances currently in effect with respect to operation of the Rolling Hills Casino"; (2) "[d]eploying any armed personnel of any nature within 100 yards from the Casino"; and (3) "[p]ossessing, carrying, displaying, or otherwise having firearms on the Tribal Properties."[400]

On July 7, 2014, the parties announced that the governance dispute would be resolved through an election that "[a] mutually agreed upon CPA firm or forensic auditor will investigate all alleged financial improprieties and both parties will cooperate in good faith"; that no disenrollments would occur prior to the election; and that "the parties will agree upon a third party to address constitutional membership requirements."[401] On October 28, 2014, the court issued an order dismissing the case, stating "[t]he Paskenta Band of Nomlaki Indians appears to

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396. If a decision of the BIA is appealed, the decision will "remain ineffective during the appeal period." Wichita & Affiliated Tribes v. Acting Southern Plains Reg'l Dir., 58 IBIA 263, 266, 2014 WL 2417633, at *2 n.6 (2014); *see also* Yakama Nation v. Northwest Reg'l Dir., 47 IBIA 117, 119, 2008 WL 2802991, at *2 (2008) (noting that an appeal of the Regional Director's decision "would automatically be stayed" by § 2.6(b)). More specifically, it will remain "ineffective pending a decision on appeal," if any, by the Interior Board of Indian Appeals ("IBIA"). Miami Tribe of Okla. v. United States, No. 03-2220, 2008 WL 2906095, at *5 (D. Kan. July 24, 2008) (citing 43 C.F.R. § 4.314(a)); *see also* Del Rosa v. Acting Pac. Reg'l Dir., 51 IBIA 317, 319, 2010 WL 2679074, at *2 (2010) (same).

397. Letter from Alex Lozada, Rosette, LLP, to Amy Dutschke, Regional Director, Pacific Region, Bureau of Indian Affairs (Jun. 9, 2014), *available at* https://turtletalk.files.wordpress.com/2014/06/6-9-14-rosette-law-notice-of-appeal-of-bia-cease-and-desist-order.pdf.

398. *See generally* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

399. Complaint for Injunctive and Declaratory Relief at 2, California v. Paskenta Band of Nomlaki Indians, No. 14-01449 (E.D. Cal. Jun. 17, 2014).

400. California v. Paskenta Band of Nomlaki Indians, No. 14-1449 (E.D. Cal. Jun. 18, 2014). On July 7, the District Court entered an Order Granting Preliminary Injunction that extended the temporary order. California v. Paskenta Band of Nomlaki Indians, No. 14-1449 (E.D. Cal. Jul. 7, 2014).

401. Press Release, Paskenta Band of Nomlaki Indians, Paskenta Band of Nomlaki Indians Reaches Agreement to Settle Leadership Dispute (Jul. 7, 2014), *available at* http://www.prnewswire.com/news-releases/paskenta-band-of-nomlaki-indians-reaches-agreement-to-settle-leadership-dispute-266125761.html.

have cured its alleged breach of compact, and no imminent threat to the public health, safety, and welfare presently exists."[402]

The Chairperson's faction won the special election on September 14, 2014.[403] Within a week of the election, and notwithstanding the settlement agreement, the new Tribal Council summarily suspended or disenrolled the four former councilpersons and their families—about 80 people altogether.[404] Because the July 3, 2014 settlement agreement conferred jurisdiction to the American Arbitration Association for "the purpose of resolving disputes" and "improving the general welfare of the Paskenta Band of Nomlaki Indians," those summary suspensions and disenrollments are currently the subject of arbitration.[405] Otherwise, there would have been no forum for the families' challenges to the disenrollment.

The Chairman has given no explanation for the sudden upheaval of the Paskenta tribal government on April 12, 2014 but according to the former Tribal Council Vice Chairperson "the rift was initiated by a handful of casino executive staff, who are not tribal members, who provided factually incorrect and incomplete information to the tribal Chairperson, which caused him to take actions based on the faulty information."[406] Ironically, the one councilmember whose family was chiefly targeted for disenrollment—Leslie Lohse, the National Congress of American Indians Pacific Region Area vice-president and the BIA's Central California Agency Policy Committee chairperson—foresaw the impact that IGRA and the Tribe's gaming operations would have on Paskenta membership and identity roughly ten years earlier.[407] In a 2004 statement to Congress, Ms. Lohse stated:

> IGRA was written to support Tribal sovereignty, self-determination and growth. Instead, it is being used to degrade and detract from our Tribal Governments. As deals are cut, revisionist historians re-write our history, and profit-driven investors lure our Tribal Governments, our Tribal Nations . . . will continue to lose our identity . . . . Tribes are willingly signing and attesting to documents that will forever change our history and perhaps cause great damage to the future of Native Americans, all for the "projected profits" put before us by outside developers and investors.[408]

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402. California v. Paskenta Band of Nomlaki Indians, No. 14-1449 (E.D. Cal. Oct. 28, 2014).

403. First Amended Complaint, Swearinger v. Paskenta Band of Nomlaki Indians, No. 01-14-0001-5485 (Am. Arb. Ass'n Feb 6, 2015).

404. *Id.*

405. *Id.*

406. Julie R. Johnson, *Paskenta Tribal Battle Continues, Escalates*, CORNING OBSERVER (May 13, 2014), http://www.appeal-democrat.com/corning_observer/paskenta-tribal-battle-continues-escalates/article_fea7dcee-db09-11e3-a877-001a4bcf6878.html.

407. *Indian Gaming Issues: Hearing Before the Comm, on H. Resources' Subcomm. on Fisheries, Conservation, Wildlife, & Oceans*, 108th Cong. (Jul. 13, 2004) (Statement of Leslie Lohse, Treasurer, Paskenta Band of Nomlaki Indians of California).

408. *Gaming on Off-Reservation Restored and Newly-Acquired Lands: Oversight Hearing Before the Comm, on Resources*, 108th Cong. (2004) (Statement of Leslie Lohse, Treasurer, Paskenta Band of Nomlaki Indians of California).

Indeed, non-Indians and other outsiders—including casino managers, lawyers, lobbyists, consultants, and security companies—were the primary beneficiaries of the disenrollment saga at Paskenta, apparently to the tune of "millions in unrecoverable lost revenue and legal fees."[409]

2. Analysis

In contrast to the Nooksack disenrollment dispute discussed above, the Paskenta dispute appears to only be marginally related to enrollment eligibility, having much more to do with control of, and unfettered benefit from, the Tribe's very lucrative casino. In addition, non-Indian control appeared to play a significant role at Paskenta. Indeed, there appears to be a trend,[410] particularly in California—where small tribes and large casino revenues proliferate—of non-Indian interests taking the following steps to directly benefit from tribal casinos: (1) creating a disenrollment dispute; (2) using the disenrollment dispute as a proxy for a political takeover via recall, election, or hostile takeover;[411] (3) exerting control over a tribe's casino and other cash-generating enterprises—by violent force if necessary—and seizing the gaming money to pay the provocateur non-Indian attorneys, casino managers, and militia;[412] and (4) issuing press releases speaking of "disenrollment," "tribal factions," and "embezzlement" as to legitimize the takeover in the eyes of the remaining membership and BIA officials, who generally look for any excuse to perform their jobs with "indifference to tribes."[413]

Of course, small tribes, coupled with large per-capita checks, have also incentivized those in control to shrink the pool of recipients so that each member

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409. Alan Wileman, *Chukchansi: Lewis Faction Agrees to "Clean Slate Elections" in May, 2015*, SIERRA STAR (Aug. 26, 2014), http://www.sierrastar.com/2014/08/26/69290_chukchansi-lewis-faction-agrees.html?rh=1; *see also* Scott Smith, *California Indian Casinos Embroiled in Turmoil*, SUNDAY GAZETTE, Nov. 23, 2014, at E.1 ("It's all by design, lawyers and lobbyists taking advantage of a void of law and order in Indian country.").

410. *See generally* Gabriel S. Galanda, *Exposing Abramoff's Playbook: Exploiting, or Filling, the Ethical Void for Tribal Lawyers*, GALANDABROADMAN (Nov. 14, 2014), *available at* http://www.galandabroadman.com/wp-content/uploads/2014/11/Exposing-Abramoff's-Playbook-Exploiting-or-Filling-the-Ethical-Void-for-Tribal-Lawyers.pdf.

411. *See e.g.*, S. Rep. No. 109-325, at 59 (2006) ("We do a recall, election and take over. Let's discuss. E-mail from Jack Abramoff to associate Jon van Horne, February 14, 2002.").

412. *See id.* at 60 n.6 (e-mail between Jack Abramoff, Greenberg Traurig, and Michael Scanlon, Capitol Campaign Strategies, where Abramoff advises, "We're charging these guys up the wazoo . . . . Make sure you bill your hours like a demon. Almost no one else is billing this client yet, so there is plenty of room. You should be able to qualify for a hefty bonus just on this one").

413. Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 6 n.15 (2004) (quotation and internal citation omitted).

still standing will have a larger piece of the pie.[414] While efforts to correct membership errors made by previous generations or the federal government were perhaps sincere,[415] according to a recent study published by the University of Arizona's Native Nations Institute and the Harvard Project on American Indian Economic Development, gaming per-capita distributions have played a significant part in the IGRA-era disenrollment disputes.[416] Some scholars have even suggested that the IGRA's allowance of per-capita payments was *intended* to bring about membership disputes.[417] At minimum, when gaming tribes began distributing large per-capita payments, followed by unprecedented disenrollment actions, those tribes' actions "should probably be regarded with a degree of skepticism."[418]

While, the IGRA did impose upon tribes a "requirement to secure federal approval for any plan to distribute gaming revenues on a per-capita basis to members, presumably to prevent political favoritism or corruption," this has not always worked.[419] Per-capita payments are often outcome determinative in tribal elections, especially amidst leadership or membership disputes.[420] A common ploy is to schedule the disbursement of per-capita checks to coincide with tribal election voting.[421]

Certain tribes' irresponsible use of per-capita payments even caused Senator John McCain to propose an amendment to the IGRA in 2006 that would

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414. *See* Laughlin, *supra* note 25, at 110–11 ("With so much money flowing into these tribes . . . membership issues have increasingly come to the forefront as individuals clamor for a piece of the gaming revenue pie.").

415. *See* Dao, *supra* note 30 ("Tribal governments universally deny that greed or power is motivating disenrollment, saying they are simply upholding membership rules established in their constitutions.").

416. *See* STEPHEN CORNELL, ET AL., PER CAPITA DISTRIBUTIONS OF AMERICAN INDIAN TRIBAL REVENUES: A PRELIMINARY DISCUSSION OF POLICY CONSIDERATIONS 4 (2007), *available at* https://nnidatabase.org/db/attachments/text/JOPNAs/2007_CORNELL_etal_per_capita_distributions.pdf ("As the monies at stake have grown, so have disputes over tribal citizenship, with some nations removing people from the tribal rolls . . . . Such actions spawn politically intense, internally destructive, and costly conflicts . . . ."); *see also* Reitman, *supra* note 58, at 849 ("[T]here appears to be at least a rough correlation between gaming and membership abuses.").

417. *See* Laughlin, *supra* note 25, at 101 ("Although the federal government may not have enacted express terms of disenrollment, it is undeniable that Congress has influenced tribal membership criteria through the enactment of the IGRA.").

418. Reitman, *supra* note 58, at 817.

419. Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 95 (2010).

420. Agnes Terrance, *Letter to the Editor*, INDIAN TIME (Feb. 27, 2014), http://www.indiantime.net/story/2014/02/27/letters-to-the-editor/letters-to-the-editor/13134.html; Orlan Love, *Meskwaki Vote Could Heal Wounds from Power Struggle*, KCRG 9 ABC (Jan. 24, 2010), http://www.kcrg.com/news/local/82551772.html#ewHt286tQfXoje5B.99.

421. Gabriel S. Galanda, *Tribal Per Capitas and Self-Termination*, INDIAN COUNTRY TODAY (Aug. 13, 2014), http://indiancountrytodaymedianetwork.com/2014/08/13/tribal-capitas-and-self-termination.

have required federal oversight of a "reasonable method of providing for the general welfare of the Indian tribe and the members of the Indian tribes."[422] While tribes were rightly outraged by Senator McCain's proposed encroachment upon tribal sovereignty, tribes were also put on notice that federal decision-makers are not afraid to act on tribes' improper use of per-capita dollars. Indeed, money-driven membership disputes and related civil rights violations by some tribes continue to provide federal lawmakers, who are already critical of tribal sovereignty, with ample reason to abrogate the self-governance rights of all tribes.

As federal deference to tribal control of disenrollment determinations has increased,[423] so has intratribal violence. In 2010, Janice R. McRae hypothesized that, "[a]s the disenrolled tribal members experience an abrogation of identity and recognition, it is apparent that such could elicit aggressive behavior as a reflection of their frustration."[424] As we have seen, this is not a new phenomenon.[425] Recall the Osage headrights that led to "conflict and violence within the Tribe."[426] The violence at Paskenta is the result of the same federal policy. And, what is more, this type of intratribal violence is proliferating.[427]

Unfortunately, federal agencies, courts, or any other modes of outside law enforcement, usually will not intercede until violence occurs. For example, in *California v. Picayune Rancheria of Chukchansi Indians*, the State of California sued to enjoin operation of the casino pursuant to the Chukchansi Tribe's gaming compact, which mandated that the Tribe not "conduct Class III gaming in a manner that endangers the public health, safety, or welfare."[428] According to the court:

> [T]he parties' inability to resolve their ongoing intra-tribal dispute over Tribal governance indicates that the underlying impetus for the armed conflict has yet to dissipate . . . . *[T]he public safety issue that has injected a Federal Court into business generally delegated by law to the Indian Tribes* still exists. As such, the Court finds that the public health and safety danger would continue to exist if the Casino were to be reopened at this time . . . . [A] group of individuals

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422. *Indian Gaming: Hearing Before the S. Comm. on Indian Affairs* (2006) (Statement of Ron His Horse Is Thunder, Chairperson, Standing Rock Sioux Tribe).

423. *See* Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT'L L. 1, 17–18 (2009) ("In recent decades, federal deference to tribal control of membership seems to be increasing.").

424. Janice R. McRae, Identity Delegitimization and Eco-Enterprise: A Comparative Study of the Process of Disenrollment in Native American Communities (2010) (unpublished Ph.D. dissertation, George Mason University), *available at* http://digilib.gmu.edu/jspui/bitstream/1920/5804/1/McRaeDissertatnFinal.pdf.

425. Indeed, in the absence of any form of modern constitutional redress, natural law predicts modes of private redress. GROTIUS, ON THE LAWS OF WAR AND PEACE (Stephen C. Neff ed., 2012).

426. FIXICO, *supra* note 242.

427. Smith, *supra* note 16.

428. California v. Picayune Rancheria of Chukchansi Indians, No. 14-1593, 2014 WL 5485940, at *1 (E.D. Cal. Oct. 29, 2014).

> attempted an armed take over of the Casino through the use of violence and intimidation. This act was illegal in the eyes of any lawful body, and constituted the worst sort of street injustice.[429]

Legal scholars echo this sentiment. As Professor Barker has noted, the effects of this newest disenrollment surge are more than superficial in that what makes all of this tribal "greed and corruption so troubled and troubling is the way that . . . tribes throughout the country have rationalized the disenrollments of historically affiliated families on the grounds of exercising their legal rights to sovereignty and self-government as not only legally absolute and unchallengeable but as culturally integral."[430] But this is not true sovereignty—it "is a sovereignty . . . inflicted through racialized notions of Native authenticity [and] perpetuate[s] stereotypical notions . . . in order to dismiss both public scrutiny and internal accountability of their actions as anti-Indian and anti-tribal sovereignty."[431]

Of course, it did not have to be this way. That the authority to make intratribal disenrollment determinations was "delegated by law to the Indian Tribes" via federal regulations and policies, is simply a byproduct of the assimilation and termination policies of yesteryear—policies that have now spiraled out of control.[432] As noted above, as late as 1988, the DOI concluded that it had "broad and possibly nonreviewable authority to disapprove or withhold approval . . . regarding membership."[433] Because the DOI and its BIA abruptly removed themselves from this arena, this means that they won't—not that they can't—make these determinations as a matter of federal policy.[434] Due to this vacuous magic, Indian country continues to suffer.

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429. *Id.* at *5 (emphasis added).

430. BARKER, *supra* note 22, at 178.

431. *Id.*; Smith, *supra* note 16. Examples of post-disenrollment intratribal violence exist throughout Indian country. *See, e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 878 (2d Cir. 1996) (Tonawanda Band of Seneca Indians); Vic Cantu, *Tribal Standoff: Protesters Arrested at Oroville's Berry Creek Rancheria*, CHICO NEWS & REVIEW (May 23, 2013), http://www.newsreview.com/chico/tribal-standoff/content?oid=9959081 (Berry Creek Rancheria); Jim Diamond, *The Deadly Trend of American Indian Disenrollment*, C.T. NEWS (Mar. 13, 2014), http://blog.ctnews.com/diamond/2014/03/13/the-deadly-trend-of-american-indian-disenrollment/ (Cedarville Rancheria); Francis X. Donnelly, *Tribes Squabble Over the Profits*, DETROIT NEWS, Dec. 18, 2000, at 5A (Keweenaw Bay Indian Community); Ian Lovett, *Power Struggle Over Indian Tribe Splinters Into Violence in California*, N.Y. TIMES (Feb. 28, 2012), http://www.nytimes.com/2012/02/29/us/chukchansi-indian-tribe-dispute-heats-up-in-california.html?_r=0 (Picayune Racheria of the Chukchansi Indians); Greg Tuttle, *Arrest of Paiute Police Chief, Husband Sparks Tribal Protests*, LAS VEGAS SUN (Sept. 12, 2000), http://www.lasvegassun.com/news/2000/sep/12/arrest-of-paiute-police-chief-husband-sparks-triba/ (Las Vegas Paiute Tribe).

432. *Picayune*, 2014 WL 5485940, at *5.

433. Brownell, *supra* note 142 (internal quotation omitted).

434. The NIGC, too, has generally taken a similar hands-off policy, also to the detriment of Indian gaming interests. The Authors have written on this topic elsewhere. *See e.g.*, Gabriel Galanda & Ryan Dreveskracht, *The Bay Mills Buck Stops With NIGC*, INDIAN COUNTRY TODAY (Nov. 6, 2013), http://indiancountrytodaymedianetwork.com/2013/

III. MASS TRIBAL DISENROLLMENT AT A CRITICAL POINT

Throughout U.S. history, disenrollment has proven to cause the following harms: (1) the perpetuation of federal policies that mandate an arbitrary, aberrant, and forced biological division between Indians and non-Indians, to the detriment of the former; (2) assimilation and the loss of the tribal land base and related Indian cultural identity; (3) wholesale termination of the federal–tribal relationship; (4) a lack of redress to Indians aggrieved by their tribal leaders; (5) intratribal factionalization; (6) Indian-on-Indian violence; and (7) disregard of the federal fiduciary duty.

It is time to find a cure to the disenrollment epidemic. Indeed, at this point, the very existence of tribal sovereignty has become endangered as a result of disenrollment. As noted by Eric Reitman, "if the basis of sovereignty is the consent of the governed, no popular sovereign can long endure the derogation of citizenship rights absent an external force to maintain order or rebalance the system."[435] Where citizenship abuses are habitually irremediable, tribal governance must either self-terminate or adopt some form of government outside of the realm of the popular sovereign.[436] To a large extent, therefore, the sovereign that allows the destruction of citizenship rights also permits the diminution of its own power.[437] And where the sovereign itself causes the abuses, seeking to hush dissidents and magnify its own clout, it triggers a vicious cycle of ever weakening sovereignty which, if left unrestrained, will ultimately discredit the polity.[438] Membership is the floor for a set of citizen rights, but it cannot be a null set.[439] When all a person gains from association can be promptly and summarily removed, the sovereign is a failure.[440] Any polity that fails to deliver security against forcible expulsion and subjugation, even if it never commences the actions, "is something less than a republic, and, at least arguably, something less than sovereign."[441]

11/06/bay-mills-buck-stops-nigc; *Ask the Experts: Spotlight on 2015 and Beyond*, 24 INDIAN GAMING 16, 20–21 (2014); *see also* Anthony Broadman, *The NIGC Can Fix Bay Mills*, GALANDA BROADMAN BLOG (Oct. 7, 2013), http://www.galandabroadman.com/2013/10/the-nigc-can-fix-bay-mills.

435. Reitman, *supra* note 58, at 839, 841.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.* Because tribes currently lack jurisdiction over non-Indians in many contexts, see, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Montana v. United States*, 450 U.S. 544 (1981), disenrollment also subtracts from the ability of a tribe to assert jurisdiction. *See* Matthew L.M. Fletcher, *Cherokee Nation: Underhanded Racial Politics*, N.Y. TIMES (Jan. 22, 2013), http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/cherokee-nation-underhanded-racial-politics (arguing that "[a]n Indian tribe is a group of individual Indians who are linked by geography, culture, politics and ancestry" who practice "weak-form tribal sovereignty" via their "power to define membership" and that if a tribe wishes to "develop into a nation" it must "exercise[]

What should be clear by this point is that *disenrollment*—as opposed to setting limits on enrollment—*is not an exercise of inherent tribal sovereignty*. The federal government itself has explicitly and repeatedly recognized this principle, even into the modern era.[442] Instead, disenrollment is an exercise of outdated and archaic federal policies that were intended to destroy tribal sovereignty—to have it replaced by a "definition of sovereignty that . . . replicat[es] many of the kinds of abuses we once fairly accused the United States of engaging in."[443]

Tribal sovereignty is "immersed in historic indigenous values" that "bind a community together";[444] it "consist[s] more of continued cultural integrity than of political powers,"[445] and "revolves around the manner in which traditions are developed, sustained, and transformed to confront new conditions" and "involves most of all a strong sense of community discipline."[446] Tribal sovereignty utilizes "peace-making, mediation, restitution and compensation to resolve the inevitable disputes that occasionally ar[i]se,"[447] and is founded in "spiritual values [and] kinship systems . . . that enabled each Native nation, and the individuals, families, and clans constituting those nations, to generally rest assured in their collective and personal identities and not have to wonder about 'who' they are."[448]

Disenrollment is the antithesis of tribal sovereignty. Disenrollment is based upon federal principles intended to terminate American Indians' values and principles, incentivize the solidification of economic and political clout, and to winnow out those who disapprove of the direction taken by individuals or subgroups aligned with the federal government.[449] Federal per-capita, termination (e.g. Osage, Creek, and Northern Ute), IRA (e.g. Nooksack), and "hands-off" (e.g. Paskenta) policies and practices do not support tribal sovereignty. These modes are all creations of the federal government, which have disserved tribal governments for the last 150 years. A collaborative solution to the modern tribal disenrollment crisis is greatly needed.

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a robust form of sovereignty over its territory and all people within its territory," something that disenrollment prohibits).

442. Beck v. Bureau of Indian Affairs, 8 IBIA 210, 1980 WL 26409 (1980) (noting that the BIA "has been delegated the task of deciding disenrollment appeals"); Alaska Native Disenrollment Appeals of: James Edward Scott, Sr. & Robert Charles Scott, 7 IBIA 157, 1979 WL 21359 (1979) (determining that the BIA, and the IBIA have authority to decide "Alaskan Native disenrollment appeals on an ad hoc basis").

443. David E. Wilkins, *A Most Grievous Display of Behavior: Self-Decimation in Indian Country*, 2013 MICH. ST. L. REV. 325, 338 (2013).

444. *Id.* at 328.

445. Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, *in* ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS 22, 22 (Roxanne D. Ortiz ed., 1979).

446. *Id.*

447. Wilkins, *supra* note 443, at 330.

448. *Id.* at 329.

449. *Id.* at 335.

A. Lack of a Current Remedy

1. Federal Courts

Santa Clara Pueblo v. Martinez "is generally employed as the starting point for any contemporary tribal citizenship rights analysis."[450] *Santa Clara Pueblo* concerned whether the ICRA provided a federal cause of action when a "tribe's right to define its own membership" conflicts with an individual's right to be protected from sexual discrimination.[451] The Court held that these two ideals may indeed conflict, but that the ICRA does not create a federal cause of action for habeas corpus unless a tribal government's "discriminatory internal restrictions on their members" [452] place a "restriction[] on liberty resulting from a criminal conviction."[453] Yet despite the rather narrow holding in *Santa Clara Pueblo*, the meaning of the case has mushroomed.[454]

Poodry v. Tonawanda Band of Seneca Indians[455] held that permanent banishment as a punitive sanction qualified as such a restriction on liberty because "Congress could not have intended to permit a tribe to circumvent ICRA's habeas provision by permanently banishing, rather than imprisoning, members 'convicted'" of a crime.[456] Since *Poodry*, tribal lawyers[457] have been clever enough to avoid disenrollment-related castigations that outright "banish." [458] In *Tavares v. Whitehouse*, for instance, the court held that if a tribe permanently disenrolls its members, excluding them from some tribal facilities, but not necessarily all, "those members have not suffered a sufficiently severe restraint on liberty to constitute detention and invoke federal habeas jurisdiction under ICRA."[459]

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450. Reitman, *supra* note 58, at 851.

451. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.36 (1978).

452. Spencer Sloan, *Accommodation and Rectification: A Dual Approach to Indigenous Peoples in International Law*, 51 COLUM. J. TRANSNAT'L L. 739, 746 (2013).

453. Zolicoffer v. U.S. Dep't of Justice, 315 F.3d 538, 540 (5th Cir. 2003).

454. *See supra* notes 177–79 and accompanying text.

455. 85 F.3d 874 (2d Cir. 1996).

456. *Id.* at 895.

457. Amidst the disenrollment epidemic, there is an alarming trend of tribal lawyer-catalyzed disenrollment efforts, which raises various questions of tribal lawyer ethics and morality. As one of the Authors has previously argued:

> When lawyers advocate, cause or facilitate *any* disenrollment proceeding that lacks a good faith basis in law and fact, they are violating ethical rules or norms—and acting immorally . . . . Tribal legal counsel's most frequent claim of "erroneous enrollment" as the basis for jettisoning unpopular or dissident Tribal members, typically lack [such] good faith basis . . . . Even more egregious are lawyer-advised disenrollment proceedings that are designed to strengthen a Tribal Council faction's ability to control Tribal assets and remain in power.

Galanda, *supra* note 410.

458. *But see* Sweet v. Hinzman, 634 F. Supp. 2d 1196 (W.D. Wash. 2008).

459. Tavares v. Whitehouse, No. 13-2101, 2014 WL 1155798, at *8 (E.D. Cal. Mar. 21, 2014) (citing Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2010)).

What is important to note about *Santa Clara Pueblo*, *Poodry*, and *Tavares* is that they are jurisdictional decisions—i.e., "wholly separable from the merits of the underlying litigation."[460] The fact that the underlying litigation in these cases involves "membership disputes" should be of no import. The courts did *not* rule that "[f]ederal courts have no jurisdiction to hear tribal membership disputes"[461]—they simply held that the ICRA did not create a cause of action for habeas corpus when something less than a restriction on liberty resulting from a criminal conviction is involved. The *Santa Clara Pueblo* fiction must cease to be told.

2. State Courts

It is well established that "[s]tates may not assert jurisdiction over tribes without congressional approval."[462] However, Public Law 280 granted certain states, such as California, "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action."[463] "The primary concern of Congress in enacting Public Law 280," however, "was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."[464] Accordingly, Public Law 280 allowed state courts to enforce state criminal laws with respect to offenses committed either by or against Indians on Indian land. With respect to the grant of civil jurisdiction, while acknowledging that the legislative history of Public Law 280 reflects a "virtual absence of expression of congressional policy or intent," it has held that the statute was intended to confer federal jurisdiction upon states where "private legal disputes between reservation Indians, and between Indians and other private citizens" was involved.[465] Its effect, therefore, was "to grant jurisdiction over private civil litigation involving reservation Indians in state court."[466] But Public Law 280 clearly did not confer state "jurisdiction over the tribes themselves."[467] Thus, because enrollment disputes are not "private legal dispute[s] between reservation Indians, but rather go[] to the heart of tribal sovereignty," state courts claim to have no jurisdiction to adjudicate them.[468]

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460. Gayle Gerson, *A Return to Practicality: Reforming the Fourth* Cox *Exception to the Final Judgment Rule Governing Supreme Court* Certiorari *Review of State Court Judgments*, 73 FORDHAM L. REV. 789, 815 n.164 (2004).

461. M. Alexander Pearl, *Symposium Introduction*, 9 FLA. INT'L L. REV. 207, 208 n.8 (2014).

462. Aroostook Band of Micmacs v. Ryan, 484 F.3d 41, 71 (1st Cir. 2007); *see also* Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g, 476 U.S. 877, 891 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.").

463. *Aroostook Band of Micmacs*, 484 F.3d at 52 (citing 28 U.S.C. § 1360(a)).

464. Bryan v. Itasca Cnty., 426 U.S. 373, 379 (1976).

465. *Id.* at 381, 383.

466. *Id.* at 385.

467. *Id.* at 389.

468. Lamere v. Superior Court, 131 Cal. App. 4th 1059, 1064 (2005); *see also* Healy Lake Vill. v. Mt. McKinley Bank, 322 P.3d 866 (Alaska 2014); Ackerman v. Edwards, 121 Cal. App. 4th 946 (2004).

3. Tribal Courts

The majority of tribal constitutions "explicitly authorize involuntary expatriation without securing for citizens any countervailing rights."[469] To the extent that tribal governments even have an independent judiciary[470]—again many do not[471]—the authority to adjudicate disenrollment disputes must be delegated by tribal law, along with a corresponding waiver of sovereign immunity or a common law directive akin to the *Ex parte Young* fiction.[472] And even when jurisdiction is conferred in this manner, there is no means to enforce a court's decision unless the tribal council—often the governmental body that is compelling the disenrollment action in the first place—orders to do so itself.[473] In addition, the tribal council may interfere by making procedural changes to the law—changing the rules of the game as its being played[474]—or even removing judges who make decisions that it is unhappy with.[475] And on a practical note, many tribal judges "are more interested in

469. Reitman, *supra* note 58, at 796.

470. *See* Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 109 (2005) (noting that some "tribes have blended the executive and judicial arms, with the tribal council serving as the highest court of appeals," while "[o]ther tribes completely lack an appellate mechanism.").

471. *See* Matthew L.M. Fletcher, California v. Cabazon Band: *A Quarter-Century of Complex, Litigious Self-Determination*, FED. LAW., Apr. 2012, at 50, 53 ("[California gaming] tribes usually do not have a tribal court system, and federal courts generally do not have jurisdiction over tribal membership claims. Therefore, assuming these Indians have lost their membership in the tribe illegitimately, they have little recourse.").

472. *See, e.g.*, Lomeli v. Kelly, No. 2013-CI-APL-002, 12 NICS App. 1 (Nooksack Ct. App. Jan. 15, 2014). Ex parte Young creates an exception to tribal sovereign immunity, described by the Ho-Chunk Tribal Court as follows:

> [T]he principle of sovereign immunity exists primarily to protect the public treasury from lawsuits seeking damages. It does not prevent people from suing the . . . government to enforce their rights . . . . Essentially, the plaintiff seeks to affect the future actions of the official or employee in an effort to avoid a continuing violation of the law. A plaintiff will typically request injunctive relief against the official or employee entrusted with implementing an allegedly illegal statutory provision.

Kirkwood v. Decorah, No. 04-33, 2005 WL 6161103, at *13 (Ho-Chunk Tribal Ct., Feb. 11, 2005) (citation and quotation omitted). As noted by the leading treatise: "the doctrine of Ex parte Young [i]s indispensable to the establishment of constitutional government and the rule of law." Wright & Miller, *Ex Parte Young*, *in* 17A FED. PRAC. & PROC. JURIS. § 4231 (3d ed. 2013).

473. MacArthur v. San Juan Cnty., 497 F.3d 1057, 1076 (10th Cir. 2007).

474. *See e.g.*, *supra* notes 335–37 and accompanying text.

475. *See, e.g.*, Pura v. Quinault Housing Authority, No. CV-12-002, at 4-5 (Quinault Ct. App. Aug. 27, 2013) (two trial court judges removed after making rulings adverse to the tribe); Longie v. Pearson, 210 F.3d 379 (8th Cir. 2000) (tribal court judge "complaining that, pursuant to a Council resolution, he was illegally removed from his position as Chief Judge in violation of tribal law, the Tribe's constitution, and federal law" after making a decision adverse to the tribe); Lewis v. White Mountain Apache Tribe, No. 12-8073 (D. Ariz. Jul. 6, 2012) (Tribal Council Resolution removing a tribal court judge after making a decision adverse to the Tribe); Robert Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Court*, 46 AM. J. COMP. L. 287,

implementing policies—against domestic violence, for example—than providing due process and a level playing field for both parties."[476]

This is not to say that tribal courts are always insufficient. Indeed, numerous disenrollment battles have been waged and won in a tribal tribunal.[477] But the point remains that, globally speaking, tribal courts only provide a solution to those tribes that are already acting as responsible governments—they do not provide disenrollees a comprehensive remedy.[478]

4. International Forums

Without international tribunals demanding that tribal governments be accountable, the disenrollment crisis will reach a boiling point, and the principles of tribal self-government will be legally dismantled.[479] As described by Attorneys Jana M. Bergera and Paula M. Fisher:

> [T]here is no relief from the [U.S. government], which claims its hands are tied despite the trust oversight duties that are owed to tribal people. The federal courts and state courts will not enter this arena of dispute and where there are no tribal courts, there is no place for justice. This is the modern-day version of the termination era come back to plague tribal people. Now tribal governments are destroying their own tribal communities by disavowing their own grandparents, parents, sisters, and brothers. In many instances, there is nothing that can be done legally to stop this result.[480]

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318 (1998) (discussing removal of tribal court judges at White Mountain Apache Tribe and the Confederated Tribes of Warm Springs); *but see* Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, 36 HUM. RTS. 16, 19–20 (2009) (noting improvement on this front in more recent years). This is not to imply that tribes taking this action is the norm—indeed, it is very small minority of tribes that take this action. A very large majority of tribes have independent judiciaries and keep them that way—even if accomplished by way of the judiciary itself. *See, e.g.*, White v. Porch Band of Creek Indians, No. SC-10-02 (Porch Band of Creek Indians Tribal S. Ct. Apr. 5, 2011); White v. Porch Band of Creek Indians, No. SC-12-01 (Porch Band of Creek Indians Tribal S. Ct. Aug. 5, 2013). In *Lac Vieux Desert Band of Lake Superior Chippewa Indians Tribal Council v. Lac Vieux Desert Band Tribal Police*, Nos. 10-CV-79 to 82 (Lac Vieux Desert Band of Lake Superior Chippewa Indians Ct. App. Sept. 11, 2010), a trial court judge even ordered the jailing of the entire tribal council for failure to comply with a court order in a tribal election dispute.

476. Lewis III, *supra* note 5, at 10.

477. *See, e.g.*, Cholewka v. Grand Traverse Band Tribal Council, No. 2007-737-CV-CV, 2009 WL 1616009 (Grand Traverse Tribal Ct. Mar. 4, 2009); Lahaye v. Enrollment Comm'n, No. 05-131-EA, 2006 WL 6358356 (Little River Tribal Ct. May 15, 2006), *aff'd sub nom.*, Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n, No. 06-113-AP, 2007 WL 6900788 (Little River Ct. App. Jun. 24, 2007); McPherson v. LRBOI Enrollment Comm'n, No. 06090EA, 2007 WL 6900799 (Little River Tribal Ct. Jul. 9, 2007).

478. Lewis, *supra* note 5, at 10.

479. Diamond, *supra* note 30, at 47.

480. Berger & Fischer, *supra* note 30, at 71.

Generally, when there is no domestic forum to litigate these types of disputes, international forums are evoked to provide the necessary relief.[481]

The problem with appeal to international forums is two-fold. First, a party cannot reach an international forum unless the party first exhausts all domestic remedies,[482] including a petition to the U.S. Supreme Court.[483] This requirement has the potential to cost a party inordinate amounts of money[484]—which bankrupt disenrollees, in particular, do not have[485]—and can take ten years or more to fully and finally litigate to exhaustion.[486] This means that, by the time a disenrollee is able to bring suit in an international forum it will be too late; the member will be long past disenrolled and they will have already suffered irreparable harm.

Second, even if a disenrollee obtains a "remedy" internationally, the offending tribe is not required to honor it. Based on the public international law doctrine of sovereign immunity, "a sovereign's immunity is extraterritorial and absolute."[487] When federal, state, or foreign sovereign immunity is at issue, domestic "courts look at whether the sovereign has waived its immunity (or otherwise consented to suit) or Congress has abrogated it."[488] This same rule applies to tribal sovereign immunity because Congress has not waived tribal immunity in this regard.[489] Unless and until Congress acts, or a disenrolling tribe voluntarily waives its immunity, domestic enforcement of any ruling rendered by these tribunals will be largely unattainable.

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481. *See, e.g.*, Richard Trink, *Lakota Efforts in the International Arena*, 4 WICAZO SA REV. 39 (1988).

482. *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 829 (9th Cir. 2008) ("'The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.'" (quoting Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 26 (Mar. 29))).

483. *See* Loewen Group v. United States, ICSID Case No. ARB(AF)/98/3 Award, ¶ 54, (2003) (refusing to analyze a petitioner's legal claims because in failing to appeal to the U.S. Supreme Court, the petitioner did not exhaust his domestic remedies).

484. Adriene Hill, *How Much Does a Big Supreme Court Case Like Gay Marriage Cost?*, MARKETPLACE ECON. (Mar. 25, 2013, 1:03 PM), http://www.marketplace.org/topics/economy/how-much-does-big-supreme-court-case-gay-marriage-cost (estimating that the cost of bringing a case before the U.S. Supreme Court is at least $250,000 and, more likely, millions of dollars).

485. Curtis, *supra* note 191; Gabriel S. Galanda, *Disenrollments Are Bankrupting Our Tribal Nations*, INDIANZ (Jan. 15, 2015), http://indianz.com/News/2015/016140.asp.

486. *See, e.g.*, Oneida Indian Nation of N.Y. v. City of Sherrill, 145 F. Supp. 2d 226 (N.D.N.Y. 2001), *aff'd*, 337 F.3d 139 (2d Cir. 2003), *rev'd sub nom.* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005); Oneida Indian Nation of N.Y. v. Madison Cnty., 401 F. Supp. 2d 219 (N.D.N.Y. 2005), *aff'd sub nom.* Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149 (2d Cir. 2010), *vacated sub nom*, Madison Cnty. v. Oneida Indian Nation of N.Y., 562 U.S. 42 (2011); Oneida Indian Nation of N.Y. v. Madison Cnty., 665 F.3d 408 (2d Cir. 2011), *cert. denied*, 134 S. Ct. 1582 (2014).

487. William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1608 n.118 (2013).

488. *Id.*

489. *Id.*

As discussed above, there is otherwise a lack of domestic remedies. Neither federal nor state courts possess subject matter jurisdiction to entertain the disputes, and many tribal courts—if they exist—are hamstrung by tribal politics. Both Congress and the executive branch, including the Secretary of the Interior and his BIA, have recently taken a hands-off approach.

B. Finding a Remedy

In this subsection, we canvas the various options proposed to help end the disenrollment crisis. We submit that existing federal permissiveness allows tribal governments to abuse their power, subjecting individual Indians to appalling restraints on their liberty, free speech, and political participation.[490] Legal scholars concur: the federal government has a duty to curb that power.[491] This may well require congressional intervention, as has been proposed by numerous Indian law scholars.[492] But especially given that a majority of bills in Congress do not pass and that the current Congress is infamously divided, dysfunctional, and unable to enact even the most pressing legislation, we also discuss less drastic routes.[493]

1. Tribal Responsibility

Ultimately, it is up to tribal governments put an end to the disenrollment crisis as a matter of responsible governance. It took the American Civil War—and roughly 750,000 deaths—for the United States to determine, as a matter of federal law, who has a right to participate in the American political process, how that right is to be determined, and whether or not that right can be removed.[494] The process of making this determination took hundreds of years. In the end, the U.S. government resolved that, while it certainly retained its formal authority, as a sovereign, "to determine who is, and who is not, a citizen, . . . it does not have sufficient authority—or perhaps even raw power—to expel those who 'don't count' as official members of the American community."[495]

Indian country is at a critical juncture.[496] As Professor Matthew L.M. Fletcher put it: "American Indian tribes will each face decisions about how to define themselves in coming decades. Eventually, each tribe's decision will determine

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490. Reitman, *supra* note 58, at 799.

491. *Id.* at 800.

492. *See id.* at 801 ("It is up to Congress to determine whether determine whether [a tribal membership] revolution will take the form of a series of violent uprisings or a bloodless sea change in the extent to which tribes are permitted to retain control over their membership."); Smith, *supra* note 16.

493. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 94 (2015).

494. Levinson, *supra* note 313, at 986.

495. *Id.* at 987.

496. *See* Stacy L. Leeds & Erin S. Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, 46 ARIZ. ST. L.J. 89, 102 (2014) ("[T]ribes must recognize that the eyes of the world are watching. They must recognize that there are generally accepted international norms with which sovereigns must be willing to comply.").

whether that tribe will develop into a nation or remain a tribe."[497] Nations, as opposed to tribes, do not concern themselves with force-fed notions of membership, rolls, or monthly dues—nations do not function as private culture clubs.[498] Modern states provide for the "automatic acquisition of citizenship status at birth," and the right to retain citizenship indefinitely once it has been conferred.[499] If tribes wish to be treated as nations, they must begin to act like it.[500] The Federated Indians of Graton Rancheria, for instance, have done just that. In April of 2013—on the heels of opening the Bay Area's largest casino, with projected profits at $418 million annually—the Graton tribe revised its constitution to prohibit disenrollment.[501] According to Graton's Chairperson Greg Sarris: "We saw the money coming, . . . We saw the changes coming. We saw the challenges and we said, 'Let's do something that could prohibit disenrollments in our tribe.'"[502]

Likewise, the Passamaquoddy Tribe of the Pleasant Point Reservation amended its constitution to proclaim that "the government of the Pleasant Point Reservation shall have no power of banishment over tribal members."[503] One of the Pasamaquoddy authors of that constitutional amendment essentially explained the law as being one intended to disallow disenrollment: "We felt that . . . we had to do this. It wouldn't be right for us to say we have the power to decide who no longer is one of us."[504]

Certainly, tribal constitutional reform on a more general level provides numerous avenues for improvement. Changes that protect members' basic rights, such as guaranteed participation in tribal elections, the right to receive tribal services and benefits, the right to be free from arbitrary and capricious government actions,

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497. Fletcher, *supra* note 264.

498. *See* Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1293 (2004) (noting that the Supreme Court has recently "perceived the functions of a tribe serving no greater purpose than that of a private club or organization" in that "like the Boy Scouts of America, tribes may only enact and enforce rules for members who consent to the rules of the 'club'"). For the difference between "tribes" and "nations" as the terms are used by Indian law scholars, see generally Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 Am. Indian L. Rev. 1 (2012).

499. Rainer Bauböck, *The Three Levels of Citizenship Within the European Union*, 15 GERMAN L.J. 751, 753 (2014).

500. Seelau, *supra* note 29.

501. Jeremy Hay, *Graton Rancheria's Disenrollment Rules Defy Trend*, PRESS DEMOCRAT (Apr. 5, 2013, 1:48 AM), http://www.pressdemocrat.com/news/2219911-181/graton-rancherias-disenrollment-rules-defy?page=2.

502. *Id.* Unfortunately, disenrollment remains taboo amongst tribal leaders nationally. *See* Galanda, *supra* note 410 ("Tribal leadership and disenrollment disputes are taboo in forums like the National Congress of American Indians and National Indian Gaming Association.").

503. Kunesh, *supra* note 61, at 111(quotation omitted).

504. *Id.*

and a waiver of tribal sovereign immunity in a tribal forum when these rights are contravened, are just a few examples of these improvements.[505]

To ensure that any reform is effective, any changes to tribal law or policy should address the following:

- *Stability*. Regulations and rules should not be allowed to change frequently, and if by chance they do need to be changed, they must be changed only by prescribed procedures and in limited scope.[506]
- *Protection from political interference.* Any disenrollment determination should be made by an independent tribal office or entity; one not beholden to the tribal council. Establishing a separate corporation to manage economic development matters and having a board of directors that is accountable to the tribal council or another arm of the tribe, such as an economic development board, will also help to ensure that gaming revenue and disenrollment remain completely separate.[507]
- *Reliability.* Whatever institution is set up to manage disenrollment issues should be governed by rules that are extant, effective, respected, and reduce uncertainty about the future of the tribe.[508]
- *A dispute resolution mechanism*. As succinctly described by Attorney Brendan Ludwick, "[P]erhaps most important [as] an effective safeguard against tribal disenrollment is an independent tribal authority that has the power to review . . . enrollment actions."[509] Although this power may be conferred to an appointed or elected committee, comprehensive oversight

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505. *See* Lewis, *supra*, at 13 ("The biggest threat to tribal sovereignty is failure to provide an adequate remedy in tribal court and failure to hold tribal officials accountable."). In addition, if the tribe wishes to entrust disenrollment decisions to an outside forum (and at the same time utilize federal resources instead of its own), a constitutional disenrollment scheme that consents to federal review under 25 C.F.R. § 62.4(a) also affords additional protection for the disenrollee.

506. *See* Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 23 (Miriam Jorgensen ed., 2007) ("Governing institutions must *be stable*. That is, the rules don't change frequently or easily, and when they do change, they change according to prescribed and reliable procedures.").

507. *See* Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, 51 FED. LAW. 37, 44 (2004) ("To the extent that elected officials do not directly benefit materially from a tribe's business activities, they will be more likely to represent the broader interests of the tribe.") (citing Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 925 (2003)).

508. Kenneth Grant & Jonathan Taylor, *Managing the Boundary Between Business and Politics: Strategies for Improving the Chances for Success in Tribally Owned Enterprises*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT, *supra* note 506, at 182. Grant and Taylor have also suggested the following: well-designated checks and balances, clear and predictable rules, staggered terms, civil service professionalism, and independent dispute-resolution mechanisms. *Id.* at 181–83.

509. Ludwick, *supra* note 507.

> will likely find greater security in a tribal court, as long as the tribal constitution vests co-equal powers to the judiciary.[510] To be effectual, these tribal courts must be authorized to decide enrollment disputes and to autonomously appraise elected officials' actions.[511]

Tribes taking responsibility for the disenrollment crisis is the preferred route for at least two reasons. First, "[f]or too long the tribes have suffered from the imposition of legal and cultural norms that do not reflect their identity or culture."[512] Addressing the disenrollment crisis according to a tribe's own indigenous culture, history, and traditions provides a means for tribal governments to once again be governed in a way that echoes its identity and culture. Second, by taking the reigns and solving the disenrollment epidemic by themselves, tribal governments show that they are indeed responsible sovereigns—sovereigns that respect human rights and do not need federal oversight or intervention. This is true tribal sovereignty.[513]

2. Litigation

Litigation might bring about an end to the disenrollment crisis. What many commentators on the *Santa Clara Pueblo*/*Poodry* line of cases overlook is that the authority to disenroll is arguably not even an "aspect[] of sovereignty . . . derive[d] from the status of Indian nations as distinct, self-governing entities."[514] A "tribe's right to define its own membership,"[515] in other words, is not necessarily equivalent

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510. *Id.*

511. *Id.* ("It is unsurprising that a disproportionate number of recent disenrollment cases have arisen in California, where tribes suffered tremendously under the former federal polices of removal and termination . . . . Most of these tribes have historically lacked the financial resources to develop functioning judicial systems. It is interesting to note that many California tribes have recently experienced rapid economic growth as a result of tribe-sponsored gaming, which not only has contributed to assertions of tribal sovereignty but also has provided tribes with the financial resources necessary to establish effective courts.")

512. Painter-Thorne, *supra* note 126, at 312.

513. *See* International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 1916, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

514. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 881 (2d Cir. 1996).

515. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); *see also* Reitman, *supra* note 58, at 851 ("[T]he substantive holding in [*Santa Clara*] served merely to foreclose a nascent (and in the end, stillborn) federal cause of action for citizenship disputes."). Disenrollment policies are similar to liquor regulations discussed in *Rice v. Rehner*, 463 U.S. 713 (1983). In *Rice*, the Supreme Court found that the regulation of liquor was never an aspect of "tribal self-government." *Id.* at 724. Rather, according to the Court, this power was vested solely in the federal government from the time that liquor was introduced to Indian Country. *Id.* at 722–24. The Court waivers on this issue, however. At other points, the Court states that the power to regulate *was* congressionally divested: "There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area." *Id.* at 724; *see also id.* at 723 (noting a "congressional divestment of tribal self-government in this area"). In addition, the Court was factually incorrect on this point. *See* ANDREW BARR, DRINK: A SOCIAL HISTORY OF AMERICA 1 (2002) (noting that "[i]t is not true (as is often supposed) that [tribes] had no alcoholic drinks").

to a right to sever its relationship with its members.[516] The latter is a federal construct, delegated to tribal governments via assimilation and termination statutes, regulations, and policies.[517] The importance of this delegation is that, while inherent powers are not subject to the limitations imposed by the Constitution,[518] the delegated powers are so limited.[519] This would require, for instance, de novo review in a federal court, the right to representation by an attorney, and access to a representative jury of the disenrollee's peers.[520]

Despite overwhelming judicial indifference in tribal membership disputes, the proliferation of disenrollment has caused some courts to take interest. Indeed, it appears that some courts are anxious to intervene. In one membership dispute, U.S. District Court for the Eastern District of California stated that "somebody ought to warn the tribe that this is the kind of facts where some court is going to say 'we're outraged' and put it to them."[521] In *Lewis v. Norton*,[522] the U.S. Court of Appeals for the Ninth Circuit noted that a disenrollment dispute was "deeply troubling on the level of fundamental substantive justice."[523] The Ninth Circuit in *Jeffredo v. Macarro*,[524] expressed frustration that it "d[id] not have jurisdiction to review

516. Under federal law, for instance, the United States created two methods for acquiring citizenship: (1) at birth in the United States; and (2) by naturalization. 8 U.S.C. §§ 1401, 1421 (2012). Once citizenship is attained via one of these routes, however, "the Government cannot sever its relationship to the people by taking away their citizenship," Afroyim v. Rusk, 387 U.S. 253, 257 (1967), because "the people have never conferred this power on the government." *Recent Publications*, 38 YALE J. INT'L L. 543, 565 (2013); *see also* Reitman, *supra* note 58, at 862 ("Sovereignty is a function of citizenship, and a sovereign that fails to preserve its citizenry fails to preserve itself.").

517. *See* Laughlin, *supra* note 25, at 114 ("The federal government has invaded the realm of tribal autonomy to establish independent enrollment criteria, encroaching on the tribes' rights to determine membership."). The Yakama Nation, for instance, has been forced by antiquated federal legislation to require that enrolled members possess "one-fourth degree or more blood" quantum to inherit property. 25 U.S.C. § 607 (2012). Such laws have been upheld as constitutional. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 813 (E.D. Wash. 1965), *aff'd sub nom.* Simmons v. Chief Eagle Seelatsee, 384 U.S. 209 (1966).

518. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

519. *See* Duro v. Reina, 495 U.S. 676, 693 (1990) ("Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."); H.R. Rep. No. 112-480, at 58 (2012) ("If Congress acts to delegate its authority to Indian tribes, then tribes would be required to provide defendants full constitutional rights."); JANE M. SMITH & RICHARD M. THOMPSON II, CONG RESEARCH SERV., R42488, TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION AND THE SAVE NATIVE WOMEN ACT 7 (2012) ("If Congress is deemed to have delegated to the tribes Congress's own power . . . , the whole panoply of protections accorded . . . in the Bill of Rights will apply.").

520. *See* Reid v. Covert, 354 U.S. 1 (1957).

521. Jerry Bier, *Nowhere To Turn*, FRESNO BEE, Aug. 22, 2004, at A1.

522. 424 F.3d 959 (9th Cir. 2005).

523. *Id.* at 963.

524. 599 F.3d 913 (9th Cir. 2010).

membership decisions, even when the results of such decisions appear unfair."[525] In *Shenandoah v. Halbritter*,[526] the U.S. Court of Appeals for the Second Circuit expressed similar frustration that it was unable to adjudicate a membership dispute "[e]ven though the actions of the ruling members of the Nation may be partly inexcusable."[527] And in *LaMere v. Superior Court of the County of Riverside*,[528] a California Court of Appeals dismissed a disenrollment dispute by noting: "[O]ur ruling means that plaintiffs have no formal judicial remedy for the alleged injustice [because] Congress has not chosen to provide an effective external means of enforcement for the rights of tribal members . . . ."[529] A finding that the power to disenroll is a federally delegated construct—a proposition for which there is ample evidence—would require that the federal government at least provide some rights to those targeted for disenrollment and would thereby satisfy these courts' concerns.

The downside of such litigation is at least threefold. First, it would add to the list one more inherent limitation on inherent tribal sovereignty.[530] As it stands, the Supreme Court has held that tribes have never possessed the sovereign power to: (1) ally with any country other than the United States;[531] (2) grant land rights to any country other than the United States;[532] (3) exercise criminal jurisdiction over non-Indians;[533] and (4) regulate liquor.[534] Generally, these "ad hoc judicial limitations on tribal authority" are disfavored, as their historical and legal underpinnings are quite suspect, particularly in the absence of direct commands from Congress.[535] Arguing that tribes were implicitly divested of their sovereign authority to disenroll—or, rather, arguing that such a sovereign power never

525. *Id.* at 921.
526. 366 F.3d 89 (2nd Cir. 2004).
527. *Id.* at 91.
528. 131 Cal. App. 4th 1059 (Cal. Ct. App. 2005).
529. *Id.* at 1063 n.2.
530. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978); *see also generally* Alex Tallchief Skibine, United States v. Lara, *Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47 (2004). The date of "incorporation" being the operative factor. *See id.* at 55 ("It was the policies of Congress that resulted in incorporation of tribes as 'domestic dependent nations,' and not the policies of Congress after incorporation, that resulted in the implicit divestiture of some of the sovereign tribal powers.").
531. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
532. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823).
533. *Oliphant*, 435 U.S. at 191.
534. Rice v. Rehner, 463 U.S. 713, 726 (1983); *see also* Deborah A. Geier, *Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, 1994 B.Y.U. L. REV. 451, 474 n.77 ("Justice O'Connor also stated in *Rice* in an offhand manner that in fact liquor regulation is an aspect of sovereignty of which tribes were divested by virtue of their dependent status . . . ."); Judith V. Royster & Rory SnowArrow Fausett, *Fresh Pursuit Onto Native American Reservations: State Rights "To Pursue Savage Hostile Indian Marauders Across the Border" an Analysis of the Limits of State Intrusion into Tribal Sovereignty*, 59 U. COLO. L. REV. 191, 243 n.110 (1988) ("Justice O'Connor in *Rice* added a fourth particular, that of liquor regulation, to the expanding list of inherent tribal powers divested by judicial contrivance.").
535. John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 776 (2006).

existed—at tribes' incorporation into the United States will likely be met with opposition from tribes on both sides of the debate.

Second, Federal Rule of Civil Procedure 19 might bar any suit against the federal government.[536] Federal courts have consistently held that "plaintiffs cannot get around *Santa Clara Pueblo* by bringing suit against the government."[537] Instead, courts have held that in any suit against the federal government involving enrollment issues, a tribe is an indispensable party because of its "sovereign interest in membership and in protecting its sovereignty."[538] And because a tribe is immune and cannot be sued, tribal sovereign immunity may bar any suit from moving forward.[539] However, there is an argument that in a lawsuit to enjoin the delegation of the power to disenroll—i.e., in determining whether tribes had a "sovereign interest in" disenrollment when they were incorporated into the United States—any interest that a tribe possesses, can be represented by the United States.[540]

Finally, as a practical note, it should be acknowledged that interpreting the history of federal interactions with tribal governments is not one of the Supreme Court's strong points.[541] Indeed, tribal interests have lost in there 75% of the time—more frequently than convicted felons.[542] It is also evident from the Court's decisions on certiorari that the only Indian law cases that interest the Court are cases where the tribal interest had won below, or in the small number of cases where the federal government consents to Supreme Court review.[543] In sum, litigants must be aware that tribal interests at large face an extreme disadvantage in litigating novel issues, such as the one here proposed, in federal court.[544]

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536. *See, e.g.*, Klamath Tribe Claims Comm. v. United States, 97 Fed. Cl. 203, 212–13 (2011).

537. Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005); *see also* Arviso v. Norton, 129 F. App'x 391, 394 (9th Cir. 2009); Williams v. Gover, 490 F.3d 785, 791 (9th Cir. 2007); Hall v. Babbitt, No. 99-3806, 2000 WL 268485, at *1–2 (8th Cir. Mar. 10, 2000); Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y, 163 F.3d 1150, 1160 (10th Cir. 1998); Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996).

538. Painter-Thorne, *supra* note 126, at 328 (citing *Arviso*, 129 F. App'x at 392, 394).

539. *Lewis*, 424 F.3d at 962; *Arviso*, 129 F. App'x at 392.

540. Sw. Ctr. for Biological Diversity v. Babbitt, 150 F. 3d 1152, 1154 (9th Cir. 1998).

541. *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73 (2002); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991).

542. Carlson, *supra* note 493, at 81.

543. Matthew L.M. Fletcher, *The Utility of Amicus Briefs in the Supreme Court's Indian Cases*, 2 AM. INDIAN L. J. 38, 41 (2013).

544. *Id.*

3. Administrative Law

A return to BIA oversight is also an option. It is only recently that the BIA has refused to interfere in disenrollment decisions, and for no apparent reason—citing only a "policy of noninterference" and a "well-established practice under which BIA refrains from interfering in . . . issues concerning tribal membership."[545] But this change in direction is just that—a practice and policy that finds no place in law or agency rules or formal policy pronouncements.[546] Indeed, it appears that this new informal policy actually violates BIA's formal policy mandating just the opposite. According to a late 1970s[547] version of the BIA's Indian Affairs Manual:

> When enrollees lose their membership they also lose their right to share in the distribution of tribal assets. Since the Secretary is responsible for distribution of trust assets to tribal members, disenrollment actions are subject to approval by the Secretary or his authorized representatives . . . . Any person whose disenrollment has been approved by the Area Director acting under delegated authority may appeal the adverse decision as provided in 25 C.F.R. § 2.[548]

Of course, unlike the BIA's newfound informal policy and practice, "[c]ompliance with the Manual is mandatory for Indian Affairs employees."[549]This part of the Indian Affairs Manual has not been modified or superseded, and therefore still constitutes operative and binding BIA policy.[550] Regardless, even if this section of the Manual was superseded, a simple fix here would be that the BIA, through agency rulemaking, can simply revert to the previous rule, reasserting its authority

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545. Cahto Tribe of the Laytonville Rancheria v. Pac. Reg'l Dir., 38 IBIA 244, 246, 249, 2002 WL 32345916, at *2, *5 (2002); *see also supra* notes 219–22 and accompanying text.

546. As Professor Wilkins explains, "the federal government . . . has reserved to itself the power . . . to overturn or interfere with any tribal nation's powers including . . . membership decisions when it suits the federal government's desires to so intervene." Wilkins, *supra* note 342.

547. U.S. Dep't of the Interior - Indian Affairs, *supra* note 182.

548. 83 BUREAU OF INDIAN AFFAIRS MANUAL: SUPPLEMENT 2, § 3.8(C)(2)–(3), *available at* http://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc012024.pdf.

549. OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS, DIRECTIVES MANAGEMENT: INDIAN AFFAIRS DIRECTIVES HANDBOOK 7 (2014). Notably, a federal cause of action will arise under the Administrative Procedure Act if the BIA does not comply with the Manual. Morton v. Ruiz, 415 U.S. 199 (1974); *see also* Confederated Tribes & Bands of Yakama Nation v. Holder, No. 11-3028, 2011 WL 5835137, at *3 (E.D. Wash. Nov. 21, 2011) (citing Alcaraz v. INS, 384 F.3d 1150, 1162 (9th Cir. 2004)) ("The internal policies that can bind an agency and give rise to a cause of action under the APA are not limited to only those rules promulgated pursuant to notice and comment rule making."). *See also generally* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49, 78–88 (2005).

550. *See* Letter from Stan Speaks, Northwest Regional Director, Bureau of Indian Affairs, to Ryan Dreveskracht (Feb. 9, 2015) (confirming that this section of the Manual has not been repealed, withdrawn, or replaced) (on file with authors).

to review disputed disenrollment determinations.[551] Indeed, proficient BIA genealogists and historians could resolve disenrollment disputes with finality.[552] While the BIA has historically bungled Indian affairs,[553] or otherwise done more

551. There may need to be an IBIA jurisdictional fix as well. As drafted, the Indian Affairs Manual grants a right to appeal pursuant to 25 C.F.R. § 2 (2014). And such appeal is likely necessary in order to exhaust administrative remedies, so that a disenrollee might challenge the BIA's determination in a federal court. *See e.g.*, Crow Creek Sioux Tribe v. Bureau of Indian Affairs, 463 F. Supp. 2d 964, 970 (D.S.D. 2006) ("Plaintiff did not appeal the BIA's decision to the Regional Director, which is in turn subject to review by the IBIA . . . . The jurisdictional requirement that the Court can only review final agency actions is clear. As a result, plaintiff's claim is subject to dismissal because of the failure to exhaust administrative remedies."). To be more precise, the determination itself would not be reviewed. Rather, a federal court would be limited to reviewing the BIA's actions under APA standards; meaning that it may not go beyond a procedural review to reach the merits of the dispute. Feezor v. Babbitt, 953 F. Supp. 1, 4 (D.D.C. 1996) (citing Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983)). But in 1989 the DOI arguably removed the IBIA's authority to make such a determination. *See* 43 C.F.R. § 4.1(1)(a)(1) (2014) ("[The] Board of Indian Appeals . . . decides finally for the Department appeals to the head of the Department pertaining to . . . [a]dministrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR Chapter I, except as limited in . . . § 4.330 of this part . . . ."); 43 C.F.R. § 4.330(b)(1) ("Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate . . . [t]ribal enrollment disputes."). The IBIA's previous rules contained no such limitation and, in fact, mandated that the IBIA make these determinations in some instances. *See* Hearings and Appeals Procedures, 36 Fed. Reg. 7,185, 7,193 (Apr. 15, 1971) ("In cases where the right and duty of the Government to hold property in trust depends thereon, Examiners shall determine . . . the Indian or non-Indian status of heirs or devisees . . . ."). There has generally been no explanation for the change in IBIA procedure. During the rulemaking period one commenter "suggested that the provisions regarding treatment of discretionary decisions in § 4.337(b) should be dropped and the Board given full authority to review such decisions," to which the Interior Department simply responded that "[t]he Board is not the only appeals board within the Office of Hearings and Appeals limited in its review of discretionary decisions. . . . . The comments are, accordingly, not accepted." Department Hearings and Appeals Procedures, 54 Fed. Reg. 6,483, 6,483 (Feb. 10, 1989). Of course, it may also be argued that the Indian Affairs Manual's mandated appeal procedure constitutes an appeal "otherwise permitted by the Secretary." 43 C.F.R. § 4.330(b)(1).

552. Dennis J. Whittlesey & Patrick Sullivan, *Tribal Membership Revocations: Dialing for Dollars?*, NAT'L L. REV. (July 7, 2013), http://www.natlawreview.com/article/tribal-membership-revocations-dialing-dollars.

553. To illustrate, a BIA Pacific Region deputy director once barbed to the *New York Times* that: "The tribe has historically had the ability to remove people . . . Tolerance is a European thing brought to the country. We never tolerated things. We turned our back on people." Dao, *supra* note 30. That statement ignores traditional tribal kinship practices, DeMallie, *supra* note 55, and the reality that removal of Indians from rolls is a federal construct, not one inherent to tribal communities. This BIA comment has been criticized by indigenous legal scholars. *See, e.g.*, Matthew L.M. Fletcher, *On Tribal Disenrollment and "Tolerance,"* TURTLE TALK (Dec. 13, 2011,), https://turtletalk.wordpress.com/2011/12/13/on-tribal-disenrollments-and-tolerance/ ("Most tribes . . . are not intolerant. . . . Indian people were *not* intolerant before the Europeans came . . . ."); *id.* ("Some Indian tribes tolerated multiple sexual orientations, criminal 'deviance,' religion, and intermarriage.").

harm than good to tribal people[554]—including in the disenrollment arena, as the Colville disenrollment situation highlights—at least BIA administrative review of tribal disenrollment decisions would allow for some form of redress to disenrollees.

4. Indian Civil Rights Act Amendment

Another proposed solution is to amend the ICRA to allow for review of tribal court disenrollment litigation pursuant to 28 U.S.C. § 1331, which grants federal courts with original subject matter jurisdiction over certain causes of action and grounds the majority of civil actions heard in federal court.[555] Indeed, such amendment is required by the federal trust obligation to protect "the fundamental rights of political liberty" owed to individual Indians.[556] Disenrollment disputes even cause some members to suffer physical violence at the hands of their government.[557] These are the exact harms that the ICRA intended to prevent.[558] In short, the ICRA is not working—in the disenrollment context at least.[559]

One criticism that might be raised is that ICRA review is purely procedural[560] and therefore cannot be used to prevent malicious or otherwise wrongful disenrollment.[561] As it stands, a large number of tribal governments lack

554. *See generally* Rebecca Tsosie, *The BIA's Apology to Native Americans: An Essay on Collective Memory and Collective Conscience*, *in* TAKING WRONGS SERIOUSLY, APOLOGIES AND RECONCILIATION (Elazar Barkan & Alexander Karn eds., 2006).

555. Smith, *supra* note 16, at 53 n.88 ("Congress's plenary authority with respect to Indian affairs would enable Congress to amend ICRA to provide, for instance, a private right of action under the ICRA that would allow aggrieved tribal members to more easily sue in federal court without having to clear the hurdles imposed by Section 1303's habeas corpus requirement."). On 28 U.S.C. § 1331 generally, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 265–363 (6th ed. 2011).

556. St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1413 (D. Minn. 1983) (quotation omitted); *see also* Reitman, *supra* note 58, at 863 ("[F]ederally recognized tribes are sovereign political entities and . . . the federal government is charged with their protection. Inasmuch as federal permissiveness towards abuses of the citizenship power threatens that sovereignty, the federal government has a responsibility to act.").

557. *See, e.g.*, *supra* notes 390–400 and accompanying text.

558. *See* Painter-Thorne, *supra* note 126, at 350 ("Congress' intent in passing ICRA was to secure individual rights of tribal members against overreaching by tribal government.").

559. Whittlesley & Sullivan, *supra* note 552 ("While the federal Indian Civil Rights Act of 1968 ostensibly offers legal protections to the victims of enrollment revocations, the reality is that the law is toothless and is not the vehicle through which individual Indians have gained much of anything in the way of rights protection.").

560. *See* Quair v. Sisco, 359 F. Supp. 2d 948, 977 (E.D. Cal. 2004) ("[I]f the court concludes that petitioners were denied their rights to procedural due process in connection with the decisions to disenroll . . . , the remedy is not reinstatement, which would interfere with tribal sovereign immunity and internal tribal affairs but, rather, a direction to provide appropriate due process, essentially a re-hearing.").

561. *See* Reitman, *supra* note 58, at 808 ("[N]on-substantive review is most likely a waste of time and is of little benefit to those under its dubious protection."). Along these lines, if ICRA is being amended to create a cause of action for disenrollment anyway, why not also legislate a de novo review? Politically, this may not be feasible, however.

any federal restraints as to citizenship abuses.[562] Even where formal appeal is made available, "it is often to the same body that promulgated the sanction."[563] What is more, given that the disenrolling tribal council often has the authority to appoint and dismiss tribal judiciaries, "even the availability of formal appeal to a sympathetic and independent tribal judiciary is no guarantee of an effective intra-tribal remedy."[564] Moreover, case law from various tribal courts demonstrates that "Indian disenrollments and expulsions are often carried out with little or no recognizable process," and "even when there is an established process, there is no guarantee that it will be followed in any one case."[565] In short, procedural ICRA review would likely nip most unjustified disenrollment proceedings in the bud, even without looking to the merits.

Another criticism may be that this amendment would require a waiver of tribal sovereign immunity. Doing so is not taken lightly by tribal governments. Nor should it. Tribal immunity provides numerous benefits for tribes, including: the ability to cap damages on lawsuits; the ability to limit remedies to nonmonetary relief; the ability to have certain lawsuits heard only in a local forum; the ability to mandate a different type of dispute resolution (e.g., mediation or arbitration); the ability to protect tribal assets from suits through the limitation of damages; the ability to waive immunity in a limited fashion that fosters commercial development; and the ability to use immunity as leverage in negotiations with state and local governments on multiple fronts, notably gaming and taxation.[566]

On the other hand, it is important to recognize that, "as with virtually every other type of sovereign entity, egregious injuries and civil and human rights violations[567] may be committed by tribal governments and their agents even against their own members."[568] And these injuries and rights deprivations may affect large groups of persons as well as greater tribal interests.[569]

Surely, a limited congressional waiver of tribal sovereign immunity for the purpose of a procedural review strikes the proper balance between these two interests. Similarly, "Congress could also empower the BIA to take a more active

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562. *Id.* at 801.

563. *Id.* at 797.

564. *Id.*

565. *Id.* at 797–98.

566. Ryan Seelau & Ian Record, *Will the Supreme Court Use Bay Mills Case to Blow Up Tribal Sovereignty?*, INDIAN COUNTRY TODAY (Nov. 5, 2013), http://indiancountrytodaymedianetwork.com/2013/11/05/sovereign-immunity-and-bay-mills-case-how-tribes-can-prepare.

567. Indeed, the ICRA was enacted because "[i]n the 1960's, some Indians complained bitterly that tribal constitutions did not extend human rights far enough and that tribal courts did not provide adequate remedies for violations of human rights by tribal governments." Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 308 (1998).

568. Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on A Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 764 (2002).

569. *Id.*

role with respect to what are now considered internal and unreviewable [disenrollment] decisions of tribes."[570] In 2000, Congress intervened to resolve a tribal membership dispute vis-à-vis statutory changes regarding the BIA's authority to review tribal constitutions.[571]

A recent study by Professor Kirsten Carlson confirms that "Indian nations garner more attention" than other interest groups "as Congress tries to figure out what to do with them because they do not fit well into the existing structure of U.S. federalism."[572] So notwithstanding current partisan gridlock on Capitol Hill and the political clout of those tribal governments that disenroll their own people, the congressional route for redressing disenrollment is not one that should be foreclosed.[573]

More generally, tribes should worry that the current Congress might use the nationwide fever pitch of disenrollment controversy as an excuse to end federal self-determination policy, to constrict or terminate Indian Self-Determination Education Assistance Act funding.[574] Indeed, Co-Directors of the Harvard Project on American Indian Economic Development, Stephen Cornell and Joseph Kalt have cited a Republican-fueled "trend away from the Indian self-government movement" and predicted that a Republican-controlled Congress might well put "an end to policies of self-determination."[575] Hopefully disenrollment does not give Congress a reason to such harm to all tribal governments,[576] particularly those who are not terminating their own people.[577]

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570. Smith, *supra* note 16, at 54.

571. Native American Technical Corrections Act of 2004, Pub. L. No. 108-204, § 125, 118 Stat. 542, 546 (codified at 25 U.S.C. § 712e (2006)); *BIA Won't Recognize Tribe's Leadership*, INDIANZ (Jan. 7, 2002), http://www.indianz.com/News/show.asp?ID=law02/172002-2.

572. Carlson, *supra* note 493, at 137.

573. Smith, *supra* note 16 ("The increasing number of banishments and disenrollments within Indian country might give Congress reason to amend ICRA to impose further limitations on Indian tribes.").

574. Mark Trahant, *A New Era of contracting Contracting Coming to Indian Country*, INDIANZ (Jan. 7, 2002), http://www.indianz.com/News/2011/003047.asp.

575. Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* (John F. Kennedy School of Government, Harvard University, HKS Faculty Research Working Paper Series RWP10-043, 2010), *available at* http://dash.harvard.edu/handle/1/4553307

576. Anthony S. Broadman, *Finishing What Slade Gorton Started: A Practical Argument Against Disenrollment*, GALANDABROADMAN (March 17, 2014), http://www.galandabroadman.com/2014/03/finishing-what-slade-gorton-started-a-practical-argument-against-disenrollment/ ("[E]nemies of tribes in federal and state office will use the [disenrollment] chaos to attack tribal interests."); Miller, *supra* note 200 ("[N]on-Indians viewing disenrollment through the lens of old stereotypes may extrapolate those notions to tribes generally.").

577. *Anthony Broadman: Tribal Disenrollment Makes Slade Gorton Proud*, INDIANZ (Feb. 15, 2015), http://www.indianz.com/News/2014/012907.asp ("By proceeding recklessly with mass disenrollments and standing behind sovereign immunity even as to their

5. Truth and Reconciliation

In this subsection, we propose a Truth Reconciliation Commission ("TRC") as an alternate fix to the disenrollment crisis. A TRC is a quasi-judicial entity established to probe, collect evidence, create a record, and respond to human rights abuses.[578] Generally used as a settlement mechanism, TRCs have specific and well-defined mandates, but their bureaucratic structures are flexible.[579] As a government attempts to rebuild, a TRC's key concern is the question of power.[580] Government leaders must agree to the transfer of power, and that agreement must be firmly in place before steps toward reconciliation begins.[581] TRCs can adopt a variety of organizational formats, but the overarching goal of a TRC is to publish a final report, which includes a record of crimes and human rights abuses that prompted its formation, transcripts of any proceedings, and recommendations for the government.[582]

Currently, private BIA-funded mediation[583] is the only mode of redress for membership disputes,[584] but it rarely works.[585] A TRC for membership disputes, funded by the federal government and available for tribal governments—or even mandated by tribal or federal law—may offer a solution by allowing the dispute to take place in a public forum that is not muted by the federal government. This way, tribal governments might be held accountable to their membership.[586]

6. The Human Rights Approach

Unless something changes domestically, tribal governments cannot be held accountable in international fora. But this does not mean that tribes cannot hold themselves accountable. Indeed, Attorney Greg Rubio has convincingly argued that

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own citizens, a handful of tribal governments are threatening the very existence of tribal sovereignty.").

578. Roslyn Myers, *Truth and Reconciliation Commissions 101: What TRCs Can Teach the United States Justice System About Justice*, 78 REV. JUR. U.P.R. 95, 100 (2009).

579. *Id.*

580. LUC HUYSE ET AL., RECONCILIATION AFTER VIOLENT CONFLICT, A HANDBOOK 21 (2003).

581. Myers, *supra* note 578, at 100 n.14 (citing HUYSE, *supra* note 580).

582. *Id.*

583. Dennis Wagner, *BIA Role in Apache Feud Questioned: Tribal Judge Says Agency Undermined Tribe's Court*, ARIZ. REPUBLIC (May 4, 2012), http://archive.azcentral.com/arizonarepublic/news/articles/20120419bia-role-apache-feud-questioned.html#ixzz3MMaKDm8P.

584. Onell R. Soto, *Mediation OK'd in Split by Tribe on Membership*, SAN DIEGO UNION TRIB. (Jul. 17, 2008), http://legacy.utsandiego.com/news/northcounty/20080717-9999-1m17pasqual.html.

585. Onell R. Soto, *Tribe Fails to Settle Leadership Dispute*, SAN DIEGO UNION TRIB. (Oct. 13, 2008), http://legacy.utsandiego.com/news/metro/20081013-9999-1m13pasqual.html; Wagner, *supra* note 583.

586. *But see* David L. Carey Miller, *National Norms Should Prevail*, 8 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON L. & JUSTICE 49, 51 (2002) ("From a lawyer's point of view, the difficulty with the Truth and Reconciliation Commission process is that it involves a suspension of the principle that serious criminal conduct should be prosecuted.").

"the legitimacy of tribal claims to sovereignty and self-determination may, going forward, depend upon their commitment to protecting these rights for all tribal members."[587] And, in fact, a number of tribes have already bound themselves in this fashion.[588] In addition, there are unexplored avenues in international law that provide a means for holding the United States accountable for its failure to provide a remedy to those indigenous persons that have been harmed by their tribal governments.

While many of the rights enumerated in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"),[589] as endorsed by the United States, are aimed at indigenous peoples as collective groups,[590] the UNDRIP also guarantees that indigenous people, as individuals, receive all human rights and fundamental freedoms recognized under international human rights law, the Charter of the United Nations, and the Universal Declaration of Human Rights.[591] The "international human rights law" that is incorporated into the UNDRIP is derived from a number of arenas and applies in an array of circumstances. While a number of the human rights are applicable only to states or state organs,[592] others are

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587. Rubio, *supra* note 423, at 40. According to Mr. Rubio:

> It would be an odd sovereignty indeed that would give the sovereign unfettered license to ignore the fundamental tenants of human rights law. Short of denying the universal nature of the rights protected under international human rights law, the grounds on which [a] tribe would avoid at least nominally committing themselves to assuring those protections for tribal members is difficult to perceive.

Id. Other Indian law scholars have argued likewise. *See, e.g.*, Singel, *supra* note 40, at 568; Clare Boronow, *Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to A Remedy*, 98 VA. L. REV. 1373, 1417 (2012); Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 1–2 (2006); Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1, 13 (1999); Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 103 (1994).

588. Reitman, *supra* note 58, at 858.

589. UNDRIP, *supra* note 27.

590. David Keith May, Individual and Collective Human Rights 9 (2013) (unpublished Ph.D. dissertation, Florida State University).

591. UNDRIP, *supra* note 27, at art. 1.

592. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 185 (2d ed. 2004) ("In general, an integral part of international human rights law is the duty of states to secure enjoyment of human rights and to provide remedies where the rights are violated."). The term "state organs" is a technical term defined as "all the individual or collective entities which make up the organization of the State and act on its behalf." Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission to the General Assembly, 56 U.N. GAOR Supp. (No. 10) at 84, U.N. Doc. A/56/10 (2001), *available at* http://legal.un.org/legislativeseries/documents/Book25/Book25_part1_ch2.pdf.

applicable to non-state and quasi-state actors.[593] Still others are not generally applicable to non-state and quasi-state actors, but require states to take proactive measures to prevent the violation of human rights by non-state and quasi-state actors.[594] The human rights approach may fill the substantive and procedural gaps in the implementation of tribal and federal international human rights obligations.

a. Tribal Obligations as Quasi-State Entities

The UNDRIP recognizes that tribal governments possess "the right to self-determination" in that they must be able to "freely determine their political status and freely pursue their economic, social and cultural development."[595] In fulfillment of their status as governmental entities with the power to govern their territories and members,[596] American tribal governments are self-governing entities, properly described as "quasi-state entities" or "quasi-state actors."[597] And although not technically nation–states, American tribal governments, as self-governing entities, possess the attributes that are essential for statehood as defined under international law: a permanent population, a defined territory, government, and the capacity to enter into relations with a nation–state.[598]

An important facet of the realization of self-determination is that tribal self-governance has resulted in "the concomitant governmental capacity to both protect

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593. *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11) ("[T]he development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.").

594. UNDRIP, *supra* note 27, at art. 1.

595. UNDRIP, *supra* note 27, at art. 1.

596. Domestically, this right has been recognized for decades as "the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959). In addition, the United States, as a signatory to the International Covenant on Civil and Political Rights ("ICCPR"), has been obligated to grant all minority groups the right to "freely determine their political status and freely pursue their economic, social and cultural development" since 1992. Art. 1(1), Dec. 16, 1966, S. Treaty Doc. 95–20, 999 U.N.T.S. 171, 173–74 [hereinafter ICCPR]; *see also* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (as a signatory, the United States is "obliged to refrain from acts which would defeat the object and purpose of a treaty"). Tribal self-determination is now considered customary international law, enforceable domestically in the United States. S. James Anaya, *The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples*, 12 L. & ANTHRO. 127, 128–29 (2005); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 109, 116–20 (1999); *see also* Murray v. The Charming Betsy, 6 U.S. 64, 124 (1804) (holding that customary international law enforceable domestically).

597. Boronow, *supra* note 587, at 1382; ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 27–29 (1990).

598. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097; *see also generally* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1603 (2004); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1053 (2007).

and violate human rights."[599] As to the latter, the UNDRIP explicitly creates a duty for tribal governments to respect human rights: "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected."[600] In addition, it states that "[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, *in accordance with international human rights standards*."[601] In sum, the UNDRIP imposes a duty to respect individual human rights directly upon tribal governments. Indeed, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recently made this responsibility clear:

> [The] wide affirmation of the rights of indigenous peoples in the Declaration does not only create positive obligations for States, but also bestows important responsibilities upon the rights-holders themselves. . . . In exercising their rights and responsibilities under the [UNDRIP], indigenous peoples themselves should be guided by the normative tenets of the Declaration . . . . The implementation of the Declaration by indigenous peoples may . . . require them to develop or revise their own institutions, traditions or customs through their own decision-making procedures.[602]

The duty to honor human rights is also inherent in a tribe fulfilling its right to self-determination, per customary international law.[603] It is generally recognized that an entity has duties under customary international law if it has "international legal personality."[604] The International Court of Justice ("ICJ") issued an advisory opinion in 1949 on Reparation for Injuries Suffered in the Service of the United

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599. Boronow, *supra* note 587, at 1378; *see also* Singel, *supra* note 40, at 585 ("[J]ust as with any other government, tribes are also capable of abusing their powers and inflicting harm on individuals . . . . [S]everal tribes have been publicly criticized for allegedly violating human rights.").

600. UNDRIP, *supra* note 27, at art. 46(2).

601. *Id.* at art. 34 (emphasis added).

602. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rep. on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, HRC, P75–79, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008) (by S. James Anaya) (citation omitted).

603. What is more, as discussed below, liability for failure to exercise due diligence in enforcing human rights norms will likely result in the Unites States being held responsible for creating a remedy—which would likely "provide an excuse for Congress to further curtail tribal sovereignty under domestic law." Boronow, *supra* note 587, at 1420; *see also* Ludwick, *supra* note 34, at 44 ("In order to achieve the goal of self-determination . . . tribal governments must maintain legitimacy in the eyes of the Indian people . . . . Tribal disenrollment that is politically motivated undermines the goal of self-determination by breeding cynicism and discouraging participation in the political process.").

604. *See generally* Oleg I. Tiunov, *The International Legal Personality of States: Problems and Solutions*, 37 ST. LOUIS U. L.J. 323 (1993).

Nations that acknowledged states are not the only subjects of international law.[605] The ICJ found that a non-state actor is also bound by customary international law, defining an "international legal personality" as an entity "capable of possessing international rights and duties" and possessing the "capacity to maintain its rights by bringing international claims."[606] Regarding the ICJ's first factor, indigenous peoples have rights under international law, such as the right to self-determination.[607] American tribal governments also have duties.[608] As described above, the UNDRIP expressly places a duty on such tribal governments to respect human rights, a duty that is implicit within the right of self-determination. As to the second factor, tribal governments have brought claims to protect their rights under international law before international bodies such as the Inter-American Commission on Human Rights[609] and the African Commission on Human and People's Rights.[610] The UNDRIP explicitly recognizes the right of tribal governments to "have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties . . . ."[611]

Moreover, tribal governments are participants in international law with the capacity to influence international legal decision-making. In 2000, the United Nations established the Permanent Forum on Indigenous Issues "to give indigenous peoples a greater voice within the U.N. system."[612] Tribal governments participated in the drafting of the U.N. Declaration on the Rights of Indigenous Peoples, which articulates principles of customary international law.[613] They have also submitted reports to and testified before international bodies such as the U.N. Human Rights Committee, the Inter-American Commission, and the World Trade Organization.[614] In sum, tribes are "governmental entities that possess nearly all of the attributes of

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605. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178–79 (Apr. 11).

606. *Id.* at 179.

607. UNDRIP, *supra* note 27, at art. 3.

608. *See generally* Cowan, *supra* note 587.

609. *See, e.g.*, *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

610. *See, e.g.*, Anuak Justice Council v. Ethiopia, Afr. Comm'n H.P.R., Comm. No. 299/05 (2006); Bakweri Land Claims Comm. v. Cameroon, Afr. Comm'n H.P.R., Comm. No. 260/02 (2004).

611. UNDRIP, *supra* note 27, at art. 40.

612. Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 237 (2010).

613. *Id.* at 241–42.

614. Indigenous Peoples' Seattle Declaration: On the Occasion of the Third Ministerial Meeting of the World Trade Organization Nov. 30–Dec. 3, 1999. To offer but one example, the Navajo Nation Human Rights Commission submitted to the U.N. Human Rights Council a response to the United States' report for its 2010 Universal Periodic Review. Navajo Nation Human Rights Comm., Response to the United States of America Universal Periodic Review National Report to the United Nations Human Rights Council, NNHRC/Report 4/2010, Sept. 24, 2010.

statehood," are benefactors of the international indigenous human rights movement and in particular the UNDRIP, and are therefore bound by customary international law to uphold human rights.[615]

b. Tribal Obligations as Non-State Actors

In addition to being responsible for the adherence to human rights norms as quasi-state actors, the Universal Declaration of Human Rights ("UDHR") binds tribal governments as non-state actors. The UDHR recognizes "the inherent dignity of the human person" as an individual, and is "firmly focused on the rights-holders rather than the bearers of the corresponding obligations."[616] For example Article 22 of the UDHR provides:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[617]

The drafting history of the UDHR indicates that Article 22 was intended to be complementary to Article 28, which guarantees that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"—assuring conditions in which the individual human rights of Article 22 can be achieved.[618] Importantly, protection of these rights is not only entrusted to the state, but to society as well.[619] The UDHR thus imposes an "imperative on society as a whole to secure and deliver those entitlements" enumerated therein.[620] In sum, the UDHR is properly regarded as a declaration of pre-existing rights that every person and entity—state, non-state, and quasi-state—must honor.

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615. Boronow, *supra* note 587, at 1416; *see also* Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419, 438 (1993) ("By virtue of the trust relationship that was established long ago and is still viable, Indian tribes merit a respect nearly on a par with their trustee. Supreme Court cases continue to . . . confirm[] that tribes are intra-continental 'nations.'").

616. Adam McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights*, 30 HAMLINE J. PUB. L. & POL'Y 33, 40–41 (2008). The UDHR's precursor, the Charter of the United Nations, also recognized "fundamental human rights in the dignity and worth of the human person." Charter of the United Nations and Statute of the International Court of Justice, Preamble para. 2, June 26, 1945, 59 Stat. 1055.

617. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 22, U.N. Doc. A/RES/217A, (Dec. 10, 1948) [hereinafter UDHR]. The concept of dignity in this context is essentially shorthand for the "absolute inner worth" of an individual human being, as coined by Kant. IMMANUEL KANT, THE METAPHYSICS OF MORALS 434–35 (1797).

618. UDHR, *supra* note 617, at art. 28; JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 239 (2000).

619. UDHR, *supra* note 617, at arts. 16, 22.

620. McBeth, *supra* note 616, at 41.

The absence of an enforcement mechanism in existing international human rights law addressing non-state actors does not preclude the existence of legal duties for those actors. Indeed, even human rights treaty-monitoring bodies strictly limited by the treaties they enforce to address only state parties to the relevant treaties, have recognized that non-state actors have a responsibility for the realization of human rights: "While only States are parties to the [International] Covenant [on Economic, Social and Cultural Rights][621] and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities . . . ."[622]

A reading of the UDHR that would limit the obligation to respect human rights to state actors would necessarily contravene the Declaration.

c. U.S. Obligations—State Organs

The International Law Commission's Draft Articles on the Responsibility of States for Wrongful Acts ("Draft Articles") lists circumstances in which an act can be attributed to the state. The Draft Articles states that "[t]he conduct of any State organ shall be considered an act of that State under international law."[623] This provision encompasses agencies that are "autonomous and independent of the executive government" if the conduct that the institution performs is a "public function" and the institution is doing so vis-à-vis "public power."[624] Tribal governments undoubtedly fit this definition in most instances.[625] When tribal governments act in this "public" capacity, the United States has an international obligation to "bear responsibility for tribal human rights violations."[626] The Draft Articles also stipulates that conduct of a non-state actor can be attributed "if and to the extent that the State acknowledges and adopts the conduct in question as its

621. *See* G.A. Res. 2200 (XXI), ¶ 3, U.N. Doc. A/RES/2200(XXI) (Jan. 1 1967).

622. Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4, at ¶ 42 (Aug. 11, 2000); *see also generally* Comm. on the Elimination of Racial Discrimination, General Recommendation XXIII: The Rights of Indigenous Peoples, U.N. Doc. A/52/18/Annex V, at 3 (Aug. 18, 1997); Human Rights Comm, General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, at 10 (Apr. 8, 1988); Comm. on the Elimination of Racial Discrimination, General Recommendation XXVII on Discrimination Against Roma, U.N. Doc. A/55/18, Annex V, at 28, 31 (Aug. 16, 2000); Human Rights Committee, General Comment 27: Freedom of Movement, U.N. Doc. CCPR/C/21/Rev.1/Add.9, at 6 (Nov. 2, 1999); Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment 12: The Right to Adequate Food, U.N. Doc. E/C.12/1999/5, at 20, 27, 29 (May 12, 1999).

623. Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83, Annex at art. 4(1) (Dec. 12, 2001) [hereinafter Draft Articles].

624. GAOR, 53rd Sess., Supp. No. 10, at 89 (2001).

625. Cowan, *supra* note 587, at 31–33.

626. *Id.* at 33.

own."[627] Two requirements must be met for attribution to occur. First, the approving state must know of the behavior and know that it would be a violation of human rights if it were undertaken by the state itself.[628] Second, the action must be tacitly adopted by the state.[629] Tacit adoption occurs where the state "factually treats [the] conduct for all purposes as if it were legal."[630] As described in more detail below, the United States often retrospectively authorizes the disenrollment actions of tribal governments.

d. U.S. Obligations—Failure to Prevent

In addition to ensuring that "its own instrumentalities do not violate the human rights of its people," states have the additional responsibility to "take positive steps for the improved realization of human rights" and to "prevent those within its jurisdiction from harming the rights of others."[631] According to the U.N. Human Rights Committee, a state's positive obligation to protect human rights "[w]ill only be fully discharged if individuals are protected . . . , not just against violations of . . . rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of . . . rights."[632]

The obligation to protect can extend to a duty to: regulate; prevent infringements by proscribing such conduct in municipal law and monitoring compliance with such laws; take action to investigate allegations of abuses; punish perpetrators; and provide a remedy for victims. The basis of a finding that a state has violated its obligation to protect human rights when those rights are infringed by the action of another individual, institution, or corporation, "is not its complicity in the non-state conduct, but the failure to protect against it."[633] As the U.N. Human Rights Committee explained:

> [A] failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[634]

Likewise, the European Court of Human Rights has found states in violation of their obligation to protect human rights where "the domestic law in force at the relevant time . . . made lawful the treatment of which the applicant

627. Draft Articles, *supra* note 623, at art. 11.

628. Stocké v. F.R.G., 199 Eur. Ct. H.R. (ser. A) (1991).

629. Kenneth P. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 111 (1987).

630. Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 53 (2005).

631. McBeth, *supra* note 616, at 33.

632. Human Rights Comm., General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶ 8 (May 26, 2004) [hereinafter General Comment 31].

633. Jan Arno Hessbrügge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 65 (2005).

634. General Comment 31, *supra* note 633, at 8.

complained."[635] A failure to investigate or respond properly to human rights infringements committed by private individuals has been held by international treaty-monitoring bodies to violate the state's treaty obligation to protect human rights.[636] At the domestic level, the state is expected to hold the direct perpetrator responsible for human rights abuses, and the state will be accountable at the international level for a failure to do so, as a breach of its treaty obligations. The Inter-American Court has found likewise.[637]

The International Covenant on Civil and Political Rights ("ICCPR") also demands that signatory states undertake "the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized" therein.[638] The U.N. Human Rights Committee has held states liable for failure to comply with this provision as to non-state actors,[639] as have regional human rights institutions.[640]

The International Covenant on Economic, Social and Cultural Rights ("ICESCR")[641] requires that states "ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights."[642] It also holds

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635. Young, James, & Webster v United Kingdom, 44 Eur. Ct. H.R. (ser. A), ¶ 49 (1981); see also X and Y v. Netherlands, 91 Eur. Ct. H.R. (ser. A) at 24–30 (1985) (same).

636. *See, e.g.*, Human Rights Comm., Baboeram v. Suriname, Commc'n No. 146/1983, U.N. Doc. CCPR/C/24/D/146/1983 (Apr. 4, 1985); Human Rights Comm., Herrera Rubio v. Colombia, Commc'n No. 161/1983, U.N. Doc. CCPR/C/31/D/161/1983 (Nov. 2, 1987); Comm. Against Torture, Dzemajl v. Yugoslavia, Commc'n No. 161/00, U.N. Doc. CAT/C/29/D/161/2000 (Dec. 2002).

637. In the *Case of Velasquez-Rodriguez*, it was held:

> The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, P174 (Jul. 29, 1988); *see also* U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR), Apr. 25–May 12, 2000, P 33, U.N. Doc. No. E/C.12/2000/4, 22nd Sess. (Aug. 11, 2000) (noting that "all human rights" impose on state parties the obligations to respect, protect, and fulfill, and explaining what those obligations require of States).

638. ICCPR, *supra* note 596, at art. 2.

639. *See, e.g.*, William Eduardo Delgado Páez v. Colombia, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (1990).

640. Waite & Kennedy v. Germany, Eur. Ct. H.R. 393 (1999); Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. 50, 58 (1993); Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, PP166, 172 (July 29, 1988)

641. G.A. Res. 2200A (XXI) U.N. Doc. A/RES/2200A (Dec. 16, 1966); *see also id.* at pmbl. ("[T]he individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the [ICESCR].").

642. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights likewise, UN Doc E/C.12/2000/13 (1997) art 18 [hereinafter Maastricht Guidelines].

states "responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behavior of such non-state actors."[643]

The U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities ("Declaration on Minorities")[644] also mandates that states "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs"; to "take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue"; and to "take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory."[645] The Declaration on Minorities's obligation requires states to "take measures to create favourable conditions" undoubtedly creates a responsibility to take proactive measures to prevent the violation of human rights by non-state actors.

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") requires state parties "to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."[646] The CERD further obligates states to assure effective protection from racial discrimination, and to assure the individual's right to seek damages if it nevertheless occurs. For instance, in *L.K. v. The Netherlands*, the Committee on the Elimination of Racial Discrimination held that these norms require the state to take concrete action when confronted with private racial discrimination.[647] In *L.K.*, a group of street residents made clear that they did not want foreigners to move into the neighborhood, and filed a petition against the landlord to prevent him from renting the home to a

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The Maastricht Guidelines "provide a comprehensive framework for understanding the legal nature of the norms found in the [ICESCR] and are widely used as a means of interpreting those norms." Office of the U.N. High Comm'r for Human Rights, Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions, at 7, U.N. Sales No. E.04.XIV.8 (2005).

643. Maastricht Guidelines, *supra* note 642, at 18 n. 37; *see also id.* at art. II p. 6 ("The obligation to protect requires States to prevent violations of such rights by third parties . . . The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.").

644. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992)

645. *Id.* at art. 4, §§ 2–4.

646. International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at art. 2(d), U.N. Doc. A/6014 (1965) [hereinafter CERD].

647. L.K. v. Neth., Communication No. 4/1991, U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/42/D/4/1991 (Mar. 16, 1993).

foreigner.[648] The Committee held that the state violated the CERD by failing to offer effective protections and remedies.[649]

The American Convention on Human Rights contains an undertaking to "respect" and to "ensure" the human rights contained therein.[650] The latter phrase gives rise to protective duties, a fact that the Inter-American Commission recognized as early as 1975.[651]

The UNDRIP explicitly requires that "[s]tates, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration," including the securing of individual rights discussed in the UNDRIP and incorporated vis-à-vis Article 1.[652] This includes steps to ensure that non-state actors do not violate individual rights.

7. Intra/Intertribal Disenrollment Appellate Court

Professor Suzianne Painter-Thorne has proposed the creation of "wholly independent judicial bodies such as an intertribal appellate court that would provide independent review of tribal membership decisions."[653] Specifically, argues Painter-Thorne, such a tribunal would "provide redress for those aggrieved by enrollment decisions, quieting critics' cries for federal oversight."[654] Ideally, an intertribal appellate court would administer appeals from trial courts of numerous tribes, much like the United States Courts of Appeal review appeals from federal district courts.[655] Ideally, the courts would be operated by the tribes themselves, in order to provide "a level of judicial independence in the review of membership decisions that critics charge is currently lacking under the current structure of tribal governments and court systems."[656]

One criticism of this approach is that it would require tribes to waive their sovereign immunity in an alien tribunal, potentially opening up a Pandora's box of

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648. *Id.*

649. *Id.*; *see also* A. Yilmaz-Dogan v. Neth., Communication No. 1/1984, U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/36/D/1/1984 (1987) (same). Notably, a CERD petition does not necessarily require domestic exhaustion. *See generally* Anne F. Bayefsky, *Direct Petition in the UN Human Rights Treaty System*, 95 PROCS. OF THE ANN. MEETING 71 (2001).

650. Organization of American States, American Convention on Human Rights, art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

651. Informe Anual de la Comisión Interamericana de Derechos Humanos 1975, Organization of American States, OEA/Ser.L/V/II.37, Doc. 20 (June 28, 1976); Report on the Situation of Human Rights in the Republic of Guatemala, Organization of American States, OEA/Ser.L/V/II.53, Doc. 21, Chapter II (Right to Life), Topic B, P 10 (Oct. 13, 1981).

652. UNDRIP, *supra* note 27, at art. 38.

653. Painter-Thorne, *supra* note 126, at 346.

654. *Id.*

655. *Id.*

656. *Id.* at 347.

liability.[657] But in this situation the benefit surely outweighs the cost, as tribes who assert sovereign immunity in the face of disenrollment actions put the entire doctrine at risk. For instance, in *Lewis v. Norton*,[658] the Ninth Circuit found that the underlying membership dispute was "deeply troubling on the level of fundamental substantive justice" and urged that Congress completely abrogate tribal sovereign immunity in light of the "new and economically valuable premium on tribal membership."[659] Tribal members themselves urge such a waiver, and have in fact called on Congress to waive tribal sovereign immunity in federal courts[660]—and, in the past, Congress has seriously considered doing so.[661] As noted by Professor Patrice Kunesh:

> [T]ribes should be mindful that improvident use of tribal sovereign immunity may impede actualization of full tribal self-determination and obstruct ultimate tribal vindication of important legal rights. . . . Co-extensive with the expansive exercise of sovereign powers, and arguably to the judicial viability of tribal sovereign immunity, is the necessity of ensuring that such power is exercised with a good measure of political fairness, responsiveness and transparency. . . . Thus, tribal immunity is much more than a protection of the legitimate interests of tribes; it is a privilege that carries with it the responsibility to engage in fair dealing in all transactions, in governmental and commercial activities and with tribal members and nonmembers alike, and to provide an independent forum properly authorized and equipped to provide appropriate and adequate relief to those who interact with tribes and are injured by them.[662]

In sum, a very *limited* waiver of sovereign immunity as it relates to disenrollment and the protection of individual human rights would sacrifice very little, and would protect a whole lot—it will ensure procedural and substantive fairness without causing Congress or the Supreme Court to trample tribal sovereignty.[663]

CONCLUSION

Federal assimilation and termination policies of yesteryear have effectively eroded the right of tribal governments to make enrollment decisions "distinct from

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657. *Id.* at 351; *see also generally* Merritt Schnipper, *Federal Indian Law-Ambiguous Abrogation: The First Circuit Strips the Narragansett Indian Tribe of Its Sovereign Immunity*, 31 W. NEW ENG. L. REV. 243, 256 (2009).

658. 424 F.3d 959 (9th Cir. 2005).

659. *Id.* at 963.

660. Painter-Thorne, *supra* note 126, at 336–37.

661. *See, e.g.*, American Indian Equal Justice Act, S. 1691, 105th Cong. §§ 1–2 (1998) (restricting tribal jurisdiction over non-Indians and providing for a waiver of tribal governments' immunity from suit in federal court).

662. Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 416–17 (2009).

663. *See* Painter-Thorne, *supra* note 126, at 350 ("To the extent membership disputes are viewed as running afoul of individual rights, the risk of congressional intervention is very real and would cost much in terms of sovereignty.").

the nation–states that threaten to engulf them."[664] The result is that the concepts and assumptions of American Indian identity reproduce the very social inequalities that have traditionally defined American Indian oppression.[665] Until these ideologies are disrupted by American indigenous peoples and tribal governments themselves, "the important projects for native decolonization and self-determination that define Native movements and cultural revitalization efforts today are impossible."[666]

Unless tribal governments address the disenrollment crisis in the first instance—either from internal reform or in support of minimally evasive federal policy or legislation changes—American indigenous peoples could end up terminating themselves. Indeed, as National Geographic photojournalist Aaron Huey poignantly remarked in a TED Talk after a visit to Sioux Indian country:

> The last chapter in any successful genocide is the one in which the oppressor can remove their hands and say, 'My God, what are these people doing to themselves? They're killing each other. They're killing themselves while we watch them die.' This is how we came to own these United States. This is the legacy of manifest destiny.[667]

This is Indian disenrollment.

Yet the modern American legacy is not, or should not be, one of Manifest Destiny. Every U.S. President for the last half century, as well as Congress on many occasions throughout that span, has renounced that legacy, in recognition of the indelible mark of American indigenous peoples on American history, geography, culture, and society.[668] The modern American legacy must instead honor and cherish American indigenous peoples, as an embodiment of Americana. But unless we the people—meaning American indigenous peoples first and foremost; the federal government, and the individuals who comprise its executive, legislative and judicial branches; other governmental and non-governmental entities; and the American citizenry at large—collectively do something to find a cure to the disenrollment epidemic, America's indigenous peoples may cease to exist.

We must find the cure.

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664. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisdictional Moment in Human Rights*, 102 CALIF. L. REV. 173, 200 (2014).

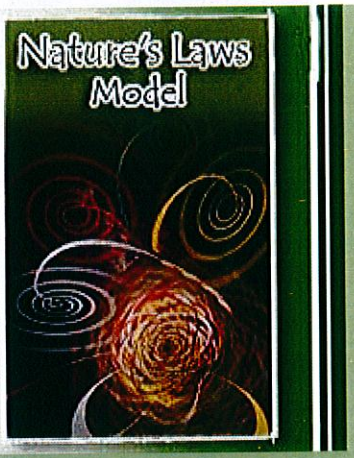
665. BARKER, *supra* note 22, at 7.

666. *Id.*

667. Aaron Huey, *America's Native Prisoners of War*, TED (Sept. 2010), http://www.ted.com/talks/aaron_huey?language=en.

668. Lise Balk King, *A Tree Fell in the Forest: The U.S. Apologized to Native Americans and No One Heard a Sound*, INDIAN COUNTRY TODAY (Dec. 3, 2011), http://indiancountrytodaymedianetwork.com/2011/12/03/tree-fell-forest-us-apologized-native-americans-and-no-one-heard-sound.

Nature's Laws Website



Partners

The *Nature's Laws Project* was developed in a partnership involving the Heritage Community Foundation and representatives of First Nations from Treaty 6, 7 and 8.

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The *Nature's Laws Project Team* contributed extensive volunteer time to the Project, which could not have been otherwise accomplished. The Senior Aboriginal Research Consultant is Chief Wayne Roan, Elder and Ceremonialist. The Senior Academic Consultant is Earle Waugh, Ph.D., Director, Dimic Research Institute and Professor Emeritus, Religious Studies, University of Alberta, Edmonton, Canada. The Legal Consultant was Catherine Twinn, B.A., LL.B., LL.M., First Nations legal practitioner and historian. The project was managed by Adriana A. Davies, Ph.D., Executive Director, Heritage Community Foundation.

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Context and Background

The Aboriginal concept of Nature's Law differs from the western concept of natural law understood within the western legal tradition and the tradition of the French *philosophes*.

In the West, natural law is usually associated, first, with the rhythms and patterns that scientists have seen in nature and, then, with local codes and legal understandings that were applied in regional European communities. Thus, natural law is held to grow out of the regular patterns of everyday life known and accepted by everyone in the community.

Aboriginal notions of Nature's Law have a much different focus and encompass all of this and more including:

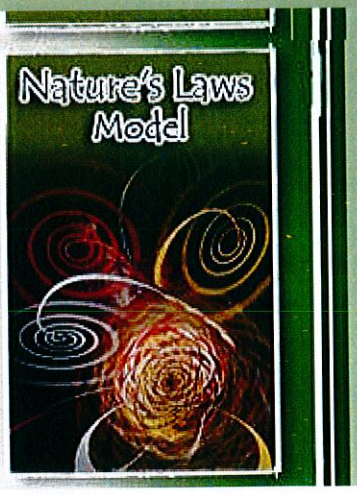
- All of the elements that we would associate with genealogical relationships
- Ancestral spirits
- The workings of the cosmos
- The moral laws expressed in right living
- The succession of growing things in nature
- The range of senses and sensory perception
- The relationships between human beings and plants and animals and, finally,
- The interconnectedness across time, generations, natural processes and culture.

Quicklinks

Understandings Held by Indigenous People

Ten Categories of Nature's Law

Traditional Indigenous "Justice" In Canada



In other words, Nature's Law relates to the principle of integration within society, culture and cosmos. Thus, it can be seen that Nature's Law enlarges the meaning of the western concept of natural law within a larger framework. In essence, everything becomes part of an ecosystem and is not bounded by western views of what we see or feel. Aboriginal attitudes towards the law are practical and, unlike the western legal tradition, it is not based on a hierarchical system of principles or customary practice. Nature's Law is, thus, very contextual and relates to tribal social organization.

In this introductory section, we will attempt to sketch out significant differences in the Indigenous understanding of law. This clearing of the ground will demonstrate that, while history does help in comprehending Indigenous law (in this report we use the words "*Indigenous*" and "*Indigenous*" more or less equivalently), for Indigenous peoples that law was based upon certain intuitions about the cosmos, the world, animals and humans that we can only designate by our word "*natural*," despite its inadequacy. The social devotion to this "*nature*" constituted the foundations for Indigenous law.

The 10 categories of Nature's Laws developed by the project team are explored as is the case for traditional Indigenous justice within the laws of Canada.

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The enduring effects of abuse and related adverse experiences in childhood

A convergence of evidence from neurobiology and epidemiology

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Abstract

Background

Childhood maltreatment has been linked to a variety of changes in brain structure and function and stress-responsive neurobiological systems. Epidemiological studies have documented the impact of childhood maltreatment on health and emotional well-being.

Methods

After a brief review of the neurobiology of childhood trauma, we use the Adverse Childhood Experiences (ACE) Study as an epidemiological "case example" of the convergence between epidemiologic and neurobiological evidence of the effects of childhood trauma. The ACE Study included 17,337 adult HMO members and assessed 8 adverse childhood experiences (ACEs) including abuse, witnessing domestic violence, and serious household dysfunction. We used the number of ACEs (ACE score) as a measure of cumulative childhood stress and hypothesized a "dose-response" relationship of the ACE score to 18 selected outcomes and to the total number of these outcomes (comorbidity).

Results

Based upon logistic regression analysis, the risk of every outcome in the affective, somatic, substance abuse, memory, sexual, and aggression-related domains increased in a graded fashion as the ACE score increased ($P < 0.001$). The mean number of comorbid outcomes tripled across the range of the ACE score.

Conclusions

The graded relationship of the ACE score to 18 different outcomes in multiple domains theoretically parallels the cumulative exposure of the developing brain to the stress response with resulting impairment in multiple brain structures and functions.

Keywords: child development, neurobiology, stress, childhood abuse, domestic violence, substance, mental health

Introduction

The organization and functional capacity of the human brain depends upon an extraordinary set and sequence of developmental and environmental experiences that influence the expression of the genome (Perry and Pollard 1998; Teicher 2000, 2002). Unfortunately, this elegant sequence is vulnerable to extreme, repetitive, or abnormal patterns of stress during critical or circumscribed periods of childhood brain development that can impair, often permanently, the activity of major neuroregulatory systems, with profound and lasting neurobehavioral consequences (Teicher 2000; Heim and Nemeroff 2001; Repetti 2002; Gutman and Nemeroff 2002; Gorman 2002; De Bellis and Thomas 2003a; Bremner and Vermetten 2001). Now, converging evidence from neurobiology and epidemiology suggests that early life stress such as abuse and related adverse experiences cause enduring brain dysfunction that, in turn, affects health and quality of life throughout the lifespan.

An expanding body of evidence from rodent, primate, and human research suggests that early stressors cause long term changes in multiple brain circuits and systems (Sanchez 2001; Bremner 2003a). The amygdala mediates fear responses, and the prefrontal cortex is involved in mood as well as emotional and cognitive responses (Bremner 2003b). The hypothalamic-pituitary-adrenal (HPA) axis plays a critical role in the stress response. There is an important interaction between development and stress, e. g., young infants do not have a fully developed glucocorticoid (cortisol in humans) response to stress, although other markers such as c-*fos* show that they do respond to stressors (Smith 1997). Substantial research has focused on the relationship between development, early stress, the HPA axis, and the hippocampus, a stress-sensitive brain region that plays a critical role in learning and memory (McEwen 1992; Sapolsky 1990, 1996; Gould and Tanapat 1999). The hippocampus has the capacity to grow new neurons in adulthood (neurogenesis), but stress inhibits neurogenesis (Nibuya 1995; Duman 1997; Gould 1997) and memory function (Diamond 1996; Luine 1994). Early stressors cause long-term increases in glucocorticoid responses to stress (Plotsky and Meaney 1993; Ladd 1996) as well as decreased genetic expression of cortisol receptors in the hippocampus and increased genetic expression of corticotrophin-releasing factor in the hypothalamus, both of which may contribute to dysregulation of the hypothalamic-pituitary-adrenocortical (HPA) system (Ladd 1996; Liu 1997). Early environmental deprivation inhibits hippocampal neurogenesis; conversely, neurogenesis is enhanced by enriched environment (Kempermann 1997), learning (Gould 1999a) and, at times, some antidepressant treatments (Malberg 2000; Czeh 2001). The noradrenergic/locus coeruleus system also plays a key role in stress (Bremner 1996a) and early stressors lead to long-term decreases in genetic expression of alpha-2 noradrenergic receptors in the locus coeruleus, which may lead to loss of feedback inhibition of noradrenergic activity with associated increases in noradrenergic responses to subsequent stressors (Sanchez 2001; Caldji 2000; Francis 1999). Alterations in serotonergic (Rosenblum 1994; Bennett 2002) and GABAergic (Caldji 2000) receptors also contribute to deficits in social attachment and regulation of mood and affect following early stress. Cognitive problems have also been identified in children with PTSD (Beers 2002).

Studies in clinical populations of abuse survivors with posttraumatic stress disorder (PTSD) are consistent with animal studies. Smaller hippocampal volume is found among adults with early abuse-related PTSD (Bremner 1997, 2003a; Stein 1997), adult women with early abuse and depression (Vythilingam 2002), and borderline personality disorder (Driessen 2000; Schmahl 2003) but not in children with PTSD (De Bellis 1999a, 2002; Carrion 2001) suggesting that early abuse with chronic long-term stress-related psychiatric disorder is required for this finding. Consistent with deficits in hippocampal function are deficits in verbal declarative memory (Bremner 1995) and failure of hippocampal activation with memory tasks (Bremner 2003a) in adult women

with early abuse-related PTSD. Children with PTSD have smaller whole brain and corpus callosum volume (Carrion and Steiner 2000; De Bellis 2002) and alterations in structure of the cerebellum (Anderson 2002) and frontal cortex. (De Bellis and Thomas 2003b; Carrion 2001). Abused children also show alterations in EEG activity in the frontal cortex (Teicher 1994, 1997; Ito 1998). Studies in adult women with early abuse-related PTSD have shown altered function in the anterior cingulate/medial prefrontal cortex while they were remembering their childhood trauma (Bremner 1999; Shin 1999). Similar to animal studies there is evidence of dysregulation of the sympathetic nervous system in humans; early abuse and PTSD is associated with increased cortisol and norepinephrine levels in children (Carrion 2002; De Bellis 1999, Gunnar 2001), down-regulated platelet alpha-2 adrenergic receptors (Perry 1994), and increased resting heart rate (Perry 2001) while adults with early abuse and PTSD have low baseline (Bremner 2003b) and increased stress-induced cortisol responses (Elzinga 2003; Bremner 2003c) and increased norepinephrine at baseline (Lemieux and Coe 1995; El-Sheikh 2001). Women with early abuse and depression also have increased cortisol reactivity to stress (Heim 2000, 2001).

Deprivation of developmentally appropriate experience may reduce neuronal activity, resulting in a generalized decrease in neurotrophin production, synaptic connectivity, and neuronal survival (Gould and Tanapat 1999; Nibuya 1995; Duman 1997; Gould 1997) resulting in profound abnormalities in brain organization and structure (Perry 2002; Read 2001). Thus, childhood abuse and exposure to domestic violence can lead to numerous differences in the structure and physiology of the brain that expectedly would affect multiple human functions and behaviors (Perry and Pollard 1998; Teicher 2000, 2002).

Numerous studies have established that childhood stressors such as abuse or witnessing domestic violence can lead to a variety of negative health outcomes and behaviors, such as substance abuse, suicide attempts, and depressive disorders (Brodsky 1997; Kingree 1999; van der Kolk 1991; Kendall-Tackett 1993; Osofsky 1999; Hefferman 2000; Kendler 2000; Putnam 2003; Rohsenow 1988). This paper presents a conceptual framework that integrates findings from recent studies of the neurobiological effects of childhood abuse and exposure to domestic violence on brain structure and function (as reviewed above) with epidemiologic data from the Adverse Childhood Experiences (ACE) Study. Although the literature about the effects of childhood maltreatment is extensive (Bremner 2000, 2003a, 2003b; Kendall-Tackett 1993), we use the data and findings from the ACE Study as series of epidemiologic "case examples" in this paper because it simultaneously assessed a wide range of interrelated adverse experiences including abuse (emotional, physical, or sexual); witnessing domestic violence; parental marital discord; growing up with mentally ill, substance abusing, or criminal household members (Dong 2003a; Dube 2004a, 2002b) whereas most prior studies have focused on single forms of abuse. In addition, the ACE Study assessed numerous social, behavioral, and health outcomes (Anda 1999, 2001, 2002a, 2002b; Dube 1999, 2002a, 2003a, 2003b; Felitti 1998; Dietz 1999; Hillis 2000, 2001, 2004; Dong, 2003b; Edwards 2003a, 2003b; Chapman 2004;Whitfield 2003a) that would necessarily involve the performance of multiple brain functions and neuroregulatory systems. These aspects of the study design along with a large sample size allow for the illustration of how the effects of multiple forms of abuse and related stressors are cumulative and affect a wide variety of outcomes that might be expected based upon the neurobiological alterations reviewed above.

We used data from the ACE Study to test the following hypotheses, which have their basis in the neurosciences:

- The damaging effects of adverse childhood experiences (ACEs) would be nonspecific, thereby affecting a variety of functions and behaviors, because abuse/traumatic stress affect a variety of brain structures and functions.
- The likelihood of disturbances in any given function or behavior such as anxiety, sleep disturbances, substance abuse, sexuality, and hyperarousal or aggression would have a cumulative or "dose-response" relationship to the number of ACEs, theoretically paralleling the total exposure of the developing central nervous system to the activated stress response during childhood.

- The number of comorbidities (Lilienfeld 2003) (mean number of human behaviors and functions affected), which theoretically parallels the number of brain systems and associated functions affected, would also have a dose-response relationship to the number of ACEs.

Methods

The ACE Study is an ongoing collaboration between Kaiser Permanente's Health Appraisal Center (HAC) in San Diego, California, and the U. S. Centers for Disease Control and Prevention. The objective is to assess the impact of numerous, interrelated, ACEs on a wide variety of health behaviors and outcomes and on health care utilization and the methods of the study have been described in detail elsewhere. (Anda 1999; Dube 1999; Felitti 1998).

The study population was drawn from the HAC, which provides preventive health evaluations to adult members of Kaiser Health Plan in San Diego County. All persons evaluated at the HAC complete a standardized questionnaire, which includes health histories and health-related behaviors, a medical review of systems, and psychosocial evaluations which are a part of the ACE Study database.

Two weeks after their evaluation, each person evaluated at the HAC between August 1995 and March 1996 (survey wave 1; response rate 70 %) and June and October 1997 (survey wave 2; response rate 65%) received the ACE Study questionnaire by mail. The questionnaire collected detailed information about ACEs including abuse, witnessing domestic violence, and serious household dysfunction as well as health-related behaviors from adolescence to adulthood. Wave 2 respondents were asked detailed questions about health topics that analysis of wave 1 data had shown to be important (Anda 2003a; Felitti 1998; Dube 2003a; Dong 2003b). The response rate for both survey waves combined was 68%, for a total of 18175 responses.

We excluded 754 respondents who coincidentally underwent examinations during the time frames for both survey waves, leaving an unduplicated total of 17421. After exclusion of 84 respondents with missing demographic information, the final sample included 95% of the respondents (17337/18175); (wave I=8 708, wave II=8 629).

Definitions of Adverse Childhood Experiences (ACEs)

Questions used to define ACEs are listed in Table 1. All questions about ACEs pertained to the respondents' first 18 years of life (≤ 18 years of age). For questions adapted from the Conflict Tactics Scale (CTS) (Strauss and Gelles 1990) there were 5 response categories: "never","once or twice","sometimes","often", or "very often". We defined 3 types of childhood abuse: emotional abuse (2 questions), physical abuse (2 questions), or contact sexual abuse (4 questions) by Wyatt (1985). We defined 5 exposures to household dysfunction during childhood: exposure to alcohol or other substance abuse (defined by 2 questions) (Schoenborn 1991), mental illness (2 questions), violent treatment of mother or stepmother (4 questions) (Strauss 1990), criminal behavior in the household (1 question), and parental separation or divorce (1 question). Respondents were defined as exposed to a category if they responded "yes"to 1 or more of the questions. Despite the sensitivity of these questions, the test-retest reliability for every ACE and the ACE score were in the good to excellent range (range of Cohen's kappa: 0.46–0.86) (Dube 2004). Furthermore, a comparison of respondents and nonrespondents to the ACE Study questionnaire found no evidence of response rate bias or that respondents were biased toward attributing their health problems to childhood experiences (Edwards and Anda 2001).

Table 1

Definition and prevalence of each category of adverse childhood experience and the ACE score

Childhood abuse	**Total N = 17,337**
Emotional abuse	10.6
(Did a parent or other adult in the household…)	
1. Often or very often swear at you, insult you, or put you down?	
2. Sometimes, often, or very often act in a way that made you fear that you might be physically hurt?	
Physical	28.3
(Did a parent or other adult in the household…)	
1. Often or very often push, grab, slap, or throw something at you?	
2. Often or very often hit you so hard that you had marks or were injured?	
Sexual	20.7
(Did an adult or person at least 5 years older ever…)	
1. Touch or fondle you in a sexual way?	
2. Have you touch their body in a sexual way?	
3. Attempt oral, anal, or vaginal intercourse with you?	
4. Actually have oral, anal, or vaginal intercourse with you?	
Household dysfunction	
Substance abuse	26.9

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The number of ACEs (range: 0–8) was summed to create the ACE scores, with scores of 4 or more included as one category (≥ 4). Analyses were conducted treating the ACE score as 4 dichotomous variables (yes or no for scores of ≥ 4, 3, 2, and 1) with a score of 0 (no ACEs) as the referent.

Epidemiological evidence of disordered brain function in adulthood

The data and definitions used for the outcomes that provide evidence of disordered function were selected on an *a priori* basis using a general framework of health and social problems that likely represent dysfunction of specific brain systems and/or improper integration between systems. We recognize that functional neuroanatomical and physiologic systems are interactive and integrated and that behaviors and health problems cannot generally be attributed to the function of any single or particular system.

To define the health-related behaviors or problem sources, we used information from the medical review of systems (ROS), the physical examination (PE), and the ACE Study questionnaire (ACEQ). In the definitions of these problems that follow, the source of the data is in parentheses.

Mental health disturbances

Panic reactions (ROS) A "yes" response to the question: "Have you had or do you now have special circumstances in which you find yourself panicked?"

Depressed affect (ROS) A "yes"to the question,"Have you had or do you now have depression or feel down in the dumps?"

Anxiety (ROS) A "yes" to the question,"Do you have much trouble with nervousness?"

Hallucination (ROS) A "yes" response to the question, "Have you ever had or do you have hallucinations (seen, smelled, or heard things that weren't really there)?"

Somatic disturbances

Sleep disturbance (ROS) A "yes" to "Do you have trouble falling asleep or staying asleep" or a "yes" to "Tiredness, even after a good night's sleep?"

Severe obesity (PE) Body mass index (kg/m^2) ≥ 35.

Multiple somatic symptoms (ROS) A total of 6 or more somatic symptoms in at least 2 different organ systems in the absence of a diagnosis specific to those systems.

Substance abuse

Current Smoking–Nicotine (ACEQ) A "yes" to the question, "Do you currently smoke cigarettes?"

Self-reported alcoholic (ACEQ) A "yes" to the question, "Have you ever considered yourself to be an alcoholic?"

Ever used illicit drugs (ACEQ) A "yes"to the question,"Have you ever used street drugs?"

Injected drug use (ACEQ) A "yes" to the question,"Have you ever *injected* street drugs?"

Impaired memory of childhood

Impaired memory of childhood (ACEQ) A "yes" to the question, "Are there large parts of your childhood after age 4 that you can't remember?"

Number of age periods affected (ACEQ) Those who responded "yes" to the previous were asked to check boxes indicating age periods (in years) of impaired memory (4–6, 7–9, 10–12, 13–15, and 16–18). We summed the number of boxes checked to assess the relationship of the ACE score to the mean number of age periods affected. Information about impaired memory was available only for the wave 1 (N = 8708).

Sexuality

Early intercourse (ACEQ) Age at first intercourse of 14 years or younger.

Promiscuity (ACEQ) Lifetime sexual partners ≥ 30 (approximately the 90^{th} percentile for males and the 95^{th} percentile for females).

Sexual dissatisfaction (ROS) A "no" to the question: "Are you currently satisfied with your sex life?"

Perceived stress, anger control, and risk of intimate partner violence

High level of perceived stress (ROS) A response indicating "high" to the instruction,"Please fill in the circle that best describes your stress level (high, medium, low)."

Difficulty controlling anger (ROS) A "yes" to the question, "Do you have or have you had reason to fear your anger getting out of control?"

Risk of perpetrating intimate partner violence (ROS) A "yes" to the question, "Have you ever threatened, pushed, or shoved your partner?" Data about the risk of perpetrating intimate partner violence was available only for wave 2 (N = 8629).

Number of comorbid outcomes We summed the number of outcomes (range: 0–18) for each respondent to quantitate the amount of comorbidity (mean number of disordered functions) associated with increasing ACE scores.

Statistical analysis

Adjusted odds ratios (OR) and 95% confidence intervals (CI) were obtained from logistic regression models using The SAS System Version 8.2, which assessed the associations between the ACE score (0, 1, 2, 3, or ≥ 4) and each of the 18 outcome measures. We used multiple linear regression to estimate the number of comorbid outcomes by ACE score. Covariates in all multivariate models included age, sex, race (other versus white), and education (high school diploma, some college, or college graduate versus less than high school).

Results

The final study sample included 9367 (54%) women and 7970 (46%) men. The mean age was 56 years for women and 58 years for men. Seventy-three percent of women and 76% of men were white; 34% of women and 45% of men were college graduates, and another 37 % and 34%, respectively had some college education.

Prevalence of the adverse childhood experiences

At least 1 ACE was reported by 64% of respondents. The prevalence of each ACE is shown in Table 1.

ACE score and the risk of health and behavioral outcomes

The ACE score had a strong, graded relationship to the prevalence and risk (adjusted OR) of affective disturbances ($P < 0.001$; Table 2, mental health disturbances). For persons with ≥ 4 ACEs, the risk of panic reactions, depressed affect, anxiety, and hallucinations were increased 2.5-, 3.6-, 2.4 and 2.7-fold, respectively (Table 2).

Table 2

Relationship of the ACE score to the prevalence and relative risk (adjusted odds ratio)* of disturbances in two major domains of dysfunction: mental and somatic health disturbances

		Mental health disturbances								Somatic health di		
		Panic reactions		Depressed affect		Anxiety		Hallucinations		Sleep disturbance		S
ACE score	(N)	%	Adjusted odds ratio	%	Adjusted odds ratio	%	Adjusted odds ratio	%	Adjusted odds ratio	%	Adjusted odds ratio	%
0	(6255)	8.3	1.0 (referent)	18.4	1.0 (referent)	7.8	1.0 (referent)	1.3	1.0 (referent)	36.3	1.0 (referent)	5
1	(4514)	10.9	1.3 (1.2–1.5)	25.2	1.5 (1.3–1.6)	9.1	1.2 (1.1–1.4)	1.5	1.1 (0.8–1.5)	41.6	1.2 (1.1–1.3)	7
2	(2758)	13.6	1.7 (1.4–1.9)	34.1	2.2 (2.0–2.4)	12.4	1.7 (1.4–1.9)	2.3	1.6 (1.2–2.3)	47.5	1.6 (1.4–1.7)	8
3	(1650)	16.8	2.0 (1.7–2.4)	38.8	2.5 (2.2–2.8)	14.1	1.8 (1.6–2.2)	2.9	2.0 (1.4–2.9)	51.1	1.8 (1.6–2.0)	8
≥4	(2160)	20.9	2.5 (2.2–2.9)	49.0	3.6 (3.2–4.0)	19.0	2.4 (2.1–2.8)	4.0	2.7 (1.9–3.7)	56.1	2.1 (1.9–2.4)	1
Total	(17337)	12.2	–	28.4	–	10.9	–	2.0	–	43.3	–	

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*All odds ratios are adjusted for age, sex, race, and educational attainment using logistic regression

The ACE score also had a graded relationship to the prevalence and risk (adjusted OR) each of the somatic disturbances ($P < 0.001$; Table 2, somatic health disturbances). The risk of sleep disturbance, severe obesity, and multiple somatic symptoms were increased 2.1-, 1.9-, and 2.7-fold, respectively, for persons with 4 or more ACEs.

Substance use and abuse also increased as the ACE score increased. The risk of smoking, alcoholism, illicit drug use, and injected drug use were increased 1.8-, 7.2-, 4.5-, and 11.1-fold, respectively, for persons with ≥ 4 ACEs (Table 3, substance abuse).

Table 3

Relationship of the ACE score to the prevalence and relative risk (adjusted odds ratio)* of disturbances in two domains: substance abuse and sexuality

		Substance abuse								Sexuality			
		Smoking		Alcoholism		Illicit drug use		Injected drug use		Early intercourse		Pı (≥
ACE score	(N)	%	Adjusted odds ratio	%	Adjusted odds ratio	%	Adjusted odds ratio	%	Adjusted odds ratio	%	Adjusted odds ratio	%
0	(6255)	6.5	1.0 (referent)	2.5	1.0 (referent)	7.9	1.0 (referent)	0.2	1.0 (referent)	2.3	1.0 (referent)	
1	(4514)	7.6	1.1 (0.94–1.3)	5.1	2.0 (1.6–2.4)	13.8	1.6 (1.4–1.8)	0.6	2.3 (1.2–4.4)	5.1	2.1 (1.7–2.6)	
2	(2758)	9.3	1.3 (1.1–1.5)	7.4	2.9 (2.4–3.6)	20.0	2.2 (1.9–2.6)	1.4	4.5 (2.4–8.4)	6.6	2.7 (2.2–3.4)	
3	(1650)	11.9	1.6 (1.3–1.9)	10.5	4.5 (3.6–5.6)	24.9	2.9 (2.5–3.4)	1.6	5.3 (2.7–10.2)	8.5	3.7 (2.9–4.7)	
≥4	(2160)	14.5	1.8 (1.5–2.1)	15.3	7.2 (5.9–8.9)	35.2	4.5 (3.9–5.2)	3.7	11.1 (6.2–19.9)	14.2	6.6 (5.3–8.2)	1(
Total	(17337)	8.8	–	6.3	–	16.5	–	1.1	–	5.8	–	

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*All odds ratios are adjusted for age, sex, race, and educational attainment using logistic regression

Similarly, all three measures of sexuality were associated with the ACE score (Table 3, sexuality). The risk of early intercourse, promiscuity, and sexual dissatisfaction were increased 6.6-, 3.6-, and 2-fold, respectively, for persons with ≥ 4 ACEs (Table 3).

The risk of impaired memory of childhood was increased 4.4-fold for persons with ≥ 4 ACEs (Table 4). The number of age periods affected for memory disturbances increased in a graded fashion as the ACE score increased ($P < 0.0001$; Table 4).

Table 4

Relationship of the ACE score to the prevalence and relative risk (adjusted odds ratio)* of problems with memory impairment for childhood and to the mean number of age periods affected

	Prevalence and risk of memory impairment			Number of age periods affected**
ACE score	(N)***	%	Adjusted odds ratio	Mean** (SD)
0	(3202)	9.7	1.0 (referent)	0.19 (0.02)
1	(2246)	12.0	1.3 (1.1–1.5)	0.23 (0.02)
2	(1379)	18.9	2.1 (1.8–2.6)	0.35 (0.02)
3	(834)	22.1	2.6 (2.1–3.1)	0.40 (0.03)
≥4	(1047)	34.0	4.4 (3.7–5.2)	0.69 (0.03)
Total	(8708)	15.8	–	–

*All odds ratios are adjusted for age, sex, race, and educational attainment using logistic regression;
**The mean number of age periods affected was adjusted for the same demographic variables using linear regression;
***The sample size is 8708 because data about memory impairment were available for the wave 1 survey only

High perceived stress, difficulty controlling anger, and the risk of perpetrating intimate partner violence (IPV) were increased 2.2-, 4.0-, and 5.5-fold, respectively, for persons with ≥ 4 ACEs (Table 5). We found (data not shown) that the adjusted odds ratio (95 % CI) for the relationship between difficulty controlling anger and the risk of perpetrating IPV were 6.3 (4.4–9.0) for men and 7.6 (5.3–11.1) for women ($P < 0.001$). Similarly (data not shown), the adjusted odds ratio (95 % CI) for the relationship between perceived high stress and the risk of perpetrating IPV was the same for both men and women: 1.8 (1.4–2.3), ($P < 0.001$).

Table 5

Relationship of the ACE score to the prevalence and relative risk (adjusted odds ratio)* of high perceived stress, difficulty controlling anger, and risk of perpetrating intimate partner violence during adulthood

		High level of perceived stress		Difficulty controlling anger		Risk of perpetrating intimate partner violence		
ACE score	(N)	%	Adjusted odds ratio**	%	Adjusted odds ratio**	(N)*	%	Adjusted odds ratio**
0	(6255)	10.5	1.0 (referent)	3.5	1.0 (referent)	(3053)	1.6	1.0 (referent)
1	(4514)	13.5	1.2 (1.1–1.4)	4.9	1.4 (1.1–1.7)	(2268)	3.0	1.8 (1.2–2.6)
2	(2758)	16.0	1.4 (1.3–1.6)	8.0	2.2 (1.8–2.7)	(1379)	4.0	2.4 (1.6–3.5)
3	(1650)	17.8	1.5 (1.3–1.8)	8.5	2.3 (1.9–2.9)	(816)	5.4	3.3 (2.1–5.0)
≥4	(2160)	24.7	2.2 (1.9–2.5)	14.4	4.0 (3.3–4.8)	(1113)	8.8	5.5 (3.8–7.8)
Total	(17337)	14.6	–	6.4	–	(8629)	3.6	–

*All odds ratios are adjusted for age, sex, race, and educational attainment using logistic regression. The adjusted odds ratio (95 % CI) for the relationship between difficulty controlling anger and the risk of perpetrating IPV were: 6.3 (4.4–9.0) for men; 7.6 (5.3–11.1) for women. The adjusted odds ratio (95 % CI) for the relationship between high perceived stress and the risk of perpetrating IPV was the same for both men and women: 1.8 (1.4–2.3).

**The sample size is 8629 because data about memory impairment were available for the wave 2 survey only

ACE score and number of comorbid outcomes

As the ACE score increased, the mean number of comorbid outcomes increased in a graded fashion (Fig. 1), nearly tripling between ACE scores of 0 and ACE scores of 7–8.

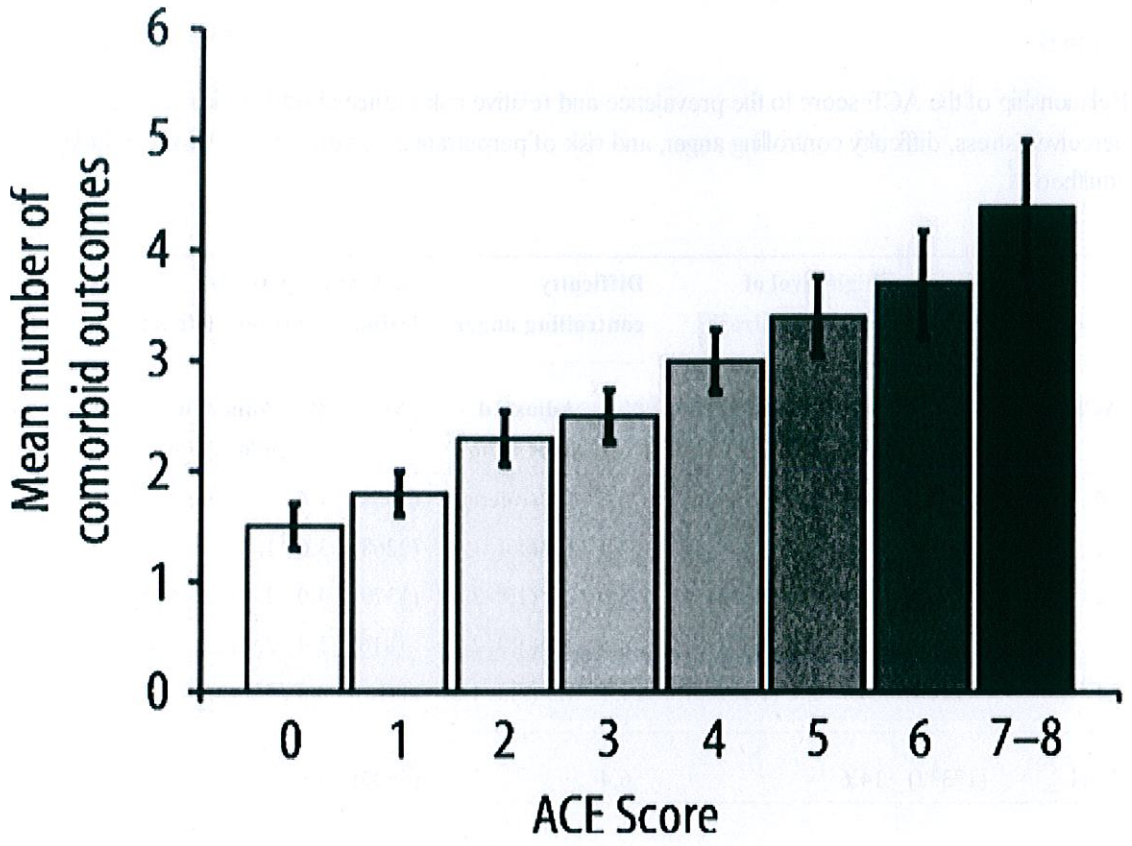

Fig. 1

The mean number of comorbid outcomes in the study sample was 2.1 (range: 0–14); means are adjusted for age, sex, race, and educational attainment. The trend in the means is significant ($P < 0.0001$); vertical error bars represent 95% confidence intervals

Discussion

These epidemiological findings converge with evidence from neurobiology about numerous effects of childhood stress on brain and physical systems (Glaser 2000). Extreme, traumatic or repetitive childhood stressors such as abuse, witnessing or being the victim of domestic violence, and related types of ACES are common, tend to be kept secret, and go unrecognized by the outside world. Likewise, the fight-or-flight response among children exposed to these types of stressors, and the attendant release of endogenous catecholamines and adrenal corticosteroids are both uncontrollable and invisible (Perry 1998; Teicher 2002; De Bellis 1994, 1997; Scaer 2001). Furthermore, the detrimental effects of traumatic stress on developing neural networks and on the neuroendocrine systems that regulate them have until recently remained hidden even to the eyes of most neuroscientists. However, the information and data that we present herein suggest that this veiled cascade of events represents a common pathway to a variety of important long-term behavioral, health, and social problems (Table 6).

Table 6

Summary of the convergence between neurobiological effects of childhood maltreatment with ACE study epidemiological findings

Area of function or dysfunction studied	Demonstrated neurobiological defects from early trauma	ACE study findings
Anxiety, panic, depressed affect, hallucinations, and substance abuse	Repeated stress & childhood trauma → hippocampus, amygdala & medial prefrontal cortex atrophy and dysfunction that mediate anxiety & mood problems	Tables 2 and 3 Unexplained panic, depression, anxiety, hallucinations & alcohol & other drug problems
Smoking, alcoholism, illicit drug use, injected drug use	Repeated stress & childhood trauma → Increased locuscoeruleus & norepinephrine activity, decreased by heroin & alcohol	Table 3 Increased smoking, alcohol and other drug use
Early intercourse, promiscuity, sexual dissatisfaction, perpetration of intimate partner violence	Repeated stress & childhood trauma → amygdala defects; role in sexual & aggressive behavior and deficits in oxytocin with impaired pair bonding	Tables 3 and 5 Risky sexual behavior, anger control, risk for aggression against intimate partners
Memory storage and retrieval	Hippocampus role in memory storage and retrieval; hippocampal & amygdala size reduction in childhood trauma; deficits in memory function	Table 4 Impaired memory of childhood and number age periods affected increases as the ACE score increase
Body weight and obesity	Repeated stress & distress, via glucocorticoid pathways, leads to increased intra-abdominal & other fat deposits	Table 2 Increased obesity
Sleep, multiple somatic	Repeated stress & distress, via several	Tables 2 and 5

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The convergence of evidence from neurobiology and epidemiology calls for an integrated perspective on the origins of health and social problems throughout the lifespan. This constellation of effects from childhood stressors calls to mind the wisdom of Occam's razor, a celebrated dictum in medicine, which holds that if a single unifying explanation can be found for multiple symptoms and problems, then it is likely that the correct explanation lies in the simplest account (Lo Re and Bellini 2002). In the context of what we present herein, the application of this dictum has the potential to unify and improve our understanding of many seemingly unrelated, but often co-morbid health and social problems that have historically been seen and treated as categorically independent in Western culture.

Certain neurobiological findings are especially congruent with the data from the ACE Study reported herein (Table 6). Magnetic resonance imaging (MRI) has revealed reductions in hippocampus (Bremner 1997, 2003a; Stein 1997), and amygdala (Driessen 2000; Schmahl 2003) volumes as well as deficits in verbal declarative

memory measured with neuropsychological testing (Teicher 2000; Heim and Nemeroff 2001) among women who were sexually abused as children. The hippocampus plays a role in memory storage and retrieval; we found that impaired memory of childhood increases as the ACE score increases. Neurobiological evidence supports the hypothesis of dysfunction in hippocampus, amygdala, medial prefrontal cortex, and other limbic structures believed to mediate anxiety and mood dysregulation following early abuse (Teicher 2002). We, in turn, demonstrated a graded relationship of the ACE score to affective symptoms and unexplained periods of panic among our study participants. We found that a history of hallucinations increases as the ACE score increases; these symptoms may be related to alterations in hippocampal and/or prefrontal cortical function. The amygdala plays a critical role in fear responses and probably sexual and aggressive behaviors (Pinchus and Tucker 1978) and in the current study we show strong relationships of the ACE score to sexual behaviors, poor anger control, and the risk for perpetrating intimate partner violence.

The current study adds support for numerous effects of childhood adverse experiences on physical health. Stress is known from animal studies to be associated with a broad range of effects on physical health, including cardiovascular disease, hypertension, hyperlipidemia, asthma, metabolic abnormalities, obesity, infection, and other physical disorders (Musselman 1998; Kaplan 1982; Rozanski, McEwen and Stellar 1993; Anda 1993). Findings of increased obesity as the ACE score increases in this study and reported elsewhere (Williamson 2002) are consistent with animal studies showing that stress, acting through the effects of glucocorticoids on the glucocorticoid receptor on intra-abdominal adipocytes, leads to increased intra-abdominal fat which carries its own independent mortality risk.

We found a strong relationship between early adverse experience and substance use and abuse (illicit drugs, alcohol, and nicotine) later in life. Studies in animals show that early stressors lead to increased activity of the locus coeruleus with resultant increased release of nor-epinephrine in the brain (Abercrombie and Jacobs 1987). Substances such as heroin and alcohol decrease firing of the locus coeruleus, while substance withdrawal has the opposite effect (Bermner 1996). Consistent with this, the onset of substance abuse corresponds to the time of traumatization in PTSD patients, and these patients report that heroin and alcohol decrease symptoms of PTSD (Bremner 1996b). Stress also results in altered release of dopamine in the nucleus accumbens (striatum), the primary reward system within the brain (Deutch and Roth 1990). Smoking causes release of dopamine in this area, which is felt to underlie the addictive properties of nicotine (Volkow 2003). Early adverse experiences may disrupt this dopamine circuit, leading to increased risk of smoking, with its attendant negative health consequences. In summary, findings from animal studies provide a physiological rationale for how early stress can be associated with substance abuse and smoking in later life.

Another interesting finding is the relationship between ACE score and sexuality (early intercourse, promiscuity, sexual dissatisfaction) in adulthood. Animal studies show that early stressors result in long-term changes in peptides such as oxytocin that regulate pair bonding and social attachment (Insel and Winslow 1998; Francis 2002). Early adverse experiences may disrupt the ability to form long-term attachments in adulthood. The unsuccessful search for attachment may lead to sexual relations with multiple partners, with resultant promiscuity and other issues related to sexuality.

The monoamine neurotransmitter systems (norepinephrine, dopamine, serotonin) (Valentsein 1998) act within a primary regulatory system of large neural networks; these monoamine systems help to orchestrate complex neural functions. Their ubiquitous patterns of connectivity originate in the lower regions of the brain and send projections throughout the brain; in addition, they receive input from the autonomic nervous system and peripheral sensory apparatus (Foote 1983). In young animals, experimental manipulation of these systems can create behaviors similar to those seen in abuse victims, including aggression, eating problems, alcohol use, stress-response dysfunction, hyper-reactivity, anergy, and many other behavioral problems. A similar situation exists in humans in whom monoamine dysfunction has been hypothesized in a host of neuropsychiatric syndromes, including aggressive and violent behavior, suicidality, alcoholism, substance abuse and dependence, depression, anxiety disorders, and social/relational problems. We know from several studies that the functioning of these monoamine systems in adults is influenced by childhood experiences (De Bellis 1999b;

Whitfield 2003b). In addition, a recent study of a polymorphism for the promoter region of the serotonin transporter (5-HTT) gene found that childhood maltreatment increased the risk of depression in early adulthood for persons with the common "short" allele compared to persons with the long allele; the short allele is associated with lower transcriptional efficiency of the promoter (Caspi 2003). Not surprisingly, many currently prescribed psychoactive drugs act by altering the dynamics of these monoamine systems. In some circumstances, the effects of these drugs may have caused an 182 oversight of the important distinction between understanding intermediary mechanisms (alterations in monoamine neurotransmitter systems) and recognizing the underlying causes of these alterations (childhood traumatic stress).

Numerous studies have shown that early abuse survivors have multiple overlapping psychiatric disorders (Kessler 1995) which have been described as "comorbidity". The term comorbidity, however, can imply that these represent unique disorders with distinct etiologies (Lillienfeld 2003). An alternative explanation is that several disorders (e. g., depression, PTSD, dissociative disorders, substance abuse, borderline personality disorder) have to varying degrees a common etiology and are modulated by genetics (Caspi 2003) and repeated exposure to stress such as childhood maltreatment. Indeed, the term "trauma spectrum disorders" has been used to describe these overlapping conditions (Bremner 2003b). In addition, the artificial distinction between psychiatric and physical disorders has represented an impediment to the effective treatment of the numerous problems among survivors of childhood maltreatment. Epidemiological findings are consistent with a need to develop more broad based approaches to addressing the wide spectrum of effects of childhood maltreatment (Fig. 1).

There are several potential limitations with retrospective reporting of childhood experiences and self-reporting of the outcome measures. For example, respondents may have had difficulty recalling certain childhood events (Edwards 2001) or may choose not to disclose certain experiences or personal behaviors. Longitudinal follow-up of adults whose childhood abuse was documented has shown that their retrospective reports of childhood abuse are likely to *underestimate* actual occurrence (DellaFemina 1990; Williams 1995). Interestingly, evidence of the effects of traumatic stress in childhood on the hippocampus provides a neurophysiologic explanation for this phenomenon. Difficulty recalling childhood events likely results in misclassification (classifying persons truly exposed to ACEs as unexposed) that would bias our results toward the null (Rothman and Greenland 1998). Thus, this potential weakness probably resulted in underestimates of the true strength of the relationships between ACEs and the 18 outcomes we examined.

The historical mind-body dichotomy that persists in traditional Western medical training points medical researchers and clinicians away from risk factors that may be judged psychosocial. Thus, the original traumatic pathophysiological insults may be "silent" until much later in life (Brown 2001; Putnam 1998), when they are likely to be overlooked by investigators and clinicians who are understandably prone to focus on proximate determinants of human well-being. This leads to treatment of *symptoms* without a full understanding of their potential origins in the disruptive effects of ACEs on childhood neurodevelopment.

The argument for a causal relationship between ACEs and a variety of outcomes is strengthened by the combined evidence from neurobiology and epidemiology. This argument is important because evidence of causation affects decisions about prognosis, diagnosis, and treatment and can enhance understanding of the role of the childhood stressors on the developing brain in producing changes in affect, behavior, and cognition (Putnam 1998).

We summarize the application of Sir Bradford Hill's 9 criteria for establishing an argument for causation (van Reekum 2001) in the context of this converging evidence:

- *Demonstration of a strong association between the causative agent and the outcome*. The strength of the relationship between ACEs and numerous outcomes is consistently strong as reported herein.
- *Consistency of findings across research sites and methods*. Numerous studies in different study populations and measures of abuse, neglect, and related experiences have shown relationships of ACEs to a variety of symptoms and behaviors.

- *Specificity*. In the context of the converging evidence from epidemiology and neurobiology, specificity is lacking, but this in no way detracts from the argument of causation. The ACE score is a *combined* score representing cumulative stress and was not designed to provide evidence of specificity. Moreover, ACEs *would be expected* to be associated with multiple outcomes because of their effects on a variety of brain structures and functions.
- *Temporal sequence*. Most of the outcomes presented herein occurred during adulthood; the exposures (childhood experiences) clearly antedate the outcomes in these cases.
- *Biological gradient*. The "dose-response" relationship between the number of ACEs and each of the outcomes (as well as the number of comorbid outcomes) is strong and graded. This is consistent with cumulative effects of childhood stress on the developing brain.
- *Biological plausibility*. The strength of the convergence between epidemiology and neurobiology is most evident here. Recent studies from the neurosciences show that childhood stress can affect numerous brain structures and functions providing convincing biologic plausibility for the epidemiologic findings.
- *Coherence*."The term coherence implies that a cause and effect interpretation for an association does not conflict with what is known about the natural history and biology of the disease (Rothman 1998)." In fact, recent research shows that childhood maltreatment interacts with a common functional polymorphism in the promoter region of the serotonin transporter 5-HTT, resulting in higher risk of depression and suicidality (Caspi 2003), both of which are associated with the ACE score. This information is consistent with an effect of early maltreatment on monoamine pathways known to be involved in depressive disorders.
- *Experimental evidence*. This is the most persuasive evidence, but for ethical reasons randomized experiments depend on animal studies. Evidence from studies in rodents and primates show that stressful exposures induce neuroanatomical and neurophysiologic differences as well as aggression and drug seeking behaviors.
- *Analogous evidence*. A widely acknowledged analogy for an exposure causing a multitude of outcomes (as seen with ACEs, including a dose-response relationship) is the causal relationship of cigarette smoking to cardiovascular diseases, neoplasms, lung disease, and other health problems (CDC, 2002).

In conclusion, there is a striking convergence of recent findings from the neurosciences with those from a large epidemiologic study of the long-term effects of ACEs which has the potential to open multidisciplinary approaches to studying and improving human well-being. Current practices of medicine and public health are fragmented by categorical funding, organizational boundaries, and a symptom-based system of medical care. Prevention and remediation of our nation's leading health and social problems is likely to benefit from understanding that many of these problems tend to be co-morbid and may have common origins in the enduring neurodevelopmental consequences of abuse and related adverse experiences during childhood.

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References

1. Abercrombie ED, Jacobs BL. Single-unit response of noradrenergic neurons in the locus coeruleus of freely moving cats. I. Acutely presented stressful and non-stressful stimuli. J Neurosci. 1987;7:2837–2847. [PMC free article] [PubMed] [Google Scholar]

2. Anda RF, Chapman DP, Felitti VJ, Edwards VE, Williamson DF, Croft JP, Giles WH. Adverse Childhood Experiences and Risk of Paternity in Teen Pregnancy. Obstet Gynecol. 2002a;100:37–45. [PubMed] [Google Scholar]

3. Anda RF, Croft JB, Felitti VJ, Nordenberg D, Giles WH, Williamson DF, Giovino GA. Adverse childhood experiences and smoking during adolescence and adulthood. J Am Med Assoc. 1999;282:1652. [PubMed] [Google Scholar]

4. Anda RF, Felitti VJ, Chapman DP, Croft JB, Williamson DF, Santelli J, Dietz PM, Marks JS. Abused boys, battered mothers, and male involvement in teen pregnancy. Pediatrics. 2001;107(2):e19. [PubMed] [Google Scholar]

5. Anda RF, Whitfield CL, Felitti VJ, Chapman D, Edwards VJ, Dube SR, Williamson DF. Adverse childhood experiences, alcoholic parents and later risk of alcoholism and depression. Psychiatr Serv. 2002b;53:1001–1009. [PubMed] [Google Scholar]

6. Anda RF, Williamson D, Jones D, Macera C, Eaker E, Glassman A, Marks J. Depressed affect, hopelessness and the risk of ischemic heart disease in a cohort of US adults. Epidemiology. 1993;4:285–294. [PubMed] [Google Scholar]

7. Anderson CM, Teicher MH, Polcari A, Renshaw PI. Abnormal T2 relaxation time in the cerebellar vermis of adults sexually abused in childhood: potential role of the vermis in stress-enhanced risk for drug abuse. Psychoneuroendocrinology. 2002;27:231–244. [PubMed] [Google Scholar]

8. Beers SR, De Bellis MD. Neuropsychological function in children with maltreatment-related posttraumatic stress disorder. Am J Psychiatry. 2002;159(3):483–486. [PubMed] [Google Scholar]

9. Bennett AJ, Lesch KP, Heils A, Long JC, Lorenz JG, Shoaf SE, Champoux M, Suomi SJ, Linnoila MV, Higley JD. Early experience and serotonin transporter gene variation interact to influence primate CNS function. Mol Psychiatry. 2002;7:118–122. [PubMed] [Google Scholar]

10. Bremner JD. Long-term effects of childhood abuse on brain and neurobiology. Child Adolesc Psychiatr Clin North Am. 2003a;12:271–292. [PubMed] [Google Scholar]

11. Bremner JD. Understanding trauma-based disorders from a neurological perspective. New York: Norton; 2003b. Does Stress Damage the Brain? [Google Scholar]

12. Bremner JD, Krystal JH, Southwick SM, Charney DS. Noradrenergic mechanisms in stress and anxiety: I Preclinical studies. Synapse. 1996a;23:28–38. [PubMed] [Google Scholar]

13. Bremner JD, Narayan M, Staib LH, Southwick SM, McGlashan T, Charney DS. Neural correlates of memories of childhood sexual abuse in women with and without posttraumatic stress disorder. Am J Psychiatry. 1999;156:1787–1795. [PMC free article] [PubMed] [Google Scholar]

14. Bremner JD, Randall P, Scott TM, Capelli S, Delaney R, McCarthy G, Charney DS. Deficits in short-term memory in adult survivors of childhood abuse. Psychiatry Res. 1995;59:97–107. [PubMed] [Google Scholar]

15. Bremner JD, Randall P, Vermetten E, Staib L, Bronen RA, Mazure C, Capelli S, McCarthy G, Innis RB, Charney DS. Magnetic image resonance-based measurement of hippocampal volume in posttraumatic stress disorder related to childhood physical and sexual abuse: a preliminary report. Biol Psychiatry. 1997;41:23–32. [PMC free article] [PubMed] [Google Scholar]

16. Bremner JD, Southwick M, Darnell MA, Charney DS. Chronic PTSD in Vietnam combat veterans: Course of illness and substance abuse. Am J Psychiatry. 1996b;153:369–375. [PubMed] [Google Scholar]

17. Bremner JD, Vermetten E. Stress and development: behavioral and biological consequences. Dev Psychopathol. 2001;13:473–489. [PubMed] [Google Scholar]

18. Bremner JD, Vythilingam M, Anderson G, Vermetten E, McGlashan T, Heninger G, Rasmusson A, Southwick SM, Charney DS. Assessment of the hypothalamic-pituitary-adrenal (HPA) axis over a 24-hour diurnal period and in response to neuroendocrine challenges in women with and without early childhood sexual abuse and posttraumatic stress disorder (PTSD) Biol Psychiatry. 2003;54:710–718. [PubMed] [Google Scholar]

19. Bremner JD, Vythilingam M, Vermetten E, Adil J, Khan S, Nazeer A, Afzal N, McGlashan T, Elzinga B, Anderson GM, Heninger G, Southwick SM, Charney DS. Cortisol response to a cognitive stress challenge in posttraumatic stress disorder (PTSD) related to childhood abuse. Psychoneuroendocrinology. 2003;28:733–750. [PubMed] [Google Scholar]

20. Bremner JD, Vythilingam M, Vermetten E, Southwick SM, McGlashan T, Nazeer A, Khan S, Vaccarino LV, Soufer R, Garg PK, Ng CK, Staib LH, Duncan JS, Charney DS. MRI and PET study of deficits in hippocampal structure and function in women with childhood sexual abuse and posttraumatic stress disorder. Am J Psychiatry. 2003;160:924–932. [PubMed] [Google Scholar]

21. Brodsky BS, Malone KM, Ellis SP, Dulit RA, Mann JJ. Characteristics of borderline personality disorder associated with suicidal behavior. Am J Psychiatry. 1997;154:1715–1719. [PubMed] [Google Scholar]

22. Brown D. (Mis)representations of the long-term effects of childhood sexual abuse in the courts. J Child Sex Abuse. 2001;9:79–107. [PubMed] [Google Scholar]

23. Caldji C, Francis D, Sharma S, Plotsky PM, Meaney MJ. The effects of early rearing environment on the development of GABA and central benzodiazepine receptor levels and novelty-induced fearfulness in the rat. Neuropsychopharmacology. 2000;22:219–229. [PubMed] [Google Scholar]

24. Caldji C, Tannenbaum B, Sharma S, Francis D, Plotsky PM, Meaney MJ. Maternal care during infancy regulates the development of neural systems mediating the expression of fearfulness in the rat. Proc Natl Acad Sci. USA. 1998;95:5335–5340. [PMC free article] [PubMed] [Google Scholar]

25. Carrion VG, Steiner H. Trauma and dissociation in delinquent adolescents. J Am Acad Child Adolesc Psychiatry. 2000;39:353–359. [PubMed] [Google Scholar]

26. Carrion VG, Weems CF, Eliez S, Patwardhan A, Brown W, Ray RD, Reiss AL. Attenuation of frontal asymmetry in pediatric posttraumatic stress disorder. Biol Psychiatry. 2001;50:943–951. [PubMed] [Google Scholar]

27. Carrion VG, Weems CF, Ray RD, Glaser B, Hessl D, Reiss AL. Diurnal salivary cortisol in pediatric posttraumatic stress disorder. J Biol Psychiatry. 2002;51:575–582. [PubMed] [Google Scholar]

28. Caspi A, Sugden K, Moffitt TE, Taylor A, Craig IW, Harrington H, McClay J, Mill J, Martin J, Braithwaite A, Poulton R. Influence of life stress on depression: moderation by a polymorphism in the 5-HTT gene. Science. 2003;301:386–389. [PubMed] [Google Scholar]

29. CDC. Annual smoking-attributable mortality, years of potential life lost, and economic costs – United States, 1995–1999. MMWR. 2002;51:300–303. [PubMed] [Google Scholar]

30. Chapman DP, Anda RF, Felitti VJ, Dube SR, Edwards VJ, Whitfield CL. Epidemiology of adverse childhood experiences and depressive disorders in a large health maintenance organization population. J Affect Disord. 2004;82:217–225. [PubMed] [Google Scholar]

31. Czeh B, Michaelis T, Watanabe T, Frahm J, de Biurrun G, van Kampen M, Bartolomucci A, Fuchs E. Stress-induced changes in cerebral metabolites, hippocampal volume, and cell proliferation are prevented by antidepressant treatment with tianeptine. Proc Nat Acad Sci USA. 2001;98:12796–12801. [PMC free article] [PubMed] [Google Scholar]

32. De Bellis MD, Baum AS, Birmaher B, Keshavan MS, Eccard CH, Boring AM, Jenkins FJ, Ryan ND. AE Bennett Research Award. Developmental traumatology. Part I: Biological stress systems. Biol Psychiatry. 1999;15(45):1259–1270. [PubMed] [Google Scholar]

33. De Bellis MD, Baum AS, Birmaher B, Ryan ND. Urinary catecholamine excretion in childhood overanxious and post-traumatic stress disorders. Ann NY Acad Sci. 1997;821:451–455. [PubMed] [Google Scholar]

34. DeBellis MD, Chrousos GP, Dorn LD, Burke L, Helmers K, Kling MA, Trickett PK, Putnam FW. Hypothalamic-pituitary-adrenal axis dysregulation in sexually abused girls. J Clin Endocrinol Metab. 1994;78:249–255. [PubMed] [Google Scholar]

35. De Bellis MD, Keshavan MS, Clark DB, Casey BJ, Giedd JN, Boring AM, Frustaci K, Ryan ND. AE Bennett Research Award. Developmental traumatology. Part II: Brain development. Biol Psychiatry. 1999;45:1271–1284. [PubMed] [Google Scholar]

36. De Bellis MD, Keshavan MS, Shifflett H, Iyengar S, Beers SR, Hall J, Moritz G. Brain structures in pediatric maltreatment-related posttraumatic stress disorder: a sociodemographically matched study. Biol Psychiatry. 2002;52:1066–1078. [PubMed] [Google Scholar]

37. De Bellis M, Thomas L. Biologic findings of post-traumatic stress disorder and child maltreatment. Curr Psychiatry Rep. 2003;5:108–117. [PubMed] [Google Scholar]

38. DellaFemina D, Yeager CA, Lewis DO. Child abuse: adolescent records vs. adult recall. Child Abuse Negl. 1990;14:227–231. [PubMed] [Google Scholar]

39. Deutch AY, Roth RH. The determinants of stress-induced activation of the prefrontal cortical dopamine system. Prog Brain Res. 1990;85:367–402. [PubMed] [Google Scholar]

40. Diamond DM, Fleshner M, Ingersoll N, Rose GM. Psychological stress impairs spatial working memory: relevance to electrophysiological studies of hippocampal function. Behav Neurosci. 1996;110:661–672. [PubMed] [Google Scholar]

41. Dietz PM, Spitz AM, Anda RF, Williamson DF, McMahon PM, Santelli JS, Nordenberg DF, Felitti VJ, Kendrick JS. Unintended pregnancy among adult women exposed to abuse or household dysfunction during their childhood. J Am Med Assoc. 1999;282:1359–1364. [PubMed] [Google Scholar]

42. Dong M, Anda RF, Felitti VJ, Dube SR, Giles WH. The relationship of exposure to childhood sexual abuse to other forms of abuse, neglect and household dysfunction during childhood. Child Abuse Negl. 2003a;27:625–639. [PubMed] [Google Scholar]

43. Dong M, Dube SR, Felitti VJ, Giles WH, Anda RF. Adverse childhood experiences and self-reported liver disease: new insights into a causal pathway. Arch Int Med. 2003b;163:1949–1956. [PubMed] [Google Scholar]

44. Dube SR, Anda RF, Felitti VJ, Chapman D, Williamson DF, Giles WH. Childhood abuse, household dysfunction and the risk of attempted suicide throughout the life span: findings from the Adverse Childhood Experiences Study. J Am Med Assoc. 2001;286:3089–3096. [PubMed] [Google Scholar]

45. Dube SR, Anda RF, Felitti VJ, Croft JB, Edwards VJ, Giles WH. Growing up with Parental alcohol abuse: Exposure to childhood abuse, neglect and household dysfunction. Child Abuse Negl. 2001;25:1627–1640. [PubMed] [Google Scholar]

46. Dube SR, Anda RF, Felitti VJ, Edwards VJ, Croft JB. Adverse childhood experiences and personal alcohol abuse as an adult. Addict Behav. 2002a;27:713–725. [PubMed] [Google Scholar]

47. Dube SR, Anda RF, Felitti VJ, Edwards VJ, Williamson DF. Exposure to abuse, neglect and household dysfunction among adults who witnessed intimate partner violence as children. Violence Vict. 2002b;17:3–17. [PubMed] [Google Scholar]

48. Dube SR, Felitti VJ, Chapman DP, Giles WH, Anda RF. Childhood abuse, neglect and household dysfunction and the risk of illicit drug use: the Adverse Childhood Experience Study. Pediatrics. 2003a;111:564–572. [PubMed] [Google Scholar]

49. Dube SR, Felitti VJ, Dong M, Giles WH, Anda RF. The impact of adverse childhood experiences on health problems: evidence from four birth cohorts dating back to 1900. Prev Med. 2003b;37:268–277. [PubMed] [Google Scholar]

50. Dube SR, Williamson DF, Thompson T, Felitti VJ, Anda RF. Assessing the Reliability of Retrospective Reports of Adverse Childhood Experiences Among Adult HMO Members Attending a Primary Care Clinic. Child Abuse Negl. 2004;28(7):729–737. [PubMed] [Google Scholar]

51. Driessen M, Herrmann J, Stahl K, Zwaan M, Meier S, Hill A, Osterheider M, Petersen D. Magnetic resonance imaging volumes of the hippocampus and the Amygdala in women with borderline personality disorder and early traumatization. Arch Gen Psychiatry. 2000;57:1115–1122. [PubMed] [Google Scholar]

52. Duman RS, Heninger GR, Nestler EJ. A molecular and cellular theory of depression. Arch Gen Psychiatry. 1997;54:597–606. [PubMed] [Google Scholar]

53. Edwards VJ, Anda RF, Felitti VJ, Dube SR. In: Adverse childhood experiences and health-related quality of life as an adult. Kendall-Tackett K, editor. Victimization and Health, American Psychological Association; 2003a. pp. 81–94. [Google Scholar]

54. Edwards VJ, Anda RF, Nordenberg DF, Felitti VJ, Williamson DF, Wright JA. Bias assessment or child abuse survey: factors affecting probability of response to a survey about childhood abuse. Child Abuse Negl. 2001;25:307–312. [PubMed] [Google Scholar]

55. Edwards VJ, Fivush R, Anda RF, Felitti VJ, Nordenberg DF. Autobiographical memory disturbances in childhood abuse survivors. In: Freyd JJ, DePrince AP, editors. Trauma and Cognitive Science: A meeting of minds, science, and human experience. Binghamton, NY: Haworth Press; 2001. Also published in Aggression,

Maltreatment, and Trauma. [Google Scholar]

56. Edwards VJ, Holden GW, Anda RF, Felitti VJ. Relationship between multiple forms of childhood maltreatment and adult mental health in community respondents: results from the Adverse Childhood Experiences (ACE) Study. Am J Psychiatry. 2003b;160:1453–1460. [PubMed] [Google Scholar]

57. El-Sheikh M, Harger J, Whitson S. Exposure to interparental conflict and children's adjustment and physical health: the moderating role of vagal tone. Child Dev. 2001;72:1617–1636. [PubMed] [Google Scholar]

58. Elzinga BM, Schmahl CG, Vermetten E, van Dyck R, Bremner JD. Higher cortisol levels following exposure to traumatic reminders in abuse-related PTSD. Neuropsychopharmacology. 2003;28:1656–1665. [PubMed] [Google Scholar]

59. Felitti VJ, Anda RF, Nordenberg D, Williamson DF, Spitz AM, Edwards V, Koss MP, Marks JS. Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults. The Adverse Childhood Experiences Study. Am J Prev Med. 1998;14:245–258. [PubMed] [Google Scholar]

60. Finkelhor D, Hotaling G, Lewis IA, Smith C. Sexual abuse in a national survey of adult men and women: prevalence, characteristics, and risk factors. Child Abuse Negl. 1990;14:19–28. [PubMed] [Google Scholar]

61. Foote SL, Bloom E, Aston-Jones G. Nucleus locus coeruleus: new evidence of anatomical and physiological specificity. Physiol Behav. 1983;63:844–914. [PubMed] [Google Scholar]

62. Francis DD, Caldji C, Champagne F, Plotsky PM, Meaney MJ. The role of corticotropin-releasing factor-norepinephrine systems in mediating the effects of early experience on the development of behavioral and endocrine responses to stress. Biol Psychiatry. 1999;46:1153–1166. [PubMed] [Google Scholar]

63. Francis DD, Young LJ, Meaney MJ, Insel TR. Naturally occurring differences in maternal care are associated with the expression of oxytocin and vasopression (V1a) receptors: gender differences. J Neuroendocrinol. 2002;14:349–353. [PubMed] [Google Scholar]

64. Glaser D. Child abuse and neglect and the brain: a review. J Child Psychol Psychiatry. 2000;41:97–116. [PubMed] [Google Scholar]

65. Gorman JM, Mathew S, Coplan J. Neurobiology of early life stress: nonhuman primate models. Clin Neuropsychiatry. 2002;7:96–103. [PubMed] [Google Scholar]

66. Gould E, Beylin A, Tanapat P, Reeves A, Shors TJ. Learning enhances adult neurogenesis in the hippocampal formation. Nat Neurosci. 1999a;2:260–265. [PubMed] [Google Scholar]

67. Gould E, McEwen BS, Tanapat P, Galea LA, Fuchs E. Neurogenesis in the dentate gyrus of the adult tree shrew is regulated by psychosocial stress and NMDA receptor activation. J Neurosci. 1997;17:2492–2498. [PMC free article] [PubMed] [Google Scholar]

68. Gould E, Tanapat P. Stress and hippocampal neurogenesis. Biol Psychiatry. 1999b;46:1472–1479. [PubMed] [Google Scholar]

69. Gutman D, Nemeroff CB. Neurobiology of early life stress: rodent studies. Semin Clin Neuropsychiatry. 2002;7:89–95. [PubMed] [Google Scholar]

70. Heffernan K, Cloitre M, Tardiff K, Marzuk PM, Portera L, Leon AC. Childhood trauma as a correlate of lifetime opiate use in psychiatric patients. Addict Behav. 2000;25:797–803. [PubMed] [Google Scholar]

71. Heim C, Nemeroff CB. The role of childhood trauma in the neurobiology of mood and anxiety disorders: preclinical and clinical studies. Biol Psychiatry. 2001;49:1023–1039. [PubMed] [Google Scholar]

72. Heim C, Newport DJ, Bonsall R, Miller AH, Nemeroff CB. Altered pituitary-adrenal axis responses to provocative challenge tests in adult survivors of childhood abuse. Am J Psychiatry. 2001;158:575–581. [PubMed] [Google Scholar]

73. Heim C, Newport DJ, Heit S, Graham YP, Wilcox M, Bonsall R, Miller AH, Nemeroff CB. Pituitary-adrenal and autonomic responses to stress in women after sexual and physical abuse in childhood. J Am Med Assoc. 2000;284:592–597. [PubMed] [Google Scholar]

74. Hillis SD, Anda RF, Dube SR, Felitti VJ, Marchbanks PA, Marks JS. The association between adolescent pregnancy, longterm psychosocial outcomes, and fetal death. Pediatrics. 2004;113:320–327. [PubMed] [Google Scholar]

75. Hillis SD, Anda RF, Felitti VJ, Marchbanks PA. Adverse childhood experiences and sexual risk behaviors in women: a retrospective cohort study. Fam Plan Perspect. 2001;33:206–211. [PubMed] [Google Scholar]

76. Hillis SD, Anda RF, Felitti VJ, Nordenberg D, Marchbanks PA. Adverse childhood experiences and sexually transmitted diseases in men and women: a retrospective study. Pediatrics. 2000;106:E11. [PubMed] [Google Scholar]

77. Insel TR, Winslow J. Serotonin and neuropeptides in affiliative behaviors. Biol Psychiatry. 1998;44:207–219. [PubMed] [Google Scholar]

78. Ito Y, Teicher MH, Glod CA, Ackerman E. Preliminary evidence for aberrant cortical development in abused children: a quantitative EEG study. J Neuropsychiatry Clin Neurosci. 1998;10:298–307. [PubMed] [Google Scholar]

79. Kaplan JR, Manuck SB, Clarkson TB, Luss M. Social status, environment, and atherosclerosis in cynomolgus monkeys. Arteriosclerosis. 1982;2:359–368. [PubMed] [Google Scholar]

80. Kempermann G, Kuhn HG, Gage FH. More hippocampal neurons in adult mice living in an enriched environment. Nature. 1997;386:493–495. [PubMed] [Google Scholar]

81. Kendall-Tackett KA, Williams LM, Finkelhor D. Impact of sexual abuse on children: a review and synthesis of recent empirical studies. Psychol Bull. 1993;113:164–180. [PubMed] [Google Scholar]

82. Kendler KS, Bulik CM, Silberg J, Hettema JM, Myers J, Prescott CA. Childhood sexual abuse and adult psychiatric and substance abuse disorders in women: an epidemiological and cotwin control analysis. Arch Gen Psychiatry. 2000;57:953–959. [PubMed] [Google Scholar]

83. Kessler RC, Sonnega A, Bromet E, Hughes M, Nelson CB. Posttraumatic stress disorder in the national comorbidity survey. Arch Gen Psychiatry. 1995;52:1048–1060. [PubMed] [Google Scholar]

84. Kingree JB, Thompson MP, Kaslow NJ. Risk factors for suicide attempts among low-income women with a history of alcohol problems. Addict Behav. 1999;24:583–587. [PubMed] [Google Scholar]

85. Ladd CO, Owens MJ, Nemeroff CB. Persistent changes in corticotropin-releasing factor neuronal systems induced by maternal separation. Endocrinology. 1996;137:1212–1218. [PubMed] [Google Scholar]

86. Lemieux AM, Coe CL. Abuse-related posttraumatic stress disorder: Evidence for chronic neuroendocrine activation in women. Psychosom Med. 1995;57:105–115. [PubMed] [Google Scholar]

87. Lilienfeld SO. Comorbidity between and within childhood externalizing and internalizing disorders: reflections and directions. J Abn Child Psychol. 2003;32:285–291. [PubMed] [Google Scholar]

88. Liu D, Diorio J, Tannenbaum B, Caldji C, Francis D, Freedman A, Sharma S, Pearson D, Plotsky PM, Meaney MJ. Maternal care, hippocampal glucocorticoid receptors, and hypothalamic- pituitary-adrenal responses to stress. Science. 1997;277:1659–1662. [PubMed] [Google Scholar]

89. Lo Re V, Bellini LM. William of Occam and Occam's razor (letter) Ann Int Med. 2002;136:634–635. [PubMed] [Google Scholar]

90. Luine V, Villegas M, Mortinez C, McEwen BS. Repeated stress causes reversible impairments of spatial memory performance. Brain Res. 1994;639:167–170. [PubMed] [Google Scholar]

91. MacMillan HL, Fleming JE, Trocme N, Boyle MH, Wong M, Racine YA, Beardslee WR, Offord DR. Prevalence of child physical and sexual abuse in the community: results from the Ontario Health Supplement. J Am Med Assoc. 1997;278:131–135. [PubMed] [Google Scholar]

92. Malberg JE, Eisch AJ, Nestler EJ, Duman RS. Chronic antidepressant treatment increases neurogenesis in adult rat hippocampus. J Neurosci. 2000;20:9104–9110. [PMC free article] [PubMed] [Google Scholar]

93. McEwen BS, Angulo J, Cameron H, Chao HM, Daniels D, Gannon MN, Gould E, Mendelson S, Sakai R, Spencer R. Paradoxical effects of adrenal steroids on the brain: Protection versus degeneration. Biol Psychiatry. 1992;31:177–199. [PubMed] [Google Scholar]

94. McEwen BS, Stellar E. Stress and the individual: mechanisms leading to disease. Arch Int Med. 1993;153:2093–2101. [PubMed] [Google Scholar]

95. Musselman DL, Evans DL, Nemeroff CB. The relationship of depression to cardiovascular disease. Arch Gen Psychiatry. 1998;55:580–592. [PubMed] [Google Scholar]

96. Nibuya M, Morinobu S, Duman RS. Regulation of BDNF and trkB mRNA in rat brain by chronic electroconvulsive seizure and antidepressant drug treatments. J Neurosci. 1995;15:7539–7547. [PMC free article] [PubMed] [Google Scholar]

97. Osofsky JD. The impact of violence on children. Future Child. 1999;99:33–49. [PubMed] [Google Scholar]

98. Perry BD. Neurobiological Sequelae of Childhood Trauma: Post Traumatic Stress Disorders in Children. In: Murburg M, editor. Catecholamine Function in Post Traumatic Stress Disorder: Emerging Concepts. Washington, DC: American Psychiatric Press; 1994. pp. 253–276. [Google Scholar]

99. Perry BD. The neurodevelopmental impact of violence in childhood. In: Schetky D, Benedek EP, editors. Textbook of Child and Adolescent Forensic Psychiatry. Washington, DC: American Psychiatric Press, Inc; 2001. pp. 221–238. [Google Scholar]

100. Perry BD. Childhood experience and the expression of genetic potential: What childhood neglect tells us about nature and nurture. Brain Mind. 2002;3:79–100. [Google Scholar]

101. Perry BD, Pollard R. Homeostasis, stress, trauma, and adaptation. A neurodevelopmental view of childhood trauma. Child Adolesc Psychiatr Clin North Am. 1998;7:33–51. viii. [PubMed] [Google Scholar]

102. Pinchus JH, Tucker GJ. Behavioral Neurology. New York: Oxford; 1978. [Google Scholar]

103. Plotsky PM, Meaney MJ. Early postnatal experience alters hypothalamic-corticotropin-releasing factor (CRF) mRNA, median eminence CRF content and stress-induced releasing in adult rats. Mol Brain Res. 1993;18:195–200. [PubMed] [Google Scholar]

104. Putnam FW. Developmental pathways in sexually abused girls. Presented at Psychological Trauma: Maturational Processes and Psychotherapeutic interventions; Harvard Medical School; March 20; Boston MA. 1998. [Google Scholar]

105. Putnam FW. Ten-year research update review; child sexual abuse. J Am Acad Child Adolesc Psychiatry. 2003;4:269–278. [PubMed] [Google Scholar]

106. Read J, Perry BD, Moskowith A, Connolloy J. The contribution of early traumatic events to schizophrenia in some patients: a traumagenic neurodevelopmental model. Psychiatry. 2001;64:319–345. [PubMed] [Google Scholar]

107. Repetti RL, Taylor SE, Seeman TE. Risky families: family social environments and the mental and physical health of offspring. Psychol Bull. 2002;128:330–366. [PubMed] [Google Scholar]

108. Rohsenow DJ, Corbett R, Devine D. Molested as children: a hidden contribution to substance abuse? J Subst Abuse Treat. 1988;5:13–18. [PubMed] [Google Scholar]

109. Rosenblum L, Coplan J, Friedman S, Bassoff T, Gormen JM, Andrews MW. Adverse early experiences affect noradrenergic and serotonergic functioning in adult primates. Biol Psychiatry. 1994;35:221–227. [PubMed] [Google Scholar]

110. Rothman KJ, Greenland S. Modern Epidemiology. Philadelphia. PA: Lippincott Raven Publications; 1998. [Google Scholar]

111. Rozanski A, Blumenthal JA, Kaplan J. Impact of psychological factors on the pathogenesis of cardiovascular disease and implications for therapy. Circulation. 1999;99:2192–2217. [PubMed] [Google Scholar]

112. Sanchez MM, Ladd CO, Plotsky PM. Early adverse experience as a developmental risk factor for later psychopathology: evidence from rodent and primate models. Dev Psychopathol. 2001;13:419–449. [PubMed] [Google Scholar]

113. Sapolsky RM. Why stress is bad for your brain. Science. 1996;273:749–750. [PubMed] [Google Scholar]

114. Sapolsky RM, Uno H, Rebert CS, Finch CE. Hippocampal damage associated with prolonged glucocorticoid exposure in primates. J Neurosci. 1990;10:2897–2902. [PMC free article] [PubMed] [Google Scholar]

115. Scaer RC. The neurophysiology of dissociation and chronic disease. Appl Psychophysiol Biofeedback. 2001;26:73–91. [PubMed] [Google Scholar]

116. Schmahl CG, Vermetten E, Elzinga BM, Bremner JD. Magnetic resonance imaging of hippocampal and amygdala volume in women with childhood abuse and borderline personality disorder. Psychiatry Res. 2003;122:193–198. [PubMed] [Google Scholar]

117. Schoenborn CA. Exposure to alcoholism in the family: United States, 1988. Adv Data. 1991;205:1–13. [PubMed] [Google Scholar]

118. Shin LH, McNally RJ, Kosslyn SM, Thompson WL, Rauch SL, Alpert NM, Metzger LJ, Lasko NB, Orr SP, Pitman RK. Regional cerebral blood flow during script-driven imagery in childhood sexual abuse-related PTSD: a PET investigation. Am J Psychiatry. 1999;156:575–584. [PubMed] [Google Scholar]

119. Smith MA, Kim SY, van Oers HJ, Levine S. Maternal deprivation and stress induce immediate early genes in the infant rat brain. Endocrinology. 1997;138:4622–4628. [PubMed] [Google Scholar]

120. Stein MB, Koverola C, Hanna C, Torchia MG, McClarty B. Hippocampal volume in women victimized by childhood sexual abuse. Psychol Med. 1997;27:1–9. [PubMed] [Google Scholar]

121. Straus M, Gelles J. Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families. New Brunswick, NJ: Transaction Press; 1990. [Google Scholar]

122. Teicher MH. Wounds that time wouldn't heal: the neurobiology of childhood abuse. Cerebrum. 2000;2:50–67. [Google Scholar]

123. Teicher MH, Andersen SL, Polcari A, Anderson CM, Navalta CP. Developmental neurobiology of childhood stress and trauma. Psychiatr Clin North Am. 2002;25:397–426. vii–viii. [PubMed] [Google Scholar]

124. Teicher MH, Ito Y, Glod CA, Andersen SL, Dumont N, Ackerman E. Preliminary evidence for abnormal cortical development in physically and sexually abused children using EEG coherence and MRI. Ann N Y Acad Sci. 1997;821:160–175. [PubMed] [Google Scholar]

125. Teicher MH, Ito Y, Glod CA, Schiffer F, Ackerman E. Possible effects of early abuse on human brain development, as assessed by EEG coherence. Am J Neuropsychopharmacol. 1994;33:52. [Google Scholar]

126. Valenstein ES. Blaming the Brain: The Truth About Drugs and Mental Health. Basic Books, NY: 1998. [Google Scholar]

127. van der Kolk BA, Perry JC, Herman JL. Childhood origins of self-destructive behavior. Am J Psychiatry. 1991;148:1665–1671. [PubMed] [Google Scholar]

128. van Reekum R, Streiner DL, Conn DK. Applying Bradford Hill's criteria for causation to neuropsychiatry: challenges and opportunities. J Neuropsychiatry Clin Neurosci. 2001;12:318–325. [PubMed] [Google Scholar]

129. Volkow ND, Fowler JS, Wang GJ. The addicted human brain: insights from imaging studies. J Clin Invest. 2003;111:1444–1451. [PMC free article] [PubMed] [Google Scholar]

130. Vythilingam M, Heim C, Newport CD, Miller AH, Anderson E, Bronen R, Brummer M, Staib L, Vermetten E, Charney DS, Nemeroff CB, Bremner JD. Childhood trauma associated with smaller hippocampal volume in women with major depression. Am J Psychiatry. 2002;159:2072–2080. [PMC free article] [PubMed] [Google Scholar]

131. Whitfield CL, Anda RF, Dube SR, Felitti VJ. Violent childhood experiences and the risk of intimate partner violence in adults: assessment in a large health maintenance organization. J Interpersonal Violence. 2003a;18:166–185. [Google Scholar]

132. Whitfield CL. The Truth about Depression: Choices for Healing. Deerfield Beach, FL: Health Communications; 2003b. [Google Scholar]

133. Williams LM. Recovered memories of abuse in women with documented child sexual victimization histories. J Trauma Stress. 1995;8:649–673. [PubMed] [Google Scholar]

134. Williamson DF, Thompson TJ, Anda RF, Dietz WH, Felitti VJ. Body weight, obesity, and self-reported abuse in childhood. Int J Obesity. 2002;26:1075–1082. [PubMed] [Google Scholar]

135. Wyatt GE. The sexual abuse of Afro-American and white-American women in childhood. Child Abuse Negl. 1985;9:507–519. [PubMed] [Google Scholar]

MEMBERS

of

THE TREATY EIGHT GROUP

of

INDIAN BANDS

BILL C-31

(Amendments to the Indian Act)

PRESENTATION

to

THE HOUSE OF COMMONS STANDING COMMITTEE ON
INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

and

THE SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

MARCH 25, 1985

"While redressing past injustices is essential, we must also be fair to existing Indians. The fragility and diversity of Indian living conditions, languages, customs, political structures, economic activities and community resources point to a need to tailor membership rules to individual band or tribal circumstances. The small size of Indian bands (over 500 of the 579 bands have fewer than 1,000 members) suggest that even modest population changes could undermine the equilibrium of band social and political structures."

The Honourable David Crombie

SUMMARY

* The long debate over reforms to the Indian Act must not culminate in an emotional contest of clichés.

* The issues raised in Bill C-31 are essentially Indian issues and not merely ancillary aspects of issues relating to sexual discrimination in Canadian society.

* The provisions that remove sexual discrimination and increase Indian control of band membership are welcome.

* The mandatory inclusion of reinstated persons on band lists without band consent is inconsistent with fundamental Indian laws and customs and should be deleted.

* A study of the effect of the membership provisions of the Bill on the bands comprising the Lesser Slave Lake Indian Regional Council reveals that the impact on those bands will be far greater than that suggested by the estimates provided by the Minister of Indian Affairs and Northern Development.

* While the effect of the Minister's estimates would be a proportionate increase in the membership of bands

across Canada of approximately 7.5%, our study indicates that the increase in the membership of the Lesser Slave Lake bands will be significantly greater. Together with the much greater enlargement of the population on the reserves and the number of electors, this increase will seriously undermine the equilibrium of band social and political structures which the Minister has undertaken to preserve.

* The mandatory reinstatement to band membership for certain bands will have such a devastating effect on their aboriginal and treaty rights entrenched under section 35 of the Constitution that they could be validly implemented only with the consent of the bands or by a constitutional amendment.

* To avoid the serious injustices that will be created by the band membership provisions of Bill C-31 and the constitutional impediment to their implementation, we strongly endorse the views of those groups who have advocated returning to the bands complete control over their membership.

* If the Committee is determined to repudiate complete band control over band membership, adjustments

should be made to the Bill to deal specifically with the consequences to those bands on whom the membership provisions will have a much greater impact than the average estimated by the Minister.

* By allowing high impact bands to control their membership in accordance with specified criteria and procedures to be applied by the bands themselves, the injustice to these bands and the constitutional impediment to the implementation of Bill C-31 could be averted.

* The criteria to be applied by the bands would ensure that the determination of band membership would be made in accordance with principles of fairness and equity, without discrimination on the basis of sex. Decisions would be made in accordance with a written membership code that would establish guidelines for admission to membership based on such matters as the applicant's Indian descent, connection with the community, cultural affinity with the band, commitment to the traditions of the band, the needs of the applicant and the resources of the band community.

* Based on financial information available to the members of the Lesser Slave Lake Indian Regional Council the potential costs of implementing the provisions of the Bill

in their present form appear to be vastly in excess of those presented to the Committee by the Minister.

* Subsection 10(3) of the Bill is ambiguous and should be amended to make it clear that first generation descendants will not automatically become band members.

* Subsection 10(6) of the Bill effectively gives the Minister a veto over band rules. The subsection should be qualified by provisions that permit appeals to a court and by the imposition of a moratorium on unilateral inclusions on band lists while an appeal is pending.

* The Minister's discretionary power to disallow by-laws dealing with residence of band members and other persons on reserves and by-laws dealing with the other matters referred to in section 13 of the Bill is anachronistic and should be removed.

* Reinstated persons should not become band members until all amounts paid to such persons on their enfranchisement have been repaid with interest.

* PARLIAMENT MUST NOT ATTEMPT TO RECTIFY 116 YEARS OF INJUSTICES WITH ONE FINAL, QUICK INJUSTICE!

INTRODUCTION

1. Few people dispute that the Indian Act creates inequities that must be addressed. We are not here to attempt to divert the Government or the Committee from this goal. However, we must ensure that in the attempt to redress the past, serious inequities are not created.

2. The long debate over reforms to the Indian Act must not culminate in an emotional contest of clichés. The issues addressed in Bill C-31 affect all Indians. These are essentially Indian issues and should not be considered as merely part of the broader issue of sexual discrimination in Canadian society.

3. The Treaty Eight Group comprises 33 Indian bands located in the Provinces of British Columbia, Alberta and Saskatchewan and in the Northwest Territories with a total population of over 20,000 persons.

4. We strongly endorse many of the statements contained in briefs already presented to this Committee and, in particular, in those presented by the Assembly of First Nations, the Treaty Six Chiefs' Alliance, the Sarcee National Administration (Treaty Seven) and the Brotherhood

of Indian Nations (Treaty Five). We adopt and reiterate the insistence of the Brotherhood of Indian Nations that the fundamental ethos of our peoples diverges in important respects from those of other Canadian citizens.

> "Our fundamental law and process is different. Based on the notion that the collective community is a whole and must be adhered to, our people and their governments must employ the processes of consensus. Your system protects the parts be they the majority or the minority. We have no such concepts as the majority or the minority. We perceive our communities, our Nations within each as one as a collectivity whose destiny is in harmony and cooperation which can only be arrived at and maintained by consensus."
>
> - Brotherhood of Indian Nations, presentation, March 12, 1985

5. To the extent that the provisions of Bill C-31 remove discrimination on the ground of sex and increase Indian control of band membership, we welcome them. To the extent that those provisions purport to impose mandatory requirements with respect to band membership and thereby to reduce the power of the existing bands to manage and govern their own affairs, the provisions of Bill C-31 are fundamentally opposed to our collective ethos and customs and represent a continuation of the paternalistic policies

of successive Canadian governments that the present Government now professes to have repudiated.

6. We do not object to the inclusion of reinstated Indians on the General List. However, we believe that the mandatory inclusion of reinstated persons on Band Lists will cause great injustice to certain bands and raise serious doubts as to the constitutional validity of the provisions. As the arguments that bear on the issue of complete band control over band membership have been fully ventilated before the Committee, the principal thrust of our submissions will be directed at the effect and validity of the band membership provisions of Bill C-31 on the bands that will be most seriously affected.

7. The reasons for our concerns will be more easily appreciated if we provide a brief profile of a group of Treaty Eight Bands comprising the Lesser Slave Lake Indian Regional Council.

THE BANDS COMPRISING LESSER SLAVE LAKE INDIAN REGIONAL COUNCIL

8. Nine of the Treaty Eight bands in Alberta are members of the Lesser Slave Lake Indian Regional Council, incorporated in 1971. The bands range in size from the

smallest, with only 38 members, to the largest with 871 members.

9. By 1979 the Council had advanced to a stage that it was able to assume from the Department of Indian Affairs and Northern Development the entire administration and program function for the Lesser Slave Lake District. This historic takeover was the first complete takeover of band programs in Canada. Without band stability, this would not have been possible.

10. Today, the Council administers an annual budget of approximately $16 million and manages the following programs:

- Social Development
- Education
- Capital Management and Band Support
- Reserves, Trusts and Membership
- Economic Development
- Technical and Engineering Services
- Employment Services
- Finance and Administration

11. Among the particular accomplishments of the Council, education ranks foremost. The Council took over educational responsibility for the District in 1976, 3 years prior to its general takeover. In the last 10 years,

enrollment for native students in high school and post-secondary training has risen by 300%. In addition, the Council offers a range of employment services, including job placement and on-the-job training. The Council is working toward developing an accredited community-based child welfare agency. In these and many other ways, the Council is developing an Indian community, based on cooperation and mutual responsibility.

12. A brief description of each of the bands within the Council follows:

A. Driftpile - The Driftpile Reserve is located 65 km west of the town of Slave Lake and encompasses 15,688 acres. There are 791 members, many of whom are employed in a sawmill operation and a farm run by the band. Driftpile has taken over its own school, which includes kindergarten through grade six.

B. Horse Lake - The Horse Lake Reserve is 69 km northwest of the city of Grande Prairie, and is in two parts, comprising 4,600 acres and 3,823 acres, respectively. The band has 184 members. Six varied, privately-owned businesses on the reserve employ a large portion of the members. There are four gas wells in operation on the reserve.

C. Grouard - The Grouard reserve consists of 3 land parcels near the hamlet of Grouard. The band has 88 members and is run under tribal custom, with a life chief and council.

D. Duncan - The Duncan Reserve is 4 km south of Brownvale and encompasses 5,122 acres. There are 62 members, many of whom are involved in farming.

E. Whitefish Lake - The Whitefish Lake Reserve consists of 3 parcels, 96 km northeast of High Prairie. There are 685 members who operate a sawmill, and commercial fishing enterprises. Producing oil and gas wells are located on this reserve.

F. Sucker Creek - The Sucker Creek Reserve is 16 km east of High Prairie. There are 687 members in the band involved in a number of occupations, including horse ranching, construction and a variety of other businesses, and the creation of a bird sanctuary.

G. Sturgeon Lake - The Sturgeon Lake Reserve has 3 locations along the shores of Sturgeon and Goose Lakes. The band has built a senior citizens' home, its own kindergarten and day-care centres and a health centre on the reserve. There are 871 members. Oil and gas wells are located on the reserve.

H. Swan River - The Swan River Reserve is on 2 locations south of Lesser Slave Lake's Auger Bay and west of Slave Lake. There are 271 members and employment is in the logging industry and in agriculture.

I. Sawridge - The Sawridge Reserve is on 6,000 acres of land near the town of Slave Lake. There are 38 members of the band. The band operates 2 hotels, in Slave Lake and in Jasper National Park, and owns manufacturing and industrial concerns. There are producing gas wells on the reserve.

13. Since the establishment of the Council, its activities have contributed greatly to the economic, social and general welfare of the nine bands. With the cooperation and encouragement of the Council, particular bands have entered into or are at present negotiating long-term

commercial and industrial commitments that are designed to further the economic development of the bands and the welfare of their members. It is critical to the continuation of our economic and social progress and development that the spirit of consensus and cooperation that constitutes the fabric of our communal life should not be disturbed by a sudden and uncontrolled influx of persons lacking any real commitment to that community, its traditions and customs.

THE BAND CONCEPT

14. Band and tribal membership has traditionally been defined through one or more of three basic systems: blood, kinship and style of life. Generally elements of more than one system are relied upon. In the United States, where in the absence of federal legislation Indian tribes have the power to define their own membership criteria, the criteria adopted have varied widely. Some bands have adopted a one-quarter blood rule, and others a kinship system not dissimilar to that in the current Indian Act. The bands may further have separate residency rules, allowing, for instance, residence of non-Indian spouses on reserves.

15. Beyond blood and kinship, there is an overriding concern with style of life. Persons may be adopted into a tribe or band. A turn of the century U.S. Supreme Court decision held that a person who was racially non-Indian had become a Cherokee Indian for the purposes of jurisdiction of a tribal court when he had been adopted into the tribe. Early negotiations between the Canadian Government and Indians focused on style of life when they dealt separately with Indians and half-breeds. Indians were granted tribally-controlled lands (reserves) by treaty. Half-breeds, **who were not necessarily mixed bloods,** received individual land allotments. The distinction was not based on blood, but on whether or not an individualistic lifestyle had been adopted.

16. The adoption of an individualistic lifestyle accorded with the long-standing Government policy of assimilation and with the values of the majority of Canadian society. The Indians who continue today in the traditional lifestyle are a tiny and fragile minority. The traditional lifestyle does not, of course, mean colour and costumes. Rather it involves the concept of a band as one complex entity, not as a collection of individuals. The elements that keep the entity alive and that give it an identity are

as unique and as impossible to define as the facets of a personality.

17. Therefore, apart from the relatively simply expressed concerns about limitations of band lands and other resources, it is very difficult for us to describe to the Committee just what could be lost by the unilateral grants of band membership contained in Bill C-31. What will inevitably change is the unique constitution of a band. Where the numbers are large and where the new (or reinstated) members have adopted an individualistic lifestyle, we are afraid that there will not only be a change, but a complete destruction of a band. The loss of even one band in this way is an irretrievable loss of a fragment of a way of life that at one time dominated this continent.

18. New and individualistic band members, by persuasion or by mere numbers, could take control of many bands. Those members may not value the customs and traditions or the religious and spiritual values of a band. They may not reflect the special attitudes of the band regarding communal rights to land, the extended family, and the law of harmony and consensus. Any or all of these characteritics could disappear without a trace.

19. Band government can take either a form determined by custom, or the Indian Act form of a chief and councillors elected by band members who are 21 years of age or older and ordinarily resident on the reserve. The chief acts as the voice of the band, and administrator of day-to-day affairs. The Council is responsible for developing and regulating the social, cultural and economic life of the band. The Council is given by-law powers under the Indian Act for these purposes. But the Council does not and cannot rely on legal powers to protect the band's way of life. The real power of the Council lies in the consensus of the band. Both the make-up and power of the Council depend completely on band membership.

UNEQUAL APPLICATION OF BILL C-31 TO CERTAIN BANDS

20. There are two major objectives apparent in Bill C-31. The first of these is to end the discriminatory provisions of the Indian Act relating to the loss of Indian status and band membership. The second is to allow Indian bands to assume control over future band membership. In order to achieve the first objective, the Government proposes to reinstate the Indian status of all persons affected by this discrimination. Partly in response to pressure from interest groups, the Government also proposes

unilaterally to restore band membership to those Indians who directly lost their rights by virtue of the discriminatory provisions. The Minister of Indian Affairs and Northern Development, the Honourable David Crombie, considers this to be a justifiable intrusion on the second objective.

21. Publicized figures indicate that Mr. Crombie expects approximately 68,000 persons to be eligible for restoration of Indian status. He expects approximately 22,000 of these will be eligible for unilateral reinstatement to band membership.

- February 28, 1985 Government Press Release
- Testimony of Mr. Lahey before the Commons Committee, at page 12:19

22. The Bill stops short of unilaterally reinstating to band membership the first generation descendants of those persons who lost their status under the Act. Mr. Crombie has stated:

> **"While redressing past injustices is essential, we must also be fair to existing Indians. The fragility and diversity of Indian living conditions, languages, customs, political structures, economic activities and community resources point to a need to tailor membership rules to individual band or tribal**

> **circumstances. The small size of Indian bands (over 500 of the 579 bands have fewer than 1,000 members) suggest that even modest population changes could undermine the equilibrium of band social and political structures."**

Mr. Crombie concludes that it would be unwise to grant band membership unilaterally to the descendants of those regaining band membership.

- "Leaked" Cabinet brief, paragraphs 29 and 30

23. The Government obviously believes that the unilateral reinstatement to band membership of only 22,000 persons would not have a significant impact on band social and political structures. Indeed, based on a total status Indian population of 292,700 Indians, the resultant proportionate increase would only be 7.5%.

- Statistics Canada, 1981 Census

24. To formulate a policy based only on averages, however, is both misleading and dangerous. Some of the 579 bands will experience much greater increases in band membership. For example, one band in the Lesser Slave Lake Indian Regional Council will likely experience an increase in band membership of more than 130%.

25. But, the potential increase in band membership is not the only factor that will destroy the equilibrium of band social and political structures. Traditionally, band membership has carried with it the right to live on the reserve. Under new section 18.1, a member of a band who resides on the reserve of the band may reside there with his or her dependent children. Thus, even though first generation descendants are not to be unilaterally granted band membership, many of them will be entitled to move on to the reserve with their reinstated parents.

26. We have also referred earlier to band government. Every band member over 21 years of age who is ordinarily resident on the reserve is an elector. Band government proceeds, for the most part, by consensus among the electors. The implementation of certain provisions of the Bill will require a majority vote by the electors. It is clear that the equilibrium of social and political structures of a band may be seriously disturbed by any dramatic increase in the number of electors. This will be particularly true in the case of the Lesser Slave Lake bands who have made such significant progress in managing and developing their social, educational and economic affairs.

27. The nine bands comprising the Lesser Slave Lake Indian Regional Council have analyzed the impact of the proposed unilateral reinstatement to band membership on their membership, reserve population and government. For the period subsequent to 1951, the analysis is based on actual numbers of women who married out of the band and their children who were enfranchised by the Governor-in-Council under section 109(2) of the Indian Act. Similarly, the actual number of adults and children enfranchised under section 109(1) and the illegitimate children removed from the band lists by protest under section 12(2) are included. Figures are not available, however, for the period prior to 1951 or with respect to the numbers of surviving first generation descendants of the women or of enfranchised families. For these groups, the analysis adopts the assumptions used by the Government in deriving its estimates even though, when applied to these bands, the assumptions produce very conservative results in some respects and unrealistically low results in others.

- Cabinet brief, Annex E
- Testimony of Mr. Lahey before the Commons Committee, page 11:9

28. A summary of this analysis shows that unilateral reinstatement will have a high impact on all of the bands in this group:

Name of Band	Unilateral Reinstatement to Membership(1)		Potential Increase in Reserve Population (1)(2)		Potential New Electors(1)(3)	
	No. of Persons	Increase	No. of Persons	Increase	No. of Persons	Increase
Driftpile	153	19%	262	61%	124	70%
Duncan	12	19%	22	52%	11	42%
Grouard	Insufficient Information Available					
Horse Lake	57	31%	98	82%	46	118%
Sawridge	51	134%	81	426%	41	410%
Sturgeon Lake	126	14%	264	44%	114	51%
Sucker Creek	136	20%	292	97%	126	101%
Swan River	103	38%	182	135%	85	152%
Whitefish Lake	110	16%	205	43%	94	55%

Note (1) These figures assume that the courts, through the Charter, will not expand the class of persons eligible for reinstatement. This assumption may well be ill-founded. As stated by Mr. Crombie in his Executive Summary to Cabinet:

> **"It is possible that denial of band membership for the children of persons regaining such membership, by a band controlling its own membership, could be construed by the courts to be a 'continuing effect' of past discrimination and therefore in contravention of the Charter."**

Clearly such a challenge could not be prevented by clause 16 of the Bill.

Mr. Crombie's opinion is substantiated by other independent legal counsel. If the class is expanded, the above figures would dramatically increase.

Note (2) (Residence) These numbers assume that all persons who have a right to return to the reserve will in fact do so. If the ratio between new members who choose to return to the reserve and those who continue to live off the reserve is the same as the existing ratio between current band members living on and off the reserve, these figures will be as follows:

Driftpile	-	33%
Duncan	-	36%
Horse Lake	-	54%
Sawridge	-	213%
Sturgeon Lake	-	30%
Sucker Creek	-	43%
Swan River	-	68%
Whitefish Lake	-	30%

Note (3) (Electors) These figures assume that all new members who are over the age of 21 years will return to live on the reserve. If the ratio between potential new electors who choose to live on the reserve and those who remain off the reserve is the same as the current ratio between band members living on and off the reserve, these figures become:

Driftpile	-	38%
Duncan	-	27%
Horse Lake	-	77%
Sawridge	-	210%
Sturgeon Lake	-	35%
Sucker Creek	-	44%
Swan River	-	76%
Whitefish Lake	-	38%

29. The Government has assumed that only 10% to 20% of those eligible will actually return to the reserves. This

assumption is founded in part on the belief that, on average, women who married non-Indians enjoy a higher standard of living than other natives. Again, averages can be misleading. The bands in the Lesser Slave Lake Indian Regional Council, which have enjoyed the social and economic success referred to earlier, can anticipate a much higher rate of return than the Government estimate.

- Testimony of Mr. Lahey before the Commons Committee, page 12:20

30. The only response provided by the Minister to the difficulties that will be experienced by high impact bands is the proposal to repeal section 112 of the Indian Act and the provisions which permit a distribution of band funds to individual band members who become enfranchised. The Minister has stated that this is to prevent individuals from applying for status and membership simply to re-enfranchise and cash in their per capita share of band funds. While we welcome the Minister's recognition of the difficulties that the Bill would impose on high impact bands, the proposed solution is in our view an unnecessarily draconian reaction to the problems that will be created by the Bill. This point will be developed latter in our presentation.

- Cabinet memo, paragraph 42

POTENTIAL ILLEGALITY OF BILL C-31

31. It is clear that some bands will suffer a much more serious impact from the proposed mandatory reinstatement to band membership than is suggested by Mr. Crombie's estimates based on the average impact across the country. We refer in this presentation to these bands as "high impact" bands.

32. The unilateral reinstatement to band membership of 22,000 persons has been justified on the assumption that the impact on Indian bands will not be sufficient to upset the equilibrium referred to by Mr. Crombie. Indeed, an increase in band membership of any band that does not materially exceed 7.5%, the average increase predicted by the Minister, may not be sufficient to upset that equilibrium. **Increases of the magnititude likely to be experienced by the bands in the Lesser Slave Lake Indian Regional Council, however, will be devastating.** The social and political fabric which has enabled these bands to achieve the successes referred to above would almost certainly be destroyed. These and other high impact bands will be unable to function and may shortly cease to exist.

33. The Government of Canada has committed itself to the preservation - not the destruction - of Indian culture. Cultural survival of native and aboriginal peoples is the cornerstone of section 25 of the Charter of Rights and Freedoms and sections 35 and 37 of the Constitution. As Indians do not constitute a single homogeneous group across the country, these sections recognize the existing cultural diversity among Indian bands. In its rush to correct past injustices, this Parliament must ensure that its actions will not jeopardize the survival of any Indian community.

34. If the Bill is not amended to permit high impact bands to avoid the consequences referred to above, they will be forced to defend their right of survival through the courts. We have been advised that they are likely to succeed. In its broadest concept, the Constitution, including the Charter of Rights and Freedoms, exists to guard against unjustifiable inequalities. In its efforts to grant equal protection of the law to the individual, the Bill overlooks the fact that the Charter also protects collective rights and freedoms, particularly where they impact upon cultural identity and survival. In rectifying injustices done to individuals (Indians who have been unjustly deprived of Indian status) the courts will not

permit the rights of collectivities (the high impact bands) to be destroyed.

- Charter, sections 2(d), 25, 27
- Constitution, sections 35, 37

35. More specifically, subsection 35(1) of the Constitution entrenches aboriginal and treaty rights existing on the 17th of April, 1982. Rights which were extinguished before that date are not entrenched. The rights of Indians to form bands and to live on their reserves are either treaty rights or, in non-treaty areas, the residue of aboriginal land rights. These are entrenched by subsection 35(1) to the extent that they existed in 1982 and can only be modified by constitutional amendment or with the consent of the bands affected. Legislation that unilaterally reinstates as band members substantial numbers of persons deprived of Indian status before April 17, 1982 is constitutionally invalid because it compels existing bands to share their entrenched rights with other people without their consent.

36. Subsection 35(4) of the Constitution guarantees equally to male and female persons the aboriginal and treaty

rights existing on April 17, 1982. Subsection 35(4) does not extend subsection (1) to rights extinguished prior to 1982. Its purpose is simply to ensure that in the future the male and female persons who enjoy subsection 35(1) rights will enjoy them equally.

37. Bill C-31 seeks to ensure that men and women are treated equally. The courts have emphasized, however, that while a law may have a legitimate purpose, its actual operation may result in the infringement of rights and freedoms guaranteed by the Constitution.

38. Unilateral reinstatement to band membership of relatively large numbers of persons will result in a diminution, and in some cases the destruction, of the entrenched rights of existing band members. Such a result cannot be accomplished legally without a constitutional amendment to section 35 or the consent of the bands affected.

A PROPOSED SOLUTION

39. The constitutional impediment can be avoided by removing from Bill C-31 the concept of unilateral

reinstatement of band membership - a position taken by many of the Indian groups who have appeared before this Committee and one which we strongly support. If the Committee will not accept this solution, the potentially devastating effects on high impact bands and the constitutional impediment can still be avoided with some relatively minor adjustments to Bill C-31 without materially affecting the Bill's primary thrust of ending discrimination and rectifying past injustices. Simply stated, any band for whom the potential influx of members, reserve inhabitants or electors is likely to exceed a threshold would be permitted to control reinstatement to membership of the band provided the band accepts prescribed conditions. These conditions would be designed to ensure that membership determination would be made in accordance with principles of fairness and equity, without discrimination on the basis of sex.

40. Specifically, we would propose that the Bill be revised to provide the following:

(a) establish three criteria for identifying a high impact band, viz: - potential influx of new members; potential increase in reserve population; and potential increase in electors;

(b) provide that a band would qualify as a high impact band if the potential increase in any of these criteria

exceeds 20% and if the band meets the other conditions referred to below;

(c) establish a category of associate band membership with the following attributes:

(i) all persons regaining status as an Indian under the Bill (including first generation descendants) would become associate members of the high impact band;

(ii) these persons would thus be afforded an identity with a particular band;

(iii) associate membership would be the first step in achieving full band membership;

(iv) associate members would be entitled to apply for full band membership and be granted a hearing;

(v) a band would be required to consider all applications on the basis of the written membership code referred to below; and

(vi) associate members would not be entitled to the other benefits of band membership until they are admitted as full band members; and

(d) to qualify as a high impact band, the electors of the band must have a written membership code that complies with the principles of fairness and equity without discrimination on the basis of sex; this would permit bands to establish guidelines for admission to membership based upon such matters as the applicant's Indian descent, connection with the community, cultural affinity with the band, commitment to the traditions of the band as well as the needs of the applicant and the resources of the band community.

COST OF BILL C-31 TO THE GOVERNMENT OF CANADA

41. The Minister has stated that he will seek funding of $295 million for the cost of implementing the measures in Bill C-31 in the first five years. The Minister has repeatedly assured the Indian people that the government will provide sufficient additional funds to ensure that the burden of absorbing additional band members and reserve population will not be borne by the existing bands. Mr. Crombie has reiterated his undertaking to the Committee but has stated that it is not possible at this time to determine the amount of additional funding that will be required. He has undertaken to seek additional funding approval for these amounts as they become known.

42. We believe that the magnitude of these undetermined costs may be several times the $295 million for which funding approval is to be sought. This conclusion is based, in part, upon an extrapolation of the expenditures by the Department of Indian Affairs and Northern Development during the fiscal year 1984/85 in respect of the nine bands comprising the Lesser Slave Lake Indian Regional Council. These expenditures totalled $15,935,215. Assuming that the ratio between expenditures in respect of Indians living on

the reserve to Indians living off the reserve is the same as shown in Annex B to the Cabinet memo, this was equivalent to an expenditure of $6,786 per Indian living on-reserve and $805 per Indian living off-reserve for the 1984/85 fiscal year. Accepting the Minister's assumption that no more than 14,000 Indians return to the reserve, these figures would indicate that the annual cost of the Bill C-31 program would be in excess of $136 million or, over a five year period, in excess of $684 million. If we add to that the one-time per capita cost of establishing an individual on the reserve, as estimated by the Minister, of $12,108 per person, the total cost of the program over five years becomes $854 million.

43. If, however, the proportion of reinstated Indians living on the reserves to those living off the reserves is the same as the equivalent proportion for existing band members in the Lesser Slave Lake Indian Regional Council (approximately 60% living on reserve), the total annual cost to the Government becomes approximately $290 million and the cost over five years becomes in excess of $1.929 billion.

44. None of the above figures includes any amounts for health care and welfare, central and regional administration costs or the purchase of additional land.

45. It may be seen from the foregoing, that the cost to the Government of maintaining an Indian on the reserve is approximately 8.5 times the cost of maintaining an Indian off the reserve. It follows, therefore, that whatever the cost of the program to the Government, it will be substantially reduced by the elimination of the unilateral reinstatement to band membership.

46. In addition to the foregoing, there are many costs associated with residence on the reserve that are borne by the bands themselves out of their own funds. To the extent that the influx of new members strains these funds, the Government will be forced to incur these expenditures itself.

PROBLEMS IN INTERPRETING SUBSECTION 10(3) OF THE BILL

47. Releases published by the government and explanations of the impact of the Bill given by Mr. Crombie indicate that first generation descendants of persons who directly lost their Indian status due to the inequities in the Act will only be entitled under the Bill to automatic registration on the Indian Register. During a two-year

transitional period in which bands may take control of their own membership, these descendants will not be unilaterally given band membership by the government. Admission to band membership of these descendants is to be determined by bands which assume control over their membership by establishing written membership rules and following the other procedures set out in section 10 of the Bill. Unless the distinction between these first generation descendants and those who directly lost status is to be meaningless, it follows that in appropriate circumstances, bands must have the right to establish membership rules which would have the effect of denying membership to some of these first generation descendants. In Mr. Crombie's words:

> "If I simply legislate that the first-generation descendants are automatically band members, without them going through a process whereby the band decides, then I think it would be dishonest to say we are supporting the principle of band control of band membership. I think it would make a mockery out of band control of band membership."
>
> - Mr. Crombie's testimony before the Commons Committee, page 14:25

48. Subsection 10(3) of the Bill reads as follows:

> "(3) Membership rules established by a band under this section may not deprive

> any person of the right to have his name entered on the Band List for that band by reason only of a situation that existed or an action that was taken before the rules came into force."

49. The wording of this subsection creates an unnecessary ambiguity in interpreting the Bill that has caused concern to some bands. The ambiguity results from the possibility that the "persons" referred to could include the first generation descendants. As that is clearly not the intention of the subsection, we would recommend that the section be amended by the insertion of the underlined words to read as follows:

> "(3) Membership rules established by a band under this section may not deprive any person of the right <u>that such person would otherwise have under subsection 11(1)</u> to have his name entered on the Band List for that band by reason only of a situation that existed or an action that was taken before the rules came into force."

MEMBERSHIP RULES AND BY-LAWS MINISTER'S VETO POWERS

50. A band may assume control of its own membership if it establishes membership rules in accordance with section 10 and if it so notifies the Minister in writing and

provides the Minister with a copy of the membership rules for the band. Under subsection 10(6) the Minister is only required to direct the Registrar to provide the band with a copy of the Band List, thereby permitting the band to assume control over its membership, if the membership rules comply with section 10. There is no provision for resolving a dispute where the Minister feels that the membership rules do not so comply. Nor is there a provision preventing the Registrar from continuing to add names to the Band List while the band and the Minister attempt to sort out their differences.

51. We would recommend that provisions be added to the Bill after subsection 10(6) providing for an appeal to the courts by the band of the Minister's refusal to accept its membership rules, with a moratorium on additions by the Registrar to the Band List until the dispute has been resolved. We have attached as an appendix to this presentation suggested wording for new subsections 10(6.1), 10(6.2) and 10(6.3).

52. Subsection 82(2) of the existing Act permits the Minister to disallow any by-law made by the council of a band under section 81. Section 13 of Bill C-31 proposes to

amend section 81 of the Act to permit band councils to make by-laws covering the following matters:

> "(p.1) the residence of band members and other persons on the reserve;
>
> (p.2) to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;
>
> (p.3) to authorize the Minister to make payments from revenue moneys to persons whose names were deleted from the Indian Register and the Band List of the band pursuant to section 14.4;"

53. Firstly, these suggested amendments are of little assistance in establishing band self-government in the absence of additional powers of enforcement. Bands have long been completely frustrated by the lack of adequate enforcement measures for breaches of their by-laws.

54. Secondly, it is anachronistic and inconsistent with the government's recognition of the right to self-determination of Indian bands to preserve a discretionary power of disallowance of by-laws validly made. We strongly urge that there be no power to disallow by-laws passed pursuant to either these new provisions or the existing provisions of section 81.

DISTRIBUTIONS OF BAND FUNDS TO REINSTATED AND DEPARTING MEMBERS

55. In recent years there have been distributions of very large sums of band funds to persons who have left these bands. In some cases, payments in excess of $150,000 have been made to each member of enfranchised families.

56. Each payment to a departing band member reduces the funds available to the remaining members that may be used to provide for the future needs of the band. The capital of the band and thus its earning power is thereby diminished. To permit any person to regain band status without restoration of these funds will be very unfair to other band members. The by-law powers contained in section 81 should be further expanded to permit bands to determine whether payback is required as a condition of restoration of band membership.

57. Mr. Crombie has said in both the Cabinet memo and his testimony before the Commons Committee that returning band members would not be eligible for current distributions of band funds until the amount foregone equals the amount previously paid out, plus interest. However, the Bill in its present form would only withhold distributions of

capital funds derived from the sale of surrendered lands. All other distributions are not affected. Because bands rarely surrender lands for sale, this provision is virtually meaningless.

- Testimony of Mr. Crombie to the Commons Committee, page 14:12
- Cabinet brief, paragraph 43

58. We have referred above to the proposed repeal of the provisions of the Indian Act dealing with the voluntary enfranchisement of bands. In order to deal with the possibility that reinstated members of a high impact band may seek enfranchisement of the band as a means of obtaining a distribution of band funds, the Government proposes to exclude the possibility of such distributions in the future upon the dissolution of a band. The proposal is paternalistic and fundamentally inconsistent with the fiduciary responsibilities of the Crown with respect to band funds. As a method of dealing with the pressures that the enactment of the Bill would necessarily impose on high impact bands it is as unjust and unnecessary as the provisions whose potentially devastating consequences it is designed to remedy. We cannot accept any increase in the power of the Government to maintain control over band

funds. Nor can we accept any attempt to prevent bands from determining their own future.

59. The abolition of capital and revenue payments to individual Indians who might become enfranchised under the existing procedures or who otherwise cease to be members of a band is proposed for the same reasons as the repeal of section 112 of the Indian Act. It is objectionable on the same grounds as the proposed repeal of section 112. In addition, we do not believe that it is in the interests of any of our bands to be forced to accept as band members individuals who have not maintained a commitment to the future of the band and who are prevented from leaving solely because of their inability to support themselves without the assistance of the per capita payments now available under subsection 15(1) of the Indian Act.

60. If either of the solutions we have recommended for the problems of high impact bands is accepted, neither the repeal of section 112 nor the abolition of capital and revenue payments to individuals who leave the band will be necessary. If our proposals are not accepted, these provisions should be restored to the Act with the proviso that any distributions be subject to band consent.

APPENDIX

10(6.1) Upon receipt of any notice under subsection 10(5), the Registrar shall not thereafter add or delete any name to or from the Band List for that band unless the Minister gives notice in writing to the band council of his decision that the membership rules do not comply with the conditions set out in subsection (1) and, in that event, the Registrar shall not add any name to the Band List for that band until the expiration of a period of six months after the Minister has given notice of his decision in writing to the band council.

10(6.2) Within six months after the Minister has given notice to a band council under subsection 10(6.1), the band council may either

(a) give any further notice or notices to the Minister under subsection 10(5), or

(b) appeal the decision of the Minister to a court referred to in subsection 14.3(5)

and, in the event that an appeal is taken under this subsection from a decision of the Minister, the provisions of subsections 14.3(2), 14.3(3) and 14.3(4) shall apply as if references in subsection 14.3(4) to the Registrar were references to the Minister.

10(6.3) In the event that, within six months after the Minister has given notice to a band council under subsection 10(6.1) the band council gives any further notice to the Minister under subsection 10(5) and the Minister decides that the further membership rules for that band provided to the Minister

THE ULTIMATE IRONY

61. For more than 100 years the policy diligently pursued by successive federal governments was the assimilation of native peoples into the wider community and the ultimate eradication of their heritage and culture. The reforms introduced by the Diefenbaker government in the 1960's heralded a dramatic reversal of this policy. The Constitution and the Charter of Rights and Freedoms entrenches this reversal. Against this background it is surely ironic that a group of Indian bands is compelled to appear before this Committee to protest measures that threaten their survival.

62. This Parliament must not attempt to rectify 116 years of injustices with one final, quick injustice!

Respectfully submitted,

MEMBERS OF THE
TREATY EIGHT GROUP
OF INDIAN BANDS

pursuant to that subsection do not comply with the conditions set out in subsection (1), the Minister may refer his decision to a court referred to in subsection 14.3(5) and the provisions of subsections 14.3(2), 14.3(3) and 14.3(4) shall thereupon apply mutatis mutandis as if the Minister was a person taking an appeal under subsection 14.3(2) and as if references to the Registrar in subsection 14.3(4) were references to the Minister.

10(6.4) After the commencement of an appeal under subsection 10(6.2) or subsection 10(6.3) in respect of the membership rules of a band, the Registrar shall not thereafter add or delete any name to the Band List for that band until the final resolution of such appeal.