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## The Tribal Franchise: An Expression of Tribal Sovereignty and a Potential Solution to the Problem of Mass Disenrollment

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THE TRIBAL FRANCHISE: AN EXPRESSION OF TRIBAL  
SOVEREIGNTY AND A POTENTIAL SOLUTION TO THE  
PROBLEM OF MASS DISENROLLMENT

*By Brent K. Mulvaney*

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# THE TRIBAL FRANCHISE: AN EXPRESSION OF TRIBAL SOVEREIGNTY AND A POTENTIAL SOLUTION TO THE PROBLEM OF MASS DISENROLLMENT

*By Brent K. Mulvaney\**

## I. INTRODUCTION

The Supreme Court has recognized the inherent right of tribal sovereignty, i.e. a diminished form of complete sovereignty that consists of the right of internal self-government, since the 19th century.<sup>1</sup> This right entails a subset of other legally recognized rights, one of which is the right to determine tribal membership.<sup>2</sup> Recently, tribal attorneys and other scholars in Indian law have been puzzling over the scope of this right in relation to the developing trend of mass disenrollment.<sup>3</sup> Although it is a disheartening fact that those facing disenrollment may be deprived of their identities, their communities, and their rights as tribal citizens, it is perhaps hubristic to assume that these problems can—or should be—solved by entreating either the federal judiciary or Congress to protect the rights of the individual Indian over that of his or her tribe. Whether tribes have—or ought to have—an absolute right to determine not

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\* J.D. Candidate, 2019, Seattle University School of Law. I am of Native Hawaiian ancestry, and I have several connections to other American Indigenous communities. In my future legal career, I hope to work with Indian tribes, but I am deeply committed to promoting social justice for all indigenous communities. The opinions that I share in this article are entirely my own, but they are also my honest reflections on the thoughts and feelings that people who are both genuine and genuinely Native have shared with me. This article is not meant to impugn actions that are actual expressions of tribal sovereignty or the motives of those that truly wish to preserve the integrity of their communities. I do not think that anyone wishes to be or represent themselves as unjust. But we all need to learn how to treat each other with the respect that we all deserve as humans and fellow members in the several overlapping communities that we are a part of, especially when we find ourselves in positions of authority. Thanks to everyone who supplied me with inspiration and support, but particularly the Geary family and the talented editors at the American Indian Law Journal.

<sup>1</sup> See *United States v. Kagama*, 118 U.S. 375, 381–82 (1886); *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 16 (1831).

<sup>2</sup> *E.g.*, *Roff v. Burney*, 168 U.S. 218, 222–23 (1897); *Red Bird v. United States*, 203 U.S. 76, 77 (1906); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978).

<sup>3</sup> *E.g.*, Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 *Ariz. L. Rev.* 383 (2015).

only the criteria for enrollment but also that for disenrollment is an issue complicated by an overarching concern that the application of any positive limit upon the sovereign rights of tribes will necessarily strip away essential features of tribal self-government. Such a stripping-away would then potentially expose or produce a vulnerability of tribal sovereignty while enhancing and justifying the expansion of federal controls over the internal operations of tribes.

While it is true that we must be mindful of potential encroachments by the federal government upon tribal governance, the ethical conflict surrounding mass disenrollment lies in the false assertion that any acknowledgement of an absolute right to tribal citizenship will lead to a diminishment of tribal sovereignty. Much of the litigation surrounding mass disenrollment actions indicates that those actions could not proceed without the depreciation of an all-important aspect of tribal membership, the tribal franchise.<sup>4</sup> The right to vote, if recognized by a governing body, is not only a primary feature of citizenship, it is the primary instrument of a fully developed sense of tribal autonomy and an effective means for the protection of due process rights. As such, this article will focus primarily on why the preservation of the tribal franchise is a necessary means to securing tribal citizenship that enhances, rather than impugns, tribal sovereignty.

In Part II, this article will provide an analysis of the development of legal notions concerning tribal identity. Rather than recognizing the processes of self-identification utilized by tribes and their members, the federal government sought to define Native peoples and their societies in accordance with a Euro-centric worldview. Consequently, sovereign tribes were deemed separate from their “subservient members,” and because the roots of tribal sovereignty rest in the combined will of the general membership of a tribe, that sovereignty was obscured and potentially diminished. When Native societies did not conform with colonial expectations, those expectations were imposed upon the tribes through legislation. Although the internal machinations of the tribes were disrupted by this imposition, both the many tribes and the federal government recognized a means by which the sovereignty of a tribe could be expressed directly, the tribal franchise. Because of the manipulation of tribal governments at the hands of Congress, tribal members are

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<sup>4</sup> See discussion *infra* Part III.B–E.

now in a position where they must protect their sovereignty and utilize it to preserve their rights as tribal citizens.

In Part III, this article will analyze whether disenrollment is an expression of tribal sovereignty or a potential attack on its foundation. The section will begin by critiquing arguments that have been utilized to suggest that tribes have a sovereign right to disenroll their members. The section will close with an analysis of how disenrolling tribes have diminished the foundations of their sovereign authority by explicitly disregarding the combined will of tribal members for the purpose of extinguishing the rights of potential disenrollees.

In Part IV, this paper will conclude by presenting an argument as to why enhanced protection of the tribal franchise can serve as a remedy for the disenrollment epidemic while promoting tribal sovereignty. Because historical evidence of the distinction between a tribe and its members—aside from that produced by the federal government—is wholly lacking, it is important for tribal attorneys and Indian law scholars to recognize tribal sovereignty as the sovereignty of a tribe as a whole, i.e. a community of individual Indians who exercise their sovereignty through the tribal franchise. The only way to reclaim this more traditional notion of tribal sovereignty is for tribal members to actively strive for the unification of their combined will with that of the tribe through active political participation. In order for such efforts to prove successful, tribal members must not only fully exercise their voting rights but also encourage the enactment of constitutional provisions that will preserve those rights for future generations. If these efforts are successful, the threat of unjust disenrollment will be substantially abated if not completely neutralized.

## II. THE DEVELOPMENT OF TRIBAL IDENTITY

There are few forces that have operated throughout the course of human history that are as politically and culturally disruptive as colonization. As a result, our notions concerning the traditional political identities of American Indians have either been distorted by a monocular and distinctly colonial perspective or were never formed due to Euro-American ambivalence or disinterest.<sup>5</sup>

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<sup>5</sup> See Martha C. Knack, *Women and Men*, in *A COMPANION TO THE ANTHROPOLOGY OF AMERICAN INDIANS* 51, 61 (Thomas Biolsi ed., 2004).

The anthropological record concerning traditional tribal political structures does, however, indicate that early tribes were organizational manifestations of kinship and, to a lesser extent, a shared locus of activity.<sup>6</sup> Further, the kinship bond exhibited in tribal organizations is not bound by blood alone, for it may also be based on adoption.<sup>7</sup> In addition to notions of tribal identity based primarily on kinship, early anthropological studies indicate that the identity of a tribal community was necessarily intertwined with tribal sovereignty, for the political actions of a tribe were generally dictated by consensus.<sup>8</sup>

Moreover, the delegation of political authority within a tribe was an inherently biological process; a tribal community would adhere to the guidance of “situation-specific leaders” who had demonstrated the skills required to address a persisting communal need.<sup>9</sup> As a result of European colonization, these once-fundamental features of tribal politics were frustrated, obscured, and paradoxically rejected for being in conflict with tribal self-determination. This process, which continues to influence the American legal conception of tribal identity, has been furthered by three major forces: (1) the federal government’s bilateral influence on the study of indigenous communities, (2) the devaluation of historical anthropological data, and (3) federal Indian policy that altered the structure and identity of tribal organizations. These externalities, rather than Native traditions, have encouraged tribal governments to adopt policies establishing a pronounced demarcation between community and sovereignty that can only be overcome by the democratic process as envisaged in the tribal franchise. It is this schism in tribal identity and the diminishment of tribal voting rights that allow tribal governments to unilaterally disenroll the members of a tribe.

While scholars in the field of anthropology have historically pursued the goal of widespread intercultural competency,

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<sup>6</sup> See, e.g., Raymond J. DeMaille, *Kinship: The Foundation for Native American Society*, in *STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS* 306, 331 (Russell Thornton Ed., 1998); Loretta Fowler, *Politics*, in *A COMPANION TO THE ANTHROPOLOGY OF AMERICAN INDIANS* 69, 70 (Thomas Biolsi ed., 2004).

<sup>7</sup> J. W. Powell, *From Barbarism to Civilization*, 1 *AM. ANTHROPOLOGIST* 98, 108 (1888).

<sup>8</sup> Knack, *supra* note 5, at 61.

<sup>9</sup> *Id.*

ethnography was developed in order to promote colonial aims.<sup>10</sup> Such developments are the products of what professor Les W. Field refers to as “official anthropology”: the process of adapting anthropological knowledge to the ontological demarcation of Native identities for the purpose of shaping official government policies.<sup>11</sup> It is this form of anthropology, having been employed by the federal government, which serves as the foundation of extratribal legal conceptions of both tribal and American Indian identities.

A. *The Lockean Influence on Concepts of American Indian Identity*

While not anthropological per se, the political theory of John Locke can be seen as a prototype for later works in official anthropology concerning American Indians. In writing his *Second Treatise of Government*, Locke proceeded under the assumption that there was once a “state of nature” that served as the bottom rung of the socio-evolutionary ladder.<sup>12</sup> After laying the foundation for this concept, he then argues that this “state of nature” had its contemporary counterpart in a generalized Native American society.<sup>13</sup> Aside from using this comparison to suggest the primitive nature of American Indians, Locke introduced two ideas that would profoundly influence early ethnographic studies and assimilationist policies in America: He argued that the primitive nature of tribes inhibited their abilities to develop into fully-functioning agrarian societies,<sup>14</sup> and he argued that—as primitive people—Native Americans must have adopted the most primitive form of commonwealth which he identified as monarchy.<sup>15</sup> The first of these assertions provided strong support for the soon to be popular notion that the proper development of Native society required the paternal

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<sup>10</sup> Peter Whitely, *Ethnography*, in A COMPANION TO THE ANTHROPOLOGY OF AMERICAN INDIANS 435, 436 (Thomas Biolsi ed., 2004).

<sup>11</sup> Les W. Field, *Unacknowledged Tribes, Dangerous Knowledge: The Muwekma Ohlone and How Indian Identities are “Known,”* 18 WICAZO SA REV. 79, 80 (2003).

<sup>12</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8–14 (C. B. Macpherson ed., Hackett Publ’g Co., Inc. 1980) (1690).

<sup>13</sup> *Id.* at 29 (“[I]n the beginning all the world was America”).

<sup>14</sup> *See Id.* at 25–30 (Arguing that Native Americans failed to utilize their land and other natural resources in a way that would produce value for and sustain their communities).

<sup>15</sup> *Id.* at 55–56 (Providing a narrative account of how child-like primitive man submitted to the rule of a common father).

guidance of a more fully developed European nation. The second of these assertions served to obscure the kinship bonds and communal leadership that traditionally served as the basis for tribal organizations.

Not only is Locke's second-hand critique of Native American society objectionable from an ethical stand-point, it is objectionable in two major ways from an academic stand-point because there is evidence that he selectively and intentionally omitted sources that undermined his arguments from his work.<sup>16</sup> First, while Locke's assertions reflected the commonly held belief that English technology was superior to that which could be found in America at the time,<sup>17</sup> they contradicted early accounts of English settlers whose survival depended on the actions of Native peoples. For example, Edward Winslow, an early settler of Plymouth Colony, wrote a letter in 1621 that provides three points of contention with Locke's later work: Winslow recounted (1) how the plantation at Plymouth adopted Native agricultural practices, (2) how settlers experienced difficulties in adapting English farming methods to the newfound environment, and (3) how Indians provided the settlement with an abundance of oysters and venison.<sup>18</sup> Such observations were confirmed by William Wood in 1639, who again emphasized the unparalleled generosity of the Natives of New England and the extent to which those Indians instructed English settlers in the planting and harvesting of Indian corn "by teaching [them] to cull out the finest seede, to observe the fittest season, to deepe distance for holes, and fit measure for hills, to worme it, and weede it; to prune it, and dresse it as occasion shall require."<sup>19</sup> Rather than indicating a lack of subsistence in Native communities, such accounts indicate the reliance of early English settlers on the generosity, communal nature, and traditional agricultural practices of Native peoples.

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<sup>16</sup> See Morag Barbara Arneil, 'All the World Was America': John Locke and the American Indian 52–70 (1992) (unpublished Ph.D. dissertation, University College London) (on file with the University College London Library) (Arguing that Locke omitted references to material in his possession when it would weaken his arguments).

<sup>17</sup> KAREN ORDAHL KUPPERMAN, *SETTLING WITH THE INDIANS: THE MEETING OF ENGLISH AND INDIAN CULTURES IN AMERICA, 1580–1640* 81 (1980).

<sup>18</sup> EDWARD WINSLOW & WILLIAM BRADFORD, *MOURT'S RELATION OR JOURNAL OF THE PLANTATION AT PLYMOUTH* 131–37 (Henry Martin Dexter ed., John Kimball Wiggin 1865) (1622).

<sup>19</sup> WILLIAM D. WOOD, *WOOD'S NEW-ENGLAND'S PROSPECT* 77–79 (Boston, John Wilson & Son 1865) (1639) (original spelling preserved).

Furthermore, these observations provide grounds for rejecting the supposition that Native societies were ever in need of the paternal guidance of European nations. However, the prejudicial assumptions underlying Locke's work and colonial fervor continued to shape a common European perception of Native peoples, including that of Edward Winslow who, in spite of his sharing in an abundance of Native resources, remarked on how the pristine—unworked and uninhabited—condition of American riverbanks would “grieve the hearts” of Englanders whose rivers were heavily burdened by human habitation.<sup>20</sup> As will become evident, this tendency to confirm prejudicial assumptions is a common theme throughout the development of American conceptions of tribal identities.

Secondly, Locke's understanding of the monarchical structure of Native society, while perhaps in conformity with the observations of the untrained settler, contradicted the observations of one of the primary sources cited in his *Second Treatise*. In the passage concerning the primacy of monarchical rule and its presence in America, Locke makes a parenthetical reference to the empires of Peru and Mexico.<sup>21</sup> Because of his familiarity with the work of José de Acosta, who documented the historical development of indigenous societies in both Peru and Mexico, it has been suggested that Locke's socio-evolutionary theory, including the idea of the primacy of the monarchical form of government, derives from Acosta's earlier work.<sup>22</sup> While this seems likely, it is abundantly clear that Locke was rather selective in choosing what material of Acosta's he would adopt as part of his own philosophy.

To illustrate this point and affirm an accurate conception of traditional tribal societies in America, it will suffice to focus on two of the many points of contention in the works of these scholars. First, Acosta writes that the original societies in Peru were “comminalties . . . governed by the advice and authoritie of many, which are as it were Counsellors.”<sup>23</sup> In the same text, Acosta indicates that the first inhabitants of New Spain were likely arranged either in

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<sup>20</sup> WINSLOW & BRADFORD, *supra* note 18, at 137.

<sup>21</sup> LOCKE, *supra* note 12, at 56.

<sup>22</sup> William G. Batz, *The Historical Anthropology of John Locke*, 35 J. HIST. IDEAS 663, 670 (1974).

<sup>23</sup> 2 JOSEPH DE ACOSTA, *THE NATURAL & MORAL HISTORY OF THE INDIES* 426 (Clements R. Markham ed., Edward Grimston trans., London, The Hakluyt Society 1880) (1604) (original spelling preserved).

commonalties or were “barbarous, . . . without law, without King, and without any certaine place of abode, [wandering] in troupes like savage beasts.”<sup>24</sup> As such, Acosta’s work indicates a far closer relationship between indigenous communities and indigenous sovereignty than that found within a monarchy, a form of rule in which the reigns of power are perhaps furthest removed from the general populous. Lastly, Acosta’s work comports with the modern notion of a traditional tribal election process informed by communal perception and initiated in response to a persisting communal need. He writes, “[M]any nations of the Indies have not indured any Kings or absolute soveraigne Lords, but live in comminalities, creating and appointing Captains and Princes for certain occasions onely, to whom they obey during the time of their charge, then after they returne to their former estates.”<sup>25</sup>

Given the foregoing statements, why, then, did Locke claim that monarchy was the first commonwealth both generally and in the Americas? The answer is simple: Neither Acosta nor Locke accepted commonalties and “barbarous societies” as genuine commonwealths, i.e. political organizations serving the common weal. In describing the societies he found in New Spain, Acosta writes, “[In] the greatest part of [the] new world . . . there are no settled kingdoms nor established commonweales, neither princes nor succeeding kings.”<sup>26</sup> Locke’s concurrence is evident from his claiming that Native societies fail to properly cull value from their land and, as a result, adequately provide for their communities.<sup>27</sup> These attitudes once again demonstrate how externally applied notions of Native identity were shaped by Eurocentrism, in this case affirming the idea that a traditional notion of tribal sovereignty is divorced from communal decision-making.

#### B. *The Bureau of American Ethnology And the Era of Assimilation*

To fully understand how European prejudices shaped the federal government’s understanding of American Indians and their societies, one ought to first look to the formative years of the federal agency concerned with the study and classification of Native

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<sup>24</sup> *Id.* at 427.

<sup>25</sup> *Id.* at 410 (original spelling preserved).

<sup>26</sup> *Id.* (original spelling preserved).

<sup>27</sup> See LOCKE, *supra* note 12, at 25–30.

peoples: the Smithsonian Institution's Bureau of American Ethnology (BAE). The BAE was created in 1879 by Congress with the express purpose of shaping federal Indian policy.<sup>28</sup>

The formation of the BAE was prompted in part by John Wesley Powell, the man who would later become the head of that agency. In a report to the Secretary of the Interior (Secretary) submitted in 1878, Powell argued that the federal government had previously failed to convince Natives to accept early assimilationist efforts on account of the dearth of ethnographic data available at the time.<sup>29</sup> In particular, Powell identified the primary obstacles to assimilationist efforts as the inability of the federal government to overcome and/or apprehend tribal organizations based on kinship and communal ownership, including potential conflicts between tribal customs and the idea of privately owned allotments and inheritance, and the role of a chief as a speaker—rather than ruler—of a pure democracy.<sup>30</sup> According to Powell, ethnographic research was required to address the “Indian problem” that resulted from the cohabitation of “the white man and the Indian,” the solution to which involved understanding the “primitive” facets of Native society so that they might be overthrown in favor of modern societal features that would facilitate social evolution.<sup>31</sup> Powell's statements demonstrate the BAE's conflicting intentions; the anthropological concern for mapping genuine characteristics of tribal identity was shackled to prejudicial notions concerning the inferiority of what Powell identified as a dying, primitive Native way of life.<sup>32</sup>

This founding philosophy of the BAE was also influenced by Powell's colleague Lewis Morgan. Prior to the formation of the BAE, Morgan—like Powell in his letter to the secretary—wrote on the desirability of using ethnological data to support the “future elevation” of Native peoples to the “position of citizens of the

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<sup>28</sup> George Pierre Castile, *Federal Indian Policy and Anthropology, in A COMPANION TO THE ETHNOLOGY OF AMERICAN INDIANS* 268, 271–72 (Thomas Biolsi ed., 2004).

<sup>29</sup> J. W. POWELL, REPORT ON THE METHODS OF SURVEYING THE PUBLIC DOMAIN 15 (Washington, Government Printing Office 1878).

<sup>30</sup> *Id.* at 15–16.

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *See id.* (“[I]n a very few years it will be impossible to study our North American Indians in their primitive condition except from recorded history.”)

State”<sup>33</sup> and on the decline of the “ethnic life of the Indian tribes.”<sup>34</sup> However, the most influential concept advanced by Morgan was his formulation of social evolution based on a succession of “Ethnical Periods” divided into three main categories—savagery, barbarism, and civilization—each of which, save the last, were divided into three subcategories—lower, middle, and upper.<sup>35</sup> Morgan asserted that tribal societies could generally be classified as lying between upper savagery and lower barbarism with some exceptions,<sup>36</sup> whereas even “remote ancestors of the Aryan nations” had developed societal forms that could be deemed modern civilizations.<sup>37</sup> Of all the factors that affected “ethnical advancement” none was more important than the succession of the arts of subsistence; in Morgan’s view, “the whole question of human supremacy on the earth” depended upon a progression from rudimentary means of subsistence, to pastoralism, and then to field agriculture.<sup>38</sup> For these reasons, Morgan felt federal Indian policy should be founded on a commitment to gradually assimilate Native peoples into American society,<sup>39</sup> a point which he communicated to President Hayes directly, stating that “the Indian cannot civilize . . . any more than our own remote ancestors[ could skip over] ethnical periods.”<sup>40</sup> In order to facilitate this transition, he advanced the following program:

The next condition into which the Indian tribes would naturally advance is the pastoral. . . . [T]he government should help them by furnishing herds of

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<sup>33</sup> LEWIS H. MORGAN, *LEAGUE OF THE HO-DÉ-NO-SAU-NEE OR IROQUOIS* ix–x (Herbert M. Lloyd ed., Dodd, Mead & Co. 1901) (1851).

<sup>34</sup> LEWIS H. MORGAN, *ANCIENT SOCIETY OR RESEARCHES IN THE LINES OF HUMAN PROGRESS FROM SAVAGERY, THROUGH BARBARISM TO CIVILIZATION* viii (Henry Holt & Co. 1877).

<sup>35</sup> *Id.* at 8–12.

<sup>36</sup> *Id.* at 10–11.

<sup>37</sup> *See id.* at 8.

<sup>38</sup> *See id.* at 19–27.

<sup>39</sup> *See* Letter from Lewis H. Morgan to President Rutherford B. Hayes (July 31, 1877), in BERNARD J. STERN, *LEWIS HENRY MORGAN: SOCIAL EVOLUTIONIST* 55 (Russell & Russell 1967) (1931) (“[Indians] are neither devoid of intelligence nor incapable of appreciating the usual incentives of human action. It will be found possible to stimulate their industry and to lead them gradually into the practice of labor, and with it into an improved plan of life.”).

<sup>40</sup> Letter from Lewis H. Morgan to President Rutherford B. Hayes (Aug. 6, 1877), in BERNARD J. STERN, *LEWIS HENRY MORGAN: SOCIAL EVOLUTIONIST* 58 (Russell & Russell 1967) (1931).

cattle and by sending herdsmen to care for them until they can be made to see that the natural increase will afford them an abundant meat and milk subsistence. . . . In time they will raise cattle in millions . . . and make a proper use of regions of no present use or value to our people.<sup>41</sup>

From this, it can be seen that Morgan's work—which would later be advanced by the BAE—represented an earnest, albeit extremely Eurocentric, attempt to align assimilationist policies with what he felt was the true and present condition shared by Native communities.

While the assimilationist movement—whose aims were most fully recognized in the Dawes Act<sup>42</sup>—adopted portions of the foundational theories advanced by Powell and Morgan, there is little evidence that their actual policy concerns were accepted by the federal government. Judging by the history of American Indian assimilation, Professor Lee Baker's observation that the field of American anthropology “gained power and prestige because ethnologists articulated theory and research that resonated with the dominant discourse on race” was not only a truism but also a positive limitation on the valuation of the BAE's work as it pertained to federal Indian policy.<sup>43</sup> In accordance with this theory, the federal government established policies aimed at excising the most “anti-progressive” features of tribal identity in order to accelerate a process of acculturation aimed at “civilizing” Native peoples as rapidly as possible, a process wholly divorced from any anthropological concern for truly understanding, preserving, or accounting for the genuine status or gradual development of Native societies.<sup>44</sup>

Clearly, Secretary Henry M. Teller employed some degree of ethnographic understanding when he prompted the establishment of Courts of Indian Offenses and the promulgation of the Code of

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<sup>41</sup> *Id.*

<sup>42</sup> See discussion *infra* at 10–14.

<sup>43</sup> LEE D. BAKER, FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE, 1896-1954 27 (Univ. of Cal. Press, Ltd. 1998) (1966).

<sup>44</sup> See FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1780–1834 156–57 (1962).

Indian Offenses in 1883.<sup>45</sup> In his letter to then Commissioner of Indian Affairs Hiram Price, Teller identified several practices of Native peoples which taken together would prove to be a “great hindrance to the civilization of the Indians”: (1) particular feasts and dances, (2) plural marriage, (3) all practices of medicine men, and (4) burial rites involving the destruction of the property of the deceased.<sup>46</sup> Given Teller’s concerns, Price then established the Code of Indian Offenses, outlawing these practices.<sup>47</sup> He also created several Courts of Indian Offenses at various reservations in which a tribunal of three Indians would be appointed by an Indian agent to judicially enforce the code.<sup>48</sup> As such, these acts of the federal government not only mandated the policing of Native identity but also delegated that task to a small subset of a tribe’s membership, who—in fulfilling their mandate under the direction of an Indian agent—would likely starve or imprison so-called Indian offenders until they could demonstrate that they no longer adhered to once-sacred aspects of their cultural identity.<sup>49</sup> Further, the Act served as an endorsement of the federal government’s paternal role in determining how tribal identity would be defined in the future.

After thoroughly disrupting Native religious practices and forcing tribes to adopt a system of centralized adjudicative authority, Congress furthered its policy of forced assimilation by passing the Dawes Act of 1887, also known as the General Allotment Act (GAA).<sup>50</sup> The GAA is typically recognized as an act requiring the apportionment of tribally owned lands so that they might be allotted to tribal members on a roughly per capita basis modified in accordance with an allottee’s familial status.<sup>51</sup> Additionally, those individual allotments would—upon creation—be held in trust on the behalf of each allottee by the federal government, rendering

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<sup>45</sup> See U.S. OFFICE OF INDIAN AFFAIRS, REGULATIONS OF THE INDIAN DEPARTMENT, WITH AN APPENDIX CONTAINING THE FORMS USED 86–88 (Washington, Gov’t Printing Office 1884).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 88–91.

<sup>48</sup> *Id.* at 88.

<sup>49</sup> Generally, cultural offenses were punishable by imprisonment while subsequent offenses were punishable by a denial of rations. Additionally, those engaged in the practices of medicine men could be imprisoned until they could prove that they would forever abandon those practices, whereas those practicing polygamy or failing to adequately provide for their families could be denied rations for as long as the offense continued. *Id.* at 88–91.

<sup>50</sup> 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331–81).

<sup>51</sup> *Id.*

those lands inalienable but also unburdened by taxation, for a period of twenty-five years.<sup>52</sup> However, lands that remained under tribal ownership after those allotments were made became “surplus” land, the sale of which was opened to the public.<sup>53</sup>

The GAA was eventually amended by the Burke Act in 1906.<sup>54</sup> That Act authorized the Secretary to issue fee patents for an allotment during a trust term after determining its possessor to be sufficiently “competent.”<sup>55</sup> Soon after, several competency commissions were established to more rapidly convert allotted lands held in trust to lands held in fee so as to open them up for sale to non-Indians.<sup>56</sup> The initial effects of these enactments were the diminishment of the tribal land base and the privatization of land ownership in Indian country. However, the proclaimed intended result of this push for diminishment and privatization was to force individual Indians to engage in agriculture by severely restricting their ability to engage in other more traditional subsistence practices.<sup>57</sup>

These enactments and the policies that they embody both converged with and diverged from the course of assimilation and related policy concerns put forward by Powell and Morgan. While Powell encouraged a level of understanding that is not in any way reflected in the GAA, he identified aspects of Native society that were counterintuitive to and, therefore, must be overthrown in order to achieve civilization.<sup>58</sup> In particular, Powell viewed the concept of communal ownership and inheritance as a social concept that was detrimental to the goal of assimilation.<sup>59</sup> It is in regard to this topic that Powell provides an illustration of one potential path to civilization:

Among [certain tribes,] much property has been accumulated, and with the increase of their wealth

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<sup>52</sup> 25 U.S.C. § 348 (2012).

<sup>53</sup> 25 U.S.C. § 402 (2012).

<sup>54</sup> 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349).

<sup>55</sup> 25 U.S.C. § 349 (2012).

<sup>56</sup> See generally Janet McDonnell, *Competency Commissions and Indian Land Policy, 1913–1920*, 11 S.D. HIST. 21 (1981) (detailing how the federal government coerced tribes into ceding their lands).

<sup>57</sup> See ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS FOR THE YEAR 1885 88 (Washington, Gov’t Printing Office 1886) [hereinafter 1885 REPORT].

<sup>58</sup> Powell, *supra* note 29, at 15.

<sup>59</sup> *Id.*

the question of inheritance and individual ownership has at last spontaneously sprung up, and . . . these tribes are intensely agitated on the subject; the parties holding radical sentiments are rapidly increasing, and it is probable that soon . . . the customs of civilization in this respect will be adopted.<sup>60</sup>

The above passage could be understood as indicating an institutional conflict between a present state—defined in part by the presence and accumulation of wealth—and past customs that (from Powell’s perspective) were outmoded. According to Powell, social evolution is the direct result of this form of competition.<sup>61</sup> In a way, the GAA can be viewed as an assimilationist attempt to agitate the traditional modes of subsistence and ownership in tribal communities.<sup>62</sup> While such a view would align with the foregoing theory, it would be wholly incompatible with Powell’s preference for the gradual and organic progress of Native societies, for according to Powell, “[W]e must either deal with the Indian as he is, looking to the slow but irresistible influence of civilization with which he is in contact to affect a change, or we must reduce him to abject slavery.”<sup>63</sup> Given Powell’s dichotomy, he would likely have found the forceful means and the ideologically and culturally subversive aim of the GAA, when combined, to be tantamount to slavery. This conflict between Powell’s work and the GAA shows that, regardless of the anthropologist’s genuine concern for Native cultural identity, the federal government was only willing to adopt and distort ethnographic data and theories advanced by the BAE insofar as they reinforced the notions of Native inferiority that undergirded federal Indian policy or suggested an expedient route to assimilation.

A letter sent by Morgan to President Lincoln in 1862 is indicative of not only the conflict between what would later become BAE and federal Indian policy but also the connection between this

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<sup>60</sup> *Id.*

<sup>61</sup> J. W. Powell, *Competition as a Factor in Human Evolution*, 1 AM. ANTHROPOLOGIST 297, 310 (1888).

<sup>62</sup> This view aligns with Henry Dawes’s argument that tribal communities are incapable of progressing toward civilization because selfishness is wholly incompatible with tribal identity. See 1885 REPORT, *supra* note 57, at 88.

<sup>63</sup> Powell, *supra* note 29, at 15.

forced transition to agriculture and slavery.<sup>64</sup> In the letter, Morgan indicates that the management of Indian affairs by the federal government had enabled its agents to defraud Native peoples through the misappropriation of Indian annuities through collusions with licensed traders.<sup>65</sup> Morgan writes that, in addition to these annuities, annual appropriations intended to fund the development and operation of agricultural farms were released to Indian agents.<sup>66</sup> Morgan then describes how \$20,000 of these funds were being utilized on the Yankton Reservation: “The agent . . . was working 50 Indians on [a] farm of a thousand or more acres at 50 cents each, per day, and intended to increase the number to 100. . . . [T]he men were paid in goods [from] the licensed trader.”<sup>67</sup> This account of how money was managed in Indian country leaves little room for doubting that the federal government—knowingly, willingly, or ignorantly—enabled the malfeasance of Indian agents and the licensed traders with whom they were associated. As a solution to this ongoing problem, Morgan encouraged the establishment of Indian states where tribes could raise cattle and engage in trade on a national level.<sup>68</sup>

In addition to providing a substantial means of subsistence for the tribes, such a solution would have enabled direct participation by individual Indians in the establishment and development of strong tribal economies. By encouraging the adoption of such a policy, Morgan acknowledged the skill, expertise, and inherent value of traditional Native horsemanship, the practice of which was closely tied to the cultural identities of many tribes, as well as the intellect and capacity for self-management of Native peoples.<sup>69</sup> Compare this to the policy behind the GAA, which completely and utterly devalued Native traditions and tribal identity, forced individual Indians to work for less than what was already

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<sup>64</sup> Lewis H. Morgan, *An Unknown Letter from Lewis H. Morgan to Abraham Lincoln*, 6 Univ. of Rochester Library Bulletin 34–40 (Paul Kosok ed., 1951) (1862).

<sup>65</sup> Morgan observed that, in many cases, “from one half to nine tenths” of the funds released to an Indian agent to be paid out to tribal members were deposited into the hands of a licensed trader (usually a near relative and always a partner of the agent) to settle past debts or in exchange for goods at a rate to be determined by the agent and trader. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

owed to them by the federal government, and conflicted with both traditional and then-emerging notions of tribal sovereignty.

Despite the fact that Morgan's letter pre-dates the GAA by two decades, the implementation of the GAA indicates that Morgan's criticisms continued to apply throughout the era of assimilation. Although individual Indians were "granted" fee title to their own allotments, these parcels of land were already held in common by each member of a tribe under its traditional notions of ownership. Therefore, the grant of fee title that is presumed to be the incentivizing element of the GAA represented little more than a grant of alienability, a right which could only be deemed valuable from a capitalist perspective wholly foreign to most allottees and their tribes. As the price for this "privilege" was a massive reduction in tribal land-holdings,<sup>70</sup> it is evident that Native peoples were once again given far less than what they were already owed. While the federal government, under the GAA, also pledged to provide Native peoples with the requisite training and supplies to transition from tribal to agrarian ways of life, individual Indians were rarely given adequate financial support and were forced to live on allotments where they would be geographically cut off from traditional, familial, and communal support systems.<sup>71</sup> In this way, the GAA profoundly influenced the disintegration of several key aspects of tribal identity and tribal self-governance. To make matters worse, many Indians who resisted this program of subversion were imprisoned.<sup>72</sup> Collectively, these observations indicate that the application of the GAA led to situations similar to those described in Morgan's letter to President Lincoln, situations in which the federal government's control of Native assets allowed for gross manipulations of tribal societies and Indian labor. As this labor was paid out of monies held in trust on behalf of the several tribes, it is perhaps inappropriate to see this as genuine payment, rather the motivating force behind Indian agricultural labor was the withholding of these funds and other tribal assets in combination with the threat of imprisonment. As such, Powell would be correct

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<sup>70</sup> See FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 20 (University of California Press, 1997) (1995) ("The national Indian land estate was reduced from 138 million acres in 1887 to 52 million acres in 1934.").

<sup>71</sup> See *id.*

<sup>72</sup> Galanda & Dreveskracht, *supra* note 3, at 400 (citing Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 394 (1998)).

to assert that such a forceful program of assimilation was akin to slavery.

While a great many legal scholars acknowledge the effects of this forced transition to agriculture, there are far fewer writers on Indian law who acknowledge how application of the GAA shaped the legal understanding of tribal membership.<sup>73</sup> In 1896, the federal government established enrollment commissions to determine the legitimacy of claims of tribal membership so as to determine whether or not claimants were entitled to allotments under the GAA.<sup>74</sup> In order to meet their objective, these commissions were to evaluate blood quantum, compel witnesses, and collect other evidence to establish official rolls for the several tribes over the course of six months.<sup>75</sup> As a result of the lack of tribal involvement and this time constraint, the commissions produced rolls, excluding members and including non-members of tribes, that memorialized their inability to properly evaluate tribal membership.<sup>76</sup> In spite of these errors, the authority of these official rolls, the importance of blood quantum in determining tribal membership, and the unilateral authority of Congress to determine tribal membership would be continually reaffirmed by the courts.<sup>77</sup> Although they clearly conflict with traditional notions of tribal identity based on non-familial kinship and shared activity, these aspects of assimilationist policy would be reaffirmed by the act intended to put an end to the federal government's program of assimilation, and they continue to exist within both tribal and federal Indian law to this day.

The assimilationist aim as adopted by the BIA also led to the restructuring and centralization of tribal governments. During the implementation of the GAA, agents of the BIA “ignore[d] existing legitimate Native governments in favor of new governments organized on its initiative, because the latter were more amenable to

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<sup>73</sup> See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at § 3.03[4] (Nell Jessup Newton ed., 2012) (indicating that the establishment of official rolls was primarily influenced by the process of allotment).

<sup>74</sup> Galanda & Dreveskracht, *supra* note 3, at 400.

<sup>75</sup> *Id.* at 400–01.

<sup>76</sup> *Id.* at 401 (citing Angelique A. EagleWoman & Wambdi A. Wastewin, *Tribal Values of Taxation Within the Tribal Economic Theory*, 18 KAN. J.L. & PUB. POL'Y, 1, 7 (2008)).

<sup>77</sup> See, e.g., *Davis v. United States*, 192 F.3d 951, 955 (10th Cir. 1999) (recognizing that the Seminole Nation continues to base tribal enrollment on the Dawes Rolls); *Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899) (holding that Congress had the authority to establish commissions to determine who was entitled to citizenship in the several tribes).

Bureau desires.”<sup>78</sup> In the 1920s, this policy led to the BIA creating the Navajo Tribal Council in order to facilitate the leasing of tribal lands for the sake of oil exploration and development by the federal government; the current government of the Navajo Nation evolved out of this act.<sup>79</sup> The BIA also made similar unsuccessful attempts to restructure/replace the All-Pueblo Council and the tribal council on the Flathead Reservation.<sup>80</sup> In each of these cases and others, the BIA attempted to shift the political power of tribal organizations from communities committed to traditional values to groups of individuals who were willing to cooperate with the capitalist aims of the federal government. While the policy behind this trend might not have persisted, the transition into the next era of federal Indian policy would occur at a time when the BIA was actively engaged in disrupting, dismantling, and redefining the distribution of tribal political power.

### C. *The Indian Reorganization Act*

Much of the current legal interpretation concerning tribal identity as it pertains to enrollment and tribal sovereignty results from policy decisions related to and the enactment of the Indian Reorganization Act of 1934 (IRA).<sup>81</sup> While one may be critical of a portion of the effects of the IRA or its implementation, it is far more difficult to find fault with its purpose. In proposing the bill to Congress, John Collier, then Commissioner for the Bureau of Indian Affairs, stated that the IRA was intended to grant Indian tribes the “freedom to organize for the purposes of local self-government and economic enterprise [so that they might achieve] civil liberty, political responsibility, and economic independence.”<sup>82</sup> The IRA was also meant to address issues presented by the Meriam Report,<sup>83</sup> which was a general study of the living conditions in Native

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<sup>78</sup> Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE BUILDING OF NATIVE NATIONS* 49, 51 (Eric D. Lemont ed., 2006).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 52.

<sup>81</sup> 25 U.S.C. § 476 (2012).

<sup>82</sup> H.R. 7902, 73rd Congress, (2nd Sess. 1934) [hereinafter IRA Proposal].

<sup>83</sup> See THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS xi (Vine Deloria ed., Univ. of Oklahoma Press 2002).

communities.<sup>84</sup> The report indicated that the totality of the living conditions to be found in most of these communities was conducive to the development of poor health and the spread of disease;<sup>85</sup> also noted in the report was the federal government's complete and utter failure to aid in the acclimation of Native peoples to the conditions produced by allotment, establish and administer educational and healthcare services, and provide Native peoples with adequate legal protections.<sup>86</sup> The means Collier identified to serve these ends were the repeal of assimilationist policies—which was to be facilitated in part by the federal government turning over control of various assets and programs to the tribes they were meant to serve—and the establishment and recognition of strong tribal governments with written constitutions.<sup>87</sup>

In the years that followed the enactment of the IRA, Indians, anthropologists, and policymakers would debate over what should serve as the basis for the form of the soon-to-be-established tribal governments. Loretta Fowler indicates that, after the development of theories concerning the process of acculturation in the 1920s, many anthropologists categorized Native representatives as being either conservative (resistant to the idea of western government) or progressive (open to the idea of political reorganization under the BIA).<sup>88</sup> Felix Cohen, an attorney who greatly influenced the establishment of tribal constitutions, indicated that a similar debate was taking place between anthropologists and BIA administrators when he wrote the following:

The word *anthropology* is a red flag to the regular Indian Service Administrator. To him, it generally connotes a breed of people that look upon Indians as museum exhibits to be measured and cataloged, rather than as human beings faced with the universal human problems of earning a living, keeping healthy, raising a family, getting along with neighbors, and enjoying life.<sup>89</sup>

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<sup>84</sup> LEWIS MERIAM ET AL, *THE PROBLEM OF INDIAN ADMINISTRATION* vii (The John Hopkins Press 1928).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 8–20.

<sup>87</sup> IRA Proposal, *supra* note 82.

<sup>88</sup> Fowler, *supra* note 6, at 73–74.

<sup>89</sup> Felix S. Cohen, *Anthropology and the Problems of Indian Administration*, 18 *THE SOUTHWESTERN SOCIAL SCIENCE QUARTERLY* 171 (1937).

This stereotyped perspective disregards the profound and deleterious effect that assimilationist policies had on Native peoples and their living conditions. To take Native peoples as they were at the time that the IRA was being drafted and implemented as the sole focus of progressive policy reform, particularly from a non-Indian perspective, would entail the dismissal of those traditional practices and perspectives that were disrupted by the process of assimilation, for while these aspects of Native culture could persist in the hearts, minds, or souls of Native peoples, they were not allowed to persist as a facet of Native activity. Even for Cohen, a progressive who arguably evaded other stereotypes, the value of historical anthropology was in its ability to aid in the implementation of policies adopted by politicians.<sup>90</sup>

Although the IRA may have been aimed at establishing a foundation upon which traditional notions of tribal sovereignty could be asserted, the devaluation of historical anthropology frustrated this purpose. Shortly after the IRA was enacted, Cohen drafted an opinion issued by the Department of the Interior on the behalf of Solicitor Nathan R. Margold concerning the “Powers of Indian Tribes” (Opinion),<sup>91</sup> which explained that tribal powers were internally defined:

In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe.<sup>92</sup>

This language served as the basis for the subsequent assertion that “an Indian tribe must, if it has any power at all, have the power to prescribe the forms through which its will may be registered.”<sup>93</sup>

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<sup>90</sup> See generally *id.* at 171–80 (providing several examples of how historical anthropology could aid in the implementation of federal policy regardless of whether it promoted the preservation or the destruction of tribal identity).

<sup>91</sup> Rusco, *supra* note 78, at 55.

<sup>92</sup> Powers of Indian Tribes, 1 Op. Solic. Gen. 445, 448 (1934) [hereinafter Powers].

<sup>93</sup> *Id.* at 455.

However, as was to be expected, any particular powers described in the opinion are illustrated by way of federal caselaw.<sup>94</sup>

This reliance on federal caselaw presented a distorted view of what tribal sovereignty meant for many tribes. While pre-1920s caselaw may have emphasized a tribe's political authority,<sup>95</sup> very few, if any, judicial opinions of the era illustrated particular manifestations of this authority or the route by which it is derived from the will of tribal members. Furthermore, caselaw that exemplified the exercise of tribal self-governance was wrought with the anthropological shortcomings of the prior era.<sup>96</sup> Even at its best, such caselaw only represented those rights that were both asserted by tribes sufficiently acquainted with American jurisprudence and recognized as valid by the courts. As a result, the Opinion would conclude with an espousal of inherent tribal powers that were overly generalized and could—at least in part—be described as the hallmarks European governmental forms.<sup>97</sup> According to the Opinion, these powers were “subject to modification,” not in light of distinct traditions, but “with respect to particular tribes in the light of particular powers granted, or particular restrictions imposed, by special treaties or by special legislation.”<sup>98</sup> These externally defined powers would serve as the defining features of a fictional, shared political identity of tribes that are—and have always been—distinguished by unique and vibrant cultures and customs that were, in this Opinion, largely disregarded.

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<sup>94</sup> *E.g.*, *Waldron v. U.S.*, 143 Fed. 413 (1905) (affirming the right of a tribe to accept as members those who do not meet a federally, rather than tribally, established criteria), *cited in* Powers, *supra* note 92, at 457; *Ex parte Crow Dog*, 109 U.S. 556 (1883) (holding that murder committed by one Indian against another Indian must be dealt with according to tribal law), *cited in* Powers, *supra* note 92, at 472–73.

<sup>95</sup> *E.g.*, *Journeycake v. Cherokee Nation and U.S.*, 28 Ct. Cls. 281, 317–18 (recognizing the civility of the Cherokee Nation and its right to refuse per capita payments to newly adopted members of the Delaware Indians after establishing a rule of distribution based on Cherokee blood quantum), *cited in* Powers, *supra* note 92, at 452–53.

<sup>96</sup> *E.g.*, *id.* (“[The Cherokee Constitution] was framed and adopted by a people some of whom were still in the savage state, and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits.”)

<sup>97</sup> In short, these powers were defined in the Opinion as follows: the powers to (1) adopt a form of a government, (2) to define tribal membership, (3) to regulate domestic relations, (4) to prescribe rules of inheritance, (5) to levy dues, fees, or taxes, (6) to exclude non-members, (7) to regulate property under tribal jurisdiction, (8) to establish and administer a system of justice, and (9) to impose limited regulations on federal employees. Powers, *supra* note 92, at 476–77.

<sup>98</sup> *Id.* at 37.

Roughly one month after Cohen drafted the Opinion, he would write a memorandum “On the Drafting of Tribal Constitutions” (Memorandum), which would “offer useful suggestions to Indians engaged in drawing up constitutions for adoption and approval under the [IRA] and to members of the Indian Service who may be called upon to assist in this task.”<sup>99</sup> This lengthy document, which provided examples of previously drafted tribal constitutional provisions that were idealized by Cohen, and a model constitution drafted in-part by Cohen would serve as templates for those tribes that had not committed the blueprint for their political identities to writing.

One section of the Memorandum entitled “Offices and Titles” was provided to help tribes and BIA employees decide whether they would “choose between the older forms of tribal government and the forms of government that are customary in white communities.”<sup>100</sup> While Cohen claimed that many of the “ancient traditions of [tribal] self-government . . . [had] been forgotten,” he did state that these traditions “offer[ed] a very important source of knowledge and wisdom to those who are engaged in drafting a constitution.”<sup>101</sup> However, the inherent value of these traditions was to be found in the fact that “each Indian tribe had its own governing officers, its own policemen if policemen were necessary, its own system of land holding and inheritance, its own laws of marriage and divorce, and its own code of crimes.”<sup>102</sup> In this way, Cohen recognized the value of tradition only insofar as it served the practical ends of the federal government as set forth in the IRA and only insofar as it concerned aspects of government that had European analogues. Even when these traditions could serve the practical purpose of informing the organization of a tribal government, Cohen cautioned that while “old methods” would likely prove satisfactory “on those reservations which have never been allotted, where the Indian community is strong, and where the difficult problems of contacts between individual Indians and individual white men seldom arise,” they could be “entirely

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<sup>99</sup> FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 3 (David E. Wilkins ed., 2006).

<sup>100</sup> *Id.* at 19.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* It is important to recognize that the powers of government here alluded to were precisely those that were outlawed, and thereby diminished, by the Code of Indian Offenses. *See supra* notes 45–49 and accompanying text.

inapplicable” in regions “where white men have entered in large numbers and where most of the Indians’ troubles arise out of the activities of whites”;<sup>103</sup> as the BIA’s implementation of the IRA—including the aid it provided in the tribal constitutional drafting process—strongly suggests that the situation of many if not all tribes fit the latter description, this could be seen as a thinly veiled argument that tribes organizing under the IRA should adopt new forms of government. The ideal form of government described by Cohen in his Memorandum<sup>104</sup> and his model constitution was a representative democracy.<sup>105</sup>

In addition to describing the form of government to be adopted by the tribes, Cohen also included exemplary provisions concerning tribal membership in the Memorandum. These provisions defined membership in terms of one’s inclusion on tribal rolls (as prepared by the BIA), blood quantum, the status of one’s parents, one’s residence, and tribal adoption practices.<sup>106</sup> While these examples were used suggestively, they were coupled with the Secretary’s urging tribes to adopt regulations—including positive limits on the automatic adoption of the children of genuine members<sup>107</sup>—because “it was paramount to their tribal welfare to weed out those Indians seeking membership who possessed a low blood quantum.”<sup>108</sup> Furthermore, the definition of “Indian” provided in the IRA excluded those Indians possessing less than one-half blood quantum that were not directly descended from members enrolled in federally recognized tribes and living on a reservation on June 1, 1934.<sup>109</sup> Instead of defining tribal membership in terms of inclusion based on kinship, Cohen and those at the BIA encouraged tribes to define tribal membership in terms of exclusion based

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<sup>103</sup> COHEN, *supra* note 99, at 19.

<sup>104</sup> *Id.* at 20 (focusing on the idea of tribal councils composed of officers each having authority delegated by the tribe).

<sup>105</sup> *Id.* at 173–75.

<sup>106</sup> *Id.* at 13–18.

<sup>107</sup> Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 447 (“[T]he Secretary [concluded] that the Department’s policy should be ‘to urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should limit such membership to persons who reasonably can be expected to participate in tribal relations and affairs.’”) (quoting Circular No. 3123, United States Dept. of Interior (Nov. 18, 1935) (on file with Carole Goldberg)).

<sup>108</sup> *Id.* at 446 (quoting Circular No. 3123, *supra* note 107).

<sup>109</sup> 25 U.S.C. § 479 (2012).

primarily on blood quanta and documentation prepared by non-Indians.

While it has been suggested by Elmer Rusco and others that a model constitution was never provided to tribes organizing under the IRA,<sup>110</sup> David Wilkins subsequently found both the model constitution drafted in-part by Cohen and evidence that it was distributed to those BIA employees that would aid in the drafting of tribal constitutions.<sup>111</sup> Comparison of this model with those constitutions drafted immediately after the enactment of the IRA strongly indicates that BIA employees to whom this model was distributed had a profound influence on the drafting process. Several tribes drafting constitutions during the 1930s adopted most of the boilerplate language of the model form with minimal deviations.<sup>112</sup> To these more formulaic constitutions, many of the adopting tribes added membership provisions (for the most part concerning blood quanta) as suggested in the Memorandum,<sup>113</sup> a section concerning vacancies and removals from tribal offices,<sup>114</sup> and a section concerning land rights.<sup>115</sup> To a lesser extent, some of these tribes included a bill of rights possessed by tribal members.<sup>116</sup> By and large, these additional sections aimed at preserving those rights that were threatened under the administration of the previous era share

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<sup>110</sup> See generally Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 49 (Eric D. Lemont ed., 2006).

<sup>111</sup> David E. Wilkins, *introduction* to FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS xi, xxvii (David E. Wilkins ed., 2006).

<sup>112</sup> See, e.g., CONSTITUTION AND BY-LAWS FOR THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION (1936); CONSTITUTION AND BYLAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION (1935); CONSTITUTION AND BY-LAWS OF THE KEWEENAW BAY INDIAN COMMUNITY MICHIGAN (1937); see also, CONSTITUTION AND BYLAWS OF THE LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON (1957).

<sup>113</sup> E.g., CONSTITUTION AND BYLAWS OF THE NORTHERN CHEYENNE TRIBE Art. II, § 1 (1935) (requiring the children of nonresident members to have one-half or more degree of Indian blood and three years of residence on the reservation to qualify for automatic adoption); CONSTITUTION AND BYLAWS OF THE FORT BELKNAP COMMUNITY OF THE FORT BELKNAP RESERVATION OF MONTANA Art. I, §§ 2-4 (1935) (requiring one-fourth and one-eighth degree of Indian blood to qualify for automatic membership and adoption respectively but also recognizing that membership shall not be lost other than by formal request or moving to a foreign country).

<sup>114</sup> E.g., CONSTITUTION AND BYLAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION MONTANA Art. V (1935).

<sup>115</sup> E.g., CONSTITUTION AND BYLAWS OF THE APACHE TRIBE OF THE MESCALERO RESERVATION NEW MEXICO art. VII (1936).

<sup>116</sup> E.g., CONSTITUTION AND BYLAWS OF THE MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION Art. VII (1936).

identical language,<sup>117</sup> which suggests that these sections were either drafted with or disseminated to the tribes by BIA employees.

Although some tribes had previously established their own constitutions—many of which were found by Cohen to be in some way exemplary<sup>118</sup>—all tribes drafting IRA constitutions were required to have their drafts approved by the Secretary of the Interior.<sup>119</sup> Those constitutions that were approved indicated that a tribe’s authority would continue to be restricted by a similar approval requirement.<sup>120</sup> For example, the Oglala Sioux of the Pine Ridge Reservation adopted multiple constitutions prior to the enactment of the IRA.<sup>121</sup> In drafting the Tribe’s first constitution, the Oglala Sioux outlined a form of tribal government that would maintain their cultural heritage by encouraging broad strokes political participation—through the Oglala Tribal Council, a large body of delegates representing the eight districts of the reservation—and preserving the role of an elected chief.<sup>122</sup>

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<sup>117</sup> For example, the sections of the Blackfeet constitution and the Grand Ronde constitution concerning land rights are nearly identical, having only one entirely unique section between them and most other sections differing only in terms of self-reference. *Compare* CONSTITUTION AND BYLAWS FOR THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION OF MONTANA Art. VII (1935), *with* CONSTITUTION AND BYLAWS FOR THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OREGON Art. IX (1936).

<sup>118</sup> In particular, Cohen makes use of the pre-IRA Pine Ridge Constitution to illustrate how tribes should formally recognize treaty rights and their articles of incorporation to illustrate how to recognize the power of tribal members to elect and modify the authority of tribal officers by popular vote. COHEN, *supra* note 99, at 7, 37, 45, 65.

<sup>119</sup> It is important to note that the IRA did not grant to the tribes a right to organize under a constitution to be approved by the Secretary of the Interior; in fact, the IRA itself contains formal recognition of an inherent aspect of tribal sovereignty: the right of tribes to organize according to their own principles. 25 U.S.C. § 5123(h) (2012). However, it is also important to consider the situation created by the IRA: For the first time, the federal government agreed to recognize tribal self-government as it was identified by the tribes. It is reasonable to believe that Native peoples may have believed that this degree of acceptance was conditioned upon approval. Such a belief is somewhat justified by the language of 25 U.S.C. § 5123(a) (2012), which indicates that IRA constitutions would only become effective when “ratified by a majority vote of [adult tribal members]” and “approved by the Secretary.”

<sup>120</sup> Generally, IRA constitutions featured provisions requiring secretarial approval before those documents could be amended. *E.g.* CONSTITUTION AND BY-LAWS OF THE ALABAMA COUSHATTA TRIBES OF TEXAS Art. IX (1938) (“[N]o amendment shall become effective until it shall have been approved [sic] by the Secretary of the Interior.”).

<sup>121</sup> See Richmond L. Clow, *The Indian Reorganization Act and the Loss of Tribal Sovereignty: Constitutions on the Rosebud and Pine Ridge Reservations*, 7 GREAT PLAINS QUARTERLY 125 (1987).

<sup>122</sup> *Id.* at 127.

Following the adoption of this constitution, the Superintendent of the Pine Ridge Reservation, Ernest W. Jermark—who complained that the newly formed council failed to be of any material benefit to him—encouraged the Tribe to adopt amendments that would both greatly reduce the size of the tribal council and require written approval from the Commissioner of Indian Affairs before any future constitutional amendments could be made.<sup>123</sup> This revised and amended constitution was accepted by the Tribe in 1928.<sup>124</sup>

Between 1928 and 1935, the evolution of the Oglala Sioux constitution is a microcosmic example of the transition from tribal governments rooted in communal sovereignty to tribal representative democracies managed by the Department of the Interior. At the direction of Jermark, the Tribe elected its first council under the 1928 constitution, which reduced the number tribal representatives from eighty to twenty-one.<sup>125</sup> Many were displeased by this drastic change, and the reservations became severely factionalized, which resulted in various forms of political dissidence including the creation of an extralegal government.<sup>126</sup> By 1933, the tribe had adopted a new constitution that settled the series of conflicts that arose out of this political divide by doing away with the commissioner approval requirement of the last constitution and recognizing that each member of the Tribe had a right to vote; however, this new constitution also established a tribal council that had complete management authority regarding any business that came before the Tribe.<sup>127</sup> In 1934, after the enactment of the IRA, the requirement for commissioner approval was replaced with review requirements for three categories of tribal legislative action: (1) no review was required for those actions that pertained only to tribal operations or tribal official procedure; (2) certain actions, including but not limited to the alteration of voting districts and hiring legal counsel, required secretarial approval; and (3) decisions related to tribal funding and property required approval by the reservation superintendent.<sup>128</sup>

By encouraging tribes to formally adopt representative democracies, the BIA diminished the authority of the general

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<sup>123</sup> *Id.* at 128.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 128–29.

<sup>127</sup> *Id.* at 129.

<sup>128</sup> *Id.* at 130–32.

membership. Even though many tribal constitutions mirroring Cohen's model that were adopted by tribes under the IRA recognized that the primary governing body was the General Tribal Council (all members qualified to vote),<sup>129</sup> IRA constitutions formally recognized a process by which the totality of the authority of a tribe—aside from the right to review and vote on official decisions—would be vested in approximately five tribal officials.<sup>130</sup> This authority once vested under an IRA constitution would then be subject to limitations imposed by the Secretary or the superintendent of a reservation, which, by extension, further restricted the authority of the membership as a whole.<sup>131</sup> By making such a constitution the supreme law of the land on a particular reservation, a tribal drafter represented, at least externally, that the tribe as a whole acted through its officials and not its members. In the context of disenrollment, this representation is made internally as well, for through the act of disenrollment, the identity of the tribe is wholly conflated with that of its officials. This situation resulted not from the federal government's acceptance or recognition of tribal custom or tradition but from a process beginning with discovery by which Native cultures were scrutinized, criticized, and—to a certain extent—diminished. While a tribe organized under the IRA may be healthy and fully functioning, officials seeking to unjustly excise tribal members may capitalize on the fact that they are clothed in the protections inherent to the authority that tribal sovereignty confers whereas potential disenrollees are not.

Given anthropological accounts concerning the connection between kinship and tribal identity and tribal governance based on consensus,<sup>132</sup> the federal government's imposition of representative forms of government—under which major decisions would be decided by quorums of enrolled voters, a separate and distinct executive body, and the Secretary—drastically altered the ideological foundations of those societies that had not made these decisions on their own.<sup>133</sup> However, Cohen did recognize that tribal

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<sup>129</sup> See COHEN, *supra* note 99, at 174.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 174–76.

<sup>132</sup> See *supra* notes 6–11 and accompanying text.

<sup>133</sup> There were, however, tribes that chose to adopt such democratic forms of government. For example, Cohen observed that “[p]olitically, there was nothing in the kingdoms and empires of Europe in the fifteenth and sixteenth centuries to parallel the democratic constitution of the Iroquois Confederacy, with its provisions for initiative, referendum, and recall, and its suffrage for

officials were direct representatives of the combined will of tribal members, even going so far as to quote a Fort Belknap elder in saying that “[t]hey are merely the Voice or Interpreter of the wishes of the people.”<sup>134</sup> It is presumably for this reason that Cohen’s model constitution recognized that the General Tribal Council was the governing body of the tribe, but the model constitution only described two powers that would clearly be *directly* exercised by such a council: (1) the power to vote in the election of tribal officials and (2) the right to call special meetings to review official decisions.<sup>135</sup> In addition to these powers, the IRA provides that constitutional adoption and amendment requires a majority vote of the General Tribal Council.<sup>136</sup> While these powers are limited, Cohen, in his model constitution, recognized that a General Tribal Council could have further powers delegated to it by the members of its tribe or the federal government and that the reserved, inherent powers of a tribe—at least insofar as they were not previously limited by acts of Congress—could be exercised by the General Tribal Council through the adoption of bylaws and constitutional amendments.<sup>137</sup> While these powers—even when fully exercised—are unlikely to lead to a complete unification of the will of tribal members with the actions of its officials, they are perhaps the surest means by which the members of a tribe may collectively exercise their sovereign authority. As such, these powers, which could potentially check the unjust actions of tribal officials, when utilized effectively, may collectively be used as a tool to fight unjust disenrollment.

### III. THE TRIBAL FRANCHISE AND DISENROLLMENT

Disenrollment—a term which has no meaning or equivalent in any Native tongue,<sup>138</sup> a term which had no special legal meaning prior to the 1930s<sup>139</sup>—is the act by which the representatives of a

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women as well as men.” Felix S. Cohen, *Americanizing the White Man*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 315, 319 (Lucy Kramer Cohen Ed., 1960).

<sup>134</sup> COHEN, *supra* note 99, at 51.

<sup>135</sup> *Id.* at 174.

<sup>136</sup> 25 U.S.C. § 5123(a)(1) (2012).

<sup>137</sup> COHEN, *supra* note 99, at 175.

<sup>138</sup> Galanda & Dreveskracht, *supra* note 3, at 385.

<sup>139</sup> David E. Wilkins, *Exiling One’s Kin: Banishment and Disenrollment in Indian Country*, 17 *W. LEGAL HIST.* 235, 239 (2004).

tribe may deny quintessential aspect of the identities of tribal members: their connections with the lands of their ancestors, their rights and benefits as recognized in treaties and other agreements with the federal government, and their abilities to identify with the whole of their shared tribal community.<sup>140</sup> Regardless of any potential merits behind such an action, the disenrollment of genuine tribal members causes bilateral harm: By disenrolling such a member, the representatives of a tribe erode—in a purely legal sense—the genuine connections between that member and his or her tribe, and in doing so, they fray the bonds between the tribe and its past, present, and future members.<sup>141</sup> At its best, disenrollment serves to remedy errors on universally inaccurate tribal rolls prepared by non-Indians<sup>142</sup> concerned with invalidating or settling en masse the claims of those Indians that their government had disenfranchised.<sup>143</sup> At its worst disenrollment is motivated by the prospect of the economic gains that would result from thinning out tribal membership when a tribe has instituted per capita distributions of tribal revenues.<sup>144</sup> To argue against these forms of disenrollment is not to attack the tribal sovereignty that serves as the basis for these actions, it is to argue on the behalf of the tribal membership that is and has always been the source of sovereign authority, that is collectively the tribe in itself, and whose sovereign rights and internal cohesion is denied by the act of disenrollment.

#### A. *Tribal Sovereignty and Justifications for Disenrollment*

Many eloquent proponents of disenrollment claim that it may be justified as a traditional practice or right of Native peoples; this claim is appealing but unfounded. Advocates for disenrollment cite both *Santa Clara Pueblo v. Martinez* and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as authorities affirming such a right. However, neither of these authorities explicitly approve the practice of disenrollment, and both authorities rest on the assertion that “Indian tribes are ‘distinct,

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<sup>140</sup> Galanda & Dreveskracht, *supra* note 3, at 392.

<sup>141</sup> *Id.* at 391 nn.31–32.

<sup>142</sup> See, e.g., Hoffman v. Colville Confederated Tribes, 4 CCAR 4, 1997 WL 34719458 (Colville C.A. May 5, 1997) (discussing the inaccuracies of the rolls prepared for tribes).

<sup>143</sup> See *supra* notes 106–09 and accompanying text.

<sup>144</sup> See discussion *infra* Part III.E.

independent political communities, retaining their original natural rights’ in matters of local self-government.”<sup>145</sup> As disenrollment was not a traditional practice of Native peoples,<sup>146</sup> in order for it to be considered to be or result from a natural right of a tribe, it must be approved collectively by its membership or else it will not be an expression of its sovereignty.

### 1. Santa Clara Pueblo v. Martinez

*Martinez* centered around a controversy arising in connection with a provision of the Santa Clara Pueblo constitution stating that tribal membership would be denied to the children of a mother of the Pueblo and a nonmember father.<sup>147</sup> Because there was no similar rule that would apply to the children of a Santa Clara father, the respondent, Julia Martinez, originally brought an action seeking declaratory and injunctive relief against the enforcement of this provision that would deny membership to her children.<sup>148</sup> In doing so, Martinez asserted that, under Title I of ICRA,<sup>149</sup> the ordinance violated her right to equal protection under the laws of the tribe.<sup>150</sup> The Court—after accepting that suit could be brought against a Tribal officer<sup>151</sup>—rejected the notion that such a cause of action was available to Martinez *in federal court* for three reasons: (1) while ICRA was enacted to preserve the rights of tribal members against the overreach of tribal governments, the legislative history of the Act shows that it was intended to promote “the policy of furthering Indian self-government”;<sup>152</sup> (2) a writ of habeas corpus is the only form of relief available under ICRA;<sup>153</sup> and (3) only Congress, rather than the federal judiciary, has the authority to review tribal legislation.<sup>154</sup>

Invoking *Martinez* to justify disenrollment actions is problematic for several reasons. Facially, the controversy in

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<sup>145</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

<sup>146</sup> *See supra* notes 138–39 and accompanying text.

<sup>147</sup> *Martinez*, 436 U.S. at 51.

<sup>148</sup> *Id.* at 52.

<sup>149</sup> *See* discussion *infra* Part III.C.

<sup>150</sup> *Martinez*, 436 U.S. at 51.

<sup>151</sup> *Id.* at 60.

<sup>152</sup> *Id.* at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

<sup>153</sup> *Id.* at 66.

<sup>154</sup> *See id.* at 72.

*Martinez* and disenrollment challenges are clearly non-analogous. Further, to apply the argument supporting the Court’s decision in *Martinez* in the context of disenrollment would lead to logical inconsistency. The fundamental basis of the *Martinez* opinion was expressed by the lower court as follows:

If [tribal sovereignty has] any meaning at all, [it] must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decision wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that it intended [ICRA] to be interpreted in such a manner.<sup>155</sup>

Shackling such a foundation to an argument in support of disenrollment would be nothing short of argumentative contortion. While it is true that the federal judiciary should not intervene in tribal governance or legislation, the argument that disenrollment imperils the identity of tribes and that it only exists because that identity has been externally manipulated and obfuscated is both undeniable and axiomatic. Every aspect of a tribe’s identity exists and has existed in some way through its membership and, therefore, to extinguish tribal membership, or the connections that serve as its foundation, is to extinguish tribal identity. Because there is no indication that disenrollment is in any way linked to Native culture,<sup>156</sup> it is entirely unclear what aspect of Native identity would be preserved by its continued and unrestrained practice.

The pro-disenrollment argument is also severely hampered by the fact that the Santa Clara constitution differs significantly from those mirroring Cohen’s model. The *Martinez* opinion also rests on the Court’s recognition that Indian tribes “retain[] their original natural rights,”<sup>157</sup> including their power to “regulat[e] their

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<sup>155</sup> *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18–19 (D.N.M. 1975), rev’d, 540 F.2d 1039 (10th Cir. 1976), rev’d, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), *quoted in Martinez*, 436 U.S. at 54.

<sup>156</sup> *See supra* notes 138–39 and accompanying text.

<sup>157</sup> *Martinez*, 436 U.S. at 55 (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)).

internal and social relations.”<sup>158</sup> When Cohen wrote his model constitution, he indicated that for each tribe these powers rested in a “General Tribal Council . . . composed of all the qualified voters of the [tribe].”<sup>159</sup> Cohen’s model is also that of an enumerated powers constitution, in that it indicates that those powers not explicitly vested in the officers of a tribe remain in the hands of the people.<sup>160</sup> Unlike many of the tribal constitutions adopted in the 1930s—which happen to closely follow Cohen’s model<sup>161</sup>—the 1935 Santa Clara constitution does not explicitly indicate that the governing body of the tribe is a General Tribal Council. Instead, the Pueblo adopted provisions indicating that the entirety of its governing power shall be vested in a pueblo council composed of the organization’s officers.<sup>162</sup> And, while the Santa Clara constitution features a section concerning its future amendment and a “general pueblo” approval requirement, that section deviates from Cohen’s model and is arguably legally ambiguous and, therefore, open to the interpretation of the pueblo council.<sup>163</sup> Furthermore, the provision challenged in *Martinez* is in direct conflict with the provision it replaced, which states that “[t]he membership of the [Pueblo] shall consist [in part of] . . . [a]ll children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council.”<sup>164</sup> On account of these deviations from constitutional norms, it may be inappropriate to apply the ruling in *Martinez* to disenrollment challenges concerning any tribe whose membership retains a greater degree of authority, particularly when those tribes have not adopted constitutional provisions that justify the disenrollment of a petitioner. Because restricting or prohibiting federal judicial review of tribal legislation and its enforcement may be necessary to prevent a degree of interference that would diminish tribal sovereignty, it is still important that this brand of review is left to tribal courts. However, those courts need to operate independently of the other branches of tribal government in order to ensure that the rights of

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<sup>158</sup> *Id.* (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)).

<sup>159</sup> COHEN, *supra* note 99, at 174.

<sup>160</sup> *Id.* at 175.

<sup>161</sup> *See supra* note 112.

<sup>162</sup> CONSTITUTION AND BYLAWS OF THE PUEBLO OF SANTA CLARA art. III, § 1 (1936).

<sup>163</sup> CONSTITUTION AND BYLAWS OF THE PUEBLO OF SANTA CLARA art. VIII (1936).

<sup>164</sup> *Id.* art. II § 1(c).

tribal members are preserved,<sup>165</sup> and—more importantly—the legal community cannot operate under the assumption that the judicial restrictions in *Martinez* apply to tribal courts.

## 2. United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP is a document that was drafted and adopted by the United Nations in 2007 to officially recognize the rights of indigenous peoples across the globe.<sup>166</sup> Although the United States initially voted against the adoption of UNDRIP, President Obama formally adopted the Declaration in 2010.<sup>167</sup> While the adoption is not legally binding on the federal government,<sup>168</sup> many tribal advocates believe that UNDRIP has been and will continue to be a positive force in federal Indian law and policy reform.<sup>169</sup> Because the policy considerations recognized in UNDRIP ought to be preserved and respected, it is important to understand how proponents and opponents of disenrollment may utilize the Declaration as a basis for their respective arguments.

While many of the articles contained in UNDRIP have some bearing on the problem of unjust disenrollment, the only article that directly relates to issues pertaining to membership is UNDRIP Article 33, which states the following: (1) “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions,” and (2) “[i]ndigenous peoples have the right to determine the structures and select the membership of their institutions in accordance with their own procedures.”<sup>170</sup> At first blush, this language seems to wholly support the notion that a tribe may determine its membership as it sees fit,

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<sup>165</sup> The disenrollments at Nooksack, regardless of whether or not they are in fact justified, clearly illustrate why a tribal judiciary needs to be independent from its tribal council. *See* discussion *infra* Part III.D.

<sup>166</sup> *See* UNITED NATIONS, UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1–4 (2008), [https://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf) [<https://perma.cc/YR6D-NJ74>].

<sup>167</sup> Rob Capriccioso, *The Obama Administration Now Supports UNDRIP—But That’s Not Enough*, INDIAN COUNTRY TODAY (June 30, 2011).

<sup>168</sup> *Id.*

<sup>169</sup> *See, e.g.*, Robert Coulter, *Message from the President—Moving UNDRIP Forward*, INDIAN LAW RESOURCE CENTER (2011), <http://indianlaw.org/content/message-president-moving-undrip-forward>.

<sup>170</sup> UNITED NATIONS, *supra* note 166 at 23.

which would clearly appeal to a proponent of disenrollment. However, a deeper analysis of the Article indicates that its drafters were not advocating for a process by which a tribal government could arbitrarily revoke the tribal identities of indigenous persons.

If we as tribal advocates wish UNDRIP to be legally binding, we ought to interpret it in light of the canons of statutory interpretation. In particular, “effect must be given to all the words of the [Article] . . . so that none will be void, superfluous, or redundant.”<sup>171</sup> Applying this rule, we are necessarily led to the conclusion that the determination of the identity or membership of indigenous peoples referred to in (1) must be distinguished from the selection of members of indigenous peoples’ institutions referred to in (2). The plain language of these sections indicates that the former concerns tribal membership whereas the latter concerns the election and/or appointment of tribal officials. In either case, Article 33 concerns actions to be taken by indigenous peoples rather than a discrete and centralized tribal government, and in the case of determining tribal membership, those actions must be taken in accordance with custom and tradition.

Given the above interpretation of Article 33, the issues become whether there are tribal traditions or customs that justify disenrollment. David E. Wilkins, who has extensively studied the history and litigation surrounding disenrollment, indicates that while American Indians did practice banishment or exile, the word “disenrollment” is a legal term that did not appear until the 1930s.<sup>172</sup> Further, Wilkins writes that accounts of and ordinances concerning early exclusion practices indicate that banishment was only used to address what tribes traditionally considered serious crimes—e.g. murder, failure to contribute ones labor to the community, and incest— unless the person facing banishment was an adopted member of an alien nation.<sup>173</sup> Gabe Galanda, a staunch legal advocate for those facing disenrollment, further explains that tribal membership was traditionally based on “kinship and belonging at birth” and that membership criteria that deviate from the rule of

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<sup>171</sup> *E.g.*, *Hillside Landscape Constr., Inc. v. City of Lewiston*, 264 P.3d 388, 392 (Idaho 2011) (quoting *State v. Mercer*, 143 Idaho 108, 109 (2006)).

<sup>172</sup> David E. Wilkins, *Exiling One’s Kin: Banishment and Disenrollment in Indian Country*, 17 WESTERN LEGAL HIST. 235, 239 (2004).

<sup>173</sup> *Id.* at 239–45.

kinship were forced upon tribes organizing under the Indian Reorganization Act in the 1930s.<sup>174</sup> In Galanda's own words:

Under the IRA, family members became political members of tribal constitutional governments and corporate entities, particularly under boilerplate constitutions and corporate charters foisted upon tribes by John Collier and his followers, including a nascent National Congress of American Indians. Under those new tribal laws, tribal relatives can be “disenrolled” from the tribe.<sup>175</sup>

The words of Wilkins and Galanda indicate that UNDRIP does not provide any justification for depriving indigenous persons of the benefits of their tribal identities as the justifications for and the act of disenrollment have no basis in the customs or traditions of Native peoples.

Arguably, UNDRIP presents a floor and not a ceiling for how we ought to interpret the rights of tribal organizations, and *Martinez* raises this floor by affirming the right of tribes to determine their identities and membership requirements without the need for traditional or customary justification. This is incredibly important because tribal identities have been manipulated and tribal traditions and customs have been obscured by acts of Congress and the federal agencies formed to assist in tribal governmental development. However, it is even more important to recognize that these manipulations of the federal government have shaped external perspectives of tribal identity to the point that “the tribe” and “tribal rights” are seen as being ontologically divorced from tribal membership, but this is entirely antithetical to most, if not all, conceptions of tribal sovereignty. For a great many tribes—including some of those that have engaged in the disenrollment of genuine tribal members—the tribe is one and the same with its membership.<sup>176</sup> As such, the rights of a tribe belong to and are to be

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<sup>174</sup> Gabe Galanda, *We Were Not “Governments” in 1492, We Were Kinship Societies*, LAST REAL INDIANS (2018).

<sup>175</sup> *Id.*

<sup>176</sup> *See, e.g.*, CONSTITUTION AND BYLAWS OF THE CROW TRIBE OF INDIANS pmbl. (2001) (recognizing that the creation of the Crow tribal government as an exercise of the sovereignty of the adult members of the Crow Tribe of Indians);

exercised by its members. In light of tribal governmental changes during the 1930s, directly exercising the right to define tribal membership would require the membership to draft and adopt its own relevant constitutional provisions, whereas indirect exercise of this right would at least require that such provisions or disenrollment actions be ratified by a majority vote of all qualified members.<sup>177</sup> Either way, constitutional articles formally recognizing the voting rights of tribal members must be ironclad and protections concerning these rights must be robust in order to ensure that the rights of a tribe are honored and respected.

The importance of the tribal franchise may be clearly illustrated by the factual backdrops of several recent disenrollment cases. In particular, these cases demonstrate how several forms of disenfranchisement have allowed officials and/or tribal minority factions to invalidate aspects of their tribal identities to profit both politically and economically. The factual backdrop of these cases is of supreme importance because the best way to prevent unjust disenrollment is to prevent such an action from ever being initiated. In a great many cases, a more complete understanding and appreciation of the scope of tribal authority and constitutional protections on the parts of tribal members, tribal officials, and the greater legal community may forestall the tragedy that is associated with disenrollment.

B. *Elem Indian Colony and the Disenfranchisement of Potential Disenrollees*

On March 30, 2016, the sixty-one adult members of Elem Indian Colony of Pomo Indians were served with orders of disenrollment informing them that all of the members living on the Clear Lake reservation, including seventy-one children, were being simultaneously disenrolled from the tribe and banished from its

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*id.* art. I (recognizing all adult members of the Crow Tribe of Indians as the governing body of the Tribe.).

<sup>177</sup> According to Cohen, it was the traditional principle of government amongst the many Indian tribes that “matters of great importance should not be decided by the governing body of the tribe without first being referred to the popular vote of the members of the tribe,” for tribal officials “were considered to have no authority to oppose the majority will of *the tribe itself*.” COHEN, *supra* note 99, at 50 (emphasis added). How a tribe defines itself is at a once both a matter of great importance and something that should, by its very nature, be dictated by the tribe, i.e. the general membership.

lands.<sup>178</sup> For the time being, the potential disenrollees are also being denied rights to both voting and health services.<sup>179</sup> The Elem Tribal Council, whose members reside in the San Francisco Bay Area,<sup>180</sup> justified this action by way of reference to a conflict concerning its 2014 tribal election.<sup>181</sup> Those facing disenrollment claim that each of the adults residing on the reservation at the time, sixty of the 121 members on the then-current membership roll, were denied access to the election venue.<sup>182</sup> Having been denied the ability to vote at the “official election,” the allegedly ousted members decided to hold an election of their own; according to the tribal council, this was a treasonous attempt at a coup and warranted disenrollment.<sup>183</sup>

Aside from the grounds presented for the removal of the reservation residents, there is ample reason to believe that this, like many other mass disenrollment actions was prompted by a struggle for economic control. In the months prior to the disputed election, the Elem Tribal Council submitted a proposal concerning the right to establish a casino on North Mare Island to the City of Vallejo, a document in which their traditional homeland is described as polluted to the point that it is “worse than useless.”<sup>184</sup> This push for capital gains is a reflection of the council’s departure from tradition and a self-proclaimed philosophy in which “the present is sacred and the past is just a memory.”<sup>185</sup>

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<sup>178</sup> Editorial, *132 Elem Pomo Indians, Comprising 100 Percent of Elem Indian Colony Residents, Face Banishment and Disenrollment*, INDIAN COUNTRY TODAY (May 3, 2016), <https://newsmaven.io/indiancountrytoday/archive/132-elem-pomo-indians-face-banishment-and-disenrollment-thfftPm-ZkmClaxNDBxGcA/> [<https://perma.cc/7DL6-9C3J>].

<sup>179</sup> Elizabeth Larson, *Elem Tribal Members File Federal Lawsuit to Stop Punitive Disenrollment Action*, LAKE COUNTY NEWS (May 3, 2016), <http://www.lakeconews.com/index.php/news/46154-elem-tribal-members-file-federal-lawsuit-to-stop-punitive-disenrollment-action>.

<sup>180</sup> San Francisco is approximately ninety miles south of Clear Lake, which has been the home of the people of Elem since time immemorial.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Any degree of validity to this grossly exaggerated claim is a result, in part, of the tribal council allowing a \$100,000,000.00 Tribal Economic Development Bond allocation procured for the sake of addressing this issue to lapse. See Letter from Anthony Cohen to Kathleen Diohep (Oct. 17, 2014), <http://www.ci.vallejo.ca.us/common/pages/DisplayFile.aspx?itemId=120712> [<https://perma.cc/7CV2-UGNZ>].

<sup>185</sup> ELEM INDIAN COLONY TRIBAL COUNCIL, OUR TRIBAL COUNCIL, <http://www.eleminiancolony.org/tribal-council/> [<https://perma.cc/72JL-H3RU>].

For Robert Geary, who has devoted himself to the preservation of the culture and traditions of the greater Pomo community, and the others who reside there, the reservation is more than just a home—it is a sacred site; it is a place of ceremony, and it provides them with the cultural resources they need in order to thrive.<sup>186</sup> For those living on the Clear Lake reservation, the land of their ancestors is far too valuable for them to part with it for the sake of building a casino, particularly when there is little reason to believe that any derivative profits would be utilized for the sake of those who currently live on the reservation.<sup>187</sup>

Although the Elem Indian Colony receives \$1,200,000.00 per year in Revenue Sharing Trust Funds,<sup>188</sup> which are distributed to non-gaming tribes to fund social services,<sup>189</sup> this money is “used almost entirely to fund Elem’s government operations.”<sup>190</sup> In reference to the Vallejo proposal, these operations include funding the tribal council’s efforts to obtain an exclusive right to negotiate with the city and, potentially, guaranteeing loans and paying for consultant services.<sup>191</sup> In the meantime, the reservation residents are being denied essential services by the tribal council who refuses to fund them; they are not even provided with access to waste removal services.<sup>192</sup> Moreover, when nonmembers contributed funds to help the reservation recover from the fire that destroyed several homes in Clearlake last year, the funds were withheld from those people actually living on the reservation.<sup>193</sup> What is revealed in these facts is a trend—not exclusive to this tribal organization<sup>194</sup>—toward separating the tribal government, along with its control over the tribal economy, from a group that made up roughly one half of the tribe’s membership.

Ironically, the ordinance that could potentially lead to disenrollment in this case was drafted by a non-Indian lawyer who is vehemently opposed to the idea of disenrollment as punishment.

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<sup>186</sup> Interview with Robert Geary (Oct. 29, 2017).

<sup>187</sup> *Id.*

<sup>188</sup> ELEM INDIAN COLONY, RESPONSE TO REQUESTS FOR QUALIFICATIONS (Nov. 14, 2014),

<http://www.ci.vallejo.ca.us/common/pages/DisplayFile.aspx?itemId=120639> [<https://perma.cc/QF3E-HDXX>].

<sup>189</sup> *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1100 (9th Cir. 2003).

<sup>190</sup> ELEM INDIAN COLONY, *supra* note 185.

<sup>191</sup> *Id.*

<sup>192</sup> Interview with Robert Geary (Oct. 29, 2017).

<sup>193</sup> *Id.*

<sup>194</sup> *See, e.g., infra* discussion Part III.E.

Anthony Cohen, former attorney for Elem Indian Colony, refused to draft a disenrollment ordinance for the Elem Indian Colony Tribal Council and, instead, convinced the tribe to adopt an ordinance that would only include disenfranchisement, banishment, and revenue forfeiture while preserving a defendant's due process rights under the ICRA.<sup>195</sup> However, when Cohen was informed that the tribe planned to engage in mass disenrollment, he capitulated to the tribal council's demands to amend the previously drafted ordinance to allow the action to move forward.<sup>196</sup> But, in Cohen's mind, he had preserved the rights of those facing disenrollment by including reference to ICRA in the ordinance.<sup>197</sup> The due process provision of that ordinance reads as follows:

**Due Process.** All persons accused of offenses that could subject them to sanctions under this Ordinance shall be afforded due process and fundamental fairness pursuant to the Indian Civil Rights Act of 1968 ("ICRA") and this ordinance shall be interpreted in a manner that is consistent with the ICRA.<sup>198</sup>

According to Cohen, the above language would provide those facing disenrollment with a route by which to circumvent *Santa Clara Pueblo v. Martinez*; he explains that when tribal officials violate ICRA, they act outside of their tribal authority and,

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<sup>195</sup> Anthony Cohen, *No Disenrollments! I'm Done at Elem*. (April 27, 2016), <http://tonycohenlaw.com/2016/04/no-disenrollments/>. As this would effectively sever a member's connection to his or her tribe, from the perspective of the Elem Indian Colony Tribal Council—and many if not all of the members subject to such an action—disenfranchisement, banishment, and revenue forfeiture when combined would, in effect, be tantamount to disenrollment.

<sup>196</sup> *Id.* In all fairness, it is probably quite difficult to balance the conflicting interests of a tribe as a whole and its representatives. However, that difficulty should diminish substantially when those representatives have not been duly elected.

<sup>197</sup> *Id.*

<sup>198</sup> ELEM INDIAN COLONY GENERAL COUNCIL, ORDINANCE ESTABLISHING THE TRIBAL SANCTIONS OF DISENFRANCHISEMENT, BANISHMENT, REVENUE FORFEITURE, AND DISENROLLMENT AND THE PROCESS FOR IMPOSING THEM NO. GCORD08412 (AMENDED 05092015), (May 9, 2015). The particular measures by which due process is to be recognized under the Ordinance are entirely ineffective if potentially disenrollees are denied access to the tribal voting process, for this is how the relevant rights of tribal members are to be exercised. *See id.*

therefore, may be sued in state court so long as PL- 280 applies.<sup>199</sup> Cohen describes a suit of this nature as requesting the court to rule that such an official is acting/speaking only in his or her individual capacity and to enjoin that individual from speaking for his or her tribe while holding them liable for defamation.<sup>200</sup> Cohen provides no support for his claim other than the following quote from *Borisclair v. Superior Court*: “In general, the agent of a sovereign may be held liable when he acts in excess of his authority or under an authority not validly conferred.”<sup>201</sup> While the gist of Cohen’s argument is agreeable, it falls prey to several flaws in application: (1) *Martinez*, at least by extension, bars extratribal judiciaries from interpreting ICRA on the behalf of tribes;<sup>202</sup> (2) actions taken by a tribal council are not likely to be attributed to an official in his or her individual capacity;<sup>203</sup> and (3) there appears to be no precedent for an action of this sort. However, Cohen’s aim to shield tribal members from unjust disenrollment is an admirable one that is shared by ethically-minded tribal attorneys serving throughout Indian country, and, sadly, the perpetual frustration of this aim is not uncommon.

Although the protections that Cohen sought to have formally recognized would likely be inadequate, his efforts indicate that he believes that the actions of tribal officials must be rooted in the collective will of the membership of their tribes. To suggest that tribal officials are acting outside the scope of their authority—when an ordinance could be interpreted as validating their actions—is to suggest that the legally valid actions of such officials must also be

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<sup>199</sup> Cohen, *supra* note 195. According to at least three Supreme Court decisions, tribal officials acting outside the scope of their official capacities could be subject to suit under *Ex parte Young*, 209 U.S. 123 (1908). Matthew L.M. Fletcher & Kathryn E. Fort, *Advising – and Suing – Tribal Officers: On the Scope of Tribal Official Immunity* (citing *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Nation*, 498 U.S. 505, 514 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171–72 (1973)). However, such action would only be available to a plaintiff seeking declaratory and injunctive relief. *Id.* (citing *Seminole Tribe of Florida v. Florida*, 516 U.S. 44, 73 (1996); *Keweenaw Bay Indian Community v. Kleine*, 546 F. Supp. 2d 509, 517 (W.D. Mich. 2008)).

<sup>200</sup> *Id.* As Cohen created an ordinance that would permit the Elem Colony Tribal Council to disenroll tribal members, it would be rather difficult to convince any court that members of that council were acting outside the scope of their authority in initiating a disenrollment action.

<sup>201</sup> *Id.* (quoting *Boisclair v. Superior Court*, 801 P.2d 305, 316 (Cal. 1990)) (internal quotations omitted).

<sup>202</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>203</sup> *Woodruff v. Jacobson*, 13 NICS App. 65, 68–71 (2015).

validated by the will of tribal members in order for them to be effective manifestations of tribal authority. However, recognition of this limitation on the authority of tribal officials cannot be left entirely to the courts, particularly when this recognition depends upon a nuanced interpretation of ICRA.

C. *The Indian Civil Rights Act as a Potential Defense Against Disenrollment*

ICRA is probably the most cited grounds for defending against an action to disenroll or banish tribal members. Disenrollees tend to rely upon the section of that Act codified as 25 U.S.C. § 1302(a)(8),<sup>204</sup> which reads as follows: “No Indian tribe exercising the powers of self-government shall deny to any person the equal protection of its laws or deprive any person of liberty or property without due process.”<sup>205</sup> However, federal courts elaborating on the holding in *Martinez* have explained that ICRA “[can]not be interpreted to impliedly create a federal cause of action against an Indian tribe or its officers for deprivation of the Act’s substantive rights.”<sup>206</sup> In particular, the Court in *Martinez*—which concerned the topic of membership but did not touch that of disenrollment—explained that 25 U.S.C. § 1302 does not, on its face, “purport[] to subject tribes to the jurisdiction of federal courts.”<sup>207</sup> Moreover, courts have held that, in spite of the language of 25 U.S.C. § 1302, the holding in *Martinez* “foreclosed any reading of [ICRA] as authority for bringing civil actions in federal court to request . . . forms of relief [other than habeas corpus].”<sup>208</sup>

In spite of prior rulings concerning actions based on 25 U.S.C. § 1302(a)(8), there is one case in which a federal court allowed that section of the Act to direct its ruling: *Sweet v. Hintzman*.<sup>209</sup> In that case, Petitioners argued that the Respondents—collectively the Snoqualmie Tribal Council—violated rights

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<sup>204</sup> See, e.g., *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004).

<sup>205</sup> 25 U.S.C. § 1302(a)(8) (2012).

<sup>206</sup> *Barker v. Menominee Nation Casino*, 897 F. Supp. 1144, 1147 (D. Nev. 2011) (citing *Martinez*, 436 U.S. at 59).

<sup>207</sup> *Martinez*, 436 U.S. at 59.

<sup>208</sup> *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983).

<sup>209</sup> See *Sweet v. Hintzman*, No. CO8-844JLR, 2009 WL 1175647, at \*10 (W.D. Wash. Apr. 30, 2009).

guaranteed to the Petitioners under 25 U.S.C. § 1302(a)(8).<sup>210</sup> In particular, the Petitioners alleged that the Respondents violated their rights to due process in the following ways:

- (a) by not providing adequate formal notice of the April 27, 2008 banishment meeting to Petitioners;
- (b) by making false charges against Petitioners; (c) by not providing an opportunity for the Petitioners to be heard at the April 27, 2008 banishment meeting;
- and (d) by not following their own procedures for voting on banishment.<sup>211</sup>

Based on these allegations, the court found that the Petitioners had been denied procedural due process and granted the Petitioners a writ of habeas corpus.<sup>212</sup> From this, we can reason that, while 25 U.S.C. § 1302(a)(8) does not provide any positive form of relief, it may be used to justify granting a writ of habeas corpus.

The other section of ICRA implicated in *Sweet* and other similar cases is 25 U.S.C. § 1303, which provides that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”<sup>213</sup> Unlike 25 U.S.C. § 1302(a)(8), this section of ICRA explicitly provides a form of relief that may be granted to potential disenrollees by an extra-tribal judiciary. The case *Poodry v. Tonawanda Band of Seneca Indians* provides some indication as to the grounds for granting this form of relief in the disenrollment context.

In *Poodry*, the Petitioners allegedly formed a rogue faction after accusing Respondent members of the Tonawanda Council of Chiefs of “misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe's business affairs, and burning tribal records.”<sup>214</sup> In response, the council declared the Petitioners guilty of treason and sent between fifteen and twenty individuals to eject them from the reservation

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<sup>210</sup> *Id.* at \*1.

<sup>211</sup> Petitioners’ Trial Brief, *Sweet v. Hintzman*, No. CV8-844 JLR, 2009 WL 4464850 (W.D. Wash. 2009).

<sup>212</sup> *Sweet*, 2009 WL 1175647, at \*10.

<sup>213</sup> 25 U.S.C. § 1303 (2012).

<sup>214</sup> *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877–78 (2d Cir. 1996).

and, in doing so, effect orders of disenrollment and banishment brought against them.<sup>215</sup> While the attempt was unsuccessful, those allied with the council engaged the Petitioners in a campaign of assault and harassment.<sup>216</sup> This prompted the Petitioners to file for writs of habeas corpus under 25 U.S.C. § 1303.<sup>217</sup>

In reviewing the case, the court in *Poodry* establish the elements required in order for a court to grant the relief requested. First, the court held that such a request would only be valid if the underlying sanction was criminal, rather than civil, in nature.<sup>218</sup> Second, a petitioner must demonstrate that the challenged sanction constituted a “sufficiently severe potential or actual restraint on liberty”;<sup>219</sup> however, “actual *physical* custody is not a jurisdictional prerequisite for federal habeas review.”<sup>220</sup> Rather, those facing banishment or disenrollment may successful petition for habeas relief insofar as they may, at any point in time, be compelled to leave the reservation and barred from ever returning; such a restraint is not generally imposed upon the members of a tribe and may, therefore, be considered an undue restraint on the liberty of tribal members.<sup>221</sup>

While both *Sweet* and *Poodry* suggest that ICRA may provide a route by which potential disenrollees can preserve their membership in a tribe, it is important to note that any such protections offered by ICRA are not absolute. There are many cases that directly oppose the rulings mentioned above.<sup>222</sup> Some courts have asserted that disenrollment cannot be equated to the detainment required for a grant of habeas relief under 25 U.S.C. § 1303,<sup>223</sup> whereas others have ruled that—even when *Poodry* does apply—disenrollment coupled with only a partial exclusion from tribal resources and facilities does not constitute a “sufficiently severe restraint on liberty to constitute detention and invoke federal habeas jurisdiction under ICRA.”<sup>224</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 888.

<sup>219</sup> *Id.* at 901.

<sup>220</sup> *Id.* at 893.

<sup>221</sup> *Id.* at 895.

<sup>222</sup> *See, e.g.,* *Jeffredo v. Macarro*, 590 F.3d 751, 753 (9th Cir. 2009) (“Despite the novelty of this approach, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained.”)

<sup>223</sup> *Id.*

<sup>224</sup> *Tavares v. Whitehouse*, No. 13-2101 2014 WL 1155798, at \*8 (E.D. Cal. Mar. 21, 2014).

In spite of the aforementioned legal barriers, it is unquestionably appropriate to invoke ICRA as the legal representative of potential disenrollees. On its face, ICRA was clearly meant to prevent the diminishment of the rights of tribal members, and disenrollment actions jeopardize those rights in toto. Arguably, all tribal advocates—attorneys representing tribes and their members—ought to challenge interpretations of ICRA that render the protections recognized in that Act ineffective.

Although ICRA-based litigation strategies may vary in effectiveness depending on jurisdiction, this caselaw, *Sweet* in particular, may inform the drafting of constitutional or tribal code amendments to address the problem of unjust disenrollment. A lesson we can learn from *Sweet* is that a tribe's failure to provide defendants with adequate due process negatively affects both sides of any litigation involving a tribal party. What this means for tribes, is that specific due process protections, at the very least, ought to be codified. In particular, tribes should formally recognize the rights to notice and hearing, counsel, and appeal and, in doing so, define the scope of those rights. The benefits of such codifications for tribal defendants is obvious, but tribes benefit from this process in two ways: (1) Courts will be less likely to overrule tribal sentencing on due process grounds, and (2) robust due process protections create tribal remedies that must be exhausted before tribal actions may be challenged in federal court. Rather than merely inserting ICRA into a tribal constitution (which would have minimal effect because the statute already creates a legal duty), tribes should attempt to provide their own express interpretations of 25 U.S.C. § 1302 in their constitutions or tribal codes to the extent that they would like to preserve the rights therein for their members and partially immunize themselves from extra-jurisdictional challenges. However, reliance upon ICRA is reactionary and, therefore, is unlikely to prevent the initiation of disenrollment actions. Further, in order for constitutional amendments advanced by the general membership of a tribe to be adopted, members must be able to call special meetings to encourage their adoption and the tribal franchise must be both protected and honored.<sup>225</sup>

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<sup>225</sup> Many tribes recognize a right to the general membership to call special elections to vote on proposed amendments to their tribal constitutions; for the most part such elections require a petition by two-thirds of the general membership of a tribe. *See, e.g.*, CONSTITUTION AND BYLAWS OF THE LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON AS AMENDED art. IX (1996).

#### D. *The Nooksack Tribe and Holdover Councils*

Another egregious example of disenfranchisement lies in the disenrollment proceedings at Nooksack. Those proceedings concern the mass disenrollment of 331 tribal members, 306 of whom are descended from Annie George, the biological daughter of Nooksack Chief Matsqui George.<sup>226</sup> These descendants of Annie George, known collectively as the Nooksack 306, were actively recruited by tribal leadership to return to their traditional homeland to help justify the tribe's application for federal recognition.<sup>227</sup> Although this recruitment was presumably prompted in-part by the acknowledged tribal ancestry of the Nooksack 306, the tribal council continues to seek to disenroll them because Annie George was not included on a 1942 federal census.<sup>228</sup> Over time, these disenrollments have been challenged on several grounds.<sup>229</sup>

To preserve and enforce these disenrollment orders, the Nooksack Tribal Council—which was headed by an adoptee with no biological connection to the tribe<sup>230</sup>—has perpetually denied the voting rights of its members. When the terms of the disenrolling councilpersons had expired, they refused to vacate office.<sup>231</sup> Because those terms had expired, the council was unable to form a quorum necessary for the conducting of tribal business.<sup>232</sup> To remedy the issue, the council amended tribal law to allow for a mail-in voting process and then filed a motion to deprive the potential disenrollees of their rights to vote.<sup>233</sup> When Nooksack Tribal Court (NTC) Chief Judge Susan Alexander suggested that she would deny the motion, the council cancelled their planned election.<sup>234</sup> The council then announced that it would postpone the election until

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<sup>226</sup> GABE GALANDA, OMNIBUS WRITTEN RESPONSE OF NOOKSACK TRIBAL MEMBERS PROPOSED FOR DISENROLLMENT 5 (2016), <https://turtletalk.files.wordpress.com/2016/10/omnibus-written-response-of-nooksack-tribal-members-proposed-for-disenrollment.pdf> [https://perma.cc/Q9HG-YGPY].

<sup>227</sup> DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 86 (2017).

<sup>228</sup> Order Determining Heirs, *In re Louis (Louie) George*, No. IP-PO-61K-71.

<sup>229</sup> See generally GALANDA, *supra* note 226.

<sup>230</sup> *Id.* at 8–9.

<sup>231</sup> Demand for Jury Retrial, *Rabang v. Kelly*, No. 2:17-CV-00088-JCC 7 (May 3, 2017).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 8–9.

<sup>234</sup> *Id.* at 9.

after disenrollment.<sup>235</sup> After Chief Judge Alexander suggested that she would compel the election, the tribal council amended the Nooksack Tribal Code to bar plaintiffs' counsel from practicing in NTC and eventually fired Alexander only to replace her with their in-house counsel Raymond Dodge.<sup>236</sup>

The procedural backdrop for the Nooksack disenrollment cases clearly shows that when the tribal franchise is selectively limited or entirely eliminated, there are no safeguards against the overreach of tribal councils. It also shows that the disenrollment epidemic is deeply rooted in the denial of the popular sovereignty that lies at the heart of traditional tribal self-governance and is the undisputed source of tribal sovereignty. For this reason, both proponents of a brand of tribal sovereignty that entails complete control over determinations concerning membership and opponents of unjust disenrollment ought to encourage constitutional amendments that preserve the traditional source of sovereignty under UNDRIP and due process rights under ICRA by reinforcing the tribal franchise.

E. *The Pechanga Band: The Invalidation of Expert Opinions and Moratoriums on Disenrollment*

One last case that illustrates the importance of preserving the tribal franchise through preemptive measures is *Jeffredo v. Macarro*. According to the Appellants in *Jeffredo*, roughly twenty-five percent of the Pechanga Tribe's general membership had been disenrolled between the years of 2002—when the Tribe opened its San Diego casino<sup>237</sup>—and 2007.<sup>238</sup> In the last wave of disenrollments, the validity of which is the subject of the litigation, approximately 200 adults and 200 children were disenrolled.<sup>239</sup> This action was not the result of careful investigation into the Appellants' claims to membership, nor was it an expression of the will of the Tribe's general council; instead this action was initiated by a simple vote of an "Enrollment Committee."<sup>240</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 10–12.

<sup>237</sup> See Pechanga Resort Casino, *About Us*, <https://www.pechanga.com/about-us> (last visited Dec. 18, 2018).

<sup>238</sup> Opening Brief of Appellants at 5, *Jeffredo v. Macarro*, 599 F.3d 913, 916 (9th Cir. 2010) (No. 08-55037).

<sup>239</sup> *Id.* at 6.

<sup>240</sup> *Id.*

Two factors set the Pechangan disenrollment dispute apart from those mentioned above. Firstly, the Pechanga Tribal Council—through the actions of its enrollment committee—acted directly against the proclaimed will of the general membership. Secondly, the tribal council disregarded anthropological evidence verifying the Appellants’ claims to membership. While the tribal council was deciding to pursue disenrollment, the Pechanga General Membership, from whom the powers of Pechangan governance originate, voted to institute a moratorium on disenrollment actions.<sup>241</sup> Although the petition underlying the moratorium was written in support of the Appellants and purposed with putting an end to all current and future disenrollments, the tribal council and its Enrollment Committee ruled by executive fiat that the moratorium would not apply to the Appellants.<sup>242</sup>

In order to justify its actions, the tribal council hired Dr. John R. Johnson of the Santa Barbara Natural History Museum to determine whether the Appellants’ common ancestor, Paulina Hunter, was a genuine member of the Tribe.<sup>243</sup> According to Dr. Johnson, his findings were largely disregarded by the tribal council.<sup>244</sup> His interpretation of the data he collected is that “[t]he preponderance of the evidence indicates that Paulina Hunter’s father was Mateo Quasacac, who was the only Indian listed as having been born at ‘Pichanga’ in the surviving early records of Mission San Luis Rey.”<sup>245</sup> Instead of concluding that this was evidence of the fact that Paulina Hunter and her descendants are Pechangan, the tribal council ruled that “the correct tribal ancestry of Paulina Hunter was San Luis Rey” rather than Pechanga Temecula.<sup>246</sup> This ruling completely disregards the fact that the genealogies of virtually all members of the Tribe can be, according to mission records, traced back to San Luis Rey; it also contradicts evidence indicating that Restituta, Paulina Hunter’s maternal grandmother, was born at the original village of Temecula.<sup>247</sup>

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<sup>241</sup> *Id.* at 7.

<sup>242</sup> *Id.* at 7–9.

<sup>243</sup> *Id.* at 6.

<sup>244</sup> Letter from Dr. John R. Johnson, Ph. D., Curator of Anthropology, Santa Barbara Museum of Natural History, to Pechanga Tribal Council (June 20, 2006) (on file with author).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (quoting Pechanga Enrollment Committee, Record of Decision Regarding the Disenrollment of the Lineal Descendants of Paulina Hunter (Mar. 16, 2006)).

<sup>247</sup> *Id.*

Feeling that the facts clearly demonstrated that they had been unjustly disenrolled, the Appellants in *Jeffredo* maintained an argument that they were entitled to habeas relief under ICRA because their collective disenrollment amounted to an unlawful detention.<sup>248</sup> The court rejected this argument as being a basis for federal court jurisdiction for two reasons. First, the court held that the Appellants' disenrollment was not tantamount to detention because they were not restrained from accessing the Pechanga Reservation and could continue to access the property they held therein.<sup>249</sup> Second, the court held that because the Appellants had not been so excluded, they had not exhausted tribal remedies to such an action as would be required for a federal court to assume jurisdiction over the matter.<sup>250</sup> The court indicated no concern with the fact that the tribe could do nothing to regain their membership rights other than bring a claim in federal court.

Because both the Ninth Circuit Court of Appeals and the Appellants acknowledged that federal courts lack jurisdiction to review tribal membership decisions,<sup>251</sup> it is important to recognize that it is possible for tribal officials to constrain facts and the legislative authority of their general membership to serve personal ends that are wholly divorced from the will of the tribe. When genuine members of any tribe face disenrollment and the unified will of their tribal community, as expressed through the tribal franchise and recognized in a tribal constitution, cannot preserve their personal, cultural, and biological identities, they have no choice but to turn to litigation. Here, the Appellants exhausted the remedies provided by the tribe and were left with no other option than to bring their challenge to federal court. Ideally, such recourse would be amenable to the best argument. However, the only argument to which the federal judiciary is—and arguably ought to be—receptive is an ICRA-based challenge alleging that petitioners have been detained. As *Jeffredo* and other cases illustrate, such challenges have a tendency to prove futile in the disenrollment context. Assuming that the status quo is maintained, this case illustrates the fact that the only effective prophylactic for preventing unjust disenrollment and the potential spread of this epidemic is ensuring that the popular vote of tribal members carries that level of

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<sup>248</sup> *Jeffredo v. Macarro*, 599 F.3d 913, 915 (9th Cir. 2010).

<sup>249</sup> *Id.* 918–21.

<sup>250</sup> *Id.* at 921.

<sup>251</sup> *Id.* at 917–18.

authority that has been recognized in countless tribal constitutions, which is the authority from which every other power of governance arises: the will of the people. Even if the authority of those facing disenrollment is diminished, the remainder of the general membership must have some way to challenge those actions of a tribal council that it finds unjust.

#### IV. CONCLUSION

The point of this article is not to challenge the authority of a tribal council or its members, rather we must recognize that tribal sovereignty originates in the people of the tribes. Some tribal officials and tribal advocates have a severely confused interpretation of this notion, a notion that the constitutions which they are tasked with upholding explicitly recognize. The source of this confusion lies in an Anglo-American conception of government where, aside from exercising the power to vote, citizens and their governments tend to function independently. Certainly, off-reservation political existence entails an ebb and flow between the people-at-large and the State, but a tribe and its people are and have always been one. For this reason, it is paradoxical to suggest that a tribe could represent its interests over those of its members. But this is sadly how some in our community justify the practice of disenrollment.

How did we get to this point where, to mirror a popular epithet, we can't see the tribe for its members? Arguably, this destructive trend began with colonization, but it really took hold when, during the Era of Assimilation, the federal government took several steps to distinguish "civilized" Indians from "savages" who adhered to practices of personal and cultural significance. Part of this campaign entailed the prohibition of sacred activities that served in-part as the foundations of Native societies, prohibitions that would be enforced in Indian courts presided over by Indian judges. After diminishing the religious freedoms of those Indians that resided within its ambit, the federal government sought to deprive Indians of the freedoms of choosing how to live and how to expend their labor. This was the state of things in Indian country when the IRA was enacted.

While the IRA was purposed with recognizing the right of the tribes to govern themselves, this legislation came at a time when the foundations of Native society had been so thoroughly legislated

that it may have been easy to lose sight of them or their importance. It is no wonder that many tribes adopting constitutions under this Act, having been to some extent deprived of the traditional foundations of their societies for generations, modeled their governmental structures after the representative form of government that could be found outside of Indian country and that was thrust upon them by the Department of the Interior. While many of the constitutions adopted under the IRA recognized that sovereignty originated in the general membership of the tribes, they also recognized that this sovereignty would be almost entirely vested in tribal councils; still, the foundation of governmental authority was recognized as remaining in the people.

Sadly, without recognition of this authority, which—as is the case in Anglo-American society—can for many tribal members only be recognized and exercised through the franchise, every other derivative right of the general membership of a tribe can be either diminished or extinguished. However, when the actions of tribal councils are amenable to the will of the people, as expressed through the popular vote, these rights can be preserved in perpetuity. Not only does recognition of this fact protect the genuine members of tribes from unjust disenrollment, it also protects the root and expression of sovereignty as it is recognized in both Anglo-American and Native societies. To dispute this is not to recognize the inherent sovereignty of a tribe, it is to diminish it. For this reason, it is important that tribes formally establish constitutional protections for tribal voting rights and approval requirements for the types of membership decisions that could potentially jeopardize tribal sovereignty.