

The Racial Paradox of Tribal Citizenship

Steve Russell

Race and Tradition

As I begin to write this my tribal election season is at hand. As usual, all the candidates claim to be “traditional.” This is a claim easy to make and hard to disprove. What is traditional? We are now over half Christian, and more of us speak English than speak Cherokee. Many of the accoutrements of contemporary identity have roots in recent times: frybread, ribbon shirts, jingle dresses, powwows. On the other hand, some items of earlier provenance, such as blowguns and turbans, surprise some modern Cherokees. We date our first written laws from 1808.¹ We have lived under a series of written constitutions, the longest lasting those of 1839² and 1975.³ Is written law traditional? More to the point of this article, is the current Cherokee law of citizenship, a race-based law like that of most American Indian tribes,⁴ traditional?

I hope to show that the idea of “race” is, in Partha Chatterjee’s phrase describing nationalism, “a derivative discourse.”⁵ It is not only derived from European colonial discourse, but it has done and continues to do harm to Indian nations on a scale similar to that of smallpox and measles.⁶ Pathogens are typically ranked by body count, and so my task here will be to demonstrate that race theory is an Old World pathogen that diminishes the numbers of American Indians on a scale that invites comparison to “guns, germs, and steel.”⁷ It is perhaps instructive to read Chatterjee’s words and substitute “race” for “nationalism”:

Nationalism as an ideology is irrational, narrow, hateful and destructive. It is not an authentic product of any of the non-European civilizations which, in each particular case, it claims as its classical heritage. It is wholly a European export to the rest of the world. It is also one of Europe's most pernicious exports, for it is not a child of reason or liberty, but of their opposite: of fervent romanticism, of political messianism whose inevitable consequence is the annihilation of freedom.⁸

Can "race" properly be considered, like nationalism, an ideology? According to the American Anthropological Association:

. . . physical variations in the human species have no meaning except the social ones that humans put on them. Today scholars in many fields argue that "race" as it is understood in the United States of America was a social mechanism invented during the 18th century to refer to those populations brought together in colonial America: the English and other European settlers, the conquered Indian peoples, and those peoples of Africa brought in to provide slave labor. . . . As they were constructing U.S. society, leaders among European-Americans fabricated the cultural/behavioral characteristics associated with each "race," linking superior traits with Europeans and negative and inferior ones to blacks and Indians. . . . Ultimately, "race" *as an ideology about human differences* was subsequently spread to other areas of the world. It became a strategy for dividing, ranking, and controlling colonized people used by colonial powers everywhere.⁹

The AAA Statement refers in a part not quoted above to the "Great Chain of Being" theory as the philosophical basis for ranking people by race, a religious theory that looked to early anthropology for scientific support.¹⁰ Cultural anthropology was in turn supported in its endorsement of racial hierarchy by disciplines thought to be more empirical in content: archaeology and physical anthropology.¹¹ Outside of Indian law, the primary postbellum legal expression of the "Great Chain of Being" was anti-miscegenation law,¹² representing a legal endorsement of racist ideology that was not declared unconstitutional by the U.S. Supreme Court until 1967.¹³

If anthropology appears to have been slow to recognize the obvious, it is worth mentioning that Ashley Montagu's famous formulation of race as "man's most dangerous myth" dates from 1942, when Adolf Hitler was engaged in a spectacular attempt to govern a modern nation by that myth.¹⁴ Before World War II, Hitler expressed admiration for the U.S. handling of race:

There are numberless examples in history, showing with terrible clarity how each time Aryan blood has become mixed with that of inferior peoples the result has been an end to the culture-sustaining race. North America, the population of which consists for the most part of Germanic elements, which mixed very little with inferior coloured nations, displays humanity and culture very different from that of Central and South America, in which the settlers, mainly Latin in origin, mingled their blood very freely with that of the aborigines. Taking the above as an example, we clearly recognize the effects of racial intermixture. The man of Germanic race on the continent of America having kept himself pure and unmixed, has risen to be its master; and he will remain master as long as he does not fall into the shame of mixing the blood.¹⁵

How much change is due to scientific progress and how much is due to staring into an abyss of horror is open to dispute—Montagu was certainly aware that he was lining up against Hitler, even if he could not then know the full extent of the damage racial ideology was causing. Whatever their motivation, contemporary physical anthropologists have joined cultural anthropologists in reconfiguring the conventional wisdom on the reality of race, putting forward as truisms that “[a]ll humans living today belong to a single species, *Homo sapiens*, and share a common descent. . . . There is great genetic diversity within all human populations. Pure races, in the sense of genetically homogenous populations, do not exist in the human species today, nor is there any evidence that they have ever existed in the past.”¹⁶ The mapping of the human genome appears unlikely to alter these statements which, to be candid, are welcome to those on the lower links of the “Great Chain of Being.”¹⁷ Of course, it must be simple coincidence that the originators of the “Great Chain of Being” religious and scientific theory were Europeans and the humans at the top link were European.¹⁸

Race as a European Disease

The settlement of the North American continent is just as little the consequence of any claim of right in any democratic or international sense; it was the consequence of a consciousness of right which was rooted solely in the conviction of the superiority and therefore of the right of the white race.

Adolf Hitler, Speech to the Industrie-Klub of Düsseldorf, Jan. 27, 1932.¹⁹

Conquest gives a title which the Courts of the conqueror cannot deny. . . .

Chief Justice John Marshall, 1823.²⁰

It's easy to forget, particularly after growing up "Indian," that Indians had no such concept of themselves before being "discovered." Most tribes had a word for "us" and a word for "not us." And, before white people, they also had a way for "not us" to become "us." If that were not so, we would have been more inbred than European royals by the time European royals started quarreling over which of them owned us.

Cherokees were *Ani-Yun Wiya*, the Real People. I have always assumed that we called white people *yonega*, white, because that is what they call themselves. Our ancestors could observe that white people are not in fact white, excepting albinos. I have done some asking around with other tribes, and I get "white" and "strangers" and "big knives" and, of course, the Lakota *wasichu*, "takes the fat," which is not particularly complimentary but is still descriptive rather than dehumanizing.

Tribal people separate the world between extended family and everybody else. I would not argue that this keeps us from treating outsiders badly, but if we do, our rudeness proceeds without scientific pretension. There was also some fluidity between outsider and insider status, and early on this was possible without regard to color. To the extent that this has changed, the change appears to be an artifact of colonialism. Spanish and Portuguese colonial societies were obsessed with color as an indicator of African or Indian blood, and that obsession lives on today in Latin America. As the Indians of America *del Sur* learned the importance of color from their colonizers,²¹ so my people in America *del Norte* were instructed by our English colonizers.

History on the popular level seldom adverts to the fact that part of the "civilizing" of the so-called Five Civilized Tribes was instruction in the institution of chattel slavery. Our oral traditions tell us that Cherokees understood slavery as a concomitant of failure in warfare, at the least a temporary status pending adoption or release;²² if death were the result, it would happen right away. Cherokees were first introduced to the idea of chattel slavery by the English, but the view was from the bottom—as slaves rather than slaveholders.²³ Eventually, the English were able to convert at least well-to-do Cherokees from the Indian view of slavery to the "civilized" understanding of human beings as property.²⁴

The slave trade was well established by the middle of the eighteenth century among the Cherokee,²⁵ a people who obviously did no raiding in Africa. This unfortunate education in racism by the English led to Cherokees lining up on both sides of the American Civil War²⁶ and, just as tragically, to some Cherokees beginning to find social significance in skin color.²⁷ That tragedy continues to play out in the struggles of black Cherokees to achieve formal equality in Cherokee law.²⁸

The Cherokee were of course not the only Indian peoples seduced by the ideology of color prejudice.²⁹ Some kind of nadir was reached in 2002 by a Lakota—if not a nadir of racism, then a nadir of shortsightedness. Author and Adjunct Professor at Connecticut College Delphine Red Shirt,³⁰ writing in the *Hartford Courant*,³¹ opined that she was offended by Connecticut’s definition of “Indian”:

Why? Because I am an Indian. I grew up Indian, look Indian, even speak Indian. So it offends me to come east and to see how “Indian” is defined in this state that I now call home.

What offends me? That on the outside (*where it counts in America’s racially conscious society*), Indians in Connecticut do not appear Indian. In fact, the Indians in Connecticut look more like they come from European or African stock. When I see them, whether they are Pequot, Mohegan, Paugussett, Paucatuck or Schaghticoke, I want to say, “These are not Indians.” But I’ve kept quiet.

I can’t stay quiet any longer. These are not Indians. . . .

There are no remnants left of the indigenous peoples that had proudly lived in Connecticut. What is here is all legally created. The blood is gone.

So, who are they? They are descendants, perhaps—though even that seems questionable—of the once proud people who lived in this state called “Quinecktecut.” These *races* have died out. Here’s how:

What if, in 1700, a Pequot married a European or African, and 30 years later their half-blood offspring married another European or African and so on? By the early 1800s, that blood would be less than 1/32 Indian. By 2002, if the pattern continued, that Indian blood would be virtually nonexistent. Yet, a person could identify herself as a descendent of that 1/32 Pequot and be considered Indian. . . .

Is she? I say no. (All emphases added.)

It would help to accomplish understanding, if not agreement, to put Red Shirt’s remarks in the context where they were made. A number of Connecticut tribes are seeking federal recognition, and these petitions are highly controversial because the good citizens of Connecticut fear a repetition of the success of the Mashantucket Pequot Foxwoods Resort and Casino.³²

Kevin Gover, the Pawnee Assistant Secretary for Indian Affairs on whose watch during the Clinton Administration some of the objects of Red Shirt’s dudgeon were recognized, replied in the pages of *Indian Country Today*:

As I understand her position, Connecticut Indians are not Indians because they do not look like her, do not act like her, do not speak like her, do not—well, you get the picture. (They also do not have cool names like hers, but she forgot to mention that.) Expect to see Ms. Red Shirt trotted out every time some white people want to say something ugly about Indian people but dare not do so because they would be labeled as racists.

I think we brown-skinned, black-haired Indians had better be careful about what we say about New England Indians. There are fewer and fewer full-bloods among us. If being Indian means looking a certain way, then most tribes are only two or three generations from extermination.

The New England Indians did what they had to do to survive. They intermarried and accommodated the overwhelming presence of non-Indians. Yet they persevered and maintained themselves, some of them, as distinct social, political and cultural communities. Are they the same as the Indians who greeted the English and Dutch settlers in the 17th century? Of course not. But then few if any tribes closely resemble their pre-Columbian ancestors.³³

Gover's response came after a flurry of similar letters to the *Courant* and an editorial denunciation by *Indian Country Today*, which has also discontinued her status as a columnist.³⁴ My purpose is not to dispute Red Shirt who, after all, only stated her opinion. I offer her opinion as an example of the conflation of tribe with race and Indian identity with phenotype that has always been common outside of Indian tribes and is now unfortunately also becoming common within them.

Citizenship by Blood Quantum

Citizenship by blood quantum alone is a guarantee of physical extinction. Know the tribal population, the required blood quantum, birth and death rates, rate of exogamous marriage, and the date of extinction is easily calculated. This is not opinion. This is arithmetic.

The reality of blood quantum extinction has swept North America generally east to west, although the genocide of the California tribes was so spectacularly successful³⁵ that most of the least touched tribal groups are west of the Mississippi but east of the Rockies. Indian policy in the United States has always been marked by differences of opinion about the proper route to the goal of extinguishing the aboriginal peoples.

The conservative position was the military option that lost political traction when the advent of photography caused the Wounded Knee Massacre in 1890

to be perceived as a massacre—a political result of technology not unlike the modern videotaping of the Los Angeles Police Department (in the words of my days as a police magistrate) “putting a few don’t bumps” on Rodney King. Spotted Elk’s (AKA Big Foot) band was no more the first massacre of Indian non-combatants than Rodney King’s shellacking was the first police beating of a black motorist, but in both cases technology took the truth beyond the victimized community.

The liberal path to extermination was less barbaric but probably had more impact. The process was directed less to physical existence and more to Indian cultural identity. For white liberals, deculturation was in our best interests, as expressed in the dictum “kill the Indian in him to save the man.” This shorthand expression of the forced assimilation policy was attributed to Richard Henry Pratt, founder of the Carlisle Indian Industrial School, who in fact used the phrase in a paper read in Denver in 1892.³⁶ It was sometimes reported as “kill the Indian child.” In either iteration, it is an apt description of the policy, but Pratt had no motive to harm Indians.³⁷

Separating Indian children from their heritage was done with the best of intentions.³⁸ Whatever the stated motive, the results were the same from the reservation years until 1933: traditional religious ceremonies banned, Indian boys forced to cut their hair, Indian adults “converted” to Christianity by withholding rations, Indian children kidnapped and forced into boarding schools where Indian languages were banned, Indian adults forbidden to criticize the government and required to obtain passports to travel from one concentration camp, I mean reservation, to another. The Indian New Deal, John Collier’s tenure as Commissioner of Indian Affairs, began in 1933,³⁹ and his attempts to reverse generations of official deculturation met with mixed success. Language rebounds with difficulty, but more easily than religion, which rebounds more easily than clan organization. Some aspects of culture are simply gone.

U.S. deculturation policies also benefited from the Indian policies of other colonial powers. The Spanish got started earlier than the English on the task of destroying Indian cultures. By the time the United States took the Southwest from Mexico by dictating the Treaty of Guadalupe-Hildago,⁴⁰ most inhabitants of the area—Indian by blood with an admixture of African and Spanish⁴¹—were generations removed from being punished by the Spanish for speaking Indian languages in school,⁴² so they were ready to have their children punished by the Anglos for speaking Spanish in school. And if that were not enough irony, the United States subsequently adopted an ahistorical and nonsensical identity called “Hispanic” that placed the Indians and their former Spanish oppressors in the same census category!⁴³ Census categories have changed, but the disappearance of Indians in Hispanic America remains.

From the perspective of Indians in the United States, we see two waves of Europeanization: the Spanish wave sweeping north from Mexico and the English wave sweeping east to west across North America, converging in a demo-

graphic splash that is bound to get us all wet at some point. Blood quantum finds a legal role in these changes in a connection to the one aspect of colonization that is as important from the colonial perspective as causing Indians to disappear: the mechanisms for separating Indians from their land. The ground was laid innocently enough with Chief Justice John Marshall's "domestic, dependent nations"⁴⁴ formulation, a legal coup that has been compared to his magical creation of judicial review in *Marbury v. Madison*,⁴⁵ in that both "...extricated the court from the rough seas of politics with procedural sleight of hand."⁴⁶ It is important that we are "nations" so we cede land in treaties only lightly dipped in the blood of conquest, "domestic" so that when we disappear our land titles escheat to the United States, and "dependent" so the United States can choose the time and manner of the disappearance.

The first stage of disappearance was the idea of "reservations," a term that suffers from the alterity between the colonizers and the colonized, the former perceiving some sort of gift to the aboriginals for as long as they remain red enough and/or backward enough to deserve and/or need the gift. The Indians, on the other hand, think of themselves as the givers and of their remaining lands as what *they* reserved for their own use. Whether the root of the misunderstanding was the meaning of "reservation" or simply a quaint notion of honor among the simple savages,⁴⁷ the lethal idea of blood quantum entered federal Indian policy if not federal Indian law with the implementation of the General Allotment Act in 1887.

Paul Spruhan, a law clerk for the Navajo Nation Supreme Court, has produced an exhaustive legal history of blood quantum that traces its origins from the simple idea of ancestry as understood in laws of descent and distribution. As race theory established itself in law as a vehicle to disadvantage blacks and Indians, blood quantum became a method of identifying persons to be disadvantaged. By the nineteenth century, one-eighth black blood was enough to keep the phenotypically white Homer Plessy from sitting where he pleased on public transportation.⁴⁸ "Blood quantum became an important method of defining Indian and tribal membership only in the early twentieth century."⁴⁹ Oddly enough, blood quantum appeared in Indian rolls (typically taken by agents of the U.S. government) before it appeared in law books.

By the time the Curtis Act of 1898⁵⁰ extended allotment to the so-called Five Civilized Tribes for the purpose of turning Indian Territory into the State of Oklahoma, blood quantum was being collected by the Dawes Commission based upon prior rolls, sworn testimony, and by eyeballing⁵¹ the applicants. The authority to collect this information is unclear to this writer, except that thinking in terms of the government needing authority to require information from Indians is perhaps anachronistic.

Of course, there was resistance to allotment, which was and is from the Indian point of view the theft of land given in exchange for land that was stolen in the first place. In addition to the litigation that culminated in the leading treaty abrogation case, *Lone Wolf v. Hitchcock* (1903), there was the "Snake

Uprising” led by Chitto Harjo among the Muscogee (Creek), and there was both lobbying and active resistance led by Redbird Smith among the Cherokee.⁵² According to my middle school Oklahoma history text, it took U.S. marshals and cavalry to enforce Creek and Cherokee allotment.⁵³ Resistance was centered in but certainly not confined to Oklahoma.⁵⁴

In spite of litigation and civil disobedience and violence, allotment of Indian reservations proceeded. In a 1906 act purporting to finally wind up the affairs of the Five Civilized Tribes, Congress restricted the alienation of allotments by “full-bloods” and made other references to citizenship by blood in connection with “intermarried whites” and “freedmen.”⁵⁵ Then the Burke Act of 1906 opened a big hole in the General Allotment Act’s protective restrictions on alienation by providing that

... the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . .⁵⁶

Between 1917 and 1920, blood quantum was taken by the Secretary “in his discretion” as a proxy for competency.⁵⁷

When descendants of people victimized by the Secretary’s discretion finally got to court in 1985, Chief Judge Donald J. Porter indulged some of the wry understatement (and passive voice) that suffuses federal Indian law when he observed that “(a)busess were rampant . . .”⁵⁸ However, he found no remedy for the abuses in the law. The Eighth Circuit Court of Appeals repeated Judge Porter’s clever observation⁵⁹ but still found no remedy. The Supreme Court denied *certiorari* without comment.

Higher blood quantum meant more restrictions on alienability of the allotment. White blood was hoped (or not, depending on one’s cynicism) to be a qualification for dealing with great white land sharks.⁶⁰ With blood quantum determining substantive rights during allotment, rights that were the only advantage to being perceived as Indian by the dominant culture, blood quantum as a determinant of citizenship was not a great leap.

Blood quantum as a determinant of citizenship might have been new to most Indians, but exogamy was not. As the Cherokee demographer Russell Thornton has pointed out, during early colonial times, the colonizers had a surplus of men while the colonized peoples often had a shortage of men.⁶¹ Inter-marriage started soon after the first contact with Europeans and continues apace to this day, with a majority of Indians choosing exogamous marriages.⁶² The collective result of these individual choices is an inevitable decline in blood quantum.⁶³

Deward Walker has produced a demographic study for the Salish and Kootenai Tribes of the Flathead Indian Reservation that illustrates the trap of blood quantum. In connection with a referendum on changing citizenship requirements, the Tribal Council requested demographic projections based upon three scenarios: (1) changing enrollment to allow all lineal descendants of current citizens to enroll, (2) changing the blood quantum requirement to 1/4 from any tribe for the descendants of current citizens, or (3) maintaining the current blood quantum requirement of 1/4 Salish or Kootenai blood.⁶⁴

Using the current standard of 1/4 Salish or Kootenai blood quantum, Walker found “. . . the only possible projection is one of decrease.”⁶⁵ Enrollment in the base year of 1999 was 6,953. The new enrollment and death rates converged in 2002 (65 new enrollments and 63 deaths)⁶⁶ and the slide from zero population growth to population loss leads to a projected population of 6,400 in 2020.⁶⁷

Altering the blood quantum requirement to include all Indian blood in descendants of current citizens results in a short term spike up to 7,700 in 2010 followed by a steady decline thereafter and a projected population of 7,290 in 2020.⁶⁸

The lineal descent from current citizens scenario naturally results in an exponential growth of the population *eligible* for enrollment. The number of eligible persons is projected at 21,524 in 2020, and the long-term trend continues upward.⁶⁹ This raises a different set of questions. How many of those eligible would choose to enroll and why? Put another way, is there a basis to choose between physical extinction and cultural extinction?

Citizenship by Direct Descent

Citizenship by direct descent alone is a guarantee of cultural extinction. In what sense is someone who has the blood but no knowledge of language, religion, or culture Indian? Answer: in a racist sense. What do you preserve when you define such people as Indian? Answer: racial privilege. My own nation has taken that path, even as the U.S. Supreme Court has adopted the position that inclusion by ancestry is exclusion by race.⁷⁰

The first reported intermarriage between my people and the colonists was in 1690. “White Cherokees” were numerous by 1810, and it was the 1/8 Cherokee great-grandson of a Scots trader, Chief John Ross, who led the tribe during its tragic confrontation with Euro-American greed that culminated with the death of thousands on the Trail of Tears.⁷¹

The race/ethnicity/phenotype issue is further complicated by Cherokee intermarriage with blacks and with other tribes of Indians.⁷² In addition, a number of ethnically African-American freedmen were enrolled as tribal members after the Civil War ended chattel slavery.⁷³ Even in the early 19th century, “. . . it was difficult to define who was a Cherokee. . . . [T]he Cherokee Nation, like the United States, was multiracial. There were different kinds of Indians living among them—Catawba, Creek, Uchee, Osage; various Europeans—British, Spanish,

French, American; and there was a growing body of Africans (some freedmen, some slaves).”⁷⁴

The final rolls⁷⁵ of the Five Civilized Tribes contained 101,506⁷⁶ names, of which 26,774 were allegedly full-bloods.⁷⁷ “Allegedly” because the full-bloods were overstated by the matrilineality of earlier generations of Cherokees⁷⁸ and because the full-bloods were understated by the policy of counting mixed tribal descent as mixed blood. To the extent that the Dawes Commission was searching for pure Indians at the turn of the 20th Century, that search was futile. The final rolls also contained about 3 percent adopted whites and 23 percent African-American freedmen.⁷⁹ This admixture demonstrates the absurdity of “race” as a determinant of Indian identity then. Subsequent events have rendered it even more absurd, primary among them the diaspora caused by federal relocation policies applied to reservation tribes⁸⁰ and the continued exogamy that leads my nation to claim citizens of 1/2048 blood⁸¹ (eleven generations from a full blood Cherokee) who do not live in Cherokee communities.

These citizens are Cherokee in a racist sense. I do not mean “racist” as a bloody red shirt, or as an all-purpose pejorative. I mean a logical corollary of Trofim Denisovich Lysenko’s idea that behavior can be imprinted on the genes, the idea that caught the attention of Stalin and set Soviet genetics back for a generation,⁸² the same idea of blood and culture that caused Hitler to understand Jews as a race. Everywhere we find race theory in its short violent history, it is traveling in disreputable company. Tribal governments are unlikely to have better luck building on this foundation of sand and blood than the colonial governments have, and therefore might want to reexamine the idea of blood in any amount as an infallible proxy for culture.

Citizenship by Culture

A sovereign nation determines who qualifies for citizenship. If Indian tribes are indeed sovereign nations, nobody outside of an Indian tribe has any right to determine citizenship in that tribe. Sovereignty includes the right to suicide just as the individual right to life does—with apologies to Brian Clark, whose tribe is it, anyway?⁸³ Everything herein is intended as a contribution to discussions within tribes and among tribes about the appropriate way to exercise tribal power, not as any suggestion that the tribal power does not or ought not exist.

Carole Goldberg, who originated the Tribal Legal Development Clinic at UCLA, has stated the most important question for those exercising tribal power when she asks “if Indian nations want citizenship requirements to serve a particular set of values and purposes within their community, what kinds of citizenship provisions will most effectively achieve those ends?”⁸⁴ Goldberg goes on to chronicle attempts by the federal government to control tribal enrollment by direct and indirect means.⁸⁵

Taking as a given that Indian communities define themselves, some of those definitions are only esoteric. The community identifies individuals who by their

actions constitute and define the community.⁸⁶ These circular self-definitions are not subject to exoteric review by any authority, and they are not, by definition, threatened by anything other than loss of population by disinterest. This is why Goldberg's statement of the question is so useful. She allows for the possibility that the values and purposes the community might wish to preserve are entirely esoteric, completely internal. In that case, the reactions of federal or state governments are of little, if any, relevance.

Federal recognition has been complicated by the casinophobia that is the subtext in the exchange above between Delphine Red Shirt and Kevin Gover. One response to the difficulties placed in the way of tribes seeking federal recognition is state recognition. There are problems with state recognition that go far beyond the observation that commerce with Indian tribes is a delegated power of the federal government.

That delegation of power⁸⁷ appears to be "plenary," most aptly meaning that the federal government, when it acts, preempts state power.⁸⁸ Unfortunately for tribal sovereignty, "plenary power" in the Indian Commerce Clause reaches far beyond federal preemption to a near-conclusive presumption that any Congressional action affecting Indians is constitutional.⁸⁹ When states recognize Indian tribes, they arrogate to themselves the same expansive notion of plenary powers that the Supreme Court has crafted on the federal level, because state recognition means (with a few exceptions of federal laws piggybacked on state recognition)⁹⁰ exactly what the states decide it means, including revocable at will. In a political atmosphere where states are seeking to control Indian tribes and the Supreme Court is as hostile to tribes as it has ever been,⁹¹ the gross distinction between state-recognized and federally-recognized becomes in the public eye a fine one.

Before relying on the case law to keep federal recognition from being withdrawn over failure to comply with some congressional desideratum, it would be good to consider both the composition of the current Court and that "[a] tribe's right to define its own membership *for tribal purposes* has long been recognized as central to its existence as an independent political community."⁹² That language in *Santa Clara Pueblo v. Martinez* would appear to leave open the possibility that the federal government might be able to define Indian citizenship as it likes for *federal* purposes, and such a reading would not displace the current "government-to-government relationship" paradigm that is the federal mantra if not always the federal policy.

Indians as tribal peoples occupy some peculiar constitutional space for equal protection purposes under the 14th Amendment, space we share with the Japanese-Americans who were locked up for being of Japanese descent (without regard for citizenship) during World War II.⁹³ The Court denied that the policy was race-based and denied that the concentration camps were concentration camps, as if "internment" was a superior way to lock up people under threat of lethal force. The "race" issue was simply wished away: "Korematsu was not excluded from the Military Area because of hostility to him or his race. He was

excluded because we are at war with the Japanese Empire. . . .”⁹⁴ The distinction between race and political affiliation was thus born in a case where the political affiliation was illusory. The people being singled out were not only mostly American citizens, but also similarly situated to German-Americans and Italian-Americans, for whom whiteness apparently functioned as a shield against maltreatment on a group level.

Justices Owen Roberts, Frank Murphy, and Robert Jackson, who later served as chief prosecutor of Nazi war criminals at Nuremberg,⁹⁵ dissented. This sordid episode in American legal culture⁹⁶ contained the seeds that flowered in federal Indian law into the proposition that while Indians as a “race” are protected by the 14th Amendment, Indians as citizens of their tribal nations are not a “suspect classification.” The validity of laws that treat Indians based on their tribal citizenship is determined by whether the laws have a “rational basis,” a question seldom answered in the negative. As Justice Benjamin Cardozo put it, “. . . the thing that matters is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.”⁹⁷ Subject to this thin veneer of rationality, the government may treat Indians as tribal members differently, whether the difference is to help or to hurt them.⁹⁸

In *Morton v. Mancari* (1974),⁹⁹ the U.S. Supreme Court upheld an Indian hiring preference in the Bureau of Indian Affairs on the basis that “Indian” was not a racial classification for equal protection purposes. In *United States v. Antelope* (1977),¹⁰⁰ Indians were subject to punishment for an offense under the Major Crimes Act that required less proof than would be required to convict white people under state law. This was held not to be based on race but on tribal citizenship. This line of cases—*Mancari* helping Indians and *Antelope* hurting them—stands for the principle that tribal citizenship is not race, and this is all that stands between Indians and a finding that any legal advantage to them unlawfully discriminates against white people.

From the point of view of the colonizers, “Indian law is race law.”¹⁰¹ Indian law dances around unpalatable subjects like race, claim of right based on Christianity,¹⁰² and defense of colonial arrangements without regard to any holistic view of the law.¹⁰³ To complete the colonization process, to turn Indian governments into nothing more than social clubs, it is necessary to slip past Indian sovereignty in the courtroom and to portray Indian identity as naked race privilege in the public eye.¹⁰⁴ Historically, *whiteness* has been the valuable commodity,¹⁰⁵ and law has erected barriers to protect that property.¹⁰⁶ In the case of American Indians, it is Indian racial status rather than white racial status that is thought to confer value.¹⁰⁷

While I would hesitate to liken it to property, tribal governments have the task of erecting legal barriers to the dilution of distinct cultures. All culture is learned. No exceptions. Language, religion, customs—all are learned. Leaving aside that the idea of inherited behavior is nonsense, it is dangerous because it

leads to the conflation of Indian blood with Indian citizenship. It makes a “racial” classification out of a political classification.¹⁰⁸ That race (or blood) as a first principle gets conflated with color, with culture, with nationality, with religion, is quite understandable as an effort to pour meaning into a vessel without objective reality, but allowing the general public to get a whiff of race privilege pulls Indians into a defensive political position that could quickly become a defensive legal position.¹⁰⁹

Fergus Bordewich, for example, does his best to continue the tradition of portraying Indian sovereignty as race-conscious law,¹¹⁰ but it is unclear why Indians should join his enterprise. Race-conscious law presupposes that the government will assign racial labels or review the reasonableness of self-identification.¹¹¹ The history of governmental race labeling is not a distinguished one,¹¹² and arguments against it are formidable.¹¹³

There are also arguments in favor of governmental race labeling,¹¹⁴ but to refer to tribal citizenship as “defined on the basis of racial exclusion” is to ignore history, law, and common sense. Bordewich carries his claim over the edge of rationality by calling it “. . . obvious to anyone that legitimizing segregation for Indians will set a precedent for its potential imposition upon black, Asian, and Hispanic Americans.”¹¹⁵ The only way to rationalize Bordewich’s remark is to ignore the race/citizenship distinction. If justice were to prevail, Indians would win that argument in court because of their distinctive legal status, but it is hard to think that justice will start prevailing in U.S. courts after all these years. Allowing tribal citizenship to be portrayed as race-based in the court of public opinion gives the law courts another reason to reduce Indian tribes to social clubs, something they are often happy to do without apparent reason.

In the court of public opinion, the rhetoric of race privilege is being deployed by Upstate Citizens for Equality in New York,¹¹⁶ Citizens Equal Rights Alliance (CERA) in Montana,¹¹⁷ One Nation United in Oklahoma,¹¹⁸ United Property Owners in Washington,¹¹⁹ Protect Americans’ Rights and Resources in Wisconsin,¹²⁰ and, of course, the white citizens of Hawai‘i who are united to prevent any re-recognition of the Native Hawaiian sovereignty.¹²¹ All of these groups have in common active hostility to all laws and policies that help indigenous people avoid the “melting pot,” and they have all found that framing the sovereignty issue as race discrimination resonates with the public. While public opinion matters not a whit to the esoteric, familial aspects of Indian identity, it matters greatly to anything tribes expect from federal or state governments as tribes. It is therefore in the best interests of tribal governments to devalue the currency of racial privilege discourse.

Culture tests for citizenship would be, as Carole Goldberg points out, terribly complicated to administer in a fair manner.¹²² The United States manages to require a degree of cultural literacy for naturalization,¹²³ and the problem for most tribal governments is naturalization, how to add new citizens rather than

how to revoke citizenships. It is not unreasonable to require applicants for naturalization to know the people to whom they wish to be relatives. For tribes with a land base, residence may be an issue because lack of physical presence interferes with one's ability to partake in ceremonial life (says the Oklahoma Cherokee who resides in Indiana). On the other hand, absentee citizens may constitute a tax base that cannot otherwise exist given the economic circumstances in much of Indian Country.

Some believe that cultural literacy should trump other values.¹²⁴ Certainly, it is hard to picture a citizenship that does not include some awareness of the social contract of which one is a part, whether or not that awareness can be termed "literacy." Literacy tests have a bad press because they were used to deny voting rights to freedmen after the Civil War, but they have never been struck down entirely, even in the voting rights context¹²⁵ where the abuses occurred. For Indian tribes, many of which have lost the advantage of a fluent population or have lost their language entirely, some broader concept of cultural literacy is still important, alone or in combination with other requirements for citizenship.

Nationhood v. Peoplehood

Seen as part of the story of liberty, nationalism could be defined as a rational ideological framework for the realization of rational, and highly laudable, political ends. But that was not how nationalism had made its presence felt in much of recent history. It has been the cause of the most destructive wars ever seen; it has justified the brutality of Nazism and Fascism; it has become the ideology of racial hatred in the colonies and has given birth to some of the most irrational revivalist movements as well as to the most oppressive political regimes in the contemporary world.¹²⁶

Today, we call ourselves the "Cherokee Nation" because our semi-autonomous towns needed to be a nation to deal with the Westphalian nation-states in the midst of power struggles that originated in Europe. The Spanish, the French, the British, and the United States were all nations, and so our governmental structure had to change. Under the United States, we became, willy-nilly, "domestic, dependent nations."¹²⁷

The inhabitants of the Americas had governments before the European Invasion. At Chaco Canyon, we have the ruins of a five-story building and archeological evidence of a vast trade network before European contact.¹²⁸ There is evidence from archeology and from oral tradition of cities founded on agricultural surplus in the Mississippi Valley and along the St. Lawrence, in addition to the better known empires of Central and South America, of road building, of trading relationships that spanned both American continents.

Indians had governments ranging from hereditary monarchies to representative democracies to “Athenian” democracies, but the Europeans were looking for kings. It is unclear whether Indians recognized fixed geographical borders in the same sense as they have defined the nation-state at least since the Treaty of Westphalia in 1648. Of course, Europeans were just developing the idea themselves, and, from an Indian perspective, it is as peculiar an idea of political geography as the one that enables a king in Europe to claim the entire Mississippi watershed because one of his subjects dipped a toe in the Big Muddy.

I would ask with Chatterjee whether the Westphalian nation-state is just so much more European baggage and, if so, whether it is a useful paradigm for tribal sovereignty or for answering the question posed so succinctly by Carole Goldberg? Leaving aside whether the Westphalian idea of statehood is “traditional,” we are most likely entering a phase of history where the puissance of the nation-state as the primary model of social organization is being supplanted in many respects by the transnational corporation.¹²⁹ Nation-states themselves struggle to maintain Westphalian sovereignty,¹³⁰ and sub-national entities are pulled along in the propwash.¹³¹ If this analysis is correct, then tribal governments become, like states and provinces, sub-national polities with legitimate demands for self-government. The problem is transnational in scope,¹³² the battleground is over which matters are appropriate to be governed at which level,¹³³ and sovereignty can no longer be conceived as absolute discretion upon a discrete piece of real estate.

Tom Holm and his colleagues offer an analysis of Indian studies as an academic discipline¹³⁴ that might inform debate on Carole Goldberg’s question regarding the “values and purposes” to be served by tribal citizenship criteria. They postulate a “peoplehood matrix” consisting of “four fundamental elements” that plainly do not describe a Westphalian state: “a sacred history; a well defined territory and environment; a distinct language; and a characteristic ceremonial cycle.” Most surviving American Indian tribes share these elements to some degree, and we all had them at one time.

It is of course true that our histories, languages, and ceremonial cycles have been forcibly suppressed. It is also true that many of us have been removed from our well-defined territory and environment at gunpoint, a process described by the neologism “ethnic cleansing.”¹³⁵ Most of these governmental attempts to destroy Indian peoplehood are horrors we have in common (ironically in light of current events) with both Jews and Palestinians, in addition to tribal peoples of Rwanda and various ethnic groups in the former Yugoslavia.

Neither public discourse generally nor academic discourse in particular casts human beings away from the peoplehood fire as punishment for lack of power to successfully resist ethnic cleansing. In fact, since World War II we have witnessed the growth of an international civil society that has taken legal actions against ethnic cleansing of Jews by Germany, Chinese by Japan, and the modern atrocities in Rwanda,¹³⁶ the former Yugoslavia,¹³⁷ and Sierra Leone.¹³⁸ The international community has even, over the objections of the United States,

created a permanent forum to try crimes of the sort that American Indians have endured.¹³⁹ Viewed from the world stage, the peoplehood paradigm represents history, aspiration, and a petition for redress of grievances. It also avoids the trap of race discourse:

The concept of peoplehood . . . adds a new dimension to political thought concerning disenfranchised or colonized Native American groups. The concept goes beyond the notion of race and even nationality. Historically Native American peoples adopted captives of several races. Adoption meant that the captive, regardless of race, became a member of a kin-group. His or her new relatives were obligated to assimilate the new family member in terms of the four aspects of peoplehood. Race, to Native Americans, was not a factor of group identity or peoplehood.

Nations—which are primarily viewed as the territorial limits of states that encompass a number of communities—do not necessarily constitute a “people” nor do they have the permanency of peoplehood.¹⁴⁰

The “permanency of peoplehood” has a positive ring to it, and it accounts for the social reality of American Indians imagining their communities on the spiritual level before they have the secular power to make demands on the political system, a process of nation-rebuilding very like that reported by Chatterjee among “other” Indians¹⁴¹ and precisely what is advocated by Wallace Coffey and Rebecca Tsosie,¹⁴² as well as a number of American Indian scholars that they cite. This is “[p]articipation and memory as the basis for a tribe”¹⁴³ and citizenship as a recognition of social reality here and now connected to traditions that antedate the United States.

I’ve sent in my absentee ballot, so the time to grill the people who are campaigning to represent me about the meaning of “traditional” is past for another election year. However, the question is not going to go away, and the answers generated within tribal governments will determine, for better or for worse, the permanency of our peoplehood on the global map. Where we live together, of course, that is not the whole story. The U.S. Supreme Court, speaking of the importance of religion in mainstream society, located it in “. . . the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel.”¹⁴⁴ Tribal identity is similar but not identical. Tribal identity is located not in individuals but in a people, and it will never be within the power of the U.S. government to invade *that* citadel. Therein lies the awesome responsibility of tribal governments: peoplehood can’t be taken from us, but we can surrender it in exchange for an imagined race or an illusory nation.

Notes

1. Rennard Strickland, *Fire and the Spirits: Cherokee Law From Clan to Court* (Norman: University of Oklahoma Press, 1975), 103-105.
2. *Compiled Laws of the Cherokee Nation* (Union, NJ: The Lawbook Exchange, 1998), 10.
3. *Cherokee Nation Code Annotated* (Orford, NH: Equity Publishing Corporation, 1986), 3.
4. This statement applies to all three federally recognized Cherokee tribes: the Cherokee Nation of Oklahoma, the United Keetoowah Band, and the Eastern Band. All determine citizenship by direct descent from a base roll. In addition, the United Keetoowah Band and Eastern Band require a minimum blood quantum.
5. Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (Minneapolis: University of Minnesota Press, 1986).
6. "The most lethal pathogen Europeans introduced to Native Americans, in terms of the total number of casualties, was smallpox." Henry F. Dobyns, *Their Number Become Thinned: Native American Population Dynamics in Eastern North America* (Knoxville: University of Tennessee Press, 1983), 11. "Measles may have been the second largest killer of Native Americans among Old World pathogens . . ." *Ibid.*, 16.
7. Jared M. Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: W.W. Norton, 1997).
8. Chatterjee, *Nationalist Thought*, 11.
9. American Anthropological Association Statement on "Race," May 17, 1998. <http://www.aaanet.org/stmts/racepp.htm> (Accessed February 27, 2006; emphasis added).
10. The Great Chain of Being was said to rank all of creation, from minerals to angels, by proximity to God. That is, the lower links are near Nothingness and the upper links near the Infinite. Arthur O. Lovejoy, *The Great Chain of Being* (Cambridge: Harvard University Press, 1936). This schema allowed for distinctions among humans expressed first by class and later by "race." According to some theorists, the distance between the great apes and "lower" men is quite insignificant. *Ibid.*, 197-207.
11. James Riding In, "Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians." *Arizona State Law Journal* 24 (1992): 11-34.
12. Keith E. Sealing, "Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation." *Michigan Journal of Race and Law* 5 (2000): 559-609.
13. *Loving v. Virginia*, 388 U.S. 1 (1967).
14. Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race*, 6th ed. (Walnut Creek, CA: AltaMira Press, 1997), 9. See also Ruth Benedict, *Race: Science and Politics* (New York: Viking Press, 1940).
15. Adolf Hitler, *Mein Kampf*, E.T.S. Dugdale, ed. & trans. (London: Hurst & Blackett, 1933), 121.
16. American Association of Physical Anthropologists, "AAPA Statement on Biological Aspects of Race." *American Journal of Physical Anthropology* 101 (1996): 569-570; also published on the World Wide Web at <http://www.physanth.org/positions/race.html> (accessed February 27, 2006).
17. Joseph L. Graves, Jr., *The Emperor's New Clothes: Biological Theories of Race at the Millennium* (New Brunswick: Rutgers University Press, 2001).
18. Of course, not all race theory was European. Peter Osborne & Stella Sandford, eds. *Philosophies of Race and Ethnicity* (London: Continuum, 2002). However, the origins of race theory in the Americas were European. So ubiquitous were racial assumptions that even black intellectuals, like contemporary Indians, were drawn into racial discourse early on by the necessity of contesting inferior "racial" status. Bruce Dain, *A Hideous Monster of the Mind: American Race Theory in the Early Republic* (Cambridge: Harvard University Press, 2002).
19. Norman H. Baynes, ed., *The Speeches of Adolf Hitler April 1922-August 1939* (New York: Howard Fertig, 1969), 792.
20. *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).
21. Martha Menchaca, *Recovering History; Constructing Race* (Austin: University of Texas Press, 2001), 62-66.
22. Theda Perdue, *Slavery and the Evolution of Cherokee Society 1540-1866* (Knoxville: University of Tennessee Press, 1979).
23. James Mooney, *History, Myths, and Sacred Formulas of the Cherokees* (Asheville, NC: Bright Mountain Books, 1992, from original works published in 1891 & 1900), 233; Russell Thornton, *The Cherokees: A Population History* (Lincoln: University of Nebraska Press, 1990), 19.
24. Thornton, *The Cherokees*, 45.

25. Rudy Halliburton, Jr., *Red Over Black: Black Slavery Among the Cherokee Indians* (Westport, CT: Greenwood Press, 1977), 10.

26. Annie Heloise Abel, *The American Indian as Slaveholder and Secessionist* (Lincoln: University of Nebraska Press, 1992, orig. ed. 1915); W. Craig Gaines, *The Confederate Cherokees: John Drew's Regiment of Mounted Rifles* (Baton Rouge: Louisiana State University Press, 1989). For a white population, this would mean having some influence regardless of which side won. For an Indian population, it meant losing more autonomy regardless of which side won.

27. Eva Marie Garoutte, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003); Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* (Berkeley: University of California Press, 2002).

28. *Lucy Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09 (Petition for Declaratory Judgment in the Judicial Appeals Tribunal of the Cherokee Nation), posted on line at <http://www.cornsilks.com/freedmenfile.html> (accessed February 27, 2006). In 2006, the Cherokee court upheld the citizenship rights of the freedmen. <http://cherokee.org/docs/news/Freedman-Decision.pdf> (accessed March 17, 2006). Principal Chief Chad Smith has called for a constitutional amendment to expel the freedmen. See also Sturm, *Blood Politics*, 168-200.

29. The Seminole Nation is also involved in litigation over the status of its black citizens. Joyce A. McCray Pearson, "Red and Black—A Divided Seminole Nation: *Davis v. U.S.*" *Kansas Journal of Law and Public Policy* 14 (2005): 607-629; Kimberly TallBear, "DNA, Blood, and Racializing the Tribe." *Wicazo Sa Review* 18,1 (2003): 95-98. Current information on freedmen litigation within the Five Tribes is often available at <http://www.freedmen5tribes.com/index.html> (accessed April 24, 2006).

30. Delphine Red Shirt, *Bead on an Anthill: A Lakota Childhood* (Lincoln: University of Nebraska Press, 1998); *Turtle Lung Woman's Granddaughter* (Lincoln: University of Nebraska Press, 2002). Red Shirt's academic affiliation was initially misstated as Yale University by the *Hartford Courant*. "Correction." *Hartford Courant* (December 13, 2002, A17).

31. Although the *Hartford Courant* is available on Lexis-Nexis and Westlaw, and some responses to Delphine Red Shirt's remarks appear in both databases, the original remarks published on December 8 or 10, 2002 do not. They were subsequently published as "These Are Not Indians," *American Indian Quarterly* 26,4 (2002): 643-644. I report her words, but she is mistaken. The source of her umbrage is the federal government's standards for tribal recognition as interpreted by the Bureau of Indian Affairs. 25 C.F.R. § 83.7 (2003).

32. <http://www.foxwoods.com/TheMashantucketPequots/Home/> (accessed February 27, 2006). <http://www.foxwoods.com/> (accessed February 27, 2006).

33. *Indian Country Today* (Oneida, NY: December 23, 2002). 1. Lexis-Nexis IC-GOVER-COL.

34. 2002 WL 104046410 (December 14, 2002); 2002 WL 104046132 (December 12, 2002). "Bigoted Assertions Belong in the Past." 2003 WL 4553856 (January 8, 2003).

35. Clifford E. Trafzer & Joel R. Hyer, eds., "Exterminate Them": *Written Accounts of the Murder, Rape and Enslavement of Native Americans During the California Gold Rush, 1848-1868* (East Lansing: Michigan State University Press, 1999).

36. Francis Paul Prucha, ed., *Americanizing the American Indians: Writings by "Friends of the Indian" 1880-1900* (Lincoln: University of Nebraska Press, 1973), 260-261. Barbara Landis maintains an outstanding resource on the Carlisle School and the boarding school movement generally on the world wide web at <http://home.epix.net/~landis/> (accessed February 27, 2006).

37. David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience 1875-1928* (Lawrence: University Press of Kansas, 1995). Elaine Goodale Eastman, *Prait, the Red Man's Moses* (Norman: University of Oklahoma Press, 1935). Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904* (Lincoln: University of Nebraska Press, 1987).

38. Prucha, *Americanizing the American Indians*. The grandparents who raised this writer were either unaware of changed acculturation policies or in need of a "bogyman" as my continual failures in the Oklahoma school system resulted in threats to send me "to Chilocco," the agent of white acculturation nearest my home. I dropped out of the Oklahoma schools in the 9th grade but know of Chilocco only from older Indians who attended and from history. K. Tsianina Lomawaima, *They Called it Prairie Light: The Story of Chilocco Indian School* (Lincoln: University of Nebraska Press, 1994).

39. Michael G. Lacy, "The United States and American Indians: Political Relations," in Vine Deloria, Jr., ed., *American Indian Policy in the Twentieth Century* (Norman: University of Oklahoma Press, 1985), 92.

40. 9 Stat. 922, U.S.-Mex., Feb. 2, 1848.

41. Menchaca, *Recovering History*.

42. The Indian origins of modern "Hispanics" are not entirely forgotten. Patricia Gonzales, *The Mud People: Chronicles, Testimonios & Remembrances* (San Jose, CA: Chusma House, 2003).

43. Luis Angel Toro, "'A People Distinct From Others': Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15." *Texas Tech Law Review* 26 (1995): 1219-1274.

44. *Cherokee Nation v. Georgia*, 30 U.S. 1, 24 (1831).

45. 5 U.S. 137 (1803).

46. Jill Nordgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996), 100-101.

47. Steve Russell, "Honor, *Lone Wolf*, and Talking to the Wind." *Tulsa Law Review* 38 (2002): 147-157.

48. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

49. Paul Spruhan, "A Legal History of Blood Quantum in Federal Indian Law to 1935." *South Dakota Law Review* 51,1 (2006): 1-51.

50. 30 Stat. 49.

51. Lest readers think these methods smack of a more primitive and less process-oriented bureaucratic culture, I must point out that when the Indian Reorganization Act of 1934, 48 Stat. 984-988, gave the Secretary of the Interior authority to extend benefits to unenrolled Indians of 1/2 or more blood quantum, the methods for determining eligibility sound remarkably similar to those in Dawes Commission hearings. Prior rolls, sworn testimony, and eyeballing were supplemented by an anthropologist, who added a scientific imprimatur to race classification by placing a pencil in the hair of applicants to see whether the hair was straight, which everyone knows would differentiate African-Americans from Native Americans. Margo S. Brownlee, "Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law." *Michigan Journal of Law Reform* 34 (2001): 288-290.

52. 187 U.S. 553 (1903); James S. Olson & Raymond Wilson, *Native Americans in the Twentieth Century* (Urbana, IL: University of Illinois Press, 1984), 87-88, 91; Rennard Strickland, *The Indians in Oklahoma* (Norman: University of Oklahoma Press, 1980), 47.

53. Victor E. Harlow, *Harlow's Oklahoma History* (Norman: Harlow Pub. Corp., 1934), 244-246.

54. Angie Debo, *A History of the Indians of the United States* (Norman: University of Oklahoma Press, 1970), 252-255.

55. 34 Stat. 137.

56. 34 Stat. 182.

57. Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934*. (Bloomington: Indiana University Press, 1991), 104-110.

58. *Bordeaux v. Hunt*, 621 F. Supp. 637, 640 (CD. SD.).

59. *Nichols v. Rysavy*, 809 F.2d 1317, 1322-1323, cert. denied, 484 U.S. 848 (1987).

60. It was a vain hope. See Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton: Princeton University Press, 1940).

61. Thornton, *The Cherokees*, 173.

62. Advisory Board to the President's Initiative on Race, *One America in the 21st Century: Forging a New Future* (Washington, DC: Office of the President, 1998), 51; Council of Economic Advisors, *Changing America: Indicators of Social and Economic Well-being by Race and Hispanic Origin* (Washington, DC: Office of the President, 1998), 10.

63. Thornton, *The Cherokees*, 176-177.

64. Deward E. Walker, Jr., *Population Projections for the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation* (Boulder: Walker Research Group, Ltd, 2002), 1.

65. *Ibid.*, 24.

66. *Ibid.*, 25.

67. *Ibid.*, 27.

68. *Ibid.*, 23.

69. *Ibid.*, 10.

70. *Rice v. Cayetano*, 528 U.S. 495 (2000).

71. Strickland, *Fire and the Spirits*, 205, 49-51; Gary E. Moulton, *John Ross: Cherokee Chief* (Athens, GA: University of Georgia Press, 1978); Thornton, *The Cherokees*, 73-76.

72. *Ibid.* at 45-46.

73. Halliburton, *Red Over Black*; Daniel F. Littlefield, Jr., *The Cherokee Freedmen: From Emancipation to American Citizenship* (Westport, CT: Greenwood Press, 1978); Perdue, *Slavery and the Evolution of Cherokee Society*.

74. William G. McLoughlin, *Cherokee Renaissance in the New Republic* (Princeton: Princeton University Press, 1986), 337.

75. "Final" because the purpose of the rolls was allotment of the reservations, then thought to be the beginning of the end of American Indians as distinctive peoples. While far from "final," these rolls are the basis of tribal citizenship today.

76. This figure is less than half of the population of the Cherokee Nation alone today.

77. Debo, *And Still the Waters Run*, 47.

78. The child of a Cherokee mother would traditionally be fully Cherokee and therefore reported as a full-blood on the earlier rolls that formed the basis for blood quantum on the Dawes Rolls.
79. *Ibid.*
80. John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights*. (New York: Oxford University Press, 1994), 105-107.
81. Sturm, *Blood Politics*, 3.
82. Valerii Soifer, *Lysenko and the Tragedy of Soviet Science*, trans. Leo Grulioiw and Rebecca Grulioiw (New Brunswick: Rutgers University Press, 1994). David Joravsky, *The Lysenko Affair* (Cambridge: Harvard University Press, 1970).
83. Brian Clark, *Whose Life is it Anyway?* (New York: Dodd, Mead, 1979).
84. Carole Goldberg, "Members Only? Designing Citizenship Requirements for Indian Nations." *Kansas Law Review* 50 (2002): 439, 437-431.
85. *Ibid.* at 445-458.
86. Hillary N. Weaver, "Indigenous Identity: What Is It, and Who Really Has It?" *American Indian Quarterly* 25,2 (2001): 240-255.
87. U.S. Constitution, Art. 1, § 8 [3].
88. David E. Wilkins & K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001), 98-116.
89. *Ibid.* I contend that the Court's expansive reading of the Indian Commerce Clause far exceeds the reach of the rest of the Commerce Clause, even taken at a high water mark like *Wickard v. Filburn*, 317 U.S. 111 (1942). See Sarah H. Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs." *Texas Law Review* 81 (2002): 1-284.
90. *E.g.*, The Arts and Crafts Act of 1990, 49 Stat. 891, including both federally recognized and state recognized tribes in protection against the marketing of faux Indian items.
91. David H. Getches, "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values." *Minnesota Law Review* 86 (2001): 267-362.
92. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, note 32 (1978) (emphasis added), citing *Roff v. Burney*, 168 U.S. 218 (1897) and *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906).
93. *Korematsu v. United States*, 323 U.S. 214 (1944). It is perhaps a measure of war's impact on the rule of law that two of the greatest civil libertarians who ever sat on the U.S. Supreme Court, William O. Douglas and Hugo Black, were with the majority, and Black wrote the opinion upholding Japanese-Americans' expulsion from their homes.
94. 323 U.S. at 223.
95. Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992).
96. U.S. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington, DC: Government Printing Office, 1983); Eric K. Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang & Frank H. Wu, *Race, Rights, and Reparation: Law and the Japanese American Internment* (Gaithersburg, MD: Aspen Publishers, 2001).
97. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 89.
98. Steve Russell, "American Indians in the Twilight of Affirmative Action." *Chicago Policy Review* 2 (1998): 37-45.
99. 417 U.S. 535 (1974).
100. 430 U.S. 641 (1977).
101. James E. Falkowski, *Indian Law/Race Law: A Five-Hundred Year History* (New York: Praeger Publishers, 1992), 1, footnote omitted. I should hasten to add that Falkowski does not endorse the colonial discourse but merely describes it.
102. Steven T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power." *New York University Review of Law and Social Change* 20 (1993): 303-341; Steven Paul McSloy, "'Because the Bible Tells Me So': Manifest Destiny and American Indians." *St. Thomas Law Review* 9 (1996): 37-47.
103. Cleveland, "Powers Inherent in Sovereignty . . ."; Steve Russell, "The Jurisprudence of Colonialism." *Legal Studies Forum* 25 (2001): 605-617; Mark Savage, "The Great Secret About Federal Indian Law—Two Hundred Years in Violation of the Constitution—and the Opinion the Supreme Court Should Have Written to Reveal It." *New York University Review of Law and Social Change* 20 (1993): 343-372.
104. *Rice v. Cayetano*, 528 U.S. 495 (2000), might have accomplished that very thing when the Supreme Court ruled that Native Hawaiians could not maintain voting control of the (state-created) Office of Hawaiian Affairs to the exclusion of white citizens of Hawai'i. The Court, however, based this holding on the 15th Amendment rather than the 14th Amendment, leaving the question of equal protection of the law and therefore the very existence of an Office of Hawaiian Affairs for another day. Litigation against programs for Native Hawaiians based on

denial of equal protection to white citizens is continuing, even as Congress considers legislation to recognize Native Hawaiians as having the same historical relationship to the United States as American Indians.

105. Cheryl I. Harris, "Whiteness as Property," in Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas, eds. *Critical Race Theory: The Key Writings That Formed the Movement* (New York: The New Press, 1995), 276-291.

106. Ian Haney López, *White by Law* (New York: New York University Press, 1996).

107. Archie Phinney, "Problem of the 'White Indians' of the United States." *Wicazo Sa Review* 18,2 (2003): 37-40. Originally written in 1943, this article bemoaned the role of mixed-bloods in tribal affairs and proposed a test for federal benefits of 1/2 blood quantum "or preferably a standard based on distinguishable Indian physical traits." *Ibid.*, 40. Phinney proposed that the phenotypically white but culturally Indian person was rare enough to be treated as a special class.

108. TallBear, "DNA . . ."

109. Carole Goldberg, "American Indians and 'Preferential' Treatment." *UCLA Law Review* 49 (2002): 943-989.

110. Fergus Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* (New York: Doubleday, 1996), 328.

111. Christopher A. Ford, "Administering Identity: The Determination of 'Race' in Race-conscious Law." *California Law Review* 82 (1994): 1231-85.

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