

2017

Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA

Abi Fain

Mary Kathryn Nagle

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>

 Part of the [Family Law Commons](#), and the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Fain, Abi and Nagle, Mary Kathryn (2017) "Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA," *Mitchell Hamline Law Review*: Vol. 43 : Iss. 4 , Article 4. Available at: <https://open.mitchellhamline.edu/mhlr/vol43/iss4/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

**CLOSE TO ZERO: THE RELIANCE ON MINIMUM
BLOOD QUANTUM REQUIREMENTS TO ELIMINATE
TRIBAL CITIZENSHIP IN THE ALLOTMENT ACTS AND
THE POST-ADOPTIVE COUPLE CHALLENGES TO THE
CONSTITUTIONALITY OF ICWA**

Abi Fain[†] & Mary Kathryn Nagle^{††}

I.	INTRODUCTION.....	803
II.	THE ORIGINS OF “INDIAN” AS A POLITICAL REFERENCE TO CITIZENSHIP UNDER FEDERAL LAW	810
	A. <i>The Absence of Blood Quantum in Tribal and Federal Laws Pre-1887.....</i>	810
	B. <i>Congress Purposefully Excluded “Indians”—Citizens of Tribal Nations—from the Fourteenth Amendment</i>	815
III.	THE USE OF BLOOD QUANTUM TO IMPLEMENT THE ALLOTMENT ACTS.....	822
	A. <i>The Purpose of the Allotment Acts Was to Take Land and Dismantle Tribal Governments</i>	825
	B. <i>1887: The Dawes Act Allotted Tribal Lands to “Indians” Without Defining “Indian”</i>	827
	C. <i>Congress Passed the Curtis Act in 1898.....</i>	833
	D. <i>The Acts of April 21, 1904, and May 27, 1908, Further Served to Open Lands to Settlement in Oklahoma.....</i>	835
	E. <i>1906: The Burke Act and the Foundation of Using Blood Quantum to Determine Competency.....</i>	836
IV.	THE FEDERAL GOVERNMENT SOUGHT TO UNDO THE DAMAGE CAUSED BY ALLOTMENT AND RESTORE “INDIAN” AS A POLITICAL CLASSIFICATION UNDER FEDERAL LAW	841
	A. <i>The IRA Was Designed to Undo the Harm Caused by the Allotment Acts.....</i>	842

[†] Abi Fain is a citizen of the Choctaw Nation and an associate at Pipestem Law, P.C. She graduated from Oklahoma University College of Law in 2012.

^{††} Mary Kathryn Nagle is a citizen of the Cherokee Nation and a partner at Pipestem Law, P.C. She graduated from Tulane Law School in 2008.

B.	<i>The IRA's Definition of "Indian" Restores the Inherent Right of Tribal Nations to Define Their Own Citizenship, Regardless of a Minimum Amount of Blood Quantum</i>	846
C.	<i>The Termination Era: Congress Once Again Uses Blood Quantum to Eradicate Tribal Nations</i>	848
D.	<i>Post-Termination Era, the Federal Government Has Consistently Refused to Impose a Minimum Blood Quantum to Define "Indian" Under Federal Law</i>	850
E.	<i>ICWA Constitutes Yet Another Example of the Federal Government's Contemporary Use of "Indian" as a Political Classification</i>	853
V.	THE SUPREME COURT AFFIRMED THE INHERENT RIGHT OF TRIBAL NATIONS TO DEFINE THEIR CITIZENSHIP AND THE USE OF "INDIAN" IN FEDERAL INDIAN LAW AS A POLITICAL CLASSIFICATION	859
A.	<i>Morton v. Mancari</i>	860
B.	<i>Santa Clara Pueblo v. Martinez</i>	863
VI.	THE RETURN OF A MINIMUM BLOOD QUANTUM REQUIREMENT IN CURRENT ICWA CONSTITUTIONAL CHALLENGES.....	865
A.	<i>National Council for Adoption v. Jewell</i>	870
B.	<i>A.D. v. Washburn—The Claim</i>	872
C.	<i>A.D. v. Washburn—Decision on the Motion to Dismiss</i>	877
VII.	CONCLUSION	879

[I]s there at all a threshold before you can call, under the statute, a child an "Indian child"? 3/256ths? . . . I'm just wondering is 3/256ths close—close to zero?

—Chief Justice Roberts, Oral Argument in *Adoptive Couple v. Baby Girl* (April 16, 2013)¹

[An "Indian" under federal law] should be one-half. . . .
What we are trying to do is get rid of the Indian problem rather than add to it.

—Sen. Burton K. Wheeler, Chairman of the Senate Committee on Indian Affairs (1934)²

1. Transcript of Oral Argument at 42–43, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399).

2. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong. 100 (1934) [hereinafter *Senate*

Baby girl A.D. [has] more than 50% non-Indian blood
Some of the tribes consider individuals with only a tiny
percentage of Indian blood to be Indian.

—Complaint, *A.D. v. Washburn* (July 6, 2015)³

I. INTRODUCTION

In *Adoptive Couple v. Baby Girl*, several Supreme Court Justices began to question whether a Tribal Nation could grant citizenship to a child of a tribal citizen if the child lacks sufficient blood quantum. As Chief Justice Roberts asked, “is there at all a threshold” at which the child of a tribal citizen can no longer be considered eligible for citizenship in a Tribal Nation?⁴ For the 567 federally recognized Tribal Nations that remain in existence today, the suggestion that at a certain point federal law will preclude their citizens from giving birth to another generation of citizens is alarming, to say the least.

This concept, however, is not new or even uniquely contemporary. Instead, this same concept—specifically, the idea that a minimum blood quantum is necessary before federal law will recognize an individual as a citizen of a Tribal Nation—originated at the turn of the twentieth century during the Allotment Era, when the United States sought to eliminate tribal governments, and their citizens, altogether.⁵ From 1887 through the Termination Era in the 1950s, the federal government imposed minimum blood quantum requirements to define tribal citizenship as part of an overall effort to (1) eliminate the number of individuals to whom the federal government owed a trust responsibility,⁶ (2) transfer millions of

Committee Hearing on Self-Government] (emphasis added) (statement of Sen. Burton K. Wheeler, Chairman, S. Comm. on Indian Affairs).

3. Complaint at ¶¶ 9, 41, *A.D. v. Washburn*, No. 2:15-CV-01259-NVW (D. Ariz. filed July 6, 2015) [hereinafter *Goldwater Litigation Complaint*], *appeal docketed*, No. 17-15839 (9th Cir. Apr. 26, 2017).

4. Transcript of Oral Argument, *supra* note 1, at 42–43.

5. See, e.g., Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, J. ANTHROPOLOGY, 2011, at 1, 4–5, <https://www.hindawi.com/journals/janthro/2011/549521/>.

6. See 1894 BD. OF INDIAN COMM’RS ANN. REP. 65 (statement of Charles H. Mansur, Assistant Comptroller of the Treasury and former member of Congress) (“A great defect in the Federal laws hitherto has been the want of an enactment to determine when an Indian ceases to be an Indian I have . . . seen dozens and

acres from Tribal Nations to non-Indian ownership,⁷ and (3) justify wholesale termination of federal recognition of entire Tribes.⁸

The Allotment Era, however, marked the very first period in which the United States federal government imposed minimum blood quantum requirements to define tribal citizenship under federal law.⁹ Prior to the Allotment Era, from the inception of the United States until the late nineteenth century, the federal government consistently recognized “Indian” as a political designation signifying citizenship in an Indian Nation.¹⁰ That is, at no time in the nineteenth century did the United States ever uniformly impose a minimum amount of blood quantum to define an “Indian” under federal law.¹¹ In the hundreds of treaties signed

dozens of delegates from the so-called Five Civilized Tribes Nearly all of them were white men. White Indians! . . . I propose . . . any member in whom the white blood predominates of any Indian tribe . . . shall be taken and considered a white person”); *see also Senate Committee Hearing on Self-Government, supra* note 2, at 263–64.

7. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1610–11 (2001) (discussing the loss of more than sixty percent of the 138 million acres of tribally-held lands at the beginning of the Allotment Era, in which a contributing factor was “the Indian Office . . . issuing patents, including passing on landowner applications at the reservation superintendent’s recommendation, sending ‘competency commissions’ out to visit and examine Indian landowners, and issuing ‘forced fee’ patents to any allotment owner of less than one-half ‘Indian blood’”).

8. VINE DELORIA JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 56 (1969) (citing the testimony of Commissioner of Indian Affairs William Zimmerman before a congressional hearing in 1947 that to determine whether a Tribe could be terminated from federal recognition, he would first look at “the degree of acculturation of the particular tribe” which “includes such factors as the admixture of white blood”).

9. W.H.H. Miller, Secretary of the Interior, *To the Secretary of the Interior: Indian Allottees Under the Act of 1887*, 19 Op. Att’y Gen. 559 (May 21, 1890) [hereinafter *Miller Opinion*]; *see also* Schmidt, *supra* note 5, at 4 (“The allotment era (1887–1934) saw the concept of blood quantum become officially integrated into the legal status of Indian identity . . .”).

10. *See* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1177 (2010); *see also* Worcester v. Georgia, 31 U.S. 515, 560 (1832) (“The Indian [N]ations had always been considered as distinct, independent political communities, retaining their original natural rights The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’”).

11. Schmidt, *supra* note 5, at 4 (“Although federal officials were aware of the use of blood quantum to trace ancestry, it was infrequently employed. Spruhan contends officials prior to the early twentieth century preferred to define tribal membership through matrilineal and patrilineal descent, or those criteria set up by

between Tribal Nations and the United States, the United States consistently recognized the inherent right of Tribal Nations to define their own citizenship requirements.¹²

By the end of the nineteenth century, however, the federal government became desperate to open up tribal lands on reservations for white settlement.¹³ To do this, Congress passed a series of allotment acts and ultimately, during the course of their implementation, imposed a minimum amount of blood quantum to define tribal citizenship and thereby diminish the authority of Tribal Nations over both their lands and their citizens.¹⁴

Federal policy changed again in 1934, when the federal government passed the Indian Reorganization Act (IRA) and once again defined “Indian” under federal law as individuals “who are members of any recognized tribe now under federal jurisdiction” without regard for whether they met a minimum blood quantum requirement.¹⁵ With the IRA, the federal government restored its original understanding that “Indian” constitutes a political classification based on citizenship in a Sovereign Tribal Nation.¹⁶

Since 1934, with the exception of select termination acts in the 1950s, Congress and the Supreme Court have repeatedly recognized and affirmed the inherent right of Tribal Nations to define their own rules and regulations regarding who qualifies for citizenship in a Nation—regardless of blood quantum.¹⁷

It is true that some Tribal Nations currently maintain citizenship laws that require a certain amount of blood quantum to be eligible for citizenship.¹⁸ That, however, is the determination of the

the specific tribe.”).

12. See, e.g., Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733; see also Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 446 (2002).

13. HOUSE COMM. ON INDIAN AFFAIRS, MINORITY REPORT ON LAND IN SEVERALTY BILL, H.R. REP. NO. 46-1576, at 7–10 (1880), reprinted in *AMERICANIZING THE AMERICAN INDIANS* 122 (Francis Paul Prucha ed., 1973); see also Schmidt, *supra* note 5, at 5 (“Wholesale American Indian allottees were released from their restrictions of selling their land, thus opening up millions of acres to European settlers.”).

14. Goldberg, *supra* note 12, at 447.

15. Indian Reorganization Act of June 18, 1934, ch. 576, § 19, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 5129 (2012)).

16. Schmidt, *supra* note 5, at 6 (describing how the IRA restored many processes that established Sovereign Nations).

17. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978).

18. See, e.g., MINN. CHIPPEWA TRIBE CONST. art. II, § 1(c) (1964).

individual Sovereign Tribal Nation.¹⁹ As Nations pre-dating the existence of the United States, tribal governments maintain an exclusive, sovereign authority to define requirements for their citizenship.²⁰ Just as France has no authority to define the requirements for citizenship in the United States, the United States has no constitutional or inherent authority to impose tribal-citizenship requirements based on a minimum amount of blood quantum.

And yet this is precisely what the Supreme Court's decision in *Adoptive Couple* signals the Court may soon do. At oral argument and in the majority opinion, the *Adoptive Couple* Court clearly questioned whether Baby Girl could be a citizen of the Cherokee Nation, despite the fact that her father was a citizen of the Nation, and she herself, under the Cherokee Nation's law, was eligible for citizenship.²¹

The majority opinion stated that the state supreme court's decision, which it reversed, read the Indian Child Welfare Act (ICWA) to apply to Baby Girl "solely because an ancestor [of hers]—even a remote one—was an Indian."²² As discussed in greater detail below, ICWA applied to her because her *father*—and not an ancestor—is a Cherokee Nation citizen, and she herself is eligible for citizenship. ICWA's application is not contingent upon Indian ancestry. Indeed, many individuals, including Senator Elizabeth Warren, either claim or have Indian ancestry but would never qualify as an "Indian"—nor would their offspring qualify as an "Indian child"—under ICWA because they are not eligible for citizenship in a Tribal Nation.²³ ICWA appropriately defers to a Tribal Nation's definition of "membership" for purposes of defining "Indian" under federal law and fulfilling the federal government's trust responsibility to tribal citizens.²⁴

Of course, by substituting the political reality of citizenship in a Tribal Nation with "ancestry," the *Adoptive Couple* majority purports

19. 25 U.S.C. § 5123.

20. *Santa Clara Pueblo*, 436 U.S. at 55–56 (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886)) ("Although no longer 'possessed of the full attributes of sovereignty,' [Indian Nations] remain a 'separate people with the power of regulating their internal and social relations.'").

21. See CHEROKEE NATION CONST. art. IV, § 1 (2006).

22. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

23. See 25 U.S.C. § 1903(3)–(4); see also Garance Franke-Ruta, *Is Elizabeth Warren Native American or What?*, THE ATLANTIC (May 20, 2012), <http://www.theatlantic.com/politics/archive/2012/05/is-elizabeth-warren-native-american-or-what/257415>.

24. See 25 U.S.C. § 1903(3)–(4).

to create a racial classification that simply does not exist. It is not clear, under the *Adoptive Couple* majority opinion, how closely related to a “full blood” Indian the Court would require an individual to be in order to qualify as a tribal citizen under federal law; all that is clear is that Baby Girl’s blood quantum is not sufficient for the Supreme Court to affirm her right to citizenship in a Sovereign Tribal Nation. This conclusion alone is cause for alarm.

The Supreme Court’s decision in *Adoptive Couple* marks a distinct departure from Congress’s post-IRA determination that the federal government would defer to a Tribe’s definition of its own citizenship requirements for the purpose of defining “Indian” under federal law, regardless of race or blood quantum.²⁵

And perhaps ironically, the Court’s *Adoptive Couple* decision has inspired a series of subsequent attacks on ICWA as an unconstitutional race-based classification. In *A.D. v. Washburn*²⁶ and *National Council for Adoption v. Jewell*,²⁷ two non-Indian organizations, the Goldwater Institute and National Council for Adoption, respectively, have filed suit purportedly on behalf of Indian children, asserting that the definition of “Indian child” under ICWA constitutes a racial classification that violates the Equal Protection Clause of the Fourteenth Amendment, as applied to the federal government through the Fifth Amendment.²⁸

Those who now attack ICWA focus their arguments on the allegedly minimal, or apparently insufficient, blood quantum of the Indian children on whose behalf they purport to sue.²⁹ Just as the proponents of imposing a minimum blood quantum requirement in the Allotment Acts asserted their efforts were made for the *benefit* of Indians, the National Council and Goldwater Institute organizations claim that their efforts to challenge the constitutionality of ICWA are being undertaken to help Indian children.³⁰ And although the National Council and Goldwater Institute lawsuits include many allegations mischaracterizing the mechanics of how various ICWA provisions apply to Indian children, this article will focus solely on

25. See *Adoptive Couple*, 133 S. Ct. at 2565.

26. *A.D. v. Washburn*, No. 2:15-CV-01259-NVW, 2017 WL 1019685, at *3 (D. Ariz. Mar. 16, 2017), *appeal docketed*, No. 17-15839 (9th Cir. Apr. 26, 2017).

27. Nat’l Council for Adoption v. Jewell, 156 F. Supp. 3d 727 (E.D. Va. 2015).

28. Complaint ¶¶ 5, 6, 7, 53, 65, 106–28, *Nat’l Council for Adoption*, 156 F. Supp. 3d 727 (No. 1:15-cv-00675-GBL-MSN) [hereinafter Nat’l Council Complaint].

29. *Id.* at ¶ 9.

30. *Id.* at ¶ 7; Goldwater Litigation Complaint, *supra* note 3, at ¶ 117.

the lawsuits' suggestions that certain Indian children do not have sufficient "Indian blood" to qualify as "Indian" under federal law without violating their rights under the United States Constitution.

Accordingly, this article will explore the origins of these lawsuits' theoretical underpinnings—specifically, this article will trace National Council and the Goldwater Institute's attempts to preclude individuals without a minimum amount of blood quantum from qualifying as "Indian" under federal law back to the Allotment Era, when the federal government first imposed minimum blood quantum requirements to transfer tribal lands from Tribal Nations to non-Indian ownership.

Part II of this article will demonstrate that, for the first hundred years of the United States' existence, federal law did not define "Indian" beyond citizenship in a Tribal Nation.³¹ And although proponents of the race-based argument today tether their arguments to the Fourteenth Amendment, this article will make clear that classifying American Indians as a "race"—as opposed to classifying them as citizens of Tribal Nations that enjoy a sovereign-to-sovereign relationship with the federal government—finds no support in the Fourteenth Amendment, and as a result, federal laws that use "Indian" as a criterion in no way violate equal protection principles.³²

Part III will articulate the manner in which the federal government, during the Allotment Era, began to impose minimum blood quantum requirements to determine tribal citizenship.³³ From 1887 through the Termination Era of the 1950s, the federal government used minimum blood quantum requirements to remove tribal lands, and tribal citizens, from the jurisdiction and sovereign authority of Tribal Nations.³⁴

In Part IV, the article will explore the debates surrounding the IRA's definition of "Indian" and, ultimately, demonstrate that the IRA marked a shift away from the assimilationist/elimination policies of the Allotment Era and toward restoring the inherent right of Tribal Nations to define their own citizenship.³⁵ Part IV will further detail the legislative history and purpose behind ICWA, an important example of a federal statute that post-dates the IRA and

31. *See infra* Sections II.A–II.B.

32. *See infra* Sections II.A–II.B.

33. *See infra* Sections III.A–III.B.

34. *See infra* Sections III.A–III.B.

35. *See infra* Sections III.A–III.B.

affirms that “Indian” constitutes, under federal law, a political designation of citizenship in a Tribal Nation—and not a racial identity.³⁶

Part V of the article will examine the Supreme Court’s decisions in *Morton v. Mancari* and *Santa Clara Pueblo v. Martinez*, wherein the Supreme Court affirmed that “Indian” under federal law is a political—and not racial—classification that upholds the inherent right of Tribal Nations to define their own citizenship, regardless of any minimum amount of blood quantum.³⁷

Finally, Part VI of the article will reveal the ways in which the Court’s decision in *Adoptive Couple*, as well as the lawsuits brought by National Council and the Goldwater Institute, recycle—or return to—the harmful concept first promoted during the Allotment Era. If these lawsuits succeed and the Supreme Court agrees to impose a minimum blood quantum requirement for citizenship, at a certain point, citizens of Tribal Nations will no longer be able to give birth to future generations of tribal citizens.³⁸ Indeed, the attacks on ICWA’s constitutionality threaten nothing less than what the statute was designed to protect and preserve: the continued existence of Tribal Nations.

More than eighty years after Congress retired the harmful policies of the Allotment Era, opponents of tribal sovereignty are attempting to resurrect a minimum amount of blood quantum as a basis for exterminating tribal sovereignty. Indeed, National Council and the Goldwater Institute’s use of arguments predicated on “blood quantum” today is just as disingenuous, deceptive, and harmful as the federal government’s use of it in implementing the Allotment Acts. And thus, the idea that at a certain point a tribal citizen will not have enough “Indian blood” to be an “Indian child” under ICWA threatens to take federal law and policy back several decades to the Allotment Era, a time when the federal government stripped Tribal Nations of their inherent right to define tribal citizenship—regardless of race or blood quantum—under federal law.

36. See *infra* Sections III.A–III.B.

37. See *infra* Sections V.A–V.B.

38. See *infra* Sections VI.A.–VI.B.

II. THE ORIGINS OF “INDIAN” AS A POLITICAL REFERENCE TO CITIZENSHIP UNDER FEDERAL LAW

[I]n many instances, children with only a minute quantum of Indian blood and no connection or ties to the tribe are subject to ICWA and relegated to the tribe’s exclusive or concurrent jurisdiction.

—Complaint, *A.D. v. Washburn* (July 6, 2015)³⁹

A. *The Absence of Blood Quantum in Tribal and Federal Laws Pre-1887*

For the first one hundred years of the United States’ existence, and prior to the enactment of the Allotment Acts, the federal government—and the majority of Tribal Nations—did not define “Indian” based on anything close to a minimum amount of “blood quantum.”⁴⁰ Instead, “Indian,” under federal law, was a political designation signifying citizenship in a Tribal Nation.⁴¹

The manner in which the United States originally recognized “Indians” under federal law—as citizens of Sovereign Tribal Nations—was not reliant on a minimum amount of blood quantum.⁴² That is, for a little over one hundred years, the newly formed United States largely viewed “blood quantum” as irrelevant in the context of its sovereign-to-sovereign relationship with Indian Nations.⁴³

The legal insignificance of “blood quantum” before the Allotment Acts is further underscored by the fact that any treaties referencing mixed-blood or half-breed Indians existed purely within a context that recognized these individuals as members of the various Tribes, entitled to rights under the treaties with their respective Tribal Nations.⁴⁴ That is, when the United States initially signed treaties with Tribal Nations, the United States respected the

39. Goldwater Litigation Complaint, *supra* note 3, ¶ 42.

40. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 4 (2006).

41. *See* Berger, *supra* note 10, at 1177.

42. Spruhan, *supra* note 40, at 9.

43. *See id.*

44. *See, e.g.*, 1865 Treaty with the Omaha, 14 Stat. 667 (granting lands in severalty to “members of the Tribe, including their half or mixed blood relatives”); 1836 Treaty with the Menominee, 7 Stat. 506 (making allowance for “relatives and friends of mixed blood . . . as chiefs shall hereafter designate”); 1805 Treaty with the Sauk and Foxes, 7 Stat. 84 (making provisions for “their mixed and half bloods”).

right of Tribal Nations to define their own citizenship, regardless of whether a respective Tribe based its citizenship on blood quantum or allowed individuals with *no* “Indian blood” to become citizens.⁴⁵ Consequently, many treaties signed between Tribal Nations and the United States affirm that an “Indian” could include individuals with no American “Indian blood” or ancestry.⁴⁶ For instance, the Treaty with the Choctaw and Chickasaw in 1866 states that “citizens by adoption or intermarriage . . . or who may hereafter become such” are recognized, and treated, as tribal citizens because the Tribal Nations recognize them as such.⁴⁷

The absence of a specified amount of blood quantum in the treaties signed between Tribal Nations and the United States carries more than academic significance. A Tribal Nation’s ability to count individuals with little to no “Indian ancestry” as political citizens of its Nation had legal ramifications.⁴⁸ Because the treaties obligated the United States to perform certain duties, such as distributing annuities or rations,⁴⁹ the absence of a blood quantum requirement in treaties obligated the United States to provide these duties to a

45. The 1892 Annual Report of the Commissioner of Indian Affairs states, In dealing with Indian matters the Government has treated with Indian [N]ations, tribes or bands as solid bodies politic, and, prior to 1871, so far as individuals composing them have been concerned, in the same manner as it would with any foreign power; that is, through treaty-making power. The individuals of the tribe or nation have not been known in our dealings with the tribe—as for instance, all persons recognized by the Indian authorities as members of the Sioux Nation, whether full-bloods, half-breeds, mixed bloods, or whites, have been treated as the Sioux Nation, and rights have vested under treaties and agreements in half-breeds, mixed bloods, and whites that can not be taken away or ignore by the Government[.]

1892 COMM’R INDIAN AFFAIRS ANN. REP. 36.

46. See, e.g., 1866 Treaty with the Seminole, 14 Stat. 755 (stating that “the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe”); 1866 Treaty with the Cherokee, 14 Stat. 799 (recognizing the Cherokee Nation’s “exclusive jurisdiction in all civil and criminal cases . . . in which members of the nation, by nativity or adoption, shall be the only parties”); 1856 Treaty with the Creeks, 11 Stat. 699 (acknowledging Tribe’s jurisdiction over “white persons . . . by adoption”); 1842 Treaty with the Wyandot, 11 Stat. 581 (granting allotments to select individuals “and their heirs all of whom are Wyandotts by blood or adoption”).

47. 1866 Treaty with the Choctaw and Chickasaw, art. 26, 14 Stat. 769.

48. Spruhan, *supra* note 40, at 27.

49. 1868 Fort Laramie Treaty, art. 10, 15 Stat. 635.

greater number of individuals, including those with *no* Indian blood or ancestry.⁵⁰ In 1877, the Indian Commission recognized this much when reflecting on the fact that individuals with no Indian blood would be legally considered “Indian” for purposes of administering the United States’ duties and obligations created by the 1868 Treaty of Fort Laramie signed with the different bands of the Sioux Nation.⁵¹ In an 1877 annual report titled “Status of Whites and Mixed-Bloods,” the Commissioner reported,

It seems pretty clear that the Department recognizes mixed-bloods as generally entitled to the rights of full-blood Indians; this should carry with it corresponding restrictions. . . .

The status of whites living among the Indians is even more anomalous than that of the mixed-bloods. It appears that the Department has consented that all those whites who were living among the Indians at the time of the treaty of 1868 shall receive annuities and rations so long as they conduct themselves properly.⁵²

In practical effect, the federal government’s inclusion of whites living within a Tribal Nation’s borders as tribal citizens for purposes of administering the treaty increased the amount of annuities the United States paid pursuant to the treaty. But in a legal sense, the aforementioned federal interpretation established a precedent of respect for tribal sovereignty and the inherent right of Tribal Nations to define their own citizenship, regardless of race or blood quantum.⁵³

The Commissioner recognized not only that whites living within Tribal Nations’ borders would count as “Indians” for purposes of interpreting treaties with Indian Nations, but moreover, that treaties

50. See Schmidt, *supra* note 5, at 4 (“Although federal officials were aware of the use of blood quantum to trace ancestry, it was infrequently employed. . . . [B]lood quantum only became important as a method to defining tribal membership in the early twentieth century when it was firmly rooted in federal Indian policy . . .”).

51. See 1877 COMM’R INDIAN AFFAIRS ANN. REP. 69–70.

52. *Id.*

53. See, e.g., Jessica Bardill, *Tribal Sovereignty and Enrollment Determinations*, NAT’L CONGRESS AM. INDIANS, <http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm> (last visited Dec. 22, 2017) (noting that in 2010 the United States signed the United Nations Declaration of the Rights of Indigenous Peoples, which states that “Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures”).

unquestionably encompassed “mixed-bloods,” with no reference to excluding those whose ancestry was not exclusively or sufficiently “Indian.”⁵⁴ Such references to individuals with mixed blood and mixed ancestry were not uncommon, as “[r]eferences in treaties to ‘half-bloods,’ ‘half-breeds,’ or ‘quarter-bloods’ began in 1817 in provisions granting various benefits to mixed individuals.”⁵⁵ For instance, the 1847 Treaty with the Chippewa of the Mississippi and Lake Superior stated,

It is stipulated that the half or mixed bloods of the Chippewas residing with them shall be considered Chippewa Indians, and shall, as such, be allowed to participate in all annuities which shall hereafter be paid to the Chippewas of the Mississippi and Lake Superior, due them by this treaty, and by the treaties heretofore made and ratified.⁵⁶

The inclusion of mixed-bloods as “Indians” with no reference to a minimum blood quantum, therefore, established that although “blood quantum was a linguistic description of ancestry in these [nineteenth century] discussions, there was no legal significance attributed to it.”⁵⁷

The absence of a minimum blood quantum requirement in the treaties signed by the United States and Tribal Nations was no accident. Yet at the same time that the federal government declined to use a specified amount of blood quantum to define “Indian” or tribal citizens in treaties and under federal law, many states used specified amounts of blood quantum as a basis for denying Indians their rights under state law.⁵⁸ Through the passage of many laws, ordinances, and codes, states relied on particular amounts of blood quantum to “declare[] certain persons ineligible to testify in court proceedings [and/or] marry whites.”⁵⁹

Virginia became the first state to codify laws relying on blood quantum in 1785, when the state used blood quantum to define a “mulatto.”⁶⁰ In 1866, Virginia expanded its statutory use of blood

54. See 1877 COMM’R INDIAN AFFAIRS, *supra* note 51, at 69–70.

55. Spruhan, *supra* note 40, at 10.

56. 2 INDIAN AFFAIRS: LAWS AND TREATIES 568 (Charles J. Kappler ed., 1904).

57. Spruhan, *supra* note 40, at 10.

58. See *id.* at 5 n.24 (citing nineteenth-century state laws barring persons with one-half or more of Indian blood from marrying a white person or testifying at trial with a white person as a party).

59. *Id.* at 4–5.

60. *Id.* at 5; *id.* at 5 n.20 (citing Act of Jan. 5, 1785, ch. 78, 1785 Va. Acts. 1, 61

quantum to include a definition of “Indian” such that under Virginia law, “Indian” would constitute “every person, not a colored person, having one-fourth or more of Indian blood.”⁶¹ And many states preceded Virginia with blood quantum laws that defined Indians at a specific amount of blood quantum in order to deny them certain rights, including North Carolina (1837),⁶² Indiana (1841),⁶³ and California (1851).⁶⁴

States’ contemporaneous reliance on a specified amount of blood quantum to strip individual Indians of due process and rights under the law renders the federal government’s nineteenth century rejection of blood quantum as a basis for defining “Indian” under federal law all the more remarkable. Certainly, the federal government’s dismissal of blood quantum as a legal definition of “Indian” was no accident or oversight; instead, it was a conscious decision made evident by the numerous federal statutes passed before 1887 that declined to define “Indian” based on blood quantum and thereby refrained from displacing the inherent right of a Tribal Nation to define its own citizenship.⁶⁵ For instance, the Indian Country Crimes Act, passed in 1834, extends the laws of the United States to Indian Country, except for crimes committed by an “Indian” against another “Indian.”⁶⁶ The statute, however, contains no definition of “Indian.”⁶⁷ Likewise, the Major Crimes Act of 1885 contains no definition of “Indian,” despite basing its application on the defendant’s status as an “Indian.”⁶⁸

The complete lack of any federal definition for “Indian” prior to 1887 evidences an intent to respect the inherent right of Tribal

(defining a quantum of at least one-fourth African American blood to be deemed a “mulatto”).

61. *Id.* at 5 n.20 (citing Act of Feb. 27, 1866, ch. 17, § 1, 1866 Va. Acts 84).

62. *See id.* at 5 n.24 (citing Act of Jan. 21, 1837, ch. 8, 1836–37 N.C. Sess. Laws 30 (requiring contracts to be signed by a “Cherokee Indian or any person of Cherokee Indian blood, within the second degree”).

63. *See id.* (citing Act of Feb. 3, 1841, ch. 51, § 4, 1840–41 Ind. Acts 134 (General Laws, 25th Sess.) (addressing sheriff’s authority to take a person into custody who was considered one-eighth or more Indian)).

64. *See id.* (citing Act of Apr. 29, 1851, ch. 5, § 394(3), 1851 Cal. Stat. 51, 114 (barring those of one-fourth or more Indian blood from being a witness in an action or proceeding)).

65. *Id.* at 8.

66. *See id.* at 18 (citing Act of June 30, 1834, ch. 161, § 25, 4 Stat. 733).

67. *See id.* (citing § 25, 4 Stat. 733).

68. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.

Nations to define their own citizenship, even when a Tribal Nation's citizenship statute encompasses whites or others with no "Indian blood" or Indian ancestry living within the Nation's borders.⁶⁹

B. *Congress Purposefully Excluded "Indians"—Citizens of Tribal Nations—from the Fourteenth Amendment*

In [*Adoptive Couple v.*] *Baby Girl*, the United States and others pressed an interpretation of ICWA that the Court concluded "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian," an interpretation that "would raise *equal protection concerns*."

—Plaintiffs' Response to Defendants' Motion to Dismiss, *A.D. v. Washburn* (Nov. 13, 2015)⁷⁰

Today, the National Council and Goldwater Institute actions assert that the Fourteenth Amendment precludes the federal government from classifying "Indians" based on citizenship in a Tribal Nation, an argument that does not follow the very foundation upon which equal protection was created and incorporated into the United States Constitution. Clinging to the dicta authored by the Supreme Court in *Adoptive Couple*, the newfound ICWA challengers make citizenship in a Tribal Nation focus on a remote connection to a phantom Indian ancestor.⁷¹ At the time of the Fourteenth Amendment's passage—and today, as well—citizenship in a Tribal Nation constitutes a political relationship with a separate Sovereign Nation.⁷² It is not, as the authors of the Fourteenth Amendment

69. See CHEROKEE CONST. art. III, § 5 (amended 1866) (including through amendment native-born Cherokee in its citizenry, as well as all Indians and whites legally members of the Nation by adoption).

70. Plaintiffs' Response to Defendants' Motion to Dismiss at 1, *A.D. v. Washburn*, No. 15-cv-01259-PHX-NVW (D. Ariz. filed Nov. 13, 2015) (emphasis added) (quoting *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013)), *appeal docketed*, No. 17-15839 (9th Cir. Apr. 26, 2017).

71. See Clint Bolick, *Native American Children: Separate but Equal?*, HOOVER INST. (Oct. 27, 2015), <http://www.hoover.org/research/native-american-children-separate-equal>, reprinted in GOLDWATER INST. (Nov. 2, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/native-american-children-separate-but-equal/> ("[ICWA] applies to children who have only a smidgeon of Native American blood, and even to children who have never set foot on an Indian reservation.").

72. See *United States v. Antelope*, 430 U.S. 641, 646 (1977); *Morton v. Mancari*,

repeatedly articulated, a “racial classification” within the context of equal protection.⁷³

It was within the first one hundred years of the fledgling United States federal government that the United States amended its Constitution to add the Fourteenth Amendment with what is now known as the Equal Protection Clause.⁷⁴ A review of the legislative history of the Amendment, as well as the Supreme Court precedent interpreting its application to citizens of Tribal Nations,⁷⁵ reveals that the authors explicitly considered and rejected drafting the Amendment so that it would apply to citizens of Tribal Nations. Because the authors explicitly excluded “Indians” from the Fourteenth Amendment’s reach, nothing in the Amendment prohibits the United States from implementing federal law that classifies citizens of Tribal Nations as “Indians.”⁷⁶

The authors’ exclusion of “Indians” was based on their understanding that “Indian” refers to individual citizens of separate, Sovereign Nations with which the United States signed treaties and engaged in other sovereign-to-sovereign government-based relations.⁷⁷ The authors of the Fourteenth Amendment thus understood that, in a legal sense, “Indian” refers to citizenship in a Tribal Nation—not race, or even ancestry.⁷⁸ Consequently, although

417 U.S. 535, 554 (1974). *See generally* S. REP. NO. 41-268, at 2 (1870) (discussing the effect of the Fourteenth Amendment on Indian Tribes and noting that “it was never claimed or pretended that [Indians] had lost their respective nationalities, their right to govern themselves, the immunity which belongs to nations in the conduct of war, or any other attribute of a separate political community”).

73. *See* Kate Shearer, Comment, *Mutual Misunderstanding: How Better Communication Will Improve the Administration of the Indian Child Welfare Act in Texas*, 15 TEX. TECH ADMIN. L.J. 423, 424 n.9 (2014) (citing Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 593 (2002)) (“[B]eing Native American is a political, rather than racial, classification . . .”).

74. *See* U.S. CONST. amend. XIV.

75. *See, e.g., Morton*, 417 U.S. at 555; *Elk v. Wilkins*, 112 U.S. 94, 102–03 (1884). *See generally* Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555 (2000) (discussing Native American citizenship status and congressional debates regarding how the Fourteenth Amendment would affect it).

76. *See* S. REP. NO. 41-268, at 1 (1870).

77. *See* Spruhan, *supra* note 40, at 9 (noting that the United States government originally formed treaties with Indian Tribes and recognized their sovereignty).

78. *See* Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 13 (Harvard Project on Am. Indian Dev., Joint Occasional Papers on Native Affairs No. 2004-03, 2004),

the Fourteenth Amendment “was intended to recognize the change in the status of the former slave which had been effected during the war, . . . it recognizes *no change in the status of the Indians*.”⁷⁹

To be sure, the authors of the Fourteenth Amendment intended to eradicate all forms of invidious racial discrimination in the states (and through the incorporation of the Fifth Amendment Due Process Clause, in the United States federal government).⁸⁰ As the Supreme Court has explained, “the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”⁸¹ The Supreme Court reached this conclusion based on its reading of the Equal Protection Clause, concluding that based on this clause, “the Fourteenth Amendment [commands] that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws.’”⁸² As Justice O’Connor espoused in *City of Richmond v. J.A. Croson Co.*, “the intentions of the Framers of the Fourteenth Amendment [were] to place clear limits on the states’ use of *race* as a criterion for legislative action, and to have the federal courts enforce those limitations.”⁸³

Thus, since the Supreme Court’s decision in *Bolling v. Sharpe* in 1954, the Court has repeatedly interpreted the Equal Protection Clause of the Fourteenth Amendment as prohibiting states from using race-based classifications to deny individuals equal protection under the law based on the authors’ admonition that the Fourteenth Amendment was to apply to “every human being, no matter what his complexion.”⁸⁴ The Fourteenth Amendment’s authors, however, made clear that the Amendment was not to prohibit governments from using “Indian” as a criterion for legislation because Indian Tribes were “recognized at the organization of this Government as

<https://hpaied.org/sites/default/files/publications/myths.pdf> (“Federal law and treaties recognize tribal sovereignty and obligations to Indian [N]ations, not to Indians as a racial group.”).

79. S. REP. NO. 41-268, at 10 (1870) (emphasis added).

80. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)); *Bolling*, 347 U.S. at 499 (holding that the Fifth Amendment’s Due Process Clause incorporates the same equal protection duties against the federal government that apply to states under the Fourteenth Amendment).

81. *McLaughlin*, 379 U.S. at 192.

82. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971).

83. 488 U.S. 469, 491 (1989) (emphasis added).

84. CONG. GLOBE, 37th Cong., 2d Sess. 1640 (1862).

independent sovereignties”⁸⁵ and were therefore kept outside the bounds of the Fourteenth Amendment.

The exclusion of “Indians” from the Fourteenth Amendment, therefore, was both purposeful and calculated. The exclusion of “Indians” was based on the authors’ respect for tribal sovereignty and the fact that Tribal Nations, as Sovereign Nations, have the inherent right to define their own citizenship, regardless of race, rendering the classification of their citizens as “Indians” a *political* and not a *racial* classification.⁸⁶

Ultimately, the authors of the Fourteenth Amendment excluded “Indians” from the Fourteenth Amendment’s reach based on (1) respect for tribal sovereignty, (2) the right of Tribal Nations to define their own citizenship, and (3) the need for the federal government to use “Indians” as a criterion to identify the citizens of a Tribal Nation with whom the United States must fulfill its treaty obligations and duties.⁸⁷

Many senators evinced their respect for Tribal Nations as separate Nations during the debates that led to the passage of the Fourteenth Amendment, including Senator Howard, who notably stated, “Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations.”⁸⁸ Senator Howard went even further, explaining that the Constitution, in particular the Indian Commerce Clause, required Congress to respect Indian Nations as separate Nations and stating,

The Government of the United States ha[s] always regarded and treated the Indian tribes within our limits as foreign Powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, for in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with the Indian tribes. That clause, in my

85. *Id.* at 1639.

86. *See* Shearer, *supra* note 73, at 424 n.9 (“[B]eing Native American is a political, rather than racial, classification . . .”).

87. *See* Berger, *supra* note 10, at 1179.

88. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard).

judgment, presents a full and complete recognition of *the national character of the Indian tribes*, the same character in which they have been recognized ever since the discovery of the continent and its occupation by civilized men; the same light in which the Indians were viewed and treated by Great Britain from the earliest commencement of the settlement of the continent. They have always been regarded, even in our ante-revolutionary history, as being *independent nations*, with whom the other nations of the earth have held treaties

[I]t has been the habit of the Government from the beginning to treat with the *Indian tribes as sovereign Powers*. The Indians are our wards. Such is the language of the courts. They have a national independence. They have an absolute right to the occupancy of the soil upon which they reside; and the only ground of claim which the United States has ever put forth to the proprietorship of the soil of an Indian territory is simply the right of preemption; that is, the right of the United States to be the first purchaser from the Indian tribes. *We have always recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains*. They sell the lands to us by treaty, and they sell the lands as the sovereign Power owning, holding, and occupying the lands.⁸⁹

The debates over the Fourteenth Amendment in the Senate further clarified that the founding of the United States had not stripped Tribal Nations of their inherent sovereignty over their lands, their citizens, or their communities. As one senator noted,

[A]lthough the Indians were thus overshadowed by the assumed sovereignty of the whites, it was never claimed or pretended that they lost their respective nationalities, their right to govern themselves, the immunity which belongs to nations in the conduct of war, or any other attribute of a separate political community.⁹⁰

The authors' respect for the inherent right of Tribal Nations to define their own citizenship regardless of race or anything close to blood quantum is further evidenced by the authors' reference to the right of Tribal Nations "to regulate their domestic affairs," or as one senator asserted,

89. *Id.* at 2895 (emphasis added).

90. S. REP. NO. 41-268, at 2 (1870).

Their right of self government, and to administer justice among themselves . . . has never been questioned; and while the United States ha[s] provided by law for the punishment of crimes committed by Indians straggling from their tribes, and crimes committed by Indians upon white men lawfully within the reservations, the Government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country.⁹¹

Ultimately, the senator asserted that because Congress—and the Constitution—recognized Indian Nations as separate Nations, the Fourteenth Amendment could not alter an Indian Nation’s right to define its own membership.⁹²

Furthermore, the authors’ decision to exclude “Indians” was borne out of adherence to the hundreds of treaties the United States signed with Indian Nations, as ratified by the Senate.⁹³ Article VI of the Constitution renders these treaties the “supreme Law of the Land,” and as such, the Fourteenth Amendment’s authors knew that the United States was constitutionally obligated to fulfill its trust duties and obligations to Tribal Nations—a command that would require the United States Congress to use “Indian” as a criterion in federal legislation and policy. Because “Indian” constituted a legal term used in nineteenth-century federal Indian law to describe a citizen of a Tribal Nation, the authors of the Fourteenth Amendment never intended for the Amendment’s prohibitions on the use of race as a criterion to prohibit the federal government from enacting legislation that relies on “Indian” as a classification.⁹⁴

Repeatedly, the Senate made clear that the Fourteenth Amendment did not include or apply to “Indians” because the United States could not constitutionally “annul the treaties previously made between [Indian Nations] and the United States.”⁹⁵ Specifically Senator Carpenter, sitting on the Judiciary Committee, stated, “[I]n the opinion of your committee the [F]ourteenth [A]mendment to the Constitution has no effect whatever upon the status of the Indian Tribes within the limits of the United States, and

91. *Id.* at 10.

92. *See id.* at 10–11.

93. U.S. CONST. art. VI, § 2.

94. *See infra* notes 95–102 and accompanying text.

95. *See* S. REP. NO. 41-268, at 1.

does not annul the treaties previously made between them and the United States.”⁹⁶ The Senate’s reverence for the sanctity of treaties signed with Indian Nations is due, in part, to the Senate’s recognition that many treaties came into existence before the Constitution was adopted.⁹⁷ As one senator noted during the debates,

[Several of the treaties came about] prior to the adoption of the Constitution. In each and every [one] of these treaties, the Indians are treated as states, or communities capable of entering into and performing the duties imposed by treaty obligations. They are treaties of peace; and made to cement friendship between the United States and the parties of the other part, respectively.⁹⁸

The Senate further understood that “because [many] treat[ies] stipulate[] for many actions,”⁹⁹ like the distribution of annuities and/or rations to tribal citizens, prohibiting the use of “Indian” as a criterion in legislation would strip Tribal Nations of their right to define their own citizenship in the treaties they signed with the United States and would thus “depriv[e] the tribes of their character as a nation or political community.”¹⁰⁰ That is, the Senate acknowledged that oftentimes a “treaty stipulates for many actions . . . which can only be performed by a separate community” defined by federal law as “Indians.”¹⁰¹

Because “Indians” were excluded from the Fourteenth Amendment’s reach, they were not granted United States citizenship under the Fourteenth Amendment.¹⁰² Less than two decades later, in 1884, the Supreme Court interpreted the Fourteenth Amendment and concluded that the Amendment did not make “Indians” United States citizens because the Amendment explicitly excluded Indians based on their political classification; that is, the Court concluded that the legal term “Indians” refers to members of “distinct political communities”—Tribal Nations—and does not refer to a classification based on race.¹⁰³ As a result, Indians did not

96. *Id.*

97. *See id.* at 2–4.

98. *Id.* at 3–4.

99. *Id.* at 1–3.

100. *Id.*

101. *Id.*

102. *Id.* at 10–11.

103. *Elk v. Wilkins*, 112 U.S. 94, 99–100 (1884).

become citizens of the United States until Congress passed the Indian Citizenship Act in 1924.¹⁰⁴

The irony of the arguments employed by National Council and the Goldwater Institute in their attacks on ICWA today is that if National Council and these organizations were to win, and congressional classifications of “Indian” were deemed unconstitutional under the Equal Protection Clause, then the very congressional act that granted Indians citizenship in the United States would be rendered unconstitutional. Indeed, a conclusion by the Supreme Court that “Indian child” under ICWA constitutes an impermissible race-based classification would call into question the entirety of federal Indian law dating back to the founding of the United States, at which time the United States entered into treaty agreements with Tribal Nations that required Congress to pass legislation identifying citizens of those Nations as “Indians.”¹⁰⁵

III. THE USE OF BLOOD QUANTUM TO IMPLEMENT THE ALLOTMENT ACTS

Baby girl A.D., on information and belief, has more than 50% non-Indian blood.

—Complaint, *A.D. v. Washburn* (July 6, 2015)¹⁰⁶

After more than a century of deferring to a Tribe’s right to define its citizenship, federal policy changed at the turn of the twentieth century. Under the pretext of protecting Indians and making Indians “equal” to other United States citizens—mirroring the very arguments asserted by those who challenge ICWA today—Congress decided that Tribal Nations should be broken up and Indians should be treated as individuals, rather than as citizens of Tribal Nations.¹⁰⁷

The 1880s ended decades of forced Indian removals, which had opened up hundreds of millions of acres of tribal lands for white

104. See Indian Citizenship Act of 1924, ch. 233, 43 Stat. 153 (codified at 8 U.S.C. § 1401(b) (2012)).

105. See Kalt and Singer, *supra* note 78, at 13 (“The reality is that tribal sovereignty is not based on race, but is a recognition of the numerous sovereign nations that were in the land settled by the European colonists. Federal law and treaties recognize tribal sovereignty and obligations to Indian [N]ations . . .”).

106. Goldwater Litigation Complaint, *supra* note 3, ¶ 9.

107. See generally General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000).

settlement.¹⁰⁸ Suddenly, however, the federal government realized forced removals and restricting tribal lands to reservations were not enough to satisfy America's quest for land. Following removal, the "discovery" of minerals and resources on reservations created an insatiable appetite for access to the lands on reservations, and tribal governments stood in the way of manifest destiny.¹⁰⁹ Something new, besides forced removal, would be necessary to open up tribal lands on reservations to white settlement and business development.¹¹⁰

The Allotment Acts, beginning with the General Allotment Act of 1887 (known as the "Dawes Act"), were Congress's solution. Under the Dawes Act, Congress authorized the allotment of tribal lands within a reservation to individual Indians in amounts established by treaty, statute, or executive order.¹¹¹ After a Tribal Nation's land was divided and allotted among its individual citizens, the Secretary of the Interior was further authorized to purchase lands not allotted within a Tribe's reservation boundaries for the purpose of opening these surplus lands to white settlers.¹¹²

It was through the implementation of the Allotment Acts that the federal government first used "blood quantum" to define "Indian" under federal law.¹¹³ Although the Allotment Acts did not themselves define "Indian" for purposes of allotting tribal lands on reservations, the Acts afforded Indian agents and the Commissioner

108. "Indian removal" began with the Indian Removal Act of 1830 and continued for decades. See Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 52 (2008) ("On May 28, 1830, months of acrimonious debate culminated in the passage of the Indian Removal Act. . . . The president would have unrestrained authority to survey and subdivide millions of acres west of the Mississippi as he saw fit. The removal and mass emigration of tens of thousands of human beings would occur when, where, and how Jackson decreed.").

109. See TASK FORCE FOUR: FED., STATE, AND TRIBAL JURISDICTION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION: FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 111–12 (1976) [hereinafter TASK FORCE REPORT], <https://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf> ("In response to extreme pressure from whites for access to Indian lands and mineral riches, Congress passed the General Allotment Act of 1887.").

110. See Schmidt, *supra* note 5, at 4–5 (discussing how the United States government took various actions to allow for increased white settlement).

111. General Allotment Act § 1.

112. *Id.* at § 5.

113. See Schmidt, *supra* note 5, at 4 ("The allotment era (1887–1934) saw the concept of blood quantum become officially integrated into the legal status of Indian identity . . .").

of Indian Affairs—pursuant to any rules and regulations that the Secretary of the Interior might promulgate—the responsibility of determining who constituted an “Indian” and should therefore receive an allotment on a particular reservation.¹¹⁴

Thus, it was through the Allotment Acts that the federal government successfully removed millions of acres of land from tribal governments and ceded them to states and settlers.¹¹⁵ The Dawes Act and its progeny¹¹⁶ were nothing less than an attempt to dismantle tribal governments, eliminate tribal citizenship, and ultimately transfer lands from Indian to non-Indian control. It was, in a very practical sense, the solution to what Senator Wheeler described as the “Indian problem.”¹¹⁷

Indeed, the Allotment Acts mark the first instance wherein “Congress . . . beg[a]n to deal with [Indians] as individuals, and not only as nations [or] tribes.”¹¹⁸ Identifying “Indians” as individuals with a certain pedigree of blood quantum, instead of as citizens of Tribal Nations, was a significant step in the federal attempt to eliminate Tribal Nations altogether.¹¹⁹

114. General Allotment Act § 3.

115. *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 31 (2012) (statement of Sen. Tom Udall, Member, S. Comm. on Indian Affairs).

116. Following the Dawes Act, Congress passed a good number of subsequent amendments and additional acts, all of which served to extend the allotment to additional Tribal Nations and ultimately remove provisions of the Dawes Act that were intended to protect the interests of Indians, such as restrictions against alienation of allotted land until after twenty-five years.

117. *Senate Committee Hearing on Self-Government*, *supra* note 2, at 100 (statement of Sen. Burton K. Wheeler, Chairman of the S. Comm. on Indian Affairs).

118. *Miller Opinion*, *supra* note 9. The Dawes Act

mark[ed], as was observed by Acting Attorney-General Jenks in his opinion of July 27, 1888, “a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore. It is the dismemberment of the tribes or bands, and absorption, as citizens, of the individuals composing them by the States and Territories containing the lands on which such individuals settle or may be settled, that is the policy of the new legislation.”

Id.

119. See Schmidt, *supra* note 5, at 6–7 (discussing how blood quantum requirements potentially threaten Native American identity and the continued existence and recognition of Tribal Nations).

In today's context, the National Council and Goldwater Institute actions seek to do the same. By supplanting citizenship in a Tribal Nation with the concept of "remote Indian ancestry" or insufficient blood quantum, these lawsuits seek to effectively impose a minimum blood quantum necessary for citizenship in a Tribal Nation. For instance, the re-classification of an Indian child citizen as an individual with a certain amount of blood quantum, as the Goldwater Institute¹²⁰—and the Supreme Court in *Adoptive Couple*¹²¹—seeks to do, reinvestigates the policies of assimilation and annihilation that originated in the Allotment Era. That is, both re-classify tribal citizens as individuals who can no longer politically associate with their Tribal Nations.¹²² Both, if taken to their logical end, seek to eliminate Tribal Nations altogether.¹²³

A. *The Purpose of the Allotment Acts Was to Take Land and Dismantle Tribal Governments*

The Allotment Acts, beginning with the Dawes Act, constituted Congress's attempt to placate the insatiable appetite of white settlers and the United States federal government for land. As Senator Dawes, Chairman of the Senate Committee on Indian Affairs and sponsor of the Dawes Act, stated, "The greed of these [white] people for the land has made it utterly impossible to preserve it for the Indian."¹²⁴ Furthermore, according to the Secretary of the Interior, Carl Schurz, Tribal Nations stood in the way of American progress and "development."¹²⁵ Six years before the passage of the Dawes Act, he stated,

I am profoundly convinced that a stubborn maintenance of the system of large Indian reservations must eventually result in the destruction of the red men What we can and should do is . . . allot[] to them lands in severalty . . . in such a manner that they no longer stand in the way of

120. See generally Goldwater Litigation Complaint, *supra* note 3.

121. See generally *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

122. See Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 545 (2017).

123. *Id.*

124. PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIAN (1887), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 109 (statement of Sen. Henry L. Dawes).

125. CARL SCHURZ, PRESENT ASPECTS OF THE INDIAN PROBLEM (1881), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 14.

the development of the country as an obstacle, but form part of it and are benefitted by it.¹²⁶

Thus, what was initiated as a means to transfer tribal lands from Tribal Nations to white settlers suddenly transformed into a benevolent effort to “benefit” Indians by making them “individual property owners” such that their Tribal Nations no longer controlled the lands.¹²⁷ As Secretary Schurz further explained,

When the Indians are so settled, and have become individual property-owners . . . the Indians will occupy no more ground than so many white people; the large reservations will gradually be opened to general settlement and enterprise, and the Indians, with their possessions, will cease to stand in the way of the “development of the country.” The difficulty which has provoked so many encroachments and conflicts will then no longer exist.¹²⁸

Despite all of the rhetoric about the benefits that “Indians” would receive from assimilation with non-Indians, a review of the Dawes Act reveals that opening the land up to white settlement was the true motivation behind the Allotment Acts.¹²⁹ A group of representatives in the House voiced their opposition to the legislation, and their statements provide a grim picture of the real purpose behind the legislation. For instance, one member opposed the bill, stating,

The main purpose of this bill is not to help the Indian, or solve the Indian problem, or provide a method for getting out of our Indian troubles, so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement. . . .
The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them. With that accomplished, we have securely paved the way for the extermination of the Indian races upon this part of the continent. If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of

126. *Id.*

127. *See id.* at 20 (arguing that transferring land to individual Indians was necessary for their absorption into “the great body of American citizenship”).

128. *Id.*

129. *See generally* General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000).

an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.¹³⁰

As one Senator put it, those who supported the Dawes Act were simply “in favor of despoiling the Indians and appropriating their lands and treating them harshly and unjustly.”¹³¹

B. 1887: The Dawes Act Allotted Tribal Lands to “Indians” Without Defining “Indian”

Congress passed the Dawes Act following several failed attempts at similar legislation.¹³² For years, Congress had discussed the best approach to “civilize” Indians into mainstream America and eliminate tribal governments.¹³³ In the Dawes Act, Congress ultimately settled on a policy of assimilation that sought to dismantle tribal governments; turn their citizens into farmers with individual ownership over portions of the Tribal Nations’ former lands; and finally, subject citizens of Tribal Nations—Indians—to state and territory laws by granting them United States citizenship, which was something the Fourteenth Amendment decidedly did not do.¹³⁴

Specifically, the Dawes Act

- broke up the land on reservations that Tribal Nations owned through the “allot[ment of] lands in severalty . . . to individual Indian[s]”;¹³⁵

130. HOUSE COMM’N ON INDIAN AFFAIRS, MINORITY REPORT ON LAND IN SEVERALTY BILL, H.R. REP. NO. 46-1576, at 7–10 (1880), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 128.

131. 11 CONG. REC. 780–81, 783, 934–35 (1881), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 131 (debate in the Senate on bill for lands in severalty to Indians); *see also* Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1068 (2012).

132. FRED A. SEATON & ELMER F. BENNETT, U.S. DEP’T OF THE INTERIOR, FEDERAL INDIAN LAW 775 (1958).

133. *See* Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385, 390 (2009); Chris Edwards, *Indian Lands, Indian Subsidies, and the Bureau of Indian Affairs*, DOWNSIZING THE FEDERAL GOVERNMENT (Feb. 1, 2012), <https://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies>.

134. H. Exec. Doc. No. 1, pt. 5, vol. 1, 50th Cong., 1st Sess., at 25–27 (1887), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 111 (statement of Sec’y of the Interior L.Q.C. Lamar).

135. General Allotment Act § 1, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000).

- stipulated that Indians could not alienate their allotted land for a twenty-five-year period in which the “United States . . . [was to] hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made,” and “any conveyance . . . of the lands . . . or contracting made touching the same, before the expiration of the [twenty-five-year trust period] . . . [would] be absolutely be null and void”;¹³⁶
- conferred United States citizenship on Indians at the time they received their allotment patent and “subject[ed them] to the laws, both civil and criminal, of the State or Territory . . . [where] they . . . reside[d]”;¹³⁷and
- authorized the Secretary of the Interior to “negotiate with . . . tribe[s] for the purchase and release . . . of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell . . . [for the] purpose of securing homes to . . . settlers.”¹³⁸

Furthermore, the Dawes Act specifically exempted a number of Tribal Nations from its purview, including the Five Civilized Tribes,¹³⁹ and included provisions governing an allotment’s partition and descent, which would prove to be problematic.¹⁴⁰

Ultimately, the Dawes Act took lands belonging to Tribal Nations and divided them up into “allotments”—the most common being 160 acres in size—and then distributed them to the Nation’s citizens, or as the Act instructs, “individual Indians.”¹⁴¹ Any land leftover after this distribution was ripe for purchase by the Secretary of the Interior from the Tribe for white settlement within reservation boundaries.¹⁴²

136. *Id.* § 5.

137. *Id.* § 6.

138. *Id.* § 5.

139. *Id.* § 8. The Five Civilized Tribes would eventually be enveloped in the allotment system. With the Act of March 3, 1893, Congress created the Five Civilized Tribes Commission (Dawes Commission) and tasked its commissioners with negotiating with the Five Civilized Tribes for the “extinguishment of the national or tribal title to any lands with that Territory now held by any and all of such nation or tribes.” 1900 COMM’N TO THE FIVE CIVILIZED TRIBES ANN. REP. 55.

140. Mark Welliver, Comment, *CP 87 and CP 100: Allotment and Fractionation Within the Citizen Potawatomi Nation*, 2 N.M. TRIBAL L.J. (2001).

141. *See generally* General Allotment Act, ch. 119, 24 Stat. 388.

142. *See id.* § 5; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998); *Solem v. Bartlett*, 465 U.S. 463, 473 (1984); Bryan T. Andersen, Case Note, *South Dakota v. Yankton Sioux Tribe: Sewing a Patchwork Quilt of Jurisdiction*, 3 GREAT PLAINS

The Dawes Act, however, did not define “Indian.”¹⁴³ The lack of a statutory definition for “Indian” was consistent with the prevailing view that an Indian was not to be defined by federal law, but rather defined by citizenship in a Tribal Nation. In this regard, the Dawes Act of 1887 echoed the past hundred years of federal policy wherein the federal government acknowledged the exclusive right of Tribal Nations to define their own citizenship. The plain language of the Dawes Act, therefore, recognized that “Indian” constituted a political term contingent upon a Tribal Nation’s political recognition. In James Thayer’s article on the passage of the Dawes Act published in the October 1891 issue of the *Atlantic Monthly*, he described the unique status of Indians as follows:

He who tries to fix and express their legal status finds very soon that he is dealing chiefly with their political condition What makes any of them peculiar, in a legal point of view, is the fact that they belong to a separate political body, and that our government mainly deals with them, not as individuals, as it does with you and me, but in a lump, as a people or a tribe.¹⁴⁴

And yet, despite the prevailing norms that recognized a Tribal Nation’s right to define its own membership, regardless of blood quantum, and the attendant legal implications thereto, the Dawes Act provided a foundation that granted broad authority to the Secretary of the Interior to further the Act’s objectives—most importantly, the elimination of tribal governments.¹⁴⁵ It was in pursuit of this objective that blood quantum was eventually

NAT. RESOURCES J. 99, 105 (1998).

143. See John P. LaVelle, *The General Allotment Act “Eligibility” Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 WICAZO SA REV. 251, 257 (1999).

144. James B. Thayer, *A People Without Law*, ATLANTIC MONTHLY, Oct. 1891, at 540, <https://unz.org/Pub/AtlanticMonthly-1891oct-00540?View=PDF>.

145. *Miller Opinion*, *supra* note 9, at 561 (“[The Dawes Act] mark[s], as was observed by Acting Attorney-General Jenks in his opinion of July 27, 1888, ‘a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore. It is the dismemberment of the tribes or bands, and absorption, as citizens, of the individuals composing them by the States and Territories containing the lands on which such individuals settle or may be settled, that is the policy of the new legislation.’” (internal citation omitted)).

incorporated into the federal framework known today as the Allotment Era.¹⁴⁶

Thus, because the Dawes Act did not define “Indian” for the purpose of effectuating the Act, and because the policy of the United States had shifted to recognizing Indians as individuals rather than citizens of Tribal Nations, the years immediately following the passage of the Dawes Act were met with inconsistent interpretations of who constituted an Indian “within the meaning of the laws of the United States.”¹⁴⁷

For instance, in 1892, in response to a case in which a mixed-blood Santee Sioux woman was denied status as an “Indian” under common-law principles because her father was white, the Commissioner of Indian Affairs, Thomas Morgan, proposed a list of determinative factors that he believed controlled who qualified as “Indian” under federal law. He suggested a definition that did not limit “Indians” to those of a particular race, but instead encompassed “mixed bloods,” as well as those with *no* Indian blood but recognized as tribal citizens through tribal adoption or marriage to a tribal citizen.¹⁴⁸ Commissioner Morgan explained that “Indian” should not be defined by race, but instead should include

Member[s] of one of the several nations, tribes, or bands of native Americans . . . who owe allegiance, primarily, to one of these political communities; and secondarily, if at all, to the United States[,] . . . one who is by right of blood, inheritance, or adoption, entitled to receive the pro rata share of the common property of the tribe[,] . . . white men . . . adopted into Indian tribes, and in accordance with the customs of those tribes became recognized by the authorities thereof as members and entitled to all the rights therein that the members of the Indian blood were entitled to and enjoyed.¹⁴⁹

In fact, Commissioner Morgan recommended that the federal government “recogniz[e] as Indians full bloods, half-breeds and mixed bloods without distinction” or reference to a minimum amount of blood quantum.¹⁵⁰ In Commissioner Morgan’s view, to otherwise impose such limitations on who could qualify as an

146. See Krakoff, *supra* note 131, at 1067–68.

147. 1892 COMM’R INDIAN AFFAIRS, *supra* note 45, at 33–37.

148. *Id.* at 33–36.

149. *Id.* at 33.

150. *Id.* at 36.

“Indian” under federal law could call into question the legitimacy of the treaties the United States had signed with Tribal Nations, many of which were signed by citizens of Tribal Nations that were not “full bloods.”¹⁵¹ It was thus for legal reasons that Morgan urged that the definition of an Indian “be construed in its historical and not in its ethnological significance.”¹⁵²

The absence of a definition for “Indian” was not the Dawes Act’s only shortcoming. The legislation was passed hastily and applied in a one-size-fits-all manner to numerous Tribal Nations.¹⁵³ But this approach contravened Senator Dawes’s own view on what would be essential to the long-term success of the allotment system and, ultimately, the solution to the Indian Problem: *time*.¹⁵⁴ Senator Dawes understood that “[t]he greed of [settlers] for the land . . . made it utterly impossible to preserve it for the Indian[;]” however, he believed the allotment system should be implemented only as Indians had the knowledge and resources to make use of their individual allotments.¹⁵⁵ He explained that it was his understanding that “President Cleveland . . . did not intend, when he first signed the bill, to apply it to more than one reservation at first . . . which [Dawes] thought was very wise[,]” yet within the same year of its passage, the Act had been applied to break up the lands of several Indian Nations.¹⁵⁶

Because the Dawes Act was flawed from the beginning—in form and in application—and because the Dawes Act provided for certain “protections” that prevented Indians from alienating their allotments—which in turn impeded the immediate availability of tribally-owned lands for white settlement—Congress quickly enacted subsequent amendments to change the terms of the Act.¹⁵⁷ These amendments removed previous restrictions on alienation of the land, including the early conveyance of fee simple title from the federal government to the individual Indian, rendering the land

151. *Id.*

152. *Id.*

153. The Dawes Act exempted some Tribal Nations, including the Five Civilized Tribes, from its application. *See supra* note 139.

154. *See* PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIAN (1887), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 100–10 (statement of Sen. Henry L. Dawes).

155. *Id.* at 109.

156. *Id.* at 107.

157. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 671–73, 872–76 (1984).

subject to state laws and taxes.¹⁵⁸ With every amendment and subsequent allotment act, from 1888 to 1908, Congress moved further away from its historical understanding that “Indians” constitute citizens of Tribal Nations and closer to the conception that to be “Indian” one must have a certain degree of “blood quantum.”¹⁵⁹

158. *Id.*

159. Examples of the Amendments Congress passed in this fashion include: Act of Aug. 9, 1888, ch. 818, 25 Stat. 392 (prohibiting white men not otherwise members of an Indian Tribe prior to August 9, 1888, from acquiring through marriage to an Indian woman rights to tribal property, tribal privilege, or any other interest to which tribal members are entitled, but with no application to the Five Civilized Tribes); Act of Feb. 28, 1891, ch. 384, 26 Stat. 794 (amending the Dawes Act to modify the size of allotments moving forward, authorizing the Secretary of the Interior to lease individual allotments where individuals, “by reason of age or disability,” cannot put their allotments to use, and clarifying that descent can be determined based on cohabitation “according to the custom and manner of Indian life” for purposes of marriage); Act of Aug. 15, 1894, chs. 289–90, 28 Stat. 286 (authorizing United States circuit courts to exercise jurisdiction and determine, where disputed, if an individual who “in whole or in part of Indian blood or descent” is entitled to land under any allotment act, but exempting the Five Civilized Tribes and the Quapaw Tribe); Act of June 7, 1897, ch. 3, 30 Stat. 62 (establishing that children from a solemnized marriage between a white man and an Indian woman who are tribal members by blood are entitled to the same rights and privileges of the mother’s Tribe as any other member of the Tribe); Act of May 31, 1900, ch. 598, 31 Stat. 221 (adding “inability” to the basis for which the Secretary of the Interior may lease an individual’s allotment, where leases had previously been limited to instances where individuals “by reason of age or disability” could not make use of their allotments); Act of Mar. 3, 1901, ch. 832, 31 Stat. 1058 (holding that rolls made by the Commission to the Five Civilized Tribes are final and that the names on such rolls “alone constitute the several tribes which they represent,” and granting the Secretary of the Interior authority to grant rights of way through any lands held by Tribal Nations or individual Indian allotments and providing that allotments “may be condemned for any public purpose under the laws of the State or Territory where located” and “money awarded” to allottee for condemnation); Act of May 27, 1902, ch. 888, 32 Stat. 245 (providing adult heirs of a deceased Indian the ability to sell or convey lands inherited that otherwise had restrictions upon alienation); Act of May 8, 1906 (Burke Act), ch. 2348, 34 Stat. 182 (providing release from restricted status on allotment for any Indian deemed competent and amending the Dawes Act to grant Indians citizenship upon receipt of fee simple patent, or land ownership without restriction, rather than upon receipt of allotment in restricted status); Act of June 21, 1906, ch. 3504, 34 Stat. 325 (removing restriction on allotments held by adult mixed-blood Indians of the White Earth Reservation, while keeping restrictions on allotments in place for full-blood members of the White Earth Reservation, with restriction being removed and allotment’s title in fee simple passing only upon a determination of competency); Act of Mar. 1, 1907, ch. 2285,

In this regard, the Allotment Acts took more than tribal lands: they took the inherent right of Tribal Nations to define their own requirements for citizenship.

C. *Congress Passed the Curtis Act in 1898*

The Curtis Act of 1898 was a direct affront to the Five Civilized Tribes who had vehemently protested the authority of the “Dawes Commission” that Congress created in 1893.¹⁶⁰ The Curtis Act went a step further than the Dawes Act in attempting to eliminate tribal governments.¹⁶¹ Not only did the Curtis Act apply an allotment system to the Cherokee Nation, Choctaw Nation, Chickasaw Nation, Creek Nation, and Seminole Nation, it also provided for the abolition of Tribal Courts and, through “agreements” with these Tribes, the dissolution of tribal governments.¹⁶² The Act gave the existing Dawes Commission the requisite authority over the Five Civilized Tribes to create membership rolls—by which the federal government would determine who was, and who was not, a citizen of one of the Five Civilized Tribes and therefore an “Indian” under the Act.¹⁶³ The Act also provided for the incorporation of towns and municipalities in Indian Territory under the laws of the State of Arkansas, abolished all Tribal Courts in Indian Territory, and

34 Stat. 1015 (granting “noncompetent Indians” the ability to sell or convey allotments with restrictions under terms and conditions provided by Secretary of the Interior).

160. Judy Kuhlman, *Curtis Act Presages Statehood*, NEWSOK (Apr. 24, 1994), <http://newsok.com/article/2464122>.

161. M. Kaye Tatro, *Curtis Act (1898)*, OKLA. HIST. SOC'Y, <http://www.okhistory.org/publications/enc/entry.php?entry=CU006> (last visited Dec. 22, 2017).

162. The Curtis Act differed in application to each of the Five Civilized Tribes based on agreements the federal government reached with each of the Tribes that were incorporated into the Act. For instance, the terms of the Atoka Agreement applied to Choctaws and Chickasaws and provided for allotments of 320 acres for each member of these Nations but also called for the abolition of each of these tribal governments to make way for statehood. PRUCHA, *supra* note 157, at 753; *see also* ANGIE DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* 289 (1934). Meanwhile, Cherokees were to receive allotments of 110 acres, Creeks 160 acres, and Seminoles 120 acres. PRUCHA, *supra* note 157, at 754. Each of the Agreements incorporated into the Curtis Act was negotiated between the Tribes and the Dawes Commission.

163. Tatro, *supra* note 161.

prohibited the enforcement of tribal laws in the courts of the United States in Indian Territory.¹⁶⁴

Given the opposition from the Five Civilized Tribes to the Dawes Commission, Congress made sure to spell out the Dawes Commission's authority over the allotment of the Five Civilized Tribes' lands.¹⁶⁵ In doing so, Congress vested the Commission with incredibly broad authority, authority that extended far beyond the bounds of the Dawes Act. That is, Congress vested the Dawes Commission with the authority to determine who would be a citizen of a Tribal Nation for any and all purposes, not just allotment. As section 21 of the Curtis Act states, the rolls created by the Dawes Commission would "alone constitute the several tribes which they represent."¹⁶⁶ The Curtis Act, therefore, effectively barred Tribal Nations from determining membership beyond the scope of those listed on the final rolls.¹⁶⁷

In addition to limiting tribal citizenship to the final rolls developed by the Dawes Commission, the Act immediately condemned the laws of Tribal Nations, abolished all Tribal Courts, and effectively signaled the end of tribal governments in Indian Territory.¹⁶⁸ The Curtis Act was passed with statehood in mind, and the proponents of statehood viewed tribal governments as impediments to what would one day become the State of Oklahoma.¹⁶⁹ Accordingly, the Act banned the "laws of the various tribes or nations [of Indians] . . . [from being] enforced at law or in equity by the courts of the United States in the Indian Territory"¹⁷⁰ and further stated that

164. Act of June 28, 1898, ch. 517, 30 Stat. 495; see Kirke Kickingbird, "Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" From "Oklahoma Hills" by Woody Guthrie, 29 Tulsa L.J. 303, 319 (1993).

165. Tatro, *supra* note 161.

166. § 21, 30 Stat. 495.

167. *Id.*; see also Spruhan, *supra* note 40, at 5–7 (noting that the creation of tribal rolls that detailed "degree of relationship" or "blood quantum" was not a new concept, but the use of the Commission's rolls to subsequently determine legal rights based on blood quantum was).

168. See PRUCHA, *supra* note 157, at 257 (arguing that the Curtis Act was "entitled an act for the protection of the people of the Indian Territory,' [and] was [a] unilateral action by the United States that signaled the end of the tribal governments").

169. *Id.* at 757.

170. § 26, 30 Stat. 495.

all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said territory by filing with the clerk of the court the original papers in the suit¹⁷¹

From 1898, when the Curtis Act was first passed, to 1919, roughly 13,110,532 acres of former tribal lands were opened for white settlement.¹⁷²

D. The Acts of April 21, 1904, and May 27, 1908, Further Served to Open Lands to Settlement in Oklahoma

Six years after the Curtis Act, demand for tribal lands once again propelled Congress into action. Although the Dawes Act and Curtis Act had successfully transferred millions of acres from Tribal Nations to white settlers, the protections that both Allotment Acts afforded Indians—specifically the protections that prohibited an Indian from selling his or her land—were preventing a large number of white settlers from purchasing (or taking) Indian owned lands.¹⁷³ In order to quell tensions related to the lack of open land that accompanied the massive influx of settlers onto reservations,¹⁷⁴ Congress passed the Act of April 21, 1904, and removed “all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who [were] not of Indian blood.”¹⁷⁵

Two years later, Oklahoma became a state, and at the insistence of the Oklahoma Congressional Delegation, Congress again moved to eliminate additional restrictions, this time by identifying tribal members whose blood constituted less than one-half Indian blood and lifting the restrictions on their lands so their lands could be sold

171. *Id.* § 28.

172. PRUCHA, *supra* note 157, at 753–54; *see also* DEBO, *supra* note 162, at 903.

173. *See* PRUCHA, *supra* note 157, at 257–60. Specifically, in Indian Territory, the Curtis Act resulted in more than 15 million acres, out of the nearly 19.5 million acres surveyed as the lands belonging to the Five Civilized Tribes, being allotted to individual Indians. *Id.* Because of the relatively small amount of surplus lands made available for white settlers through the allotment of Indian Territory, there was a push to have restrictions against alienation on the allotments removed. *Id.*

174. *See id.* at 753; *see also* DEBO, *supra* note 162, at 902.

175. Act of April 21, 1904, ch. 1402, 33 Stat. 180.

to white settlers.¹⁷⁶ The Act of May 27, 1908, was therefore passed in response to expressed concerns that the “protections” in the original Dawes Act impeded continued western expansion.¹⁷⁷ Representative Charles D. Carter, a Congressmen from the newly established Oklahoma delegation,¹⁷⁸ lamented that “restrictions have proven in the past a constant and successful barrier to the progress and development of [Oklahoma], a menace to the civilization and advancement of the Indian and destructive of the very spirit of American liberty.”¹⁷⁹

Ultimately, the 1908 Act passed, and Congress removed the restrictions, or “protections,” that prohibited the alienation of allotment land to anyone who was “less than one-half Indian blood.”¹⁸⁰ In this manner, Congress formally introduced the concept of a minimum amount of “blood quantum” to maintain one’s status as an “Indian” under federal law, thereby adjudicating who would be considered truly “Indian” and thus a citizen of a Tribal Nation. The congressional goal, of course, was to remove the federal restrictions on selling Indian-owned land in the hope that more Indians would “sell” their land to white settlers.¹⁸¹ Congress’s imposition of a minimum amount of blood quantum, however, went far beyond removing tribal lands from tribal control. By imposing a minimum amount of “Indian blood” necessary to be considered “Indian” under federal law, Congress began a conversation about when “Indians” might cease to exist at all.

E. 1906: The Burke Act and the Foundation of Using Blood Quantum to Determine Competency

Two years after the 1904 Act, and two years before the 1908 Act, Congress took yet another step in opening up more tribal lands for white settlement. In 1906, Congress passed the Burke Act to ensure

176. Act of May 27, 1908, ch. 199, 35 Stat. 312.

177. *History of Allotment*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history> (last visited Dec. 22, 2017).

178. Oklahoma became a state with the passage of the Act of June 16, 1906, ch. 3335, 34 Stat. 267.

179. 42 CONG. REC. 449 (1908) (statement of Rep. Carter).

180. See Act of May 27, 1908, ch. 199, 35 Stat. 312.

181. *History of Allotment*, *supra* note 177 (describing Congress’s interest in Indian lands for settlement purposes, including “railroads, mining, forestry and other industries”).

that more “Indian” lands could pass into non-Indian hands.¹⁸² The original restrictions in the Dawes Act prohibited Indians from utilizing their land, by sale or lease, for twenty-five years but had also granted Indians citizenship in the United States at the time the allotment patent was issued.¹⁸³

The Burke Act amended section 6 of the Dawes Act in two important ways. First, the Burke Act granted citizenship at the end of the twenty-five-year trust period or at any other time the federal government deemed the Indian “competent” to receive the title to his or her land in fee simple.¹⁸⁴ Second, the Burke Act authorized the Secretary of the Interior to remove restrictions on Indian allotments when it could be determined that an Indian was “competent.”¹⁸⁵ Thus, if an Indian was found to be “competent,” the restrictions on alienation would be lifted, and the Indian’s land could be put up for sale or otherwise transferred to non-Indian ownership, regardless of whether the initial twenty-five-year trust period had run to completion.¹⁸⁶

Specifically, the Burke Act granted the Secretary of the Interior broad discretion in determining the competency of Indians who had received allotments under the Dawes Act for the purposes of removing restrictions on allotments.¹⁸⁷ Like in the Dawes Act, Congress did not define the standards for determining who was “competent and capable of managing his or her affairs . . . [so as] to be issued . . . a patent in fee simple” for his or her land.¹⁸⁸

In the first year following the passage of the Burke Act, the Commissioner of Indian Affairs noted that the “competency”

182. Glen Bessemer, *Burke Act (1906)*, WORLD HIST. (Sept. 27, 2015), <http://www.worldhistory.biz/modern-history/81133-burke-act-1906.html>.

183. *Id.*

184. Burke Act, ch. 2348, 34 Stat. 182 (1906).

185. *Id.*; see also PRUCHA, *supra* note 157, at 298.

186. One additional rationale promoted by the Department of the Interior for removing restrictions—beyond opening up tribal lands for white settlers—was that “Indians of less than one-half blood could be entrusted with the untrammelled management of their lands . . . [and] Indians of less than 75 percent Indian blood should be authorized to sell their surplus lands” due to their white parentage and access to educational opportunities; this rationale is of course belied by the fact that even after allotment, white settlers were still pushing for the removal of restrictions on all Indian lands. See ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 139–40, 142 (discussing the pressure exerted on public officials to remove all restrictions from Indian land allotments in 1905–1906).

187. See Burke Act, ch. 2348, 34 Stat. 182 (amending § 6 of the Dawes Act).

188. *Id.*

determinations coincided with land speculation on many reservations and ultimately resulted in “Indians [being] defrauded out of a large portion of the value of their lands.”¹⁸⁹ Despite the awareness among federal officials that competency determinations led to abuses resulting in significant land loss for individual Indians, Congress continued enacting legislation that provided for easier removal of restrictions to a greater number of individuals by basing rights and restrictions on blood quantum.¹⁹⁰

In the same year as the Burke Act was passed, Congress and the Department of the Interior embarked on an era in which they would define “Indians” based on a minimum blood quantum. In an attempt to increase the tax base,¹⁹¹ minimize the obligations owed by the federal government pursuant to treaties signed with Tribal Nations, and further diminish the sovereignty of Tribal Nations, Congress enacted legislation that (1) extended restrictions on allotments for “full bloods”;¹⁹² (2) removed restrictions on allotments belonging to Indians who were less than one-half Indian blood, intermarried with a citizen of the United States, or classified as a freedman; and (3) further released restrictions on allotments, minus the homestead, for Indians who were between one-half and three-quarters Indian blood.¹⁹³

Suddenly, “Indian” under federal law no longer signified membership in a Tribal Nation as defined by the Tribe itself, but instead denoted a federally mandated minimum amount of “blood quantum.” By redefining “Indian” to be contingent upon a threshold degree of “blood quantum,” the federal government not only decimated the land base of Tribal Nations, but redefined “Indian” under federal law for the purposes of fulfilling trust obligations in a way that was largely inconsistent with the treaties the United States had previously signed with Tribal Nations.¹⁹⁴

189. 1909 COMM’R INDIAN AFFAIRS ANN. REP. 63.

190. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1081 (Nell Jessup Newton ed., 2012); see *supra* Section III.D (discussing the Act of April 21, 1904, and the Act of May 27, 1908, which removed restrictions based on race and blood quantum).

191. See Spruhan, *supra* note 40, at 20.

192. *Id.*; see also Act of April 26, 1906, ch. 1876, §§ 19, 22, 23, 34 Stat. 137, 144–45.

193. See Spruhan, *supra* note 40, at 20; see also Act of May 27, 1906, ch. 199, § 1, 35 Stat. 312.

194. Compare PRUCHA, *supra* note 157, at 753, with *supra* note 133 (showing how blood quantum was not part of the original Curtis Act discussing tribal lands).

The federal government's substitution of a certain degree of blood quantum for political citizenship was further cemented from 1913 to 1920, when the Department of the Interior employed a commission to lift restrictions on allotments en masse based on competency determinations.¹⁹⁵ During this time, Commissioner of Indian Affairs Cato Sells introduced an official policy for making large-scale determinations of competency that hinged almost exclusively on the amount of blood quantum of the individual Indian.¹⁹⁶ Prior to the adoption of Commissioner Sells's policy, competency was intended to be judged on an individual case-by-case basis.¹⁹⁷

Such individualized treatment of competency determinations, however, served as a barrier to achieving what Commissioner Sells envisioned as a time in which an "Indian" would no longer constitute a citizen of a Tribal Nation, but instead would become a part of the "ultimate absorption of the Indian race into the body politic of the Nation," something Sells referred to as "the beginning of the end of the *Indian problem*."¹⁹⁸ In 1917, Commissioner Sells released the Declaration of Policy in the Administration of Indian Affairs, stipulating that "all able-bodied adult Indians of less than one-half Indian blood . . . be given . . . full and complete control of all their property."¹⁹⁹

Sells believed that the "practical application" of the policy would "relieve from the guardianship of the Government a very large number of Indians"²⁰⁰ by releasing individuals he termed as "white Indians,"²⁰¹ or Indians without sufficient blood quantum to be, in his view, citizens of Tribal Nations. He bragged that the number of acres transferred from Indian ownership in the "less than 18 months [since the blood quantum policy was implemented], nearly equals the area [transferred] during the preceding 10 years."²⁰² That is, the erasure of tribal citizenship coincided with the loss of Indian-owned lands. Based on the competency policy implemented by

195. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 4–5 (1995).

196. See generally 1917 COMM'R INDIAN AFFAIRS ANN. REP.

197. See Burke Act, ch. 2348, 34 Stat. 182 (1906).

198. FRANCIS S. DRAKE, INDIAN HISTORY FOR YOUNG FOLKS 504 (1919).

199. 1917 COMM'R INDIAN AFFAIRS, *supra* note 196, at 4.

200. *Id.* at 5.

201. 1918 COMM'R INDIAN AFFAIRS ANN. REP. 19.

202. See *id.*

Commissioner Sells, by 1928, “four-fifths of the Indians declared ‘competent’ no longer owned their land.”²⁰³

As Commissioner Sells’s ideology reveals, the goal of taking tribal lands from Tribal Nations could not be accomplished without breaking up the governments of the Nations themselves, and tribal governments could not be eliminated so long as they maintained their citizens.²⁰⁴ Accordingly, the use of a minimum blood quantum in the implementation of Allotment Acts served to strip Tribal Nations of their most basic, fundamental sovereign right: the right to define their own citizenship.²⁰⁵ Of course, this served the ultimate purpose of the Dawes Act; as the Commission of Indian Affairs in 1889 explained,

The Tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted. The allotment of lands in severalty, the establishment of local courts and police, the development of a personal sense of independence, and the universal adoption of the English language are means to this end.²⁰⁶

While the policy of taking tribal lands from Tribal Nations was not new, the blood quantum-based competency methodology employed in the Allotment Acts was. That is, despite hundreds of forced removals and hundreds of broken treaties, the United States had consistently—until the Allotment Acts—accepted that an “Indian” under federal law constituted any individual whom a Tribal Nation recognized as a citizen, regardless of the degree of blood quantum maintained by the tribal citizen.

After more than a century of defining “Indian” based on citizenship in a Tribal Nation, and more than a century of affirming the inherent right of Tribal Nations to define their own citizenship, regardless of race, the United States federal government, for the first time, altered the legal definition of “Indian” to be contingent upon

203. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 190, at 1081.

204. Thomas J. Morgan, *Statement on Indian Policy*, reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 75.

205. Steven Newcomb, *The 1887 Dawes Act: The U.S. Theft of 90 Million Acres of Indian Land*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 8, 2012), <https://indiancountrymedianetwork.com/news/opinions/the-1887-dawes-act-the-us-theft-of-90-million-acres-of-indian-land/> (discussing the Allotment Acts pushing Native Americans into U.S. citizenship rather than their tribal citizenship).

206. Morgan, *supra* note 204, at 75.

a minimum amount of blood quantum.²⁰⁷ The Allotment Acts, therefore, sought to strip Tribal Nations of their right to govern both their land and their citizens.²⁰⁸

In 1933, the new Commissioner of Indian Affairs, John Collier, halted the practice of using blood quantum–based competency tests to remove restrictions on allotment lands.²⁰⁹ Of course by that time, the land holdings of Indian Nations and their citizens had been reduced by nearly 90 million acres since the Dawes Act was passed in 1887.²¹⁰

In 1934, federal policy changed once again, this time restoring the inherent right of Tribal Nations to define their own citizenship.

IV. THE FEDERAL GOVERNMENT SOUGHT TO UNDO THE DAMAGE
CAUSED BY ALLOTMENT AND RESTORE “INDIAN” AS A POLITICAL
CLASSIFICATION UNDER FEDERAL LAW

[One] percent Indian blood is [not] enough to make them
a tribal—a tribal member, eligible for tribal membership.

—Paul Clement, Counsel for Guardian Ad Litem, Oral
Argument in *Adoptive Couple v. Baby Girl* (April 16, 2013)²¹¹

Just a few decades after the federal government first imposed a minimum blood quantum to define tribal citizenship and opened tribal lands for white settlement, “the policy of allotting Indian lands was repealed with the passage of the Indian Reorganization Act.”²¹² In this regard, “[t]he Indian Reorganization Act of 1934 marked a shift away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture,” including promoting tribal self-government over tribal domestic affairs and

207. See Spruhan, *supra* note 40, at 39 (“After a century of use of blood quantum primarily to describe, but not to define individual Indians, Congress and the BIA applied blood quantum to release whole classes of Indian allottees from restrictions on sales of allotments.”).

208. See *generally id.* (discussing how the Allotment Acts dissolved Tribes as Sovereign Nations and how blood quantum played a role in defining “Indian” under federal law).

209. See PRUCHA, *supra* note 157, at 320.

210. 1 AM. INDIAN POL’Y REVIEW COMM’N, FINAL REPORT TO CONGRESS 67, 318 (1977).

211. Transcript of Oral Argument, *supra* note 1, at 29 (argument of Paul Clement, counsel for guardian ad litem, arguing for adoptive parents).

212. TASK FORCE REPORT, *supra* note 109, at 112 n.11.

defining citizenship.²¹³ Instead of defining “Indian” as an individual with a certain amount of “Indian blood,” the IRA dismissed the “blood quantum” definition that prevailed for much of the early twentieth century and restored the federal government’s original recognition that “Indian” legally signifies any citizen of a Tribal Nation—regardless of a specified amount of blood quantum.²¹⁴ Indeed, ICWA is one manifestation of the IRA’s shift away from assimilation and toward restoration of tribal self-government.

As discussed in greater detail below, this shift was not completed overnight.²¹⁵ Instead, it was not until the 1970s that Congress ceased using blood quantum as a means to achieve the extermination of Tribal Nations, their citizens, and their governments.²¹⁶ The IRA, however, was the start.²¹⁷

A. *The IRA Was Designed to Undo the Harm Caused by the Allotment Acts*

The IRA was the result of growing concern that the Allotment Acts caused serious harm to Tribal Nations and their citizens.²¹⁸ In 1926, the Secretary of the Interior formally requested that the Institute for Government Research²¹⁹ conduct a study related to federal Indian policy, including allotment, stating that the Department was in a need of “a constructive contribution in this difficult field of government administration.”²²⁰ Two years later, the

213. *Id.* (citation and quotation omitted); *see also* *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 180 n.8 (2011).

214. Schmidt, *supra* note 5, at 1–9.

215. *See infra* Section IV.A.

216. *See infra* Section IV.C.

217. *See infra* Section IV.A.

218. S. REP. NO. 112-116, at 4–5 (2012) (explaining that the purpose of the IRA was to “replace assimilationist policies,” “revitalize and strengthen tribal government,” and “reestablish [tribal] homelands”); *see id.* at 6 (“[R]estoration of land to tribal ownership is one of the central purposes of the IRA and has been recognized by Congress as essential to tribal self-determination.”); *see also* *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (stating that allotment “quickly proved disastrous for the Indians”); Schmidt, *supra* note 5, at 16 (“The authors of this act intended a few purposes, including *discontinuing* the use of allotments” (emphasis added)).

219. The Institute for Government Research is now known as the Brookings Institute. *Brookings Institution History*, BROOKINGS, <https://www.brookings.edu/about-us/brookings-institution-history/> (last visited Dec. 22, 2017).

220. PRUCHA, *supra* note 157, at 808.

Institute released its report entitled “The Problem of Indian Administration,” more commonly known as the Meriam Report.²²¹

The Meriam Report gave a scathing critique of the Dawes Act and the federal government’s relationship with Tribal Nations generally.²²² Not only had the allotment system decimated tribal land holdings,²²³ it had also undermined tribal sovereignty to such an extent that tribal citizens suffered greatly. For example, the Meriam Report noted that the overall “health of the Indians compared with that of the general population [wa]s bad”²²⁴ and that Indian children were forced to attend boarding schools where “provisions for the care of the Indian children . . . [were] grossly inadequate.”²²⁵ The Meriam Report further concluded that “[t]he income of the typical Indian family is low and the earned income extremely low,”²²⁶ while also noting that as a result of the forced removals and Allotment Acts, many tribal citizens were “living on lands from which a trained and experienced white man could scarcely wrest a reasonable living.”²²⁷ The Meriam Report drew significant attention to the harm caused by the congressional effort in the Allotment Acts to eliminate tribal governments altogether. Although Tribal Nations had survived the Allotment Acts and assimilationist policies of the post-Dawes Act era, many of their citizens had not.²²⁸

With mounting criticism of the Allotment Acts, in 1933, President Franklin Roosevelt appointed John Collier to the post of Commissioner of Indian Affairs.²²⁹ Collier immediately took it upon himself to retire the allotment system and propose sweeping changes designed to restore tribal sovereignty, as outlined in his initial draft of the IRA.²³⁰ Collier saw the IRA as having a twofold purpose.²³¹

221. *Id.*

222. *Id.* at 809–10.

223. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1610 (2001).

224. INST. FOR GOV’T RESEARCH, MERIAM REPORT: THE PROBLEM OF INDIAN ADMINISTRATION 3 (1928), <http://www.narf.org/nill/resources/meriam.html>.

225. *Id.* at 11.

226. *Id.* at 4.

227. *Id.* at 5.

228. *See id.* at 3.

229. Royster, *supra* note 195, at 16.

230. *Id.*

231. 1934 U.S. DEP’T OF THE INTERIOR, ANN. REP. SEC’Y INTERIOR, *reprinted in* FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 226 (3d ed. 2000) [hereinafter 1934 REPORT].

First, it was intended to “end the long, painful, futile effort to speed up the normal rate of Indian assimilation by individualizing tribal land and other capital assets”; and second, it was intended to “provide the means, statutory and financial, to repair as far as possible, the incalculable damage done by the allotment policy and its corollaries.”²³²

Collier’s initial draft was submitted to the House of Representatives on February 12, 1934, as House Bill 7902, and to the Senate the following day, February 13, 1934, as Senate Bill 2755.²³³ Collier’s original version of the IRA consisted of forty-eight pages,²³⁴ containing sixty-one sections.²³⁵ The final Act, however, contained only nineteen sections.²³⁶ The draft bill encompassed Collier’s vision for self-governing Tribes and a diminishing role for the federal government.²³⁷ In his memorandum of law to the House concerning his initial draft of the IRA, Collier stated, “There is no serious question as to the constitutional capacity of Congress to grant the various powers of self-government enumerated in” the draft legislation.²³⁸ Collier made sure to inform Congress that the grant of powers of tribal self-government in the IRA did not “constitute a grant of new powers,”²³⁹ but rather, as he explained, were “a recognition of tribal powers which Congress ha[d] never seen fit to abrogate.”²⁴⁰ Collier further noted that “[t]he right of an Indian tribe to deal with many matters affecting the lives and property of its members ha[d] repeatedly been upheld by the federal courts,” and ultimately, the IRA was necessary “to clarify and define the relations of an Indian tribe to its members.”²⁴¹

232. *Id.*

233. PRUCHA, *supra* note 157, at 957.

234. *Id.*

235. See VINE DELORIA JR., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 8–19 (2002).

236. See *id.* at 20–23.

237. 1934 REPORT, *supra* note 231.

238. Memorandum from John Collier, Comm’r of Indian Affairs, The Purpose and Operation of the Wheeler-Howard Indian Rights Bill, to the Senate and House Comms. on Indian Affairs (Feb. 19, 1934), <http://cdm15019.contentdm.oclc.org/cdm/ref/collection/p4005coll11/id/513>.

239. *Id.*

240. *Id.*

241. *Id.*

In furtherance of Collier's first noted objective of ending forced assimilation and the abolishment of tribal governments,²⁴² the IRA explicitly ended the allotment practices that had resulted in the loss of 90 million acres of tribally-owned lands since 1887.²⁴³ And although congressional debates on the IRA presented a number of opposing opinions as to how the IRA should proceed in form and function, it was apparent that allotment had to stop.²⁴⁴ Congressman Edgar Howard, co-sponsor of the IRA and the Chairman of the House Indian Affairs Committee, explained,

[T]he land was theirs under titles guaranteed by treaties and law; and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship.²⁴⁵

Reaching a consensus on Collier's second stated objective of the IRA of "provid[ing] the means, statutory and financial, to repair . . . the incalculable damage done by the allotment policy and its corollaries" was not so straightforward.²⁴⁶ The "incalculable damage" left in the wake of the Allotment Acts was more than land loss: the damage included loss of identity; loss of communities and families; and loss of the inherent right of Tribal Nations, as sovereigns, to unequivocally define their membership and govern their internal domestic affairs. In the first instance, the IRA restored the ability of Indian Nations to adopt bylaws and charters for the purpose of self-governance and further authorized lands being taken into trust for tribal governments.²⁴⁷

242. See, e.g., Act of June 28, 1898, ch. 517, 30 Stat. 503 (subjecting tribal officials to criminal prosecution in federal courts and mandating Tribes to be party to civil suits in federal court concerning tribal property).

243. See Indian Reorganization Act of June 18, 1934, ch. 576, § 19, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 5129); see also 1934 REPORT, *supra* note 231.

244. See 1934 REPORT, *supra* note 231.

245. 78 CONG. REC. 11,728 (1934).

246. 1934 REPORT, *supra* note 231.

247. *Id.*

B. *The IRA's Definition of "Indian" Restores the Inherent Right of Tribal Nations to Define Their Own Citizenship, Regardless of a Minimum Amount of Blood Quantum*

Collier recognized that much of the harm caused by the Allotment Acts stemmed from the federal government's imposition of a minimum blood quantum requirement to define "Indian" under federal law, thereby imposing federal citizenship requirements on Indian Nations.²⁴⁸ Collier further recognized that to move away from the Allotment Acts' harmful policies, the federal government needed to restore the inherent right of Tribal Nations to determine *who* is eligible for citizenship in their Nations, regardless of a threshold degree of blood quantum.²⁴⁹

Not everyone in Congress agreed, however. There remained numerous members of Congress who believed that limiting the legal definition of "Indian" to individuals with a minimum amount of "Indian blood" would lower the number of "Indians" living in the United States to whom the United States would be required to maintain treaty duties and obligations.²⁵⁰ Indeed, not all members of Congress agreed that the "harm" of the Allotment Acts should be remedied or that self-government of Tribal Nations should be restored.²⁵¹ Some believed that Tribal Nations should be eliminated altogether and "Indians"—tribal citizens—should be assimilated into the dominant white culture with no political ties to their Tribal Nations.²⁵²

Of course, the most efficient way to eradicate Tribal Nations is to take away their citizens.²⁵³ Suddenly, blood quantum became more than a means to secure the transfer of tribal lands from Tribal Nations. As Congress debated the IRA, imposing a minimum blood quantum requirement under federal law became the means by which many members of Congress believed the United States could phase Tribal Nations out of legal existence.²⁵⁴

248. Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 287 (2001).

249. *Id.*

250. *See Senate Committee Hearing on Self-Government*, *supra* note 2, at 263–64.

251. *Id.* at 264.

252. *Id.*

253. *See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 190, at 927–28 ("Indian naturalization was conditioned on the severing of tribal ties, renouncing tribal citizenship, and the removal of federal protection . . .").

254. *See Senate Committee Hearing on Self-Government*, *supra* note 2, at 263–64

Front and center in the debates surrounding the IRA was the question of how the IRA would define “Indian.” As noted by Senator Thomas from Oklahoma, the draft of the “bill, as [he] underst[oo]d it, [applied to] any Indian on the rolls, and many of them ha[d] no Indian blood at all.”²⁵⁵ Senator Burton K. Wheeler, then Chairman of the Senate Committee on Indian Affairs, advocated for a definition of “Indian” contingent upon a threshold amount of blood quantum, so as to limit the number of people who could legally claim to be “Indian.”²⁵⁶ In response to a proposed definition of “Indian,” he argued,

As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half. In other words, I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of the half blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done. *What we are trying to do is get rid of the Indian problem rather than add to it.*²⁵⁷

As Senator Thomas further noted, by limiting the number of people with sufficient “blood” to qualify as “Indian” under federal law, the federal government would be able

to eventually disseminate them and disintegrate them and to mix them with the white people, so that the problem would gradually fade away like the mist. Now, that is working fairly well among some tribes in my State. We have great numbers of Indians there that are in every sense—I will say white people, to make the distinction.²⁵⁸

Despite these arguments for limiting “Indian” under federal law to a certain blood quantum, the final act that passed on June 18, 1934, rejected the Chairman’s request that “Indian” be limited solely to individuals with one-half or more “Indian blood.”²⁵⁹ Indeed, the

(statement of Sen. Burton K. Wheeler, Chairman, S. Comm. on Indian Affairs).

255. *Id.*

256. *Id.*

257. *Id.* (emphasis added).

258. *Id.* at 152.

259. *See* Indian Reorganization Act of June 18, 1934, ch. 576, § 19, 48 Stat. 984,

final legislation marked a dramatic shift from the legal definition of “Indian” that emerged during the Allotment Acts and instead recognized that an “Indian” under federal law includes *anyone* who is a member of a Tribal Nation or a descendant of a member of a Tribal Nation—regardless of degree of blood quantum. In the final legislation, the IRA mandated,

The term “Indian” as used in this Act shall *include all persons of Indian descent* who are members of any recognized tribe now under Federal jurisdiction, and *all persons who are descendants of such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.²⁶⁰

Thus, although the IRA’s definition includes individuals with “one-half or more Indian blood,” one need not have any “Indian blood” to qualify as an Indian under the IRA’s definition if the individual is recognized by the Tribal Nation as a member or is the descendant of a member. Accordingly, the IRA enshrined the concrete principle that “Indian” under federal law is not dependent on a quantifiable amount of blood or race, but rather is based on a Tribal Nation’s determination that an individual is a citizen of its body politic.²⁶¹

C. *The Termination Era: Congress Once Again Uses Blood Quantum to Eradicate Tribal Nations*

Although the IRA marked a dramatic shift away from using blood quantum to define “Indian” under federal law, the congressional shift was not complete until the 1970s. In the 1950s, just two decades after the passage of the IRA, Tribal Nations once again faced federal policies geared towards termination of Tribal Courts, tribal governments, and tribal citizens. During the 1950s Termination Era, Congress returned to its use of blood quantum to define “Indian” under federal law.

In the 1950s Termination Era, Congress passed legislation in an effort to rid the federal government of its trust responsibility owed to Tribal Nations by eliminating “all federal supervision and control

988 (codified as amended at 25 U.S.C. § 5129 (2012)).

260. *Id.* (emphasis added).

261. Approximately 181 Tribes have adopted constitutions pursuant to the IRA. 3 DEP’T OF INTERIOR ANN. REP. 1, 376 (1946).

over Indians” at the “earliest practicable” date.²⁶² Specifically, on August 1, 1953, the House of Representatives passed House Concurrent Resolution 108, which articulated the congressional purposes behind termination as follows: (1) to subject Indians to all the laws, privileges, and responsibilities that were applicable to every non-Indian United States citizen, specifically, state laws and taxation; (2) to end the “ward” status of Indians and Tribes; (3) to grant to Indians “all rights and prerogatives pertaining to American citizens”; and (4) to free Tribal Nations and their individual members from “Federal supervision and control and from all disabilities and limitations applicable to Indians.”²⁶³

Thus, just as the desire for tribal lands was characterized as freeing and “civilizing” the Indian in the Dawes Act, the desire to eliminate tribal governments altogether in the Termination Era was characterized as a benevolent exercise in granting rights to Indians. The consequences of the Termination Era, however, were severe. Within a year of House Concurrent Resolution 108, Congress had approved and passed legislation providing for the termination of seventy Indian Nations, declaring them to no longer be federally recognized.²⁶⁴ Tribal Nations that lost federal recognition status suffered the consequences of fractured governments, land loss, and the imposition of state governance on tribal lands.²⁶⁵ The elimination of federal recognition meant that their citizens were no longer, under federal law, “Indian.”²⁶⁶

During this Termination Era, Congress imposed a threshold amount of blood quantum to secure the demise of several Tribal Nations. For instance, in 1954, the federal government declared that any Utes with less than fifty-one percent Ute blood would be terminated from citizenship in the Ute Tribe; the federal government agreed, however, to continue to recognize full-blood Utes as legitimate tribal citizens.²⁶⁷ Once again, the most efficient way to eliminate a Nation is to eliminate its citizens. And once again, Congress realized that imposing a minimum amount of blood

262. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 190, at 89; see also H.R. REP. NO. 82-2503 (1952).

263. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 190, at 90.

264. H.R. Con. Res. 108, 83d Cong. (1953).

265. See Richard Nixon, *Special Message to the Congress on Indian Affairs*, THE AM. PRESIDENCY PROJECT (July 8, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2573>.

266. See *id.*

267. Ute Partition Act of 1954, Pub. L. No. 671, 68 Stat. 868.

quantum for tribal citizenship quickened the elimination process of tribal governments altogether.

Within a short number of years, public outcry against Congress's termination acts informally ended the Termination Era; however, the damage was already done.²⁶⁸ Approximately three percent of the Indian population had been terminated from federal recognition and 1,365,801 acres of trust lands were withdrawn and released to non-Indian control.²⁶⁹ It was not until the Nixon Administration that the Executive Branch officially and formally repudiated termination,²⁷⁰ and it was not until 1988 that Congress officially repudiated its termination acts altogether.²⁷¹

Thus, although the IRA marked a return to a recognition that "Indian" is a political and not merely racial classification under federal law, the Termination Era demonstrates that although the IRA initiated a restoration of tribal sovereignty, this restoration, in the 1950s, was not yet complete. The Termination Era was short-lived, however. Just two decades later, in the 1970s, Congress and the federal government finally—and fully—affirmed the inherent right of Tribal Nations to define their own citizenship regardless of degree of blood quantum.

D. Post-Termination Era, the Federal Government Has Consistently Refused to Impose a Minimum Blood Quantum to Define "Indian" Under Federal Law

After the Termination Era in the 1950s subsided, and since the early 1970s, federal law has consistently defined "Indian" as a citizen of a Tribal Nation and not—as it was defined in the Allotment Acts—a percentage of a blood quantum. For instance, in 1975, Congress enacted hallmark legislation affirming the inherent sovereignty of Tribal Nations when it passed the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA). This legislation provided Tribal Nations with the opportunity to enter into contracts with the federal government and take over administration of programs and functions that the federal government was otherwise obligated to provide as a result of the United States' treaty duties and

268. See PRUCHA, *supra* note 157, at 1058.

269. *Id.* at 1058–59.

270. See Nixon, *supra* note 265.

271. THOMAS CLARKIN, FEDERAL INDIAN LAW AND POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS 1961–1969, at 271 n.3 (2001).

obligations, such as education and health and social services.²⁷² The ISDEAA supported a Tribal Nation's own determination of how best to serve its members. This was in direct contradiction to the mindset promulgated in the Allotment Acts, wherein tribal governments were viewed as incompetent, inferior, or simply institutions to be eliminated. The ISDEAA recognized that citizens of Tribal Nations had been denied

an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and [that] the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.²⁷³

That is, after several decades of federal policy designed to eradicate tribal governments, Congress reached the conclusion that Indians—the citizens of Tribal Nations—would never accept or allow the termination of their political affiliations with their governments.

Most notably, the ISDEAA completed the shift away from using a minimum blood quantum as a method for defining “Indian” under federal law. The Act defines an Indian as “a person who is a member of an Indian tribe.”²⁷⁴ The ISDEAA contains no discussion of a minimum amount of blood quantum necessary to render oneself an “Indian” under the law. Thus, by 1975, “Indian” under federal law was once again a political, not racial, designation.

Following the ISDEAA, Congress passed numerous other acts that likewise defined “Indian” as dependent upon citizenship in a federally recognized Tribe. The following are examples of such acts:

- The Indian Land Consolidation Act (ILCA), the purpose of which was to reduce fractionated interests in allotments by authorizing the acquisition of lands in trust for individual Indians and consolidating them into tribal ownership. ICLA defines an Indian as “any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or

272. See Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203; see also Geoffrey D. Strommer and Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 4 (2015).

273. Indian Self Determination and Education Assistance Act § 2(a)(1)–(2).

274. *Id.* § 4(a).

restricted interest in land” with no mention of a minimum blood quantum.²⁷⁵

- The Indian Child Protection and Family Violence Protection Act (Protection Act), the purpose of which was to reduce the incidents of child abuse and family violence in Indian Country. The Protection Act defines an Indian as “any individual who is a member of an Indian tribe” with no mention of a minimum blood quantum.²⁷⁶
- The Indian Employment, Training and Related Services Act (IETRSA), the purpose of which was to provide resources that assist Tribal Nations in improving the effectiveness of services provided to tribal citizens. That is, IETRSA sought to “reduce joblessness in Indian Country” and further support the “policy of self-determination.”²⁷⁷ IETRSA states that an Indian is “a person who is a member of an Indian tribe” with no mention of a minimum blood quantum.²⁷⁸
- The Indian Health Care Improvement Act (IHCIA), the purpose of which was to address the “unmet health needs of the American Indian people”—categorized as “severe”—and the health status of Indians, which continued to be “far below that of the general population.”²⁷⁹ IHCIA defines Indian to be “any person who is a member of an Indian tribe” with no mention of a minimum blood quantum.²⁸⁰

The Indian Child Welfare Act is yet another example of a federal statute that post-dates the IRA and affirms that under federal law, “Indian” constitutes a political designation of citizenship in a Tribal Nation and not a racial identity. Congress passed ICWA in 1978 to address a crisis involving the separation of Indian children from their families and Tribal Nations that, because of its magnitude, threatened the very existence of Tribal Nations as self-governing, separate Sovereign Nations.²⁸¹

275. 25 U.S.C. § 2201 (2012) (passed in 1983 and subsequently amended several times for constitutional reasons related to the taking of property).

276. *Id.* §§ 3201–3202 (passed in 1990).

277. *Id.* § 3401 (passed in 1992).

278. *Id.* § 3402 (passed in 1992 and amended in 2000) (citing the definition of “Indian” in the ISDEAA, 25 U.S.C. § 5304(d)).

279. *Id.* § 1601(5) (passed in 1976 and subsequently amended in 1992 and 2010).

280. *Id.* § 1603(13) (passed in 1976 and subsequently amended several times).

281. “As early as 1973, the Senate Committee on Interior and Subcommittee on Indian Affairs began to receive reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of

E. ICWA Constitutes Yet Another Example of the Federal Government's Contemporary Use of "Indian" as a Political Classification

ICWA is the result of significant congressional inquiry over a period of several years. The severity of the problem that Congress documented cannot be understated: "in 1978, when ICWA was passed, a large percentage of Indian children—one-quarter to one-third—were being adopted or placed in foster care families outside of Tribal Nations."²⁸² In 1974, evidence was presented to Congress revealing that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions."²⁸³ As a result, "[t]he adoption rate of Indian children was eight times that of non-Indian children," and "[a]pproximately 90% of the Indian placements were in non-Indian homes."²⁸⁴

To make matters worse, "state adoption policies provided little to no protection for maintaining the tribal citizenship and political affiliations of these adopted Indian children."²⁸⁵ And as Congress noted, in the wake of the loss of millions of acres of tribal lands in the Allotment Acts, "the continued existence of a Tribal Nation's sovereign identity was, in large part, dependent on the nation's ability to maintain its future generations of citizens—citizens who

nontribal government agencies." S. REP. NO. 95-597, at 11 (1977).

282. Brief of Amici Current and Former Members of Congress at 7, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399) [hereinafter *Adoptive Couple* Amicus Brief]. Mary Kathryn Nagle, one of this article's authors, was an author of the *Adoptive Couple* Amicus Brief.

283. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (citing *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 3, 15 (1974) [hereinafter *1974 Hearings*]). In addition,

Congress's examination of the crisis confirmed that Indian children were far more likely to be removed from their families (and, as a result, their Tribes) than other children. During the Senate hearings in 1974, one witness described "[t]he wholesale removal of Indian children from their homes" as "the most tragic aspect of Indian life today."

Adoptive Couple Amicus Brief, *supra* note 282, at 8–9 (quoting *1974 Hearings*, *supra* (statement of William Byler)).

284. *Holyfield*, 490 U.S. at 33 (citing *1974 Hearings*, *supra* note 283, at 75–83).

285. *Adoptive Couple* Amicus Brief, *supra* note 282, at 6. "Both the Senate and the House held hearings on this crisis with testimony 'from the administration, Indian people, State representatives, tribal leaders, medical and psychiatric professionals and child welfare groups.'" *Id.* at 8 (quoting S. REP. NO. 95-597, at 12 (1977); H.R. REP. NO. 95-1386, at 27–28 (1978)).

would learn the nation's language, practice its traditions, and participate in its tribal government, regardless of whether they lived on or off a reservation."²⁸⁶

As a result, Congress established the American Indian Policy Review Commission, which established a task force that addressed issues of Indian child welfare and culminated in a published report in 1976.²⁸⁷ The next year, in 1977, the American Indian Policy Review Commission submitted a report to Congress based in part on the task force's findings and recommendations.²⁸⁸

Congress enacted ICWA in 1978 as a remedy to these problems, finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,' . . . and that Indian Tribes would likely cease to exist as sovereign, political entities absent congressional intervention."²⁸⁹ As Representative Robert J. Lagomarsino explained, the bill was enacted to reverse conditions that threatened the future of Tribal Nations.²⁹⁰ The legislative record showed "considerable emphasis on the impact on the tribes themselves of the massive removal of their children."²⁹¹ "Congress heard from several tribal leaders 'that [their] children are [their] greatest resource, and without them [tribes] have no future.'"²⁹² The task force recognized that "[c]hild rearing and the maintenance of tribal identity are essential tribal relations."²⁹³ "The large number of Indian children placed with families outside their

286. *Adoptive Couple* Amicus Brief, *supra* note 282, at 6–7. In addition, "after 'over 4 years of congressional hearings, oversight, and investigation' conducted during three sessions of Congress, Congress concluded that 'Indian tribes and Indian people are being drained of their children, and, as a result, their future as a tribe and a people [have been] placed in jeopardy.'" *Id.* at 7 (quoting 124 CONG. REC. 38101-02 (1978) (statement of the principal sponsor of ICWA, Rep. Morris Udall)); *see also* H.R. REP. NO. 95-1386, at 27 (1978).

287. *Adoptive Couple* Amicus Brief, *supra* note 282, at 8 (citing TASK FORCE REPORT, *supra* note 109, at 2).

288. *See generally* 1 AM. INDIAN POLICY REVIEW COMM'N, *supra* note 210.

289. *Adoptive Couple* Amicus Brief, *supra* note 282, at 7 (quoting the Indian Child Welfare Act, 25 U.S.C. § 1901(3) (2012)).

290. *Id.* (quoting 124 CONG. REC. 38,102 (1978)).

291. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989).

292. *Adoptive Couple* Amicus Brief, *supra* note 282, at 9 (quoting *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 78 (1978) [hereinafter *1978 Hearings*] (statement of Faye La Pointe, Puyallup Tribe official)).

293. *Id.* (quoting TASK FORCE REPORT, *supra* note 109, at 86).

Tribal Nations ‘paralyz[ed] the ability of the tribe to perpetuate itself.’”²⁹⁴

Accordingly, Congress’s goal in enacting ICWA was to preserve “the continued existence and integrity of Indian tribes.”²⁹⁵ Congress intended for ICWA “to establish minimum federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.”²⁹⁶ ICWA’s procedural safeguards reflect Congress’s care in creating those standards:

[First], because Congress found that a Tribal Nation’s sovereignty depends upon the preservation of extended Indian family relationships within the tribe, Congress crafted provisions designed to ensure that a court’s first attempt to place an adopted Indian child is with a member of his or her extended family.²⁹⁷ [Second], understanding the complex history surrounding Indian lands, Congress created provisions that not only recognize a tribe’s inherent jurisdiction concerning the placement of an Indian child domiciled on a reservation, but also afford tribes jurisdictional and procedural rights in proceedings involving children not domiciled on a reservation where the parents’ rights have been voluntarily relinquished or terminated by a State.²⁹⁸

Furthermore, by enacting ICWA, Congress sought to preserve family relationships in order to preserve tribal sovereignty.²⁹⁹ During its inquiry, Congress discovered that the family relationships that serve as important aspects of tribal sovereignty and citizenship in

294. *Id.* (quoting TASK FORCE REPORT, *supra* note 109, at 86); *see also* TASK FORCE REPORT, *supra* note 109, at 78–79 (“One of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the way to destroy Indian tribal integrity and culture, usually justified as ‘civilizing Indians,’ is to remove Indian children from their homes and tribal settings.”).

295. *Adoptive Couple* Amicus Brief, *supra* note 282, at 9 (quoting 25 U.S.C. § 1901(3) (1978)). As he read a letter from Rep. Robert J. Lagomarsino, Rep. Morris Udall stated, “I firmly believe that the future and integrity of Indian tribes and Indian families are in danger because of this crisis.” *Id.* at 13 (quoting 124 CONG. REC. 38103 (1978)).

296. H.R. REP. NO. 95-1386, at 19 (1978).

297. *Adoptive Couple* Amicus Brief, *supra* note 282, at 14 (citing 25 U.S.C. § 1915(a) (2012)).

298. *Id.* (citing 25 U.S.C. § 1911).

299. *Id.* at 16.

tribal communities extend beyond the parent-child relationship and include the dozens of relatives “counted as close, responsible members of the family.”³⁰⁰ The House Report concluded that the “‘dynamics of Indian extended families are largely misunderstood’ by states and nontribal authorities that insist it is in the best interests of Indian children to place them in non-Indian homes” outside of their Tribal Nation based on cultural misunderstandings and prejudice.³⁰¹

With this understanding, Congress designed ICWA to protect the parent-child relationship as an aspect of the child’s relationship with the tribe. For instance, section 1912(f) sets a higher standard for the termination of parental rights, and section 1913(a) requires that any voluntary consent to termination of parental rights be executed in writing and recorded before a judge of a “court of competent jurisdiction,” who must certify that the terms and consequences of the consent were fully explained and understood. The parental termination provisions found in these sections serve ICWA’s broader purpose that, “where possible, an Indian child should remain in the Indian community.”³⁰²

Congress further determined that when an Indian child’s biological parents’ rights have been terminated—whether voluntarily or involuntarily—the extended family “should be the *first* place that the state looks in searching for a placement that is in the best interest of the child.”³⁰³ “If ‘good cause’ exists to prevent this placement, then State courts must look to place the child with ‘other members of the Indian child’s tribe,’ and, if a suitable home within the tribe is not available, then preference is given to placement in ‘other Indian families.’”³⁰⁴ Section 1915 is a result of congressional evidence indicating that “tribal citizenship is best preserved within the context of an extended Indian family.”³⁰⁵

ICWA also addressed the crisis’s jurisdictional concerns. Congress recognized that “[t]he exclusive jurisdiction of the tribe

300. *Id.* at 16–17 (quoting *1974 Hearings*, *supra* note 283, at 18).

301. *Id.* at 17 (quoting H.R. REP. NO. 95-1386, at 10).

302. *Id.* (quoting 25 U.S.C. § 1913(a); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989)).

303. *Id.* at 17–18 (citing 25 U.S.C. § 1915(a), which states that “preference shall be given . . . to a placement with (1) a member of the child’s extended family”).

304. *Id.* at 18 (citing 25 U.S.C. § 1915(a)).

305. *Id.*

[over the adoption placements of its children] is well founded in the law.”³⁰⁶ “ICWA thus contains not only ‘procedural and substantive standards for those child custody proceedings that do take place in state court,’³⁰⁷ but also procedural rights meant to protect the Indian tribe’s inherent sovereign jurisdiction over the placement and legal status of its own citizens.”³⁰⁸

First, “[i]n enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.”³⁰⁹ “This provision acknowledges the status of Tribal Nations as sovereign entities” with exclusive jurisdiction over the domestic affairs of tribal citizens residing on tribal lands.³¹⁰

Second, because of the American Indian Policy Review Commission task force’s finding that the “concept of [tribal] court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child,”³¹¹ Congress decided that ICWA must afford tribes certain procedural rights regarding the placement of their citizens who reside off-reservation.³¹² Thus, when the Indian child is not domiciled on tribal lands, “section 1911(b) creates the presumption that any proceeding concerning foster care or the termination of parental rights for an Indian child will be transferred to Tribal Court, ‘absent objection by either parent . . . or the Indian custodian or the Indian child’s tribe.’”³¹³ ICWA thus reflects Congress’s determination that an Indian Nation has a sovereign interest in its citizens no matter where they reside.

Ultimately, ICWA’s entire application hinges on whether the child is an “Indian child” under the statute. If the child is not an “Indian child,” then none of ICWA’s provisions apply. Congress’s definition of “Indian child,” therefore, is significant as it stems from Congress’s consideration of testimony from tribal leaders.³¹⁴ These tribal leaders confirmed that “without a future generation of citizens,

306. *Id.* at 19 (citing S. REP. NO. 95-597, at 17 (1977); *Fisher v. District Court*, 424 U.S. 382 (1976)).

307. *Id.* (quoting *Holyfield*, 490 U.S. at 36).

308. *Id.* (citing S. REP. NO. 95-597, at 17 (1977); *Fisher*, 424 U.S. 382)).

309. *Id.* at 20 (quoting *Holyfield*, 490 U.S. at 42).

310. *Id.*

311. *Id.* (TASK FORCE REPORT, *supra* note 109, at 86).

312. *Id.*

313. *Id.* (citing 25 U.S.C. § 1911(b) (2012)); *see also* H.R. REP. NO. 95-1386, at 21 (1978) (“Either parent is given the right to veto such transfer.”).

314. *Adoptive Couple* Amicus Brief, *supra* note 282 at 15.

tribal governments would have no means by which to transfer their culture, heritage, language, or civic duties such as voting and participation in self-governance.”³¹⁵ Indeed, “without citizens, tribes have no future leaders; without future leaders, tribes have no self-government” and simply cease to exist.³¹⁶ For this reason, the applicability of ICWA is contingent upon citizenship in a Tribal Nation—not a minimum amount of blood quantum and certainly not race.

ICWA defines an “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”³¹⁷ Congress made ICWA’s definition of “Indian child” contingent upon tribal citizenship because it understood that “the preservation of tribal self-government derives from the preservations of a tribe’s future citizens.”³¹⁸

Accordingly, for ICWA to apply, the child must already be an enrolled citizen or the child’s parent must be an enrolled citizen and the child must be eligible for citizenship under her tribe’s citizenship requirements.³¹⁹ “This limited definition confirms the congressional purpose behind ICWA: in instances where a child is already a citizen, or is eligible for citizenship, and her parent has elected to maintain his citizenship, then the child’s tribe has a sovereign, political interest in where that child is placed.”³²⁰

Congress remained cognizant that “for an adult Indian, there is an absolute right of expatriation from one’s tribe.”³²¹ Thus, Congress realized that “a child’s parent could terminate voluntary tribal membership at any time. For this reason, Congress intentionally refrained from extending ICWA’s application to children who are eligible for citizenship in a tribe, but whose parents have elected to

315. *Id.*

316. *Id.* (citing *1978 Hearings*, *supra* note 292, at 193) (citing testimony that adoption practices that place Tribes’ future citizens outside of tribal communities “seriously undercut the tribes’ ability to continue as self-governing communities”).

317. 25 U.S.C. § 1903(4).

318. *Adoptive Couple* Amicus Brief, *supra* note 282, at 14 (citing § 1903(4)).

319. *Id.* at 14–15 (citing § 1903(4)).

320. *Id.* at 15.

321. *Id.* (quoting H.R. REP. NO. 95-1386, at 20 (1978)); *see* U.S. *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (1879).

terminate their citizenship with the tribe or simply never enrolled.”³²²

ICWA also excludes children who are not eligible for citizenship, even though one or both of their parents may be.³²³ By excluding these children, Congress refrained from imposing its own arbitrary definition of citizenship on a Tribal Nation, thereby respecting the United States Supreme Court’s decision 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.”³²⁴ Congress’s definition of “Indian child” in ICWA, therefore, “recognized that Congress’s authority over Indian affairs extends only to individuals who meet the individual tribe’s unique, political qualifications for citizenship.”³²⁵

In stark contrast to the policies of the Dawes Commission and the Secretary’s implementation of the Burke Act of 1906, ICWA’s applicability hinges on political affiliation with a Sovereign Nation—not on a minimum amount of blood quantum.

V. THE SUPREME COURT AFFIRMED THE INHERENT RIGHT OF TRIBAL NATIONS TO DEFINE THEIR CITIZENSHIP AND THE USE OF “INDIAN” IN FEDERAL INDIAN LAW AS A POLITICAL CLASSIFICATION

Contemporaneous with the passage of ICWA, and following four decades of congressional effort to restore the tribal self-determination and sovereignty that the Allotment Acts sought to eliminate, the Supreme Court took up two cases to answer questions that would, ultimately, determine the constitutionality of legislation Congress passes relying on “Indian” as a political classification to signify citizenship in a Tribal Nation. In *Morton v. Mancari* in 1974, the Supreme Court concluded that the policy of the Bureau of Indian Affairs (BIA) to give preference to hiring Indians over non-Indians did not constitute invidious racial discrimination in violation of the Equal Protection Clause.³²⁶ And in 1978, the same year that ICWA was enacted, the Supreme Court decided *Santa Clara Pueblo v. Martinez*, wherein the Court upheld the inherent right of the Santa

322. *Adoptive Couple* Amicus Brief, *supra* note 282, at 15; *see* § 1903(4) (b).

323. *Adoptive Couple* Amicus Brief, *supra* note 282, at 16; *see* § 1903(4) (b).

324. *Adoptive Couple* Amicus Brief, *supra* note 282, at 16 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)).

325. *Id.*

326. *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

Clara Pueblo to define who could—and who could not—be a citizen of its Nation.³²⁷ Thus, forty years after the passage of the IRA, Congress's efforts to restore tribal self-determination and self-governance through acts of legislation using "Indian" as a criterion were declared fully, and unquestionably, constitutional.

A. *Morton v. Mancari*

In *Morton*, a group of non-Indian employees of the BIA brought a class-action lawsuit challenging the employment preference the IRA created to ensure tribal citizens were hired by the BIA.³²⁸ The Court in *Morton* explained,

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for *Indians* who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified *Indians* shall hereafter have the preference to appointment to vacancies in any such positions.³²⁹

Thus, as discussed above, the IRA defines "Indian" as any member of a Tribal Nation. Several non-Indian BIA employees challenged the preference the IRA created for "Indians" in the BIA, claiming the preference violated the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972 (EEOA)³³⁰ and the Due Process Clause of the Fifth Amendment. A three-judge panel of the district court considered the challenges and determined that in passing the EEOA in 1972, Congress had impliedly repealed the "Indian" preference it put in place in 1934 in the IRA.³³¹ Because the district court determined the 1972 EEOA impliedly repealed the preference in the IRA, the district court did not need to address the constitutional inquiry.³³²

327. *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

328. *Morton*, 417 U.S. at 537.

329. *Id.* at 537–38 (emphasis added) (quoting the Indian Reorganization Act of June 18, 1934, ch. 576, § 12, 48 Stat. 984, 986 (codified as amended at 25 U.S.C. § 5129 (2012))).

330. Equal Opportunity Employment Act of 1972, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

331. *Morton*, 417 U.S. at 536.

332. *Id.* at 540.

The Supreme Court reversed and upheld the hiring preference for Indian employees in the BIA.³³³ The Court made clear that it could not consider whether the prohibitions against racial discrimination in the 1972 EEOA impliedly repealed the hiring preference in the IRA without placing the statutory question in its proper historical context.³³⁴ First, the Court noted that “[t]he preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934.”³³⁵ As such, the Court looked at the statutory purpose of the IRA and determined that the “Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”³³⁶ The Court explained,

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. As discussed above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that institutional changes were required. An important part of the Indian Reorganization Act was the preference provision here at issue.³³⁷

The Court noted that the “Indian” preference in the IRA was one of many preferences Congress had passed since 1934 and further that

[t]he purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.³³⁸

The Court likewise reasoned that “Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians.”³³⁹ This disadvantage, however, did

333. *Id.* at 553–55.

334. *Id.* at 553.

335. *Id.* at 542.

336. *Id.*

337. *Id.* at 553.

338. *Id.* at 541–42.

339. *Id.* at 544.

not support the conclusion that Congress intended for the EEOA to impliedly repeal the IRA's Indian preference because Congress had "explicitly determined that [the] gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government."³⁴⁰ It was within this historical and legal context that the Supreme Court considered whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972 and concluded it was not.³⁴¹

The Court next determined whether the hiring preference constituted invidious racial discrimination in violation of the Fifth Amendment's Due Process Clause.³⁴² Of course, one hundred years before, the authors of the Equal Protection Clause determined that the Civil War Amendments would have no application to Indians on account of their status as citizens of separate sovereigns—Indian Nations—with whom the United States had signed numerous treaties requiring the United States Congress to legislate with regards to Tribal Nations and their citizens.³⁴³ Accordingly, the Court commenced its constitutional analysis by noting that

340. *Id.*

341. *Id.* at 545. The Court's conclusion that Congress did not intend for the EEOA's prohibitions against racial discrimination to repeal the IRA's "Indian" preference was further supported by the fact that "[t]hree months after Congress passed the 1972 amendments, it enacted two new Indian preference laws." *Id.* at 548. As the Court noted,

These [new Indian preference laws] were part of the Education Amendments of 1972. The new laws explicitly require that Indians be given preference in Government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Id. at 548–49 (internal citations omitted).

342. *Id.* at 551.

343. *See* S. REP. NO. 41-268, at 1, 9 (1870) ("[T]he fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes . . . and does not annul the treaties previously made between them and the United States. . . . [T]he Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution." (emphasis added)).

“[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law.”³⁴⁴

The Supreme Court further noted that as a result of the treaties the United States signed, the United States remained legally obligated to provide rations and annuities and perform other duties for citizens of Tribal Nations—an obligation the United States would not be able to fulfill if it could not classify or identify tribal citizens as “Indians” in federal legislation.³⁴⁵ The Court explained,

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.³⁴⁶

The Court, therefore, determined that the hiring preference did not constitute racial discrimination.³⁴⁷ The Court further explained that the preference was not “even a ‘racial’ preference” because “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”³⁴⁸ Therefore, in *Morton v. Mancari*, the Supreme Court confirmed that classifying tribal citizens as “Indians” constitutes a political—and not a racial—classification that does not trigger the Fourteenth Amendment’s prohibitions on racial discrimination.

B. Santa Clara Pueblo v. Martinez

Four years after the Court determined that the use of “Indians” in federal legislation constitutes a political and not a racial classification, the Supreme Court upheld the inherent sovereign right of Tribal Nations to define who are—and who are not—citizens of their Nations. In *Santa Clara Pueblo v. Martinez*, the Supreme Court

344. *Morton*, 417 U.S. at 551.

345. *Id.* at 552.

346. *Id.*

347. *Id.* at 553.

348. *Id.* at 553–54.

considered “whether a federal court may pass on the validity of an Indian tribe’s ordinance denying membership to the children of certain female tribal members.”³⁴⁹

A female citizen of the Santa Clara Pueblo and her daughter sued the Santa Clara Pueblo because a tribal law denied the daughter citizenship on the basis that her father was not a citizen.³⁵⁰ The mother, Julia Martinez, was a member of the Santa Clara Pueblo, and she resided on the Santa Clara Reservation in Northern New Mexico.³⁵¹ She married a citizen of the Navajo Nation and, together they had several children, including Audrey Martinez.³⁵² Two years before Julia’s marriage, the Santa Clara Pueblo passed a law barring admission of the Martinez children to the Tribe because their father was not a citizen of Santa Clara Pueblo. In response, the daughter and mother filed suit, claiming that the rule “discriminates on the basis of both sex and ancestry in violation of Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1303.”³⁵³

The Supreme Court, however, declared that federal courts have no authority to tell a Tribal Nation how it must define its citizenship.³⁵⁴ The Court’s decision was based on respect for the inherent sovereignty of Indian Tribes as separate, Sovereign Nations: “Indian tribes are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.”³⁵⁵ Thus, Tribal Nations have the inherent right to define their own citizenship even if, under the United States Constitution, the citizenship laws could be found violative of the Equal Protection Clause because “[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”³⁵⁶

In line with prior Fourteenth Amendment jurisprudence, the *Santa Clara Pueblo* Court cited its prior decision in *Elk v. Wilkins*, wherein the Supreme Court concluded that the Civil War Amendments have no application to Indian Nations and their

349. 436 U.S. 49, 51 (1978).

350. *Id.* at 51–52.

351. *Id.* at 52.

352. *Id.*

353. *Id.* at 51.

354. *Id.* at 56.

355. *Id.* at 55 (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

356. *Id.* at 56.

citizens because, as the Court reasoned, “the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.”³⁵⁷

Together, *Morton* and *Santa Clara Pueblo* affirm the original, pre- and post-Allotment Era understanding of “Indians” as a political, and not a racial, classification. While *Morton* confirmed that the federal government’s classification of “Indian” refers strictly to a citizen of a Tribal Nation, *Santa Clara Pueblo* upheld the inherent right of Tribal Nations to define who that citizen could be—regardless of American notions of race or sex discrimination originating in the Civil War Amendments. Whereas 1887 to 1934 demarcated an era wherein the federal government imposed minimum blood quantum requirements to strip Tribal Nations of their lands and their citizens, the Supreme Court’s jurisprudence interpreting the IRA confirmed the Act’s success in restoring “Indian” as a political classification and ensuring that Tribal Nations—not the federal government—have the authority to say who is a tribal citizen and who is not.

VI. THE RETURN OF A MINIMUM BLOOD QUANTUM REQUIREMENT IN CURRENT ICWA CONSTITUTIONAL CHALLENGES

“[H]ad Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.”

—*Adoptive Couple v. Baby Girl* (2013)³⁵⁸

In 2013, nearly eighty years after Congress decidedly departed from the Allotment Acts’ imposition of a minimum blood quantum requirement to define tribal citizenship, the United States Supreme Court revitalized the concept of a minimum blood quantum, deeming it relevant to the adjudication of the placement of an Indian child under ICWA.³⁵⁹ In *Adoptive Couple v. Baby Girl*, the Supreme Court considered whether the parental rights of a biological father of an Indian child had been terminated under § 1912(d) such that the father could no longer challenge his daughter’s placement with outside adoptive parents.³⁶⁰

357. *Id.* at 71 (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)).

358. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013).

359. *See id.* at 2552.

360. *Id.*

Although the question involved a purely legal issue of statutory interpretation regarding the termination of parental rights under 25 U.S.C. § 1912(d), Justice Alito began his opinion for the majority by announcing the Indian child's blood quantum, stating, "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."³⁶¹ Of course, under the law, the child's blood quantum is entirely irrelevant to the question of whether parental rights have been lawfully terminated to allow for her adoption under § 1912(d).³⁶²

However, instead of simply focusing on whether the father's parental rights had been lawfully terminated under § 1912(d), the Supreme Court based its decision, in part, on the fact that "had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."³⁶³ For the first time since Congress ended the Termination Era altogether, a lack of sufficient blood quantum was used as a factor in determining whether an individual could be considered "Indian" under federal law. Only this time it was the Court—and not Congress—threatening to substitute a Tribal Nation's inherent right to define its own citizenship with an unspecified amount of judicially defined minimum amount of blood quantum.

A review of the Supreme Court's rhetoric at oral argument and its final decision in *Adoptive Couple* reveals that the Court's problem was not that Baby Girl was "Indian," but rather, the Court opined that she was not *Indian enough*.³⁶⁴ In this regard, the Court's use of blood quantum to undermine Baby Girl's Cherokee Nation citizenship eligibility and the transfer of a child to non-Indian parents is no different than the imposition of a minimum amount of blood quantum to define tribal citizenship in the implementation of the Burke Act.³⁶⁵ In both instances, the sufficiency of a tribal citizen's blood quantum is questioned in order to transfer Indian lands—or Indian children—from the Tribal Nation to non-Indian ownership.³⁶⁶

361. *Id.* at 2556.

362. *See* 25 U.S.C. § 1912(d) (2012).

363. *Adoptive Couple*, 133 S. Ct. at 2559.

364. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 328 (2015); *see Adoptive Couple*, 133 S. Ct. at 2556; Transcript of Oral Argument, *supra* note 1, at 38–43.

365. Berger, *supra* note 364, at 328.

366. *Id.* at 330–31.

The blood quantum arguments and questions advanced by the Supreme Court at oral argument and in the final *Adoptive Couple* opinion are not new. They are entirely unoriginal, as they trace their origins to the federal allotment policies designed to eliminate tribal lands and citizens and ultimately alter the United States' treaty obligations to Tribal Nations. Indeed, the comments made by the Justices during oral argument closely mirror the sentiments expressed by the Congress that enacted the Dawes Act and subsequent Allotment Era statutes,³⁶⁷ as well as those members of Congress who opposed the restoration of sovereignty over tribal citizenship in the IRA.³⁶⁸

At oral argument, the Justices asked numerous questions designed to highlight, question, or target the Indian child's blood quantum as a basis for disqualifying her from eligibility for Cherokee Nation citizenship.³⁶⁹ For instance, Chief Justice Roberts inquired,

If—if you had a tribe, is there at all a threshold before you can call, under the statute, a child an “Indian child”? 3/256ths? And what if the tribe—what if you had a tribe with a zero percent blood requirement; they're open for, you know, people who want to apply, who think culturally they're a Cherokee or—or any number of fundamentally accepted conversions.³⁷⁰

And just a few moments later, the Chief Justice returned to the question of blood quantum, stating, “I'm just wondering is 3/256ths close—close to zero?”³⁷¹ Justice Breyer went further, questioning Baby Girl's eligibility for citizenship in the Cherokee Nation because “it appears in this case [the Biological Father] had three Cherokee ancestors at the time of George Washington's father.”³⁷²

Of course, none of these Justices would question the inherent sovereignty of the United States to grant American citizenship to the

367. See 42 CONG. REC. 449, 60th Cong., 1st Sess. (1908). For example, in arguing for the removal of restrictions on Indian lands in Oklahoma, Representative Carter stated, “As a matter of fact, they are not real Indians as you understand that term. A great majority of them are mixed-blood Indians, with a small degree of Indian blood. . . . [T]he actual Indian, the real full-blood Indian, only represents a very small minority of people.” *Id.*

368. See *Senate Committee Hearing on Self-Government*, *supra* note 2, at 263–64; Transcript of Oral Argument, *supra* note 1, at 38–43.

369. See Transcript of Oral Argument, *supra* note 1, at 38–43.

370. *Id.* at 38–39.

371. *Id.* at 42–43.

372. *Id.* at 40.

child of an American citizen, even if that child's lineage was occupied by a majority of non-American ancestors making her percentage of American ancestors "close to zero." The idea that a citizen of the Cherokee Nation cannot give birth to or create a new generation of Cherokee Nation citizens without a certain degree of blood quantum is not derived from the Cherokee Nation's law or values—instead, such an idea traces its origins to a time in American history when lawmakers sought, unsuccessfully, to eradicate the citizens of Tribal Nations altogether.

Ultimately, the Supreme Court refused to apply a plain reading of ICWA's text and evaluate whether the parental rights of Baby Girl's father had been lawfully terminated because, as the majority determined, to do so "would put certain vulnerable children at a great disadvantage solely because *an ancestor—even a remote one—was an Indian*," an interpretation that "would raise equal protection concerns."³⁷³ That is, relying on the determination that Baby Girl's blood quantum did not meet some undefined minimum threshold, the Court replaced her father's citizenship in the Cherokee Nation with the concept that ICWA was triggered based on her ancestry alone. In this regard, ancestry became another way for the Court to promote the concept that, below a certain minimum threshold blood quantum, one can no longer be a tribal citizen or, ultimately, an "Indian" under federal law.

The ultimate irony of the Supreme Court's introduction of a minimum amount of blood quantum as a relevant factor in its ICWA analysis is that the Court's injection of race into a political classification has inspired a series of lawsuits that challenge ICWA's "Indian child" definition as an impermissible racial classification under the Fourteenth Amendment's Equal Protection Clause.³⁷⁴ Such a conclusion, of course, contradicts the Supreme Court's prior decision in *Elk v. Wilkins*, in which the Court concluded that the authors of the Fourteenth Amendment intended to exclude "Indians" based on their political classification, meaning that

373. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013) (emphasis added).

374. Other constitutional challenges to ICWA have been asserted, such as the use of the Commerce Clause as a basis for legislating Indian child welfare; however, the same historical facts that invalidate any equal protection argument apply to these other constitutional challenges as well. Such other challenges are discussed in numerous other articles and are not directly pertinent to this article's thesis.

“Indians” refers to members of “distinct political communities” or separate Sovereign Nations.³⁷⁵

The Supreme Court’s “near zero” blood quantum/ancestry dicta in *Adoptive Couple* likewise contradicts the Court’s conclusion in *Morton v. Mancari*, in which the Court held that following Congress’s departure from the Allotment Acts’ reliance on a threshold amount of blood quantum to define citizenship, post-1934, “Indian” under federal law signifies citizenship in a Tribal Nation and is therefore a political, and not a racial, classification.³⁷⁶ And the Supreme Court’s suggestion that it could impose a minimum blood quantum requirement to define Cherokee Nation citizenship directly contradicts the Court’s affirmance in *Santa Clara Pueblo v. Martinez* of the inherent right of Tribal Nations to define their own citizenship.

And yet, despite this jurisprudential dissonance, because of *Adoptive Couple*’s blood quantum/ancestry dicta, agencies that work to place Indian children in non-Indian homes are leading the way in bringing race-based constitutional challenges to ICWA’s “Indian child” classification.

On May 27, 2015, National Council for Adoption filed a lawsuit in the United States District Court for the Eastern District of Virginia, challenging ICWA as unconstitutional under the Equal Protection Clause.³⁷⁷ Shortly thereafter, on July 6, 2015, the Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute followed suit, filing claims in the United States District Court for the District of Arizona, alleging that ICWA’s “Indian child” classification is racial and therefore unconstitutional under the Equal Protection Clause.³⁷⁸ Both actions challenge the constitutionality of ICWA and, in doing so, specifically attack the Cherokee Nation’s Constitution and citizenship requirements—in addition to the constitutions and laws of several other Tribal Nations.

Like the majority in *Adoptive Couple*, these two lawsuits challenge the inherent right of Tribal Nations to establish citizenship requirements void of a minimum amount of blood quantum. Ultimately, they invite the federal government to, once again,

375. 112 U.S. 94, 111 (1884).

376. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court’s Changing Vision*, 55 U. PITT. L. REV. 1, 80 n.335 (1993).

377. Nat’l Council Complaint, *supra* note 28, at ¶¶ 5, 6, 7, 53, 65, 106–128.

378. Goldwater Litigation Complaint, *supra* note 3.

attempt to eradicate its federal trust responsibility to citizens of Tribal Nations.

A. National Council for Adoption v. Jewell

On May 27, 2015, National Council for Adoption filed a lawsuit in the Eastern District of Virginia, naming then-Secretary of the Interior Sally Jewell and then-Assistant Secretary Kevin Washburn as defendants.³⁷⁹ National Council's lawsuit challenges the constitutionality of the Bureau of Indian Affairs' 2015 "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings," as well as the constitutionality of ICWA as applied to "Indian children," on the basis that the 1978 statute constitutes an impermissible race-based classification that violates Equal Protection.³⁸⁰

While Chief Justice Roberts, Justice Breyer, and Justice Alito questioned whether a minimum amount of blood quantum must be required before someone would be permitted to enroll as a tribal citizen under federal law, National Council's complaint attempts to revise the "Indian child" definition in ICWA by conflating Indian ancestry with tribal membership.³⁸¹ Of course, membership in a Tribe is determinative of a child's status as an "Indian child" under ICWA, not ancestry. For instance, National Council posits that "most children are classified as 'Indian children' under the 2015 Guidelines' interpretation of ICWA based *solely on their ancestry*."³⁸²

National Council's assertion that "most children are classified as 'Indian children' . . . based solely on their ancestry" is directly contradicted by the plain language of the statute itself. Congress made ICWA's definition of "Indian child" contingent upon tribal citizenship.³⁸³ 25 U.S.C. § 1903(4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

379. Nat'l Council for Adoption v. Jewell, 156 F. Supp. 3d 727, 730 (E.D. Va. 2015).

380. *Id.*

381. Nat'l Council Complaint, *supra* note 28, at ¶¶ 106–109.

382. *Id.* (emphasis added).

383. 25 U.S.C. § 1903(4) (2012).

Thus, for ICWA to apply, either the child must already be an enrolled citizen at the time of the state proceedings or the child's parent must be an enrolled citizen and the child herself must be eligible for citizenship under her Tribe's unique citizenship requirements.³⁸⁴ This limited definition confirms the congressional purpose behind ICWA: in instances where a child is already a citizen, or is eligible for citizenship and her parent has elected to maintain his citizenship, then the child's Tribal Nation has a sovereign, political interest in where that child is placed.³⁸⁵

"Indian child" under ICWA, therefore, turns on whether the child's parent has maintained a political relationship with a Sovereign Tribal Nation such that the child, or the parent, is enrolled. A child is not—as National Council posits—an "Indian child" because she has an ancestor who was once a tribal citizen. Indeed, there are thousands—if not millions—of American children who have Indian ancestors but do not constitute "Indian children" under ICWA because neither they nor their parents are enrolled citizens of a Tribal Nation.

Whether or not one's ancestors are "Indians" has no bearing on ICWA's application, and yet National Council has made ancestry its focal point for the equal protection challenge it brings, asserting that ICWA "impermissibly discriminates against birth parents of 'Indian children' by limiting adoptive placements based on the 'Indian' ancestry of those children in violation of the equal protection rights secured by the Fifth Amendment."³⁸⁶ That is, with complete disregard for the fact that a child's designation as "Indian child" under ICWA is contingent upon the parent's decision to enroll either himself or his child—and not the mere existence of some tribal citizen ancestor in the past—National Council's complaint avers that "ICWA violates the due process and equal protection rights of 'Indian children'" because the Act "discriminates against those children on the basis of their 'Indian' ancestry."³⁸⁷

To be fair, National Council finds support for its mischaracterization of ICWA's "Indian child" definition in the comments made by several Justices during the *Adoptive Couple* oral argument. For instance, Justice Breyer commented that Baby Girl's citizenship eligibility in the Cherokee Nation was contingent upon

384. *See id.*

385. *See id.* § 1901 (stating the congressional findings and the purpose of ICWA).

386. Nat'l Council Complaint, *supra* note 28, at ¶ 6.

387. *Id.*

the fact that her father “had three Cherokee ancestors at the time of George Washington’s father,”³⁸⁸ which implies that ICWA’s “Indian child” definition is based on ancestry. It is not. Baby Girl is not an “Indian child” because she has ancestors who were Cherokee at the time of George Washington. She is an “Indian child” because her *father* is a citizen of the Cherokee Nation, and she is his biological child, and under the Cherokee Nation’s laws, she is eligible for citizenship (if not yet already enrolled).³⁸⁹

Justice Breyer’s substitution of ancestry for political citizenship would erroneously bring many non-Indian Americans, such as Senator Elizabeth Warren, into ICWA’s reach. Senator Warren’s children could never be “Indian children” under ICWA, however, because they are not enrolled in the Cherokee Nation and neither is their parent, Senator Warren.

Indian ancestry has no bearing on ICWA’s application, and yet, it has become the foundation for the recent constitutional challenges brought against the Act.

B. A.D. v. Washburn—The Claim

Less than two months after National Council filed its lawsuit, the Goldwater Institute followed suit, also challenging ICWA as relying upon a race-based classification in violation of the Fourteenth Amendment’s Equal Protection Clause.³⁹⁰ The Goldwater Institute openly acknowledges that its “case is a successor to *Adoptive Couple v. Baby Girl*, . . . challeng[ing] the constitutionality of provisions of the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901, et seq.”³⁹¹

In its Opposition to Defendants’ Motion to Dismiss, the Goldwater Institute states,

In *Baby Girl*, the United States and others pressed an interpretation of ICWA that the Court concluded ‘would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian,’ an interpretation that ‘would raise equal protection concerns.’ Here, plaintiffs challenge ICWA

388. Transcript of Oral Argument, *supra* note 1, at 40.

389. Berger, *supra* note 364, at 327.

390. See generally Goldwater Litigation Complaint, *supra* note 3.

391. Plaintiffs’ Response to Defendants’ Motion to Dismiss, *supra* note 70, at 1.

provisions on their face and as applied by defendants that do exactly that.³⁹²

Just as the majority in *Adoptive Couple* attempted to re-write ICWA and render the “Indian child” classification contingent upon the identification of an Indian ancestor, the Goldwater Institute’s action attempts to insert the words “Indian ancestor” or “ancestry” into ICWA’s “Indian child” definition. A plain reading of the statute—as well as an understanding of the evolution of “Indian” under federal law—reveals that the Goldwater Institute’s insertion of “Indian ancestor” is nothing more than an attempt to create a racial classification where none exists.

To be clear, ICWA’s “Indian child” definition renders the identity of an “Indian child” contingent upon the political citizenship of one of the child’s biological parents—not ancestor—or the biological parent’s decision to enroll his or her child, if the child is already a tribal citizen at the time of the adoption proceedings.³⁹³ ICWA’s “Indian child” definition, therefore, is not connected or at all related to the identification of some ancient, phantom Indian ancestor that the Goldwater Institute hypothesizes. As discussed above, many Americans may be able to trace their bloodline to “Indian ancestors;” however, if their parents did not elect to enroll in a Tribal Nation or if they do not meet the unique citizenship requirements of their Nation, they will never qualify as an “Indian child” under the Act. Qualifying as an “Indian child,” accordingly, is a not question of ancestry. Instead, it is a classification that reflects the political affiliations of the child’s biological parent³⁹⁴—just as citizenship in the United States is contingent upon the choice of a biological parent to maintain, affirm, or expatriate oneself from United States citizenship.

A review of the Goldwater Institute’s complaint and preliminary motion papers reveals that the Institute’s constitutional challenge is predicated almost entirely on the insertion of the words “Indian ancestry” or “Indian ancestor” into ICWA’s definition of “Indian child.” Many of the Institute’s constitutional challenges hinge on ancestry, with the following being examples:

- “ICWA[] . . . violate[s] the substantive due process rights of children with Indian ancestry, and those of adults involved

392. *Id.* at 1 (citation omitted) (quoting *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013)).

393. 25 U.S.C. § 1903(4)(b) (2012).

394. Berger, *supra* note 364, at 327.

in their care and upbringing who have an existing family-like relationship with the child.”³⁹⁵

- “[The implementation of ICWA’s provisions] ha[ve] caused significant emotional and psychological harm to baby boy C. who, through no fault of his own, has to leave the security of his home and visit with strangers solely because he was born with Indian ancestry.”³⁹⁶

Thus, the Goldwater Institute’s first step in creating a racial classification is to replace ICWA’s tribal citizenship requirement in § 1903(4) with Indian ancestry—despite the fact that the word “ancestry” appears nowhere in the statute. The Goldwater Institute next equates Indian ancestry with race, asserting that “children with Indian ancestry are singled out and afforded separate, unequal treatment resulting in delayed resolution of foster care placement and termination of parental rights proceedings of children with Indian ancestry, based solely on their race.”³⁹⁷ Additional examples of how the Goldwater Institute equates “ancestry” with “race” include the following:

- “This separate, unequal treatment of children with Indian ancestry is based solely on the child’s race.”³⁹⁸
- “[The provisions of ICWA] deprive children with Indian ancestry of an individualized race-neutral determination that all other children enjoy under state law.”³⁹⁹
- “[U]nder ICWA, these families are subjected to procedural and substantive provisions that are based solely on the race of the children and the adults involved, which lead to severe disruption in their lives contrary to the children’s best interests.”⁴⁰⁰
- “All of the Indian children and all of the parents who are seeking to care for and adopt them are affected by ICWA on the basis of the race of these children.”⁴⁰¹

Just as National Council picked up on the *Adoptive Couple* Court’s imposition of an undefined minimum amount of blood

395. Goldwater Litigation Complaint, *supra* note 3, ¶ 99.

396. *Id.* at 6–7 (emphasis added).

397. *Id.* at 15 (emphasis added).

398. *Id.* at 17 (emphasis added).

399. *Id.* at 20–21 (emphasis added).

400. *Id.* at 7 (emphasis added).

401. Plaintiffs’ Motion for Class Certification at 9, *A.D. v. Washburn*, No. 2:15-CV-01259-PHX-NVW (D. Ariz. filed Aug. 21, 2015), 2017 WL 1019685 [hereinafter Goldwater Class Certification Motion].

quantum necessary for tribal citizenship under ICWA, the Goldwater Institute followed suit and cited the absence of an unspecified threshold amount of blood quantum in the citizenship requirements of Tribal Nations as yet another basis to conclude that ICWA's "Indian child" definition constitutes an impermissible race-based classification. Like National Council, the Goldwater Institute repeatedly decries the failure of several Tribal Nations to impose a minimum amount of blood quantum before recognizing an individual as a citizen in statements such as the following examples:

- "Some of the tribes consider individuals with only a tiny percentage of Indian blood to be Indian, even if they have little or no contact or connection with the tribe. *See, e.g.*, Cherokee Nation Const. art. IV, § 1."⁴⁰²
- "Thus, in many instances, children with only a minute quantum of Indian blood and no connection or ties to the tribe are subject to ICWA and relegated to the tribe's exclusive or concurrent jurisdiction."⁴⁰³

ICWA only inquires as to whether a child is a citizen of a Tribal Nation or the biological child of a citizen and also eligible for citizenship. However, in its complaint, the Goldwater Institute repeatedly points out the lack of a blood quantum requirement for the children on whose behalf the Institute purports to sue. For instance, the Goldwater Institute identifies Baby Girl A.D. as having "more than 50% non-Indian blood."⁴⁰⁴ And the Institute identifies Baby Boy C. as having "more than 50% Hispanic blood."⁴⁰⁵ The Goldwater Institute then concludes that "[b]y virtue of ICWA, the tribes make the primary determination whether children with a specified blood quantum will be brought within their jurisdiction and control."⁴⁰⁶ This, of course, is not true based on a reading of the plain language of the statute in § 1903(4). Under § 1903(4), a parent can disenroll him or herself (and the child, if the parent previously enrolled the child), and then the child would no longer qualify as an "Indian child" under ICWA, regardless of blood quantum or the existence of an Indian ancestor. ICWA places the "primary determination," as the Institute labels it, in the hands of the child's biological parents.

402. Goldwater Litigation Complaint, *supra* note 3, ¶ 41.

403. *Id.* ¶ 42.

404. *Id.* ¶ 9.

405. *Id.* ¶ 10.

406. *Id.* ¶ 115.

Yet, by inserting blood quantum and an Indian ancestor into § 1903(4), the Goldwater Institute claims that ICWA's application is contingent upon a racial classification that violates the Fourteenth Amendment's Equal Protection Clause. In direct contradiction to the authors' conviction that the Civil War Amendments would in no way prohibit the federal government from classifying individuals as "Indians" based on their citizenship in a Tribal Nation, the Goldwater Institute repeatedly cites equal protection as the basis for the Institute's constitutional challenge, such as in the following allegations:

- "There can be no law under our Constitution that creates and applies pervasive separate and unequal treatment to individuals based on a quantum of blood tracing to a particular race or ethnicity. This country committed itself to that principle when it ratified the Fourteenth Amendment and overturned *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and when it abandoned *Plessy v. Ferguson*, 163 U.S. 537 (1896)."⁴⁰⁷
- "Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*. Alone among American children, their adoption and foster care placements are determined not in accord with their best interests but by their ethnicity, as a result of a well-intentioned but profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act (ICWA), codified at 25 U.S.C. §§ 1901–1963."⁴⁰⁸
- "[T]he adoption placement preferences provision of ICWA, and New Guidelines, all subject Plaintiffs to unequal treatment under the law based solely on the race of the child and the adults involved and are therefore unconstitutional under the equal protection guarantee of the Fifth Amendment."⁴⁰⁹
- "[The State official's] compliance with and enforcement of these provisions subjects Plaintiffs to unequal treatment under color of state and federal law based solely on the race of the child and the adults involved and therefore deprives Plaintiffs of equal protection of the law under the Equal

407. *Id.* ¶ 1.

408. *Id.* ¶ 3.

409. *Id.* ¶ 94.

Protection Clause of the Fourteenth Amendment. *See* 42 U.S.C. § 1983.⁴¹⁰

- “The defendants’ implementation of the Indian Child Welfare Act (ICWA), codified at 25 U.S.C. §§ 1901–1963, has given rise to a separate and unequal child custody and welfare system, a system in which Indian children are treated as second class citizens. The Constitution does not tolerate a system that separates children based on race and subjects them to separate and unequal treatment. ICWA is such a law.”⁴¹¹

If the Goldwater Institute’s arguments seem confusing or contradictory, this is because they are. Their theoretical acceptance requires ignoring the historical foundations and creation of the very constitutional amendment upon which they rely. For instance, the Fourteenth Amendment authors made clear that the Amendment in no way infringed on the federal government’s ability to legislate with regard to “Indians” because “Indians” refers to citizens of Tribal Nations, and if the federal government could not legislate with regard to citizens of Tribal Nations, the government would be unable to fulfill its treaty obligations to tribal citizens.⁴¹²

As discussed above, the Fourteenth Amendment did not make Indians citizens of the United States, and it was not until 1924, when Congress passed the Indian Citizenship Act,⁴¹³ that Indians became United States citizens. Ironically, the Goldwater Institute posits that tribal citizenship is somehow irrelevant to ICWA’s true application because “[t]he citizenship that is relevant here is American citizenship.”⁴¹⁴ Under the Institute’s constitutional theory, however, the 1924 Act that made American Indians “American citizens” would be unconstitutional, and Indians would have *no* American citizenship.⁴¹⁵

C. *A.D. v. Washburn—Decision on the Motion to Dismiss*

On March 16, 2017, the United States District Court for the District of Arizona issued its decision on the motions to dismiss filed

410. *Id.* ¶ 107.

411. Goldwater Class Certification Motion, *supra* note 401, at 2.

412. *See* S. REP. NO. 41-268, at 1 (1870).

413. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)).

414. Plaintiffs’ Response to Defendants’ Motion to Dismiss, *supra* note 70, at 10.

415. *See* *Elk v. Wilkins* 112 U.S. 94, 119–20 (1884).

by the United States, the State of Arizona, and the two intervenor-defendants, the Gila River Community and the Navajo Nation.⁴¹⁶ The district court began its analysis by noting that “[i]n this action the adult Plaintiffs and those who have undertaken to speak for the child Plaintiffs attempt to challenge parts of the Indian Child Welfare Act (“ICWA”) as unconstitutional racial discrimination.”⁴¹⁷ In its decision, the district court dismissed *all* of plaintiffs’ claims that ICWA’s “Indian child” classification constitutes “unconstitutional racial classification.”⁴¹⁸

The district court’s decision, however, was not predicated on principles related to equal protection or racial discrimination, but rather, the district court ordered that “all of the pending motions to dismiss the Amended Complaint will be granted, and the Amended Complaint will be dismissed for lack of jurisdiction and lack of standing.”⁴¹⁹ Quoting precedents such as *Lujan v. Defenders of Wildlife*, the court dismissed the Goldwater Institute plaintiffs’ claims for failure to allege an actual injury “fairly traceable” to the application of ICWA—a deficiency that left the court without jurisdiction under Article III of the Constitution to hear their claims.⁴²⁰ One by one, the court addressed each statute and Guidelines section challenged and noted that Plaintiffs had failed to allege any facts that could demonstrate that the adoptive placements of the children they claimed to sue on behalf of had been delayed or in any way prejudiced by the application of ICWA.⁴²¹

416. *A.D. v. Washburn*, No. 15-CV-01259-PHX-NVW, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017).

417. *Id.* at 2.

418. *Id.* at 11–17.

419. *Id.* at 18.

420. *Id.* at 8 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

421. *See id.* at 11 (“[T]he Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1911(b).”); *id.* at 13 (“[T]he Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(d).”); *id.* at 14 (“[T]he Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(e).”); *id.* at 14 (“[T]he Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1912(f).”); *id.* at 16 (“[T]he Amended Complaint does not allege facts showing that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1915(a).”); *id.* at 17 (“[T]he Amended Complaint does not allege facts showing

The court went further, noting that although “Plaintiffs initiated this action on July 6, 2015, alleging a putative class so numerous that joinder of all members [was allegedly] impracticable,” as of March 2017, they had remained unable to locate or identify a single Indian child who had suffered the harms they claimed to be caused by ICWA.⁴²² Consequently, after nearly two years of searching, Plaintiffs remained unable to locate “any plaintiffs with standing to challenge any provisions of ICWA or the 2015 Guidelines.”⁴²³ The court admonished Plaintiffs that “[a]ny true injury to any child or interested adult can be addressed in the state court proceeding [where the ICWA proceeding takes place], based on actual facts before the court, not on [the] hypothetical concerns” Plaintiffs brought to the federal district court.⁴²⁴

Ultimately, the Goldwater Institute Plaintiffs’ inability to locate a single Indian child who has suffered the harms that the Goldwater Institute claims to be caused by ICWA reveals that their lawsuit is not predicated on any actualized harm. Instead, the Goldwater Institute’s claims trace their origins to a time in United States history when the federal government imposed minimum blood quantum requirements to eliminate the individuals who could be classified as citizens of Tribal Nations—and thus “Indians” under federal law. Indeed, the Goldwater Institute Plaintiffs’ suggestion that children without a certain minimum amount of “Indian” blood should not be classified as “Indian” under federal law is just as “benevolent” and “beneficial” to Indians as the Allotment Acts that originated the blood quantum concept one hundred years before.

VII. CONCLUSION

The recent suggestion by some Supreme Court Justices that a minimum amount of blood quantum must be required before a citizen of a Tribal Nation can constitute an “Indian child” under ICWA is not a new, or even original, concept. Instead, it finds its origins in a period in American history where the imposition of a minimum amount of blood quantum was used to attempt to eradicate Tribal Nations altogether. When analyzed in their proper

that any of the Plaintiffs suffered a concrete and particularized injury, actual or imminent, and fairly traceable to § 1915(b).”).

422. *Id.* at 19.

423. *Id.*

424. *Id.*

historical context, it is clear that the current constitutional attacks on ICWA find no support in the actual text or legislative history of the Fourteenth Amendment itself.

At the turn of the twentieth century, Congress was the branch of the federal government that attempted to impose minimum blood quantum requirements to extinguish Tribal Nations and their citizens. Today, it is the Supreme Court. Congress, of course, ultimately dismissed the imposition of a federally mandated minimum blood quantum to define eligibility for tribal citizenship.

One can only hope, therefore, that when ICWA is analyzed in the full historical and legal context, the Supreme Court will acknowledge that the constitutional challenges in the National Council and Goldwater Institute lawsuits have no basis in the United States Constitution, nor in the historical sovereign-to-sovereign relations between Indian Nations and the United States. Instead, the current blood quantum-based challenges to ICWA trace their origins to an American policy wrongfully designed to eradicate Tribal Nations and their citizens. National Council and the Goldwater Institute have returned to the same minimum blood quantum concept used during the Allotment Acts—the only distinction being that instead of trying to remove tribal lands from Tribal Nations, they seek to remove tribal citizens, specifically Indian children.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School *of* Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu