CHAPTER 4

TRIBAL CITIZENSHIP

The law of tribal citizenship or membership (the terms "citizenship" and "membership" will be used interchangeably in this book) is the most fundamental to Indian nations. The law of tribal citizenship determines who is an Indian for purposes of eligibility for tribal government and for services and benefits such as housing, health, education, and employment. In recent years, as some Indian nations have chosen to distribute gaming wealth to tribal members, tribal membership has acquired an economic value, sometimes making tribal members incredibly wealthy. This value may have encouraged some Indian nations to pursue the thinning of their membership ranks through disenrollment proceedings. In no short order, tribal citizenship disputes are among the most "bitter" and "heartwrenching" cases, to quote Frank Pommersheim. In other words, such disputes create a civil war of sorts.

Extended family relationships used to form the backbone of traditional American Indian governments — for example, the Anishinaabe family governance — with membership in a community being based on family relationships almost exclusively. The key rules regulating the relationships of these communities, which were very small in number of members, often derived from a clan system. For example, one could not marry into one's own clan, which provided some assurance that one was not marrying a close relative. This meant, for example, that innumerable Anishinaabek would marry outside of their small communities, creating complicated family relationships that extended beyond villages. In this way, to a great extent — since so many Michigan Ottawas from Grand Traverse Bay married Chippewas from Sault Ste. Marie, for example — the family relationships cemented political relationships between the bands. However, residence determined final membership in a community, so that an Anishinaabekwe (Anishinaabe woman) who moved in with her spouse's family in another village became a member of that community, and vice versa.

The classic Anishinaabe example is the story of Leopold Pokagon. Leopold, born into an Ottawa or Ojibwe community in the late eighteenth century in northern lower Michigan, married a Potawatomi woman from the St. Joseph River basin. He moved south to live with her family, which was one of the most prominent families in the region. Leopold developed influence and authority

over time, was adopted by the local tribal community, and eventually represented his community in the fateful 1833 treaty council. That treaty resulted in the forced removal of all the Michigan and northern Indiana Potawatomis to Kansas and later Oklahoma — except for Leopold's band, which the United States allowed to remain in Michigan due to his negotiating tactics and skills. And so the federally recognized Indian tribe known as the Pokagon Band of Potawatomi Indians is named after someone who started his life as an Ottawa or Ojibwe Indian.

This traditional form of family and village membership often survived in many Indian nations until the early part of the twentieth century, when the United States began to interject blood quantum requirements into federal-tribal relations. The government accomplished this feat in different ways. First, the United States incorporated blood quantum requirements into treaties. Much treaty language appears to assume that most Indians subject to the treaties were full-blood Indians, but the treaty had provisions for half-blood Indians, likely at the request of the tribal treaty negotiators. From the point of view of Indian leaders, these half-blood Indians were family members. From the point of view of the federal government, these half-blood Indians were problems. They were not true Indians, and might not even be Indians anymore. And they were not white, either. This mixed racial status, combined with requests from the tribal leadership to include them in the benefits of the treaty, appears to have confused U.S. government officials. Moreover, especially during a later treaty council, many of these half-blood Indians participated in the treaty negotiations as English-speaking, educated Indians, making more trouble for the U.S. government treaty commissioners.

Second, the federal government continued to informally recognize many Indian tribes as half-blood Indian communities. Statutes in 1921 and 1924 referenced earlier formalized the duty of the Department of Interior to provide services to all half-blood Indians, and the 1934 Indian Reorganization Act continued this requirement.

Third, after tribal communities would sue the United States for an accounting of treaty annuities promised under various treaties or other claims, the federal government often ordered the creation of a judgment roll for the purpose of paying out the judgment on a per capita basis. These rolls often served to create two classes of individuals: full-bloods and half bloods.

Fourth, and more generally, the federal government conditioned some federal programs on blood quantum.

But the recognition of blood quantum in these three areas — and others — has helped to create crises regarding Indian citizenship that undermined the family orientation of Indian tribes and forced the creation of an American-style citizenship regime based on blood quantum, as opposed to tribal membership based on family relationships.

Federal Indian law principles leave tribal membership up to Indian nations. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978), Justice Marshall wrote: "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." But as much of the material in this chapter demonstrates, tribal control over its own membership criteria often is illusory.

A. TRIBAL CITIZENSHIP CRITERIA

Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States

Kirsty Gover, 33 Am. Indian L. Rev. 243, 262-73 (2008-2009)

. . .

III. The Federal Concept of Blood Quantum and Its Enduring Influence on Tribes

A. The Indispensability of Indianness in the Federal Conception of Tribes

Notwithstanding the formal autonomy of tribes in membership governance and the rarity of congressional interventions, the federal concepts of Indianness and tribalism have an enduring influence on tribes. It is important, then, to consider the logic underpinning these concepts in federal policy. This helps to show the way tribes have adopted, adapted, and resisted federal preferences in the design of membership rules.

Since the 1930s, federal policy on tribal membership has been organized around the principle that persons should be enrolled in a tribe only if they can be expected to "participate in tribal relations and affairs." . . . In addition to insisting that the relation between members and tribes be political, the federal government also believes that tribes should be comprised of persons who are Indian. When reviewing tribal constitutions, the Department of the Interior has historically acted to "prevent . . . the admission to tribal membership of a large number of applicants of small degree of Indian blood" and has further attempted to limit discretionary adoptions to "person[s] of Indian descent related by marriage or descent to the members of the tribe." Hence the view expressed by the Department's solicitor in 1969 that "[m]embership of non-Indians in the past as 'naturalized citizens' of Indian tribes . . . reflects the political nature of Indian tribes; however, recognition given Indians and Indian tribes by the United States Government is in essence a recognition of race."

Therefore, federal ideology on tribalism has long been dependant on the idea that tribes are politically organized, racially-Indian communities. However, the federal emphasis on Indian blood quantum is a relatively more recent phenomenon. It is commonly assumed that Indian blood quantum was the federal government's preferred membership rule in the IRA era and that it was imposed on the tribes during that period through the Department's drafting and approval of constitutions. In fact, constitutional membership regimes enacted during the IRA era were not heavily reliant on Indian blood quantum. Less than half used a blood-quantum rule, compared to seventy percent today. Instead, blood-quantum rules were only to be deployed as a stand-in where a two-parent enrollment rule or a residency rule could not be used[.] . . . Indian blood rules are more frequently used in tribal constitutions after 1960, where there has been a break in continuity between the recognition of a tribe for IRA purposes and the drafting of a formal constitution.

B. Indian Blood Quantum and the Sovereign Status of Tribes

The federal concept of tribes as politically-organized racially-Indian communities has important normative consequences. From the standpoint of federal policy, if these elements of tribalism are missing or attenuated, the sovereign status of the tribe is jeopardized. . . . According to this logic, a tribe's sovereign status could be withdrawn by an act of Congress or federal court on the grounds that the community is no longer sufficiently tribe-like to exercise tribal sovereignty. The Department's view is revealed in its advice to the Lac Courte Oreilles Band of Lake Superior Chippewa Indians in 1992:

> We share your concern about eliminating the blood quantum in favor of mere descendancy. . . . If there ceases to exist a demonstrable bilateral, political relationship between a tribe and its members, the courts or Congress may well decide that a tribe has so diluted the relationship between a tribal government and its members that it has "self-determined" its sovereignty away.

. . . In the landmark Supreme Court case of *Morton v. Mancari*, [417 U.S. 535 (1974),] legislation directed to "Indians" was found to be shielded from strict scrutiny. . . . The regulation in question (the BIA's hiring preference for Indians) was limited to tribal members of a specified blood quantum, and on this basis, the Court found that it was "not directed towards a 'racial' group consisting of 'Indians'; instead, it applied only to members of 'federally recognized' tribes." Because it operated to "exclude many individuals who are racially to be classified as 'Indians' . . . the preference [was] political rather than racial in nature."

Extrapolating from this finding, the Department asserts that it is the political relationship between tribes and their members that saves special measures for Indians from the category of constitutionally impermissible racial classifications. If the political relationship is lost, so too is the protection of the federal-Indian trust relationship. The tribe becomes a racial association, and all special measures applying to it are rendered suspect. . . . Importantly, the Department considers blood quantum to be a measure of a person's political relationship to the tribe.

Because it constructs blood quantum as evidence of political relations, federal policy contains the prior notion that intra- and inter-tribal endogamy is a display of political affiliation. By implication, exogamous marriage (marriage to a person who is not the descendant of a tribal member) is equated to "out-marriage." In this model, the tribal spouse and his or her children assimilate into a non-Indian community and the non-tribal spouse is not integrated into the tribe. The result is a particular understanding of blood-quantum rules as tied intrinsically to the idea of a tribe as a political entity. . . .

[W]hile the Department has never formally refused to approve an IRA constitution or constitutional amendment on the basis of its over-inclusivity, its position is as follows: "If an amendment to a tribal constitution would change the requirements for membership from those which would evidence some continuing relationship with the tribe or other tribal members to requirements which could evidence only descendancy, the Secretary could in his discretion disprove it." This could occur, for instance, where a tribe seeks to amend its constitution to remove a blood quantum requirement and operate instead with an unqualified lineal descent rule, as was the case in the

Department's 1983 dispute with the Citizen Band of Potawatomi Indians. In this instance, the Department eventually dropped its opposition to the amendment, on the basis that the blood-quantum rule "had been inserted by the BIA in the first place." Two other contentious instances involved newly recognized tribes — the Grand Traverse Band of Ottawa and Chippewa Indians and the Narragansett Tribe of Rhode Island, both of which sought to expand their membership provisions beyond the list of descendants provided to the Department during the acknowledgment process.

The documentary record of the Grand Traverse Band dispute illustrates the anatomy of a dispute involving the assertion of federal policy on tribal membership as a condition of federal acknowledgment. It reveals the federal government's interest in controlling the composition of tribal base rolls, notwithstanding the tribe's formal sovereign authority to admit any person as a member. The Band was the first tribe to be recognized through the regulatory acknowledgments process, and therefore, the negotiations were the first in which competing conceptions of tribal membership had to be formally addressed.

After it was formally acknowledged in 1980, the Band proposed membership criteria for inclusion in its constitution that would have increased the number of persons on the base roll from around 600 to more than 2400. In its negotiations with the Band, the Department urged the adoption of membership rules that would "maintain the integrity of the acknowledgement decision" by ensuring that members were "descended from individuals of the historical Grand Traverse bands" and "have maintained political and community ties to the modern-day tribal entity." The Department provided replacement criteria that limited base enrollment to persons who were on the original petition roll and others of one-fourth Ottawa or Chippewa blood who were lineal descendants of members of the historic Grand Traverse Bands and had "political and community ties to the Band." Correspondence with the Band also shows the Department's insistence that other federal discretions concerning the Band's property were dependant on its adoption of acceptable membership criteria. These included the Department's decision to designate land held in trust as the Band's reservation and the assignment of the band's share of a multi-tribal judgment award. The Band initiated litigation against the Department for its refusal to approve the constitution, but ultimately agreed to modify its proposed base roll in line with the Department's proposals. According to the Department, membership rules were so closely tied to the legitimacy of the acknowledgment decision itself, that if the Band had refused to amend its constitution, the Department would have taken steps to reverse its determination. . . .

IV. Changes in Tribal Membership Governance: The Genealogic Shift

. . .

A. Constitutional Amendments and Membership Path-Dependency

As noted above, there are two epochs of tribal constitutional activity evident in the study: the IRA era (1934-1950) and the early self-determination era (1970-1980), separated by a period of inactivity during the termination-policy

era (1950-1970). More than seventy-five percent of tribes in the study adopted a constitution in one of these two periods. The frequency of adoption of new constitutions is at its highest in the 1930s and rises sharply again in the first decade of the self-determination era, beginning in 1970. There is a comparable rise in the frequency of tribal constitutional amendments beginning in the mid-seventies and extending through the mid-eighties.

Just over a third of the current constitutions in the study are second or third iteration constitutions, amended versions of the original document. The distinction between first and second iteration constitutions is an analytically important one. The membership regimes in the post-1970 "new constitutions" and the "second iteration" constitutions do not share the same characteristics. This is because tribes do not generally alter the fundamental structure of their membership regimes when they revise their constitutions. Accordingly, since most of the second-iteration constitutions in the study belong to tribes who first drafted a constitution in the IRA era, the vast majority continue to use the parental-enrollment rules that characterize constitutions drafted in that period. They do not jettison parental-enrollment rules in favor of the lineal descent rules preferred by tribes writing constitutions for the first time after 1970. Instead they tend to keep the parental-enrollment rules and add or subtract additional criteria. Most commonly, they remove a residency rule or require future members to demonstrate tribal or Indian blood in addition to parental enrollment. One explanation for the reluctance to amend parental-enrollment rules is that these establish an unbroken, documented intergenerational link between applicants and base enrollees. Unless other corrective mechanisms are used, switching to lineal descent from a parental-enrollment regime could have two destabilizing effects. First, the status of non-descendant members would be called into question. This class would include persons incorporated into the tribe, such as spouses and adopted children. Second, the descendants of all base-enrollees could become retrospectively eligible for enrollment, whether or not there is a generational break in enrollment. This could require the admittance of an indeterminate and potentially very large class of persons. Tribes consequently tend to favor the addition of tribal blood to a parental-enrollment regime, likely because this approach introduces a tribally-specific descent rule for future members without calling into question the status of existing members. Importantly the number of tribes adding tribal blood rules is more than twice that of tribes imposing Indian blood rules. When tribes choose a blood rule to supplement parental enrollment, they overwhelmingly opt for measures of tribe-specific ancestry.

B. Changes in Membership Governance: Genealogy, Flexibility, and Insularity

The membership rules used by tribes as a class of actors have changed over time. These changes are revealed by observing the distribution of rules amongst constitutions in force within each decade since 1930. The number of tribes with constitutions has more than doubled over the period covered by the study, from 102 to 245. This increase is because new tribes have been recognized since the 1930s and because recognized tribes are increasingly likely to draft and publish written constitutions. The changes are of three

basic kinds. First, there are changes in the substantive content of mandatory rules; those criteria that determine the class of persons eligible for membership "as of right." Second, there are changes in the frequency and scope of discretionary rules, allowing the incorporation of persons not qualifying under the mandatory rules; through tribal adoptions and honorary membership. Third, the study shows changes in the frequency of provisions prohibiting multiple membership.

1. Genealogy: Changes in Mandatory Regimes

The most striking change evident in tribal constitutions is the increasingly genealogic quality of tribal membership rules over time. This is revealed in the transition from the use of parental enrollment and residency rules, to lineal descent and blood rules. First, the proportion of tribal constitutions using a lineal descent rule has increased significantly from fifteen percent of tribal constitutions in force before 1941 to forty-four percent of constitutions in force today. In pre-1941 constitutions, the vast majority of tribes use parental-enrollment rules.

Second, the use of blood-quantum rules has increased from forty-four percent of pre-1941 constitutions to seventy-one percent today. The rise in the frequency of tribal blood rules is especially striking. These specify that applicants must show requisite blood quantum derived from persons affiliated with the accepting tribe. They appeared very rarely in constitutions in operation prior to 1941 but are now used by just over one-third of tribes in the study. Third, the use of parental residency rules in tribal membership regimes has dropped sharply. Only one-in-five tribes requires parental residency as a condition of eligibility today, compared with over half of tribes with constitutions operative before 1950. Significantly, while the frequency of both lineal descent and tribal blood rules has increased, blood-quantum rules are more likely to be added to parental-enrollment regimes by tribes amending older constitutions, while descent rules are more often used by tribes adopting constitutions for the first time. The rise in lineal descent trunk rules therefore is primarily a function of the strong preference for lineal descent shown by tribes adopting constitutions for the first time after 1970. The rise in blood rules, on the other hand, is partly the result of constitutional amendment. Overall, there is a marked shift from the "parental enrollment plus parental residence" configuration, to the "lineal descent plus blood quantum" configuration.

2. Flexibility: Changes in Discretionary Regimes

The proportion of tribal constitutions making reference to tribal adoptions has dropped from ninety-two percent in the pre-1941 era to seventy-four percent of current constitutions. An increasing number of tribes, however, omit a constitutional requirement for secretarial review of adoptions. The decrease in the frequency of explicitly permissive adoption rules is largely due to the decision of tribes to exclude these rules from their first iteration constitutions, not the removal of these rules by constitutional amendment.

3. Insularity: Changes to Multiple Membership Rules

The third striking set of changes demonstrated in the data is the increased use of provisions expressly prohibiting multiple membership. Today more

than half of tribes in the study prohibit multiple membership, whereas such provisions were rarely used in the IRA era.

Multiple membership prohibition rules are among those most likely to be added to existing regimes as part of tribal constitutional reform. Just under half of the tribes that amended their membership rules did so by adding a multiple membership prohibition. The uptake of multiple membership rules increases sharply after 1960. . . .

NOTES

1. Consider the following tribal constitutional provision dealing with tribal membership, this one imposing a one-quarter blood quantum on tribal members:

> Section 1. The membership of the Ely Shoshone Tribe shall consist of the following:
>
> (a) All persons of at least one-quarter (1/4) degree Shoshone Indian blood whose names appear on the census roll of the Ely Colony dated April 1, 1930, revised April 19, 1983; Provided, That the Ely Shoshone Tribal Council shall have the authority to make any necessary corrections in the above specified roll.
>
> (b) All persons of at least one-quarter (1/4) degree Shoshone Indian blood who are descendants of members.
>
> Section 2. The Ely Shoshone Tribal Council shall have the power to enact ordinances governing enrollment procedures including the loss of membership and the adoption of new members.
>
> Section 3. No persons enrolled with another Indian tribe or group, whether Federally recognized or not, shall be a member of the Ely Shoshone Tribe.
>
> Section 4. Written applications must be filed on behalf of all applicants applying for enrollment with the Ely Shoshone Tribe. Any person refused membership or who is subject to loss of membership by the Ely Shoshone Tribal Council shall have the right to appeal in accordance with tribal ordinances.

ELY SHOSHONE TRIBE CONSTITUTION AND BYLAWS art. II (May 8, 1990).

2. The following constitutional provision establishes lineal descendancy as the rule for tribal membership:

> Section 1. The following persons shall be entitled to membership in the Sault Ste. Marie Tribe of Chippewa Indians, provided that such persons possess Indian blood and are not currently enrolled with any other tribe or band of North American Indians, and provided further that such persons are citizens of the United States of America:
>
> (a) All persons descended from the six historical bands (Grand Island, Point Iroquois, Sault Ste. Marie, Garden River, Sugar Island, and Drummond Island Bands) of the Sault Ste. Marie Chippewa Indians whose names appear on any historical roll, census or record made by officials of the Department of the Interior or Bureau of Indian Affairs.

(b) All persons enrolled on the membership roll of the organization, known as the Original Bands of the Sault Ste. Marie Chippewa Indians who are alive on the date of approval of this constitution and who are descendants of the original bands.

(c) All persons who may hereafter be adopted into the tribe in accordance with any ordinance enacted for that purpose by the board of directors;

(d) All lineal descendants of such persons as are described in (a), (b) or (c) above.

Section 2. The board of directors shall have the power to enact ordinances consistent with this article to govern future membership, loss of membership and adoption.

Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians art. III (November 13, 1975).

3. The following provision allows for membership into the community through the process of adoption:

SECTION 1. Membership of the Saginaw Chippewa Indian Tribe shall consist of: . . .

d.) Any person of at least one-quarter degree Indian blood who is an adopted child of any member of the Saginaw Chippewa Indian Tribe of Michigan or is married to any member may become an adopted member of the Tribe pursuant to any adoption ordinance which the Tribal Council may enact. Every person adopted pursuant to this section shall be deemed to be a member of the Tribe for all intents and purposes, EXCEPT that no person so adopted into the Tribe shall be eligible to hold the office of Chief, Subchief, Tribal Secretary, Tribal Treasurer or Tribal Council member. . . .

SECTION 3. Any adopted member of the Saginaw Chippewa Indian Tribe of Michigan may be subject to disenrollment in the Tribe for the following reasons:

a.) The individual became an adopted member of the Tribe by reason of marriage to a member of the Tribe and such marriage has been terminated by annulment or divorce and such adopted member has neither maintained a principal residence on the Isabella or Saganing Reservation nor remarried to another member of the Tribe for a period of twelve or more consecutive months preceding Tribal disenrollment action; or

b.) The individual became an adopted member of the Tribe by being an adopted child of member of the Tribe, upon reaching the age of 18 or older, elects to abandon Tribal relations with the Saginaw Chippewa Indian Tribe of Michigan in favor of re-establishing Tribal relations with the Tribe from which they are descendants by blood.

c.) Individuals so disenrolled shall thereafter not be entitled to share any subsequent rights of membership. . . .

Saginaw Chippewa Indian Tribe of Michigan Constitution art. III (November 4, 1986).

4. Paul Spruhan's excellent study of the legal history of blood quantum in federal Indian law concludes with the following:

> The legal history of blood quantum to 1935 is more striking for its lack of use than its application. Rules defining the status of mixed-ancestry persons by blood and descent existed from at least 1705 in Anglo-American law, but the federal government only applied blood quantum to Indians on a large scale in the early twentieth century. Though early federal officials knew of blood quantum, and used it to describe individuals of mixed ancestry, they generally avoided its application. . . .
>
> . . . The muddled array of individual uses of the legal term Indian that developed to 1935, some requiring a threshold blood quantum (without a consistent quantum) and some requiring tribal membership, reflects that the United States failed to resolve these inherent contradictions in its Indian law. Instead, individual statutes, regulations, and court rulings emphasized different aspects of Indian status, with no cohesive explanation for the varied definitions.
>
> . . . In 1846 the Supreme Court extended federal criminal jurisdiction over white tribal members by interpreting the statutory term Indian to refer to a race of Indians. Further, federal law barred Indians from American citizenship, explained by some officials as due to the alleged incapacity of the Indian race. . . .
>
> However, nineteenth-century federal officials also treated tribes as autonomous political entities, and "Indian" as a political citizen of a tribe. The federal government negotiated treaties with tribes for various purposes, and mostly did not interfere with internal membership. Early treaty provisions included references to half-breeds or quarter-bloods, and a few treaties defined eligibility for specific benefits by blood, but no treaty stated that mixed-bloods were not tribal members or were not Indian. Indeed, some later treaties explicitly recognized mixed-bloods and even intermarried whites and black freedmen as tribal members. Bureau of Indian Affairs administrative practice generally made no distinction between mixed-bloods and other Indians for distribution of benefits, and generally left the decision up to tribal officials whether to recognize mixed-bloods as members. Even when the Attorney General and federal judges suggested a distinction between Indians and white citizens, defined by the amount of Indian blood, they declined to apply it. Instead, the branches of the federal government preferred rules of matrilineal or patrilineal descent or tribal membership to classify mixed-bloods.
>
> While the federal government viewed Indians as members of political entities, it also exerted supervision and control over Indian property as the guardian of Indian wards. The government barred Indians from making contracts, from selling land, and from other activities associated with "competent" citizens of the United States under the notion of guardianship. Federal officials selectively extended their guardianship authority to protect mixed-bloods as Indians by supervising their transactions.
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> By the 1870s the federal government increasingly asserted its guardianship authority and de-emphasized the concept of Indians as citizens of autonomous tribes. . . .
>
> However, the political conception of Indian identity never completely went away. When the federal government distributed allotments, all three branches eventually applied tribal membership to define eligibility. Officials

> recognized intermarried white men as empowered to vote on land cession agreements, and these white men shared in the distribution of property at certain times as tribal members. Even when Congress in 1888 barred newly intermarried white men from sharing in tribal property, it still recognized the authority of tribes to recognize them as members.
>
> In the early twentieth century the federal government asserted virtually absolute control over Indian lands and applied the pre-existing concept of blood quantum directly. . . . Both Congress and the Bureau of Indian Affairs used blood quantum as one of the defining elements of competency to release whole classes of Indians, while retaining restrictions on others. Congress then conditioned funding and, for certain tribes, membership itself, based on blood quantum, limiting its responsibilities to a subset of biological wards. . . .
>
> To add to the confusion, the [1934 Indian Reorganization Act] combined the various conceptions of Indian identity in one piece of legislation. With the exception of adopted non-Indian tribal members, both political and biological Indians were beneficiaries of the act. Tribal membership continued to be important, as the IRA included all tribal members of "Indian descent." However, Congress also included on-reservation descendants of members and Indians of one-half or more Indian blood not affiliated with any tribe. . . . The IRA set up a process for tribes to organize constitutional governments and corporate entities, and subsequent BIA interpretation left membership to the tribes themselves. However, the increase of the blood quantum threshold from one-quarter to one-half perpetuated the notion of Indian as biological ward. . . .
>
> . . . The resulting muddle will continue as long as the United States applies blood quantum and tribal membership inconsistently, frustrating future generations of Indian people, as well as those who practice federal Indian law, by perpetuating the inconsistencies of Indian legal identity.

Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1, 47-50 (2006).

5. Tribal membership criteria do create seeming inequities in application. People who are undoubtedly Indians may nevertheless be ineligible for membership. The classic case is the child of Indians who have worked for the Bureau of Indian Affairs or the child of urban Indians who intermarry with Indians of other tribes. These children may be full-blood Indians, but without the requisite blood quantum to meet membership eligibility criteria in any one tribe. Nicole Laughlin examines the inequities of blood quantum, and the underlying reasons for the use of blood quantum in the first place:

> The goal of most tribes today is to have "enrollment reflect some sort of valid cultural affiliation." To achieve this objective, modern tribes flipped the ideology of early Euro-Americans, electing to favor membership to those who possess greater amounts of Indian blood. This is based in part on the theory that the more Indian blood a person possesses, the more likely they will be to adhere to cultural standards. This reasoning, however, is inherently flawed, because a higher fraction of Indian blood does not guarantee that a member will adhere to traditional customs or acclimate to the tribal community.

> Additionally, this method precludes individuals with legitimate cultural ties from membership simply because they cannot meet the blood quantum threshold. . . . [T]his policy directly conflicts with the goal of gaining culturally affiliated members, and the result is a diminishing number of Indians eligible for membership[.] . . .
>
> This very scenario is illustrated . . . through the story of Robert Upham. Robert is considered a mixed blood because he has ancestors from the Assiniboine, Kootenai, Nakota, and Salish tribes. However, Robert was brought up on the reservation of the Gros Ventre Indians in Montana. Although four generations of his mother's family lived on the reservation and are buried there, Robert is not eligible for membership within the Gros Ventre because his blood lines have become too thin. Even though Robert is "entirely Indian by heritage" because he is not able to meet the blood quantum threshold for any tribe he is foreclosed from membership and any of the accompanying benefits.

Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 Hamline L. Rev. 97, 111-13 (2006).

6. Many tribal membership rules are based on a federally generated annuity roll often dating back to the nineteenth or early twentieth century. As Carole Goldberg points out, such reliance may create legal and political problems:

> The phenomenon of federally-devised lists or "rolls" of citizens is not confined to the termination/restoration process. Beginning in the late nineteenth century, various federal laws compelled the Department of the Interior to compile such lists for purposes of distributing Indian allotments and land claims judgments. In other words, these lists attended the dismantling of tribal land bases. Professor John Lavelle has powerfully pierced the misconception that these laws imposed blood quantum requirements. Nevertheless, these laws did exert a force on tribal governing documents, offering a convenient starting point for citizenship criteria that turn on lineal descendance. Unfortunately, these federally-mandated lists are sometimes inadequate and incomplete, excluding some people with deep and continuous tribal connections, whose ancestors failed to show up for the sign-ups because their traditional beliefs counseled nonparticipation or for other culturally-based reasons. Dean Rennard Strickland relates the poignant story of a Seminole woman who could not qualify for an Indian scholarship program because she could not document her Indian ancestry based on federally-compiled rolls. Her Seminole grandmother, who barely spoke English, had resisted enrollment and hidden from the enrollment parties because she did not believe that the tribal land base should be broken up. As Strickland points out, "[h]er granddaughter could not qualify to enroll in law school under the Native American Scholarship program because the tribal rolls were closed to her despite her historic Indianness." The impact of such omissions becomes magnified with each generation. Once a roll is established as the basis for citizenship, it becomes politically difficult to expand citizenship beyond its confines.

Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 40 U. Kan. L. Rev. 437, 457-58 (2002).

B. JUDICIAL REVIEW OF TRIBAL CITIZENSHIP DETERMINATIONS

Much litigation in tribal courts involves challenges to decisions by tribal election determination entities that have decided membership or citizenship questions. On occasion, the administrative decision of the election board is final, and on other occasions, the tribal court is the body entrusted to hear these questions in the first instance. And there are other variations as well, such as tribes that entrust final election decisions to a panel of elders, who can and occasionally do reverse election results.

1. TRIBAL COURT AUTHORITY TO REVIEW TRIBAL CITIZENSHIP DETERMINATIONS

MALTOS V. SAUK-SUIATTLE TRIBE

Sauk-Suiattle Tribal Court of Appeals, No. SAU-CIV-5-3/01/001,
6 NICS App. 132 (November 24, 2003),
Reconsideration Denied (February 27, 2004)

WOODROW, J.:

Procedural History

[Plaintiff brought suit against the Tribe after the Tribal Council revoked the Plaintiff's citizenship.]

The Tribe asserted sovereign immunity. On February 11, 2002 the Honorable Chief Judge Martin Bohl of the Sauk-Suiattle Tribal Court issued an order granting the Plaintiff's motion to dismiss on sovereign immunity grounds and directing notice of rehearing for Respondent.

The Appellant Tribe appeals the trial court's order. The appellant appeals (1) the trial court's conclusion that it has jurisdiction to order a rehearing upon a finding of denial of due process, and (2) the trial court's order for a rehearing.

Jurisdiction

This Court having reviewed the record and listened to the arguments of counsel, agrees that the trial court does have jurisdiction to order a rehearing. We reached this opinion by deciding that sovereign immunity[2] does not apply. The rehearing is an administrative remedy and as such does not constitute a suit against the Tribe.

2. The principal that tribes enjoy the sovereign's common law immunity from suit is well established. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The immunity extends to agencies of the tribes. *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986). It applies in both state and federal court. *See Pan American Co. v. Sycuan Band of Mission Indians*, 84 F.2d 416 (9th Cir. 1989) Tribal immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

Rehearing

The trial court did not conduct a trial on any issue of fact. The trial court held, however, that the Respondent was denied due process which pierced the sovereign immunity of the tribe for the limited purposes of allowing a rehearing. There is no factual record before this Court that would allow it to determine if this conclusion of law is supported by substantial evidence. On remand the trial court is to conduct a finding of fact and determine after the Respondent loss his membership in the Sauk-Suiattle Tribe if he was afforded or given notice of his right to appeal. The trial court shall also determine if the Respondent was given notice of his right to appeal and if he waived this right by not filing an appeal or pursuing his administrative remedies. The trial court shall also determine if Respondent was given notice of his right to appeal and if he understood that he could appeal his loss of membership in the tribe because of the ambiguous nature of the Enrollment Ordinance.[4]

Enrollment Ordinance of the Sauk-Suiattle Indian Tribe

The enrollment ordinance is ambiguous. It is unclear if a member may appeal a disenrollment or a relinquishment of membership in the tribe. This court holds that a member may appeal a loss of membership in which privileges of membership are revoked by the Tribal council or the Enrollment Committee. There is no distinction that this court can find between a loss of membership and a denial of membership. This conclusion is based upon the following facts: (1) the tribal membership is a valuable property right and all member must be afforded due process when that right is taken by the tribe; (2) tribal members should have the same appeal rights as other Indians seeking to become tribal members; (3) the Enrollment Ordinance is ambiguous regarding appeals rights and this ambiguity should be resolved in favor of the tribal members; (4) there does not appear to be any appeal process or right to re-apply for membership if a member is disenrolled or relinquishes membership

4. For example:

> Section 11 Loss of Membership or Enrollment: The Tribal Council may, upon its own motion or the recommendation of the Enrollment Committee, remove person from the Tribal Roll and revoke the privileges of membership under any of the following conditions: a. (Degree of Blood is incorrect). b. The member in question is enrolled in another tribe or band or community in violation of Article II of the Sauk-Suiattle Constitution, unless dual enrollment is the result of a mistake and is corrected as soon as possible. . . . d. The member in question request dis-enrollment or relinquishment of membership. e. (Convictions) f. (Membership affects the cultural integrity of the tribe).
>
> Section 12 Appeals: In those cases where enrollment is denied, the applicant shall also be informed in the same notice that he or she has thirty (30) days from receipt of the notice of denial to petition the Tribal Council in writing for a re-hearing or to request additional time. . . . a. Upon request for such a rehearing, the Enrollment Clerk shall set a specific date. . . . The notice of hearing shall again inform the applicant of the applicant's right to submit evidence and to appear with or without representation or assistance at their own expenses. . . . c. After final denial by the Tribal Council, an applicant denied enrollment shall have such further appeal to the Sauk-Suiattle Tribal Court. Its decision shall be final. d. Any applicant denied membership may file a new application along with proper documentation as outlined in this ordinance.

The above is curious because non-member Indians are given a right to appeal their rejection, are given a right to present evidence, a right to counsel, a right to file again for membership and a right to appeal to Tribal Court. Member Indians that are dis-enrolled have no such rights.

brought by the motion of the Tribal Council or the Enrollment Committee. There should always be a remedy for mistake or error.

Conclusion

The court concludes that tribal sovereignty was never at issue in this case. The trial court must hold a hearing to determine if the Respondent was given notice of his right to appeal, and if the Respondent understood that he had the right to appeal a disenrollment or relinquishment or if the Respondent was given his notice to appeal and waive that right by inaction and a failure to exhaust his administrative remedies.

Dissenting Opinion

ELDEMAR, J.: . . .

B. Sovereign Immunity

The Council acted pursuant to its constitutional authority when it enacted the Enrollment Ordinance and directed that it (the Council) could revoke privileges of enrollment. The Council did not create a procedure for appeal of revocation. This must be done expressly because all matters heard in review of Council action must arise from an express waiver of immunity or from application of the . . . *Accardi* doctrine.* Absent a waiver of sovereign immunity, this Court lacks the personal jurisdiction in any dispute against the Council. *Santa Clara Pueblo*, 436 U.S. [49,] 58 [(1978)]. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Id.* Only by clear, express, and unequivocal language can the Tribes' immunity from suit be waived. *Id.*

This Justice finds persuasive the 5th Circuit's statement that "any waiver of immunity is to be interpreted liberally in favor or the Tribe and restrictively against the claimant." *S. Unique Ltd. v. Gila R. Pima-Maricopa Indian Comm.*, 674 P.2d 1376, 1381 (Ariz. App. 1983); citing *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1966). Applying this standard, the procedure for appeal of Council action defined in §12 of the Enrollment Ordinance cannot be read as a waiver of sovereign immunity. Consequently, this court lacks jurisdiction in this suit against the tribe and cannot afford the relief requested by Appellant.

C. Ex Parte Young

The *Young* doctrine is a narrow exception made available under specific circumstances to avoid sovereign immunity. *Ex Parte Young* requires a plaintiff to plead and prove the following: (1) that the Council acted palpably outside the scope of its authority; (2) that the Council violated a federal statute, treaty, tribal constitutional provision or some other law to which full faith and credit of the Tribe is required; (3) that the violation is ongoing. If plaintiff successfully demonstrates the preceding, he may only seek prospective injunctive relief.

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* *Editor's note:* Earlier the opinion stated: "The doctrine requires an agency to comply with its own self-imposed rules but it only applies when the agency creating those rules intends itself to be bound by the rule it has created. *United State ex rel. Accardi v. Shaugnessy*, 347 U.S. 260 (1954)."

A suit of damages or retrospective relief is not available under the Young exception.

Appellant did not plead *Young*. Appellant did not plead the elements of *Young*. Accepting all of Appellant's allegations as true, Appellant has failed to state a claim under *Young*. Appellant is the master of his case. Appellant's case is justly dismissed.

For the aforementioned reasons, I dissent.

NOTES

1. Judicial review of tribal enrollment decisions comes in many forms. In *Ballina v. Confederated Tribes of Grand Ronde*, 2003.NAGR.0000008 (Confederated Tribes of the Grand Ronde Community Ct. App., Sept. 19, 2003), the court confronted the question of whether a tribal constitutional amendment increasing the blood quantum requirements from 1/16 to 1/8 was retroactive:

> Because neither the text nor the history of the enrollment amendment manifests the voters' intent concerning its temporal reach, we must proceed to the next level of retroactivity analysis set forth in *Landgraf* [*v. USI Film Products*, 511 U.S. 244 (1994)], which incorporates a number of central concepts and principles. First, it has long been recognized that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." . . . Thus, in American jurisprudence, there is a deeply rooted presumption against retroactive legislation. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." . . . For those reasons, we adopt the presumption against retroactive legislation as explained in *Landgraf*, understanding "legislation" to include not only the Tribal Council's enactments but also voter-approved constitutional amendments.
>
> Second, "[w]hile statutory retroactivity has long been disfavored, deciding when a statute [or constitutional amendment] operates 'retroactively' is not a simple or mechanical task." . . . There are, however, some functional conceptions of legislative "retroactivity" that provide guidance in performing that task. For instance, "[a] law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" . . . Further, a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability." *Sturges v. Carter*, 114 U.S. 511, 519 (1885). . . .
>
> . . . Applying those standards to the instant case, we conclude that application of the new criteria contained in the enrollment amendment to the applicants did not have retroactive effect, because there was no impairment of a vested right, no increase in liability for the applicants, and no new duties imposed on the applicants.

Id. at ¶¶55-59.

2. However, many tribal legislatures restrict tribal court review of membership decisions by placing a deferential standard of review on courts. *E.g.*, *Kaufmann v. Little Traverse Bay Bands of Odawa Indians Enrollment Office*,

2004 WL 5760773 (Little Traverse Bay Bands of Odawa Indians Tribal Court 2004) (applying a "clear error" standard to tribal enrollment decisions).

2. LIMITED TRIBAL COURT SCOPE OF REVIEW

Cooke v. Yurok Tribe

Yurok Court of Appeals, No. YTCV 04-12,
7 NICS App. 78 (September 29, 2005)

Before: David L. Harding, Chief Justice; Randal E. Steckel, Justice; Jerrie M. Simmons, Justice. . . .

I. Facts and Procedural History

This matter comes before the Court of Appeals on an appeal of a grant of summary judgment for Appellee, the Yurok Tribe. [T]he Appellant, Bernard Cooke, is the biological child of Joseph Cooke, deceased, who was non-Indian, and Ivora Nelson Cooke, deceased, who was an enrolled member of the Hoopa Valley Tribe at the time of her death on February 27, 1990.

. . . On June 9, 2004, the Tribe's Enrollment Committee determined Mr. Cooke was not eligible for enrollment in the Yurok Tribe. . . . On September 9, 2004, contrary to the recommendation of the Enrollment Committee, the Tribal Council denied Mr. Cooke's application for enrollment. . . .

II. Jurisdiction and Scope of Review

Although jurisdiction was not addressed in the Ruling of the Tribal Court, the Tribal Court has jurisdiction "to hear all appeals of enrollment." Enrollment Ordinance of the Yurok Tribe, §10.4. . . .

The scope of review of the Court of Appeals is expressly limited to determining whether "mistakes of law were made by the lower court." Yurok Tribal Court Rules of Appellate Procedure (1997), Rule 1(A). "The appellate court shall have no jurisdiction to hear appeals based upon any other ground." *Id.*, Rule 1(B).

III. Standard of Review

The Yurok Tribal Code and Yurok Rules of Court do not specify the standard of review for an appeal of an enrollment decision. The Tribal Code does, however, establish that the Tribal Court is to apply federal law where an issue is not addressed by Tribal law, custom or usage. Yurok Tribal Court Interim Ordinance, Yurok Tribal Code 1-05, August 9, 1996. As the United States Supreme has stated, "decisions by judges are traditionally divided into three categories, denominated questions of law (reviewed *de novo*), questions of fact (reviewed for clear error) and matters of discretion (reviewed for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 2546 (1988). Because our review of a Yurok Tribal enrollment decision is limited to mistakes (i.e., questions) of law, our review is *de novo*. *De novo* review of questions of law means that this Court shows no deference to the legal conclusions of the lower court or Tribal Council. *Sklar v. Commissioner*, 282 F.3d 610, 612 (9th Cir. 2002).

IV. Analysis

This case requires interpretation of the Yurok Tribal Constitution. Because he meets the blood quantum requirement (1/8 Yurok) and because his grandfather was a Yurok allottee, Mr. Cooke appears to qualify for enrollment under the "Extraordinary Circumstances" provision of the Yurok Constitution. Article II, §3. The Tribal Enrollment ordinance tracks the Constitution word for word concerning eligibility. However, the Yurok Constitution also includes a provision that "No person who is a lineal descendant of a *present or former* member of another Tribe and who is without a parent enrolled with the Yurok Tribe shall qualify for membership in the Yurok Tribe." Article II, §4(c) (emphasis added).

The Tribe argues that Article II, §4(c) of the Yurok Constitution is an absolute limitation on membership and therefore the controlling law in this case. Because Mr. Cooke's mother was a member of the Hoopa Tribe at the time of her death in 1990 and neither of Mr. Cooke's parents is or was enrolled at Yurok, the Tribe argues that §4(c) establishes a non-discretionary bar to Mr. Cooke's application for enrollment.

Mr. Cooke's basic argument is that Article II, §4(c) does not apply because his mother is a "deceased" member of the Hoopa Tribe, not a "former" member. Mr. Cooke argues that "former" and "deceased" are not legally equivalent terms. To support his argument, Mr. Cooke points out that in an unrelated section of the Yurok Enrollment Ordinance (which was adopted only a few months after adoption of the Constitution), the Ordinance itself makes an explicit distinction between "deceased" and "former" members of the Yurok Tribe. . . .

As a secondary argument, Mr. Cooke points out that Yurok Constitution Article II, §3(c) opens membership to "any adopted person whose biological parents would have qualified, or would have qualified if alive for the Yurok Membership Roll." Mr. Cooke does not claim this section is directly applicable to him because he is not adopted. However, Mr. Cooke's pleadings can be construed as arguing that, because his mother died before the Yurok Tribe was officially recognized, his biological mother "would have qualified if alive" and that he should not be afforded less rights under the Constitution than an adopted person in the same circumstances. . . .

While Mr. Cooke sets forth a cogent argument that there is a legal distinction between a "former" member and a "deceased" member of a tribe, we are not persuaded that the distinction applies to Article II of the Yurok Constitution. Mr. Cooke is correct that §8 of the Yurok Enrollment Ordinance make a distinction between "former" and "deceased" members of the Yurok Tribe. However, the provision for separate registers of "former" and "deceased" members is clearly intended to facilitate administration of the membership rolls, with "former" members being defined to include "individuals who selected the 'buy-out' option under the Hoopa-Yurok Settlement Act, and all individuals who have been disenrolled pursuant to this Ordinance and the Constitution of the Yurok Tribe." Enrollment Ordinance, §8.2. While there is a separate register for "deceased" members, Enrollment Ordinance §8.3, there is nothing in the Enrollment Ordinance that suggests that "deceased" members would not also be considered "former" members as those terms are commonly used, despite the provision for separate registers.

The dictionary defines "former" as "preceding in time; earlier; past [in former times]." Webster's New World Dictionary, Second College Edition, 1979. We hold that, for the purposes of Article II of the Yurok Constitution, a "deceased" member of another Tribe is a "former" member of that Tribe.[2]

Mr. Cooke also sets forth a cogent argument that Article II, §3(c) appears to establish more favorable treatment for an adoptee than a lineal descendant of a Yurok Reservation allottee. However, as Mr. Cooke acknowledges, he is not an adoptee. We also agree with the Tribe that Article II, §4(c) is nondiscretionary and therefore would "trump" §3(c), which is clearly discretionary (a person "may" be determined to be eligible for membership under §3 whereas "no" person "shall" qualify for membership where §4(c) applies.)

As the Tribe argues, it is well settled that one of the most fundamental rights of a sovereign nation is the right to determine qualifications for the enrollment of its members. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978). Regardless of whatever sympathies the members of this Court may have for Mr. Cooke or any other person who meets the blood quantum requirement for membership in the Yurok Tribe but is deemed ineligible for membership because of the combined actions of their parents and the drafters of the Yurok Constitution, it is simply not within the power of this Court to rewrite or ignore that Constitution. . . .

NOTE

Often, there is not much for a tribal appellate court to consider in reviewing tribal citizenship decisions. Note the *Cooke* Court recognizing that its review of the facts is very limited — the "clear error" standard. Other tribal courts apply a standard incorporated from administrative law, the "arbitrary and capricious" standard. *E.g.*, *Miller v. Confederated Tribes of Grand Ronde*, No. 00-07-013, 2001.NAGR.0000010 (Confederated Tribes of the Grand Ronde Community Tribal Court, July 27, 2001) ("In these proceedings, the Court's standard of review is limited. The Court can reverse or remand only if it finds that the Enrollment Committee's decision was "arbitrary and capricious or a violation of Tribal Constitutional rights." ENROLLMENT ORDINANCE §(d)(4)(H).").

3. BLOOD DEGREE CERTIFICATION

HOFFMAN V. COLVILLE CONFEDERATED TRIBES

Colville Confederated Tribes Court of Appeals, No. AP05-093,
24 Indian Law Reporter 6163, 1997.NACC.0000010 (May 5, 1997)

The opinion of the court was delivered by: LAFOUNTAINE, P. J.

2. Even if we were to accept Mr. Cooke's argument that a "deceased" member of another tribe is not a "former" member of that tribe, under Article II, §4(c), Mr. Cooke would still be "without a parent enrolled with the Yurok Tribe." Mr. Cooke's suggestion that his mother "could have" disenrolled herself from the Hoopa Tribe and then enrolled in the Yurok Tribe requires a level of speculation that this Court is not authorized to engage in.

This matter came before this Appellate panel of Presiding Justice Frank S. LaFountaine, Justice Elizabeth Fry, and Justice Dennis Nelson of the Colville Tribal Court of Appeals. . . . [T]his Appellate Panel of the Colville Court of Appeals has decided to Affirm the decision of the Trial Court as to the following findings and/or conclusions, that:

1. The appellant, Floyd L. Hoffman, has failed to introduce clear and convincing proof that he is entitled to an increase in blood quantum based upon factual proof of additional Indian blood;
2. The appellant, Floyd L. Hoffman, has neither argued nor presented any tribal, state or federal statute or case law which requires the Tribes in either 1907 or 1937 to afford due process of law to its members in exercising the Tribes' powers of self-government through adoption and reductions of blood quantum conferred through adoption;
3. Appellant, Floyd L. Hoffman, has not pled or raised any customs of the Colville Confederated Tribes related to rights conferred through adoption and blood quantum established through adoption as needed to warrant a hearing pursuant to CTC §3.4.04 to determine a custom followed by the Colville Confederated Tribes defining rights and status conferred through an adoption in 1907 and defining what rights, if any, are protected during a reduction in blood quantum taking place in 1937; and
4. Appellant's petition for blood degree correction is denied.

. . .

On January 12, 1995, the appellant, Floyd L. Hoffman, and other Petitioners filed a Petition for Blood Degree Correction with the Tribal Court, pursuant to Amendment IX of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation and pursuant to the Colville [Tribal] Membership Code, CTC §§36.7.01 through 36.7.09. Petitioners were Floyd L. Hoffman, a Colville Tribal member; and his children [and grand children.] . . .

On September 7, 1995, the Trial Court [denied] the appellant's blood correction. . . .

Constitutional Amendments Dealing with Tribal Membership

On May 20, 1949, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment III of the Colville Tribal Constitution by a referendum vote, and Amendment III was later approved by the Commissioner of Indian Affairs on April 14, 1950. Amendment III amended the Tribal Constitution to add Article VII, Membership of the Confederated Tribes of the Colville Reservation.

Article VII created a new provision governing membership in the Tribes. Article VII recognized as tribal members the following persons:

> (a) All persons of Indian blood whose names appear as members of the Tribes on the official census of Indians of the Colville Reservation as of January 1, 1937;
>
> (b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Tribes maintaining a permanent residence on the Colville Indian Reservation; and

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Tribes maintaining residence elsewhere in the continental United States provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs.

Article VII (Amendment III) also provided that the Business Council of the Tribes has the power to prescribe rules and regulations governing future membership in the Tribes, including adoption of the members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior;

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood;

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

On May 9, 1959, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment V of the Colville Tribal Constitution by a referendum vote, and Amendment V was later approved by the Acting Commissioner of Indian Affairs on July 2, 1959.

Amendment V amended Article VII, Membership of the Confederated Tribes of the Colville Reservation of the Tribal Constitution and By-Laws. Amendment V added to Article VII a new Section 3, which provided that after July 1, 1959, no person shall be admitted to tribal membership unless such person possessed at least one-fourth (1/4) degree blood of the tribes, constituting the Confederated Tribes of the Colville Reservation.

On March 22, 1988, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment IX of the Colville Tribal Constitution by a referendum vote, and Amendment IX was later approved by the Secretary of the Interior on May 19, 1988.

Amendment IX amended Article VII, Membership of the Confederated Tribes of the Colville Reservation of the Tribal Constitution and By-Laws. Amendment IX added to Article VII a new Section 4, which provided the following:

(1) that all Indian blood identified and stated as being possessed by all persons whose names appear as members of the Confederated Tribes of the Colville Reservation on the official census of the Indians of the Colville Reservation of January 1, 1937, shall be considered Indian blood of the Tribes, which constitute the Confederated Tribes of the Colville Reservation;

(2) that no tribal member's blood degree will be decreased as a result of Amendment IX;

(3) that pursuant to procedure which shall be adopted by the Colville Business Council, any

(a) Applicant for membership, or

(b) Tribal member who is listed on the official census of the Indians of the Colville Reservation of January 1, 1937, or

(c) Tribal member descended from a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, may petition the Tribes, to officially recognize for enrollment purposes that a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, possesses Indian blood that is not listed on the official census of the Indians of the Colville Reservation of January 1, 1937, and such Indian blood, when properly authenticated by clear and convincing proof, shall be recognized as blood of the Colville Tribes.

Standard of Review — Clearly Erroneous

Appellant asserts that de novo review is justified because this case involves "review of documents not witness credibility" as "in" *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007, 6009-10 (CB. Pot. Sup. Ct., Feb. 17, 1988). . . . The Court is not rejecting the appellant's assertion of law, but the Court does not believe a de novo review is required in this appeal.

The Tribes argued in their Response Brief that "a panel of this Court of Appeals has expressly adopted a 'deferential, clearly erroneous standard of review for factual determinations made by the trial court, as articulated in *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781 (1982).' *Colville Confederated Tribes v. Nadene Naff*, Case No. AP93-12001-03, at 2, [2 CTCR 08, 2 CCAR 50, 22 Indian L. Rep. 6032] (Colv. Ct. App., Decision of January 22, 1995)." . . .

[T]he Supreme Court has articulated the policy behind the broad deference to trial court factual findings:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is a correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . [T]he trial on the merits should be the "main event" . . . , rather than a "tryout" on the road. [Citations omitted.]

. . .

[Discussion]

As the evidence record in this appeal shows, and as the Trial Court clearly found, all Tribal census rolls prior to and including the 1937 roll were riddled with inconsistencies regarding blood degree. . . . Amendment IX in effect resolved those inconsistencies by — (1) preserving the blood degrees of 1937 enrollees as minimum blood degrees (regardless of the actual blood degree) and (2) providing a way to prove with clear and convincing evidence that a person actually possessed a higher degree of Colville blood.

In the present case on appeal, it is undisputed that Appellant, Floyd L. Hoffman, is listed on the 1937 roll as a Colville Tribal member with a blood degree of 5/32. He claims to possess a higher blood degree, and Amendment IX provides that he must prove it with "clear and convincing proof." . . .

. . . The substantive law applicable to this cause of action is set forth in CTC §36.7.03 (newly codified at Colville Tribal Law and Order Code, Title 8, §8-1-242, Standard of Proof), which provides that:

> In all actions for blood degree corrections the plaintiff shall be required to prove by clear and convincing evidence, that a blood degree other than that which is listed on the Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be. There shall be a presumption, rebuttable by the plaintiff, that the blood degree listed on the roll is correct.

. . . The Trial Court correctly noted that the clear and convincing standard is an "onerous burden because it requires that the petitioner produce evidence . . . so clear and convincing that the opposition's evidence is plainly outweighed." Mem. Op. at page 11, *citing Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 Indian L. Rep. 6007 (C.B. Pot. Sup. Ct., Feb. 17, 1988) and *General Motors Acceptance Corp. v. Bitah*, 16 Indian L. Rep. 6002 (Nav. Sup. Ct., August 11, 1988). The Trial Court also noted that federal case law formulations of the clear and convincing evidence standard are not binding on the Trial Court, but acknowledged that the federal cases state "essentially the same" standard as the "plainly outweigh" formulation in the tribal court decisions. . . .

After reviewing the evidence of the appellant presented to the Trial Court, it is clear to this Appellate Panel that the appellant has failed to prove by clear and convincing evidence that he is entitled to a blood degree correction based upon factual proof. . . .

The constitutionally mandated starting point of this appeal is the 1937 Census. The evidence showed and the parties admitted that the appellant, Floyd Hoffman, is listed on the 1937 Census as possessing 5/32 Indian blood; Floyd Hoffman's mother, Helen Ferguson, is listed on the 1937 Census as possessing 5/16 Indian blood; Floyd Hoffman's father, Clarence Hoffman, possesses no Indian blood on the 1937 Census; Floyd Hoffman's grandparents, Joseph and Annie Ferguson, are listed on the 1937 Census as: Joseph Ferguson 1/2 Indian blood and Annie Etue Ferguson 1/4 Indian blood.

At trial, Appellant argued that his blood degree should be increased because Annie Ferguson possessed at least 1/2 Indian blood. In support of this argument, the appellant introduced the following evidence:

First, Appellant introduced "Delayed Death Certificate" from the 1935 Census showing that Joseph and Annie Ferguson possessed 21/32 Indian blood when they died. Under the law as set forth above and adopted by this Appellate Panel, the death certificates, without more, received little weight by the Trial Court because no evidence was introduced to indicate that the information upon which the death certificates were based was given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

Second, the petitioner admitted into evidence four (4) fee patent applications, two applications were dated 1928 and two applications were undated, all of which listed Helen Ferguson and Esther Mason Ferguson as possessing 5/8 Indian blood. No evidence was introduced that these patent applications were sworn applications made in a formal setting or subject to cross examination and impeachment. Though the applications were personally made by Helen and Esther Ferguson, no evidence was introduced that information contained in the applications was verified by the BIA and that the information provided was accurate.

Third, evidence was admitted showing that Esther Ferguson McClung, natural and full sister of Helen Ferguson Hoffman, Appellant's mother, is an enrolled member of the Colville Confederated Tribes possessing 5/16 Indian blood, while Helen Ferguson Hoffman is listed as possessing only 3/8 Indian blood. In 1983, the children of Esther Ferguson Mason successfully changed Esther Mason's blood degree to 5/8 Indian blood. This allowed the children, first cousins to Floyd Hoffman, to enroll in the Colville Confederated Tribes as possessing 5/16 Indian blood. Applying the above legal framework, this inconsistent information provides little weight in light of the fact that Esther Ferguson McClung is the only child of Joseph and Annie Ferguson listed on the 1937 Census as possessing 5/8th Indian blood.

Fourth, Appellant admitted into evidence a 1981 BIA letter stating that if there are "conflicting degrees of Indian blood" between natural brothers and sisters then the record should be changed to reflect the same level for all brothers and sisters. This evidence neither weighs in favor nor against Appellant since policy does not indicate whether the blood degree should be increased or decreased or which blood degree should be preferred in a case, such as in this appeal, where multiple degrees are listed.

Fifth, the appellant relied on a BIA letter dated February 21, 1910, showing that Joseph and Annie Ferguson were adopted into the Colville Confederated Tribes as each possessing 1/2 degree Indian blood. Under the law as set forth above, the letter, without more, received little weight by the Trial Court because no evidence was introduced to indicate that the information upon which the letter was based was given in a formal setting, subject to cross examination and impeachment, or was by a person personally acquainted with the Hoffmans.

Sixth, Appellant submitted Census records from 1899, 1903, 1904, 1907, 1908, 1912-13, 1913, 1924, 1924, 1930, 1933, 1935, 1937, and 1939 that showed: (1) Floyd Hoffman's blood degree fluctuated from 3/16 to 5/32 to 1/8; (2) Helen Ferguson Hoffman's blood degree fluctuated from 1/2 to 3/8 to 5/16 to 5/32; (3) Esther Ferguson Mason's (natural sister of Helen Ferguson Hoffman) blood degree fluctuated from 5/8 to 1/2 to 5/16; (4) Mabel Ferguson McClung's (natural sister of Helen Ferguson Hoffman) blood degree fluctuated from 1/2 to 5/16; and (5) Annie Etue Ferguson's blood degree fluctuated from 21/32 to 1/2 to "less" than 1/2 to 1/4 to 1/8.

The Trial Court noted that these records are contradictory on their face. Under the law as set forth above, such contradictory evidence received little weight by the Trial Court because no evidence was introduced to indicate that the information contained in the census records were given in a formal setting,

subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

Finally, Appellant submitted a school record indicating that Annie Etue Ferguson possessed 1/2 degree Indian blood. Again, Appellant has failed to provide supporting evidence to indicate that the information upon which the school records were based was given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

To summarize Appellant's evidence, it is inconsistent. It does not provide a record that supports a finding of any one specific blood quantum by clear and convincing evidence. This Appellate Panel affirms Court's finding that it "does not find a clear weight of this [Appellant's] evidence supporting any specific blood quantum."

The Tribes, on the other hand, argue that the appellant's evidence, listed above, fails to prove by clear and convincing evidence that the blood degree listed on the 1937 Census for Floyd Hoffman is incorrect. In support of this argument, the Tribes introduced the following evidence that consistently supports a finding that Annie Etue Ferguson's actual Indian blood degree, as established through heredity, was 1/8th:

> First of all, the Tribes admitted into evidence a marked sworn and witnessed affidavit dated March 27, 1905 made by Cora Desautel Etue, Annie Etue Ferguson's mother, and witnessed by the U.S. Indian Agent at the Colville Agency, Miles, Washington. Though the purpose of the affidavit when made is not clear from the evidence, the affidavit purports to show a historical and genealogical record of Cora Desautel Etue, her husband and children. The document indicates that Cora Ferguson herself only possessed 1/4 Indian blood and Annie Etue Ferguson only possessed 1/8 Indian blood. Applying the legal analysis set forth above, this affidavit received considerable weight by the Trial Court. It is obvious from the face of the document that the document was made in a formal setting because it was witnessed and sworn to. In addition, the statement contained first hand information from Cora Desautel Etue who was intimately familiar with the facts concerning her family.

In analyzing the Tribes' evidence, the Trial Court reviewed the appellant's exhibits of official Colville "Individual History Cards" for Annie Etue Ferguson, Helen Ferguson, Mabel McClung and Esther Ferguson which shows that their blood degree quantum was consistent with Cora Etue's 1905 statement. No evidence was introduced on the setting in which a[n] "Individual History Card" is compiled. However, the Trial Court was aware, from previous blood degree correction cases, that the "Individual History Card" is one of the main ways for the Enrollment Office and the BIA to accurately reflect biographical information for each member. For this reason these cards received considerable weight by the Trial Court.

Finally, the Tribes introduced into evidence a 1968 letter from the BIA approving Colville Business Council Resolution 1968-50 requesting a decrease of Annie Etue Fergusons blood degree from 1/4 to 1/8. From this investigation and recommendation by the BIA, the Enrollment Office did decrease Annie Etue Ferguson's Indian blood on the 1937 Census from 1/4 to 1/8. However, because of the Enrollment's Office interpretation of

Amendment IX as stipulated to by the parties, the Enrollment Office increased Annie Etue Ferguson's Indian blood on the 1937 Census to 1/4 after Amendment IX was passed. As testified to by Audrey Sellars's at the Trial Court Hearing, this letter represents official action taken by the Enrollment Office in investigating and correctly representing the blood degree of Annie Etue Ferguson. For this reason, this letter received considerable weight by the Court.

From the above, the appellant has failed to meet his burden of proving by clear and convincing evidence that Floyd Hoffman's Indian blood on the 1937 Census should be increased to a specific blood degree which has been established as factually correct by clear and convincing evidence. Though Appellant had several documents admitted into evidence, he relied on only a few of the documents. Appellant failed to show the Trial Court the importance of each document at the Trial Court hearing. Many of the documents used by the appellant to make his case were contradictory. Appellant failed to explain the contradictions. In short, Appellant failed to clearly convince the Trial Court that the 1937 Census reflects a lower blood degree than actually exists. Appellant's evidence was not so clear and convincing that the evidence supporting the 1937 Census was plainly outweighed. The above findings and conclusions are affirmed by this Appellate Panel. . . .

The Trial Court stated in its Memorandum Opinion that "[I]f there were no written laws pertaining to the tribal adoption in 1907, 'custom law' is the relevant inquiry. Unlike Anglo statutory laws on adoption, Indian law is deeply rooted in the customs and traditions of the Tribes, which is woven into one's lifestyle and beliefs." *In Re P.*, J82-3021, 5-6 (Colv. Tr. Ct. 1983); *In Re: J.J.S.*, 11 Indian L. Rep. at 6031-32. Traditionally, "custom" is unwritten law. *In Re P.*, J82-3021 at pages 5-6. The Trial Court could have requested a "custom hearing" when "any doubt arises as to the customs of the Tribes. . . ." CTC §3.4.04. Also, see §56.07 of Colville Tribal Civil Rights Act. However, the burden of proof is on the appellant in this blood degree correction action to invoke CTC §3.4.04. Since the appellant has the burden of proof, he must affirmatively plead that a custom of the Tribes controls the law on an issue pertinent to his blood degree correction action in order for the Trial Court to request a customs hearing. This has not been done in this action. In the appellant's petition and subsequent pleadings, no specific allegations have been made regarding the applicability of custom law pertaining to adoption or blood corrections. Therefore, this Appellate Panel will affirm the decision of the Trial Court for not ordering a customs hearing. . . .

The decision of the Trial Court is affirmed, and the appeal is denied and dismissed.

NOTES

1. The Colville appellate court establishes a very high burden of proof for persons wishing to challenge a denial of their membership—the clearly erroneous standard. It appears the petitioner in this case, who was not represented by counsel, made a few strategic mistakes in relying entirely on the documentary evidence. In this case, it appears the documentary evidence submitted likely was incorrect. But what about other instances where there

is little documentary evidence? Could a live witness provide sufficient evidence?

2. The *Hoffman* Court affirmed the trial court's decision not to call for a hearing on tribal customary law. Could oral testimony that contradicts the written documentation control? How would a trial judge weigh the credibility of oral testimony (or even oral tradition) against written, and presumably verified, documents?
3. The trial court in the *Hoffman* matter held that the court had no jurisdiction to issue one of the orders requested by the petitioners — to be included on a judgment distribution roll — on grounds that the Tribes had not consented to suit. *See Hoffman v. Colville Confederated Tribes*, 22 Indian L. Rep. 6127, 6127 (Colville Confederated Tribes Indian Reservation Tribal Court, Sept. 7, 1995). The Colville Confederated Tribes had waived immunity for the limited purpose of allowing the tribal court to issue "injunctive relief correcting blood degrees." *Id.* at 6128.
4. In a portion of the opinion not excerpted above, the *Hoffman* appellate court also affirmed the trial court's determination that only one petitioner, Floyd Hoffman, had standing to maintain a blood correction claim in tribal court. *See Hoffman*, 22 Indian L. Rep. at 6128. The Tribes' constitution had limited the class of persons eligible to bring blood degree correction claims to:

> (1) a member, whether a natural person himself/herself, guardian or a minor or incompetent, or an administrator or executor of an unprobated estate; (2) an applicant for membership into the Colville Confederated Tribes; (3) a tribal member whose name appears on the January 1, 1937 official census of the Colville Reservation; or (4) a member descended from a tribal member whose name appears on the January 1, 1937 official census . . . of the Colville Confederated Tribes.

Id. at 6129. The trial court linked the standing issue to the Tribes' limited waiver of sovereign immunity. *See id.* at 6128. Why? What effect does this have?

5. Shortly after the Colville appellate court issued the *Hoffman* opinion, it applied the *Hoffman* evidentiary standards in another membership matter, *Pouley v. Colville Confederated Tribes*, 25 Indian L. Rep. 6024 (Colville Confederated Tribes Court of Appeals 1997). There, the court confronted the question of how to weigh documentary evidence that was "unsworn":

> *Hoffman* set forth the standard that sworn statements are given more weight than unsworn statements and as a general rule this is correct. In other words, the standard of proof should remain as set forth in *Hoffman*, but the Trial Court is cautioned to review each document for "circumstantial guarantees of trustworthiness" and not necessarily take the contents of each document at face value.
>
> It is the opinion of this panel that where unsworn evidence shows unusual consistency, it should be given greater weight than inconsistent, unsworn evidence. As was pointed out at oral argument, Victor Frank Desautel was consistently shown, without deviation, to be 1/2 Indian on every census record admitted. While censuses are admittedly generally unreliable from

> year to year, where there is a conclusive consistency regarding an individual, they should be entitled to greater weight.
>
> The Panel also believes that the Tardy Book, which is unsworn, is a census document. The Tardy Book is unique to the Tribes and has been a preferred document for enrollment purposes. The Panel believes that the Tardy Book qualifies as a traditional Tribal document and should be accorded greater weight than a regular census role — which is in accord with the Tribal Court's position that census rolls, whether prepared in 1937 or earlier, are inherently unreliable as sources of factually accurate blood degrees.

25 Indian L. Rep. at 6026.

6. In *Loges v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 171, 2003.NAGR.0000007 (Confederated Tribes of the Grand Ronde Reservation Tribal Court 2003), the court rejected an argument favoring enrollment by a person who would have qualified for membership under an earlier version of the tribe's constitution:

> Petitioner's first claim is that the Tribal Constitution that was in effect when her blood quantum was changed or corrected should have been applied in her case. Apparently, Petitioner seeks to have her application judged under the standards that were in effect before the 1999 constitutional amendment that changed the enrollment requirements. Previously, the Tribal Constitution, as it applies in Petitioner's case, would not have required that she have a parent who was a Tribal member at the time of her birth and it would instead have been sufficient if she was "descended from a member of the Confederated Tribes of the Grand Ronde Community of Oregon[.]" Tribal Constitution, former Art v. section 1(b).
>
> Other than the fact that Petitioner might prevail, there is no apparent reason to apply the earlier version of the constitutional provision in her case. As the Tribe notes, it does not keep track of the blood quantum of non-members. The Tribe acknowledges that the blood quantum of several members of Petitioner's ancestral family was changed and increased in the Tribal records in 1999. But that change did not give Petitioner any vested right or entitle her forever to apply for Tribal membership under the version of the Tribal Constitution that was then in effect. At most, Petitioner had then — and she had before — the opportunity and ability to apply for membership in the Tribe. But she did not pursue that opportunity until she applied for membership in 2001, after the constitutional amendment was in effect. It is her application that is the pivotal event. . . . Thus, the Enrollment Committee did not err in applying the amended version of the Tribal Constitution in Petitioner's case.

Id., 2003.NAGR.0000007 at ¶¶19-20.

Similar cases have arisen at Grand Ronde, a tribal community terminated by Congress and then later restored, challenging the tribe's amendments to its constitution allowing membership where tribal members had enrolled before termination and limiting membership for those that did not. In *In re Young*, 3 Am. Tribal Law 233, 2003.NAGR.0000007 (Confederated Tribes of the Grand Ronde Reservation Tribal Court 2001), the court rejected equal protection claims by family members who were ineligible but were similarly situated to family members who were eligible:

The Tribe did not deprive Petitioner of due process by considering their applications under the new amendment. . . . Applying the new amendment also did not result in any equal protection violation. The Tribe has the right to define its own membership for tribal purposes," *Santa Clara Pueblo v. Martinez*, 46 U.S. 49, 72 n. 32 (1978), and the Tribe was simply exercising that right, and drawing reasonable distinctions, when its members voted to amend the Constitution.

Petitioner claims that the new requirements are impossible to meet — that no person born during Termination could have a parent on the rolls of membership, as required now, as there was no membership roll during Termination. In fact, it appears that many persons born during Termination have been deemed to have a parent on the rolls — the roll as it existed at the time of Termination, and which was then carried over to the time of Restoration. This Court cannot repair the oversights of eligible members who could have, but did not, enroll prior to Termination.

The facts of this case are extremely sympathetic, as Ms. Young's family on the mother's side has been involved in Tribal matters for generations, and several family members are enrolled Tribal members. However, she advances no successful legal challenge to the new amendment's application in his case.

Id., 2003.NAGR.0000007 at ¶¶23-25.

4. DUAL ENROLLMENT AND INDIAN BLOOD OF OTHER TRIBAL NATIONS

In re Menefee*

Grand Traverse Band of Ottawa and
Chippewa Indians Tribal Court,
No. 97-12-092-CV, 2004 WL 5714978 (May 5, 2004)

Wilson D. Brott, Associate Judge.

I. Facts and Procedural History

. . . In June 1997, Petitioners Robin and Eva Menefee attempted to enroll their son, Jacob Mitchell Menefee as a member of the Respondent Grand Traverse Band of Ottawa and Chippewa Indians. On August 8, 1997, the membership office of the Respondent denied the application on the basis that Jacob Menefee was less than one-quarter Indian blood, and on the basis that he was already enrolled as a member of the Oneida of Thames Indian tribe in Canada. It is undisputed that the Oneida Tribe is not recognized by the United States government as a "federally recognized Indian tribe" as defined by 25 C.F.R. §83.1. Petitioner filed a lawsuit with this Court in October 1997 seeking to overturn the decision of the membership office. . . .

* *Disclosure:* The author of this book participated in the case as counsel for the Grand Traverse Band of Ottawa and Chippewa Indians.

II. Issues

The issues as presented to the Court and clarified by the Court of Appeals are as follows:

A. What is the definition of "Indian blood" as it relates to whether Petitioner meets the eligibility requirement of Article II, Section 1(b)(2)(a) of the Constitution that he is "at least one-fourth (1/4) Indian blood, of which at least one-eighth (1/8) must be Michigan Ottawa and/or Chippewa blood."

B. What is the meaning of "federally-recognized Indian Tribe, Band or Group" as it relates to whether Petitioner is prevented from being enrolled as a member pursuant to Article II, Section 2 of the Constitution, which states that "No person shall be eligible to be a member of the Grand Traverse Band if that person is enrolled in another federally-recognized Indian Tribe, Band, or Group."

Petitioner's argument hinges largely on history: that "Indian blood" should be interpreted to include Canadian Indian blood based upon the historical location and migration of the Ottawa and Chippewa Indians throughout the Great Lakes region (including both the United States and Canada), that the Court should not necessarily draw a distinction between or recognize the political boundaries of the United States and Canada. Further Petitioner argues that at some level, the United States government does recognize Canadian Indian tribes and gives special rights to American Indians born in Canada to cross the border between the United States and Canada. See 8 U.S.C. §1359.

Respondent argues that the Court should uphold the decision of the membership office to reject Petitioners' application for membership and requests that the Court adopt the interpretations of the Constitution relied upon by the membership office. Respondent argues that the history of migration of the tribes is irrelevant to the issue of interpreting the Constitution adopted by the Grand Traverse Band adopted in 1988. Respondent argues that the United States government placed certain constraints upon the Grand Traverse Band's Constitution before it would recognize the tribe, and urges the Court to interpret "Indian blood" as meaning essentially "American Indian blood," and not including Canadian Indian blood. . . .

III. Decision

The Court is faced with issues that go to the very essence of who the Grand Traverse Band of Ottawa and Chippewa Indians includes, as the issues relate to the determination of eligibility for membership in the Tribe. 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. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 32 (1978). . . .

A. Blood quantum

This Court must interpret the definition of "Indian blood" as stated in Article II, Section 1(b)(2)(a). There is no question that prior to the existence of the United States of America and Canada, that the boundaries that presently exist were not recognized by the Ottawa and Chippewa peoples, who freely

migrated across what is now the Canadian-U.S. border. However, it is impossible to ignore that fact that the United States and Canada have an established border, which has now been in place for over 200 years. The Grand Traverse Band of Ottawa and Chippewa Indians is a people made up of Ottawa and Chippewa Indians, which were part of a larger nation of Native Americans indigenous to the Great Lakes region. However, the Grand Traverse Band of Ottawa and Chippewa Indians is an Indian tribe that in many respects has its physical boundaries and legal authority created and/or defined by the laws of the United States of America.

Although the Ottawa and Chippewa Indian nations have been in existence for centuries, the notion of a "federally-recognized" tribe is a relatively new one. The Grand Traverse Band of Ottawa and Chippewa Indians was organized under the Indian Reorganization Act, and was "federally recognized" as an Indian tribe by the United States government in 1980. A history of the Grand Traverse band in terms of federal recognition is summarized as follows:

> The Grand Traverse Band is a federally recognized Indian tribe presently maintaining a government-to-government relationship with the United States. . . . The Band previously maintained a government-to-government relationship with the United States from 1795 until 1872, and is a successor to a series of treaties with the United States in 1795, 1815, 1836 and 1855. . . .
>
> In 1872, then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the Band and the United States, ceasing to treat the Band as a federally recognized tribe. . . . Following termination of the relationship, the Band experienced increasing poverty, loss of land base and depletion of the resources of its community. . . .
>
> Between 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe. The Band's efforts succeeded in 1980 when it became the first tribe acknowledged by the Secretary of the Interior pursuant to the federal acknowledgment process, 25 C.F.R. Part 54 (now 25 C.F.R. Part 83). . . . On January 17, 1984, the Department of the Interior declared a single 12.5 acre parcel as the initial reservation of the Band. 49 Fed. Reg. 2025 (Jan. 17, 1984).
>
> The Band has a six-county service area in the Western District of Michigan, encompassing Antrim, Benzie, Charlevoix, Grand Traverse, Leelanau and Manistee Counties. . . .
>
> The history of the Band's original recognition, executive termination and later re-recognition is essentially parallel to that of the Pokogon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Little River Band of Ottawa Indians. All three tribes were parties to the same series of treaties and the same termination by Secretary Delano in 1872. . . .
>
> Between 1980 and 1988, the Band engaged in a protracted dispute with the Department of the Interior over the terms of its constitution. During this period, the Secretary of the Interior refused to take further land into trust for the Band. . . . In March 1988, after the dispute was resolved, the Secretary ratified the Band's Constitution. . . .

Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 198 F. Supp. 2d 920, 924-925 (W.D. Mich. 2002). The present Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians was adopted on March 29, 1988, by its members, and was

approved by the Secretary of Interior. It is undisputed that the Constitution was drafted and amended several times prior to adoption under strict guidelines imposed by the Bureau of Indian Affairs. The Secretary of Interior had authority to approve or disapprove the proposed Constitution under 25 U.S.C. §476(a)(2). Many provisions of the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians were modified prior to its adoption in order to gain the approval and recognition of the United States government, including the membership provisions of the Constitution. Although it is certainly true that the Tribe's Constitution was ultimately adopted and approved by the members of the Grand Traverse Band, this Court cannot ignore the circumstances under which the current Constitution was adopted and the influence the United States government also exerted on its creation.

The federal government has strongly urged against the acceptance of Canadian Indian blood for the purposes of determining a blood quantum related to the membership requirements of tribal constitutions. *See* Letter from Marsha Kimball, United States Dept. of Interior to Larry Morrin, Bureau of Indian Affairs, dated February 22, 2002 concerning Little Traverse Bay Band; *and* Letter from Mark Anderson, United States Dept. of Interior to Earl Barlow, Bureau of Indian Affairs, dated September 30, 1993, concerning St. Croix Band of Chippewa Indians. Their argument is based upon the definition of "Indian" in 25 U.S.C. §479, which does not include Canadian Indians, and further upon other difficulties of determining the authenticity of Canadian Indian heritage. As noted by Respondent, membership in American Indian tribes is determined by tribal law, whereas membership in Canada is derived by Canadian federal or provincial law. As noted in the Kimball letter cited above:

> The Department [of Interior]'s position in other contexts is that Canadian Indians are non-Indians. That is certainly the case in which Canadian nationals, possessed of Canadian Indian blood, are arrested and held by tribal law police and court systems. Canadian Indian blood does not factor into whether that individual is an "Indian for the purposes of tribal criminal jurisdiction". Further the BIA should not be placed in a position in which it is required to evaluate and determine the authenticity of documents created by Canadian tribal entities. . . .
>
> The reliance on documents other than those generated by the officials of the United States adds an element of uncertainty and the potential for abuse in the establishment of this crucial original membership list.

Kimball letter, *supra*, p. 3-4.

While the Court believes that the Petitioner's argument is well grounded in history, this Court cannot ignore the context in which the current Constitution was adopted. Nor can this Court ignore the significant threat to the Tribe's federal recognition by United States government that would be presented if this Court adopted Petitioner's interpretation of the Constitution. Therefore, this Court is persuaded that the term "Indian Blood" as used in Article II, Section 1(b)(2)(a) of the Constitution was intended by the drafters of the Constitution to be limited to Indian blood from tribes which are recognized by the United States government within the boundaries of the continental United States, and was not intended to include Canadian Indian blood.

B. Federally-recognized Indian Tribe

Article II, Section 2 of the Grand Traverse Band of Ottawa and Chippewa Indians Constitution states that "No person shall be eligible to be a member of the Grand Traverse Band if that person is enrolled in another federally-recognized Indian Tribe, Band, or Group." This Court must interpret the meaning of "federally-recognized Indian Tribe, Band or Group" as it relates to Petitioner's request to be enrolled as a member of the tribe. . . .

This Court is satisfied, that the Respondent has adequately shown that the circumstances under which the Grand Traverse Band adopted its Constitution intended that "federally-recognized Indian tribe" refer to those tribes which have been recognized by the United States government as an Indian tribe. Furthermore, it is clear to this Court that the plain meaning of "federal recognition" is recognition by the United States government as an Indian tribe within the boundaries of the continental United States, and does not include Indian tribes physically located in other countries such as Canada. To interpret otherwise would require the Court to ignore the plain meaning of the phrase as it is used under the laws of the United States, and to ignore the circumstances under which the members of the Grand Traverse Band drafted and adopted its Constitution in 1988.

IV. Conclusion

For the reasons stated above, this Court holds that the decision of the Membership office in rejecting the Petitioner's application for membership was Constitutionally sound. This Court holds that "Indian blood" as stated in Article II, Section 1(b)(2)(a) of the Constitution was intended by the drafters of the Constitution to be limited to Indian blood from tribes which are recognized by the United States government within the boundaries of the United States, and was not intended to include blood from Canadian Indian tribes. This Court further holds that "federally-recognized Indian Tribe, Band or Group" as stated in Article II, Section 2 of the Constitution, refers to those tribes, bands or groups, which have been recognized by the United States government as an Indian tribe within the boundaries of the continental United States. . . .

NOTES

1. On occasion, Indians that are residents of other nations may be eligible for American Indian tribal citizenship, or at least federal services. One example is the Garden River Ojibway community just north of Sault Ste. Marie, Michigan, in Ontario, Canada. The Garden River community is part of the groups now known as the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians. *See Bay Mills Indian Community Land Claims Settlement*, Hearing before the Senate Committee on Indian Affairs, S. Hrg. 107-925, at 34 (Oct. 10, 2002) (Prepared Statement of L. John Lukfins, President, Executive Council, Bay Mills Indian Community).
2. As a general rule, Indian people may not be citizens of more than one Indian nation. As such, some Indian people who may have citizenship in one

Indian nation relinquish their citizenship in order to petition for citizenship with another tribe. Occasionally, litigation arises out of this relinquishment process.

In *Loy v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 132, 2003.NAGR.0000010 (Confederated Tribes of the Grand Ronde Reservation Court of Appeals 2003), the court struck down a one-year waiting period on relinquishment imposed by the tribal council:

> The Enrollment Committee was required to wait at least one year after Loy relinquished her Siletz tribal membership before considering her Grand Ronde enrollment application. Tribal Code §4.10(b)(4). We must address whether the Tribal Council had the authority to legislatively adopt this one-year waiting period, given the absence of such a requirement in the 1984 Grand Ronde Constitution, which stated with respect to dual membership:
>
> > Section 1. Requirements. The membership of the Confederated Tribes of the Grand Ronde Community of Oregon shall consist of all persons who are not enrolled as members of another recognized tribe, band or community and . . . .
> >
> > Section 2. Dual Membership Prohibited. No person who is an enrolled member of any other organized tribe, band, or Indian community officially recognized by the Secretary of the Interior shall be qualified for membership in the Confederated Tribes of the Grand Ronde Community of Oregon, unless he or she has relinquished in writing his or her membership in such tribe, band or community.
>
> Grand Ronde Constitution, Art. V, §§1, 2 (1984). . . .
>
> The Constitution required the Tribal Council to "enact an ordinance establishing procedures for processing membership matters, including but not limited to application procedures. . . ." Grand Ronde Constitution, Art. V, §3. The Tribe argues that the one-year waiting period is only a procedural requirement authorized under the foregoing provision. We disagree.
>
> [W]e view the one-year waiting period as being substantive because it "creates, defines, and regulates" the eligibility requirements for tribal membership. That conclusion is supported by the voters' subsequent amendment of Article V in 1999, which, in addition to changing the enrollment criteria, added the one-year waiting period as a requirement for those applicants who have relinquished membership in other recognized tribes. *See* Grand Ronde Constitution, Art. V, §§1, 2 (1999). In addition, the sample ballot distributed to tribal voters indicated that the Constitutional amendment was designed "to increase requirements for enrollment" in the Tribe. The Tribal Council did not, and does not, have the authority to create by ordinance membership requirements inconsistent with those expressly defined in the Constitution. The Tribal Council could no more add the one-year waiting period to the membership requirements than it could change the Indian blood quantum the Constitution requires.
>
> Consequently, we hold that the Tribal Council exceeded its constitutional authority and violated the 1984 Grand Ronde Constitution when it added as a membership requirement a one-year relinquishment waiting period that was not contained in the Constitution. . . .

Id., 2003.NAGR.0000010 at ¶¶25-32.

C. DISENROLLMENT

Snowden v. Saginaw Chippewa Indian Tribe of Michigan

Appellate Court of the Saginaw Chippewa Indian Tribe of Michigan,
No. 04-CA-1017, 32 Indian L. Rep. 6047 (January 7, 2005)

By Frank Pommersheim, Associate Justice, for a unanimous Court. . . .

I. Introduction and Background

For the past decade, if not longer, the Saginaw Chippewa Indian Tribe has been embroiled in extensive political and legal conflict over issues of membership. While the cause of these disputes is deeply rooted in various *federal* moves relative to membership, it has been left to the Tribe to resolve these often painful issues. This case is one example. It focuses on the issue of disenrollment.

The consolidated cases in this appeal grow out of an attempt by the Tribe to disenroll two deceased Tribal members, Malina Hinmon and Mary Lee (Tipkey) Snowden and their descendants. The descendants include two members of a prior Tribal Council, as well as a former Chief Judge of the Tribal Court. . . .

II. Issue

This appeal raises a single issue, namely, whether the Tribal Council's power to disenroll currently enrolled members is limited to the narrow grounds expressly identified in the Tribal Constitution and if not, what are the Tribal constitutional boundaries in establishing (substantive) grounds for disenrollment.

III. Discussion

This case is not just about the meaning of the Saginaw Chippewa Tribal Constitution of 1986, but it is also a story about a People and a Tribe enmeshed in the coils of an unknowing and meddlesome Bureau of Indian Affairs and Federal Government. This destabilizing federal force is amply demonstrated in the history leading up to the adoption of the first Saginaw Chippewa Tribal Constitution in 1937. The Saginaw Chippewa Tribe of Michigan came into specific legal existence as a result of the Indian Reorganization Act (IRA) of 1934 and the adoption of the first Tribal Constitution in 1937. As is well know, the thrust of the IRA was to encourage tribes to formally adopt the Act through a tribal referendum and then adopt a constitution as provided by Sec. 16 of the Act as well as a business charter as provided in Sec. 17 of the Act.

Many local Tribal leaders and people were interested in the possibilities offered by the IRA. In fact, even before the referendum on the IRA itself, a Business Committee headed by Elijah Elk was established to meet with various tribal communities and to begin drafting a tribal constitution. The work of this committee resulted in a (draft) constitution that was sent to Secretary of Interior Harold Ickes on Nov. 27, 1934 for his approval.

The draft constitution is noteworthy in several respects that are directly pertinent to this litigation. The proposed constitution's preamble began,

"We, the members of the Saginaw, Swan Creek, and Black River Bands of Chippewa Indians. . . ." The proposed Tribal Council recognized four districts — three of which were outside the boundaries of the Isabella Reservation — three representatives from Mt. Pleasant (i.e. Isabella Reservation), three from Bay City, one from Caro, and three from Hubbard Lake.

Action on this proposed Constitution was slowed as a result of BIA Commissioner John Collier's direction to Elijah Elk that no action could be taken until the formal referendum to accept the IRA took place. As a result, energy shifted away from the draft constitution toward developing a list of eligible voters to vote in the IRA referendum. The list that was compiled by tribal individuals and BIA special agent George Blakeslee contained the names of many tribal people living outside the boundaries of the Isabella Reservation. The referendum was held on June 17, 1935 and included at least two off reservation voting places. The referendum passed.

With the successful referendum accomplished, attention returned to the Constitution itself. The Tribe's desire to include all of its communities within its constitution — even those communities outside the Isabella Reservation — met strong resistance from Assistant Commissioner of Indian Affairs, William Zimmerman. Commissioner Zimmerman took the position that a tribe could only organize under the IRA if it had a reservation and its only members could be tribal people residing on the Reservation.

With this dubious interpretation at the forefront of his review of the proposed Constitution, he changed the preamble to read "We, the Indians residing on the Isabella Reservation it the State of Michigan. . . ." In addition, he changed the proposed Tribal Council representation to require all council members be elected from within the Reservation, and required that all Tribal members reside on the Reservation. Commissioner Zimmerman further advised the Tribe that subsequent to the referendum to accept the constitution the Tribe could "adopt" those individuals living off the reservation. In fact, this "adoption" language appears in Sec. 2 of Art. III — Membership of the 1937 Constitution.

All these "recommendations" were accepted by the Business Committee and incorporated in the proposed Tribal Constitution that was voted on and accepted by tribal members on March 27, 1937. Unfortunately, the 1937 Constitution — whatever its intent — sowed the seeds of membership confusion and discontent that yielded the bitter harvest at the core of this most challenging, even heartwrenching, litigation about the cultural and legal aspects of tribal belonging.

The shortcomings of the membership provisions of the 1937 Constitution were apparent from the beginning. The problems caused by severe land loss, conflicting allotment procedures, and artificial residency requirements virtually insured a confusing, inconsistent approach to enrollment. This flawed and inadequate patchwork approach was capped by Congress' insistence that as part of the settlement of the Saginaw Chippewa Tribe's successful land claim against the United States that a new Tribal Constitution — approved by Congress — be adopted by a vote of the members of the Saginaw Chippewa Tribe. The Constitution so adopted by majority vote was the Saginaw Chippewa

Tribal Constitution of 1986 which contains the membership and other relevant sections at issue in this case.

The most essential ingredient of tribal sovereignty is the ability of tribes "to maintain or establish [their] own form of government." Felix S. Cohen, Handbook of Federal Indian Law 247 (1982). Indeed, "[t]his power is the first element of sovereignty." *Id.* Tribes accordingly allocate authority to their elected officials in the manner that they view as most conducive to the effective functioning of their political communities. "Tribal government . . . may reflect the tribe's determination as to what form best fits its needs based on practical, cultural, historical, or religious considerations." *Id.*; *see also Holmes v. St. Croix Casino*, 26 Indian L. Rep. 6089, 6092 (St. Croix App. Ct. 1999) ("The first element of sovereignty . . . is the power of the tribe to determine and define its own form of government. *Such powers include the right to define the power and duties of its officials. . . .*") (emphasis added); *Coin v. Mowa*, 25 Indian L. Rep. 6208, 6210 (Hopi App. Ct. 1997) ("In the federal scheme, the Tribe retains any power not abrogated by the federal government. *The Tribe exercises its retained sovereignty by allocating this power as it sees fit.*") (citation omitted and emphasis added).

Tribal constitutions frequently serve as the vehicle that Tribes use to define the allocation of power to their governing institutions, *see Terry-Carpenter v. Las Vegas Paiute Tribal Council*, 29 Indian L. Rep. 6041, 6043 (Las Vegas Paiute Ct. App. 2002), and, as this Court stressed in *Chamberlain* [*v. Peters*, 27 Indian L. Rep. 6085 (Saginaw Chippewa Indian Tribe Appellate Court 2000)], in constitutional systems it is often the solemn responsibility of the tribal courts to ensure that the Tribe's governing bodies do not exceed the bounds thereby placed on their authority. *Chamberlain*, 27 Indian L. Rep. at 6089 ("Among the most important functions of courts are constitutional interpretation and the closely connected power of determining whether law and acts of the legislature comport with the provisions of the Constitution. Courts were created to serve these purposes.") (quoting *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 Indian L. Rep. 6149, 6155 (C.S. & K.T. Ct. App. 1995).

A. Structure of the Saginaw Chippewa Tribal Constitution of 1986

A central element in this process of establishing a constitutional government is the allocation of power between the Tribal Government and the "people." In determining what is the constitutional range of the Tribe's power to disenroll individuals who currently are legally recognized as Tribal members, it is helpful to review the overall structural design of the 1986 Constitution. The essential historical types of constitutions in Indian country are the "plenary" model in which all power is expressly granted to the Tribal Council or the enumerated or "limited" powers model in which the Tribal Council is provided a limited set of enumerated powers with a reservation of all such non-enumerated powers to "the people." An example of the former is the Grand Traverse Band of Ottawa and Chippewa Indians Constitution at Art. IV:

> The Tribal Council . . . shall be vested with all of the sovereign governmental executive and legislative powers of the Tribe not inconsistent with any

> provision(s) of the Constitution or federal law. *Such powers shall include, but not be limited to, the following*. . . . (emphasis added).

An example of the latter is the Turtle Mt. Band of Chippewa Indians Constitution at Art. X:

> Any right [or] power heretofore vested in the [Band], but not expressly referred to in the Constitution, shall remain in the Band, and may be exercised by the [Band] or by the Tribal Council through the adoption of appropriate constitutional amendment if that be the wishes of the people.

Needless to say the Constitution of the United States is also an enumerated powers constitution.

The 1986 Saginaw Chippewa Constitution is clearly an enumerated powers Constitution at Art. VI (Powers of the Tribal Council) Sec. 2:

> The Trial Council may exercise such further powers as may in the future be *delegated to it by members of the Tribe* (emphasis added).

Since Sec. 1 of Art. VI enumerated the powers of the Tribal Council, there is no doubt that Sec. 2 is in direct limitation of Tribal Council authority to those powers specifically identified in Sec. 1.

B. Express Constitutional Power to Disenroll

Sec. 1(m) of Art. VI of the Constitution expressly addresses issues of membership by recognizing Tribal Council authority:

> To enact resolutions or ordinances not inconsistent with Art. III of this Constitution governing adoptions and abandonment of membership.

This language does not reflect any extensive or generalized power to disenroll. At best, it is reasonable to interpret the language as including Tribal Council authority to enact ordinances relevant to disenrollment in the context of "adoption" or "abandonment of membership." Apparently no such ordinances have ever been adopted and therefore Art. VI Sec. 1(m) is not relevant to the case at hand.

Art. III of the Constitution deals directly with membership. Sec. 1 deals with the qualifications for enrollment. (In fact, Sec. 1, and more particularly Sec. 1(c), is the Constitutional core of the Bryant case.) Sec. 1 provides no authority to the Tribal Council to legislate in the area of enrollment except as to "adoption." Sec. 1 contains no express powers of disenrollment.

Secs. 2 and 3 deal expressly with disenrollment and basically track the language of Art. VI(1)(m) about "abandonment" and "adoption." Sec. 2 mandates disenrollment if a tribal member becomes "an enrolled member of any other federally recognized tribe." Sec. 3 involves the potential disenrollment of an "adopted member" of the Tribe "by reason of marriage" wherein said marriage is dissolved by either annulment or divorce and said individual neither maintains Reservation residence nor remarries another tribal member within twelve months. An "adopted" tribal member is also subject to potential disenrollment by "re-establishing tribal relations with the tribe from which they are descendants by blood." Disenrollment under Sec. 2 is

mandatory (i.e. "shall"). Disenrollment under Sec. 3 is discretionary (i.e. "may").

In sum, the only express constitutional authority to disenroll is limited to certain situations involving "adopted" tribal members and tribal members who "abandon" Saginaw Chippewa Tribal membership by enrolling in another federal[ly] recognized tribe.

C. Implied Constitutional Power to Disenroll

Both sides presumably do not dispute any of the above, which merely establishes the background and context for examining the pivotal issue whether there are any implied powers of disenrollment and if so, what they are. The fact that the Constitution is an enumerated powers constitution with limited express powers of disenrollment does *not* automatically foreclose the possibility of some limited — presumably very limited — implied powers of disenrollment.

Before examining such possibilities, it is necessary to address the Tribe's observation that this Court has made an "unwarranted assumption . . . that all persons listed on the tribal rolls had, in fact, been admitted to membership after first proving that they in fact and in law actually met the Tribe's constitutional membership criteria." (Appellee's Brief at 15.) This Court's "assumption" is indeed warranted and required by both legal and cultural norms of integrity. If someone has achieved a legal status (even if erroneously), they are entitled to that status until the government *proves* adequately to the contrary. The Tribe would have us *assume* the "guilt" rather than the "innocence" of Appellants. Such an approach would necessarily taint and even erode this Court's bedrock commitment to due process and cultural respect.

No constitutional text is completely transparent or self-disclosing and no constitution is beyond the necessity of interpretation. In fact, that is the request of the parties in this litigation, that the Court engage in constitutional adjudication. In this regard, the Tribe makes rather extensive claims that it has wide-ranging implied powers to disenroll that flow from Art. VI Secs. e, j, n and o.

The core of the Tribe's argument is that the interplay of Art. VI Secs. e, j, n, and o particularly the "general welfare" clauses of Secs (j) and (o) along with the "economic affairs" clause of Sec. (e) provide the Tribal Council with authority "essentially unrestricted as to *subject matter* so long as the Council's legislation can be fairly said to promote the Tribe's 'general welfare' or 'economic affairs' . . . so long as that legislation does not contravene any other explicit limitation on the Council's powers." (Appellee's Brief at 19.) This claim is rather bold, if not extravagant, in that it seeks to convert an enumerated powers Constitution into a plenary powers Constitution with an overwhelming presumption in favor of *any and all* Tribal Council action that would put the burden on the non-Tribal Council party to show "explicit limitation on the Council's power." This goes too far and would necessarily unhinge Tribal Council authority from the history and text of the Constitution.

The "general welfare" clauses at Secs. (j) and (o) are primarily related to matters of "tribal property . . . natural resources . . . to cultivate Indian arts,

crafts" (sec. o). Neither of these enumerations, whether using the statutory interpretation maxims of *ejusdem generis* or *noscitur a sociis*[19] or ordinary common sense, appear related to issues of membership and more particularly to issues of disenrollment, and therefore they do not support any wide-ranging Tribal Council power to disenroll.

The Appellants' argument goes too far in the other direction. They claim that a limited powers Constitution — such as the one at bar — contains no implied powers whatsoever and the power to disenroll is limited to the express power to disenroll relative to "adoption" and "abandonment" as set out at Art. III Secs. 2 and 3 and Art. IV Sec. 1(m). For the Appellants, those limited express grounds for disenrollment negate any implied grounds for disenrollment.

The logic of this assertion is that the overall structure of the Constitution constrains any attempt to go beyond the express language of disenrollment. This argument is credible, but it is not compelling. The express grounds for disenrollment are really designed to cover a specific kind of disenrollment — disenrollment that comes into play *after* legitimate enrollment through the occurrence of a *condition subsequent* such as the divorce of an "adopted" trial member or "abandonment" of membership by obtaining membership in another federally recognized tribe.

The Constitution is silent on the ability of the Tribal Council to disenroll someone who did not meet — at the front end — the basic conditions for enrollment set out in Art. III, Sec. I. To interpret this constitutional silence as an absolute bar to *potential* disenrollment of such individuals would create a constitutional anomaly that would, for example, put "fraud" in the membership context beyond the pale of the constitutional text. Such a reading would seem a clear failure of constitutional justice.

A survey of other tribal constitutions is informative and consistent in this regard. No tribal constitution cited by the parties or otherwise known by the Court contains any express provision to disenroll on such basic grounds like "fraud" and "mistake." This does *not* lead to the conclusion that such power does *not* exist in any Tribe, but rather that it is so basic and ingrained in the understanding of what is necessary to become a (legitimate) tribal member that there is a very, very limited *implied* power to disenroll on grounds of fraud and mistake that inheres in the right to enroll itself. To put it another way, there is a very, very limited, but necessary, constitutional corollary relative to disenrollment that is an ineluctable part of the constitutional mandate of enrollment itself. Without such implied constitutional power, the Tribe would be powerless to deal with fraud and mistake in the enrollment

19. These Latin phrases, staples of statutory interpretation, may be translated as follows: *ejusdem generis* means of the same kind or class and refers to the textual principle that "[w]here general words follow specific words in [textual] enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland, Statutes and Statutory Construction §47.17 (6th ed., Norman Singer, ed.). *Noscitur a socciis* literally means that something is known from its associates or more colloquially a word is known by the company it keeps. . . . These principles of statutory construction add up to the commonsensical notion that where the framers of a document group together a number of items in a particular textual enumeration, they do not do so randomly, but because they think of the items as related to one another and intend them to be read as such. . . .

process. Such an interpretation of the constitutional text would improperly exalt form over substance.

No, the Tribe may not disenroll people for whatever "good" reasons it might identify. No, the Constitution does not (and cannot) condone any constitutional failure of justice that would potentially endorse (constitutional) fraud and mistake in obtaining membership. Beyond such quite limited constitutional authority to disenroll on grounds of fraud or mistake, there are *no* other *implied* grounds for disenrollment.[20]

This Court has an unflagging duty to interpret the Constitution. That is, in fact, its highest calling. This duty and calling are never taken lightly and never confused with a mere review of policy. Tribal membership involves not only constitutional status, but also serves as the ultimate indication of cultural belonging. With this in mind, we urge the parties, as we did in the *Chamberlain* case, to place themselves in the heart of Native American jurisprudence by "healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again." 27 Indian L. Rep. 6085, 6097 (2000).

IV. Conclusion

For all of the above stated reasons, the decision of Community Court is reversed. The implied Constitutional power to disenroll is limited to matters of fraud and mistake. Further, the guarantee of due process requires that exercise of such implied power must be set out in an appropriate ordinance that defines these substantive grounds for disenrollment and further complies with the procedural guarantees set out in Ordinance 14.

IT IS SO ORDERED.

NOTES

1. The Saginaw Chippewa Indian Tribe's citizenship conflicts continue to this day. In a pair of recent decisions, the tribal appellate court rejected the decision of the tribal administrative citizenship office that declined to give weight to a blood quantum determination made by the Tribe and memorialized in a Certificate of Degree of Indian Blood. *See Graverette v. Saginaw Chippewa Tribe of Michigan*, Nos. 09-CA-1040, 09-CA-1041 (Saginaw Chippewa Tribe of Michigan Court of Appeals, Aug. 16, 2010). *See also Tappen v. Tribal Certifiers*, No. 10-CA-0264 (Saginaw Chippewa Tribe of Michigan Court of Appeals, Aug. 16, 2010). The court wrote:

> The [Office of Administrative Hearings] and the Tribal Certifier also apparently read [the tribal statute] to deny consideration of federally or tribally issued Certificates of Degree of Indian Blood. . . . We do not believe that [the tribal statute] supports such an approach on the basis that tribal certificates of degree of Indian blood are unreliable. This is akin to accusing the Saginaw Chippewa Indian tribe of lying in official documents; we cannot

20. It is critical to remember that this case does *not* involve the review of any specific lower court decision to disenroll. The precise grounds for such potential disenrollment have *never* been established, much less applied. Identifying that relevant standard is what this case is about. Any actual case of disenrollment will be subject to the stringent due process and burden of proof standards of Ordinance 14 and subject to (potential) review by this Court.

> countenance such an unsubstantiated conclusion without more explanation or an affirmative finding by the legislative body.

Graverette, at 3.

2. Angela Riley notes that tribal disenrollment cases often arise out of disputes over gaming wealth, as does the outsider scrutiny of such cases:

> News reports of banishment and disenrollment of individual Indians by wealthy tribes, in particular, are fueling deeply embedded misconceptions about tribal governments. Though it's not clear that there are more membership disputes today than in the past, they are certainly more widely reported than before. Tribes concede that they are carefully scrutinizing tribal membership decisions. One reason is that casino wealth has attracted masses of people who wouldn't have bothered to claim tribal membership before. Thus, tribes are faced with the unenviable task of verifying the membership of new and existing members.
>
> News reports of tribal members suffering disenrollment or banishment after, for example, contesting the scope of tribal leaders' powers, alleging civil rights violations, or opposing major economic development projects have added to negative public sentiments about tribal governments. Many tribes believe this is due much more to a backlash over gaming than anger over civil rights violations of individual tribal members. But, in any case, civil rights lawyers (including Indian attorneys themselves) are aggressively representing individual Indians and pressing for federal court review of tribal court decisions. These cases appear to inspire a level of opposition to tribal governments — coming especially from tribal members themselves — that was not seen immediately following *Santa Clara Pueblo*.

Angela R. Riley, *Tribal Sovereignty in a Post-9/11 World*, 82 N.D. L. Rev. 953, 959-60 (2006).

3. Tribal disenrollment decisions are often accompanied by the banishment of the disenrolled individuals. Professor Riley writes:

> [R]ecent stories of banishment in the news raise the inference that, at least in some instances, tribal members are being permanently exiled from their tribal communities in the absence of the other requisite governance factors. Allegations that tribal members have been banished for voicing dissent against tribal leadership are particularly troubling. In the case of one California rancheria, for example, the *Los Angeles Times* reported that 174 members — fifteen percent of the tribe's total enrollment — were banished because their common relative vocally opposed a proposed casino development deal. Another California tribe purportedly disenrolled seventy tribal members, including the vice chair of the tribal council, for signing a petition to recall other elected officials. Subsequently, two tribal members who expressed vocal opposition to the previous banishments were also disenrolled. In that instance, the tribal chairwoman, Glenda Nelson, reportedly said that the tribal members were disenrolled for the sake of tribal unity, because the dissidents' actions were destroying the tribe. Just recently, five tribal members were allegedly "shunned" by their tribe for several years for filing a lawsuit to demand review of tribal finances. They were not informed of their banishment — which will preclude them from accessing their tribal membership benefits for seven years — until almost a month after the tribal council's decision. And there are other cases that raise questions about the

> rights of minority factions who claim they are being punished for speaking out against powerful elites. Such stories are troubling from an indigenous perspective, not only because injustice may be perpetrated on individual Indians, but because such stories raise the ire of the non-Indian community and further instigate misconceptions and animosity toward tribes, even when such incidences are extremely isolated.

Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 113-14 (2007).

4. Tribal courts confronted with the question of the revocation of tribal citizenship by tribal officials after the discovery of an error are split on whether the disenrolled member is entitled to keep per capita payments.

In *Kennard v. Dore*, No. 93-C-02, 1994.NAPA.0000001 (Passamaquoddy Tribe Appellate Division, July 14, 1994), the court wrote the following:

> For the Court below to agree that the Pleasant Point Tribal Council had the right to remove Brad Jr. from the membership rolls on December 15, 1993 but to somehow maintain that Brad Jr., clearly never entitled to Tribal membership, yet possessed some type of "entitlement" to per capita monies, which "entitlement" only Tribal members would have, is a veritable conundrum. If he is not a member he has no "entitlement" to per capita. If he is not a member the question may also be raised whether he ever had entitlement to I.C.R.A. protections. The decision of the Court below that — the part of the Court's decision conferring the "entitlement" and the finding of the I.CR.A. violation will stand — cannot stand. The record below shows due process disallowance of Kayla's application for membership and due process disenrollment of Brad Jr. When these things occurred any "entitlement" ceased *ab initio*. Any other result would result in an absurdity whereby a non-member would possess a continuing right to per capita income from a Tribe to which he did not belong. So much of the lower Court's decision finding a continuing "entitlement" in Brad Jr. to allocated per capita income being error, that decision is hereby reversed and it is ordered that all monies paid by the Nation to the Clerk of Tribal Court to be kept in escrow in this case, representing unpaid allocated per capita on behalf of Brad Jr., be immediately returned to the Nation.

Id. at ¶29.

5. Somewhat conversely, the court in *Deverney v. Grand Traverse Band of Ottawa and Chippewa Indians*, 2000 WL 35749822 (Grand Traverse Band Court of Appeals, Nov. 15, 2000), held that the revocation of tribal membership is not void ab initio until the disenrolled citizen has exhausted tribal remedies:

> [O]nce membership is granted, the court must give due process except where the Tribal Constitution expressly removes the court discretion or jurisdiction. This was clearly done in the second part of Article II, Section 2 of the Tribal Constitution for members who become members of another tribe after becoming members of this tribe. The Constitution sets out the remedy in that situation, but does not set out a remedy in the first part of that section. Since the parties framing the Constitution set out the remedy in one situation and knew how to apply it, the court cannot add it to another situation. This is particularly strong policy in this case where the tribe passed Ordinance 7 GTBC 202(b) six weeks after the Constitution was ratified. The argument

that it only applies to people enrolled under Article II, Section 1, is rejected as part (b) is unambiguous and does not speak to any such limitation on its face. This general reference is continued in 7 GTBC Sections 203 and 204 as to "any" person disenrolled.

The Tribe must be given the power to exercise its discretion in making a membership decision. A later-discovered error by the Certifier must be corrected as the particular case requires. It cannot be automatic and remove the Certifier's discretion or judgment. This court denies the argument that both parts of Section 2 are automatic and self-executing. This also is a rejection that both parts of Article II, Section 2 makes membership errors void *ab initio*.

Id. at *3-4.

6. In *Muscogee (Creek) Nation Citizenship Board v. Todd*, 7 Okla. Tribal Court Rep. 9 (Muscogee (Creek) Nation Supreme Court 2000), the court reversed a disenrollment order by the Nation's Citizenship Board:

> The authority of the Board to revoke citizenship is based upon NCA 81-06, Section 4006: REMOVAL OF NAMES FROM THE CITIZENSHIP ROLL:
>
> > The Citizenship Board shall have the power to remove the names of persons from the Citizenship Roll of the Muscogee (Creek) Nation, by:
> >
> > A. Designating a cause to remove from the roll, said cause hereby limited to:
> >
> > 1. Proof that the person is not Muscogee (Creek) Indian by blood,
> > 2. Proof that the person is an enrolled member of another Indian tribe, nation, band or pueblo,
> > 3. Proof that fraud, bribery, or misrepresentation were utilized at any stage in securing enrollment,
> > 4. Voluntary resignation from citizenship by an enrolled citizen,
> > 5. Order by a tribal court to remove a name from the Citizenship Roll.
> >
> > B. Notification of the otherwise enrolled citizen that the cause for their name to be removed has been designated and that they have thirty days to request a hearing if any cause other than resignation or court order is involved.
> >
> > C. Holding a hearing if requested by the person against whom cause has been designated. The hearing shall be an evidentiary proceeding where *the burden of proof shall be upon the Citizenship Board* to establish [by] a preponderance of the evidence that the designated cause is true and sufficient to remove the person from the Citizenship Roll. All certified copies of records in the citizen's file shall automatically be introduced by the Chairman. The citizen and any member of the Citizenship Board may subpoena witnesses. The decision of the Citizenship Board may be reviewed by the tribal courts as provided by this Ordinance.
>
> NCA 81-06 §4006 (emphasis added).
>
> This Court finds that the District Court did not err in remanding this case to the Muscogee (Creek) Nation Citizenship Board for the Board to comply with the mandated procedures for removal of a person from the Citizenship Rolls as set forth in NCA 81-06. . . .

> The Citizenship Board is to follow the language of NCA 81-06 and shall not place the burden of proof upon the citizen to fight against a petition for removal.

Id. at 11-13.

The tribal court in *Todd* had applied by analogy the burden of proof adopted by the United States Supreme Court in denaturalization cases:

> The United States Supreme Court, in *Schneiderman v. United States*, 320 U.S. 118, 63 S. Ct. 1333 (1943), has addressed the burden of proof placed upon the government in de-naturalization cases. The United States Supreme Court requires the government to establish its allegations by clear, unequivocal and convincing evidence. Further, in *Fedorenko v. United States*, 449 U.S. 490, 101 S. Ct. 737 (1981), the Court said that American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences. For these reasons, we have held that the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." The evidence justifying revocation of citizenship must be "clear, unequivocal, and convincing" and not leave "the issue in doubt."

Todd v. Muscogee (Creek) Nation Citizenship Board, 6 Okla. Tribal Court Rep. 170, 175 (Muscogee (Creek) District Court, Oct. 16, 1999). Are the due process concerns in American denaturalization proceedings the same as in a tribal disenrollment case? Did the Muscogee (Creek) Nation Supreme Court implicitly revoke this standard by not mentioning it in its opinion?

7. In disenrollment cases, tribal courts tend to give the benefit of the doubt to the potential disenrollee for due process purposes. For example, in *Delgado v. Puyallup Tribal Council*, No. 95-3604, 1996.NAPU.0000007 (Puyallup Tribal Court, April 3, 1996), the court faced an appeal of a disenrollment by a tribal administrative board involving the proper notice to be provided to the disenrollee:

> The Tribe contends that Ms. Delgado intentionally placed herself where she could not receive mail and thus it was of her own making that she was unable to be notified. This argument is disingenuous for two reason: 1) the Tribe's Enrollment Director distributed a memorandum on April 17, 1991, to all concerned parties that Ms. Delgado was able to receive only personal and emergency mail and that all mail for Ms. Delgado should be directed to the Enrollment Office and 2) there is no evidence before the court that shows any attempt was made to notify her of the disenrollment proceedings. There are no letters returned (regular or otherwise), no return receipt proving she was notified by certified mail, and no affidavits attesting to service of the notice.
>
> The evidence is clear that Ms. Delgado was not in the United States during the time in question. It is also clear that Ms. Delgado could receive mail that was either of a personal or an emergent nature.
>
> The court finds from the evidence presented that Ms. Delgado did not receive notice she was being considered for disenrollment from the Puyallup Tribe of Indians
>
> The court concludes as a matter of law that Ms. Delgado was denied due process of law in violation of the Tribal and United States Constitutions.

Id. at ¶¶52-55. The court reversed the disenrollment on that ground.

8. In rural tribal communities, it is a unique and difficult question for tribal courts and tribal governments to provide adequate notice to tribal citizens. Americans Indians often do not have addresses, and must rely upon post office boxes, but proper notice often requires more than mailing an official document to a post office box. Tribal courts often rely upon publication in tribal or local newspapers, but even that kind of notice may be insufficient in a case where the tribal government is moving toward disenrolling a citizen.

In one unusual case, Hoopa Valley Tribe citizens who wanted to challenge the enrollment of another citizen complained to the Tribe's appellate court that they did not receive adequate notice of the enrollment. *See Baldy v. Hoopa Valley Tribal Council*, 3 NICS App. 286, 288 (Hoopa Valley Tribe Court of Appeals, March 16, 1994). The appellants argued that the publication of the enrollment notice in the local newspaper, *The Kourier*, was insufficient:

> While the Appellants acknowledged that *The Kourier* regularly published legal notices of the Hoopa Valley Tribal Court, they also argued that other methods were more likely to inform tribal members of the hearing. When asked what other methods were available, Appellants suggested the tribal newsletter. However, the tribal newsletter is a monthly publication, sporadically published and did not customarily provide legal notice.

Id. at 289. The court dismissed the argument, noting:

> Assuming, *arguendo*, that every member of the Hoopa Valley Tribe has standing to contest enrollment matters, does this entitle every member to personal notice? Immediate family members are not affected by an enrollment decision any more than other tribal members. Even so, Julie McKinnon, one of the Appellants, was served by mail, as were other family members. Regardless, the method of notice advocated by the Appellants would require notice by mail to approximately 2,000 tribal members.
>
> To adopt such notice requirement would not only unduly burden the court clerk's office consisting of one employee, it is also unnecessary in light of the additional custom of posting legal notices in the Neighborhood Facilities Building. The Neighborhood Facilities Building is a community center of the Hoopa Valley Tribe, located on the reservation and frequented by a large majority of tribal members. Appellee noted that one of the appellants works at the building. Appellees also argued that Hoopa Valley is a small community and as such, news travels fast.

Id. at 289-90.

9. In *In re the Membership Revocation of Meza*, 7 NICS App. 111 (Sauk-Siuattle Tribal Court of Appeals 2006), the court upheld a tribal statute disenrolling several tribal citizens:

> On March 25, 2005, the Sauk-Suiattle Tribal Council (hereinafter "Tribal Council") enacted Sauk-Suiattle Resolution No. 03/27b/05, which rescinded Sauk-Suiattle Resolution No. 19/88, and Sauk-Suiattle Resolution Nos. 03/28b/05 thru 03/34b/05, which disenrolled Warren Bill, Janice Enick Bill, Julie Bill Meza, John Bill, Miriam Bill, Melton Bill and Gloria Bill (hereinafter "Appellants"). Sauk-Suiattle Resolution No. 19/88 amended the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942, by adding the

name of Emily (Joe) Bill. After the passage of Sauk-Suiattle Resolution No. 19/88, Appellants had filed for and were granted membership into the Sauk-Suiattle Tribe on the basis that they were each a direct descendant of Emily Joe Bill. . . .

The Tribal Council convened special meetings on October 3, 2005, and November 1, 2005 to consider the proposed revocation of Appellant's Tribal membership based on the lack of evidence that the Appellants had direct descendancy from anyone listed on the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942.[1] The Council revoked the Appellants' membership, concluding that the Appellants did not meet the qualifications for enrollment in the Sauk-Suiattle Indian Tribe because the Appellants had no direct descendancy from anyone listed on the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942. . . .

The Appellants argue that the Tribal Council's decision to revoke their Tribal memberships was clearly unsupported by the record of decision. This Court disagrees.

The governing authority outlining the enrollability of an individual into the Sauk-Suiattle Indian Tribe is contained in the Sauk-Suiattle Indian Tribal Community Constitution and Bylaws, Article II, Membership, Section 1, which states:

> The membership in the Sauk-Suiattle Indian Tribe shall extend to the following persons provided they do not hold membership in another tribe except as provided for under the provisions of honorary membership.
>
> (A) All persons of Sauk-Suiattle Indian blood whose names appear on the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942.
>
> (B) All persons who possess at least one-fourth (1/4) Indian blood born since the date of said roll who are direct descendants of persons named on the base roll.
>
> (C) Corrections may be made in kthe [sic] tribal membership roll at any time by the tribal council, subject to the approval of the secretary of the interior or his authorized representative.

Turning to the facts at bar, the Tribal Council's record of decision makes clear that the Appellants do not qualify for enrollment pursuant to the Sauk-Suiattle Indian Tribal Community Constitution and Bylaws, Article II, Membership, Section 1: (1) none of the Appellants appear on the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942; (2) none of the Appellants, all of whom were born since the date of the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942, are direct descendants of persons named in the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942; and (3) the Tribal Council has not corrected the Tribal membership roll to add any of the Appellants. The record of decision does not contain any credible evidence showing that Emily Joe Bill should be properly listed on the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942. Therefore, this Court holds that the decision of the Tribal Council revoking the Appellants' membership based on the evidence that the Appellants did not meet

1. At the time of these special meetings, the membership of the Tribal Enrollment Committee was the same as the membership of the Tribal Council and the Council appears to have been acting in the capacity of both Enrollment Committee and Council.

> the qualifications for enrollment in the Sauk-Suiattle Indian Tribe because the Appellants had no direct descendancy from anyone listed on the Skagit-Suiattle (Public Domain) census roll dated January 1, 1942, was not clearly unsupported by the record of decision.

Id. at 112, 115-16.

This case demonstrates the *possibility* of political tides turning against individuals, resulting in the disenrollment of those individuals. Consider first the fact that the tribal council sat as the tribe's enrollment board, not an unusual occurrence in Indian country. Couple that fact with the standard of review, which limited the reviewing court to the record developed by the enrollment board (that is, the tribal governing body). Other tribal courts in other contexts have expressed concern about the potential for abuse in developing a factual record in this manner. That is not to say this case is an example of abuse. There is no reason to think that anything like that occurred here, but these facts suggest the possibility.

D. FEDERAL GOVERNMENT INTERVENTION

The Scope of Federal Government Authority over Tribal Membership Disputes and the Problem of Disenrollment

Brendan Ludwick, 51 Fed. Law. 37, 40-42 (October 2004)

"Secretarial Elections" Involving Tribal Constitutional Amendments

The Bureau of Indian Affairs has authority over tribal elections that involve amendments to a tribe's constitution. Under the Indian Reorganization Act, special statutory rules and regulations govern the procedure of these elections; they are referred to in the statute as "secretarial elections." . . .

[T]he BIA continues to hold considerable authority over secretarial elections, including the power to nullify the results of elections in some circumstances. In *Shakopee Mdewakanton Sioux v. Babbitt*, [107 F.3d 667 (8th Cir. 1997,] the tribe sought to amend the portion of its constitution that set out qualifications for membership in the tribe. Pursuant to 25 U.S.C. §476(c)(1), the tribe requested the secretary of the interior to call the election and conduct it, and an election board consisting of one BIA officer and two members of the tribal government posted a list of registered voters. In response to objections to the board's initial determinations with respect to eligibility, the board concluded that certain people were ineligible to vote and removed them from the list. The election proceeded, and, based upon the board's revised eligibility determinations, the amendment passed. However, after the election, some tribal members objected to the revised eligibility standards that the board had relied on in the election. Ultimately, the BIA was unable to determine whether the board's eligibility determinations were correct and decided to nullify the electoral results.

. . . The Eighth Circuit held that the secretary's interpretation of the statute — allowing the rejection of election results when the interior secretary

is unable to determine whether the election has resulted in ratification by a majority of tribal members — was reasonable for the purposes of APA review. . . .

Perhaps a greater limitation on tribal sovereignty under the IRA may derive from the fact that secretarial elections are federal elections and, therefore, have implications for federal rights. As Professor Carole Goldberg explains, "If the Department of the Interior has review power over a tribal constitution based on the Indian Reorganization Act or some other federal law, the tribe may need to attend to possible violations of the Indian Civil Rights Act." . . . If a membership policy requires a constitutional amendment, then the BIA must review for compliance with the ICRA; but, in most other contexts, determination of tribal membership is outside the purview of federal jurisdiction.

Enrollment Appeals under 25 C.F.R. §62.4(a)

Enrollment determinations that do not involve a constitutional amendment are generally not subject to BIA review, unless the tribe explicitly consents to one by law. Section 62.4(a) of 25 C.F.R. authorizes BIA review of tribal enrollment determinations with tribal consent, providing, "A person who is subject of an adverse enrollment action may file or have filed on his/her behalf an appeal. An adverse enrollment action is . . . [t]he rejection of an application for enrollment or the disenrollment of a tribal member by a tribal committee *when the tribal governing document provides for an appeal of the action to the Secretary*." (Emphasis added.)

In [*Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, Bureau of Indian Affairs*, 38 IBIA 244 (2002),] the Indian Board of Appeals considered the scope of BIA review under §62.4(a) in a disenrollment action by the Cahto Tribe of the Laytonville Rancheria. In that case, the tribe's General Council elected to remove a group of members on the grounds that they were also members of other tribes and/or had received property under another tribe's reservation distribution plan. Through its attorney, the tribe sought BIA recognition of the disenrollment action. The BIA superintendent issued a decision stating that the BIA did not recognize the tribe's disenrollment action, and the BIA's regional director affirmed the superintendent's decision, stating, "Under ordinary circumstances, this office would agree that the Cahto Tribe has a right to interpret its own laws and to determine its own membership, and that the BIA has no right to interfere in this situation; however, after reviewing the case and the gravity of injustice inflicted [on the disenrolled family], I fully support the decision of the Superintendent not to recognize the Tribe's decision."

The tribe appealed to the Board of Indian Appeals, which held that BIA officials lacked jurisdiction over the enrollment dispute. . . .

. . . *Cahto* demonstrates the narrow scope of the BIA's authority under 25 C.F.R. §62.(a)(3). For BIA officials to intervene in an enrollment dispute pursuant to consent by tribal law, the BIA must explicitly act in direct response to an appeal by an aggrieved tribal member. Although the board is prevented from adjudicating enrollment disputes under federal law, the board may invalidate a BIA official's decision that exceeds this limited grant of authority. Such reasoning reflects a policy that respects tribal sovereignty in enrollment matters and limits federal interference.

In dictum that was arguably in conflict with this policy, however, the board in *Cahto* made two additional points worthy of mention. First, the board stated that, under exceptional circumstances, the BIA may have jurisdiction over an internal membership dispute even if the tribe has not consented by law. According to the board, this authority derives from the BIA's responsibility to carry out the government-to-government relationship and may be exercised when, as a result of the dispute, it is not possible to ascertain who is qualified to represent the tribe in dealings with the BIA. Second, the board noted that, when the BIA does have jurisdiction, it has "authority and responsibility" to review the decision for violations of the ICRA. Because the board found no basis for jurisdiction in *Cahto*, it declined to entertain the appellants' ICRA-based claims. The board stated, "ICRA is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise within its jurisdiction." . . .

NOTES

1. Tribal attorneys Timothy Joranko and Mark Van Norman predicted, ten years earlier than the Ludwick excerpt above did, that the Secretary of Interior would retain enormous authority over tribal membership criteria:

> *Santa Clara Pueblo* has endured for fourteen years. During that time, Congress has rejected repeated attempts to create federal court remedies for alleged ICRA violations. By so doing, Congress has made clear its intention that tribal decisions are not to be subject to oversight in federal fora. Surely, Congress did not intend to single out tribal constitutional amendments as the only tribal action subject to federal court review under the ICRA. The adoption of constitutional amendments is a far greater exercise of tribal members' self-determination than ordinances and actions by tribal officials. Yet a comparison of *Santa Clara Pueblo* with §476(a) (1988) yields the result that tribal ordinances and official acts are not subject to federal review, but manifestations of the whole tribe's vision of their government, as embodied in their constitution-making, are. This result could not have been intended by Congress and it cannot be reconciled with Congress' commitment to Indian self-determination. . . .

Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 Gonzaga L. Rev. 81, 104 (1993-1994).

2. Federal courts recognize conclusively that they have no jurisdiction to decide internal tribal matters such as citizenship, but the suits keep coming. In *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), the court rejected a series of claims by non-citizens of the Shakopee Mdewakanton Sioux (Dakota) Community, writing:

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of [various federal statutes], and the Tribe's Constitution. However, upon closer examination, we find that these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.

In this regard, an excerpt from the plaintiffs' amended complaint is particularly telling. In attempting to establish the Secretary of the Interior's liability, the plaintiffs alleged that the "scheme" in which the Secretary participated involved[]

> several willful elements, including: (1) the improper inclusion of non-members on the Tribe's membership rolls; (2) the improper removal and exclusion of constitutionally qualified members from those rolls; (3) the improper exclusion from such rolls of constitutionally qualified members whose membership applications have been indefinitely postponed in their consideration; and (4) improper payments of gaming revenues to non-members who have been removed temporarily from the Tribe's membership rolls.

Amended Complaint at 4. As plaintiffs' own words illustrate, this conflict concerns nothing more than the Tribe's membership determinations.

The facts of this case further show that this dispute needs to be resolved at the tribal level. We note that the Mdewakanton Tribe has expressly waived sovereign immunity from suit in tribal court for actions disputing an individual's qualified status to receive per capita payments. Revenue Allocation Amendments at §14.5(B). Several of the appellants involved in this action have previously brought similar actions in tribal court. In fact, at different stages of this action, suits of this very nature were pending in tribal court. . . .

Id. at 559.