

AN ARGUMENT FOR THE PARTIAL ABROGATION OF
FEDERALLY RECOGNIZED INDIAN TRIBES'
SOVEREIGN POWER OVER MEMBERSHIP

*Eric Reitman**

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INTRODUCTION

It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return.

According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE,¹ no warnings are required before banishment for acts of murder, rape, or treason.

Your actions to overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of Seneca Nation, and further by becoming a member of the Interim General Council, are considered treason. Therefore, banishment is required.

According to the customs and usage of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members.

¹ Haudenosaunee is the traditional name for the Five Nations, an Iroquois-speaking confederacy consisting of the Cayuga, Onondoga, Oneida, Mohawk and Seneca tribes. It has no independent legal significance.

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YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.²

AS an individual's most basic and important legal affiliation, native citizenship is generally considered to be an inviolable right. In the United States, citizens are conditioned to believe that parentage and birth location determine citizenship, which thereafter vests a right that, while for the most part freely alienable, can only be alienated freely. In other words, while one's citizenship can be *given* away, or that of another nation's voluntarily adopted, the idea that it can be *taken* away seems somehow unthinkable. The United States will deport non-citizens who immigrate illegally, denaturalize legal immigrants who procure their citizenship dishonestly,³ and apply capital punishment equally to native-born and naturalized citizens. Yet, involuntary expatriation (stripping of citizenship) is not an available penalty under any other state or federal statute, even those regarding allegiance-related or anti-national offenses.⁴

Take, for example, the cases of Aldrich Ames, Bobby Fischer, Yaser Hamdi, Wassef Ali Hassoun, John Hinckley, Jr., Charles Robert Jenkins, John Walker Lindh, and Timothy McVeigh. All of these individuals were accused (and some of course later found guilty) of serious offenses against the United States, yet none were deprived of their American citizenship as a result. The case of Hamdi is particularly interesting because he had likely never con-

² Notice of Disenrollment and Banishment, Council of Chiefs for the Tonawanda Band of the Seneca Nation (Jan. 24, 1992), *quoted in* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 878 (2d Cir. 1996), cert. denied, 519 U.S. 1041 (1996).

³ See 8 U.S.C. § 1451 (2000) (providing procedures for revoking the naturalization of a previously naturalized citizen when the naturalization was procured illegally, by concealment of a material fact, or by willful misrepresentation).

⁴ See, e.g., *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (rejecting the idea that Congress has any general power to take away citizenship without assent); *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (holding that penal expatriation is a violation of the Eighth Amendment prohibition on cruel and unusual punishment). Federal law does allow for the expatriation of U.S. citizens who participate in foreign military or other treasonous actions against the United States, but only where such actions are taken “*with the intention of relinquishing United States nationality.*” 8 U.S.C. § 1481(a) (2000) (emphasis added).

sidered himself an American national.⁵ Even so, as an American citizen, Hamdi benefits from Supreme Court decisions that have effectively eliminated the use of forcible expatriation as a penal measure.⁶

In sharp contrast to the near-categorical prohibition on forcible expatriation by the federal government, federally-recognized Indian tribes exercise essentially plenary power over tribal citizenship.⁷ Most can disenroll (expatriate) and banish both native-born and naturalized citizens with relative ease.⁸ Although the federal government possesses the power to make tribal membership determinations,⁹ it has only done so for its own narrow purposes¹⁰ or in relatively extreme cases.¹¹ The vast majority of tribal constitu-

⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (noting that Hamdi was a citizen of the United States by virtue of his birth in Louisiana, even though he had left the country as a child). As part of the settlement agreement that ended his trial, Hamdi agreed to voluntarily relinquish his U.S. citizenship. Settlement Agreement at 2, *Hamdi v. Rumsfeld*, 540 U.S. 507 (2004) (No. 03-6696), <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html>. Whether requiring Hamdi to voluntarily denaturalize as a condition of his release constitutes a violation of the government's inability to forcibly expatriate has not yet been tested by the courts. At the very least, the government's adherence to the form of voluntary expatriation demonstrates the power of the underlying principle.

⁶ See *Afroyim*, 387 U.S. at 257; *Trop*, 356 U.S. at 101-02.

⁷ See Felix S. Cohen, *Handbook of Federal Indian Law* 20-23 (Rennard Strickland et al. eds., 1982). This Note adheres to the convention of using the terms "membership" and "citizenship" interchangeably when referring to Indians' citizenship in their tribes. Indian citizenship is wholly independent of American and state citizenship; tribes do not have the power to withdraw an Indian's state or American citizenship.

⁸ See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879 (2d Cir. 1996), cert. denied, 519 U.S. 1041 (1996); *Quair v. Sisco*, 359 F. Supp. 2d 948, 978-79 (E.D. Cal. 2004). In both of these cases, parties argued that forcible expatriation from a tribe violated 25 U.S.C. § 1302(7) (2000), which provides that "[n]o Indian tribe in exercising powers of self-government shall . . . inflict cruel and unusual punishments." In neither case did the court find that forcible expatriation constituted such cruel and unusual punishment.

⁹ Though not explicitly established by any one authority, Congress is generally considered to have plenary power over Indian Tribes. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-59 (1832).

¹⁰ See, e.g., *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) (noting that in the relevant statute Congress had specifically named the beneficiaries of the Gros Ventre Tribe fund).

¹¹ See, e.g., *Classification of Persons as Illegitimate for Purposes of Exclusion from Tribal Membership Repugnant to Civil Rights Act of 1968 and Therefore Void*, 76 Interior Dec. 353, 356 (1969) (advising the Secretary of the Interior that certain provisions of the constitution of the Jicarilla Apache Tribe that deny membership to those

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tions surveyed explicitly authorize involuntary expatriation without securing for citizens any countervailing rights.¹² There is often no intra-tribal remedy for such action.¹³ Even where formal appeal is available, it is often to the same body that promulgated the sanction.¹⁴ Membership disputes are frequently the artifacts of highly charged, highly personal, internecine, and even at times intra-familial conflicts.¹⁵ Given this combination of factors, even the availability of formal appeal to a sympathetic and independent tribal judiciary is no guarantee of an effective intra-tribal remedy.¹⁶ Moreover, while the Supreme Court has held that those subject to federal civil denaturalization/expatriation proceedings must be accorded a heightened civil evidentiary standard,¹⁷ case law demon-

born out of wedlock must not be approved). The Deputy Solicitor made this determination pursuant to the equal protection guarantee of the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (2000), because the purpose of the tribe's restriction, to deter sexual promiscuity, was deemed not "based upon an essential requirement of an Indian tribe [or a] rational purpose."

¹² The Constitution of the Crow Tribe of Montana is typical: "The Crow Tribal General Council shall have the power to adopt ordinances, consistent with this Constitution, governing future membership and loss of membership of members of the Crow Tribe of Indians." Crow Tribal Const. art. III, § 3 (no date available), available at http://www.tribalresourcecenter.org/ccfolder/crow_const.htm. See generally National Tribal Justice Resource Center, Tribal Court Codes & Constitutions, <http://www.tribalresourcecenter.org/tribalcourts/codes/default.asp> (last visited Feb. 28, 2006); University of Oklahoma Law Center, Tribal Constitutions, <http://thorpe.ou.edu/const.html> (last visited Feb. 28, 2006) (two excellent databases of tribal constitutions). Several Indian constitutions do contain affirmative guarantees of membership. See *infra* notes 276-77.

¹³ See, e.g., *Poodry*, 85 F.3d at 876 (finding that it was "undisputed" that there was "no avenue for tribal review" of a banishment decision); *Quair*, 359 F. Supp. 2d at 972 (same).

¹⁴ The lack of an independent judiciary is a common feature in cases that pit members against their tribes. See, e.g., *In re Sac & Fox Tribe*, 340 F.3d 749, 751 (8th Cir. 2003) (finding that when the elected Tribal Council refused to act on a constitutionally-authorized petition that required them to conduct a recall election for their positions, the petitioners' only recourse was to appeal to the selfsame Tribal Council).

¹⁵ For a banishment case with clear intra-familial overtones, see *Custalow v. Commonwealth*, 596 S.E.2d 95 (Va. Ct. App. 2004).

¹⁶ See, e.g., *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 919 (D. Wyo. 1997), *aff'd*, 163 F.3d 1150 (10th Cir. 1998) (demonstrating that vindication in a tribe's judiciary branch may be insufficient to overcome the opposition of a recalcitrant executive in a membership dispute).

¹⁷ See *Klapprott v. United States*, 335 U.S. 601, 612 (1949) ("[B]ecause of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This burden is substan-

strates that Indian disenrollments and expulsions are often carried out with little or no recognizable process.¹⁸ Finally, case law suggests that even when there is an established process, there is no guarantee that it will be followed in any one case.¹⁹

The lack of effective Indian citizenship rights poses three problems. First and foremost, it is manifestly unsuited to the establishment or maintenance of robust republican institutions. Second, it places Indians in the intolerable position of having to trade off free speech and political participation against the potential loss of property, livelihood, and community status. Third, it threatens the entire federal-Indian system, imposing unnecessary and inequitable costs both within the tribes and in the form of negative externalities that must be borne by the state and federal governments. While conceding that the tribes' near plenary power over citizenship is well-established as a matter of law, and indeed central to the

tially identical with that required in criminal cases—proof beyond a reasonable doubt.”) (internal citation omitted); *Schneiderman v. United States*, 320 U.S. 118, 123 (1943) (requiring that the government adduce “evidence of a clear and convincing character” to deprive a nationalized American of his American citizenship).

¹⁸ See, e.g., *Poodry*, 85 F.3d at 878 (explaining that the tribe banished petitioners immediately through a written notice that, among other things, acknowledged that “[a]ccording to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason.”); *Quair*, 359 F. Supp. 2d at 958–59 (detailing how the court was given three different sets of minutes for the meeting at which the council voted to disenroll petitioners, none of which actually recorded any deliberations or details on the vote).

¹⁹ Take, for example, the case of *Alire v. Jackson*, where members of the Warm Springs Reservation sought to expel a non-member Indian day care worker who had been convicted of child neglect. 65 F. Supp. 2d 1124, 1125 (D. Or. 1999). The tribe's constitution placed expulsion power with the Tribal Council, providing that the Tribal Council has the power “[t]o exclude from the territory of the Confederated Tribes persons not legally entitled to reside therein under ordinances which shall be subject to review by the Secretary of the Interior.” Const. and By-Laws of the Confederated Tribes of Warm Springs Reservation of Or. As Amended art. V, § 1(h) (no date available), available at http://www.tribalresourcecenter.org/ccfolder/warm_springs_constandbylaws.htm. Notwithstanding the clear grant of power in the tribal constitution, tribe members first sought and received an expulsion order from the local Bureau of Indian Affairs Superintendent. See *Alire*, 65 F. Supp. 2d at 1125. It was only after the Superintendent rescinded his own *ultra vires* order that members began lobbying the Tribal Council for expulsion. *Id.*; see also *Custalow*, 596 S.E.2d at 99–100 (Annunziata, J., dissenting) (arguing that the tribe had not followed its own established expulsion procedure, which provides that a majority of tribal members over twenty-one years of age vote to expel the individual).

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concept of sovereign self-determination, this Note will argue that the best interests of the federal government, the Indian Tribes, and ultimately the Indians themselves, would be effectuated by action on the part of the federal government that affirmatively curbs that power. Continued permissiveness towards abuses of the tribal membership power subjects individual Indians to unacceptable restraints on liberty, expressed both in the form of high profile disenrollments, disenfranchisements, and banishments, and in the less obvious, yet potentially more insidious, day-to-day chilling of free speech and political participation.

Part I of this Note will focus on the nature and extent of tribes' power to control membership by effecting individual or en masse involuntary disenrollments, promulgating regulations that limit enrollment, disenfranchising members of specific benefits, and physically banishing members from the reservation. Beyond simply being cut off from one's ancestral community, membership-related sanctions can carry with them serious economic consequences. Such consequences include, but are not limited to, the rights to live largely tax-free on an Indian reservation, to receive medical care from the Indian Health Service and various other federally- and tribally-funded public welfare benefits, and even to receive per capita distributions of gaming or other revenue that can amount to hundreds of thousands of dollars per year.²⁰

The primary avenue of federal redress for tribal citizenship rights abuses is to sue for a writ of habeas corpus under the Indian Civil Rights Act of 1968 ("ICRA").²¹ After illustrating how habeas

²⁰ In the tribal citizenship rights case of *Smith v. Babbitt*, the complaint alleged that per capita gaming revenue distributions to members of Mdewakanton Sioux Tribe could be as high as \$400,000 per person. 100 F.3d 556, 557 (8th Cir. 1996). The per capita distribution had been as high as \$500,000 several years earlier, and would reach \$576,000 within a year of the ruling. Tim Giago, *It's Time For Tribes To Share*, Omaha World-Herald, Mar. 4, 1997, at 13; Rogers Worthington, *Who belongs to tribe? Casino wealth raises the stakes*, Chi. Trib., May 28, 1994, § 1, at 1.

²¹ 25 U.S.C. § 1303 (2000). Because federally-recognized tribes enjoy general sovereign immunity, suing a tribe in federal court requires either that the tribe waive immunity or that Congress waive it for them. See *infra* notes 52-53 and related text. Because it explicitly provides for federal habeas suits against tribes, the ICRA is the only federal statute that provides Indians with a jurisdictional basis to sue tribes in federal court for general civil rights issues. See, e.g., *Fillion v. Houlton Band of Maliseet Indians*, 54 F. Supp. 2d 50, 53-54 (D. Me. 1999) (holding that because tribes are not bound

review as presently applied routinely fails to secure Indian citizenship rights, Part I will contrast the ICRA cases with how habeas is applied by the federal courts in other related contexts. Part I will demonstrate the lack of an effective federal remedy for the victims of wrongful disenrollment, disenfranchisement, or banishment, and for putative members to whom membership has been wrongfully denied.

Part II of the Note will define citizenship and lay out a theoretical framework that can be used to appraise the ultimate effects of citizenship power abuses on a political community. By exploring the inextricable link between sovereignty and the effective securing of citizenship rights, this Part will suggest that the current Indian citizenship regime poses a serious risk to the continued independent existence of the tribes. It will then provide a brief history of U.S. citizenship law as a backdrop for illuminating the disparity between U.S. and tribal guarantees in this area. Part II concludes by looking at the peculiar and perhaps unique nature of tribal sovereignty and Indian citizenship, and the benefits that accrue to Indians by belonging to tribes. Part III will then chart the origins of tribal citizenship power, which emerged from the confluence of two semi-independent jurisprudential developments: the recognition of (1) tribal primacy in citizenship decisions, and (2) tribal sovereign immunity.

Finally, Part IV will examine the costs to our joint Amerindian society of plenary tribal citizenship power, using several lenses to substantiate the conclusion that the federal government has an affirmative obligation to curb that power. The asymmetry in power between tribal elites and those whose citizenship rights they abuse has already resulted in violence,²² and it is increasingly likely to do

by the Constitution, including the Fifth Amendment, they cannot be subjected to claims under 42 U.S.C. § 1983).

²² See, e.g., *Poodry*, 85 F.3d at 878 (recounting allegations that respondents attacked and stoned the banished petitioners); Herbert Atienza, Tribal Tangle: Two councils fight for leadership of 115-member group, *The Press-Enterprise* (Riverside, Cal.), Mar. 27, 2005, at B1; Francis X. Donnelly, Tribes squabble over the profits, *Detroit News*, Dec. 18, 2000, at 5A ("In 1996 the Keweenaw Bay Indian Community tribal center reflected the war it had been through with its exterior littered with bricks, broken bottles and barbed wire. A dissident group called Fight For Justice seized the building and repeatedly clashed with tribal police as they remained for 18 months. The members were angry at longtime Chairman Fred Dakota for knocking 200 political foes off the voting rolls. The violence spread to the rest of the reservation as

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so in the future as the stakes and abuses rise. Plenary membership power is in the final analysis a tyrannical power, one that is irreconcilable with modern republican values,²³ and whose only true palliative is revolution. It is up to Congress to determine whether that revolution will take the form of a series of violent uprisings or a bloodless sea change in the extent to which tribes are permitted to retain control over their membership.

I. NATURE AND EXTENT OF TRIBAL CITIZENSHIP POWER

[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment. . . . Banishment was a weapon in the English legal arsenal for centuries, but it was always adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.²⁴

This Part addresses the nature and extent of tribal citizenship power, with particular reference to abuses and the general lack of effective tribal or extra-tribal remedies. Although the cases discussed here involve only a small number of tribes, it is not unreasonable to extrapolate those experiences into a general picture of the overall Indian citizenship rights regime, as the vast majority of federally-recognized tribes lack structural constraints on abuses of the citizenship power.²⁵ Moreover, as will be discussed in Part II, the absence of actual abuses is no guarantee that the potential for abuse is not already exercising a chilling effect on the political life of the tribes, because abuses committed in one tribe might strongly impact behavior within similarly-situated tribes.

Though encompassing a variety of factual circumstances and several distinct federal causes of action, together these cases stand

someone ignited a bomb in the back yard of a member, police said. Another had the brakes to her car clipped. No one was hurt but death threats abounded.”).

²³ See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (“The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”).

²⁴ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) (internal citations and quotation marks omitted).

²⁵ See *supra* note 12 and accompanying text.

for two simple propositions. First, most tribes can abuse the citizenship power by: (1) disenfranchising citizens from benefits accorded to similarly-situated citizens, effectively introducing second-class citizenship; (2) disenrolling (forcibly expatriating) even native-born citizens; (3) promulgating restrictive membership guidelines that disenroll members en masse; and (4) banishing those it has disenrolled. Second, victims of those abuses are almost entirely without remedy under the current regime.

At present, the only widely-available federal remedy for wrongful disenrollment or expulsion is to seek a writ of habeas corpus under the ICRA.²⁶ Unfortunately, even if a plaintiff is successful in securing a writ, “the remedy is not reinstatement” of the individual into tribal membership, because that “would interfere with tribal sovereign immunity and internal tribal affairs.”²⁷ Instead, a federal court would merely direct the tribe “to provide appropriate due process, essentially a re-hearing.”²⁸

Members of gaming tribes may also seek redress under the terms of the Indian Gaming Regulatory Act (“IGRA”),²⁹ but while there have been some positive developments in the use of the IGRA to combat tribal membership power abuses, recent IGRA-based challenges have proven no more effective than their ICRA-based counterparts. Even when addressing wrongful disenfranchisement from gaming revenue, the IGRA has amassed a mixed record at best. There is no effective federal cause of action for disenfranchisement outside of the gaming context (for example, from tourist or other revenue) and, overall, no effective remedy for the redress of any citizenship power abuse whatsoever as against a determined and sophisticated tribal opposition. The doctrines of tribal primacy in membership and tribal sovereign immunity make it nearly impossible for individuals to triumph over abuses of the citizenship power.

²⁶ 25 U.S.C. § 1303 (2000). See *infra* Part III for more on the doctrine of tribal sovereign immunity; see also *Runs After v. United States*, 766 F.2d 347, 353 (8th Cir. 1985) (holding that federal courts do not have jurisdiction to hear disputes between an Indian tribe and its members alleging violations of the ICRA save where the habeas corpus provision attaches under 25 U.S.C. § 1303).

²⁷ *Quair v. Sisco*, 359 F. Supp. 2d 948, 977 (E.D. Cal. 2004).

²⁸ *Id.*

²⁹ 25 U.S.C. §§ 2701–2721 (2000). The federal courts’ exact jurisdiction over IGRA suits is a matter of some dispute. See *infra* note 158 and accompanying text.

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Sections A and B of this Part focus on the use of the ICRA to combat the two most extreme forms of abuse: individual disenrollment, often coupled with physical banishment, and the malicious manipulation of citizenship guidelines to both disenroll and bar initial enrollment. Section C focuses on disenfranchisement and its relationship to the prosecution of other citizenship power abuses under the IGRA. Finally, Section D addresses the use of habeas corpus in related federal contexts and invites readers to appreciate the contrast between its application there and in tribal citizenship disputes.

A. Individual Disenrollment

The most targeted form of citizenship power abuse, individual disenrollment, strips an individual of his Indian citizenship. As it would be in any society, this is among the most serious sanctions that a tribe can mete out. Yet perhaps more important than its draconian effect on an individual is its effect on the political life of the remaining members of the tribe. As discussed in Part II, it is precisely this type of abuse that reduces the rights of all citizens and, as a result, the attendant sovereignty of their political community. The following two cases, *Poodry v. Tonawanda Band of Seneca Indians*³⁰ and *Quair v. Sisco*,³¹ demonstrate the dire situation confronting Indians who are forcibly expatriated on criminal and civil bases, respectively.

1. Penal Expatriation: Poodry v. Tonawanda Band of Seneca Indians

In late 1991, a dispute over tribal governance arose within the Tonawanda Band of Seneca Indians. Several members of the tribe accused the tribal Council Chairman and other members of the Council of Chiefs of “misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe’s business affairs, and burning tribal records.”³² On January 24, 1992, several of the dissenting members were accosted at their homes by groups of fifteen to twenty-five men and presented with the ban-

³⁰ 85 F.3d 874 (2d Cir. 1996), cert. denied, 519 U.S. 1041 (1996).

³¹ 359 F. Supp. 2d 948 (E.D. Cal. 2004).

³² *Poodry*, 85 F.3d at 877–78.

ishment order reproduced at the beginning of this Note. There was no prior notice, no judicial proceeding at which the dissenters could defend themselves, and no mechanism or opportunity for tribal review or appeal.³³ Indeed, nothing in the record attests to or suggests the utilization of *any* formal process. When the dissenters refused to leave, certain tribal officials “and persons purporting to act on their behalf allegedly continued to harass and assault [the dissenters] and their family members, attacking [one] on Main Street in Akron and ‘stoning’ [another].”³⁴ The dissenters further alleged that the Council had cut off electrical service to their homes and businesses and instructed the New York Department of Public Health, which operates the Tonawanda Reservation Medical Clinic, to strike the dissenters from its list of eligible members.³⁵

Regardless of the merits of each side’s allegations, this catalog of events can only be seen as anathema in a society ruled by laws. While one must admit the possibility of malicious intent upon the part of the dissenters and acknowledge the sovereign’s right to protect itself against a coup d’état, one cannot ignore either the severity of the sovereign’s remedy or the malice with which it was effected. Without anything approaching federal constitutional due process, native-born members of the Tonawanda tribe were divested of property (including various extra-tribal benefits), community standing, and a fundamental cultural and historical affiliation. For failing to comply with a banishment order that the United States Court of Appeals for the Second Circuit found amounted to nothing less than the “destruction of one’s social, cultural, and political existence,”³⁶ the dissenters were then allegedly subjected to a further program of tribe-sponsored and mob-effected violence.³⁷

Lacking a tribal remedy, the dissenters filed suit in federal court arguing that their summary expatriation and banishment were actionable under the habeas corpus review provision of the ICRA.³⁸ *Poodry* was the first case to consider a tribal disenrollment dispute

³³ Id. at 876–78.

³⁴ Id. at 878 (citation omitted).

³⁵ Id.

³⁶ Id. at 897.

³⁷ Id. at 878.

³⁸ 25 U.S.C. § 1303 (2000).

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under the ICRA habeas corpus section,³⁹ which provides that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”⁴⁰ Noting that literal physical detention is not a prerequisite for habeas corpus review,⁴¹ the court applied the “severe restraints on individual liberty” test from *Hensley v. Municipal Court*⁴² and determined that “the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus.”⁴³

The court also made it clear that, as habeas corpus is an Anglo-American legal remedy, decisions to grant review must be made according to Anglo-American standards.⁴⁴ In dismissing arguments based on cultural relativism, which distinguish between Anglo-American and Indian legal perspectives so as to “render the congressionally created remedy useless,”⁴⁵ the court foreclosed a path that it found “could only create a refuge for repression.”⁴⁶ The thrust of the cultural relativity argument in *Poodry* was that while the penalties applied to the dissenters are considered criminal in nature in the United States, within the tribe they were merely civil penalties. This argument was important for the tribe, because even though Congress has recognized a tribe’s ability to punish Indian

³⁹ *Poodry*, 85 F.3d at 879.

⁴⁰ 25 U.S.C. § 1303 (2000).

⁴¹ *Poodry*, 85 F.3d at 893 (citing *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

⁴² 411 U.S. 345, 351 (1973).

⁴³ *Poodry*, 85 F.3d at 895.

⁴⁴ *Id.* at 900.

⁴⁵ *Id.*; see also *id.* at 900–01 (concluding that “there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive ‘sovereignty’ our country has long recognized and sustained”). The question of whether to apply Anglo-American or Indian legal standards was raised by the tribe, which argued that banishment was a civil procedure under Indian law and therefore outside the definition of “detention,” upon which ICRA review jurisdiction relies. *Id.* at 890. The court foreclosed this line of argument by noting that Congress had used the phrases “detention” and “in custody” interchangeably in different habeas corpus statutes and that “in custody” had long been held not to require actual physical restraint. *Id.* at 890–93.

⁴⁶ *Id.* at 900.

criminals,⁴⁷ tribal authority to impose criminal penalties is limited under the ICRA to a \$5000 fine and one year of imprisonment.⁴⁸ Where banishment and imprisonment are considered analogous restraints on liberty, this limitation would peremptorily rule out penal use of the citizenship power.⁴⁹ In a nod to tribes' plenary citizenship power, the court declined to go so far as to find forcible expatriation categorically unavailable under the ICRA's criminal provisions. Instead it merely approved the petition for habeas review and remanded for a determination on the merits.⁵⁰

Although nominally a victory for the expatriated dissenters, the *Poodry* result is unsatisfactory in at least one respect. In dismissing the Tonawanda Band itself as a proper respondent and failing to endorse strong substantive habeas review,⁵¹ the court left the dissenters with a largely empty remedy. The court based its decision to dismiss the Band on the well-established sovereign immunity of tribes⁵² and the absence of either an explicit waiver from the tribe

⁴⁷ See, e.g., *United States v. Lara*, 541 U.S. 193, 197–99 (2004) (holding that tribes possess the power to prosecute their own members for criminal offenses on an equal basis with state and federal governments).

⁴⁸ 25 U.S.C. § 1302(7) (2000).

⁴⁹ But see *Custalow v. Commonwealth*, 569 S.E.2d 95, 95–96 (Va. Ct. App. 2004). There the court approved (or at least did not disapprove) two different criminal penalties meted out by an Indian tribe to a tribe member. The first, six months imprisonment and a \$1000 fine, is clearly within the acceptable limits of the ICRA. The second, a two-year banishment, illustrates the ambiguous application of the ICRA to citizenship rights disputes. It is possible, although unlikely, that the court was unfamiliar with the ICRA guidelines. More probably, it simply did not equate imprisonment with banishment.

⁵⁰ *Poodry*, 85 F.3d at 901. The author was unable to locate a record of any proceeding on remand. The Supreme Court denied certiorari in *Tonawanda Band of Seneca Indians v. Poodry*, 519 U.S. 1041 (1996), and the case was thereafter presumably settled or dropped.

⁵¹ Under a strong habeas regime, a court moves from assessing a plaintiff's purely procedural objections to an inquiry into the underlying merits of the challenged governmental action. A court may even go so far as to substitute its judgment over that of the challenged governmental body. See *infra* Part I, Section D.

⁵² See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 756–60 (1998) (affirming the concept of tribal sovereign immunity and tracing that jurisprudence back to *Turner v. United States*, 248 U.S. 354 (1919)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (holding that “[i]n the absence here of any unequivocal expression of contrary legislative intent . . . suits against the tribe under the ICRA are barred by its sovereign immunity from suit”).

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or an abrogation of that immunity by Congress.⁵³ Citing *Santa Clara Pueblo v. Martinez*,⁵⁴ the court noted that the ICRA does not act as a waiver of tribal sovereign immunity.⁵⁵ The dissenters invited the court to distinguish *Santa Clara Pueblo* on the basis that while it had been predicated on an implied private federal cause of action arising under the ICRA *in general*⁵⁶—a cause ultimately determined not to exist—this case was predicated on the specific habeas corpus provision.⁵⁷ Holding for the tribe, the court found that this interpretation would represent a significant departure from traditional habeas corpus jurisprudence, one that it did not feel Congress had intended.⁵⁸ While this follows the conventional sovereign immunity understanding of habeas corpus review, applying the action against government officials instead of the government itself,⁵⁹ the restriction is crippling in the absence of strong substantive habeas review.⁶⁰ Generally speaking, the potency of a habeas writ is conditional on either the propensity of a government to disavow and undo the actions of its agent or the ability of a neutral arbiter to impose its own substantive standards. In other words, inasmuch as the remedial potential of a purely procedural writ relies

⁵³ See, e.g., *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (“Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.”).

⁵⁴ 436 U.S. 49 (1978).

⁵⁵ *Poodry*, 85 F.3d at 898–99.

⁵⁶ *Santa Clara Pueblo*, 436 U.S. at 51–52.

⁵⁷ *Poodry*, 85 F.3d at 898.

⁵⁸ *Id.* at 898–99.

⁵⁹ *Id.* at 899 (“An application for a writ of habeas corpus is never viewed as a suit against the sovereign, simply because the restraint for which review is sought, if indeed illegal, would be outside the power of an official acting in the sovereign’s name.”); see also *Ex parte Young*, 209 U.S. 123, 168 (1908) (noting that habeas corpus actions are pursued against officials effecting the detention at issue, not the state in general).

⁶⁰ *Poodry*, 85 F.3d at 906 (Jacobs, J., dissenting) Even the dissent did not go so far as to advocate strong substantive habeas review. Judge Jacobs wrote,

[T]he writ that is sought cannot remedy many of the wrongs alleged. Tribal property and the quiet enjoyment of it cannot be allotted by writ; nor can the writ restore the petitioners’ roles in tribal affairs or their utility service, allay the hostility of their fellows, or force people to address the petitioners by their tribal names. If we had the power, by a writ of habeas corpus, to restore the petitioners to their culture and birthright, we still could not do it without dismantling the vestiges of tribal sovereignty that Congress requires us to preserve.

Id.

on institutional separation between a government and its agent, it is largely stymied where, as here, the government and the agent are essentially coterminous.

Under a strong habeas regime, the dissent would not have to lament that “the writ that is sought cannot remedy many of the wrongs alleged,” by “restor[ing] the petitioners’ roles in tribal affairs” or returning their proportion of the tribal property.⁶¹ Under the regime in *Poodry*, the only remedy the court can provide is an assurance to the plaintiffs that they may return to federal court as many times as necessary until the tribe can justify their disenrollment on solid procedural grounds. Where the structure and history of the government in question give one reason to believe that forcing a procedurally sound adjudication of the matter will result in an equitable outcome, the *Poodry* regime is appropriate. But where, as in *Poodry*, there is little reason to believe that the government will permit an equitable outcome, regardless of the procedural constraints, an order to provide process is merely an invitation to provide paperwork—an instruction to be more sophisticated in one’s persecution. Under these circumstances, non-substantive review is most likely a waste of time and is of little benefit to those under its dubious protection.

2. *Expatriation Outside the Penal Context: Quair v. Sisco*

Eight years after *Poodry*, tribal membership power was again pitted against ICRA habeas review in *Quair v. Sisco*.⁶² *Quair* is important, not only as the next step in the chain of doctrinal development, but because of the particularly egregious nature of the circumstances involved. At the same time the holding in *Quair* emphasizes the impotence of ICRA-based citizenship suits, its facts underscore the caprice with which citizenship-related sanctions may be effected, while its procedural history highlights the incredible difficulty of vindicating citizenship rights through a traditional tribal government.

Quair is the consolidation of two ICRA habeas corpus actions by disenrolled former citizens of the Santa Rosa Rancheria Tachi Indian Tribe, Rosalind Quair and Charlotte Berna. Whereas the

⁶¹ Id.

⁶² 359 F. Supp. 2d 948 (E.D. Cal. 2004).

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plaintiffs in *Poodry* were charged with attempting to depose the duly constituted tribal government, it is more difficult to understand how Rosalind Quair came to constitute “a clear, present and extremely serious danger to the health, safety and welfare of the entire Rancheria.”⁶³ A semi-literate wheelchair-bound student who had been disenrolled for “betrayal and treason”⁶⁴ (which consisted of allegedly retaining an attorney to represent her in a sexual harassment suit against a male member of the tribe), Quair was later banned from the reservation for prosecuting the following petition-based appeal to the tribal government:

I Roselind Quair is here today to reinstate all my rights as a trible [sic] because I have the law suit drop [sic], I had call the auttorney [sic] to drop everything. ON [sic] July 24, he as out of town so I had to waite [sic] for him to get back in town so it was on Aug. 3, 2000 I had drop the low [sic] suit I was not trying to hurt the tribe in any way. I have family that are trible [sic] members, do think I want to hurt them or others [sic]. . . .

I don't know much about trible [sic] rights or the laws. I feel I'm not the only one has done wrong [sic]. There are others who has done wrong and still gets another chance [sic]. I am human to [sic] I feel that have a second to chance to like everyone eles did [sic].

I don't have the kind of income or insurce [sic] for all my meds that I need to take everyday. It is hard for me to get a job and still going to school. How would to be in my place and feel what I have been going through for the last 3 months [sic].

I feel I am still a member because I have not received any legal letter saying I am not no longer a member [sic]. I want to thank all of those who sign my petion [sic].⁶⁵

⁶³ Id. at 961–62 (quoting General Council Resolution No. 00-27, Authorizing the Tribal Council to Exclude Charlotte Berna and Rosalinda Quair from the Rancheria (Oct. 2, 2000)).

⁶⁴ *Quair*, 359 F. Supp. 2d at 952 (internal quotation marks omitted).

⁶⁵ Id. at 960–61 ([sic]s in original).

At the same time the tribe disenrolled Quair, it also disenrolled Berna, a former tribal treasurer.⁶⁶ Berna alleged that she had been falsely accused of “vague, unwritten, and unsubstantiated criminal charges,” including embezzlement of tribal funds, and had been fired as treasurer when she sought an independent review of unauthorized expenditures made by certain members of the tribe.⁶⁷

Notwithstanding the severity of the charges leveled at Berna, the impetus for her disenrollment seems to have been her employment of the same attorney allegedly retained by Quair. Though the court was not called on to make a judgment in this respect, it seems clear from the record that both of the banishments at issue in this case resulted from the Indians’ association with a lawyer who had “a long and bitter history with the Tribe and was [already] seeking to enforce a multi-million dollar judgment against the Tribe, various tribal officials and tribal members.”⁶⁸ Even though Berna had been removed from her position in March of 2000, it was not until after the plaintiffs were publicly connected with this particular attorney that they were disenrolled (June 2000) and banished (October 2000).⁶⁹ Apparently, hiring an attorney to represent them in suits opposing tribal members who wielded more power than they did was enough to justify forcible expatriation.

Though doctrinally irrelevant to the questions of due process involved in habeas review, the actual grounds of the sanction implicate the larger issue of whether or not the citizenship power has been abused in any individual case. The facts also provide a window into the inner workings of a government against which an expatriated Indian’s only leverage is a writ of habeas corpus. The effectiveness of a procedural habeas writ is largely a function of the nature of the government against which it is assessed, particularly

⁶⁶ Id. at 952.

⁶⁷ Id. Not surprisingly, the tribe’s submissions paint a very different picture of Berna, alleging that she gained power by running a successful smear campaign to recall her predecessors for substantially the same financial malfeasance that she would herself later commit, all the while campaigning to have her political enemies disenrolled and harassing their families with “fraud investigations” when she failed to secure their disenrollment. Id. at 955.

⁶⁸ Id. at 956.

⁶⁹ The inference is particularly strong in the case of Quair, whose action “to the detriment of the Tribe” seems to have consisted solely of hiring this particular attorney. Id. at 961.

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whether the processes at issue are realistically subject to remediation.⁷⁰ An analysis of *Quair* shows the potentially wide gap between the rights theoretically secured by the availability of habeas review and the transgressions sought to be remedied in suits over citizenship power abuses.

3. Application of the ICRA in *Quair*

After unsuccessfully pursuing largely informal remedies within the tribe, the plaintiffs in *Quair* filed an ICRA habeas corpus action. Following *Poodry*, the court first established that habeas corpus does not require an actual physical imprisonment.⁷¹ While the court endorsed the holding in *Poodry*, it felt that its outcome was not dispositive in *Quair*'s case because the facts here failed to substantiate a "charge of 'treason,'"⁷² a finding that lent credence to the Rancheria's argument that the banishments at issue were legitimate *civil* procedures. In a clear victory for opponents of banishment, the court in *Quair* nonetheless found the state of affairs amenable to habeas review because "even if the circumstances leading to imposition of the sanction are not considered criminal conduct per se, the imposition of that sanction renders those proceedings criminal for purposes of habeas corpus relief."⁷³ Moreover, whereas the finding in *Poodry* was limited to its facts,⁷⁴ the court in *Quair* established a categorical rule that "disenrollment from tribal membership and subsequent banishment from the reservation constitutes detention" sufficient to satisfy the jurisdictional requirement for habeas review under the ICRA.⁷⁵ Finally, whereas *Poodry*'s interpretation of sovereign immunity doctrine

⁷⁰ See supra note 60 and related text.

⁷¹ *Quair*, 359 F. Supp. 2d at 967–68 (citing *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); and *Williamson v. Gregoire*, 151 F.3d 1180, 1182–83 (9th Cir. 1998) for the proposition that habeas corpus review does not require actual physical detention).

⁷² *Quair*, 359 F. Supp. 2d at 967.

⁷³ *Id.*

⁷⁴ While there is language in *Poodry* that could be read to lay out a categorical rule subjecting banishments to habeas review, the court's summary of the holding conspicuously fails to establish such a proposition, finding instead that "[t]he petitioners have *here* demonstrated a sufficiently severe restraint on liberty." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 901 (2d Cir. 1996), cert. denied, 519 U.S. 1041 (1996) (emphasis added).

⁷⁵ *Quair*, 359 F. Supp. 2d at 971.

had required the dissenters to sue specific tribal officials in place of the tribe itself, the court in *Quair* softened somewhat the blanket proscription against suing governmental bodies by allowing suit against the entire Tribal Council.⁷⁶ In finding the members of the Tribal Council to be proper respondents, the court effectively allowed a habeas action against a sovereign, addressing the agency problem left unresolved in *Poodry*. Yet for all the court in *Quair* did to strengthen ICRA habeas review for the victims of membership abuses, it is still probably best classed with *Poodry* as a nominal victory that serves to underscore the ultimate impotence of non-substantive habeas review, regardless of against whom it is allowed.

[T]he rights guaranteed under [ICRA habeas review] are procedural in nature and do not require a specific substantive remedy. For instance, if the court concludes that petitioners were denied their rights to procedural due process in connection with the decisions to disenroll them and banish them from the reservation, the remedy is not reinstatement, which would interfere with tribal sovereign immunity and internal tribal affairs but, rather, a direction to provide appropriate due process, essentially a *re-hearing*.⁷⁷

While the court characterized the limited power of habeas review as a “balancing . . . [that] should have the effect of vindicating and protecting the rights of both parties,”⁷⁸ in the absence of an underlying process that can be purged of the corruptions that justified the writ, procedural habeas review is simply meaningless. *Quair* itself provides a powerful example of one such likely irremediable process.

⁷⁶ This is not quite the same thing as attaching as a proper respondent the Tribal Council itself, which would be a significant departure from traditional habeas practice. Yet, the court’s action nonetheless represents an important victory for the plaintiffs. For a description of the tribal government in *Quair*, see *infra* notes 81–83 and accompanying text.

⁷⁷ *Quair*, 359 F. Supp. 2d at 977 (emphasis added).

⁷⁸ *Id.*

2006] *Indian Tribes' Sovereign Power Over Membership* 8134. *Tribal Procedures in Quair: Mobocracy in Action*

Although some modern tribal courts “mirror American courts” and “are guided by written codes, rules, procedures, and guidelines,” tribal law is still frequently unwritten, being based instead “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” and is often “handed down orally or by example from one generation to another.”⁷⁹

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often “subordinate to the political branches of tribal governments,” and their legal methods may depend on “unspoken practices and norms.”⁸⁰

The tribe involved in *Quair* has a two-tiered system of government.⁸¹ A General Council composed of all adult citizens holds plenary power and delegates day-to-day operations to a six-member elected Tribal Council, which exercises legislative, executive and judicial functions. Only the General Council may disenroll citizens, but the monthly General Council meetings are organized and run by the Tribal Council, which exercises considerable power over which issues will come to a vote. While citizens subject to disenrollment proceedings are at least technically given an opportunity to present their case before the General Council,⁸² in *Quair*, it was undisputed that, as in *Poodry*, the tribe had no established procedure by which expatriated citizens could appeal a judgment.⁸³ Habeas review, therefore, would have to attach to the process by which the General Council makes disenrollment decisions.

⁷⁹ *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 *Judicature* 126, 130–31 (1995)).

⁸⁰ *Duro v. Reina*, 495 U.S. 676, 693 (1990) (quoting Cohen, *supra* note 7, at 334–35).

⁸¹ The author was unable to locate the constitution, by-laws or other organizing documents of the tribe and has inferred the governance structure from the details provided in the opinion. See *Quair*, 359 F. Supp. 2d at 954 (describing the structure of the tribal government).

⁸² See *id.* at 978.

⁸³ *Id.* at 972.

Unfortunately, other than the fact that the ultimate power to banish rests with the General Council, no one seems entirely sure what that process is, whether or not it was followed in this case or, more broadly, to what rights the plaintiffs were entitled under either tribal law or the ICRA.⁸⁴ Consider, for instance, the issue of providing notice to those subject to banishment hearings.

Respondents assert that . . . [the individual] is notified that the General Council will be deciding whether to exclude him or her from the tribal community. Petitioners dispute this, asserting the lack of a written procedure and further asserting that petitioners did not receive any notice that there would be a vote to disenroll and banish them. Respondents assert that this notification may be in writing but can also be delivered orally. Petitioners dispute this, asserting that respondents have produced no written procedures regarding notice and again asserting that they received no notice.⁸⁵

It is not surprising that each side portrays the process in the light most favorable to itself, but even a midpoint between the accounts would still bespeak a real lack of recognizable process. Contrast the tribe's depiction of General Council meetings with that of the plaintiffs. The tribe describes the meetings as "open hear[ings] . . . where all tribal members are provided with the opportunity to speak," characterized by "vigorous [debate], with tribal members weighing in on both sides of the issue and [where], upon the conclusion of the debate, the General Council will vote by a show of hands."⁸⁶ The plaintiffs have a different perspective: "[I]t is customary for General Council meetings to be very loud and boisterous, . . . often no one is in control, people are yelling and tribal business is not attended to."⁸⁷ What the tribe calls "vigorous" debate, the plaintiffs call "the loudest tribal members yelling out their

⁸⁴ As Justice Souter has noted, "there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents 'jot-for-jot.'" *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 *Am. Indian L. Rev.* 285, 344 & n.238 (1998)).

⁸⁵ *Quair*, 359 F. Supp. 2d at 954–55.

⁸⁶ *Id.*

⁸⁷ *Id.* at 954.

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positions and aggressively calling for issues that they want voted on.”⁸⁸ And whereas the tribe asserts that “all tribal members are provided with the opportunity to speak,” the plaintiffs note that “many times people are shouted down when they are trying to speak and . . . their views are not heard by the General Council.”⁸⁹

One must not lose sight of the importance of establishing procedure in a habeas suit. Where the habeas remedy is an assurance of due process, it is critical that one be able to identify both the process and a set of metrics that can be used to gauge adherence and objectivity. While there is no established bright-line rule for judging civil proceedings, it is not a stretch to question whether the Rancheria’s disenrollment process nonetheless falls below some minimum threshold beyond which assurances of procedural adherence are effectively meaningless. If the parties to a habeas suit cannot even agree on the parameters of the process whose validity is being challenged, how can even the most diligent and well-meaning court purport to warrant adherence? Is it enough to ensure an equitable outcome that those subject to a forcible expatriation order have the right to be shouted-down at a raucous and chaotic meeting?

All this is not to belittle tribal governance or assert the illegitimacy of what may in fact be a time-tested methodology, but rather to draw attention to the extremely limited force of weak habeas review—whose guarantee of “appropriate due process” amounts to “essentially a re-hearing.”⁹⁰ In twenty-four pages of factual findings one can identify exactly three measurable rights which could therefore be enforced under a writ: Citizens have the right (1) to be informed prior to a disenrollment hearing before the General Council;⁹¹ (2) to be heard at the meeting;⁹² and (3) to be promptly notified of the judgment.⁹³ Conspicuously absent are any substantive rights relating to the offenses for which a citizen may be disenrolled, evidentiary standards for those offenses, and/or an appeals process.

⁸⁸ Id. at 955.

⁸⁹ Id. at 954–55.

⁹⁰ Id. at 977.

⁹¹ See id. at 978.

⁹² See id.

⁹³ See id. at 959.

Poodry and *Quair* represent extremes on the spectrum of forcible expatriation cases. *Poodry* involved a charge of treason, one of the most serious crimes an individual can commit. *Quair*, though nominally a civil case because no criminal charges were brought against the petitioners, by all appearances involved no real charges whatsoever. Whether one is more concerned about abuse of criminal or civil powers, surely one of these two cases has to represent very nearly the worst possible abuse of the citizenship power. And yet for all the courts' sympathy towards the expatriated Indians—and indeed the sympathies of both courts appeared to lean heavily in that direction—neither court proved willing or able to accord the plaintiffs any form of substantive relief.

Despite ample precedent to the contrary,⁹⁴ neither court was willing to adopt the kind of strong substantive review necessary to give teeth to ICRA habeas relief in the context of a forcible expatriation. While perhaps of immediate import only to those Indians involved, continued federal permissiveness towards individual expatriations promises to create long-term problems for similarly situated tribes, whose elites learn that the citizenship power can be abused, and whose citizenry learn that the penalties for dissent can be swift and terrible.

B. Malicious Manipulation of Membership Guidelines

In addition to the power to forcibly expatriate individuals, tribes also possess the power to promulgate and enforce tribe-wide citizenship guidelines that can have the same effect on a much wider basis.⁹⁵ As most citizenship guidelines are racial, familial, geographic, or genetic in nature, one would expect them to remain relatively stable over time. Yet recent years have seen a number of substantial changes in the guidelines of various tribes. Some tribes have become more inclusive, promulgating less restrictive definitions in order to combat the problem of ever-thinning bloodlines. For instance, the Mashantucket Pequots, owners of the famously successful Foxwoods Casino, now only require that citizens have a

⁹⁴ See *infra* Section I.D for a discussion of strong substantive habeas review in the citizenship and benefits contexts.

⁹⁵ See, e.g., *Montana v. United States*, 450 U.S. 544, 564 (1981) (holding that “Indian tribes retain their inherent power to determine tribal membership”).

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native blood quanta of one-sixteenth (compared with the more typical one-fourth).⁹⁶ In other cases, “tribes have dropped blood requirements altogether and require only proof of lineal descendancy for membership.”⁹⁷ While overly-inclusive guidelines might raise questions about the ethical entitlement of those who are only minimally Native American to receive federal (and other) related benefits, a far more serious problem is posed when tribes cut off individuals whose status as tribal citizens has never before been in question.

Although many of these changes are no doubt motivated by sincere efforts at strengthening tribes, many seem at least arguably mal-intentioned. Historically, most tribes have been relatively impoverished, if not *imperiled* entities. When a tribe that is particularly small and/or has recently moved from categorical poverty to casino-related prosperity makes guideline changes that remove native-born citizens from the tribal rolls, or suddenly and drastically raises the bar to putative citizens, the changes should probably be regarded with a degree of skepticism. The inference is almost inescapable that such changes have less to do with preserving the cultural integrity of an ancient nation than with minimizing the payout denominator. A quick news survey reveals numerous examples of guideline-based disenrollments in gaming tribes.⁹⁸ Although it

⁹⁶ Worthington, *supra* note 20, § 1, at 1.

⁹⁷ *Id.*

⁹⁸ On March 17, 2005, the Mooretown Rancheria tribe reclassified approximately twenty percent of its per capita distribution-receiving members as non-lineal descendants, meaning that these descendants were still members of the tribe, but ineligible for the per capita payments. Press Release, Mooretown Rancheria, Mooretown Rancheria Tribal Council Announces Reclassification of Some Members (Mar. 18, 2005), http://216.109.157.86/press_release/Mooretown%20Rancheria%20Tribal%20Council%20Announces%20Reclassification%20of%20Some%20Members.htm. One disenrolled former member said her annual distribution had been \$45,000. *Sovereignty No Cause for Silence*, *Enterprise-Record* (Chico, Cal.), Apr. 1, 2005, at 8A.

In 2004, the Pechanga Band of Luiseño Indians completed the disenrollment of 130 members (representing an extended family of over 350 individuals), each of whom stood to lose around \$120,000 per year. Tim O’Leary, *Pechanga panel ejects 130 adults from tribe*, *Press-Enterprise* (Inland S. Cal.), Mar. 20, 2004, at A1. The Redding Rancheria cut nearly a quarter of its members, questioning their ancestry even though a DNA test showed that it was 99.89% probable that the members were descendants of one of the Rancheria’s original settlers. Louis Sahagun, *Tribe Wants to Deal Out 10% of Its Members*, *L.A. Times*, Jan. 31, 2004, at B1.

would be wrong to condemn these decisions solely on the basis of media accounts, it would be naïve to assume that the tribes' actions are wholly devoid of avarice.⁹⁹

According to Laura Wass, a spokesperson for an Indian rights organization called the American Indian Movement, tribes in California were working to disenroll up to 2,000 Indians in 2004.¹⁰⁰ The following table on disenrollments by California (and one New Mexico) gaming tribes was compiled using population data from the 2000 U.S. Census¹⁰¹ and disenrollment data compiled by a non-governmental watchdog.¹⁰²

In 2000, the Shakopee Mdewakanton Sioux Community disenrolled thirty-five members, dealing them out of roughly \$400,000 each per year. Chris Ison, 35 Sioux lose fight on tribal enrollment, *Star Tribune* (Minneapolis), Feb. 23, 1995, at 1B.

In 1996, leaders of the Saginaw Chippewa Indian tribe tried (and failed) to disenroll 484 out of the tribe's roughly 2600 members. Mark Puls & Melvin Claxton, Power grab, money spur tribal expulsions: Control of casino empire is at stake, *Detroit News & Free Press*, Aug. 5, 2001, at 1A. In 2001, the tribe took aim at ten percent of its live membership, disenrolling three deceased members and by inference their progeny. "It is not about who is Chippewa and who isn't," said 66-year-old tribal elder Grace Pego, one of the few Chippewas who speaks Ojibwe, the tribe's original language. "It is about money and keeping control of it." *Id.*

In 1991, the Cabazon Indian tribe barred two out of its forty-four members, including a former chairman of the tribe, from voting in tribal elections or receiving any tribal financial benefits. Tom Gorman & Dan Morain, Gaming Profits Stir Fights Over Tribal Membership, *L.A. Times*, Feb. 28, 2000, at A3.

⁹⁹ See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 897 (noting that this is "a time when some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason'").

¹⁰⁰ See, e.g., Danna Harman, Gambling on Tribal Ancestry, *Christian Sci. Monitor*, Apr. 14, 2004 at 15, 16 (citing Ms. Wass and noting that hundreds of Indians have been ejected or disenrolled from gaming tribes since the advent of tribal gaming).

¹⁰¹ U.S. Census Bureau, American Indian and Alaska Native Alone and Alone or in Combination Population by Tribe for the United States: 2000, American Indian and Alaska Native Tribes in the United States: 2000, at 2-10 tbl.1 (2002), available at <http://www.census.gov/population/cen2000/phc-t18/tab001.pdf>.

¹⁰² See Tribal Disenrollments, <http://www.bureau-of-indian-affairs.com> (last visited April 9, 2006).

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Gaming Tribe	Members Disenrolled	Population in 2000	Percent Disenrolled
Mooretown Rancheria of Maidu Indians	40	105	38%
Santa Rosa Indian Community	78	215	36%
Berry Creek Rancheria	27	129	21%
Cahto Tribe of the Laytonville Rancheria	26	175	15%
Pechanga Band of Luiseno Mission Indians	130	934	14%
Picayune Rancheria of Chukchansi Indians	200	1,519	13%
Isleta Pueblo (New Mexico)	132	4,421	3%

Because altering citizenship guidelines can be a far more efficient method for malicious manipulation of citizenry than the kind of targeted disenrollments at issue in *Poodry* and *Quair*, one might suspect that legal protections would be greater in this area.¹⁰³ As it turns out, however, effecting disenrollments by changing citizenship guidelines often clothes an otherwise actionable disenrollment in a veneer of legality. If anything, case law shows that these actions are even more difficult to challenge by extra-tribal means than individual disenrollments.

The impact on sovereignty of en masse citizenship abuses cannot be understated. While tribal leaders might succeed in defending individual expatriations with plausible, even if transparently insincere, justifications,¹⁰⁴ what possible justification can there be for exercising up to a third of the population? What possible legitimacy can

¹⁰³ Note that this intuition is not borne out in the context of federal administrative law. The Supreme Court has held that administrative adjudicative due process claims that are otherwise actionable become non-actionable exercises of administrative rulemaking when the scope of the administrative decision covers a sufficiently large group of individuals. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445 (1915). While none of the cases surveyed by the author applied this federal administrative principle to tribal administrative actions, the enhanced difficulty attendant to challenging membership abuses conducted en masse (as compared to challenges against individual abuses) might be explainable on these grounds.

¹⁰⁴ See, for example, the “unspecified criminal charges” made by the tribe in *Quair v. Sisco*, 359 F. Supp. 2d 948, 953 (E.D. Cal. 2004).

the sovereign retain after taking such an action? Finally, what legitimate federal, tribal or individual purpose is served by continuing to recognize such sovereigns, given that continued recognition is at least a tacit endorsement of these actions?

In *Ordinance 59 Association v. Babbitt*,¹⁰⁵ roughly 400 individuals who had been denied enrollment in the non-gaming Eastern Shoshone Tribe sought either an injunction under the ICRA to force the Shoshone Executive to enroll them, or a binding declaration that they were citizens of the tribe. The plaintiffs had applied for citizenship under a 1988 tribal ordinance, Ordinance 59, which had been repealed in 1989 while their applications were still under review. Their citizenship had later been vindicated and their enrollment ordered by the Shoshone Tribal Court and Tribal Court of Appeals.¹⁰⁶ The Tribal Court of Appeals declared that the plaintiffs were enrolled tribal citizens; it also held several members of the tribe's executive branch, the Tribal Business Council, in contempt for subsequently failing to effect the enrollment.¹⁰⁷ After exhausting their tribal remedies, which is a general, though not absolute, prerequisite for extra-tribal appeal,¹⁰⁸ the plaintiffs turned to the federal courts.

Federal jurisdiction was premised on the Equal Protection Clause of the ICRA, which prohibits a tribe from "deny[ing] to any person within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of

¹⁰⁵ 970 F. Supp. 914 (D. Wyo. 1997).

¹⁰⁶ *Id.* at 918.

¹⁰⁷ *Id.* at 919. That such an emphatic vindication in the highest court of the tribe failed to ensure the enrollments vividly demonstrates the Supreme Court's observation in *Duro v. Reina* that "[t]ribal courts are often 'subordinate to the political branches of tribal governments.'" 495 U.S. 676, 693 (1990) (quoting Cohen, *supra* note 7, at 335).

¹⁰⁸ See, e.g., *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985) (citing *Juidice v. Vail*, 430 U.S. 327, 338 (1977) in noting that exhaustion is generally required except where tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith . . . where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction") (internal citation and quotation marks omitted); *Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63 (2d Cir. 1997) (holding that a casino developer had to exhaust remedies available within the tribe's judiciary before seeking recourse, if available, to federal courts); *Wetsit v. Stafne*, 44 F.3d 823, 824, 826 (9th Cir. 1995) (holding that failure to exhaust tribal court appeals precluded habeas corpus review under the ICRA).

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law.”¹⁰⁹ Following *Santa Clara Pueblo*, the court held that it lacked jurisdiction because “tribal courts have repeatedly been recognized as appropriate forums for *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”¹¹⁰ The district court held that “such internal tribal affairs as membership and government are not appropriate subjects for the application of [the remedial powers of the federal courts]” and granted the tribe’s motion to dismiss without delving into the merits of the case, in particular the significance of the plaintiffs’ victory in the tribal courts.¹¹¹

Santa Clara Pueblo, the case that proved dispositive in *Ordinance 59 Association*, is the only Supreme Court case to address citizenship and the ICRA.¹¹² The petitioner in *Santa Clara Pueblo*, a female citizen of the tribe, challenged an ordinance providing that “[c]hildren born of marriages between female members of the . . . [tribe] and non-members shall not be members of the Santa Clara Pueblo.”¹¹³ Preclusion from citizenship meant that the petitioner’s children were unable to vote in tribal elections, hold secular office in the tribe, or inherit their mother’s home or her possessory interests in the communal lands.¹¹⁴ It also meant that their

¹⁰⁹ 25 U.S.C. § 1302 (2000). The *Ordinance 59 Ass’n* plaintiffs also argued for federal jurisdiction under 25 U.S.C. § 163, which allows the Secretary of the Interior to require the creation of tribal rolls which then constitute the official register of tribal membership for the purposes of the Indian Appropriation Act, 25 U.S.C. § 162a. The court found that this argument had been foreclosed by *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364, 367 (10th Cir. 1966), which had determined that the statute does not confer upon the Secretary the authority to actually make the rolls, thereby determining membership criteria. *Ordinance 59 Ass’n*, 970 F. Supp. at 926–27.

¹¹⁰ *Ordinance 59 Ass’n*, 970 F. Supp. at 925 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (emphasis added)).

¹¹¹ *Ordinance 59 Ass’n*, 970 F. Supp. at 925.

¹¹² For an example of how membership disputes played out before the ICRA, see *Martinez v. S. Ute Tribe of S. Ute Reservation*, 249 F.2d 915, 920 (10th Cir. 1957), a wrongful disenrollment action in which the court held that “[i]t appears that for purposes of which the tribe has complete control, the tribe conclusively determines membership.” See also *Patterson v. Council of Seneca Nation*, 245 N.Y. 433, 438 (N.Y. 1927) (holding that “the Seneca Nation of Indians has retained for itself that prerequisite to their self-preservation and integrity as a nation, the right to determine by whom its membership shall be constituted”).

¹¹³ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 n.2 (1978).

¹¹⁴ *Id.* at 52–53.

right to remain on the reservation was entirely at the will of the tribe, and thus subject to revocation.¹¹⁵

The federal district court and court of appeals accepted jurisdiction under ICRA equal protection and grounded their (conflicting) judgments on the substantive merits of the equal protection claim. The district court found for the tribe. It applied a balancing test that was designed to accommodate both congressional support for tribal self-determination—and, by inference, the application of traditional tribal values despite the potential exclusion of American constitutional norms—and the “rights-floor” established in the ICRA:

[The] equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and therefore should be preserved Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day To abrogate tribal decisions, particularly in the delicate area of membership, for whatever “good” reasons, is to destroy cultural identity under the guise of saving it.¹¹⁶

Like the district court, the court of appeals found that ICRA implicitly and necessarily allowed for federal jurisdiction— “[o]therwise, it would constitute a mere unenforceable declaration of principles”¹¹⁷—but reversed on the merits. Though the court acknowledged that ICRA equal protection does not wholly import or necessarily accord with Fourteenth Amendment equal protection jurisprudence, it nevertheless found the gender classification to be invidious and therefore void due to the absence of a compelling tribal interest.¹¹⁸

¹¹⁵ *Id.*; see also *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1128 (1999) (holding that a tribe could physically exclude a non-member Indian from the reservation and citing *Duro v. Reina*, 495 U.S. 676, 696 (1990), for the proposition that tribes still possess “their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands”).

¹¹⁶ *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18–19 (D.N.M. 1975).

¹¹⁷ *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042 (10th Cir. 1976).

¹¹⁸ *Id.* at 1047–48.

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Declining to address the merits, the Supreme Court found for the tribe on the jurisdictional issue, holding that the provision of ICRA's single, non-comprehensive habeas corpus remedy was deliberate, and that the courts below were wrong to entertain a non-habeas corpus-based challenge.¹¹⁹ The crux of the holding in *Santa Clara Pueblo* is that there is no general private ICRA cause of action, and that "[i]n the absence . . . of any unequivocal expression of contrary legislative intent, [non-habeas based] suits against [tribes] under the ICRA are barred by [their] sovereign immunity from suit."¹²⁰ Accordingly, because the plaintiffs in *Ordinance 59 Association* were suing under ICRA equal protection and not ICRA habeas corpus, the Supreme Court determined it had no jurisdictional basis upon which to offer relief.

In terms of the severity of the tribal interests at stake, *Poodry* and *Quair* are roughly analogous to *Santa Clara Pueblo* and *Ordinance 59 Association*. While *Poodry* involved an alleged coup d'état, recall that it was not clear what danger the plaintiffs in *Quair* posed to the sovereign integrity of the tribe. Similarly, it is unclear why the principles enunciated in *Santa Clara Pueblo*, which involved a challenge to an ancient and established tribal rule, should apply with equal effect in *Ordinance 59 Association*, where both sides in the dispute between the tribe's judiciary and its executive could legitimately claim to represent the sovereign interest of the tribe.

Santa Clara Pueblo pitted the remedial powers of the federal courts squarely against the will of the tribe, expressed by tribal tradition, tribal statutory law,¹²¹ and over thirty years of ineffective lobbying by the plaintiffs prior to suit.¹²² In *Ordinance 59 Association*, by contrast, it is difficult to understand how the federal court's involvement would threaten tribal sovereignty. Given that the tribal courts had already declared that the plaintiffs were citizens, it

¹¹⁹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

¹²⁰ *Id.* at 59.

¹²¹ While the statute at issue was relatively new, "the District Court nevertheless found it to reflect traditional values of patriarchy still significant in tribal life." *Id.* at 53-54.

¹²² See *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 11 (D.N.M. 1975) (noting that "Julia Martinez first attempted to have Audrey recognized as a member of the Pueblo in 1946, shortly after Audrey was born [and s]ince 1963 her efforts have been vigorous and constant").

is not at all clear how or why a favorable holding in the federal courts would constitute an invasion of tribal sovereignty. One could easily reconcile the holding in *Santa Clara Pueblo* with a holding for the plaintiffs in *Ordinance 59 Association* based on the idea that while federal courts lack the power to *make* tribal membership decisions, they may order tribes to enforce membership decisions made by the appropriate tribal authority.¹²³ The District Court declined an invitation to make that distinction, however, holding instead that the

[p]laintiff may not circumvent the Tribe's sovereign immunity by re-characterizing its action as supporting or enforcing a tribal ordinance instead of challenging an ordinance. . . . [W]here the relief plaintiff seeks . . . would run against *the Tribe itself*, the Tribe's sovereign immunity bars the action against the defendant Tribal officers in their official capacity and against arms of Tribal government such as the Shoshone Tribe Business Council.¹²⁴

Though seemingly straightforward, the holding rests on an ultimately unsatisfactory tautology, namely the court's characterization of "the Tribe itself" as a unitary and identifiable interest. The court chose to ascribe to the tribe as a whole the interest of its executive, as opposed to that of its judiciary and indeed the plaintiffs, who according to some authorities were *already* citizens of the tribe, thus "resolving" the dispute by declining to acknowledge it.

The decision in *Ordinance 59 Association* demonstrates that when carried too far, courts' otherwise laudable deference to tribal sovereignty renders them incapable of assisting victims of even the most glaring citizenship rights abuses. Inasmuch as it is difficult to envision how applicants for tribal membership could make a stronger case than that put forth by the plaintiffs in *Ordinance 59 Association*, the lesson is clear, if only communicated *sub silentio*: As long as the challenged measure has the veneer of legality, the ICRA cannot overcome the federal courts' Herculean disinclination to become involved in citizenship disputes. As Parts III and IV will discuss, the federal courts' failure to police these abuses not only works to the detriment of individual Indians, but harms the

¹²³ See *Ordinance 59 Ass'n v. Babbitt*, 970 F. Supp. 914, 923 (D. Wyo. 1997).

¹²⁴ *Id.* (emphasis added).

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tribe as well. The inextricable link between citizenship and sovereignty means that tribes cannot abuse (or allow the abuse of) citizenship rights without simultaneously undermining their legitimacy as polities and, by implication, the legitimacy of the federal-Indian regime that perpetuates their existence.

*C. Challenging Disenfranchisement and Other Abuses
under the IGRA*

Since the IGRA placed Indian gaming operations within a federal framework in 1988, citizenship disputes within gaming tribes have taken on an entirely new dimension. The IGRA allows tribes to apply gaming revenues to five permissible purposes: “(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.”¹²⁵ The most contentious uses of gaming revenue are per capita distributions made to individual citizens in furtherance of goals (i) and (iii), which must be made pursuant to a plan approved by the Secretary of the Interior.¹²⁶ When citizenship disputes that would otherwise be non-justiciable constitute unapproved changes to a tribe’s per capita allocation plan, disenrolled or disenfranchised Indians can assert federal question jurisdiction under the IGRA.¹²⁷ Because only tribe members may receive per capita distributions,¹²⁸ questions of citizenship are inextricably linked to disputes over the per capita allocation regime. Where an IGRA violation coincides with a citizenship rights violation, therefore, courts adjudicating one issue must necessarily adjudicate the other, even if the citizenship component would be non-justiciable on its own.

¹²⁵ 25 U.S.C. § 2710(b)(2)(B) (2000).

¹²⁶ *Id.* § 2710(b)(3)(B); see, e.g., Per Capita Distribution Ordinance, 2 Ho-Chunk Nation Code § 12(6) (2003), available at <http://www.narf.org/nill/Codes/hochunkcode/hochunk212percap.htm> (providing that 78.26% of gaming revenues will be applied to the general welfare of the tribe, permissible purpose (ii), with an unspecified amount therein paid out as per capita distributions to tribal members, and with a majority of the remaining revenue allocated to permissible purposes (i) and (iii)).

¹²⁷ See, e.g., *Sac & Fox Tribe v. Bear*, 258 F. Supp. 2d 938, 940 (2003).

¹²⁸ 25 U.S.C. §§ 2710(b)(2)(B)–(b)(3) (2000).

In sharp contrast to the ICRA, moreover, the IGRA expressly provides for federal jurisdiction.¹²⁹

This section follows the evolution of IGRA citizenship jurisprudence in the Eighth Circuit, the first circuit to probe the IGRA citizenship connection in depth. In 1991, the Supreme Court held in *Oklahoma Tax Commission v. Citizen Band of the Potawatomi Indian Tribe*, that “sovereign immunity . . . does not excuse a tribe from all obligations,”¹³⁰ something that Justice Stevens’s concurrence noted could become the basis of a general equity-based exception.¹³¹ Taking its lead from *Potawatomi*, in the early 1990s the Eighth Circuit came extremely close to recognizing a general equity-based remedy for ICRA violations, at least where those violations affect rights under the IGRA.¹³² Unfortunately, the Circuit pulled back in the mid 1990s, leaving IGRA-based citizenship challenges no more successful than their ICRA-based counterparts.¹³³ Nonetheless, as the Supreme Court has not yet ruled on these issues, the experience and jurisprudence of the Eighth Circuit can still serve as a model for jurisdictions that wish to provide substantive redress for IGRA and ICRA violations.

1. Ross and Maxam: Toward an Equity-based Remedy Under IGRA and ICRA

In *Ross v. Flandreau Santee Sioux Tribe*,¹³⁴ the United States District Court for the District of South Dakota held that tribes waive sovereign immunity for suits based on the IGRA when they undertake gaming activities. The court cited *Oklahoma Tax Commission* for the proposition that “sovereign immunity does not excuse an Indian tribe from all obligations” and concluded that “the Tribe cannot reap the benefits of the IGRA and simultaneously refuse to

¹²⁹ Id. § 2710(d)(7)(A). However, the exact parameters of IGRA’s jurisdictional grant are a matter of some dispute. See *infra* note 158.

¹³⁰ 498 U.S. 505, 512 (1991).

¹³¹ Id. at 516 (Stevens, J., concurring).

¹³² See *infra* Subsection I.C.1 (discussing *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992) and *Maxam v. Lower Sioux Indian Cmty.*, 829 F. Supp. 277 (D. Minn. 1993)).

¹³³ See *infra* Subsection I.C.2 (discussing *Smith v. Babbitt*, 875 F. Supp. 1353 (D. Minn. 1995), *aff’d* 100 F.3d 556 (8th Cir. 1996), cert. denied 522 U.S. 807 (1997)).

¹³⁴ 809 F. Supp. 738, 744–45 (D.S.D. 1992).

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comply with [its] statutorily mandated provisions”¹³⁵ Although the court did not address the merits of the case, which involved the legality of an unapproved per capita distribution plan that would have disenfranchised approximately seventy-four percent of the tribe’s members,¹³⁶ it did note that the Secretary of the Interior had promulgated regulations specifically directed at preventing malicious disenfranchisement. In particular, the Secretary required tribes to justify any distribution plan that did not treat all members of the tribe equally:

When the Revenue Allocation Plan calls for distribution of per capita payments to an identified group of members rather than all members, the tribe shall provide a justification for limiting such payments to the identified group of members. The justification must establish a rational basis for making payments to the identified group of members. *The tribe must insure that the distinction between members eligible to receive payments and members ineligible is reasonable and not arbitrary, does not discriminate, or otherwise violate the Indian Civil Rights Act.* The tribe’s justification must comply with the tribe’s governing or organic documents.¹³⁷

Although the court acknowledged the power of the tribe to implement any plan approved by the Secretary,¹³⁸ the holding can also be read to endorse the power of federal courts to address ICRA abuses in the context of IGRA violations. The court expressly disclaimed any intention to create such a combined ICRA-IGRA remedy,¹³⁹ yet giving any effect to the Secretary’s guidelines would

¹³⁵ Id. at 744.

¹³⁶ At the time of trial, the tribe had drawn up three per capita allocation plans, each of which excluded members of the tribe who lived outside of Moody County, South Dakota. Id. at 743. At the time, 453 (or approximately 74%) of the tribe’s 611 members lived outside of Moody County. Id. at 741.

¹³⁷ Id. at 745–46 (internal quotation omitted).

¹³⁸ Id. at 744.

¹³⁹ Id. Specifically, the court noted that:

Both the United States Supreme Court and the Eighth Circuit have clearly spoken as to whether federal courts have jurisdiction to hear disputes between an Indian Tribe and its members alleging violations of the Indian Civil Rights Act. . . . Simply because BIA guidelines for approval of per capita distribution plans under the IGRA prohibit such violations does not alter this jurisdictional fact.

produce much the same result. Any ICRA violation within a gaming tribe that affected an individual's per capita distribution rights would become a justiciable claim under the IGRA. At the very least, the combination of the court's finding that IGRA implies a waiver of sovereign immunity, and the Secretary's pronouncement that uneven distributions should be given a high ICRA-mediated level of scrutiny, represented a significant step on the road to the justiciability of at least some citizenship disputes.

The principles enunciated in *Ross* were reinforced and extended one year later in *Maxam v. Lower Sioux Indian Community*.¹⁴⁰ In *Maxam*, a group of tribal citizens brought suit under the IGRA to protest an unapproved per capita distribution plan that was cutting off at least 300 of the tribe's then 441 members.¹⁴¹ As in *Ross*, the plaintiffs based jurisdiction on the IGRA,¹⁴² arguing that the plan was invalid because it had not been approved by the Secretary of the Interior.¹⁴³ The plaintiffs asked the court to enjoin the tribe from making any further distributions under the plan, contending that they faced the "threat of irreparable harm" because it would be impractical (if not impossible) to recall payments already made following a favorable judgment.¹⁴⁴

As in all suits involving Indian tribes, the court first had to determine whether it had jurisdiction over the claim despite the tribe's sovereign immunity. Following *Ross*, the court held that the tribe's "decision to conduct . . . gaming pursuant to the IGRA constitute[d] a clear waiver of sovereign immunity."¹⁴⁵ As an alternative, it noted that even absent a waiver, the court would likely have jurisdiction on the basis of Justice Stevens's contention in his *Po-*

Id. at 744 (internal citations omitted).

¹⁴⁰ 829 F. Supp. 277 (D. Minn. 1993).

¹⁴¹ Id. at 283. Although the tribe's plan had not been approved by the Secretary, it had been in force for at least three years by the time the case came to court. To give some idea of what is at stake in these cases, in 1992, the year before *Maxam* was decided, the 141 members authorized to receive payments had received \$33,000 per person. An even per capita payment would have resulted in slightly more than \$10,000 per person. Id.

¹⁴² Id. at 279 n.1.

¹⁴³ Id. at 280–81.

¹⁴⁴ Id. at 282–83.

¹⁴⁵ Id. at 281.

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tawatomi concurrence that a tribe's sovereign immunity "does not necessarily extend to actions seeking equitable relief."¹⁴⁶

Having found jurisdiction, the court then determined that the plaintiffs satisfied the "threat of irreparable harm"¹⁴⁷ injunction standard on several grounds. As a preliminary matter, the court noted that even if the Secretary rejected the revenue allocation plan, its design would prevent the plaintiffs from being made whole.¹⁴⁸ The court then explicitly contemplated an enforceable ICRA-based regime for evaluating IGRA allocation plans:

Although the ICRA is a statute and not a constitution, the rights it is intended to protect are clearly analogous to individual rights protected by several amendments to the United States Constitution [T]his court has found no case suggesting that the rights guaranteed by the ICRA are any less important or that an Indian government's denial of those rights is any less irreparable than a similar denial of federal constitutional rights by federal, state or local government. . . . If the [tribe] has denied rights guaranteed to the plaintiffs by the ICRA, plaintiffs have suffered irreparable harm.¹⁴⁹

Although the *Maxam* court did not assemble the pieces in this fashion, the holding can arguably be read to create (or affirm) a general equity-based remedy for ICRA violations. Even if such a right were limited to the context of injunctions, it would represent a substantial departure from previous ICRA jurisprudence, a departure which has at least the tacit sanction of the Supreme Court after *Potawatomi*. Even if the right was limited to ICRA violations that were also IGRA violations, it would nonetheless provide a powerful tool for the victims of citizenship rights abuses within gaming tribes.

¹⁴⁶ Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) (Stevens, J., concurring) (quoted in *Maxam*, 829 F. Supp. at 282).

¹⁴⁷ *Maxam*, 829 F. Supp. at 282 (quoting the Eighth Circuit's injunction standard from *Dataphase Sys., Inc. v. C. L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

¹⁴⁸ *Id.* at 283. The plan prohibited retroactive payments and provided a severability clause that preserved any part of the Act that was not disapproved by the Secretary. This meant that even if the Secretary invalidated the uneven allocation plan, the retroactivity provision might still keep the plaintiffs from being made whole. *Id.*

¹⁴⁹ *Id.* at 282-83.

2. Smith: *The Unfulfilled Promise of Ross and Maxam*

Unfortunately, when the Minnesota district court was presented with the perfect opportunity to apply such an equity-based remedy for an IGRA-ICRA violation two years later in *Smith v. Babbitt*,¹⁵⁰ the court not only failed to invoke the new doctrine, it even questioned whether it had gone too far in *Maxam*. In *Smith*, a combination of enrolled Indians, disappointed applicants for citizenship, and applicants whose applications had been “postponed indefinitely,” sued as a self-described group of “constitutionally qualified” citizens seeking to vindicate their collective citizenship.¹⁵¹ They also sought to halt per capita payments to a large number of individuals who they contended failed to meet the tribe’s constitutionally-mandated citizenship guidelines.¹⁵² The court first distinguished *Maxam* and *Ross*, noting that those cases involved implementation of unapproved allocation plans, whereas the plan at issue in *Smith* had been approved by the Secretary of the Interior.¹⁵³ It then pushed aside the IGRA claims to expose the underlying citizenship dispute and disposed of the case by reaffirming tribal primacy in citizenship matters.¹⁵⁴ Not content to simply distinguish this case from *Maxam* and *Ross*, the court went on to question the IGRA immunity waiver it had applied in those cases:

In this case, the Plaintiffs seek to extend the scope of the waivers found in *Maxam* and *Ross*. Unlike the tribes in *Maxam* and *Ross*, the [tribe here] has a distribution plan which was submitted to the Secretary and has been approved as adequate. . . .

. . . .

. . . Assuming *arguendo* that the [tribe] implicitly waived its immunity for determining whether it has satisfied IGRA’s requirements, there is no indication the [tribe] waived its immunity

¹⁵⁰ 875 F. Supp. 1353 (D. Minn. 1995), *aff’d*, 100 F.3d 556 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997).

¹⁵¹ *Id.* at 1356.

¹⁵² *Id.* at 1356–57.

¹⁵³ *Id.* at 1360.

¹⁵⁴ *Id.* at 1360–61 (“This is an internal tribal membership dispute. It is not a dispute over compliance with IGRA, and does not belong in federal court.”) (emphasis omitted).

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to allow a federal court to interpret its membership requirements.¹⁵⁵

After determining that it did not have jurisdiction to hear tribal citizenship disputes, the court noted that even if it did have jurisdiction, the defendants would prevail because the plaintiffs had failed to exhaust their tribal remedies.¹⁵⁶ Until the United States District Court for the District of Minnesota has another opportunity to address these issues, it is difficult to know whether *Maxam* or *Smith* is more properly termed the anomaly.¹⁵⁷ At best, *Smith* is a narrow affirmation of *Maxam*; at worst, it is a wholesale retreat from what had been a promising doctrinal development.

Though it is largely a traditional application of tribal power over citizenship, *Smith* is nonetheless somewhat perplexing in the face of *Maxam* and *Ross*. Under these three cases, it is easier in the Eighth Circuit to disenroll members than to disenfranchise them, as the IGRA provides the disenfranchised with an avenue into federal court under *Ross* and *Maxam* that is closed to the disenrolled under *Smith*. Far from meeting a more serious violation with a more strenuous federal regime, *Smith* seemed to close off the federal courts to individuals who are being written not just out of per

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.* at 1366.

¹⁵⁷ While the gap between *Maxam* and *Smith* may represent nothing more than the natural evolution of IGRA-citizenship jurisprudence in the Eighth Circuit's district courts—after all, this was the third time the courts had dealt with the issue—there is at least one other competing explanation. It is possible that *Smith* represents less of a doctrinal shift than a particularized response to the circumstances. As the court notes, this case had already been heard and dismissed, on substantially the same grounds, by an appellate panel within the Bureau of Indian Affairs. See *id.* at 1360 (referencing *Feezor v. Acting Minneapolis Area Dir.*, 25 IBIA 296, 298, 1994 WL 184434 (I.B.I.A., Apr. 28, 1994)). Yet while the Bureau came down firmly on the side of the *Smith* defendants, there may be more to the story than simple judicial deference to prior adjudication by a competent administrative agency. As the *Feezor* opinion notes, the tribe's prior per capita regime, "which was the result of painstaking negotiations among various groups within the [tribe] over many years, was utterly disrupted in 1993 when the Bureau of Indian Affairs . . . required the [tribe] to amend its ordinances, and refused to approve the [tribe's] payment of gaming revenues to non-members." *Feezor*, 25 IBIA at 297, 1994 WL 184434. Given the movement in *Ross* and *Maxam* towards a broader, necessarily more intrusive conception of IGRA-ICRA, one has to wonder how the court dealt with the notion that this entire controversy began not with an intra-tribal dispute, but with an assumedly well-meaning intervention by extra-tribal authorities.

capita payments, but out of the tribe itself.¹⁵⁸ Despite some initially promising developments, therefore, at present the IGRA has proven no more effective than the ICRA at addressing abuses of the membership power. Given that these Acts are the only two routes into federal court for Indians fighting citizenship abuses, it should now be clear that there is no effective federal remedy for these practices.

Part I began by noting four generic ways in which tribes could abuse citizenship rights: (1) disenfranchising citizens from benefits accorded to similarly-situated citizens, effectively introducing second-class citizenship; (2) disenrolling even native-born citizens; (3) promulgating restrictive membership guidelines that disenroll

¹⁵⁸ Furthermore, under several later Eighth Circuit cases, it may no longer be possible for private parties to sue tribes for IGRA violations as they did in *Ross*, *Maxam*, and *Smith*. See, e.g., *In re Sac & Fox Tribe*, 340 F.3d 749, 766 (8th Cir. 2003) (noting that there is no general private right of action under the IGRA); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 744–45 (D.S.D. 1995) (same). Under the terms of the IGRA, federal district courts have jurisdiction over:

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

25 U.S.C. § 2710(d)(7)(A) (2000). This list is almost certainly exhaustive, meaning that the federal courts have no jurisdiction to hear IGRA suits by private individuals. See, e.g., *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984); *Hartman v. Kickapoo Tribe Gaming Comm'n*, 176 F. Supp. 2d 1168, 1175 (D. Kan. 2001). But of course *Block* also stands for the proposition that such lists are not necessarily exhaustive, and it is not clear which of these interpretations controls the Eighth Circuit's contemporary IGRA jurisprudence. See *Block*, 467 U.S. at 350.

Of the three early district court cases, each of which involved a private suit under the IGRA, only *Smith* is ever discussed at the circuit level, and the jurisdictional question pointedly does not arise. Jurisdiction is ultimately fatal to the *Smith* plaintiffs on appeal, but only because the court perceives their IGRA claims to be a convenient wrapper for an otherwise non-justiciable citizenship conflict. No mention is made of their standing (or lack thereof) as a private party. See *Smith*, 100 F.3d at 559. Finally, when lack of private party standing was found to be dispositive in *Sac & Fox Tribe*, a later Eighth Circuit district case, *Smith* was distinguished on jurisdictional grounds, implying that it somehow remains good law. See *Sac & Fox Tribe*, 258 F. Supp. 2d at 942–43. In short, depending on which paragraph of *Sac & Fox Tribe* one wishes to cite, the Eighth Circuit either will or will not allow private IGRA suits.

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members en masse; and (4) banishing those it has disenrolled. Under the current regime, it seems clear that these abuses remain largely, if not wholly, without remedy. What is less clear, however, is why.

D. The Puzzling Impotency of ICRA Habeas Review

The inability of the federal courts to provide a remedy for the victims of Indian citizenship abuses is puzzling given the strength of habeas corpus review in other related contexts. Whereas courts involved in tribal citizenship disputes constantly cite Congress's sole provision of habeas review as a limitation on their remedial powers,¹⁵⁹ there is nothing inherently weak about habeas review. Federal habeas jurisprudence in other, related areas of the law suggests that the courts' protestations of impotency may have more to do with their own timidity than any inherent defect in the habeas remedy. In fact, far from being a limitation on their power, Congress's provision of the habeas remedy could reasonably be interpreted as a substantial grant of power to the courts.

Depending on the context and the court, the power assigned to habeas review can exist anywhere along a very broad spectrum. While at one extreme habeas is a purely formalistic collateral procedural review, at the other extreme, as Justice Holmes put it, habeas "comes in from the outside . . . and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."¹⁶⁰ Viewed in this light, habeas review is a substantive catch-all, what the Court has called "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,"¹⁶¹ and "a prompt and efficacious remedy for whatever society deems to be intolerable restraints."¹⁶² Notwithstanding these grand pronouncements, the courts that have thus far addressed tribal membership questions under ICRA habeas review have largely taken the procedural view. And as tribal due process is not bound by federal constitutional due process jurisu-

¹⁵⁹ See supra note 119 and accompanying text.

¹⁶⁰ Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

¹⁶¹ Harris v. Nelson, 394 U.S. 286, 290-91 (1969).

¹⁶² Fay v. Noia, 372 U.S. 391, 401-02 (1963).

dence¹⁶³—or indeed any substantive body of law justiciable outside the tribe¹⁶⁴—the “re-hearing” made available under the procedural habeas approach may afford challengers little, if any, traction before a hostile tribal government.

While the courts’ approach reflects a well-intentioned deference to the sovereignty of tribes, it is at least somewhat incongruous given the nature and severity of the claims being made in citizenship rights cases. As the Supreme Court noted in *Ng Fung Ho v. White*, where it approved de novo review under a writ of habeas corpus in a forcible expatriation case (involving U.S. rather than tribal citizenship), an adverse judgment in such a case “may result . . . in loss of both property and life; or of all that makes life worth living.”¹⁶⁵ Similarly, when Judge Henry Friendly listed those governmental actions that merit a judicial-like hearing notwithstanding their administrative character, he put questions of citizenship second in severity only to cases of actual physical imprisonment.¹⁶⁶

Given that membership in a tribe carries with it numerous unique federal benefits, it is also difficult to square purely procedural habeas review with the more substantive review applied in *Goldberg v. Kelly*¹⁶⁷ and *Mathews v. Eldridge*.¹⁶⁸ Together, *Goldberg* and *Mathews* established that federally assisted welfare benefits are more like property rights than gratuitous privileges; therefore,

¹⁶³ See, e.g., *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that “as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government”); *Martinez v. S. Ute Tribe*, 249 F.2d 915, 919 (10th Cir. 1957) (holding that “the Due Process clause of the Fifth Amendment does not apply to the activities of the tribe”); see also *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (citing to *Talton* and noting that “it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes”) (Souter, J., concurring); *Elk v. Wilkins*, 112 U.S. 94, 109 (1884) (holding that Indians were not made citizens of the United States by the Fourteenth Amendment).

¹⁶⁴ See, e.g., *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (holding that federal district courts do not have jurisdiction to interpret a tribal constitution or tribal laws).

¹⁶⁵ 259 U.S. 276, 284 (1922).

¹⁶⁶ Henry J. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1296–97 (1975) (discussing the Court’s “some kind of hearing” jurisprudence and conditioning the extent to which an otherwise administrative procedure should conform to the characteristics of a judicial process primarily on the personal liberty interest at stake).

¹⁶⁷ 397 U.S. 254 (1970).

¹⁶⁸ 424 U.S. 319 (1976).

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appeal of their termination receives more than a purely procedural due process review. Because termination of these benefits constitutes “state action,”¹⁶⁹ courts under *Mathews* will expand their inquiry beyond whether the correct procedures were followed and into the underlying merits.¹⁷⁰

The provision of federally assisted benefits to Indians also gives courts a basis to invoke the “some evidence” rule set out by the Court in *Superintendent v. Hill*.¹⁷¹ While the rule itself lacks a precise definition, it essentially authorizes courts faced with a due process claim to inquire into the substantive merits of a challenged governmental action, further endorsing the strong form of habeas review in benefits cases. “Ultimately, a procedural due process ‘some evidence’ requirement is founded on the need to vindicate [an individual’s] rights, in the face of pressures that may tempt the decisionmaker to sacrifice individual justice to other preferences or policies.”¹⁷² In the present context, the rule could be used by courts to analyze an allegation of a citizenship rights abuse.

The “some evidence” requirement is also important outside the benefits context, where federal courts employ it “to review the evidentiary basis of rulings by decisionmakers whose decisions on issues of law the court would not or could not review de novo.”¹⁷³ Moreover, “the Supreme Court will apply the ‘some evidence’ standard to decisions reached in independent or semi-independent adjudicative systems.”¹⁷⁴ The rule is not an independent source of

¹⁶⁹ *Goldberg*, 397 U.S. at 262.

¹⁷⁰ In particular, courts applying *Mathews* will inquire into:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

¹⁷¹ 472 U.S. 445, 455–56 (1985) (“The requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. . . . [T]he relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.”).

¹⁷² Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 San Diego L. Rev. 631, 635 (1988).

¹⁷³ *Id.* at 659.

¹⁷⁴ *Id.* at 660; see, e.g., *Int’l Bd. of Boilermakers v. Hardeman*, 401 U.S. 233, 237–39, 246 (1971) (applying the “some evidence” standard in a case where the court insinu-

jurisdiction, but rather a tool that courts may apply to find jurisdiction under constitutional due process—or by inference, ICRA’s due process provision.

It seems that there are few inherent limits to the remedial potential of habeas as applied to tribal citizenship cases. Habeas jurisprudence in both the U.S. citizenship and benefits contexts strongly supports the analogous application of strong substantive habeas review to Indian citizenship cases, even though the federal courts would normally not have appellate jurisdiction in these matters. Unfortunately, however, none of the federal courts that have had the opportunity to apply habeas corpus review under the aegis of the ICRA have taken up the invitation, declining to employ any of the tools outlined above to give teeth to what is otherwise an empty procedural remedy.

II. UNDERSTANDING CITIZENSHIP

Notwithstanding the manner in which the current regime strands the victims of tribal citizenship abuses in pitiable circumstances, one might still question whether the lack of remedies is doctrinally problematic. While one certainly would not applaud a sovereign state that took these types of actions, the tribes nonetheless may have a sovereign right to take them. In order to successfully argue that Indian citizenship rights abuses deserve remedial action, this Note must chart, in brief, the relationship between citizenship and sovereignty, the peculiar status of Indian tribes as semi-sovereign communities within the United States, and the citizenship rights of American citizens generally. Only then can one establish a normative basis with which to make judgments about the efficacy of the current Indian citizenship rights regime.

“Citizenship” can be conceived of as a particular type of “membership,” where membership is defined as the minimum set of

ated itself into what had generally been understood to be the exclusive jurisdiction of either the National Labor Relations Board, an independent administrative agency, or the particular union in question); *Estep v. United States*, 327 U.S. 114, 120 (1946) (“The silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them.”). *Estep* is considered one of the main early “some evidence” standard cases, even though it does not make use of that exact phrase.

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rights and obligations extending between an individual and a membership-granting community sufficient for observers to distinguish between members and non-members. Under this framework, the term “citizenship” implies that the membership-granting community is a sovereign entity, where “sovereignty” is the exclusive right to create and enforce norms over particular substantive areas and within a particular geographic domain. Though by no means the only way to define these terms,¹⁷⁵ this simple framework is useful for attacking the problems posed by Indian citizenship power abuses. It forces recognition of the interdependence of citizenship and sovereignty, and it strips away from the definition of citizenship any preconceived notions of the particular rights or obligations implicated. Only by conditioning the definition of citizenship on the sovereignty of the community can one address the peculiar status of Indian tribes as veritable *imperium in imperio in imperio*,¹⁷⁶ as well as the question of when, and if, deprivation of tribal citizenship rights will in fact nullify the “*imperium*” by depleting its underlying sovereignty. Once one understands that by affecting or permitting denigration of citizenship rights, a sovereign necessarily undermines its own foundations, it becomes clear that as semi-sovereign entities, Indian tribes that fail to guard against such

¹⁷⁵ See, e.g., Black’s Law Dictionary 261 (8th ed. 2004) (defining citizen as “[a] person who, by either birth or naturalization, is a member of a political community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges”); id. at 1430 (defining sovereignty as, among other things, “[s]upreme dominion, authority or rule”).

¹⁷⁶ “*Imperium in imperio*” denotes a political system where sovereignty is divided among various political units, for instance between the American federal and state governments. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1430 (1987) (discussing criticisms of divided sovereignty, the “political monster” or ‘hydra’ of ‘*imperium in imperio*.’”). Because Indian tribes are semi-sovereign political units that operate in concert with the federal and state governments, Indians living on Indian land reside in an *imperium in imperio in imperio*. The viability of such arrangements, where what is elsewhere a unified sovereign power is divided among various agencies, has long been a source of intense debate. See, e.g., *The Federalist* No. 15 (Alexander Hamilton) (labeling the ineffectual division of sovereignty under the Articles of Confederation an “*imperium in imperio*” and characterizing the same as a “political monster”); Joseph Story, *A Familiar Exposition of the Constitution of the United States* 114 (Harper Bros. 1884) (“[T]o reconcile a partial sovereignty in the Union, with complete sovereignty in the States [is] to subvert a mathematical axiom, by taking away a part, and letting the whole remain.”). Not surprisingly, adding the additional “*imperio*” of a semi-sovereign Indian tribe (let alone hundreds) increases the complexity and attendant problems considerably.

abuses may be jeopardizing their continued existence as sovereigns within the American system. Additionally, only by starting with a view of membership (including citizenship) as a broad label for a wide variety of rights and obligations can one objectively assess the differences in citizenship regimes, decide which regime is most conducive to a particular social order, and, by implication, select which minimum citizenship guarantees should be required of the Indian tribes. The overarching theme of this Note is that because it permits forcible expatriation and other citizenship power abuses, the current Indian citizenship regime is badly suited to fostering prosperity and representational norms within the Indian tribes.

A. Citizenship, Sovereignty, and Membership as a Minimum

While citizenship is often thought of as something that follows the creation of a sovereign entity, it is important to note that citizenship and sovereignty are in fact coextensive. Citizenship without a granting sovereign makes no more sense than a sovereign with no citizenry. The latter relationship is in part pragmatic—in international law, for instance, a state must have a “permanent population” before other countries will recognize it¹⁷⁷—and in part a reflection of the belief that legitimate sovereignty must be the result of some sort of explicit or implicit social compact.¹⁷⁸ For instance, because an autocracy resembles more an artifact of the might-makes-right state of nature than a successful progression into civil society, the sovereignty of such states is often in doubt.¹⁷⁹

¹⁷⁷ Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25.

¹⁷⁸ See, e.g., The Declaration of Independence para. 2 (U.S. 1776) (“[G]overnments are instituted among men, deriving their just powers from the consent of the governed.”); Declaration of the Rights of Man art. 3, Fr. 1789, available at <http://www.yale.edu/lawweb/avalon/rightsof.htm> (“The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.”).

¹⁷⁹ See, e.g., Robert Kagan, *A Twilight Struggle: American Power and Nicaragua, 1977–1980*, at 345–53 (1996) (discussing the Reagan Doctrine, which “denied the fundamental legitimacy of all communist governments, and by implication all non-democratic governments, declaring them to be essentially transient”); David Luban, *Just War and Human Rights*, in *International Ethics* 195, 204 (Charles R. Beitz et al. eds., 1985) (“[A]n illegitimate and tyrannical state cannot derive sovereign rights against aggression from the rights of its own oppressed citizens, when it itself is denying them those same rights.”).

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North Korea, to cite one example, was a member of the United Nations for over a decade before its sovereignty was recognized by the United States.¹⁸⁰

While an in-depth tour of social contract theory¹⁸¹ is beyond the scope of this Note, it is sufficient to recognize that if the basis of sovereignty is the consent of the governed, no popular sovereign can long endure the derogation of citizenship rights absent an external force to maintain order or rebalance the system. Where citizenship rights abuses are chronically irremediable, the system will either collapse or adopt, either immediately or by degrees, some version of government outside the realm of popular sovereignty. To a very great extent, therefore, the popular sovereign that allows the depredation of citizenship rights also allows the depletion of its own power. And where the sovereign itself commits the violations, seeking to silence dissenters and aggrandize its own power, it sparks a vicious cycle of ever diminishing sovereignty which, if left unchecked, will eventually explode the polity.¹⁸² It is therefore not

¹⁸⁰ While North Korea joined the United Nations in 1991, its sovereignty was not recognized by the United States until 2005. See List of Member States of the United Nations, <http://www.un.org/Overview/unmember.html> (last visited Mar. 5, 2006).

¹⁸¹ See, e.g., John Locke, *Two Treatises of Government* 240–41 (Neill H. Alford, Jr. et al. eds., 1994) (1690) (“Whosoever therefore out of a state of Nature unite into a Community, must be understood to give up all the power necessary to the ends for which they unite into Society, to the majority of the Community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one Political Society, which is all the Compact that is, or needs be, between the Individuals that enter into or make up a Common-wealth. And thus that which begins and actually constitutes any Political Society, is nothing but the consent of any number of Freemen capable of a majority to unite and incorporate into such a Society. And this is that, and that only which did or could give beginning to any lawful Government in the World.”).

¹⁸² See Alexis de Tocqueville, *Democracy in America* 164–65 (Henry Reeve trans., 3d Am. ed. 1839) (1835) (note by American Editor). The editor notes:

[T]he first principle in [Republican governments], that on which all others depend, and without which no other can exist, is and must be, obedience to the existing laws at all times and under all circumstances. It is the vital condition of the social compact. He who claims a dispensing power for himself, by which he suspends the operation of the law in his own case, is worse than a usurper, for he not only tramples under foot the Constitution of his country, but violates the reciprocal pledge which he has given to his fellow-citizens, and has received from them, that he will abide by the laws constitutionally enacted ; [sic] upon the strength of which pledge, his own personal rights and acquisitions are protected by the rest of the community.

Id.

surprising that these types of abuses are nearly universally condemned.¹⁸³

While it is generally accepted that citizenship rights and the sovereignty prerogative must be balanced in order to ensure a stable and legitimate state, this does not mean that there is only one stable equilibrium. A quick scan of several modern republican states reveals substantial variation in the basket of citizenship rights. For example, France, Sweden, the United States, and the United Kingdom all receive Freedom House's highest ratings for political rights and civil liberties,¹⁸⁴ yet differ markedly in the particular rights and obligations that they accord their citizens. These differences show up in, among other places, the form of government, the nature of the legal system, the extent of social welfare provisions, and in innumerable specific rights and duties such as capital punishment, national service requirements, and the right to bear arms. What does not vary, however, is the notion that each citizen's rights are the same.

Whatever the particular components, citizenship under a popular sovereign must be the "rights and obligations [that] define a region of legal equality—what T.H. Marshall called the 'basic human equality associated with . . . full membership of a community.'"¹⁸⁵ While the structure of American citizenship is only one of many stable equilibria, and therefore need not be exactly replicated by the tribes, all republican solutions to the question of citizenship must feature equality.

Where this equality is absent, either because the community explicitly classifies citizens, or because the community's failure to deliver on the promise of equality creates *de facto* classification, the sovereignty and republican character of the community is thereby diminished. While no society achieves full equality, one can distinguish communities where lapses are the exception as opposed to the rule. Where a community's actions routinely separate citizens from the rights they are taught to expect, confusion, disappoint-

¹⁸³ See *infra* note 236 and related text.

¹⁸⁴ Freedom House, *Freedom in the World 2006*, Table of Independent Countries: Comparative Measures of Freedom, <http://www.freedomhouse.org/template.cfm?page=15&year=2005>.

¹⁸⁵ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* 21 (1992) (quoting T.H. Marshall, *Citizenship and Social Class* 8 (Cambridge Univ. Press 1950)).

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ment, and disenchantment create an irrevocable social loss. While such unofficial classification is often a form of majoritarianism, it can also come about independently where an elite minority uses its power to effectively abrogate the rights of the majority.

It is even possible to experience many of the negative effects of citizenship rights abuses *before* they occur. Where the organizing structure of a community permits the discriminatory application of membership rights, even the unexercised potential for abuse can exercise a deleterious effect on the members. This effect is analogous to “chilling” in the context of free speech and political participation discourse. A community where some members avoid officially permissible activities for fear of sanction is a community with second-class citizens. In a politically dynamic society, it may even be the case that *all* members refrain from certain activities for fear that those officially permissible acts might nonetheless prove dangerous when, in the normal course of events, their faction rotates out of power. Under such circumstances, all citizens are in a very real sense second-class citizens, bound by all the obligations of citizenship, but unable to exercise the full set of stated rights. The severity of the problem depends on the nature of the activities avoided and the applicable sanctions. Where the activity is the exercise of a fundamental civil right and the sanction is expatriation, the effective citizenship package falls below the threshold of republicanism, and one must question that community’s claim to sovereignty.

A community in which a minority may capriciously expel members of the majority (or indeed the entire majority) imposes so great a social loss that it effectively nullifies the underlying social compact. As Justice Black stated in *Afroyim v. Rusk*, “citizenry is the country and the country is its citizenry.”¹⁸⁶ Membership is a minimum set of rights, but it cannot be the null set. Where everything an individual gains from an association can be instantly and summarily withdrawn, the community is a failure, and a drag both on the resources of the membership and on those who bear the externalities imposed by a defunct polity. In short, where a sovereign community allows the abrogation of basic citizenship rights, the sum of those rights will, absent corrective action, trend inevitably

¹⁸⁶ 387 U.S. 253, 268 (1967).

towards zero, where there is no citizenship, no sovereignty, and the community is less a state than a prison. There may be an infinite number of distinct sets of rights and obligations that can legitimately claim the mantle of republican citizenship, but there is a minimum set. Any community that fails to provide guarantees against forcible expatriation and disenfranchisement, even if it never undertakes these actions, is something less than a republic, and, at least arguably, something less than sovereign.

B. Citizenship in the United States

“Citizenship,” wrote Chief Justice Warren in his dissent from the decision in *Perez v. Brownell*, “is man’s basic right[,] for it is nothing less than the right to have rights.”¹⁸⁷ In that dissent, which was joined by Justices Black and Douglas, Warren outlined the three key components of citizenship as it is generally understood in the United States today. First, citizenship is not merely an attribute, but a positive associational right.¹⁸⁸ Second, the value of the right is in its holder’s ability to assert claims against the community unavailable to non-citizens.¹⁸⁹ Third, the power to alter one’s citizenship (“citizenship power”) belongs exclusively to the individual, not the government.¹⁹⁰ Because these notions are so ingrained in U.S. culture, it is important to take a moment and note that all three are relatively recent developments.

Until the passage of the Expatriation Act of 1868,¹⁹¹ American jurisprudence struggled to reconcile the fact of mass immigration with the traditional doctrine of indefeasible perpetual allegiance. Applying the traditional doctrine in *Shanks v. Dupont*, Justice Story defined it as “[t]he general doctrine . . . that no persons can by any act of their own, without the consent of the government, put

¹⁸⁷ 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (“Remove [citizenship] and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf.”).

¹⁹⁰ *Id.* (“This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence.”).

¹⁹¹ An Act concerning the Rights of American Citizens in foreign States ch. 249, 15 Stat. 223 (1868) [hereinafter Expatriation Act of 1868].

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off their allegiance, and become aliens.”¹⁹² While citizenship under the traditional doctrine still implies rights, those rights are necessarily outweighed by the obligation not to expatriate. In this sense, the right to expatriate can be viewed as a market check on the policies of the sovereign; where there is no such check, the sovereign’s incentive to prioritize the welfare of the citizenry is necessarily less than what it would be otherwise.

One prominent example of perpetual allegiance in action was the British impressment of American sailors prior to the War of 1812 on the theory that there could be no “former” British subjects.¹⁹³ Although impressment was no longer a pressing issue by 1815, similar concerns motivated the passage of the Act of 1868.¹⁹⁴ The Expatriation Act focused on the right of individuals to expatriate and bound the United States government to respect those decisions.¹⁹⁵ The so-called “Hostage Act”¹⁹⁶ bound the President to secure the rights of naturalized Americans abroad against attempts to characterize them as non-Americans, and authorized for this purpose the use of any means “not amounting to acts of war.”¹⁹⁷ It was actually the right of *expatriation*, as opposed to *immigration*, that remained the primary concern of U.S. citizenship law well into the twentieth century.

Over this period, the focus moved from auto-expatriation by individual Europeans as a way of legitimizing American naturalization to forcible expatriation by the United States as an extension of

¹⁹² 28 U.S. (3 Pet.) 242, 246 (1830).

¹⁹³ See, e.g., President James Madison, War Message to Congress (June 1, 1812), available at http://edsitement.neh.gov/lesson_images/lesson571/WarMsgFull.pdf (noting, among other reasons to go to war with Great Britain, her practice of “violating the American flag on the great high-way of nations, and of seizing and carrying off persons sailing under it; not in the exercise of a belligerent right, founded on the law of nations against an enemy, but a municipal prerogative over British subjects”).

¹⁹⁴ Expatriation Act of 1868, *supra* note 191. One of the driving forces behind the Act was the British refusal to treat as Americans naturalized U.S. citizens who participated in the Irish Fenian movement (revolt). Donald K. Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 Va. L. Rev. 408, 413 (1970).

¹⁹⁵ Expatriation Act of 1868, *supra* note 191, at 224.

¹⁹⁶ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 676 (1981) (noting that the Expatriation Act of 1868 is also known as the “Hostage Act” because its chief concern was the forcible repatriation of naturalized American citizens to their previous nations).

¹⁹⁷ Expatriation Act of 1868, *supra* note 191.

the foreign affairs power. By 1907, when Congress passed the first “general statute covering expatriation,”¹⁹⁸ the concern was less with ensuring that other nations accepted their former citizens’ nationalization as Americans, but rather with how Americans themselves could be expatriated. Under the Expatriation Act of 1907,¹⁹⁹ Americans would lose their citizenship if they were naturalized by, or took an oath of allegiance to, a foreign state, or if they spent too much time in their “home country” after having been naturalized as U.S. citizens. Most controversially, the Act also provided that an American woman who married a foreigner was deemed to have relinquished her citizenship in favor of her husband’s, a provision that the Court famously upheld in *Mackenzie v. Hare*.²⁰⁰ Two further Acts²⁰¹ increased the list of expatriating actions before the Court began to construct the contemporary conception of citizenship evinced by Chief Justice Warren in his *Perez* dissent.

Perez was actually the high water mark for federal expatriation power. In that case, the Court upheld the statutory expatriation of an American who had voted in a Mexican election, despite arguments that he had not intended to relinquish his citizenship.²⁰² Writing for the court, Justice Frankfurter upheld the statute on the basis of the federal government’s inherent foreign affairs power:

Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. . . . The Government must be able not only to deal affirmatively with foreign nations . . . [i]t must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.²⁰³

¹⁹⁸ Duvall, *supra* note 194, at 412.

¹⁹⁹ An Act in reference to the expatriation of citizens and their protection abroad ch. 2534, § 2, 34 Stat. 1228 (1907).

²⁰⁰ 239 U.S. 299, 312 (1915).

²⁰¹ See Immigration and Nationality Act, ch. 477, 66 Stat. 163, 267–72 (1952); Nationality Act of 1940, ch. 876, 54 Stat. 1137, 1168–70.

²⁰² *Perez v. Brownell*, 356 U.S. 59, 62 (1958) (holding that Congress has the power to pass a statute that forcibly expatriates Americans who vote in foreign elections).

²⁰³ *Id.* at 57 (internal citations omitted).

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Justice Frankfurter was not the first Justice to pen such a broad paean to the federal government's inherent foreign affairs power.²⁰⁴ As early as 1793, Chief Justice Jay had recognized the danger of holding the federal government unable to prosecute American citizens who committed unauthorized acts of war against foreign nations.²⁰⁵ While allowing an American citizen to vote in a foreign election is certainly less problematic than allowing Americans to wage war against countries with whom the United States is itself at peace,²⁰⁶ one can see how by viewing the former as the thin end of the wedge, the Court could easily find forcible expatriation permissible. The rationale would be that by adopting the foreign policy of another nation, an American citizen necessarily sacrifices his affiliation to the United States.

Over the next six years, the Court would encounter and strike down three forcible expatriations before affirmatively curbing the practice in *Afroyim v. Rusk*.²⁰⁷ In *Trop v. Dulles*²⁰⁸ and *Kennedy v. Mendoza-Martinez*,²⁰⁹ the court disallowed the use of penal expatriation even where the cases involved citizens' refusal to serve in wartime. As Chief Justice Warren asserted in *Trop* when discussing expatriation:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's

²⁰⁴ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–16 (1936) (endorsing the concept of inherent foreign affairs powers beyond those specifically enumerated in the Constitution by holding that “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs”).

²⁰⁵ *Henfield's Case*, 11 F. Cas. 1099, 1103 (D. Pa. 1793) (No. 6360) (quoting Chief Justice Jay explaining the federal government's interest, the absence of a specific enumerated power notwithstanding, in policing the actions of American citizens with respect to foreign nations, and noting that “[i]f a sovereign who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation than if he injured them himself”).

²⁰⁶ *Henfield's Case*, for instance, dealt with an American who participated in French privateering against British shipping, an act of war, at a time when the United States was officially neutral in the conflict between Britain and France. *Id.* at 1100 n.1.

²⁰⁷ 387 U.S. 253, 267–68 (1967).

²⁰⁸ 356 U.S. 86, 103 (1958).

²⁰⁹ 372 U.S. 144, 186 (1963).

status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . He may [in addition to other disabilities] be subject to banishment, a fate universally decried by civilized people.²¹⁰

The Court went even in further in *Schneider v. Rusk* when it voided the purely non-penal “home country” expatriation provided for in the original 1868 Act.²¹¹

In *Afroyim*, the court faced substantially the same facts as in *Perez*, but came to the opposite result, adopting a position even stronger than that advocated by Chief Justice Warren in his *Perez* dissent. Repudiating *Perez*, the Court held that voting in a foreign election would not automatically expatriate an American citizen. Instead, the Court found that “Congress has [no] general power, express or implied, to take away an American citizen’s citizenship without his assent.”²¹² The federal courts have since expanded on and reinforced that holding in *Vance v. Terrazas*²¹³ and *Kahane v. Shultz*,²¹⁴ holding that neither swearing allegiance to a foreign country nor holding elected office in a foreign country, respectively, constitutes intent to expatriate. After *Afroyim* and its progeny, it is clear that “[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.”²¹⁵ This position represents a striking difference between the United States and its Indian tribes.

C. Citizenship in Indian Tribes

American Indians may have up to three “citizenships.” They are United States citizens by virtue of the Indian Citizenship Act of 1924,²¹⁶ citizens of their states by virtue of the Fourteenth Amend-

²¹⁰ *Trop*, 356 U.S. at 101–02.

²¹¹ *Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964).

²¹² *Afroyim*, 387 U.S. at 257.

²¹³ 444 U.S. 252, 261 (1980).

²¹⁴ 653 F. Supp. 1486, 1487 (E.D.N.Y. 1987).

²¹⁵ *Afroyim*, 387 U.S. at 257.

²¹⁶ An Act To authorize the Secretary of the Interior to issue certificates of citizenship to Indians, ch. 233, 43 Stat. 253 (1924). Individual Indians had acquired American citizenship prior to the 1924 Act through a variety of means. See also An Act Granting citizenship to certain Indians, ch. 95, 41 Stat. 350 (1919) (granting American citi-

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ment,²¹⁷ and, unless the relationship has been severed, citizens of their tribe which, if landed, may exercise a wholly unique set of semi-sovereign powers.²¹⁸ That landed tribes are neither states of the union nor foreign countries is a well settled matter of federal Indian law,²¹⁹ but what exactly they *are* remains a subject of endless debate. They are not mere clubs, with an associational right to exclude,²²⁰ but neither are they states, bound by the “right to travel”²²¹ to leave (state) citizenship power in the hands of the citizen. Indian lands are not administrative units within states, such as counties or towns, but neither are they outside of the states. And while Indian-governed lands are physically within states, save for a few particular purposes, they are not effectively *of* those states.

One thing that can be said for certain is that tribes are not parties to the Constitution. They were not parties to the original agreement, and there has been no Fourteenth Amendment-like incorporation of constitutional guarantees to them. As a result, they are not bound by federal constitutional jurisprudence when operating within their sovereign sphere. Decisions such as *Afroyim* and general federal civil rights statutes therefore have no effect on tribal citizenship power.²²² As the Tribal Staff Attorney for the Penobscot Nation explains:

zanship to Indians who fought in World War I while explicitly reserving for them their rights as tribal citizens).

²¹⁷ “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1.

²¹⁸ See, e.g., *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996) (“Indian tribes retain elements of sovereign status, including the power to protect tribal self government and to control internal relations.”).

²¹⁹ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 26–27 (1831).

²²⁰ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (discussing private clubs’ associational right to exclude); *Garvey v. Seattle Tennis Club*, 808 P.2d 1155, 1158 (Wash. Ct. App. 1991) (holding that due process rights do not apply to a member’s expulsion from a private club). But see *Lambert v. Fishermen’s Dock Coop., Inc.*, 297 A.2d 566, 568–69 (N.J. 1972) (holding that there are limitations on the powers that private organizations may grant themselves where there are significant property interests at stake).

²²¹ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 501, 504 (1999) (holding that the Fourteenth Amendment protects the right of citizens to move from state to state and to be treated on an equal basis with current citizens of their new state).

²²² See, e.g., *Fillion v. Houlton Band of Maliseet Indians*, 54 F. Supp. 2d 50, 53–54 (D. Me. 1999) (holding that because tribes are not bound by the Constitution, including the Fifth Amendment, they cannot be subjected to claims under 42 U.S.C. § 1983).

Under the American legal system, Indian tribes have sovereign powers separate and independent from the federal and state governments. The extent and breadth of tribal sovereignty is not the same for each tribe, however.

One of the main reasons for this lack of uniformity is that there are more than five hundred federally recognized tribes within the United States. Each tribe has its own form of government, its own distinct language, and its own unique culture and history. The sovereign powers exercised by a tribe are mostly based on its unique relationship with the federal government and any particular agreements entered into between the parties.²²³

As this passage indicates, the problem with trying to quantify or generalize about Indian sovereignty is that it was not conferred by any one constitutional provision or convenient congressional act, but rather on the haphazard basis of tradition, jurisprudence, and positive law, both statutory and constitutional. It is less the result of conscious deliberation than the aftermath of irresistible westward expansion and the need to “deal” with the attendant “Indian problem.” In general, tribes are said to retain “‘attributes of sovereignty over both their members and their territory,’ to the extent that sovereignty has not been withdrawn by federal statute or treaty.”²²⁴ This of course only begs the question of what has or has not been “withdrawn” from any particular tribe. While the federal government has at various times attempted to systematize its approach to Indian affairs, there has been no binding systematization of the scope of tribal sovereignty.

Regardless of the exact legal status of tribes, the fact of the matter is that they exist and confer citizenship rights. Although the federal government has developed various definitions of “Indian” for particular purposes²²⁵ and will at times define citizenship in a

²²³ Mark A. Chavaree, Tribal Sovereignty, Wabanaki Legal News (1998), available at <http://www.ptla.org/wabanaki/sovereign.htm>.

²²⁴ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

²²⁵ See, for example, *United States v. John*, 437 U.S. 634, 649–52 (1978), which upholds Congress’s definition of “Indian” under the Indian Reorganization Act of 1934 and notes that Congress has defined “Indian” for a wide variety of purposes, including eligibility for social programs, jurisdiction in criminal matters, preference in gov-

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specific tribe,²²⁶ these determinations are generally considered “one of an Indian tribe’s most basic powers,”²²⁷ and are almost always left to tribal discretion. Guidelines are often traditional in nature, involving criteria based on some combination of tribal blood quanta²²⁸ and/or patrilineal or matrilineal descendancy.²²⁹ Because the federal government only rarely intervenes in questions of tribal citizenship, and as the tribes themselves are not bound by federal constitutional jurisprudence on the topic of citizenship, Indian citizens “temporarily in office” exercise near-plenary citizenship power.²³⁰ This includes, among other powers, the ability to effect forcible and unappealable expatriation.

Since Indians are American citizens, disenrollment from a tribe does not leave them literally stateless, but this is likely to be of little comfort to one being denied an ancient racial, political, and national association. Beyond the intangible social value of citizenship, Indian tribes provide two general types of tangible economic benefits. The first type is conferred by the tribe through its own resources. Depending on the specific tribe, and in particular whether or not it is a gaming tribe, tribal-sourced benefits can range from the negligible to the lottery-esque. Not surprisingly, there appears to be at least a rough correlation between gaming and membership abuses. The second type of economic benefit is conferred by the federal government, either through the tribe or directly to citizens. “The scope of [federal] Indian Affairs programs is extensive and includes a range of services comparable to the programs of state

ernmental hiring, and administration of tribal power. There is no single statute that defines “Indian” for all federal purposes.

²²⁶ See, e.g., *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978).

²²⁷ Cohen, *supra* note 7, at 20.

²²⁸ See, e.g., Hopi Const. art II, § 1(b), available at http://www.tribalresourcecenter.org/ccfolder/hopi_const.htm (defining as those eligible for membership “[a]ll persons of a one-fourth degree Hopi Indian blood or more, or one-fourth degree Tewa Indian blood or more, or one-fourth degree Hopi-Tewa Indian blood or more combined, born after December 31, 1937, who are not enrolled with any other Indian Tribe”).

²²⁹ See, e.g., Sac and Fox Nation Const. art I, § 2, available at http://www.tribalresourcecenter.org/ccfolder/sac_fox_const.htm (defining as those eligible for membership “[a]ll persons of one-fourth (1/4) or more degree of total combined Sac and Fox Indian blood at least one of whose parents is a member of the Sac and Fox Nation”).

²³⁰ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). For the full text of the quote, see *supra* note 23.

and local government, e.g., education, social services, law enforcement, courts, real estate services, agriculture and range management, and resource protection.”²³¹ Several federal agencies exist solely to service the needs of Native Americans—such as the Indian Health Service and the Administration for Native Americans, which provide, respectively, healthcare and economic development assistance to tribes—and therefore numerous other Native American oriented programs that reside throughout the executive branch. Among others, the Departments of Housing and Urban Development, Justice, Agriculture, Education, Labor, Commerce, and Energy all have special responsibilities towards the Native American community.²³²

Not surprisingly, the effect of citizenship power abuses by tribes can be almost as traumatic and economically disastrous for an Indian as would be expatriation and banishment from the United States itself, since “[t]ribal membership is as fundamental to Indians as American citizenship is to Americans generally.”²³³ As the cases in Part I have shown, this is not a theoretical question. Abuses of tribal citizenship, while hardly endemic throughout the community of recognized tribes, are regular enough to present a real and growing threat not only to individual Indians, but to the federal-Indian system as a whole.

III. THE ORIGINS OF TRIBES’ SOVEREIGN CITIZENSHIP POWER

Martinez, Maxam, Montgomery, Ordinance 59 Association, Poodry, Quair, Ross, Santa Clara Pueblo, and Smith all serve as powerful reminders that two centuries after losing their status as independent sovereign entities, America’s “domestic dependent nations”²³⁴ still retain enormous power over their citizenry, including an expatriation power denied to the state and federal governments,²³⁵ as well as the governments of all common law countries

²³¹ Indian Ancestry—What are the Benefits & Services Provided to American Indians & Alaska Natives, <http://www.doi.gov/benefits.html> (last visited Mar. 11, 2006).

²³² *Id.*

²³³ *Classification of Persons as Illegitimate for Purposes of Exclusion From Tribal Membership Repugnant to Civil Rights Act of 1968 and Therefore Void*, 76 Interior Dec. 353, 355 (1969).

²³⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

²³⁵ See, e.g., *Trop v. Dulles*, 356 U.S. 84, 92 (1958).

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and indeed most other countries.²³⁶ While Part IV of this Note addresses the wisdom of allowing tribes to retain this peculiar institution, the concern here is with the origins of this power and its evolution to an almost *a priori* principle that has stood so strongly in the way of the plaintiffs in the cases discussed previously. As the term implies, “sovereign citizenship power” is the fusion of two concepts: (1) plenary tribal citizenship power and (2) tribal sovereign immunity.

A. The Origins of Plenary Tribal Citizenship Power

As the only Supreme Court case to address citizenship questions under ICRA, *Santa Clara Pueblo* is generally employed as the starting point for any contemporary tribal citizenship-rights analysis. Yet as the substantive holding in the case served merely to foreclose a nascent (and in the end, stillborn) federal cause of action for citizenship disputes, the case is best viewed as simply the latest in a long line of Supreme Court cases establishing and reinforcing the tribes’ near plenary power over citizenship. In fact, the question of tribal membership power first reached the Supreme Court over a century earlier in *United States v. Rogers*, where Chief Justice Taney recognized, if obliquely, the right of the Cherokee to adopt non-Indians into the tribe.²³⁷ In 1897, the Court explicitly addressed citizenship power for the first time in *Roff v. Burney*, holding that the Chickasaw tribe had the power to both to enroll and disenroll non-Indians.²³⁸ More importantly for the purposes of this

²³⁶ While there was an explosion of forcible expatriation laws in Europe in the first half of the twentieth century—starting with France in 1915, Belgium in 1922, Italy in 1926, Austria in 1933, and Germany, through the Nuremberg Laws, in 1935—the United Nations determined in a survey of eighty-four countries that by 1954 only the Philippines and Turkey permitted penal denaturalization of native born citizens. Laws Concerning Nationality at 379, 461, U.N. Doc. ST/LEG/SER.B/4, U.N. Sales No. 1954.V.1 (1954); see also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* 131–33 (Daniel Heller-Roazen, trans., Stanford Univ. Press 1998).

²³⁷ 45 U.S. (4 How.) 567, 572–73 (1846).

²³⁸ 168 U.S. 218, 222 (1897). Although this is the first official judicial notice of the Indians’ citizenship power, it had in fact been recognized by jurists at least fifty years earlier:

[Indian tribes] have been deemed to be the lawful occupants of the soil, and entitled to a temporary possession thereof, subject to the superior sovereignty of the particular European nation, which actually held the title of discovery. They have not, indeed, been permitted to alienate their possessory right to the soil,

Note, *Roff* established the first two of the three basic principles that undergird all tribal citizenship jurisprudence. Those principles are: (1) tribes possess plenary power over citizenship; (2) this power is ultimately subject to Congress; and (3) tribes possess sovereign immunity from suit. The Court explained:

The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred.²³⁹

Another early case, *Glenn-Tucker v. Clayton*,²⁴⁰ also provides strong evidence for the notion of plenary tribal citizenship power. In 1882, the Choctaw National Council passed an act aimed at purging the Choctaw lands of non-citizens.²⁴¹ In the Act, the Choctaw explicitly “requested” that the Secretary of the Interior instruct the local Indian agent to supply appellate jurisdiction for individuals such as the plaintiffs, whites who claimed Choctaw citizenship under several theories.²⁴² After eighteen years of litigation,²⁴³ the

except to the nation, to whom they were thus bound by a qualified dependence. But in other respects, they have been left to the free exercise of internal sovereignty, in regard to the members of their own tribe

Justice Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 6 at 14 (Legal Classics Library 1992) (1884).

²³⁹ *Roff*, 168 U.S. at 222.

²⁴⁰ 70 S.W. 8 (Indian Terr. 1902).

²⁴¹ *Glenn-Tucker*, 70 S.W. at 9 (citing Act passed by the Choctaw National Council (Oct. 21, 1882)).

²⁴² *Id.* The use of the ambiguous phrase “requests” to establish the Indian Agent’s appellate jurisdiction means that on its face, it is not clear whether the tribe freely granted the jurisdiction for its own purposes, was compelled by the Agent to grant it, or simply purported to “grant” a power that would have otherwise been exercised given the contemporary political reality.

²⁴³ In November of 1884, the Choctaw Council ruled that the plaintiffs were not entitled to membership. In December of that year, the plaintiffs appealed to the local Indian Agent. In August of 1887, the Indian agent affirmed the Council’s decision, and in June of 1890 this decision was approved by the Department of the Interior. The plaintiffs then appealed to the Dawes Commission in 1889, which rejected their application, before finally suing in the United States Court for the Central District of the Indian Territory. After losing in the district court, which found that it had no power to

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Court of Appeals for the Indian Territory²⁴⁴ ruled for the tribe, holding that the Choctaw National Council had lawfully passed judgment on the plaintiffs' citizenship, that the Department of the Interior had lawfully rejected the plaintiffs' appeals, and that the Territorial Courts of Indian Country had no jurisdiction to entertain a further action.

In addition to its pro-tribe holding, there are two aspects of the case that strongly reinforce the notion of plenary tribal citizenship power. The first, the grant theory, is an adherence by the federal government to delegated jurisdiction that seems most reasonably interpreted as reflecting a belief in tribes' plenary citizenship power. The second is the relatively rare provision of full faith and credit to an Indian tribunal. The grant theory is substantiated by the fact that at each stage of the proceedings, the federal executive and judicial branches acted in complete accord with the notion that the tribe exercised plenary power over citizenship, tempered only by a grant of appellate jurisdiction by the tribe to the Indian Agent. For instance, when the Commissioner for Indian Affairs, an intermediary between the Agent and the Secretary, attempted to reverse the decision of the Agent, the court found that his actions were *ultra vires* and his decision a nullity because no jurisdiction had been granted to him by the tribe.²⁴⁵ The district court similarly held itself to be without jurisdiction, finding that the only available extra-tribal jurisdiction was that which had been conferred by the tribe on the Indian Agent.²⁴⁶

Finally, while expounding at length on the merits of the plaintiffs' petition, the court of appeals based its decision on *res judicata*, holding that "the proceedings and judgments of the courts of the several nations in the Indian Territory are on the same footing with proceedings and judgments of the courts of the territories of

hear their petition for membership, the plaintiffs appealed to the Court of Appeals for the Indian Territory seeking a writ of mandamus to force the district court to hear their application. *Glenn-Tucker*, 70 S.W. at 8–10.

²⁴⁴ The Indian Territory courts are the predecessors to the state courts of Oklahoma.

²⁴⁵ *Glenn-Tucker*, 70 S.W. at 10.

²⁴⁶ The plaintiffs also made an appeal to the Dawes Commission, which apparently had the power to compel their enrollment, but it is not clear from the opinion whether that appeal was turned down on jurisdictional grounds, which would support the grant theory, or on the merits, which would not. *Id.* at 534.

the Union, and are entitled to the same faith and credit.”²⁴⁷ On this basis, the court held that the action was barred in the face of the plaintiffs’ otherwise compelling argument that

‘the decision relied upon in this case [that of the Indian Agent] was not that of a court, or any person possessing any judicial authority, or competent under the constitution and laws of the United States to be clothed with any such authority, but was the act of a merely executive or administrative officer of the United States, who, in the exercise of a discretionary power, incidentally passed upon the question now directly in issue in the present case’ [and, citing numerous authorities . . . to establish the proposition that the decisions of executive officers do not come within the rules governing former adjudications, and that the opinions of the Indian agent and of the secretary of the interior in this case cannot be pleaded an estoppel of the claimants’ rights to citizenship in the Choctaw Nation.²⁴⁸

The appellate court agreed with this argument and noted that if only the Indian Agent and/or the Secretary of the Interior had passed judgment on the plaintiffs’ application, there would be no estoppel. However, because the court, citing unspecified Supreme Court and Eighth Circuit cases,²⁴⁹ found it proper to accord the tribal court full faith and credit, estoppel attached and the plaintiffs were left without a justiciable cause of action. Even though it was not the general practice to accord Indian tribunals full faith and credit (nor indeed is it today),²⁵⁰ the court here latched onto (or, alternatively, invented) an exception to that rule that has surfaced at various times in citizenship jurisprudence, most notably in *Santa Clara Pueblo*²⁵¹ and the Indian Child Welfare Act of 1978.²⁵² While

²⁴⁷ Id. at 520.

²⁴⁸ Id. at 519 (quoting the claimants’ counsel).

²⁴⁹ Id. at 520. The court might have been referring to *Talton v. Mayes*, 163 U.S. 376 (1896), which had been handed down six years earlier, but it is not entirely clear.

²⁵⁰ See, e.g., Jill E. Tompkins Shibles, Full Faith and Credit: A Net of Protection, *Quinnehtukqut Legal News*, Winter 1998, available at <http://www.ptla.org/quinnehtukqut/ct2fullfaith.htm> (noting that state and federal courts generally do not accord full faith and credit to tribal courts, but rather only where directed to do so by specific federal statutes). Judge Shibles is the former Chief Judge, Mashantucket Pequot Tribal Court. Id.

²⁵¹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.21 (1978) (noting, in dicta, that “[j]udgments of tribal courts, as to matters properly within their jurisdiction, have

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there are examples of instances where tribal courts have been accorded full faith and credit outside the citizenship context,²⁵³ the doctrine seems particularly strong in the area of citizenship.

The last of the early jurisprudence is an aggregation of actions known as the *Cherokee Intermarriage Cases*, which affirmed the concurrent power of the Cherokee tribe and Congress to promulgate and enforce citizenship guidelines.²⁵⁴ At the heart of the controversy was the question of whether intermarried whites, their descendants, and freed black slaves formerly owned by Cherokee masters would share in the 4,420,406 acres of land soon to be allotted by the tribe.²⁵⁵ By a special act of Congress, the Court of Claims was authorized to exercise jurisdiction over the case and any parties “aggrieved” by the outcome were granted expedited review in the Supreme Court.²⁵⁶ While the opinion does not directly address the question of jurisdiction, it appears that without the Act, the federal courts would not have been able to hear the cases. The fact that the Court applied Cherokee law underscores the federal government’s respect for tribal citizenship power, even in a situation in which the stakes were high enough to require Congressional intervention. The Cherokee statute distinguished between whites who had intermarried before and after November 1, 1875, and the court applied this standard.²⁵⁷ The somewhat different position of African Americans within the Cherokee Nation provides a powerful illus-

been regarded in some circumstances as entitled to full faith and credit in other courts”).

²⁵² 25 U.S.C. §§ 1901–63 (2000). Under the terms of the Indian Child Welfare Act:

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1911(d). See generally David Getches et al., *Cases and Materials on Federal Indian Law* ch. 8, § C(4) (5th ed. 2005).

²⁵³ See, e.g., *Jim v. CIT Fin. Serv. Corp.*, 533 P.2d 751, 752 (N.M. 1975) (holding that “the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the Courts of New Mexico because the Navajo Nation is a ‘territory’ within the meaning of that statute” in an action concerning repossession of a pickup truck).

²⁵⁴ 203 U.S. 76 (1906).

²⁵⁵ *Id.* at 77.

²⁵⁶ Act of March 3, 1905 ch. 1479, 33 Stat. 1048, 1071.

²⁵⁷ *Cherokee Intermarriage Cases*, 203 U.S. at 83.

tration of Congress's ultimate power over citizenship, the second of the three main principles that guide tribal citizenship jurisprudence.

After the Civil War, in which the slave-holding Cherokee Nation had sided with the Confederacy, the Cherokee were compelled by the terms of their peace treaty to recognize their former slaves as citizens.²⁵⁸ Why Congress chose not to make the freedmen citizens of the underlying state is a fascinating question for a different note, but nonetheless demonstrates that Congress has the power, if only rarely exercised, to determine citizenship in a specific tribe, even where the new citizens have no blood connection to the Native American community.

While the early cases show that the United States has long recognized the power of the tribes over citizenship, each of the cases relates to the rights of *non-Indians* involved with Indian tribes. They leave open the question of what would happen if and when an Indian challenged a tribal citizenship decision in federal court. As should be clear by now, it is at best an uphill battle. To fully explain that phenomenon, however, it is necessary to understand not only tribes' citizenship power, but also their sovereign immunity.

B. The Origins of Tribal Sovereign Immunity

The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of Congress, *they then exercised within a defined territory the powers of a sovereign people*; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial.²⁵⁹

In 1890, a group of Creek Indians destroyed fencing belonging to an Anglo-Indian joint venture, causing an immediate financial loss to the company as well as an ongoing loss of expected profits. Eighteen years after the incident, Congress passed a special act authorizing a suit against the tribe in the Court of Claims,²⁶⁰ much as

²⁵⁸ Treaty between the United States and the Cherokee Nation, art. IX, July 19, 1866, 14 Stat. 799.

²⁵⁹ *Turner v. United States*, 248 U.S. 354, 354–55 (1919) (emphasis added).

²⁶⁰ Act of May 29, 1908, Pub. L. No. 156, § 26, 35 Stat. 444.

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it had passed a special jurisdictional act in response to the *Cherokee Intermarriage Cases* three years earlier. By that time, the alleged damages had grown to represent roughly four percent of the tribe's total wealth, or roughly ten percent of their readily available funds.²⁶¹

Twenty-nine years after the events giving rise to the action, the Court held for the tribe on the basis that there was no "substantive right to recover the damages resulting from failure of a government or its officers to keep the peace."²⁶² Even though the Court explicitly held that "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit,"²⁶³ its oblique references to the tribe as a sovereign, in dicta, have proven to be extremely important in the development of federal Indian law. By way of the passage cited at the beginning of this Section, the Court had, as Justice Kennedy would assert nearly eighty years later, invented the doctrine of tribal sovereign immunity "almost by accident."²⁶⁴

Accidental, incidental, or otherwise, the innovation of the doctrine of tribal sovereign immunity in *Turner* has made it extremely difficult for individuals to achieve federal judicial vindication of their tribal citizenship rights. Tribal sovereign immunity was cited and affirmed in *Maxam*,²⁶⁵ *Montgomery*,²⁶⁶ *Ordinance 59 Association*,²⁶⁷ *Poodry*,²⁶⁸ *Quair*,²⁶⁹ *Ross*,²⁷⁰ *Santa Clara Pueblo*,²⁷¹ and *Smith*.²⁷² Paired with tribal primacy over membership decisions, it has proven to be a powerful barrier for plaintiffs. Yet, as noted previously, there is one other guiding principle at issue—namely Congress's plenary power over the Indian tribes—and it is to this

²⁶¹ At the time of trial, the alleged damages, including lost profits, totaled \$105,698.03. At that time, the United States held \$1,325,167.16 in trust for the tribe, which had an additional \$1,100,000.00 on deposit with various banks in Oklahoma. *Turner*, 248 U.S. at 357 n.1.

²⁶² *Id.* at 358.

²⁶³ *Id.*

²⁶⁴ See *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 756 (1998).

²⁶⁵ 829 F. Supp. at 281.

²⁶⁶ 905 F. Supp. at 745–46.

²⁶⁷ 970 F. Supp. at 917.

²⁶⁸ 85 F.3d at 898.

²⁶⁹ 359 F. Supp. 2d at 962.

²⁷⁰ 809 F. Supp. at 745.

²⁷¹ 436 U.S. at 59.

²⁷² 875 F. Supp. at 1359.

power, which can override both tribal citizenship power and tribal sovereign immunity, that we must turn in our search for a solution.

IV. ARGUMENT FOR ABROGATION

[A] society consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual.²⁷³

Though extremely serious in and of themselves, citizenship rights abuses are in fact merely symptoms of the broader small republic problem so eloquently described by James Madison in *Federalist* 10.²⁷⁴ The history of small republics, Native American or otherwise, is by and large a history of volatile republics. The problem of the small republic is as ancient as it is resistant to resolution. Societies that are too small or homogenous to benefit from the moderating effects of cross-cutting cleavages among the franchised are unavoidably predisposed to polarization.²⁷⁵ Yet while there may be no way to preserve the republican character of tribal governments and avoid the endemic entropy of small communities, there may be ways to control some of its most harmful effects, namely the forcible ouster of disfavored individuals or groups.

Tribal governments may be the inheritors of indigenous and time-tested governance models, but to the extent that they fashion themselves after the Anglo-American model, there are reasons to argue that Anglo-American and not indigenous norms should govern certain societal fundamentals. The inviolability of citizenship is one of these fundamentals. Though Congress has not yet seen fit to incorporate a basic citizenship right to the tribes, a number of tribes have already bound themselves in this fashion, creating at least a colorable argument that such a right is not necessarily an in-

²⁷³ The *Federalist* No. 10, at 60 (James Madison) (Henry B. Dawson ed., 1891).

²⁷⁴ *Id.*

²⁷⁵ See, e.g., Michael Taylor & Douglas Rae, *An Analysis of Crosscutting Between Political Cleavages*, 4 *Comp. Pol.* 534, 535 (1969).

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trusive, foreign norm.²⁷⁶ Some tribes have additionally bound themselves from altering their citizenship guidelines without approval from the Secretary of the Interior.²⁷⁷ Moreover, Congress and the Indian community have collectively and explicitly endorsed this idea in their advocacy for the Indian Child Welfare Act, where Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”²⁷⁸ To secure citizenship status for Indian children but not for their parents seems illogical, and provides further credence to the assertion that an inalienable citizenship right is not fundamentally un-Indian. Yet even where curtailing tribal citizenship power would run counter to the norms of the community, there remains a compelling justification for taking action. When viewed in the context of its broader effects, plenary citizenship power is always dangerous and only rarely, if ever, profitable to the community. Even where it is never exercised, the power to disenroll and banish individuals by fiat can linger like a black cloud over the heads of members, chilling political dissent and inserting a terrifying uncertainty into an affiliation so fundamental that most individuals never question its immutability.

²⁷⁶ See, e.g., Const. of the Duckwater Shoshone Tribe art. III, § 3 (2001), available at http://www.tribalresourcecenter.org/ccfolder/duckwater_shoshone_const.htm (providing that “[t]he Tribal Council shall prescribe by ordinance, the rules and regulations governing loss of membership which shall be limited exclusively to voluntary relinquishment”); Const. and By-Laws of the Confederated Tribes of Warm Springs Reservation of Or. art. III, § 4 (1938), available at http://www.tribalresourcecenter.org/ccfolder/warm_springs_constandbylaws.htm (providing that “[i]n no case shall a member lose his membership other than by personal request in writing to the Tribal Council”).

²⁷⁷ See, e.g., Const. and By-Laws of the Confederated Tribes of the Grand Ronde Cmty. of Or. art. V, §§1, 5 (1999), available at http://www.tribalresourcecenter.org/ccfolder/grand_ronde_constandbylaws.htm; Const. of the Coquille Indian Tribe art. II, §§ 1, 4 (no date available), available at http://www.tribalresourcecenter.org/ccfolder/coquille_const.htm; Const. of the Skokomish Indian Tribe art II, § 3 (1980), available at http://www.tribalresourcecenter.org/ccfolder/skokomish_const.htm.

²⁷⁸ Indian Child Welfare Act, 25 U.S.C. § 1901(3) (2000).

A. The Ultimate Cost of Plenary Citizenship Power

The predicament of Indian victims of citizenship abuses has to date proven insufficient to compel even partial congressional abrogation of tribal citizenship power. Even if ignorance could adequately explain the absence of regulation before *Santa Clara Pueblo*, the subsequent lack of congressional action, especially in the face of numerous subsequent federal cases, is probably best explained not as ignorance, but as apathy. If there is to be the kind of legislative revolution that will render irremediable citizenship abuses a thing of the past, one must first foster the understanding that citizenship abuses prejudice not only individual Indians, but the entire federal purpose in maintaining tribes as semi-sovereign entities. To do this, one must determine, at least to a first approximation, the content of that federal purpose.

At a fundamental level, the question of why Indian tribes continue to exercise semi-sovereign power so long after the coast-to-coast settlement of the United States can only be resolved by resort to the tautology of constituencies. To wit, there is a Nez Perce Nation for the same reason that there is a Norwegian nation; because if these groups have nothing else in common, it is a shared belief that they are neither Danes, Finns, nor Swedes. At a more practical level, one can identify at least two reasons for the continued existence of tribes, both falling under the aegis of Congress's general "responsibility for the protection and preservation of Indian tribes."²⁷⁹ The first justification guided federal Indian policy throughout most of American history and still exerts a powerful hold on our collective subconscious, even if to voice it is to attract charges of ignorant adherence to anachronism or even outright cultural imperialism. It is that tribes are permitted to exist to facilitate their efficient and peaceable assimilation into Anglo-American society in order to ensure harmonious and prosperous co-existence with the United States.²⁸⁰ The second justification is that tribes serve as a vehicle for the conveyance of benefits accruing to Native Americans on a variety of bases, including historical recompense,

²⁷⁹ Id. § 1901(2).

²⁸⁰ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribes are "domestic dependent nations . . . in a state of pupilage . . . [and] [t]heir relation to the United States resembles that of a ward to his guardian").

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effecting assimilation, and remedying their chronic and contemporary poverty, and in a variety of forms, including direct financial disbursements, specialized welfare programs, and valuable rights distinct from those of other Americans. Adherence to plenary tribal membership power frustrates both of these proffered purposes.

B. Plenary Citizenship Power Stunts the Growth of Republican Values

When banishment is on the table, it crowds out other rights and precludes the democratizing effect of being required to compromise. While it is beyond the scope of this Note to catalog the intricacies of this connection, it should be enough to note that inasmuch as representative government is designed to mediate an otherwise irresistible elitism, it is simply incompatible with the ability to expel the powerless. Each controversy resolved by an abuse of the citizenship power is a lost opportunity, as it is precisely the process of working through initially irreconcilable differences that educates us in the fundamental practice and benefits of democracy. The only lesson learned when the citizenship power is abused to resolve a political dispute is that the safest course is not to engage in such disputes. Unless the federal government acts to remove the undemocratic escape hatch of expatriation power, it simply will not be possible to foster robust republican values within tribal nations.

C. Plenary Citizenship Power Defeats the Provision of Federal Benefits

The core of this argument is that the federal government legislates not for the benefit of tribes as abstract entities, but for the benefit of individual Indians themselves.²⁸¹ Regardless of why Con-

²⁸¹ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978) (commenting on the relationship between Indians and federal constitutional rights and noting that “[t]he line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course, does not relieve State and Federal Governments of their obligations to individual Indians under these provisions”); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 181 (1973) (“To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians [to whom are owed] individual rights.”).

gress chooses to favor tribes with any particular right or property interest, the ultimate purpose of that legislation is eviscerated when an Indian tribe can choose to summarily and permanently exclude individuals theretofore entitled to receive those benefits. Unless one adopts the fairly harsh view that ejection serves the federal purpose of integrating Indians into the general population, federal purposes are defeated when powerful individuals, likely those least in need of assistance, are able to direct the flow of benefits away from those Congress sought to aid. After all, Congress would not tolerate an administrator of Pell grants, Medicare payments, or indeed any federal funds excluding from the pool of beneficiaries individuals who hold political views contrary to his own. Congress should not continue to allow tribal elites to do precisely the same thing, both in the interest of equity for individual Indians and because it frustrates congressional attempts to ameliorate the socioeconomic conditions of tribes. Moreover, it is not merely direct federal monies that are at stake, but also the full panoply of benefits that tribes derive from natural resources and tourism on the reservation, as well as gambling and other tribal enterprises that exist largely, if not solely, because of federal laws that treat Indian lands differently than their surrounding states.

D. Plenary Citizenship Power Violates the Federal Government's Duty to Preserve the Tribes as Sovereigns

The ultimate result of unchecked federal permissiveness towards tribal citizenship rights abuses will be complete diminution of tribal sovereignty and the end of the tribes as semi-independent polities. Sovereignty is a function of citizenship, and a sovereign that fails to preserve its citizenry fails to preserve itself. It has long been an article of faith in tribal sovereignty jurisprudence that “[t]o abrogate tribal decisions, particularly in the delicate area of membership, for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it.”²⁸² It is time to revisit this theoretical and overly broad answer to the real and practical problem of citizenship power abuses. While control over the boundaries between insiders and outsiders is crucial if one is to manage cultural norms, this is

²⁸² *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18–19 (D.N.M. 1975), rev’d, 540 F.2d 1039 (10th Cir. 1976), rev’d, 436 U.S. 49 (1978).

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hardly an argument for the power to expatriate or, for that matter, to naturalize. Simply put, if federally recognized Indian tribes exist solely to allow the preservation of their cultural integrity, and cultural integrity is a function of the citizenry, then surely tribes should be prohibited from engaging in any action that would perturb the racial/cultural mix. The fact that tribes are allowed to increase their rolls necessarily implies that tribes are more than living museums. Yet the fact that it would be wrong to wholly curtail the citizenship power does not provide an argument for the opposite extreme of the existing plenary citizenship power. Either solution unacceptably perverts the inherent freedom of the tribes to develop as societies. One extreme reduces the tribes to an Amish-like stasis, whereas the other threatens to turn them into “refuge[s] for repression.”²⁸³ This is not to say that there is no solution, merely that there is no easy solution. Nonetheless, the absence of an effortless panacea does not excuse the federal government from intervening. If there are only two principles with which all parties agree, it is that federally recognized Indian tribes are sovereign political entities and that the federal government is charged with their protection. Inasmuch as federal permissiveness towards abuses of the citizenship power threatens that sovereignty, the federal government has a responsibility to act.

CONCLUSION

Bearing in mind the destructive potential of plenary membership power as evidenced by the cases reviewed in this Note, Congress should exercise its power over federally recognized Indian tribes and abrogate, at least in part, tribal citizenship power. While endeavoring to leave primary responsibility for citizenship decisions with the tribe, it is imperative that Congress, at the very least, establish some form of potent remedial mechanism to prevent abuse. Actions taken to broaden access to citizenship must be policed to prevent fraudulent dilution and ensure that only bona fide Indians profit from the special status and benefits accorded that group. Actions taken to curtail existing rights and/or restrict access to citizenship must be similarly policed for reasonableness and motivation.

²⁸³ *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900 (2d. Cir. 1996), cert. denied, 519 U.S. 1041 (1996).

Finally, tribes simply should not be allowed to involuntarily disenroll members by fiat (if at all), either as a result of actions taken against individuals or by a general redrafting of citizenship criteria.

While the principles that must undergird the new regime are relatively easy to articulate, the transformation of those principles into an effective system is far more difficult. The exact mechanism must represent a balance between the right of tribes to be governed by traditional, as opposed to Anglo-American norms, as well as the relative competency and trustworthiness of tribal and federal forums, including, but not limited to, tribal and federal courts and federal administrative agencies.

The inherent power of Indian tribes to control their membership rolls has been affirmed by state²⁸⁴ and federal²⁸⁵ jurisprudence, state²⁸⁶ and federal²⁸⁷ statutes, numerous tribal constitutions,²⁸⁸ and in Felix Cohen's Handbook of Federal Indian Law, the field's seminal treatise.²⁸⁹ Although the federal government already possesses the power to make tribal membership determinations, it must be prevailed upon to adopt a more intrusive stance than it has been willing to take in the past. All three branches of the federal government have assiduously and dogmatically held themselves apart from membership determinations in the interest of preserving the tribes as semi-sovereign states. As one court put it, "[a] sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps

²⁸⁴ See, e.g., *Custalow v. Virginia*, 596 S.E.2d 95, 97 (Va. Ct. App. 2004); *Dontigney v. Brown*, 2002 Conn. Super. Ct. LEXIS 3297, at *2 (Oct. 8, 2002), *aff'd*, 2004 Conn. App. LEXIS 101, at *17.

²⁸⁵ See, e.g., *Santa Clara Pueblo*, 436 U.S. at 55–56; *Roff v. Burney*, 168 U.S. 218, 223 (1897).

²⁸⁶ See, e.g., Rules for tribal membership, Conn. Gen. Stat. Ann. § 47–66j (West 2004).

²⁸⁷ See, e.g., 41 Am. Jur. 2d *Indians* §§ 16–17 (2005) (commenting on the roll of membership of Indian tribes and noting that Indian tribes retain power over citizenship “[i]n the absence of express legislation by Congress to the contrary,” of which none is cited).

²⁸⁸ See, e.g., Const. and Bylaws of the Ely Shoshone Tribe art. II, § 2 (1990), available at http://www.tribalresourcecenter.org/ccfolder/ely_shoshone_const.htm; Const. and Bylaws of the Miccosukee Tribe of Indians art. II, § 2 (no date available), available at http://www.tribalresourcecenter.org/ccfolder/miccosukee_constandbylaws.htm; Articles of Incorporation of the Tunica-Biloxie Indians of La. art. VIII, § 2 (1974), available at http://www.tribalresourcecenter.org/ccfolder/tunica_biloxie_const.htm.

²⁸⁹ Cohen, *supra* note 7, at 248.

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no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribes' [sic] membership determinations."²⁹⁰ And yet, even though under the terms of the ICRA tribal courts are prevented from imposing criminal sanctions greater than a \$5,000 fine and one year's imprisonment,²⁹¹ it should now be clear that tribes in fact possess and exercise far more power over their members.²⁹² Simple recognition of this fact would require no congressional action and go a long way towards resolving the problem. Unfortunately, no court has yet been willing to take this step. While there are authoritative sources of rights that Indians may technically assert in the face of membership abuses, most notably strong form substantive habeas review under the ICRA, without recourse to an extra-tribal remedial process, these rights are largely worthless. As Anglo-American jurisprudence has long recognized, *ubi jus ibi remedium*; and conversely, without a remedy, there is no right. Though premised on the pro-tribe principle of tribal sovereign immunity, plenary membership power has a destructive potential that far outweighs any benefits it might engender.

Though no doubt well-intentioned, permissiveness towards abuses of the citizenship power fails tribes in their capacity as "ward[s],"²⁹³ because the ready availability of irremediable banishment relieves them of the democratizing burden of working out a compromise. It also fails states, both because the health and well-being of banished Indians becomes their responsibility and because the federal government has an established duty to guarantee lawfulness on lands within the states to which it denies them the power

²⁹⁰ *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995).

²⁹¹ 25 U.S.C. § 1302(7) (2000); Hopi Indian Tribe Law & Order Code, title III, ch. 2, § 3.2.4 (1991), available at http://www.tribalresourcecenter.org/ccfolder/hopi_lawandordermenu.htm (providing that "[e]very person convicted of a violation of any provision of [the Hopi Law & Order Code] . . . shall be punished by a fine of not more than Five Thousand Dollars (\$5000.00) or by imprisonment in the Tribal Jail for not more than one year, or both").

²⁹² See, e.g., *Klapprott v. United States*, 335 U.S. 601, 611–12 (1949) ("Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. . . . The consequences of such a deprivation may even rest heavily upon [that individual's] children.").

²⁹³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

to police and govern.²⁹⁴ Finally, it fails the federal government itself because its efforts to foster republican values and tribal self-sufficiency are stunted or corrupted, the benefits it authorizes fail to reach the intended beneficiaries, states burdened with an expensive “Indian problem” will eventually turn to the federal government for assistance, and ultimately because banishment power is simply not conducive to peace within the federal trust lands.

Though perhaps neither the most visibly contentious nor heavily litigated issue in federal Indian law, citizenship power is at the heart of an increasing number of controversies. It is a present and growing concern, particularly, but not exclusively, within gaming tribes, and if it is not yet on the forefront of federal Indian law discourse, the lack of attention may perhaps signify not the absence of a problem, but the last best opportunity to address it.

²⁹⁴ Except where Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (2000)), commonly referred to as “Public Law 280,” has provided states with criminal jurisdiction over Indian lands, the ultimate responsibility for ensuring lawfulness on Indian lands rests with the federal government. At present, Public Law 280 applies to various degrees in Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wisconsin, although not all of these states are authorized to exercise criminal jurisdiction, and not all of those which exercise such jurisdiction do so over all of the reservations within the state. See Cohen, *supra* note 7, at 362–63 n.125.