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## Citizenship, Disenrollment & Trauma

Deron Marquez

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## CITIZENSHIP, DISENROLLMENT & TRAUMA

DERON MARQUEZ\*

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## INTRODUCTION

This Article will discuss, in four parts, a current phenomenon occurring within Indian communities today. First, is the path and process towards citizenship<sup>1</sup> in Indian Country, and the uniqueness that American Indians find themselves within the meaning of a citizen. Second, is the federal government's position on tribal governance and enrollment, which has provided tribes the ability to engage in disenrollment practices. In addition, the second part of this Article will discuss the issues these disenrollment practices present to American Indian communities. *Santa Clara Pueblo v. Martinez* answered an enrollment question, but courts and tribal governments also apply *Martinez* to termination practices.<sup>2</sup> Third, is the introduction of various tribal citizen disenrollment court cases which illustrate disenrollment practices. With such practices, these actions are the most recent traumatic events that Indian Country and American Indian individuals encounter. The final section will explore traumatic studies from Indian Country. These studies emphasize the already delicate environment tribal individuals occupy. Federal and state forces have consistently subjected Indian Country to ill treatment, and when the hollowing of an individual's identity, spirit and soul manifests from within that

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1. In Indian Country, "membership" is the most operative term. See Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 79 (1993). The Bureau of Indian Affairs states:

As a general rule, an American Indian or Alaska Native person is someone who has blood degree from and is recognized as such by a federally recognized tribe or village (as an enrolled tribal member) and/or the United States. Of course, blood quantum (the degree of American Indian or Alaska Native blood from a federally recognized tribe or village that a person possesses) is not the only means by which a person is considered to be an American Indian or Alaska Native. Other factors, such as a person's knowledge of his or her tribe's culture, history, language, religion, familial kinships, and how strongly a person identifies himself or herself as American Indian or Alaska Native, are also important. In fact, there is no single federal or tribal criterion or standard that establishes a person's identity as American Indian or Alaska Native.

*Frequently Asked Questions*, U.S. DEP'T. INTERIOR, <http://www.bia.gov/FAQs/> (last accessed Apr. 18, 2017).

2. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

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individual's community, such internal actions produce negative episodes.

Disenrollment—a systematic removal and termination of an individual's status as a tribal citizen of their Indian Nation—has taken root in tribal communities throughout Indian Country.<sup>3</sup> The ideals and concepts of alienable rights<sup>4</sup> and the natural rights<sup>5</sup> of the individual, clash around disenrollment. Inalienable rights are protected as constitutional rights, and they extend to all citizens.<sup>6</sup> However, in Indian Country, these inalienable rights morph into alienable. By the end of the century, tribes would engage in the disenrollment process.<sup>7</sup> Not dismissing the direct effects, these actions have indirect effects as well. Tribal governmental actions receive supreme standing; especially when it's an Indian-on-Indian action that clearly falls within the sphere of tribal sovereignty. In such instances, tribal governments stand above the individual Indian; this is prevalent today, as illustrated by American Indian tribal governments' self-termination acts of disenrollment.<sup>8</sup> In the past, federal courts have hesitated to intervene in such internal affairs.<sup>9</sup> Dr. David Wilkins, who has composed many articles on disenrollment, expressed deep concern of possible federal government intervention. He stated, “Without action to help to forestall

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3. Brooke Jarvis, *The Disenrolled*, N.Y. TIMES MAGAZINE (Jan. 22, 2017), <https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html>.

4. Laws that can be restricted or withheld. Cf. Stuart M. Brown, Jr., *Inalienable Rights*, 64 PHIL. REV. 192, 192-99 (1955).

5. Rights such as “life, liberty and the pursuit of happiness” prescribed in the United States Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See generally Brown, *supra* note 4.

6. See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens*, 25 T. JEFFERSON L. REV. 367, 371-72 (2003).

7. Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 385-86 (2015).

8. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); see also *United States v. Quiver*, 241 U.S. 602, 603-04 (1916).

9. See *Martinez*, 436 U.S. at 55-56; see also *Duro v. Reina*, 495 U.S. 676, 685-686 (1990) (where the Supreme Court noted tribal sovereignty is especially important because it allows tribes “to control their own internal relations, and to preserve their own unique customs and social order.”).

[disenrollment], the U.S. Congress or, more realistically, the Supreme Court, will impose their radical treatments.”<sup>10</sup>

### I. CITIZENSHIP

One of the basic characteristics of citizenship is participating in a collective—*perhaps one of the deepest of all human needs*. In the beginning, Indian Country,<sup>11</sup> through treaties and statutes, *received* citizenship status, and presumably the rights forged in the United States Constitution (including those rights found in the Bill of Rights, which joined the founding document in 1791<sup>12</sup>). But as time has illustrated, an Indian’s individual rights of United States citizenship have not risen to the same level as others, nor have they become sacrosanct.<sup>13</sup> John Adams stated in *Novanglus* Essays (No. 7), the United States is “[a] government of laws, and not of men.”<sup>14</sup> The Articles of Confederation attempted to mold a gentlemen’s agreement amongst the states that honored each state’s legalities of the individual as equal.<sup>15</sup> However, the Article’s fourth passage, as pointed out by James Madison’s

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10. David Wilkins, *Re-Membering Through Adoption*, INDIAN COUNTRY TODAY, (Apr. 4, 2015), <https://indiancountrymedianetwork.com/news/opinions/re-membering-through-adoption/>.

11. See 18 U.S.C. § 1151 (1948). The term “Indian Country” is a legal term riddled throughout federal law and is defined here simply as all lands, including allotment lands, within the limits of any Indian reservation falling under the jurisdiction of the United States. See also *DeCoteau v. Dist. Ct.*, 420 U.S. 425, 427 n.2 (1975). While there is a more expansive definition, this Article only requires this simplified version.

12. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51(1833) (The United States Supreme Court, under Chief Justice Marshall, concluded that the first ten amendments (the Bill of Rights) applied only to the federal government, thus empowering state constitutions and forcing individuals to seek relief from state courts.).

13. *Shenandoah v. Halbritter*, 275 F. Supp.2d 279, 286 (2003), *aff’d*, 366 F.3d 89, *cert. denied* 544 U.S. 974 (2005) (“Members of federally recognized Indian tribes are citizens of the United States and are therefore afforded constitutional protection against violations of individual rights by federal and state institutions, but constitutional provisions limiting federal or state authority are of no force in constraining actions of tribal governments.”).

14. *Novanglus* Essays (1775), *reprinted in* 4 THE WORKS OF JOHN ADAMS 205 (2015).

15. See Articles of Confederation, 1 Stat. 4 (1778).

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*Federalist No. 42*, includes multiple terms attempting to define citizenship.<sup>16</sup> As the new constitution sought to provide congressional authority to make uniform national laws, Article 1, Section 8 granted Congress power regarding the “Rule of Naturalization.”<sup>17</sup> The authority was to generate a uniform law to become a citizen, thus qualifying for the rights, responsibilities, and privileges provided by the Constitution.

The ideals of citizenship foretell a simplistic occurrence. However, counter to Madison, *man* served as the gatekeeper to citizenship.<sup>18</sup> Most evident of such denial was in a court of law. For American Indians, the term “subject” was deemed most appropriate.<sup>19</sup> In 1856, Attorney General Caleb Cushing opined a theory demarcating American Indians as subjects. Cushing theorized: “The fact, therefore, that Indians are born in the country does not make them citizens of the United States. The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home-birth, citizens of the United States.”<sup>20</sup>

In 1868, the 14<sup>th</sup> Amendment reaffirmed federal jurisdiction over “[a]ll persons born or naturalized in the United States . . .” and labeled them “citizens of the United States.”<sup>21</sup> These constitutional alterations were crafted as a result of the Emancipation Proclamation.<sup>22</sup> Simply stated, while the 1868 constitutional amendment guaranteed citizenship, it was the citizens themselves who made the full weight of citizenship applicable. However, Congress did not forfeit its constitutional rulemaking right; the constitutional amendment meant Congress could not legislate denial of citizenship.<sup>23</sup> Congress enacted

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16. THE FEDERALIST NO. 42 (James Madison).

17. U.S. CONST. art. I, § 8.

18. *Contra* THE FEDERALIST, *supra* note 16.

19. *See generally* ANDRES RESENDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* (2016).

20. Caleb Cushing, *Relation of Indians to Citizenship*, in 7 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 746, 749 (C.C. Andrews ed., 1856).

21. U.S. CONST. amend. XIV.

22. *Slaughter-House Cases*, 83 U.S. 36, 73 (1872) (“That [the 14<sup>th</sup> amendment’s] main purpose was to establish the citizenship of the negro can admit of no doubt.”).

23. *Cf.* Birthright Citizenship Act of 2015, H.R. 140, 114th Cong. (2015) (illustrating Congress has control of addressing citizenship).

the 1866 Civil Rights Act, which stated “all persons born in the United States, and not subject to any foreign power” were deemed citizens, “excluding Indians not taxed.”<sup>24</sup> Regarding Indians, the Senate Judiciary Committee concluded in 1870 that Indians did not qualify as citizens under the amendment.<sup>25</sup>

Equal standing of law and citizenship could be seen as a sacred phenomenon, but the lack of application of the law by fellow man created a sacred hollowness. When the question of citizenship found its way to the high court, the Supreme Court arrived at a majority in the cases of *Dred Scott v. Sandford*,<sup>26</sup> *Elk v. Wilkins*,<sup>27</sup> and *United States v. Wong Kim Ark*.<sup>28</sup> In *United States v. Wong Kim Ark*, the Court decided a question regarding the intersection of place of birth and citizenship. In *Wong*, the Supreme Court broadly interpreted the 14<sup>th</sup> Amendment to include birthright citizenship status to people born within the United States territory, rendering the United States’ parental citizenship status unnecessary.<sup>29</sup> In other words, an individual need not be a citizen to give birth to a citizen, provided the child is born on United States soil.<sup>30</sup> *Wong* and the 14<sup>th</sup> Amendment sought to remedy discrimination that freed slaves and Asian immigrants encountered based on their ethnicity. It was viewed that the 14<sup>th</sup> amendment remedied *Dred Scott*,<sup>31</sup> a case asking whether Mr. Scott was a free-man or slave. Conversely, *Elk v. Wilkins* was not remedied by the 14<sup>th</sup> Amendment. *Elk* was a case regarding Indian births on United States soil. The Supreme Court ruled birthright citizenship did not apply, and reiterated American Indian status as “subjects,” the same way Attorney General Cushing opined in 1856.<sup>32</sup>

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24. Civil Rights Act (Enforcement Act) of 1866, 14 Stat. 27 (1866).

25. VINE DELORIA JR. & DAVID E. WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* 142 (2005); *see also* S. REP. NO. 41-268 (1868).

26. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

27. *Elk v. Wilkins*, 112 U.S. 94 (1884).

28. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (Chinese immigrants were denied citizenship by the Chinese Exclusion Act of 1882 and proponents of exclusion preferred citizenship to be based on “*jus sanguinis*” (parent’s nationality)).

29. *Id.* at 693.

30. *Id.*

31. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

32. *Elk*, 112 U.S. at 109; *see also* Caleb Cushing, *supra* note 20, at 749.

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The 14<sup>th</sup> Amendment states, “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”<sup>33</sup> It was liberally interpreted in *Wong*, despite the government’s argument that Wong Kim Ark was a subject to the emperor of China.<sup>34</sup> Sixteen years after the adoption of the 14<sup>th</sup> Amendment, the Supreme Court adjudicated *Elk*. In its 1884 decision, the Court held that tribal births did not qualify for inclusion in the United States, deeming Indian Country beyond the jurisdiction of the federal government.<sup>35</sup> Interestingly, two years later in *United States v. Kagama*, the Supreme Court changed its position by unanimously ruling (9-0) in favor of a federal criminal statute extending into Indian Country and stated that such a right was bestowed upon Congress by the Constitution.<sup>36</sup> Congress further extended its plenary power by passing the General Allotment Act the following year.<sup>37</sup> During the

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33. U.S. CONST. amend. XIV, § 1.

34. *U.S. v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

35. *Elk*, 112 U.S. 94 at 102 (“Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.”).

36. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886). State courts were also prohibited to address crimes committed by Indians against Indians. Justice Miller added that state courts had been historically the American Indians “deadliest enemies.” *Id.*

37. Dawes Act of 1887 (General Allotment Act), Pub. L. 49-119, 24 Stat. 388 (1887) Act was passed on February 8, 1887 and Section 6 and Section 8 focused on citizenship status. Section 6 stated:

[t]hat upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subjected to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indians within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, . . . his residence separate and apart from any tribe of Indians therein, and has adopted the habits of

wholesale dismantling of Indian Territories, Indians would receive allotted land after satisfying certain steps. Thereafter, they became recognized citizens. As pointed out by Deloria and Wilkins, the act contradicted *Elk* and further conflated the question of citizenship.<sup>38</sup>

For Indian Country, ascription of citizenship, consensual or not, would not transpire until 1924 via the Indian Citizenship Act (“ICA”).<sup>39</sup> Regardless of the actions and steps taken by the Supreme Court and Congress, established citizens resisted the nature of such a title to American Indians, and state governments repeatedly refused to acknowledge their citizenship rights.<sup>40</sup>

This regresses back to a basic question: is citizenship sacred or hollow? The ideals of citizenship conjure the fanciful measurements of status, where nationalism seeks to create community, the state provides the administrative mechanisms of governance, and territory provides

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civilized life, is hereby declared to be a citizen of the United States, and is entitled to all rights, privileges, and immunities of such citizens . . . .

*Id.* § 6.

Section 8 stated:

[t]hat provisions of this act will not extend to the territory occupied by [various tribes], in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

*Id.* § 8.

38. See DELORIA & WILKINS, *supra* note 25, at 146. Referring to the General Allotment Act, they stated:

This provision, it should be noted, is in direct contradiction to both the Senate Judiciary Committee’s report and *Elk v. Wilkins*. And succeeding allotment acts and agreements only served to confuse the issue further. Finally, in 1924, Congress passed the Indian Citizenship Act, which succinctly stated: “That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States.

*Id.*

39. Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (June 2, 1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)). Prior to the Indian Citizenship Act, two-thirds of American Indians had already been deemed citizens by treaty or statute. FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW: WITH REFERENCE TABLES AND INDEX* 155 (1988). With the passage of the act, only 125,000 indigenous individuals who were born on United States territory were naturalized, excluding all those born across the borders in Mexico and Canada. *Id.*

40. See *supra* notes 22-36 and accompanying text.

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the space. Citizenship, much like freedom, is preconditioned on manmade articles of governance and it is man that concedes, forms, and casts limitations.<sup>41</sup> In the *Elk* decision, Justice Gray penned the following passage:

The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.<sup>42</sup>

Justice Gray reiterates that the qualifications of becoming a citizen rest on the ideals of the dominant political body.<sup>43</sup> Specifically, the nation's congress has the authority and ability to extend the title of citizenship when it wished.<sup>44</sup>

A piercing theme throughout the *Elk* opinion – that of *being civilized* – was predicated on being sufficiently intelligent and possessing manners and habits of civilized life.<sup>45</sup> Accordingly, citizenship *may* become attainable by forgoing one's tribal nature and manifesting a “non-tribal” state in an erstwhile fashion. Simply stated, American Indians needed to assimilate. Perhaps the most crucial aspect complicating the citizenship equation for Indian Country (i.e., the desire to become a United States citizen) was the difference between *emigrant*

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41. See generally Margaret R. Somers, *Citizenship and the Place of the Public Sphere: Law, Community, and Political Culture in the Transition to Democracy*, 58 AM. SOC. REV. 587 (1993).

42. *Elk v. Wilkins*, 112 U.S. 94, 106-07 (1884).

43. *Id.*

44. *Id.* at 101.

45. *Id.* at 109 (“The fact that [an Indian] has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one.” (quoting *U.S. v. Osborn*, 2 F. 58, 61 (D. Or. 1880))).

*race* status<sup>46</sup> and the United States Supreme Court's term "domestic dependent"<sup>47</sup> sovereign status, i.e. *Indian Country*.

Justice Gray's ruling opined that an individual Indian was Indian first and could not simply shed the political fabric of tribal governance.<sup>48</sup> Complicating it further was the overt racism that persisted in this era, thereby making the citizenship equation for Indian Country a double negative. Race and political community seemed to negate allegiance. What the ICA provided was a set of rights and duties that are attached to federal citizenship as found in the Constitution, such as voting, taxation, residency and the like.<sup>49</sup> However, the act did not grant complete suffrage because each state required different inclusion qualifying mechanisms and thus was not compatible with federal citizenship.<sup>50</sup> Congressman Snyder, sponsor of the 1924 bill, stated it was not the intent of the bill to encroach on such qualifiers.<sup>51</sup> States like Arizona and New Mexico, would not extend suffrage until 1948, delaying for citizens the ability to practice the citizenship rights recognized by ICA.<sup>52</sup> However, as time progressed, American Indians were permitted to participate in and be acknowledged by federal and state governments.<sup>53</sup> The same cannot be said for the individual Indian in Indian Country.<sup>54</sup>

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46. Including, for example, immigrants of the following races: Asian, African, Irish, Italian, English, German, etc.

47. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) ("The Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy . . . They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will . . . Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

48. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

49. *See* Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (Jun. 2, 1924) (codified as amended at 8 U.S.C. § 1401(b) (2012)).

50. *See id.*

51. 65 CONG. REC. 9303 (1924) (statement of Rep. Snyder).

52. FRANCIS PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN* 794 (1995).

53. *Id.*

54. "[T]he term 'Indian country' . . . means . . . all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . ." 18 U.S.C. § 1151 (2012).

## II. DISENROLLMENT TRAILHEAD

In 1968, Congress passed a third civil rights act, Titles I through VII of which are commonly known as the Indian Civil Rights Act (“ICRA”).<sup>55</sup> This act arrived on the heels of the Civil Rights Act of 1964.<sup>56</sup> The 1964 Act sought to end discriminatory practices of employment and public accommodations based on national origin, race, religion and gender in a broad sense.<sup>57</sup> The subsequent ICRA was specific to Indian Country. In 1968, it included sections on tribal courts; civil and criminal actions; offenses on reservations, acquiring legal counsel; and a final section simply titled “Materials Relating to Constitutional Rights of Indians,” which was the gathering of past treaties, executive orders, laws and regulations effecting Indian Country.<sup>58</sup> The most interesting section was the inclusion of a *quasi*-Bill of Rights for Indians as protection from their governments.<sup>59</sup>

The Civil War Amendments – the 13<sup>th</sup> (1865), 14<sup>th</sup> (1868) and 15<sup>th</sup> (1870) Amendments – were also an extension of rights unto a subset of people, excluding Indians.<sup>60</sup> The 13<sup>th</sup> Amendment quashed slavery;<sup>61</sup> the 15<sup>th</sup> extended the right of citizens to vote.<sup>62</sup> The 14<sup>th</sup> Amendment states: “All persons born or naturalized in the United States. . . are citizens of the United States and of the State wherein they reside,”<sup>63</sup> as upheld in *Wong*,<sup>64</sup> but later denied in *Elk*.<sup>65</sup> Due process was also included in the 14<sup>th</sup> Amendment so that no State shall “deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the

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55. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (Title I through Title VII codified as amended at 25 U.S.C. §§ 1301-1304 (2012)).

56. Civil Rights Act of 1964, 88 Pub. L. 352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

57. *Id.*

58. Civil Rights Act of 1968 §§ 101-701.

59. *Id.* § 202.

60. U.S. CONST. amends. XIII, XIV, XV.

61. U.S. CONST. amend. XIII.

62. U.S. CONST. amend X.

63. U.S. CONST. amend. XIV.

64. *U.S. v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

65. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

laws.”<sup>66</sup> The 5<sup>th</sup> Amendment, as part of the Bill of Rights, also carries due process language (“nor be deprived of life, liberty, or property, without due process of law”) and was focused on the procedural functionality of judicial happenings.<sup>67</sup> Similarly, the Indian Civil Rights Act of 1968 includes a section stating: “No Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of the law.”<sup>68</sup>

The 1978 Supreme Court decision in *Santa Clara Pueblo v. Martinez* was a sacred watershed moment for Indian Country.<sup>69</sup> The Supreme Court, by a 7-1 ruling, upheld the right of a tribal government over an individual.<sup>70</sup> The 1968 ICRA initially aimed *habeas corpus*<sup>71</sup> at criminal acts, but lower courts applied the Act to civil aspects, injecting federal courts with power over self-government practices, such as elections, voting, holding office and the like, in Indian Country.<sup>72</sup> In *Santa Clara*, Mrs. Julia Martinez, a full-blood member of the Santa Clara Pueblo tribe, sought to enroll her daughter, whose father was Navajo, into Santa Clara Pueblo.<sup>73</sup> In 1939, the Santa Clara Pueblo tribal government had passed a “membership ordinance” only permitting males who have children outside the Pueblo to enroll their children.<sup>74</sup> Mrs. Martinez believed this was a violation of the equal protection clause of the 1968 Indian Civil Rights Act, as well as the 14<sup>th</sup> Amendment.<sup>75</sup> *Santa Clara* was not simply a question of tribal

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66. U.S. CONST. amend. XIV.

67. U.S. CONST. amend. V.

68. Civil Rights Act of 1968, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77 (1968) (Title I through Title VII codified as amended at 25 U.S.C. §§ 1301-1304 (2012)). Due process has morphed into two categories, substantive and procedural. Procedural aims towards fairness of the unfolding events. Substantive seeks to protect fundamental rights as prescribed in the Constitution and the Bill of Rights, which are the sacredness of citizenship.

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

70. *Id.* at 71-72.

71. *Habeas Corpus*, BLACK’S LAW DICTIONARY 837 (4th ed. 1968) (explaining that *Habeas Corpus* is a writ requiring a person to be brought before a judge or a court).

72. 25 U.S.C. § 1302 (2012)); see also PRUCHA, *supra* note 52, at 364.

73. *Martinez*, 436 U.S. at 49-52.

74. *Id.* at 52 n.2.

75. *Id.* at 51.

citizenship; it was also a matter of the Constitution's application as it pertains to civil rights under the due process clauses.<sup>76</sup> The Court relied on *Talton v. Mayes* to justify its ruling that the Constitution did not apply.<sup>77</sup> In *Talton*, the Court stated the 5<sup>th</sup> Amendment did not apply, because "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal and state authority."<sup>78</sup> *Santa Clara* held that the ICRA did not waive any of the tribal government's rights to suit, for such a waiver cannot be implied against the tribe or its officers.<sup>79</sup> The Supreme Court acknowledged that the ICRA sought to serve two masters, the individual Indian and the tribal government.<sup>80</sup> These are both axioms that the Court used to bolster its opinion:

Creation of a federal cause of action for the enforcement of rights created in Title I [of the ICRA], however useful it might be in securing compliance with §1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums . . . but it would also impose serious financial burdens on already "financially disadvantaged" tribes . . . .

Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. Under these

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76. *Id.* at 56.

77. *Id.* at 56 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)) (Ruling by an 7-1 majority that the 5<sup>th</sup> Amendment was restricted to federal powers only. Stemming from a homicide conviction, the Supreme Court held that the 5<sup>th</sup> Amendment did not apply to legislation of the Cherokee Nation, which created a grand jury of 5 peers.).

78. *Id.*

79. *Id.* at 58-59.

80. *Id.* at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) ("Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'").

circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.<sup>81</sup>

The Court did reiterate that Congress, holding firm to its plenary power, could tilt the scale regarding civil matters.<sup>82</sup>

Because Mrs. Martinez was seeking a remedy in court, regardless of venue (federal or tribal), the tribal government would have to waive its sovereign immunity to be held liable.<sup>83</sup> As a United States citizen, Mrs. Martinez was afforded due process of the federal system, up to the highest court in the land.<sup>84</sup> However, Mrs. Martinez would be the only American Indian afforded the privilege of having an enrollment question answered by the Supreme Court.<sup>85</sup> Mrs. Martinez was informed that federal actions seeking to protect individual citizens did not extend to her because she was more than just a citizen.<sup>86</sup> Mrs. Martinez, as well as all Indians, became a dual quasi-citizen, partially impregnated by two sovereigns, tribal and federal.<sup>87</sup> Equal citizenship,

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81. *Id.* at 64-66 (citations omitted).

82. *Id.* at 60.

83. *See* Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, § 110, 88 Stat. 2203, 2213; *see also* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 155 (2004).

84. NELL JESSUP NEWTON, *RECOGNIZING AND ENFORCING STATE AND TRIBAL JUDGMENTS: A ROUNDTABLE DISCUSSION OF LAW, POLICY AND PRACTICE* 248 (1993).

85. *See* *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 832 (2017); *Alto v. Jewell*, 661 F. App'x 502 (9th Cir. 2016), *cert. denied*, *Alto v. Haugrud*, 85 U.S.L.W. 3409 (2017).

86. *See* *Martinez*, 436 U.S. at 62-63 (“Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal ‘policy of furthering Indian self-government.’ This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments. Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases[.]”) (citations omitted).

87. *See id.* and accompanying text.

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as Professor Jeff Spinner notes, means being able to participate fully regardless of race, gender or racial group “membership.”<sup>88</sup> If equal citizenship means being able to participate fully, American Indians are still waiting to become full citizens.

Today, various tribal tribunals, tribal enrollment committees, and the like address questions of enrollment.<sup>89</sup> *Santa Clara* upheld the right of a tribe government to decide who would be permitted for enrollment and once enrolled, who would participate as a citizen of that community.<sup>90</sup> Tribal people are familiar with *pre-qualifications* for enrollment.<sup>91</sup> However, what happens when such qualifications are changed after enrollment, sometimes years later? What is the remedy? Justice Byron White, in his lone dissent in *Santa Clara*, opened with the following:

The declared purpose of the Indian Civil Rights Act of 1968 (ICRA or Act), 25 U.S.C. §§ 1301-1341, is “to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.” . . . The Court today, by denying a federal forum to Indians who allege that their rights under the ICRA have been denied by their tribes, substantially undermines the goal of the ICRA and in particular frustrates Title I’s purpose of “[protecting] individual Indians from arbitrary and unjust actions of tribal governments.” Because I believe that implicit within Title I’s declaration of constitutional rights is the authorization for an individual Indian to

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88. JEFF SPINNER, *THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY AND NATIONALITY IN THE LIBERAL STATE* 39 (1995).

89. *Tribal Enrollment Process*, U.S. DEP’T INTERIOR, <https://www.doi.gov/tribes/enrollment> (last visited Apr. 18, 2017) (“The tribes establish membership criteria based on shared customs, traditions, language and tribal blood.”).

90. *See Martinez*, 436 U.S. at 49; *see also id.* at 72 (White, J., dissenting) (“Congress’ authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. . . [U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.”).

91. *See, e.g.*, U.S. DEP’T OF INTERIOR, *supra* note 78 (informing the public that “Tribal enrollment criteria are set forth in tribal constitutions, articles of incorporation or ordinances.”).

bring a civil action in federal court against tribal officials for declaratory and injunctive relief to enforce those provisions. I dissent.<sup>92</sup>

The ICRA did not provide a path for individual Indians to seek due process;<sup>93</sup> so, where do individual Indians find due process? Disenrollment has captured many in this quagmire.<sup>94</sup> Some derive from non-“financially disadvantaged” tribes.<sup>95</sup> Further, denial of enrollment and the act of disenrollment are not the same. Citizenship confirms rights, duties and entitlements that were legitimized on the basis of inclusiveness and, as Professor Yasemin Soysal points out, citizenship “defines bounded populations, with a specific set of rights and duties, excluding others on the grounds of nationality.”<sup>96</sup> Tribal governments have included citizens before excluding a subset of citizens.

For any individual to become a diminished citizen, they must be afforded a form of due process, which typically includes a courtroom.<sup>97</sup>

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92. *Martinez*, 436 U.S. 49 at 72-73 (White, J., dissenting).

93. *Id.* at 72 (“[U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.”).

94. Elizabeth Larson, *Indian Disenrollments a Statewide, Nationwide Issue*, LAKE CTY. NEWS (Dec. 5, 2008, 4:21 PM), [http://www.lakeconews.com/index.php?option=com\\_content&view=article&id=6567:-indian-disenrollments-a-statewide-nationwide-issue&catid=1:latest&Itemid=197](http://www.lakeconews.com/index.php?option=com_content&view=article&id=6567:-indian-disenrollments-a-statewide-nationwide-issue&catid=1:latest&Itemid=197) (“Late last month, the Robinson Rancheria Band of Pomos Citizens Business Council informed several dozen members of its intent to remove their tribal membership, an action taking place not just locally but around California and the nation.”).

95. Marc Cooper, *Tribal Flush: Pechanga People “Disenrolled” en Masse*, LA WEEKLY, (Jan. 2, 2008, 12:00 PM), <http://www.laweekly.com/news/tribal-flush-pechanga-people-disenrolled-en-masse-2151380> (“Gomez . . . helped birth the Pechanga [Tribe’s] mega-resort, which opened in 2002 and today grosses as much as \$1 billion a year . . . . But it’s Gomez’s tribe no more . . . . Gomez and 135 adult members of his extended family (and 75 or more children) have been purged from formal Pechanga membership . . . . All of the adults, including Gomez, lost the generous per capita monthly payout, derived from casino profits, that was given to each adult of the tribe.”).

96. YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP, MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 2* (1995).

97. *Magna Carta: Muse and Mentor, Due Process of Law*, LIBRARY OF CONG.: EXHIBITIONS, <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due->

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And within that process, the full magnitude of the Constitution and the Bill of Rights play a role; all rights pertaining to due process are included, because they are full citizens.<sup>98</sup> The same is not true in Indian Country.<sup>99</sup> Justice White continued in his dissent by stating that

federal district courts have jurisdiction over ‘any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.’ Because the ICRA is unquestionably a federal Act ‘providing for the protection of civil rights,’ the necessary inquiry is whether the Act authorizes the commencement of a civil action for such relief, which he answered in the affirmative.<sup>100</sup>

### III. DISENROLLMENT

Perhaps it is only a matter of time when Indian Country becomes engaged in a case before the high court or hearings in Congress that address the difference between rights, entitlements, duties and property

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process-of-law.html (last visited Apr. 18, 2017) (“Due process of law is a constitutional guarantee that prevents governments from impacting citizens in an abusive way. In its modern form, due process includes both procedural standards that courts must uphold in order to protect peoples’ personal liberty and a range of liberty interests that statutes and regulations must not infringe. . . . The Fifth and Fourteenth Amendments to the Constitution, which guarantee that no person shall ‘be deprived of life, liberty, or property, without due process of law,’ incorporated the model of the rule of law that English and American lawyers associated most closely with Magna Carta for centuries.”).

98. *Id.*

99. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978) (“Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal government . . . . Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases. . . .”); 25 U.S.C. § 1302(a)(8) (2012) (“No Indian tribe in exercising powers of self-government shall. . . (8) deny to any person within its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law[.]”).

100. *Martinez*, 436 U.S. 49 at 74 (White, J., dissenting) (“[A] private cause of action under Title I of the ICRA should be inferred.”).

that were harmoniously enjoyed for years before terminating and removing an Indian's identity. Disenrollment, a recent phenomenon, has been practiced by approximately 80 federally recognized tribes.<sup>101</sup> The Supreme Court's *Santa Clara* ruling has sanctioned these actions but why these acts are unfolding is still not truly understood.<sup>102</sup> Gabriel Galanda speculates that gaming *per capita*—disbursement of funds that are generated by gaming operations—could be a reason.<sup>103</sup> Simply stated, the smaller the number of tribal citizens, the larger the dividend for each remaining tribal citizen. This *may* very well be the reasoning for some tribal government's disenrollment acts. In a forthcoming publication, "Dismembered: Banishment, Disenrollment & Statelessness in Indian Country," Dr. Wilkins produces categorical findings on disenrollment, banishment, gaming and per capita payments.<sup>104</sup> In California, 23 tribes are engaged in disenrollment and 2 in banishment.<sup>105</sup> Of the 25 California tribes, 20 operate gaming facilities of which 17 disburse *per capita* checks. Nationally, excluding California, 47 tribes are engaged in disenrollment.<sup>106</sup> Of this cohort, 34 operate gaming facilities.<sup>107</sup> Of the 47, 2 tribes are engaged in both banishment and disenrollment; 16 distribute checks, while 28 do not, and 3 are not known.<sup>108</sup> In the aggregate, 34.72% (just over one-third) of disenrollment actions are transpiring in California; Oklahoma is second with 9.72%.<sup>109</sup> Given the high occurrences in California, there

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101. See Galanda & Dreveskracht, *supra* note 7, at 408-09.

102. See generally *id.* at 410 ("Ironically, disenrollment is antithetical to tribal self-determination and self-sufficiency via economic development. In most instances, tribal disenrollment serves only to harm a tribe's bottom line by creating negative media and investor perceptions that indicate greed and corruption. Potential business partners may also conclude that working with a tribal government engaged in deserting its own citizens is not worth the risk to investment.").

103. Gabriel Galanda, *The Reluctant Watchdog: How National Indian Gaming Commission Inaction Helps Tribes Disenroll Members for Profit, and Jeopardizes Indian Gaming as We Know It*, 20 GAMING L. REV. & ECON. 147, 148 (2016) ("Disenrollment tied to gaming per capita payments is now epidemic.").

104. DAVID WILKINS, DISMEMBERED: BANISHMENT, DISENROLLMENT & STATELESSNESS IN INDIAN COUNTRY (forthcoming 2017).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

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are two cases that exemplify disenrollment acts by tribal governments: *Jeffredo v. Macarro* and *San Diego Health and Human Service Agency v. Michelle T.*<sup>110</sup> Both include tribal governments that engage in gaming operations and both engage in *per capita* programs. Both are located in Southern California.

#### A. *Jeffredo v. Macarro*

Since 2010, the Ninth Circuit Court of Appeals has entertained five cases dealing with disenrollment.<sup>111</sup> In all cases, the tribal governments and officers were immune from suit and the question of enrollment was answered in *Santa Clara*.<sup>112</sup> In *Jeffredo v. Macarro*, Judge N.R. Smith wrote:

The Pechanga Band of the Luiseño Mission Indians (“Pechanga Tribe”) disenrolled a number of its members (“Appellants”) for *failing to prove their lineal descent as members of the Tribe*. Federal courts generally lack jurisdiction to consider any appeal from the decision of an Indian tribe to disenroll one of its members. Appellants, therefore, brought this petition for habeas corpus under 25 U.S.C. § 1303 of the Indian Civil Rights Act (“ICRA”), claiming their disenrollment by members of the Pechanga Tribal Council (“Appellees”) was tantamount to an unlawful detention. Despite the novelty of this approach and *despite the potential injustice of this situation*, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained. Therefore, Appellants cannot bring their claims under § 1303 of the ICRA and we must affirm the district court. *Only Congress can aid these appellants.*<sup>113</sup>

The Court relied upon *Santa Clara*, but the circumstances in *Jeffredo* differed.<sup>114</sup> The Pechanga Band of the Luiseno Mission

110. *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010); *In re K.P.*, 195 Cal. Rptr. 3d 551 (Cal. Ct. App. 2015).

111. See *Jeffredo*, 599 F.3d 913; *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013); *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir. 2013); *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016); *Allen v. Smith*, 597 F. App’x 442 (9th Cir. 2015).

112. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

113. *Jeffredo*, 599 F.3d at 915 (emphasis added).

114. Compare *id.* at 921, with *Martinez*, 436 U.S. at 72 n.32.

Indians, a federally recognized tribe, adopted their constitution in 1978, which included qualifications for membership.<sup>115</sup> As described in *Jeffredo*, to qualify, lineal descent from “original Pechanga Temecula people . . . [and] [p]eople who were accepted in the Indian Way prior to 1928 will be accepted.”<sup>116</sup> Those not accepted are “adopted people, family or Band, and non-Indians” as well as anyone else “enrolled or recognized in any other reservation.”<sup>117</sup> The issue in *Jeffredo* was Section A of the tribe’s constitutional requirement: “Applicant must show proof of Lineal Descent from original Pechanga Temecula people” and according to the court, in late 2002, “the Enrollment Committee received information from its members alleging that a number of Pechanga Tribe members were not” original.<sup>118</sup> Thus, the Enrollment Committee commenced an investigation and starting disenrolling individuals; 8 years later, we have Judge Smith’s opinion in *Jeffredo*.<sup>119</sup>

Judge Wilken issued a dissenting opinion. He stated:

Appellants, enrolled members of the Pechanga Tribe since birth, filed a petition for a writ of habeas corpus under the Indian Civil Rights Act (ICRA) asserting that their Tribal Council violated the due process, equal protection, free speech and cruel and unusual punishment clauses of the Act when it stripped them of membership in the Tribe. The membership criteria that the Tribal Council applied were not established until 1979; the procedures it used to disenroll Tribal members were not established until 1988; and the Tribal Council did not begin disenrolling large numbers of members until recently, when the Tribe’s casino profits became a major source of revenue.—Appellants allege that they are victims of the Tribal Council’s greed associated with these casinos.

The majority concluded that the district court properly dismissed Appellants’ petition for lack of subject matter jurisdiction because Appellants (1) were not detained and (2) did not exhaust their Tribal remedies. I respectfully dissent . . . .<sup>120</sup>

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115. *Jeffredo*, 599 F.3d at 915.

116. *Id.*

117. *Id.*

118. *Id.* at 915-16.

119. *Id.* at 916.

120. *Id.* at 921-22 (Wilken, J., dissenting) (internal footnotes omitted).

Interestingly, the lone footnote in the dissent, as marked above, states: “At the time of Appellants’ disenrollment, every adult Pechangan received a per capita benefit of over \$250,000 per year.”<sup>121</sup> Even the majority opinion shares concern with Pechanga’s governmental actions of self-termination practices. Judge Smith’s majority opinion contains a concerning phrase – “despite the potential injustice of this situation” – possessing strong descriptive terms.<sup>122</sup> The term “injustice” should be remembered when discussing “*ex post facto* disenrollment.” *Jeffredo* does support Galanda’s thesis (the lack of oversight by the National Indian Gaming Commission helps disenrollment for larger profit shares for remaining members).<sup>123</sup> However, without his thesis and probing, along with others, the desire to uncover the genesis of such actions would not be discussed. Plus, the remaining Ninth Circuit cases – *Alto v. Black*, *Cahto Tribe of Laytonville Rancheria v. Dutschke*, and *Allen v. Smith* – all include tribal governments that operate gaming operations.<sup>124</sup> Three of the four tribes engage in *per capita* payments from gaming operations, though the degree of amount differs from tribe-to-tribe.<sup>125</sup> A more troubling disenrollment affect, beyond the *per capita* posit, is the specific politically secured extensions and practices of federal Indian law, because they are no longer Indian. The act of disenrollment surpasses reservation boundaries; it also removes laws that seek to protect, secure and foster.

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121. *Id.* at 922 n.1.

122. *Id.* at 915.

123. *Id.*

124. See *Jeffredo*, 599 F.3d 913; *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013); *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir. 2013); *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016); *Allen v. Smith*, 597 F. App’x 442 (9th Cir. 2015).

125. See *Alto*, 738 F.3d at 1118; Tony Perry, *Pala Tribe Roiled by Bloodline Dispute*, L.A. TIMES (Mar. 17, 2012), <http://articles.latimes.com/2012/mar/17/local/la-me-pala-dispute-20120318>.

*B. San Diego Health and Human Service Agency v. Michelle T.*

The Indian Child Welfare Act (“ICWA”) of 1978<sup>126</sup> was crafted to assist in the placing of American Indian children into culturally favorable settings to cultivate the child’s culture. ICWA was Congress’s reaction to Indian children being placed into non-Indian homes (foster or adopted), which broke up Indian families.<sup>127</sup> ICWA extended and granted “exclusive” tribal jurisdiction over disposition of foster care and adoption of Indian children.<sup>128</sup> However, in *San Diego Health and Human Service Agency v. Michelle T.*,<sup>129</sup> the intent of ICWA was defeated by a tribe’s ability to simply disenroll current members.<sup>130</sup>

In 2009, a court placed two nine-month old twins, K.P. and Kristopher, in foster care at the home of Mr. and Mrs. G.<sup>131</sup> The court notified their tribe, the Pala Band of Mission Indians.<sup>132</sup> Their tribe’s chairman, Smith, responded that the twins were eligible for enrollment under the IWCA.<sup>133</sup> In July of that year, the Pala Tribe filed for

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126. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) [hereinafter *ICWA*].

127. H.R. REP. NO. 95-1386, at 8 (1978) (“[t]he purpose of [the ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the *removal* of Indian children from their families and the placement of such children in foster or adoptive homes.”).

128. See *ICWA* § 101, 92 Stat. at 3071 (“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward to a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. (b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.”).

129. *In re K.P.*, 195 Cal. Rptr. 3d 551 (Cal. Ct. App. 2015).

130. *Id.* at 560.

131. *Id.* at 553-54.

132. *Id.*

133. *Id.*

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intervention.<sup>134</sup> It submitted a plan of guardianship, which was favored by the court.<sup>135</sup> The plan granted visitation rights to the mother while the twins remained with Mr. and Mrs. G.<sup>136</sup> The court considered parental visitation rights a pathway to cultural connection.<sup>137</sup> The juvenile court terminated its jurisdiction in August of 2011 after accepting the plan of guardianship.<sup>138</sup> For two years while the twins were under the care of Mr. and Mrs. G., Michelle T. was an absentee parent, visiting the twins periodically.<sup>139</sup> Eventually, she began visiting them once a month.<sup>140</sup> As the frequency of her visits increased, Michelle T. conveyed to the twins “that she was their real mother and they should not call Mrs. G. ‘mom.’”<sup>141</sup> Mrs. G. reported to the court that “the children were ‘unsett[led]’” by the visits.<sup>142</sup> In December 2013, the G.’s, seeking more control over visits, asked the San Diego County Health and Human Service Agency (“SDCHHSA”) to reinstate dependency jurisdiction.<sup>143</sup> The Agency set a new hearing at which it recommended that the G.’s adopt the children. It then contacted their tribe to discuss the recommendation<sup>144</sup>

The Pala Band of Mission Indians informed the Agency that as of February 2012, the twins were not enrolled in IWCA because they lacked the proper blood quantum degree.<sup>145</sup> Pala’s Executive Committee (“EC”) adopted a revised enrollment ordinance in 2009, which allowed the EC to erase or “remove a member’s name from the

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134. *Id.*

135. *Id.* at 553-54.

136. *Id.* at 554-55.

137. *See id.* at 554.

138. *Id.* (“The Pala Band General Council rejected the Agency’s proposed permanent plan of tribal customary adoption and instead approved a plan of guardianship for the children.”).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; *see also* *Doe v. Mann*, 415 F.3d 1038, 1064 (9th Cir. 2005) (“Congress intended Public Law 280 states to have jurisdiction over Indian child dependency proceedings unless tribes availed themselves of Section 1918 [in ICWA] in order to obtain exclusive jurisdiction.”).

144. *In re K.P.*, 195 Cal. Rptr. 3d at 554-55.

145. *Id.* at 555-56; *see also supra* note 1 (defining blood quantum).

Pala Band's roll on a finding that an application misstated or omitted facts that may have made the applicant ineligible for enrollment."<sup>146</sup> Interestingly, a tribal individual can appeal to the Bureau of Indian Affairs' ("BIA") Pacific Regional Director, but the EC has final authority.<sup>147</sup>

In 2011, the EC asserted that the ancestor of Michelle T., known as M.B., precluded the twins' generation from meeting the requirements for enrollment.<sup>148</sup> And so, the Pala Tribe terminated the twins' rights to tribal benefits.<sup>149</sup> M.B., born in 1856, was thought to have been a full-blood (4/4) and was "identified on the Pala Band's November 1913 allotment roll as having 4/4 degree Pala Indian blood."<sup>150</sup> In 2011, 98 years later, the EC determined M.B. was only one-half degree and adjusted their rolls accordingly.<sup>151</sup>

Michelle T. appealed to the BIA.<sup>152</sup> But, it resulted in a no decision, and the BIA recommended that the twins remain enrolled "with the Pala Band because there was no evidence to support their disenrollment."<sup>153</sup> The Department of the Interior's Assistant Secretary of Indian Affairs concurred with the BIA's recommendation, "stating that 'the Department has no authority under federal or tribal law to decide enrollment issues for the [Pala] Band.'"<sup>154</sup> However, after declaratory relief was denied by a federal district court and during the pendency of the appeal to the 9<sup>th</sup> Circuit, the Department of Interior and the plaintiffs

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146. *In re K.P.*, 195 Cal. Rptr. 3d at 555.

147. *Id.*

148. *Id.*

149. *Id.* at 555-56.

150. *Id.* at 555 n.3.

151. *Id.* ("Previously, there had been inconsistent determinations as to the blood degree of M.B.'s descendants. Until 1984, the BIA considered M.B. as a 'halfblood' in determining the blood degree of her descendants. In resolving an appeal on one of M.B.'s descendants in 1989, the BIA concluded that M.B. was a 'fullblood' and 'direct[ed] that the blood degree of her descendants be reviewed and corrected accordingly.'").

152. *Id.* at 556.

153. *Id.*

154. *Id.*

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brokered an agreement not to remove the plaintiff-Indians off Pala's federal rolls.<sup>155</sup>

Michelle T. sought to stop the tribe's disenrollment action. She argued, "in view of a pending appeal in the United States Court of the Ninth Circuit challenging the validity of the Pala Band's enrollment ordinance," the disenrollment of her two children was not yet final.<sup>156</sup> She continued to argue that enrollment was not a requirement to be considered an "Indian child."<sup>157</sup> The juvenile court, ignoring her request, moved forward and issued its ruling:

This case involves an essence of the concept of sovereignty. There is no dispute that the Pala Band is a sovereign Indian nation. It is a separate political entity. They have their own governing documents. . . And, here, the tribe, not a party to the lawsuit, has rendered an opinion, whether we agree with it or not, that the children are no longer considered Indian children by virtue of [its] calculation of blood quantum requirements. That is both a factual determination and a legal interpretation of their governing documents, particularly, the enrollment ordinances. And under either analysis, factual or legal, it would be an impermissible intrusion to second guess [the Pala Band] to counter what they have done.<sup>158</sup>

"The juvenile court determined that the [twins] were not Indian children within the meaning of ICWA" and because they were likely to be adopted in a reasonable amount of time by the G family, the court terminated Michelle T.'s parental rights.<sup>159</sup> The California Court of Appeals affirmed the juvenile court's ruling.<sup>160</sup> By Pala diminishing the children's status as Indian,<sup>161</sup> ICWA no longer protected the children<sup>162</sup>

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155. *Id.* at 555. However, the State Court noted that "[u]nder the ICWA, the Department of the Interior's agreement to take no action to remove individuals from the federally maintained roll of the Pala Band during the federal appeal is irrelevant to the children's state court dependency proceedings." *Id.* at 560.

156. *Id.* at 553.

157. *Id.*

158. *Id.* at 557.

159. *Id.*

160. *Id.* at 560.

161. *See id.* at 553-54.

162. *See id.* at 557-58.

and as tribes continue with this practice, families who have been disenrolled by their tribe could face similar events.

In March of 2012, the Los Angeles Times reported a strikingly similar story about Margarita Owlinguish Britten, a Pala Indian Tribe member who died in 1925.<sup>163</sup> Britten “was a revered elder of the Pala Indian Tribe, a survivor of the forced relocation in 1903 of the Cupeno Indians to an area beside the San Luis Rey River in northern San Diego County.”<sup>164</sup> However, the EC disenrolled about 162 of her descendants, terminating their \$7,500 per month *per capita* check along with health and education coverage.<sup>165</sup> By reclassifying Margarita Britten as only half-Indian, today’s descendants do not meet the 1/16<sup>th</sup> threshold.<sup>166</sup> As the L.A. Times article shows, the Pala Indian Tribe has a history of reducing deceased Pala ancestors’ blood quantum degrees, allowing it to disenroll the ancestors’ living descendants from the tribe and its social welfare benefits.<sup>167</sup>

### C. Aftermath

The late 1990’s and early 2000’s were the beginning of the end for high stakes bingo halls and modest card rooms. In California, those days witnessed the overhaul of California’s laws and constitution, which paved the way for the erection of non-tribal mega-casinos.<sup>168</sup> Between 1997 and 2012, approximately two-dozen California tribes

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163. Tony Perry, *supra* note 125.

164. *Id.*

165. *Id.* Assuming all 162 received full per capita payments, the amount repurposed back to the tribe would be \$1,215,000 per month and \$14,580,000 per year. Taking a conservative approach, if 54 adults receive per capita payments, \$405,000 would be disbursed monthly and \$4,860,000 annually. This amount does not include cost of health care, education and other tribal government programs. *See id.*

166. *Id.*

167. *Id.*

168. *See* S. Res. 142, Proposed S. CONST. Amend. 11, 1999-2000 Reg. Sess. (Cal. 1999) (providing full text of proposition); CAL. CONST. art. IV, § 19. *See generally* CAL. GAMBLING CONTROL COMM’N, CALIFORNIA GAMBLING LAW, REGULATIONS, AND RESOURCE INFORMATION (2017), *available at* [http://www.cgcc.ca.gov/documents/enabling/2017/CA\\_Gambling\\_Law\\_Regulations\\_Resource\\_Information\\_2017\\_Edition.pdf](http://www.cgcc.ca.gov/documents/enabling/2017/CA_Gambling_Law_Regulations_Resource_Information_2017_Edition.pdf).

disenrolled 3,000 Indians.<sup>169</sup> The aftermath of disenrollment for tribal people across the nation is a traumatic experience. The loss of Indian legal status, loss of place, loss of identity, and for some, loss of financial assistance may produce trauma in their lives.

#### IV. TRAUMA

History is traumatic.<sup>170</sup> Effects on those experiencing disenrollment—the amputation of mind, body, and spirit—has an impact on their soul. No longer included in their society, removed by legal force, legal standing diminished, terminated from their intrinsic setting, there must be an effect. Studies of the two – trauma and disenrollment – are lacking, but the actions taken are not new to Indian Country; the only difference being the political body executing the actions. Jeffrey Alexander, an expert on social trauma, states that trauma “is not something naturally existing; it is something constructed by society.”<sup>171</sup> Thus, trauma is manmade. The National Indian Child Welfare Association (“NICWA”) defines trauma as “an event, or series of events, that causes moderate to severe reactions.”<sup>172</sup> “Traumatic events are characterized by a sense of horror, helplessness, serious injury, or the threat of serious injury or death . . . affecting those who suffer injuries or loss.”<sup>173</sup> Further, trauma addressed to the specific conditions and experiences of indigenous people is a “unique individual experience associated with a traumatic event or enduring conditions . . . often related to the cultural trauma, historical trauma, and intergenerational trauma that has accumulated in AI/AN [American Indian/Alaska Native] communities through centuries of exposure to

169. WILKINS, *supra* note 104.

170. Typically, and simplistically, history transpires in a binary “inferior-superior” hegemonic multi-constant relationship. Indian Country has encountered such a relationship; the “superior” group seeks to control the “inferior” group. Control becomes the operative word. The superior group seeks to provide illusions – a phantom sovereign spirit – onto the inferior, with the former in ultimate sovereign control. Tribal government’s actions of disenrollment have similar components. *See generally* JEFFREY C. ALEXANDER, *TRAUMA: A SOCIAL THEORY* (2012).

171. *Id.* at 7.

172. *Trauma-Informed Care Fact Sheet*, NICWA (Apr. 2014), [http://www.nicwa.org/mental\\_health/SystemsOfCare/documents/TraumaInformedCareFactSheet\\_April2014\\_000.pdf](http://www.nicwa.org/mental_health/SystemsOfCare/documents/TraumaInformedCareFactSheet_April2014_000.pdf) [hereinafter *NICWA*].

173. *Id.*

racism, warfare, violence, and catastrophic disease.”<sup>174</sup> These referenced traumatic events are all manmade episodes.

Maria Yellow Horse Braveheart coined the phrase “historical trauma” (a “cumulative emotional and psychological wounding, over the lifespan and across generations, emanating from massive group trauma”) back in the 1980s, and her theory consists of six categories:

1. First Contact: life shock, genocide, no time for grief. Colonization Period: introduction of disease and alcohol, traumatic events such as Wounded Knee Massacre.
2. Economic Competition: sustenance loss (physical/spiritual)
3. Invasion/War Period: extermination, refugee symptoms.
4. Subjugation/Reservation Period: confined/translocated, forced dependency on oppressor, lack of security.
5. Boarding School Period: destroyed family system, beatings, rape, prohibition of Native language and religion. Lasting effect: ill-prepared for parenting, identity confusion.
6. Forced Relocation and Termination Period: transfer to urban areas, prohibition of religious freedom, racism and being viewed as second class; loss of governmental system and community.<sup>175</sup>

However, a new category must be proposed to capture the latest disenrollment actions taking place across the country and many of the elements listed above capture what disenrollment *may* produce.

NICWA lists four forms of trauma, with *current trauma* being a concern.<sup>176</sup> In 2007, according to the National Center for Children in Poverty, American Indian children are 2.5 times more likely to experience trauma.<sup>177</sup> According to Novins, Fickenscher and Manson, in a study focused on American Indian adolescents ages 13 to 18, with a sample size of 99 from 27 different tribes (58 males and 41 females), the study found a 14.6% prevalence rate of Major Depressive Disorder

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174. *Id.*

175. Vinnie Rotondaro, *Reeling from the Impact of Historical Trauma*, NAT’L CATHOLIC REP. (Sept. 3, 2015), <https://www.ncronline.org/printpdf/108976>.

176. NICWA, *supra* note 172.

177. Janice L. Cooper, *Facts about Trauma for Policymakers: Children’s Mental Health*, NAT’L CTR. FOR CHILDREN IN POVERTY (July 2007), [www.nccp.org/publications/pub\\_746.html](http://www.nccp.org/publications/pub_746.html).

among the indigenous youth, with females reporting a 25.7% rate.<sup>178</sup> Anxiety and depressive disorders were at 19.1% with females experiencing a higher rate at 28.6%.<sup>179</sup> Conduct disorder was reported at 74.2% for the total cohort.<sup>180</sup> Posttraumatic Stress Disorder was reported at 10.1%.<sup>181</sup> Of the 66 reported as conduct disorder, tranquilizers, marijuana and alcohol were the most abused substances at 91.7%, 80% and 78.3% respectively by this cohort.<sup>182</sup>

In 2001, Yu and Stiffman conducted a study using a multiple and interactive environmental (familial, social and cultural) predictor regression model on 401 American Indian adolescent youths with alcohol/dependence symptoms where participants engaged in community activities.<sup>183</sup> Of the sample, 205 were from reservations and 196 from urban centers, with an age range of 13 to 19.<sup>184</sup> On average, reservation cohorts initiated alcohol use at 13.4 years old compared to 14.3, for their urban peers.<sup>185</sup> Of those who had consumed more than six drinks ( $n=209$ ) in their life, 20.2% drink weekly, with 21.9% drinking at least one week a month.<sup>186</sup> The study found that “generic cultural activities” (memorials, feasts, powwows, dances, giveaways and religious celebrations) *might* not have a positive influence when compared to “cultural pride/spirituality” activities (sweats, naming ceremonies, talking circles and spiritual running).<sup>187</sup> The results of the study stated:

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178. D. Novis, A. Fickensher & S. Mason, *American Indian Adolescents in Substance Abuse Treatment: Diagnostic Status*, 30 J. SUBSTANCE ABUSE TREATMENT 275, 279 (2006). “The goal of this study was to describe the prevalence of *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) psychiatric disorders among a sample of American Indians (AI) adolescents in residential substance abuse treatment. Data on 89 AI adolescents admitted to a tribally operated residential substance abuse treatment program were collected.” *Id.* at 275.

179. *Id.* at 280.

180. *Id.*

181. *Id.*

182. *Id.*

183. ManSoo Yu & Arlene Rubin Stiffman, *Culture and Environment as Predictors of Alcohol Abuse/Dependence Symptoms in American Indian Youths*, 32 ADDICTIVE BEHAV. 2253, 2254 (2007).

184. *Id.*

185. *Id.* at 2255.

186. *Id.*

187. *Id.* at 2256.

In contrast, pride in being American Indian and religious affiliation were associated with fewer alcohol symptoms. Importantly, religious affiliation reduced the impacts of negative familial and social environments on youth's alcohol symptoms. This has implications for further intervention/prevention strategies: promoting cultural pride/spirituality and religious affiliation, particularly in the presence of problematic peers and family situations, adolescents may reduce alcohol involvement and, consequently, prevent problems.<sup>188</sup>

Traumatic episodes and substance dependence seem to emerge in early adulthood for the American Indian population as the Ehlers study found in 2013.<sup>189</sup> Eight contiguous reservations provided the participants, each having at least 1/16<sup>th</sup> Native American Heritage and ranging between 18 and 70 years old.<sup>190</sup> A traumatic range, or baseline, was crafted that included seven types of possible trauma: military combat, sexual abuse, injury or assault, natural disaster with loss, witnessed trauma, crime experienced without injury, and unexpected death.<sup>191</sup> This baseline was measured against specific traumas: Posttraumatic Stress Disorder (PTSD), heritability of assaultive trauma, comorbidity of trauma and PTSD with substance dependence, affective disorder and conduct disorder.<sup>192</sup> Of the 309 that completed the Semi-Structured Assessment for the Genetics of Alcoholism ("SSAGA"), denoting information on traumatic events and PTSD, 94% reported experiencing at least 1 of the 7 types of trauma – 92% males; 94% females.<sup>193</sup> Thirty-four percent of participants, exposed to at least one traumatic event, met *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) for PTSD with women receiving a higher PTSD score (38%) versus men (29%).<sup>194</sup>

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188. *Id.* at 2258.

189. Cindy L. Ehlers et al., *Lifetime History of Traumatic Events in an American Indian Community Sample: Heritability and Relation to Substance Dependence, Affective Disorder, Conduct Disorder and PTSD*, 47 J. PSYCHIATRIC RES. 155, 155 (2013).

190. *Id.* at 156.

191. *Id.*

192. *Id.*

193. *Id.* at 157.

194. *Id.* at 157-58.

The purpose of including these studies, of which there are many more stating the same, was to illustrate that Indian Country is rife with traumatic events, which commence early in childhood, and continue to have grand effects.<sup>195</sup> Dr. Adachi discussed such concerns in an open letter to Indian Country regarding disenrollment and she wrote that disenrollment “perpetuates historical trauma,” leading to “historical loss,” which results in “depression, PTSD, and poly-drug use in Native youth.”<sup>196</sup> The Whitbeck study in 2004 was based on 143 American Indian parents, of children 10 to 12 years of age in the upper Midwest.<sup>197</sup> The historical loss segment (using the *Historical Loss Scale* and the *Historical Loss Associated Symptoms Scale*), found that the loss of traditional/spiritual ways (33.4%), tribal language (36.3%) and tribal culture (33.7%) were consciously a daily cerebral thought.<sup>198</sup> Only the effects of alcohol (losses associated with the effects of alcoholism) ranked higher (45.9%) as a daily thought.<sup>199</sup> Regarding sadness or depression, 44% reported “sometimes” while 11.3% reported “often.”<sup>200</sup> Anger registered positively at 38.1% for “sometimes” and 16.9% was reported for “often.”<sup>201</sup> Anxiety or nervousness was also measured and 23.1% responded “sometimes” with 8.1% responding to “often.”<sup>202</sup> Thus, as Dr. Adachi’s letter suggests, these elements exist and disenrollment can add to the psychological ills that already reside within the very same communities that are dismembering “tribal members.”<sup>203</sup> The addition of disenrollment stress – “*Am I next?*” – may only serve to negatively impact tribal people. Once ousted, where do tribal people and tribal families go to seek psychological traumatic help?

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195. Katya Adachi, *Association of American Indian Physicians Background Paper on Disenrollment*, ASS’N AM. INDIAN PHYSICIANS, <https://www.aaip.org/media/news/m.blog/76/disenrollment-background-papers-and-resolution> (last accessed Apr. 27, 2017).

196. *Id.*

197. Les B. Whitbeck et al., *Conceptualizing and Measuring Historical Trauma Among American Indian People*, 33 AM. J. CMTY. PSY. 119, 120 (2004).

198. *Id.* at 124.

199. *Id.*

200. *Id.* at 125.

201. *Id.*

202. *Id.*

203. *See* Adachi, *supra* note 195.

## CONCLUSION

As discussed, citizenship for the United States of America was, and is, considered a privilege and a feat many aspire to achieve. Race had, and does, play a role. For example, early in the 19<sup>th</sup> Century, the United States Supreme Court issued a set of cases known as the *Insular Cases*,<sup>204</sup> mostly denoting territories as “unincorporated” and “incorporated.”<sup>205</sup> The Court contemplated the application of the Constitution and the Bill of Rights to territories newly acquired after conquest.<sup>206</sup> In 1904, the Supreme Court ruled in *Dorr v. United States* that the inhabitants of the Philippines Islands would not be extended due process until Congress extended such rights.<sup>207</sup> In 1903, the court in *Hawaii v. Mankichi*, ruled that until Hawaii was incorporated into the United States, the Bill of Rights, namely the 5<sup>th</sup> and 6<sup>th</sup> Amendments, would not apply to Hawaiians.<sup>208</sup> Prior to these two cases, in 1901, in *Downes v. Bidwell*, the Supreme Court ruled that Puerto Rico was not “foreign” nor part of the United States as a state, a phrase familiar to Indian Country.<sup>209</sup> But in 1904, the Supreme Court ruled in *Gonzales v. Williams* that citizens of Puerto Rico were not aliens, as defined by the Immigration Act of 1891, thus the Commissioners of Immigration could not detain new arrivals.<sup>210</sup> 112 years later, the Supreme Court denied a petition for a writ of certiorari from a D.C. Circuit case, *Tuaua v. United States*, considering whether American Samoa qualified as a territory that included birthplace rights – *jus soli* – for citizenship.<sup>211</sup> A unanimous appellate court ruled that citizenship did not extend to

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204. See generally *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901).

205. James E. Kerr also includes political motivations were also prevalent during this time, given the election of 1900 and America’s overwhelming support of territory acquisition. See generally JAMES E. KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* (Rudolph J. Gerber ed., 1982).

206. See generally *Dorr v. United States*, 195 U.S. 138 (1904).

207. *Id.* at 143.

208. *Hawaii v. Mankicki*, 190 U.S. 197, 217-18 (1903).

209. *Downes v. Bidwell*, 182 U.S. 244, 248-49 (1901).

210. *Gonzales v. Williams*, 192 U.S. 1, 12 (1904).

211. *Tuaua v. United States*, 136 S. Ct. 2461 (2016) (denying petition for writ of certiorari).

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individuals born in American Samoa.<sup>212</sup> The court reaffirmed that *Congress* has to extend such statutes as it has with other territories.<sup>213</sup>

In her ruling, Justice Janice Roger Brown wrote:

Citizenship is not the sum of its benefits. It is no less than the adoption or ascription of an identity, that of “citizen” to a particular sovereign state, and a ratification of those mores necessary and intrinsic to association as a full functioning component of that sovereignty. At base Appellants ask that we forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity—on a distinct and unincorporated territory of people, in the absence of evidence that a majority of the territory’s inhabitants endorse such a tie and where the territory’s democratically elected representatives actively oppose such a compact.

We can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will.<sup>214</sup>

Within that ruling, *Elk* appears to be setting the bar of separation regarding the Citizenship Clause.<sup>215</sup> Focusing on *jurisdiction* in relationship to the United States, the court’s opinion in *Elk* states that whole *political jurisdiction* was needed to receive citizenship status, not partial.<sup>216</sup> Dependence on the United States government must be full and not semi-independent, a position the American Samoan Government agreed with.<sup>217</sup>

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212. *Tuaua v. United States*, 788 F.3d 300, 311-12 (D.C. Cir. 2015).

213. See U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power to . . . establish a uniform Rule of Naturalization;”); see also *id.* at amend. XIV (“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.”). The American Samoan Government also opposed automatic citizenship, believing such a jurisdictional extension by the United States would interfere with their governmental practices. David G. Savage, *American Samoans demand Supreme Court finally grant them full citizenship*, L.A. TIMES (June 9, 2016, 2:20 PM), <http://www.latimes.com/nation/la-fg-court-samoan-citizens-20160609-snap-story.html>.

214. *Tuaua*, 788 F.3d at 311.

215. *Id.* at 305-306.

216. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

217. See *Tuaua*, 788 F.3d at 310-11.

In a separate *amicus curiae* brief, congressional members and former government officials filed a supportive brief for the petitioner. The brief to the Supreme Court stated:

As current and former government officials of the U.S. Territories, *Amici* are uniquely well positioned to speak to the profound implications of that profoundly wrong decision. If birthright citizenship really is something that persons born in the Territories enjoy only as a matter of legislative grace, then there is nothing to stop Congress from denying citizenship to persons born in Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands tomorrow. Indeed, it is not even clear that Congress could not revoke birthright citizenship of territorial residents who currently enjoy it. The decision below thus imperils the citizenship of *everyone* born in the U.S. Territories.

That result cannot be reconciled with the text, structure, history, and purpose of the Fourteenth Amendment. Unsurprisingly, the D.C. Circuit's decision is grounded in none of those things, but instead rests largely on the notion that the American Samoa Government should get to dictate whether American Samoans enjoy constitutional birthright citizenship. Setting aside the rather obvious problem with conditioning a constitutional right on the will of the majority, the concerns that led the D.C. Circuit to defer to the preferences of the American Samoa Government are completely unfounded, as recognizing that the Citizenship Clause applies with full force to the Territories would not imperil the culture or the people of American Samoa citizenship. Setting aside the rather obvious problem with conditioning a constitutional right on the will of the majority, the concerns that led the D.C. Circuit to defer to the preferences of the American Samoa Government are completely unfounded, as recognizing that the Citizenship Clause applies with full force to the Territories would not imperil the culture or the people of American Samoa.<sup>218</sup>

The *amicus* brief illustrates the important role Congress plays in deciding territorial—incorporated and unincorporated—status of citizenship. The current and former officials ask a profound question: Why does the American Samoa Government get to dictate whether

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218. Brief for *Amici Curiae* Members of Congress and Former Governmental Officials in Support of Petitioners at 3-4, *Tuaua v. United States* 136 S. Ct. 2461 (2016) (No. 15-981), 2016 U.S. S. Ct. Briefs LEXIS 984, at \*5-\*7.

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American Samoans enjoy constitutional birthright citizenship? Perhaps the answer is found in *Santa Clara v. Martinez*, the very same canon crippling American Indians today. Without citizenship there are no constitutional protections, no due process, and no equal standing, a phenomenon being witnessed within tribal citizen disenrollment practices. Congress has power to extend the criteria of citizenship and the same lawmakers—as history dictates—under the doctrine of plenary power, can issue the same constitutional rights to those seeking a voice regarding removal and termination from their tribal communities that courts currently deny.

Lastly, tribal government's disenrollment practices are traumatic events. Manmade termination and removal of tribal citizens have a high probability of imperilment.<sup>219</sup> Tribal communities already host many afflictions, which are well documented. There are no current studies taking place that seek to correlate disenrollment and the traumatic categories, but traumatic episodes are present in Indian communities across the country. Indian Country simply cannot afford to lose any more American Indians, including those disenrolled.

According to the Suicide Prevention Resource Center ("SRPC"), utilizing data from the Centers for Disease Control and Prevention, American Indians/Alaska Natives have a suicide rate of 16.93 per 100,000, while the total population rate is 12.08 per 100,000, with the 10-24 age range being the highest cohort for American Indians/Alaska Natives.<sup>220</sup> Amongst the youth, as SRPC illustrates in the table below, underage drinking becomes a coping mechanism.

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219. *Id.* at 4 ("Recognizing that the Citizenship Clause applies with full force to the Territories would not imperil the culture or the people of American Samoa.").

220. SUICIDE PREVENTION RESOURCE CTR., SUICIDE AMONG RACIAL/ETHNIC POPULATIONS IN THE U.S.: AMERICAN INDIANS/ALASKA NATIVES 1-2 (2013), [http://www.sprc.org/sites/default/files/migrate/library/AI\\_AN%20Sheet%20Aug%2028%202013%20Final.pdf](http://www.sprc.org/sites/default/files/migrate/library/AI_AN%20Sheet%20Aug%2028%202013%20Final.pdf).

Results of 2013 Youth Risk Behavior Survey of High School  
Students Regarding Drinking Status and Depression, Suicide  
Consideration, and Developing a Suicide Plan<sup>221</sup>

	Depressive Feelings	Considered Suicide	Developed Suicide Plan
Non- Drinker	34%	17%	20%
Current, No Binge	23%	16%	15%
Current, Binge	30%	15%	16%

Traumatic events that trigger depressive episodes were once an external matter, but with internal traumatic manifestations, these episodes *may* have a deeper and greater psycho-social impact, one that has yet to be measured.

Studies have been conducted that consider trauma within Indian communities. In one study, looking at rates of violence and trauma in a Southwestern Indian community, 81.4% (N=247) experienced some form of trauma and of individuals who experienced multiple traumatic events, 66% (N=163), had a higher risk rate of developing depression.<sup>222</sup> Such traumatic events, such as combat, physical assault, witnessing extreme violence, serious injury, fire or unexpected deaths—to name a few—may have long-lasting impressions, such as Post-Traumatic Stress Disorder, within families and across generations.<sup>223</sup> These events may lead to unresolved grief and

221. SUICIDE PREVENTION RESOURCE CTR., SUICIDE AMONG RACIAL/ETHNIC POPULATIONS IN THE U.S.: AMERICAN INDIANS/ALASKA NATIVES 3 (2013), <https://www.samhsa.gov/capt/sites/default/files/resources/suicide-ethnic-populations.pdf>.

222. Robert W. Robin et. al., *Prevalence and Characteristics of Trauma and Posttraumatic Stress Disorder in a Southwestern American Indian Community*, 154 AM. J. PSYCHIATRY 1582, 1582 (1997).

223. Aaron R. Denham, *Rethinking Historical Trauma: Narratives of Resilience*, 45 TRANSCULTURAL PSYCHIATRY 391, 396 (2008).

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prolonged suffering for a lifetime, thus complicating an individual's "way of life" and the generational affects.<sup>224</sup>

Indian communities are the most impacted communities within the United States and the majority of the impactful thrusts culminated from external forces. Today, internal forces are impacting the state of health on Indian communities. After the tribal governments' disenrollment actions, where and how do these disenfranchised people gain assistance to combat the depressive illness that may follow? If the "healing journey" can be found within the individual's culture and identity, where does one turn when that culture has been terminated?<sup>225</sup>

The full weight and measure of citizenship for American Indians remains in a quasi-state. After years of struggle to reach equal standing in the American political sovereign fabric, the American Indian remains abridged; equality of due process has yet to be reached. The federal government's unwillingness to intervene remains steadfast. *Santa Clara* served to acknowledge tribal supremacy regarding enrollment, but the federation's governments, which includes tribes, shield themselves with the same ruling regarding disenrollment. These two acts—to admit and to erase—have two distinctly different origins. Plus, falsifying information during the enrollment process, knowingly so or not, can only have merit when completing the process when the rules have changed, not after. These federation governments serve to silence the individual's inalienable rights with destructive alienable laws. *Santa Clara*'s shield should not be extended to tribal laws that seek to erase the individual without due process.

Such acts have a negative impact on already fragile communities. Indian Country already hosts deplorable health issues. These acts of disenrollment only enhance these traumatic conditions, leaving those disenrolled unprotected and no longer protected by federal or tribal human service programs. Though further research is need to fully understand the state of those disenrolled, many studies already expose Indian Country's traumas. The manmade actions can only serve to further the community trauma.

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224. *Id.*

225. See generally Hilary N. Weaver, *Examining Two Facets of American Indian Identity: Exposure to Other Cultures and the Influence of Historical Trauma*, 2 J. HUM. BEHAV. SOC. ENV'T 19 (1999).

The federal government's disinclination to intervene will most likely continue and the courts will most likely continue the *Santa Clara* path. Given that American Indians are the smallest population, the democratic system affords those elected to not be concerned with such minimal measures. Congress has the power to adjust the balance in the direction of fairness. Until then, it is unclear what redress will be available to these communities.