Native Identity and Current Enrollment Issues

Beyond Blood Quantum: The Legal Implications of Tribal Enrollment Policies

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Disclaimer

- Tribal needs are paramount in making enrollment decisions.
- This presentation is not meant to suggest that tribes should focus on external factors when making enrollment law and policy. It is intended to point out ways that those internal policies can have external effects.
- Lots of text incoming.

Background – *Morton v. Mancari* (1974)

- Underpins the federal law understanding of tribal identity
- Indian Reorganization Act of 1934 gave hiring preference to members of federally-recognized tribes for positions in the Bureau of Indian Affairs ("Indian Preference")
- Question – Was Indian Preference unlawful discrimination?

Background – *Morton v. Mancari* (1974)

- Held – Indian Preference was not unlawful racial discrimination, because it was not racial discrimination at all.
- Indian Preference was based on a political classification, not a race-based classification.
- Indian Commerce Clause – Congress has the power to "regulate Commerce . . . with the Indian Tribes"
- "Indeed, [Indian Preference] is not even a 'racial' preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. **It is directed to participation by the governed in the governing agency**."
- (Indian Preference also required ¼ or more "Indian Blood")

Background – *Rice v. Cayetano* (2000)

- Office of Hawaiian Affairs, state agency that administered programs for native Hawaiians. Only "Hawaiians," defined as descendants of people inhabiting Hawaii in 1778, could vote for the statewide election of trustees.
- Supreme Court held that this was a racial classification.
- Now-Justice Kavanaugh wrote an amicus brief and an op-ed about *Rice*.
  - "But neither the Congress nor the Department of Interior has recognized native Hawaiians as an Indian tribe. What's more, Hawaiians have never even applied for recognition as an Indian tribe. The reason is obvious. Native Hawaiians couldn't possibly qualify. They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or in territorial enclaves. They don't even live together in Hawaii. Native Hawaiians are dispersed throughout the state of Hawaii and the United States. **In short, native Hawaiians bear none of the indicia necessary to qualify as an Indian tribe.**"
  - "And that's not all. By claiming that native Hawaiians deserve special privileges because their ancestors lived in Hawaii, the Justice Department's position is also fiercely anti-immigrant, **flouting the principle that all American citizens have equal rights regardless of when they became citizens**."

Legal Impacts of Tribal Enrollment

- “Democratic deficit”
- Indian Child Welfare Act (ICWA)
- Cherokee Freedmen Ruling

"Democratic Deficit"

- "Democratic Deficit" is a theory that because non-Indians (or non-members in most cases) cannot become tribal members, tribal jurisdiction over them is anti-democratic
- Arose most prominently in Justice Kennedy's concurrence in *U.S. v. Lara* (2004)
- *Lara* involved a criminal prosecution of a member of the Turtle Mountain Band of Chippewa Indians by the Spirit Lake Sioux Tribe of North Dakota. Prosecution by one tribe of members of another tribe was recognized by Congress in 1990.
  - "Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. **The Constitution is based on a theory of original, and continuing, consent of the governed.** Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State."
  - **"There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.**"
  - "Perhaps the Court's holding could be justified by an argument that **by enrolling in one tribe Lara consented to the criminal jurisdiction of other tribes**, but the Court does not mention the point. And, in all events, we should be cautious about adopting that fiction."

“Democratic Deficit” – Flaws

- Obvious flaws in the “Democratic Deficit” theory:
  - Citizens of other countries can’t participate in US politics, and vice-versa
  - A citizen of one state cannot meaningfully participate in the politics of another place they visit
  - Even if you spend 49% of your time in one county, if another county is your primary residence, you cannot participate in the government of the place where you live 49% of the time.
  - No real difference between that and going to a reservation where you do not get direct political participation
- Kennedy applied the argument to a situation where a member of a federally recognized tribe was prosecuted by another tribe, even though the tribal member could theoretically have escaped prosecution by any tribe by renouncing tribal membership, which represents at least some level of consent.

“Democratic Deficit” – Takeaways

- Even with the flaws, it is still compelling to at least some judges and academics.
- Takeaway – If it is theoretically possible for someone to join a tribe, the democratic deficit argument completely falls apart.

ICWA – *Brackeen v. Bernhardt* (2019)

- *Brackeen* involved a constitutional challenge to the Indian Child Welfare Act
- ICWA has certain protections for Indian Children. "Indian Child" is defined in the Act as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."
- Question – is the definition of "Indian Child" a political or race-based classification?

Brackeen v. Bernhardt – District Court

- Federal district court held that ICWA violated the equal protection requirements of the 5th amendment
  - "By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race and therefore 'must be analyzed by a reviewing court under strict scrutiny.'"
  - The district court held that ICWA failed the strict scrutiny analysis, as basically everything does.

Brackeen v. Bernhardt – 5th Circuit

- 5th Circuit Panel reversed, holding that the definition of "Indian Child" was not based solely on tribal ancestry or race.
- 5th Circuit could have just referred to *Mancari*, as the same logic underlies ICWA (special relationship to tribes, tribal membership as political classification). However, the court dove into actual tribal membership requirements:
  - "As Defendants explain, under some tribal membership laws, **eligibility extends to children without Indian blood, such as the descendants of former slaves of tribes who became members after they were freed, or the descendants of adopted white persons**. Accordingly, a child may fall under ICWA's membership eligibility standard because his or her biological parent became a member of a tribe, despite not being racially Indian. **Additionally, many racially Indian children, such as those belonging to non-federally recognized tribes, do not fall within ICWA's definition of "Indian child."** Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe."[10]
  - "[10] The Navajo Nation's membership code is instructive on these points, despite the district court's reliance on it to the contrary. **The Navajo Nation explains that, under its laws, "blood alone is never determinative of membership." The Navajo Nation will only grant an application for membership "if the individual has some tangible connection to the Tribe," such as the ability to speak the Navajo language or time spent living among the Navajo people.** "Having a biological parent who is an enrolled member is per se evidence of such a connection." Additionally, individuals will not be granted membership in the Navajo Nation, regardless of their race or ancestry, if they are members of another tribe."

Brackeen Takeaways

- Case was accepted for *en banc* review and argued, but no decision yet.
- Takeaway – Tribal membership requirements that were disconnected in various ways from race were used to uphold ICWA:
  - Tribal membership extending to those without any "Indian blood" (i.e. an indigenous ancestor)
  - Tribal membership requiring more than ancestry

Cherokee Freedmen

- Pre-Civil War, the Cherokee had Black slaves like the slaveholders in the South.
- After the Civil War, in 1866, the US signed a treaty with the Cherokee that said the Cherokee Freedmen were emancipated and allowed to become citizens of the Cherokee Nation.
- In the 1980s, the Cherokee Nation administration amended citizenship rules to require that citizens have direct descent from an ancestor listed on the "Cherokee by Blood" section of the Dawes Rolls, the Rolls used to trace descent and membership.
- In 2006, the Cherokee Supreme Court ruled that that requirement was unconstitutional.
- In 2007, a special election resulted in the passage of a constitutional amendment to the Cherokee Constitution adding the "by blood" language.

Cherokee Freedmen – Federal Court

- In 2009, the Cherokee Tribal Council voted to consent to federal court jurisdiction to resolve the issue of whether the 1866 treaty prevented the Cherokee Nation from limiting its membership to members "by blood"
- In 2017, at the end of the 78 page opinion, the court wrote:
  - "The Cherokee Nation's sovereign right to determine its membership is no less now, as a result of this decision, than it was after the Nation executed the 1866 Treaty. The Cherokee Nation concedes that its power to determine tribal membership can be limited by treaty... The Cherokee Nation can continue to define itself as it sees fit but must do so equally and evenhandedly with respect to native Cherokees and the descendants of Cherokee freedmen. By interposition of Article 9 of the 1866 Treaty, neither has rights either superior or, importantly, inferior to the other. Their fates under the Cherokee Nation Constitution rise and fall equally and in tandem. In accordance with Article 9 of the 1866 Treaty, the Cherokee Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees."

Cherokee Freedmen – Last Week

- Last week, the Cherokee Supreme Court struck the words "by blood" from the Cherokee Constitution, formalizing the result of the federal court case.
- Although it was based on the federal court ruling (for which the Cherokee Nation waived sovereign immunity) it also had some language about the consequences of ignoring the treaty:
  - "Otherwise, the consequences could place **our nation in peril**.[16] ... [16] Today, the Cherokee Nation is dependent on federal subsidies and aid for approximately 70% of our General Operating Fund … An abrogation of the 1866 Treaty or further violations may render these funds in jeopardy. During the [prior litigation], the tribe's failure to abide by the 1866 Treaty not only drew threats from the U.S. to withhold the same, **but included a temporary suspension of $33 million dollars from the Department of Housing and Urban Development**. … *See also* [two house resolutions] (**both bills sought to sever relations with the Cherokee Nation and to suspend the tribe's right to conduct gaming operations**)."
  - "As our people rejoice the ruling in *McGirt*, and expect a similar determination in pending litigation before the Oklahoma Court of Civil Appeals, may we be reminded that the Creek Nation's rights to self-governance and the recognition of its reservation was dependent upon its 1866 Treaty. Likewise, **Cherokee Nation's pathway to similar recognition requires upholding the 1866 Treaty, not abrogating it**."

Cherokee Freedmen – Takeaways

- The Cherokee Freedmen case was particularly morally compelling, which likely contributed to it getting much more national attention than most disenrollment cases
- The Cherokee Nation also had a clearly defined treaty obligation to the U.S. in that case, unlike most disenrollment cases
- Still, it is an example of internal enrollment policy having broad external impacts, and tremendous external pressure to set enrollment policy in a certain way

Overarching Takeaways

- Enrollment policies are first and foremost decisions about the future of the tribe
- However, they can also have serious impacts on court cases, administrative decisions, and congressional lawmaking
- Moving away from membership definitions based solely on race can have far-reaching benefits and strengthen arguments in favor of broader tribal jurisdiction
- Being proactive and thoughtful about membership decisions, rather than relying on criteria handed down by the BIA in the 1930s, can help stave off outside interference with tribal enrollment decisions

Questions?

- More reading? Beyond Blood Quantum – American Indian Law Review
- More listening? Beyond Blood Quantum – All My Relations Podcast