

Citizenship, Disenrollment & Trauma

Introduction

This abridged paper will discuss citizenship¹ and the uniqueness that American Indians find themselves within the meaning of citizen and the federal government's position on tribal governance and enrollment, leading to the ability of tribes to engage in disenrollment practices. Then, the introduction of tribal citizen disenrollment court cases illustrating disenrollment practices. Disenrollment practices differ from the enrollment practice as ruled in *Santa Clara*. With such practices, these actions are the most recent traumatic events that Indian Country and American Indian individuals are encountering. The final section will introduce traumatic episodes from Indian Country, which emphasizes the already delicate environment tribal individuals occupy. When the hollowing of an individual's identity, spirit and soul manifests from within the individual's community, such internal actions produce negative episodes.

Citizenship

In the beginning, Indian Country², through treaties and statutes, *received* citizenship status and presumably the rights forged in the United States Constitution. But as time illustrated, an Indian's individual rights of United States citizenship did not rise to the same level as others nor did it become sacrosanct. The ideals of citizenship foretell a simplistic occurrence. But, the gatekeeper

¹ In Indian Country, membership is the most operative term. 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." (At: <http://www.bia.gov/FAQs/>).

² 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. There is an expansive definition, but for this paper, the simply version provided enables us to move forward.

to citizenship was, and is, man. For American Indians, the term “subject”³ was deemed most appropriate.

In 1868, the 14th Amendment reaffirmed federal jurisdiction over “All persons born or naturalized in the United States...” and labeled them “citizens of the United States.” Congress enacted the 1868 Civil Rights Act, which states “all persons born in the United States, and not subject to any foreign power” were deemed citizens, “excluding Indians not taxed.”⁴ Regarding Indians, the Senate Judiciary Committee concluded in 1870 that Indians did not qualify as citizens under the amendment.⁵ Equal standing of law, 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 highest court, the Supreme Court arrived at a mixed majority as in *Dred Scott v. Sandford* (1857),⁶ *Elk v. Wilkins* (1884) and *United States v. Wong Kim Ark* (1898).⁷ In *United States v. Wong Kim Ark*, the Supreme Court decided a question regarding place of birth leading to citizenship. The Supreme Court broadly interpreted the 14th Amendment to include birthright citizenship status to people born within the United States. In other words, an individual need not be a citizen to give birth to a citizen, provided they are on United States soil. Conversely, *Elk v. Wilkins* was not reversed. *Elk* was a case regarding Indian births on United States soil. The

³ 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.” See Felix Cohen, *Handbook of Federal Indian Law: With Reference Tables and Index*, William S Hein & Co, September, 1988.

For a deeper look at Indigenous-European interactions, see Dr. Andres Resendez, *The Other Slavery, The Uncovered Story of Indian Enslavement in America*, Houghton Mifflin Harcourt, Boston and New York, 2016.

⁴ *Elk v. Wilkins*, 112 U.S. 94, 1884. Also see *United States v. Osborn*, 2 Fed. 58, (1880), *Matter of Heff*, 197 U.S. 488 (1905) and *United States v. Nice*, 241 U.S. 591 (1916).

⁵ See Vine Deloria Jr. and David Wilkins, *Tribes, Treaties, & Constitutional Tribulations*, University of Texas Press, Austin, 2005. Also, see U.S. Senate, Committee on the Judiciary, “The Effect of the Fourteenth Amendment on Indian Tribes,” Senate Report No. 268, 41st Congress, 3d Session, Washington, D.C., Government Printing Office, 1871.

⁶ *Dred Scott v. Sandford*, 60 U.S. 393, 1857.

⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 1898. Chinese emigrants 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).

Supreme Court ruled birthright citizenship did not apply and reiterated American Indian status as “subjects.”

For Indian Country, ascription of citizenship would not transpire until the Indian Citizenship Act (ICA) of 1924.⁸ Citizenship, much like freedom, is preconditioned on manmade articles of governance and it’s man that concedes, forms and casts limitations. Justice Gray reiterates throughout his *Elk* opinion that qualifications of becoming a citizen rests on the ideals of the dominant political body. A pointed theme within the opinion – that of *being civilized* – was based on being sufficiently intelligent and possessing manners and habits of civilized life. Complicating the citizenship equation for Indian Country (or desire to become a United States citizen) and perhaps the most crucial aspect, was the difference between *emigrant race* status and United States Supreme Court’s term “domestic dependent” sovereign status – *Indian Country*.

Disenrollment Trailhead

In 1968, Congress passed the Indian Civil Rights Act (ICRA). The Act included various sections on tribal governments and communities. The most interesting section was the inclusion of a *quasi*-Bill of Rights for Indians as protection from their governments. Due process was also included in the Act and states: “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.”⁹ The *14th Amendment* also states 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 laws.” The *5th Amendment*, as part of the Bill of Rights (1791), also carries due process language.

⁸ Indian Citizenship Act was enacted on June 2, 1924, *U.S. Statutes at Large*, 43:253. Prior to the Indian Citizenship Act, as Felix Cohen points out, two-thirds of the American Indian population was already deemed citizens by treaty or statute. 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.

⁹ Civil Rights Act of 1968 of April 11, 1968, *U.S. Statutes at Large*, 82:77-81. 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.

The 1978 *Santa Clara Pueblo v. Martinez*¹⁰ Supreme Court case was seen as a sacred watershed moment for Indian Country. The Court upheld the right of a tribal government over an individual. In *Santa Clara*, Mrs. Julia Martinez, a full-blood member of the tribe, sought to enroll her daughter, whose father was Navajo. In 1939, the Santa Clara Pueblo tribal government passed a “membership ordinance” only permitting males who have children outside the Pueblo to enroll their children. Mrs. Martinez believed this was a violation of the equal protection clause of the 1968 Indian Civil Rights Act, as well as the 14th Amendment. *Santa Clara* was not simply a question of tribal citizenship. It was also a question of applying the Constitution and the application of the civil rights due process. The Court used precedents to uphold its ruling stating that the Constitution did not apply as decided in *Talton v. Mayes* (1896).¹¹ In *Talton*, the Court stated the 5th Amendment does not apply, because “tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal and state authority.” *Santa Clara* continues to state that the ICRA did not waive any rights of the tribal government to suit, for such a waiver cannot be implied against the tribe or its officers. The Supreme Court acknowledged that the ICRA sought to serve two masters, the individual Indian and the tribal government. The Court did reiterate that Congress, holding firm to its plenary power, could tilt the scale regarding civil matters.

Today, various tribal tribunals, tribal enrollment committees and the like address questions of enrollment. *Santa Clara* upheld the right of a tribe to decide who would be permitted for enrollment and once enrolled, participate as a citizen of that community. Tribal people are familiar with *pre-qualifications* for enrollment, as discussed in *Santa Clara*. But, *Santa Clara’s* “enrollment”

¹⁰ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 1978.

¹¹ *Talton v. Mayes*, 163 U.S. 376, 1896. The Supreme Court ruled by an 8-1 supermajority that the 5th Amendment was restricted to federal powers only. Stemming from a homicide conviction, the Supreme Court held that the 5th Amendment did not apply to legislation of the Cherokee Nation, which created a grand jury of 5 peers.

question is not the same inquiry regarding disenrollment. What happens when such qualifications are changed after enrollment, sometimes years later? What is the remedy?

Disenrollment

Approximately 80 federally recognized tribes are practicing disenrollment. The Supreme Court's *Santa Clara* ruling has sanctioned these actions, but why these acts are unfolding is still not truly understood. Gabriel Galanda speculates that gaming *per capita* could be a reason.¹² In a forthcoming publication, "*Dismembered: Banishment, Disenrollment & Statelessness in Indian Country*," Dr. Wilkins produces categorical findings on disenrollment, banishment, gaming and *per capita* payments. In California, according to the research, 23 tribes are engaged in disenrollment and 2 in banishment. Of the 25 California tribes, 20 operate gaming facilities of which 17 disburse *per capita* checks. Given the high occurrences in California, there are two cases that exemplify disenrollment. Both include tribal governments that engage in gaming operations and both engage in *per capita* programs. Also, both are located in Southern California.

Jeffredo v. Macarro

The Ninth Circuit Court of Appeals has entertained, since 2010, four cases dealing with disenrollment.¹³ In all four cases, the tribal governments and officers were immune from suite and the question of disenrollment was answered via *Santa Clara*. In *Jeffredo v. Macarro* (2010), the Court relied upon *Santa Clara*, but the circumstances in *Jeffredo* differ. The Pechanga Band of the Luiseno Mission Indians, a federally recognized tribe, adopted their constitution in 1978, which includes qualifications for membership. As described in *Jeffredo*, to qualify, lineal descent from "original Pechanga Temecula people...prior to 1928 will be accepted." The issue for *Jeffredo* was

¹² 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," *Gaming Law Review and Economics*, Vol. 20, No. 2., 2016.

¹³ *Jeffredo v. Macarro*, 599 F. 3d 913, 2010. Supreme Court of the United States; Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied on May 24, 2010. *Alto, et al v. Black*, 738 F. 3d 1111, 2013. *Cahto Tribe of Laytonville Rancheria v. Amy Dutschke*, 715 F.3d 1225, 2013. *Aguayo v. Jewell*, S.D. Cal., November 18, 2014, No. 13-CV-1435-BAS; 2014 WL 6473111. *Ronald D. Allen v. Robert H. Smith*, No. 13-5552, 9th Cir., 2015.

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. Thus, the Enrollment Committee commenced an investigation and 8 years later, we have Judge Smith's *Jeffredo* ruling.

Part of the ruling was a dissent by Judge Wilken. 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.¹⁴ Appellants allege that they are victims of the Tribal Council's greed associated with these casinos.

The majority concludes 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...

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.¹⁴" Even the majority opinion shared 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. The term "injustice" should be remembered when discussing *ex post facto* disenrollment.

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

The Indian Child Welfare Act (ICWA) of 1978¹⁵ was crafted to assist in the placing of American Indian children into culturally favorable settings in an attempt to cultivate the child's culture. ICWA was a reaction to Indian children being placed into non-Indian homes (foster or

¹⁴ The monthly amount is \$20,833.33 per individual. If the disenrolled number was 165, that would be \$3,437,500 per month and \$41,250,000 annually. This amount does not include cost of health care, education and other tribal government programs.

¹⁵ Indian Child Welfare Act, November 8, 1978, *U.S. Statute at Large*, 92: 3069, 3071-73, 3075-76.

adopted), which was “breaking-up” Indian families. ICWA went further. It extended and granted “exclusive” tribal jurisdiction over such matters.¹⁶ In *San Diego Health and Human Service Agency v. Michelle T.*,¹⁷ the intent of ICWA was defeated by disenrollment.

In 2009, at 9-months of age, K.P. and Kristopher, twins, were placed in a foster care setting; they were placed in the home of Mr. and Mrs. G. The court notified the Pala Band and Tribal Chairman Smith notified the court that the twins were eligible for enrollment. In December 2013, the G.'s, after troubled visits with the mother, Michelle T., sought more control over visits and asked San Diego County Health and Human Service Agency to reinstate dependency jurisdiction. The Pala Band of Mission Indians informed the Agency that back in February of 2012, the twins were no longer enrolled and thus not eligible for membership due to lack of proper blood quantum degree. Pala's Executive Committee (EC) adopted a revised enrollment ordinance in 2009; the twins were born in late 2008. As stated in the court decision, the new ordinance allows the EC to erase or “remove a member's name from the Pala Band's roll on a finding that an applicant misstated or omitted facts that may have made the applicant ineligible for enrollment.” As the case frames it, in 2011, the EC asserted that the ancestor of Michelle T. by which her lineage was traced, mentioned as M.B. in the court case, did not allow today's generation to meet the requirements for enrollment. Her children's “rights to tribal benefits were terminated” and were no long Indian under ICWA.

¹⁶ The Acts states: Sec. 101. (a) 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 proceedings 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...”

¹⁷ *San Diego Health and Human Service Agency v. Michelle T.*, Court of Appeal, Fourth Appellate District, Division One, State of California, Super. Ct. No. NJ10159K-L, November 10, 2015. See *Adoptive Couple v. Baby Girl*, 570 U.S. __ (2013) and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). Michelle T. is the mother of 10, including the twins, about 8 years old now, being the youngest. The father, John P., was absent throughout the proceedings.

In March of 2012, the Los Angeles Times reported a story about Margarita Owlinguish Britten who died in 1925.¹⁸ According to the Times, the EC disenrolled about 162 descendants of Margarita Britten, possibly M.B., terminating their \$7,500 per month *per capita* check along with health and education coverage.¹⁹ By reclassifying Margarita Britten as only half, today's descendants do not meet the 1/16th threshold.

Aftermath

The late 1990's and early 2000's was the beginning of the end for high stakes bingo halls and modest card rooms. In California, those days witnessed the overhauling of California's laws and constitution to gain a voter approved monopoly on gambling. Then came the erection of mega-casinos. Concurrently, approximately two-dozen tribes in California have disenrolled 3,000 Indians between 1997 and 2012. The aftermath of disenrollment for tribal people across the nation could be traumatic: loss of Indian legal status, loss of place, loss of identity and for some, loss of financial assistance.

Trauma

History is traumatic.²⁰ Effects of those experiencing disenrollment, the amputation of mind, body and spirit must have an impact on the soul. No longer included in their society, removed by legal force, their 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. As Jeffrey

¹⁸ Tony Perry, Pala Tribe Roiled by Bloodline Dispute, Los Angeles Times, March 17, 2012.

¹⁹ 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 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.

²⁰ 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.

Alexander states, trauma “is not something naturally existing; it is something constructed by society.”²¹ Thus, trauma is manmade.

Maria Yellow Horse Braveheart coined the phrase “historical trauma” back in the 1980s and the theory consists of six axioms²²:

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.

Indian Country is rife with traumatic events that commence early in childhood and for some, continue throughout life. Dr. Adachi discussed such concerns in an open letter to Indian Country regarding disenrollment²³ and she wrote that disenrollment “perpetuates historical trauma,” leading to “historical loss,” which leads to “depression, PTSD, and poly-drug use in Native youth.” The Whitbeck study in 2004 was based on 143 American Indian parents of children 10 to 12 years of age in the upper Midwest.²⁴ The historical loss segment (using the *Historical Loss Scale* and the *Historical Loss Associated Symptoms Scale*), found that loss of traditional/spiritual ways (33.4%), language (36.3%) and culture (33.7%) were consciously a daily cerebral thought. Only the effects of alcohol (the losses from the effects of alcoholism on our people) ranked higher (45.5%) as a daily thought. Regarding sadness or depression, 44% reported “sometimes” while 11.3% reported “often.” Anger registered positively at 38.1% for “sometimes” and 16.9% was reported for “often.”

²¹ Jeffery C. Alexander, *Trauma, A Social Theory*, Polity Press, 2012.

²² Vinnie Rotondaro, Reeling from the Impact of Historical Trauma, National Catholic Reporter, September 3, 2015.

²³ Dr. Katya Adachi, Association of American Indian Physicians Background Paper on Disenrollment, October 22, 2015.

²⁴ Whitbeck, L., Adams, G., Hoyt, D. and Chen, X., “Conceptualizing and Measuring Historical Trauma Among American Indian People,” *American Journal of Community Psychology*, Vol. 33., Nos. 3/4, June, 2004.

Anxiety or nervousness was also measured and 23.1% responded “sometimes” with 8.1% agreeing to “often.” 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.” The addition of such a 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?

Conclusion

As discussed, citizenship for the United States of America was, and is, considered a privilege and was, and is, a feat many aspire to achieve. Without citizenship, there are no constitutional protections. Congress has the power to extend the criteria of citizenship and give a voice to those facing 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 has a high probability of imperilment. A new set of ills has been created and only time will tell the outcome on the disenrolled community.

SAN MANUEL

BAND OF MISSION INDIANS



Deron Marquez, Ph.D.
Former Chairman

Deron Marquez served as chairman of the San Manuel Band of Mission Indians from 1999 through April 2006. In addition to leading the seven-member Business Committee, he was instrumental in designing and directing a progressive agenda of social, economic and governance development for the tribal government and community. Under his leadership, the Tribe has entered into successful business ventures with the goal of securing critical government revenues well into the future. The Tribe also enhanced its governance capabilities, instituted public services for tribal citizens and solidified intergovernmental relations at the local, state and national levels under his leadership. Marquez is a nationally-recognized speaker and lecturer on such issues as economic development, tribal governance and tribal sovereignty. He earned his undergraduate degree from the University of Arizona, a Masters degree in Politics and a Ph.D. in community health, politics and public policy from Claremont Graduate University.

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