A LEGAL HISTORY OF BLOOD QUANTUM IN FEDERAL INDIAN LAW TO 1935

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I. INTRODUCTION

The concept of blood quantum confronts anyone interested in American Indian identity in the United States. Both for federal recognition as an "Indian" and for membership in a tribal nation, a person generally must possess a threshold amount of Indian or tribal "blood," expressed as one-half, one-quarter, or some other fractional amount.[1] In this context, blood is a metaphor for ancestry, as the amount of Indian blood depends on the status of a person's lineal ancestors. For instance, a person with one Indian parent and one non-Indian parent has one-half Indian blood, while a person with one Indian grandparent and three non-Indian grandparents has one-quarter Indian blood. Intermixture between an Indian and a non-Indian reduces a resulting child's Indian blood quantum,[2] potentially jeopardizing that child's federal status as an Indian for certain purposes.[3] Even intermixture with an Indian of a different tribe reduces a resulting child's tribal blood quantum, potentially jeopardizing his or her tribal membership,[4] and indirectly his or her Indian status for other purposes.[5]

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1. *See* BUREAU OF INDIAN AFFAIRS, PHOENIX AREA OFFICE, TRIBAL ENROLLMENT 65-67, 81-85, A-4 (1984) (training manual of federal Bureau of Indian Affairs defining and discussing how to calculate blood quantum); Eric Beckenhauer, *Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161, 167 (2003) (discussing blood quantum requirements); Margo Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 279-80, 288-98, 308-12 (2001) (discussing blood quantum in survey of modern federal definitions of "Indian"); Russell Thornton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans*, 16 POPULATION RESEARCH AND POLICY REV. 33, 36-37 (1997) (discussing blood quantum and tribal membership criteria). For a graphic depiction of the staggering mathematical possibilities for a person's blood quantum, calculated from one thirty-second to sixty-three sixty-fourths, see BUREAU OF INDIAN AFFAIRS, *supra*, at 67 (chart for calculating quantum). *See also* EVA MARIE GARROUTTE, REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA 44-45 (2003).

2. *See* BUREAU OF INDIAN AFFAIRS, *supra* note 1, at 67 (chart for calculating blood quantum based on quantum of parents); GARROUTTE, *supra* note 1, at 44-45.

3. *See, e.g.*, 25 C.F.R. § 40.1 (2005) (authorizing educational loans for persons of one-quarter or more Indian blood); 25 C.F.R. § 5.1 (2005) (granting Bureau of Indian Affairs Indian employment preference to tribal members, certain descendants, and those of one-half or more Indian blood). The Ninth Circuit invalidated the educational loan provision in section 40.1 as beyond the authority of the Bureau of Indian Affairs. Zarr v. Barlow, 800 F.2d 1484, 1493-94 (1986). However, the provision still appears in the Code of Federal Regulations. 25 C.F.R. § 40.1.

4. For example, a child of a person of one-quarter Navajo blood and an Indian of a different tribe cannot be an enrolled member of the Navajo Nation, as the child has one-eighth Navajo blood. *See* 1 N.N.C. § 701 (2005) (Navajo Nation membership provision requiring one-quarter Navajo blood). If the tribe of the non-Navajo parent also bars enrollment due to blood quantum, that child might be considered ethnically or culturally Indian, but would not be a member of any tribe.

5. *See* 25 U.S.C. § 450b(e) (2000) (defining Indian as tribal member for self-determination contracts and educational assistance); *Id.* § 1903(3) (defining Indian in Indian Child Welfare Act (ICWA) as tribal member); *Id.* § 1903(4) (defining Indian child in ICWA as minor tribal member or

Classification as an Indian or non-Indian or a member Indian or non-member Indian is central to jurisdictional questions in Indian law, as both Congress and the Supreme Court demarcate federal, tribal and state authority on Indian lands based on an individual's status.[6] Further, such classification determines eligibility for a host of tribal rights and federal benefits.[7]

Blood quantum is controversial among academics, policy makers, and affected individuals both inside and outside tribal communities.[8] Some allege that the federal government applies blood quantum to eliminate its responsibilities to Indian people by legally defining Indians out of existence.[9] In

minor eligible for membership).

6. *See* 18 U.S.C. § 1152 (2000) (establishing federal criminal jurisdiction over interracial crimes but not crimes by an Indian against another Indian in Indian Country); *Id.* § 1153 (establishing federal jurisdiction over major crimes committed by Indians); 25 U.S.C. § 1301(2) (2000) (affirming tribal criminal jurisdiction over Indians); Montana v. United States, 450 U.S. 544, 566 (1981) (limiting tribal civil jurisdiction over non-Indians); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (holding that the state of Washington could tax on-reservation cigarette sales to non-Indians and non-member Indians but not member Indians); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribes have no tribal criminal jurisdiction over non-Indians); New York *ex rel.* Ray v. Martin, 326 U.S. 496, 497-501 (1946) (recognizing state jurisdiction over crimes by a non-Indian against another non-Indian committed on a reservation in that state).

7. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52-53 (1978) (describing the effects of tribal membership on the ability to vote in tribal elections and to live on Pueblo lands); 15 N.N.C. § 604 (2005) (Navajo Nation provision mandating employment preference for enrolled Navajo members); Brownell, *supra* note 1, at 279-83 (discussing Indian eligibility for various federal programs).

8. *See* GARROUTTE, *supra* note 1, at 38-60 (discussing cultural implications); PHILIP SEVERSON, I SEE THE BUFFALO, WHERE ARE THE INDIANS? (1992) (critiquing federal blood quantum rules as too lenient); CIRCE STRUM, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA (2002) (discussing use of blood quantum in Cherokee Nation); Beckenhauer, *supra* note 1, at 167-72 (discussing arguments for and against use); Ward Churchill, *The Crucible of American Indian Identity: Native Tradition Versus Colonial Imposition in Postconquest North America*, 23 AM. INDIAN CULTURE & RES. J. 39 (1999) (critiquing blood quantum policies in historical context as imposition by federal government); Raymond Fogelson, *Perspectives on Native American Identity*, *in* STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS 40, 45-48 (Russell Thornton ed., 1998) (discussing blood as one form of native identity). *See generally* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002) (discussing arguments for or against blood requirements); Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001) (advocating for membership rules not based on blood); James Hamill, *Show Me Your CDIB: Blood Quantum and Indian Identity Among Indian People of Oklahoma*, 47 AM. BEHAVIORAL SCIENTIST 267 (2003) (discussing importance of blood quantum in Oklahoma Indian communities); M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America, in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE 123 (M. Annette Jaimes ed., 1992) (critiquing blood quantum as imposed to limit federal responsibilities to Indian tribes); Melissa Meyer, *American Indian Blood Quantum Requirements: Blood is Thicker Than Family*, *in* OVER THE EDGE: REMAPPING THE AMERICAN WEST 231 (Valerie Matsumoto & Blake Allmendinger eds., 1999) (discussing history of blood quantum and potential compatibility to tribal concepts of group identity); Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689 (1995) (critiquing blood quantum in context of gaming); John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 195-96, 199-200, 217-18, 220-30 (2001) (criticizing tribal use of blood quantum in context of right of naturalization by tribes regardless of race); Pauline Turner Strong & Barrik Van Winkle, *"Indian Blood": Reflections on the Reckoning and Refiguring of Native North American Identity*, 11 CULTURAL ANTHROPOLOGY 547 (1996) (discussing issues around use); Kimberly TallBear, *DNA, Blood, and Racializing the Tribe*, 18 WICAZO SA REV. 81 (2003) (critiquing use); Terry Wilson, *Blood Quantum: Native American Mixed Bloods*, *in* RACIALLY MIXED PEOPLE IN AMERICA 108 (Maria Root ed., 1992) (discussing use). There are also numerous discussions and critiques of blood quantum on the internet. *E.g.*, Roy Cook, *Heart of Colonialism Bleeds Blood Quantum, at* http://www.americanindiansource.com/bloodquantum.html; Jack Forbes, *Blood Quantum: A Relic of Racism and Termination*, *at* http://www.yvwiiusdinvnohii.net/Articles2000/JDForbes001126Blood.htm.

9. *See, e.g.*, Churchill, *supra* note 8; Forbes, *supra* note 8; Jaimes, *supra* note 8.

the tribal membership context, some see blood quantum as a negative force allegedly imposed by the United States and at odds with traditional forms of tribal membership.[10] Others see it as a neutral method to define tribal membership when consistent with the policy goals of a tribe.[11]

While blood quantum permeates federal Indian policy, its origins are not well documented.[12] This paper is an attempt to fill the void. It traces the use of blood quantum by the federal government to 1935. This time period covers the advent of federal Indian policy to the passage of the Indian Reorganization Act,[13] a major transitional development in Indian law which set up procedures for tribes to adopt constitutions to define their membership.[14]

The article focuses on the evolution of the use of blood quantum primarily in the context of federal definitions of two separate terms, "Indian" and "tribal member," by courts, by Congress, and by the Department of Interior. Part I discusses colonial and early state uses of blood quantum. Part II discusses federal uses of blood quantum, divided into several periods of federal Indian policy.[15] Part IIA discusses the treaty period (1817-1871). Part IIB discusses the reservation period (1871-1887). Part IIC discusses the allotment period (1887-1934). Part IID discusses the 1934 Indian Reorganization Act.

In Part III the article concludes that blood quantum in federal Indian policy to 1935 is more striking for its lack of use than its application. Though early

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10. *Id. See also* Snowden et al., *supra* note 8.

11. *See, e.g.*, Beckenhauer, *supra* note 1, at 168-70 (discussing economic and sociopolitical reasons to use blood quantum); Goldberg, *supra* note 8, at 459-71 (discussing use of blood quantum as one of several potential criteria for tribal citizenship provisions).

12. Several scholars have discussed the history of legal definitions of Indian and tribal membership at specific times or concerning specific native populations, but not the legal history of blood quantum across time. *See* JACK FORBES, AFRICANS AND NATIVE AMERICANS 195-98, 211-18, 251-62 (Basil Blackwell, Inc. 1988) (discussing colonial and state definitions in context of Indian-black intermixture); Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830-1934*, 21 AM. INDIAN L. REV. 1 (1997) (discussing legal rules concerning mixed-bloods in context of legal status of Indian women); Churchill, *supra* note 8, at 46-50 (discussing blood quantum in treaty provisions and allotment); Lucy Curry, *A Closer Look at* Santa Clara Pueblo v. Martinez: *Membership by Sex, by Race, and by Tribal Tradition*, 16 WIS. WOMEN'S L.J. 161, 182-83, 191-92, 194-99 (2001) (discussing late nineteenth and early twentieth century definitions); Fogelson, *supra* note 8, at 45-48 (discussing linguistic and legal origins); Forbes, *supra* note 8; Meyer, *supra* note 8, at 232-33, 239-40 (discussing history in treaties and enrollment); David E. Wilkins, *The Federal Courts and Indigenous Identity*, 13 W. LEGAL HIST. 83 (2000) (reviewing federal case law on the definition of Indian). Even for works that do discuss the history of blood quantum, some scholars erroneously have attributed its first application to the 1887 General Allotment Act, 24 Stat. 338 (codified as amended at 25 U.S.C. §§ 331-358 (2000)), and its implementation. *See, e.g.*, Churchill, *supra* note 8, at 50; Gould, *supra* note 8, at 720; Jaimes, *supra* note 8, at 126. As will be discussed below, the origins of blood quantum are much earlier, *see infra* text accompanying notes 19-25, and neither the General Allotment Act nor any administrative or judicial implementation applied blood quantum, *see infra* text accompanying notes 190-240, 254-69, 273-95. *See generally* John LaVelle, *The General Allotment Act "Eligibility" Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 WICAZO SA REV. 251 (1999) (discussing erroneous history of blood quantum).

13. Act of June 18, 1934, ch. 576, 48 Stat. 984 [hereinafter Indian Reorganization Act] (codified as amended at 25 U.S.C. §§ 461-79 (2000)).

14. *See id.* § 16. Tribes can adopt their own statute or constitutional provision to define their membership even if they voted not to adopt the IRA. *See, e.g.*, 1 N.N.C. § 701 (2005) (Navajo Nation membership provision requiring one-quarter Navajo blood).

15. These divisions into periods of federal Indian policy primarily are for convenience of organization, though they track several significant legal and policy shifts, such as the end of treaty making and the beginning of allotment. Different scholars have constructed similar divisions. *See, e.g.*, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-150 (1982 ed.).

federal officials were aware of blood quantum and used it in scattered situations for specific purposes, they generally preferred definitions that applied matrilineal or patrilineal descent or tribal membership. Blood quantum became an important method of defining Indian and tribal membership only in the early twentieth century. By the passage of the Indian Reorganization Act, blood quantum was firmly entrenched in federal Indian policy, though it existed alongside political definitions of Indian status. The shift from the almost exclusive use of political definitions to the selective use of biological ones tracks the changing perception of the federal government's relationship to Indian tribes. Ultimately, the lack of consistency in applications of blood quantum reflects the failure of the United States to reconcile the foundational contradictions of federal Indian law.

II. COLONIAL AND STATE USES OF BLOOD QUANTUM

To understand the federal use of blood quantum, it is important to recognize its antecedents. The use of fractional amounts of blood to describe ancestry long predates the question of mixed-race ancestry. An ancient rule of English common law distinguishes between "whole blood" and "half blood" relatives for purposes of inheritance.[16] Like blood quantum, the concept of whole and half blood divides different bloods to define legal status, distinguishing persons with the same parents from those with only one parent in common.[17] As described in William Blackstone's *Commentaries*, the distinction arose because, "[A]s every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath . . . all the same ingredients in the composition of his blood that the other hath."[18]

British colonies and later states similarly applied fractionated amounts of blood to define the legal status of mixed-race people for various purposes. Initially articulated in terms of the number of generations from an unmixed black or Indian ancestor,[19] colonies and states declared certain persons ineligible to

16. *See* FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 301-05 (1959) (discussing use in thirteenth and fourteenth century England).

17. *See* BLACK'S LAW DICTIONARY 164 (7th ed. 1999).

18. 2 WILLIAM BLACKSTONE, COMMENTARIES *227. For a general discussion of the concept of blood in Europe and other societies, see MELISSA MEYER, THICKER THAN WATER: THE ORIGINS OF BLOOD AS SYMBOL AND RITUAL (2005).

19. *See, e.g.*, Act of June 28, 1746, ch. II, § L, 23 STATE RECORDS OF NORTH CAROLINA 252, 262 (Walter Clark ed., 1904) (prohibiting testimony in court against whites by "Negroes, Mulattoes, bond and free, to the Third Generation"); Act of Apr. 4, 1741, ch. I, § XIII, 23 STATE RECORDS OF NORTH CAROLINA, *supra* at 158, 160 (assessing fine against any white person who marries an "Indian, Negro, Mustee, or Mulatto Man or Woman, or any Person of Mixed Blood, to the Third Generation"); Act of Nov. 23, 1723, ch. V, § II, 23 STATE RECORDS OF NORTH CAROLINA, *supra* at 106 (assessing tax on "free Negroes, Mulattoes, and other Persons of that kind, being mixed Blood, including the Third Generation"); 1705 Va. Acts ch. IV, 3 STATUTES AT LARGE 250, 252 (William Waller Hening ed., 1823) (defining mulatto as "the child of an Indian and child, grand child, or great grandchild, of a negro"). One intriguing possibility for the origin of the use of "the third generation" to define status is a passage from the biblical Book of Deuteronomy, which, in the King James translation, has almost identical language. *See Deuteronomy* 23:8 (King James). Under the Mosaic Law the children of Egyptians and Edomites were allowed in the congregation "in their third generation." *Deuteronomy* 23:7-8 (King James). Whether consistent with the original intent or not, several later writers have interpreted this passage as defining the status of children of mixed marriages. *See* 5 THE JEWISH ENCYCLOPEDIA 40, 41 (Isidore Singer ed., 1943); DANIEL WILSON, PREHISTORIC MAN: RESEARCHES

testify in court proceedings, marry whites or for other purposes by the amount of Indian or black blood.[20] One of the earliest examples is a Virginia statute in 1705, which defined "mulatto" in a statute barring mulattos and others from holding public office as "the child of an Indian and child, grandchild or great grandchild of a negro."[21] Virginia also appears to have been the first to articulate a specific amount of blood, by defining mulatto in 1785 for various purposes as:

> [E]very person of whose grandfathers or grandmothers any one is or shall have been a Negro, although all his other progenitors, except that descending from the Negro shall have been white persons . . . and so every person who shall have *one-fourth or more Negro blood*, shall, in like manner be deemed a mulatto.[22]

In 1866 Virginia extended blood quantum to define Indian as "every person, not a colored person, having one-fourth or more of Indian blood."[23] Other nineteenth-century state statutes defined Indian for various purposes by blood quantum.[24] State courts also adopted the language of blood for purposes such as voting and interracial marriage prohibitions.[25]

INTO THE ORIGIN OF CIVILISATION IN THE OLD WORLD AND THE NEW WORLD 520 (London, MacMillan 1865). Interestingly, North Carolina extended the restriction to the "fourth generation" in later statutes. *See, e.g.*, Act of Nov. 15, 1777, ch. II, § XLII, 24 STATE RECORDS OF NORTH CAROLINA 48, 61 (Walter Clark ed., 1905) (making "all Persons of mixed Blood, descended from Negro and Indian Ancestors, to the fourth Generation inclusive (though one Ancestor of each Generation may have been a white Person)" incapable of testifying as a witness); Act of Apr. 14, 1749, ch. III, § II, 23 STATE RECORDS OF NORTH CAROLINA, *supra* at 310, 345 (deeming taxable persons to include "Persons of Mixt Blood, to the Fourth Generation").

20. *See, e.g.,* Act of Apr. 8, 1777, ch. II, § XLII, 24 STATE RECORDS OF NORTH CAROLINA, *supra* note 19, at 48, 61 (making "all Persons of mixed blood, descended from Negro or Indian ancestors, to the fourth Generation inclusive (though one Ancestor of each Generation may have been a white Person)" incapable of testifying as a witness); Act of Mar. 17, 1749, ch. III, § II, 23 STATE RECORDS OF NORTH CAROLINA, *supra* note 19, at 342, 345 (deeming taxable persons to include "Persons of Mixt Blood, to the Fourth Generation"); Act of Dec. 5, 1746, ch. II, § L, 23 STATE RECORDS OF NORTH CAROLINA, *supra* note 19, at 251, 262 (prohibiting testimony in court against whites by "Negroes, Mulattoes, bond and free, to the Third Generation"); Act of Apr. 4, 1741, ch. I, § XIII, 23 STATE RECORDS OF NORTH CAROLINA, *supra* note 19, at 158, 160 (assessing fine against any white person who marries an "Indian, Negro, Mustee, or Mulatto Man or Woman, or any Person of Mixed Blood, to the Third Generation"); Act of Nov. 23, 1723, ch. V, § II, 23 STATE RECORDS OF NORTH CAROLINA, *supra* note 19, at 103, 106 (assessing tax on "free Negroes, Mulattoes, and other Persons of that kind, being mixed Blood, including the Third Generation"); 1705 Va. Acts ch. IV, 3 STATUTES AT LARGE, *supra* note 19, at 250, 252 (defining mulatto as "the child of an Indian and child, grand child, or great grandchild, of a negro"). For other examples, see FORBES, *supra* note 12, at 195-98, 211-18, 251-62. For a description of the origins of Indian–non-Indian intermixture in the present day United States, see THOMAS N. INGERSOLL, TO INTERMIX WITH OUR WHITE BROTHERS: INDIAN MIXED BLOODS IN THE UNITED STATES FROM EARLIEST TIMES TO THE INDIAN REMOVALS 3-76 (2005).

21. 1705 Va. Acts ch. IV, 3 STATUTES AT LARGE, *supra* note 19, at 250, 252.

22. 1785 Va. Acts ch. LXXVIII, § 1, 12 STATUTES AT LARGE 184 (William Waller Hening ed., 1823) (emphasis added).

23. Act of Feb. 27, 1866, ch. 17, § 1, 1866 Va. Acts 84, 84.

24. *See, e.g.*, Act of Oct. 24, 1866, § 1, 1866 Or. Acts 10 (barring marriage of white person and "any person having more than one-half Indian blood"); Act of May 15, 1854, ch. III, § 42, 1854 Cal. Stat. 84, 94 (barring those of one-half or more Indian blood from testifying in case where white person was a party); Act of Apr. 29, 1851, ch. V, § 394(3), 1851 Cal. Stat. 51, 114 (barring those of one-fourth or more Indian blood from testifying in case where white person was a party); Act of Feb. 3, 1841, ch. LI, § 4, 1841 Ind. Gen. Laws 134 (banning writs of *capias ad respondendum* (commanding sheriff to take person into custody for court appearance) against any Indian, defined as one-eighth or more and tribal member); Act of Jan. 21, 1837, ch. VIII, 1837 N.C. Laws 30 (requiring written agreement, signature, and two witnesses for contracts with Cherokee Indian or "person of Cherokee Indian blood, within the second degree").

25. *See, e.g.*, Smith v. Jeffries, 25 Ind. 376 (1865) (holding that person of one-eighth Indian blood could vote as a white citizen); Bailey v. Fiske, 34 Me. 77 (1852) (finding woman of one-sixteenth Indian

Slaves were a special class for state courts, as courts used the language of blood to describe the ancestry of slaves, but applied a rule of matrilineal descent to decide whether individuals were legally slaves or free. Slaves filed emancipation suits claiming they were entitled to freedom because a maternal ancestor was a free white or Indian person.[26] In these and other cases concerning slave status, state courts applied a common law rule known as *partus sequitur ventrem* ("the offspring follows the mother").[27] Under that doctrine a slave took the status of his or her mother, regardless of the amount of white, black, or Indian ancestry.[28] Therefore, a slave could by blood quantum standards be one-quarter or one-eighth black by blood, and have the physical appearance of a white or Indian person (subjectively defined), but still be a slave by law.[29] However, if the slave could prove that he or she had a maternal ancestor who was a free white or Indian, the court could declare that slave legally free.[30]

Courts struggled with this rule, as, in the absence of documents, the slave and master fought over how to prove maternal ancestry. An 1806 case from Virginia, *Hudgins v. Wrights*, is a good example.[31] Faced with a situation where no reliable records on the race of the plaintiffs' ancestors existed,[32] the court set up presumptions in the law of evidence based on physical appearance.[33] If a slave looked Indian or white, the master had to prove he or she descended from slaves in the maternal line.[34] If the slave looked black, the slave had to prove he or she descended from a free Indian or white.[35] Interestingly, the court used the language of blood to describe ancestry and its effect on physical features. Judge

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blood could not legally marry mulatto because she was legally white); Inhabitants of Medway v. Inhabitants of Natick, 7 Mass. 88 (1810) (holding offspring of half-black, half-white parent and white parent not a mulatto under law outlawing marriage between mulattos and whites); Jeffries v. Ankeny, 11 Ohio 372, 375 (1842) (finding person of one-quarter Indian blood could vote as a "free white citizen"); Gray v. Ohio, 4 Ohio 353, 353-54 (1831) (determining that negro could not testify against person of one-quarter negro blood, because statute defines "quarteroon" as white and therefore "a party of such a blood" has the "privileges of whites"). For a general survey of southern cases, see Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

26. *See, e.g.*, Daniel v. Guy, 19 Ark. 121 (1857); Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806). For a detailed discussion of these and other cases, see Jason Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535 (2004).

27. *See, e.g.*, *Hudgins*, 11 Va. (1 Hen. & M.) at 137.

28. *See, e.g.*, *Daniel*, 19 Ark. at 132, 135; Gaines v. Ann, 17 Tex. 211, 214-15 (1856); *Hudgins*, 11 Va. (1 Hen. & M.) at 137.

29. *See, e.g.*, *Daniel*, 19 Ark. at 135 (rejecting jury instruction that set slave status threshold at one-fourth "negro blood"); *Gaines*, 17 Tex. at 215. In *Gaines*, a woman of one-eighth black blood, identified only as "Ann," failed to win her freedom. *See id.* The Texas Supreme Court reversed the jury verdict in her favor, despite testimony by two doctors that they "could not detect any of the indicia of African blood in her, but that a person who was only one eighth of the African blood might not show any signs of the existence of that blood." *Id.* at 214. Ultimately the court concluded that Ann was a slave and that "[h]er child, if by a white man . . . following the status of its mother . . . would be a slave, and it would so descend, *ad infinitum*, so long as the descent from a slave mother could be traced." *Id.* at 215. For a similar discussion of Indian identity, but reaching the opposite conclusion, see *infra* text accompanying note 231.

30. *See, e.g.*, *Hudgins*, 11 Va. (1 Hen. & M.) at 140, 143.

31. 11 Va. (1 Hen. & M.) 134.

32. *See id.* at 137.

33. *See id.* at 140.

34. *See id.*

35. *See id*.

Tucker described an ancestor of the plaintiffs as having "long black hair . . . [and] a copper complexion . . . a circumstance which could not well have happened, if her mother had not had an equal, or perhaps a larger portion of Indian blood in her veins."[36] Ultimately, according to the evidence, the plaintiffs possessed "entirely the appearance of white people,"[37] and the maternal ancestor, according to witness testimony, had looked Indian.[38] Lacking sufficient evidence by the defendant to overcome the presumption of their appearance, all the judges concurred that they should be declared free.[39]

In non-slave cases, some state courts recognized mixed-bloods as Indians, at least for purposes of legal incapacities imposed on Indians under state laws. Two cases applied a straight political or social test to define Indian. In *Inhabitants of Andover v. Inhabitants of Canton*, two towns in Massachusetts argued over which town was responsible to financially support a pauper who was the child of a slave father and a half-white, half-Indian mother.[40] The answer depended, in part, on whether the mother was legally affiliated with the Punkapoag tribe, whose members lived within the boundaries of the town of Canton, but paid no taxes and were not legally considered residents of the town for purposes of Canton's financial responsibility.[41] The court first concluded that the pauper was not born a slave under *partus sequitur ventrem* because his mother was a free person.[42] The court then identified the mother as a mulatto and concluded that she was a Punkapoag because "it [was] immaterial, whether she was a mulatto or not, provided she associated with the tribe, making one of their number."[43] In *Wall v. Williams*,[44] the Alabama Supreme Court ruled that a woman of one-half Choctaw blood who remained in the state after removal of most of the tribe was an Indian for purposes of a statute requiring two witnesses to a contract with an Indian.[45] The court concluded that:

> In common parlance, the word "Indians," includes not only those who have no admixture of blood with the white or negro races, but those descendants of Indians who have become thus mixed, yet retain their distinctive character as members of the tribe from which they trace their descent.[46]

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36. *Id.* at 137.

37. *Id.* at 141.

38. *Id.* at 142.

39. *See id.* at 136, 141, 143.

40. 13 Mass. (12 Tyng) 547 (1816). The question turned on the concept of "settlement," which allocated responsibility between towns or districts to support poor residents. *See id.* Settlement in a particular town conferred the right to a pauper to *see* k aid from that town. *See* BLACK'S LAW DICTIONARY 1539 (4th ed. 1968). For a discussion of the Massachusetts law of "settlement" and its effect on former slaves, see Kunal M. Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75 (2001).

41. *See Andover*, 13 Mass. (12 Tyng) at 547, 554.

42. *See id.* at 551-53.

43. *Id.* at 553. The court ultimately ruled against Andover, holding that the pauper did not have a settlement in Canton due to the slave status of his father and the Punkapoag status of his mother. *See id.* at 554-55.

44. 11 Ala. 826 (1847).

45. *See id.* at 836.

46. *Id.* at 836.

In *Doe v. Avaline*,[47] the Indiana Supreme Court applied a hybrid biological-political rule to a woman of three-eighths Miami Indian blood to invalidate a will she made without the state legislature's approval.[48] The court noted that the deceased was "an Indian, in the ordinary and popular acceptation of the term," as the Miami tribe and state and federal authorities recognized her as a tribal member, and she had spoken the Miami language.[49] Further, the court observed that since December, 1842, more than half of "persons known, called, and recognized as Indians in [Indiana], were not full bloods, but mixed, being part white."[50] Based on this evidence, the court rejected a rule defining Indian as those with a "preponderance" of Indian blood.[51] Ultimately, the court interpreted a statute requiring legislative approval for Indian contracts *in pari materia*[52] with an 1841 statute[53] that defined Indian for purposes of barring a certain type of writ as "all persons of Indian descent, who are recognized [sic] as members of any tribe residing in the State of Indiana, down to those having one-eighth Indian blood."[54] As she had three-eighths Indian blood, and was a member of the Miami tribe, she was an Indian and therefore her will was invalid.[55]

There is little evidence, in terms of citations in decisions or references in administrative or congressional discussions, that federal officials directly applied colonial or state approaches. Early federal officials were clearly conversant in the language of blood applied in colonial and state law.[56] Further, as will be discussed below, there are a few scattered citations to state statutes or case law,[57] including *Hudgins v. Wrights*,[58] concerning *partus sequitur ventrem*.[59] The important thing is that blood quantum existed before the extension of federal authority over tribal territory, and was not created specifically for it. As the United States expanded and interacted with more tribal nations, officials brought a pre-existing language of blood that they would apply in different ways to define Indians.

47. 8 Ind. 6 (1856).

48. *See id.* at 14-15.

49. *Id.* at 16-17.

50. *Id.* at 14.

51. *See id*.

52. BLACK'S LAW DICTIONARY 1270 (7th ed. 1999). *In pari materia* is a rule of interpretation that statutes concerning the same subject can be interpreted together. *See id.*

53. Act of Feb. 3, 1841, ch. LI, § 4, 1841 Ind. Gen. Laws 134.

54. *Doe*, 8 Ind. at 15.

55. *See id.* at 14-17.

56. *See, e.g.*, 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, 331, 454 (1832) (containing 1792 and 1793 reports of federal officials referencing "half-breeds" among Creeks and Cherokees); JEDEDIAH MORSE, REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS 24, 33, 37, 50, 58, 64, 69-70, 73, 190 (1822) (reporting on condition of Indian tribes to federal government and describing various individuals as "full" or "mixed" blood).

57. *See, e.g.*, United States v. Sanders, 27 F. Cas. 950, 951-52 (C.C.D. Ark. 1847) (No. 16,220) (citing state slave cases); *In re* Camille, 6 F. 256, 258 (C.C.D. Or. 1880) (citizenship case, which cites state law defining "white person").

58. 11 Va. (1 Hen. & M.) 134 (1806). For a discussion of the case, see *supra* text accompanying notes 31-39.

59. *See Sanders*, 27 F. Cas. at 951-52.

III. FEDERAL USES OF BLOOD QUANTUM

Inconsistency is the main theme in federal applications of blood quantum. The branches of the federal government took different positions and applied different approaches to the definition of Indian and tribal membership. The definition depended on the purpose of the federal action. The resulting muddle shows that there has never been a uniform application of blood quantum in federal Indian law.

The primary cause of the inconsistency was the lack of any clear guidance by Congress, the branch of the federal government with primary authority over Indian affairs under the United States Constitution.[60] Congress did not attempt to define Indian status until the late nineteenth century, and then did so primarily in the context of the distribution of Indian property and the allotment of Indian lands.[61] Without statutory definitions, courts and executive branch officials applied varying rules to specific situations, utilizing the language of blood, but not necessarily applying blood quantum to divide Indian from non-Indian or tribal member from non-member.

A. THE TREATY PERIOD (1817-1871)

1. Treaty Provisions

Treaties are an important place to begin in a discussion of blood quantum in federal Indian policy, as the United States initially adopted the colonial and state policy of negotiating treaties with tribes as sovereign political entities for various purposes, including ceding tribal land to the United States.[62] Treaties involved two branches of the federal government, as they were negotiated with tribal leaders by representatives of the President and ratified by a two-thirds vote of the Senate.[63] Though Congress passed general legislation concerning Indian affairs in the early nineteenth century, especially concerning trade,[64] treaties were the primary documents that defined the legal relationship between the United States and tribes up to the abolition of treaty-making by Congress in 1871.[65]

It is clear from early treaty negotiations that federal officials used the language of blood to describe people of mixed Indian and non-Indian ancestry. For example, federal officials, including Andrew Jackson, lamented the purportedly negative influence of "half-breeds" in encouraging resistance to

60. *See* U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has developed out of this clause, known as the Indian Commerce Clause, the notion that Congress possesses "plenary power" over Indian affairs. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). Under plenary power, Congress has primary authority over Indian affairs among the branches of the federal government, and may control or regulate the powers of Indian tribes, including dissolving tribes as political entities. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978).

61. *See infra* text accompanying notes 244-69.

62. *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (Univ. of California Press 1994).

63. *See* U.S. CONST. art. II, § 2.

64. *See, e.g.*, Act of June 30, 1834, ch. 161, 4 Stat. 729.

65. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2000)).

removal of the Five Civilized Tribes[66] in the early 1800s.[67] In these and other discussions, federal officials identified individuals by blood, whether by specific amounts, such as "one-fourth Indian," three-fourths "white," "full-blooded," or by the general term "half-breed."[68] However, though blood quantum was a linguistic description of ancestry in these early discussions, there was no legal significance attributed to it.

References in treaties to "half-bloods," "half-breeds" or "quarter-bloods" began in 1817 in provisions granting various benefits to mixed individuals.[69] Treaties with the Sac and Fox (1824), and the Sioux, Omaha, Iowa, and Ottoe tribes (1830) granted separate reservations for "half-breeds."[70] Treaties with the Chippewa, Ottawa, Menominee and other tribes granted monetary payments to "half-breeds" or "mixed-bloods."[71] Two 1837 treaties granted payments to individuals of "not less than one-quarter" Winnebago and Sioux blood, using specific fractional amounts of blood instead of the general term half-breed.[72]

66. The Five Civilized Tribes are the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles. Despite resistance by mixed-bloods and other Indians, most of those tribes, including mixed-bloods, were removed to the Indian Territory, which became the state of Oklahoma. *See generally* GRANT FOREMAN, INDIAN REMOVAL (1972).

67. *See* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 232, 234, 236-37, 239, 241-43 (1834) (1820 discussion of Choctaw treaty negotiations); INGERSOLL, *supra* note 20, at 224 (discussing attitude of federal officials toward mixed-blood anti-removal); THEDA PERDUE, "MIXED BLOOD" INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH 70-71, 95-96 (2003) (discussing Andrew Jackson's complaints of half-breed influence over Chickasaws in 1816).

68. 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 241, 242, 243, 278 (1834); 4 AMERICAN STATE PAPERS: PUBLIC LANDS 858-59 (1859) (1826 application of Creek half-breeds to sell land). The term half-breed, though suggesting persons of exactly half Indian and half non-Indian blood, appears to have been a more elastic term roughly synonymous with mixed-blood. *See infra* text accompanying notes 118-23.

69. *See, e.g.*, Treaty with the Sac and Fox art. 4, Sept. 28, 1836, 7 Stat. 517, 518; Treaty with the Ottawa art. 14, Aug. 30, 1831, 7 Stat. 359, 362; Treaty with the Shawnee art. 13, Aug. 8, 1831, 7 Stat. 355, 358 (referring to "quarter blooded Shawnee"); Treaty with the Chippewa art. 4, Aug. 5, 1826, 7 Stat. 290, 291; Treaty with the Kansas art. 6, June 3, 1825, 7 Stat. 244, 245; Treaty with the Osage art. 5, June 2, 1825, 7 Stat. 240, 241; Treaty with the Quapaw art. 7, Nov. 15, 1824, 7 Stat. 232, 233; Treaty with the Miami art. 3, Oct. 6, 1818, 7 Stat. 189, 191; Treaty with the Wyandot art. 8, Sept. 29, 1817, 7 Stat. 160, 163-164. Some of the beneficiaries of these provisions named in the treaties were mixed French and Indian, resulting from French fur-trading and settlement. For descriptions of the *métis*, or French mixed-blood communities in the Great Lakes and other former French areas, see TANIS THORNE, THE MANY HANDS OF MY RELATIONS: FRENCH AND INDIANS ON THE LOWER MISSOURI (1996); Jacqueline Peterson, *Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815*, *in* THE NEW PEOPLES: BEING AND BECOMING MÉTIS IN NORTH AMERICA 37, 39 (Jacqueline Peterson & Jennifer S.H. Brown eds., 1985).

70. Treaty with the Sac and Fox, Sioux, and Omaha art. 9-10, July 15, 1830, 7 Stat. 328, 330; Treaty with the Sac and Fox art. 1, Aug. 4, 1824, 7 Stat. 229, 229. For a discussion of the implementation of the 1824 Sac and Fox reservation and the Sioux reservation provisions, see *infra* text accompanying notes 96-123. The Omaha half-breed land was known as the Nemaha Half-Breed Reservation. *See* Berlin Chapman, *The Nemaha Half-Breed Reservation*, 38 NEBR. HIST. 1 (1957). For the history of that reservation, see THORNE, *supra* note 69, at 214-20; Chapman, *supra*; Robert L. Bohlken and James C. Keck, *An Experience in Territorial Social Compensation: Half Breed Tract, Nebraska Territory*, 34 NORTHWEST MO. ST. U. STUD. 1 (1973).

71. Treaty with the Yankton Sioux art. 6, Apr. 19, 1858, 11 Stat. 743, 746; Treaty with the Chippewa art. 2, Aug. 2, 1855, 11 Stat. 631; Treaty with the Chippewa art. 3, Feb. 22, 1855, 10 Stat. 1165, 1167; Treaty with the Menominee art. 4, Oct. 14, 1848, 9 Stat. 952; Treaty with the Chippewa art. 4, Oct. 4, 1842, 7 Stat 591, 593; Treaty with the Chippewa art. 3, July 29, 1837, 7 Stat. 536, 537; Treaty with the Menominee art. 2, Sept. 3, 1836, 7 Stat. 506, 507; Treaty with the Ottawa, art. 6, Mar. 28, 1836, 7 Stat. 491, 493.

72. Treaty with the Winnebago art. 4, Nov. 1, 1837, 7 Stat. 544, 545; Treaty with the Sioux, art. 2, Sept. 29, 1837, 7 Stat. 538, 539.

Later treaties granted land or land certificates (scrip) to "half-breeds" or "mixed bloods" connected to various tribes.[73]

Importantly, blood quantum in these treaties defined entitlement to specific property or benefits, and not membership in those tribes or Indian status for all purposes.[74] Also, the amount of blood needed for entitlement varied from treaty to treaty, reflecting the unique situations of particular tribal groups at particular times. These provisions, as articulated by the federal officials who drafted them, and seemingly approved by tribal officials who signed the treaties,[75] set an important pattern for later federal uses of blood quantum. The use of blood was situational, and did not define Indian or tribal membership generally. However, later courts and executive officials used these provisions out of context to bolster their positions that mixed-bloods were or were not Indians or tribal members.[76]

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73. *See, e.g.*, Treaty with Cheyennes and Arapahoes art. 5, Oct. 14, 1865, 14 Stat. 703, 705; Treaty with the Osage art. 14, Sept. 29, 1865, 14 Stat. 687, 689; Treaty with the Chippewa art. 7, Apr. 12, 1864, 13 Stat. 689, 690 (revising 1863 treaty to distribute scrip in lieu of land); Treaty with the Chippewa art. 8, Oct. 2, 1863, 13 Stat. 667, 669; Treaty with the Kansas art. 9, Oct. 5, 1859, 12 Stat. 1111, 1113; Treaty with the Sacs and Foxes art. 10, Oct. 1, 1859, 15 Stat. 467, 470; Treaty with the Chippewa art. 2, Sept. 30, 1854, 10 Stat. 1109, 1110 (discussing Chippewa half-breed scrip). The issuance of half-breed scrip under the 1854 and 1864 treaties with the Chippewa was very controversial, as, like other benefits to mixed-bloods under these treaties, see *infra* text accompanying notes 88-95, 117, whites speculated in mixed-bloods' claims. *See* H.R. Ex. Doc. NO. 42-193, at 55-65 (1872); 1 WILLIAM WATTS FOLWELL, A HISTORY OF MINNESOTA 470-78 (1921).

74. It may be that the concept of membership as that term is used now did not exist at the time of the early treaties. Therefore it may be anachronistic to expect these treaties to define the status of mixed-bloods as members of a tribe one way or another. However, it is clear that by the 1850s the notion of tribal membership did exist for federal purposes, at least in terms of entitlement to annuities and other benefits accruing to those considered affiliated with a tribe. *See infra* text accompanying notes 77-83. One scholar has suggested that the entire notion of membership is a federal imposition having little to do with traditional notions of belonging in tribal communities. *See* Curry, *supra* note 12, at 181.

75. It is an interesting question whether tribal representatives in treaty negotiations understood and agreed to the use of blood quantum in these treaties, or if federal drafters translated their requests to grant land or money to people of mixed descent into the existing English language concept of blood. The United States Supreme Court rule of interpretation of treaty language arises, in part, from the conclusion that federal officials were the superior negotiators and that Indians were unfamiliar with the nuances of the English language. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979). Under this rule federal courts must interpret treaty provisions liberally, with ambiguities resolved in the tribe's favor. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999). Whether the historical record bears this out in each treaty negotiation is an open question. It is clear that by the early twentieth century some tribal leaders themselves used the language of blood and descent to debate how to define membership, though their understanding of those terms may have differed from that of federal officials. *See* Alexandra Harmon, *Tribal Enrollment Councils: Lessons on Law and Indian Identity*, 32 W. HIST Q. 175, 190-98 (2001) (discussing the decision process of Colville tribal officials regarding allotment eligibility). Whether both sides of the negotiation used the language of blood to create the early treaty provisions is unclear. There is at least one allegation that the Sioux understood half-breed to mean mixed-blood regardless of blood quantum in the context of the treaty of 1830. *See infra* text accompanying note 120. There is surely a wealth of material to be discovered concerning the tribal understanding and use of terms like half-breed and mixed blood that may have informed the language of the treaties. As such discussion is beyond the scope of this paper, the author can only encourage others to explore these issues.

76. *See, e.g.*, United States v. First Nat'l Bank, 234 U.S. 245, 250 (1914) (describing position of federal officials that separate treaty provisions for half-breeds meant that they were not considered Indian); United States v. Higgins, 103 F. 348, 350-51 (C.C.D. Mont. 1900) (stating that treaty provisions recognize mixed-bloods as Indians); Black Tomahawk v. Waldron, 17 Pub. Lands Dec. 457, 462 (1893) (stating that treaty provisions show that mixed-bloods are not Indians, as separate provisions had to be included in treaty for their benefit). This is not to say that federal officials at the time did not attempt to separate Indians and mixed-bloods through land grants or payments to mixed-bloods. *See* INGERSOLL, *supra* note 20, at 221-28. Some federal officials did see such treaty provisions as inducement for mixed-bloods to remain while full-bloods removed to areas farther from white settlement. *See id.* at 222, 225-26. However, it is clear that not all mixed-bloods stayed, see, *e.g., id.* at 230, 234 (describing Cherokee

The United States does acknowledge mixed-bloods explicitly as tribal members in a few treaties.[77] Treaties with the Chippewa, Omaha, Pawnee, Ponca, and Winnebago each contain provisions recognizing mixed-bloods as tribal members.[78] The Chippewa treaty states that "the half or mixed bloods of the Chippewas residing with them shall be considered Chippewa Indians, and shall, as such, be allowed to participate in all annuities which shall hereafter be paid . . . ."[79] Both the Pawnee and Ponca treaties distinguish between "half-breeds" who choose to live with the tribe and those who choose to leave the tribe to live "among the whites [to] follow the pursuits of civilized life . . . ."[80] Those who stay with the tribe "enjoy all the rights and privileges of members of the tribe . . . ."[81] The Winnebago and Omaha treaties recognize "members of the tribe, including their half or mixed blood relatives now residing with them" as eligible for land distribution.[82] Finally, treaties with the Sac and Fox and Chippewa, though not explicitly recognizing mixed-bloods as members, include almost identical provisions requiring mixed-bloods to reside with the tribe on their reservation to receive tribal benefits.[83]

2. Federal Performance of Treaty Obligations

After the Senate ratified the treaties, officials performing federal treaty obligations had to decide whether mixed-bloods were legally Indian for various purposes. The issues were whether mixed-bloods were a separate tribe for land cessions, and, importantly, whether mixed-bloods were subject to restrictions imposed by the federal government as guardian of Indians.

While the President and Senate dealt with tribes as sovereign political entities through negotiation of treaties, the federal government asserted a second role as the protector of Indian wards. In the seminal Supreme Court case *Cherokee Nation v. Georgia*,[84] Chief Justice John Marshall stated that the United States had a relationship with tribes resembling that of a "guardian" to a "ward."[85] According to Marshall, tribes were in a "state of pupilage" as "domestic dependent nations" under the protection of the federal government.[86] Congress and the executive branch asserted this guardianship authority in significant ways to control Indian lands, money, and, importantly, transactions

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and Potawatomi mixed-bloods removed despite resistance), and some who received these benefits returned to their tribes, see, *e.g., infra* note 228.

77. The use of the present tense for these provisions reflects that they may still be in effect and enforceable.

78. Treaty with the Omaha art. 4, Mar. 6, 1865, 14 Stat. 667, 668; Treaty with the Winnebago art. 1, Apr. 15, 1859, 12 Stat. 1101, 1101; Treaty with the Ponca art. 3, Mar. 12, 1858, 12 Stat. 997, 999; Treaty with the Pawnee art. 9, Sept. 24, 1857, 11 Stat. 729, 731-32; Treaty with the Chippewa art. 4, Aug. 2, 1847, 9 Stat. 904, 905.

79. Treaty with the Chippewa, *supra* note 78, art. 4.

80. Treaty with the Ponca, *supra* note 78, art. 3; Treaty with the Pawnee, *supra* note 78, art. 9.

81. *Id.*

82. Treaty with the Omaha, *supra* note 78, art. 4; Treaty with the Winnebago, *supra* note 78, art. 1.

83. Treaty with the Chippewa art. 4, Mar. 19, 1867, 16 Stat. 719, 720; Treaty with the Sac and Fox art. 7, Mar. 6, 1861, 12 Stat. 1171, 1173.

84. 30 U.S. (5 Pet.) 1 (1831).

85. *Id.* at 17.

86. *Id.*

with non-Indians.[87]

The construction of the federal government's role as guardian entered into the distribution of treaty payments to mixed-blood beneficiaries. The payment to those of one-quarter or more Winnebago blood under the 1837 treaty[88] presented the question of whether the mixed-blood beneficiaries could legally sign agreements, such as powers of attorney, with non-Indians.[89] In 1839 the commissioners appointed by the President to distribute the payments published a list of claimants, including the "degree of relationship," or blood quantum, of each mixed-blood.[90] Some mixed-bloods assigned their claims to non-Indian speculators instead of taking the payments themselves.[91] The official charged with making the payments asked for guidance from the Secretary of War,[92] as, according to his interpretation of federal regulations, whites could contract to sell their claims while Indians could not. However, according to the official:

> Half-breeds are neither white men nor Indians, as expressed in their name; and the proper treatment of them is neither defined in the regulations, nor, perhaps, established by usage. If it is said they are not Indians, and must therefore be treated as white men, it may more plausibly be said that they are not white men, and ought therefore to be treated as Indians, as they unquestionably have been in almost all treaties containing stipulations in their favor …. It is against all knowledge (although there may be exceptions) to suppose the half-breeds are acquainted with the power of attorney or bills of exchange; and to discuss a question concerning them, upon a presumption of their moral responsibility to our laws and usages, is, to my mind, an absurdity.[93]

In the end, the House of Representatives ordered the Secretary of War to report on his department's handling of the transactions between the mixed-bloods and speculators.[94] The Secretary of War informed the House that his department would not recognize the transactions, concluding that the mixed-bloods were subject to federal controls over Indian contracts.[95]

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87. *See, e.g.*, Act of Mar. 3, 1847, ch. LXVI, § 3, 9 Stat. 203, 203-04 (codified as amended at 25 U.S.C. § 111 (2000)) (regulating distribution of treaty annuity payments and prohibiting executory contracts by Indians); Act of June 30, 1834, ch. CLXI, §§ 2-8, 4 Stat. 729, 729-30 (regulating traders on Indian lands) (sections 3 and 4 codified as amended at 25 U.S.C. §§ 263-64 (2000)); *Id.* § 11, (codified as amended at 25 U.S.C. § 180 (2000)) (prohibiting non-Indian settlement on Indian lands); *Id.* § 12 (codified as amended at 25 U.S.C. § 177 (2000)) (prohibiting sale of Indian lands without federal treaty); *Id.* § 22 (codified at 25 U.S.C. § 194 (2000)) (setting burden of proof on non-Indian in land dispute with Indians); Instructions of the Secretary of War, Oct. 1, 1846, *reprinted in* BUREAU OF INDIAN AFFAIRS, OFFICE COPY OF THE LAWS, REGULATIONS, ETC. OF THE INDIAN BUREAU 1850, at 82 (1874) (containing regulations concerning powers-of-attorney by Indians to non-Indians); Revised Regulations-No. III, June 1, 1837, §§ 30-37, *reprinted in* BUREAU OF INDIAN AFFAIRS, *supra* at 21, 25-26 (containing regulations concerning annuity distribution).

88. Treaty with the Winnebago, *supra* note 72, art. 4. *See supra* text accompanying note 72.

89. *See* H.R. EXEC. DOC. NO. 25-229, at 1-2 (1839).

90. *See id.* at 28-31.

91. *See id.* at 1-4.

92. Indian affairs were under the jurisdiction of the Department of War until 1849, when Congress transferred responsibility to the Department of the Interior. *See* COHEN, *supra* note 15, at 119.

93. H.R. EXEC. DOC. NO. 25-229, at 7.

94. *See id.* at 1.

95. *See id.* at 2. Several years later, both Congress and the Department of War asserted control over powers of attorney as well as other Indian contracts in relation to the payment of treaty annuities. In 1846 the Secretary of War instructed agents to refuse to recognize powers of attorney except to

The Sac and Fox and Sioux half-breed reservations created by the 1824 and 1830 treaties presented the question of whether the half-breed beneficiaries collectively were tribes with whom the United States had to sign treaties to dispose of their land. In 1834 Congress passed a statute dissolving the Sac and Fox "half-breed tract" and granting fee simple ownership to the half-breeds as tenants in common.[96] The act allowed the half-breeds to sell or devise their interests in the land under the laws of the State of Missouri.[97] Individuals identified as half-breeds[98] proceeded to sell their claims, creating multiple white claimants who argued among themselves over who truly owned property in the tract.[99] After Iowa courts divided the land among the alleged owners,[100] several parties challenged the courts' actions, arguing, among other things, that the state courts lacked any authority.[101] According to the parties, Congress could only have authorized a division of the reservation through a treaty with the Sac and Fox half-breeds as a sovereign tribe.[102] In separate cases, the Iowa Supreme

compensate holders of such agreements in an amount "fair and just." *See* Instructions of the Secretary of War, Oct. 1, 1846, *reprinted in* BUREAU OF INDIAN AFFAIRS, *supra* note 87, at 82. In 1847 Congress mandated that annuity payments could be paid to "heads of families and other individuals entitled to participate," and not, as had been previously done, to the chiefs of the tribe. *See* Act of Mar. 3, 1847, ch. LXVI, § 3, 9 Stat. 203, 203 (codified as amended at 25 U.S.C. § 111 (2000)). The same statute prohibited future contracts with Indians. *Id.* Based on that statute, the Secretary of War, under the power of the President "[a]s the responsible guardian of the interest and welfare of the Indians" issued instructions to agents to distribute payments only to the individual Indian beneficiaries, "being considered in the light of wards under the guardianship of the government." Instructions of the Secretary of War, Aug. 30, 1847, *reprinted in* BUREAU OF INDIAN AFFAIRS, *supra* note 87, at 92. Consistent with previous statutes and regulations, none of these provisions clarified the term Indian.

96. Act of June 30, 1834, ch. 167, 4 Stat. 740.

97. *See id.*

98. There was a question whether particular individuals were indeed Sac and Fox half-breeds with legitimate interests in the parcel. For instance, one non-Indian party in a case purchased his interest in the tract from an Indian named Na-ma-tau-pus, who allegedly was a half-breed. *See* Webster v. Reid, Morris 467, 478 (Iowa 1846). Na-ma-tau-pus did not testify at the hearing, requiring other witnesses to testify to his half-breed status. *See id.* In a discussion reminiscent of the slave emancipation cases, see *supra* text accompanying notes 26-38, the Iowa Supreme Court rejected hearsay testimony that Na-ma-tau-pus was a half-breed by a witness who did not speak the "Indian language." *See id.* That witness testified that various other people had identified Na-ma-tau-pus as a half-breed, and there was also testimony that he had the "complexion of a half-breed." *Id.* The court ruled the evidence insufficient. *Id.* The United States Supreme Court appears to have reversed this ruling, stating without any reasoning that the claimant had "proved" that Na-ma-tau-pus was a half-breed. Webster v. Reid, 52 U.S. 437, 460 (1850). The identification issue came up with other Sac and Fox individuals who sold alleged claims, as a senator later argued against a bill distributing land to Sioux half-breeds, see *infra* text accompanying notes 105-23, by using the example of the problems of identification of the Sac and Fox beneficiaries. CONG. GLOBE, 31st Cong., 2d Sess. 334 (1851) (statement of Sen. Dodge). The fallibility in identification of mixed-bloods and their correct blood quantum would appear again and again in situations where land or other property was sold to non-Indians. *See infra* text accompanying notes 368-75, 380-83.

99. *See, e.g.*, Coy v. Mason, 58 U.S. 580 (1854); Wright v. Marsh, Lee & Delavan, 2 Greene 94 (Iowa 1849); Telford v. Barney, 1 Greene 575 (Iowa 1848); *Webster*, Morris 467.

100. Two lines of non-Indian title clouded ownership in the tract for several years. *See Webster*, Morris 467 (Supreme Court of Iowa decision upholding purchase of tract in sheriff's execution sale to fulfill judgment against half-breeds); Spaulding v. Antaya, (Iowa, filed May 8, 1841), *reprinted in* 14 ANNALS OF IOWA 450-55 (1924) (Lee County District Court decision partitioning tract among claimants). The United States Supreme Court invalidated Webster's purchase of the tract in 1850, ruling, among other things, that the notice to the half-breeds in the original lawsuit was deficient. *Webster*, 52 U.S. at 461. The Court ultimately upheld the Spaulding partition in 1854. *Coy*, 58 U.S. at 584.

101. *See Telford*, 1 Greene at 580; *Webster*, Morris at 471, 476.

102. *Id.*

Court and the Lee County District Court ruled, notwithstanding the treaty language stating that the tract was Indian land, that the half-breeds were not a tribe, but a group of individuals with no sovereign right to govern the tract.[103] Therefore, a treaty was not necessary, and Congress legitimately subjected the half-breeds to state property laws.[104]

The Sioux half-breeds did attempt to enter into treaties as an Indian tribe with the United States to purchase their reservation.[105] The half-breeds had negotiated a treaty in 1841, but the Senate rejected it, apparently because senators considered the $200,000 purchase price too high.[106] In 1849 an attorney hired by the half-breeds negotiated a treaty with federal commissioners.[107] Unlike the assignments of Winnebago claims,[108] the treaty commissioners recognized the attorney's authority as the legal representative of the half-breeds, though they required the half-breeds to attend the actual negotiations.[109] The Senate ultimately rejected the treaty, because, according to later reports, enough senators did not consider the half-breeds a tribe with whom the United States could sign a treaty to dissolve the reservation.[110] Instead they considered them citizens of the United States and not Indians, though they did not clearly state why they were citizens.[111] At the time Indians could not be citizens,[112] but the half-breeds apparently became citizens through their white ancestry. The suggestion that legal status could be determined by a white citizen father instead of an Indian mother was one of the first articulations of a rule opposite *partus sequitur ventrem*.[113] Commissioners applied the same rule in 1851 to bar French half-breeds from participating in treaty negotiations with the Chippewa at Pembina, Minnesota, even though they occupied the land the United States sought to purchase.[114]

Ultimately, like the Sac and Fox tract, Congress passed a statute dissolving the reservation instead of ratifying a treaty.[115] Congress did not pay for the land,

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103. *See Telford*, 1 Greene at 580; *Webster*, Morris at 476-78.

104. *Id.*

105. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES COMMUNICATING A TREATY WITH THE HALF-BREEDS OF THE SIOUX NATION OF INDIANS 4, 7-8 (1850) [hereinafter MESSAGE] (on file with author). This document is a confidential briefing paper for senators considering approval of the treaty. *See id.* at 3.

106. *See id.* at 17.

107. *See id.* at 3. The treaty documents before the Senate included the power of attorney. *See id.* at 5-10.

108. *See supra* text accompanying notes 88-95.

109. *See* , MESSAGE, *supra* note 105, at 16.

110. *See* H.R. REP. NO. 33-138, at 2, 13 (1854).

111. *See id.* at 13.

112. *See infra* text accompanying note 129.

113. For a discussion of *partus sequitur ventrem*, *see supra* text accompanying notes 27-39.

114. *See* S. EX. DOC. NO. 32-1, at 285 (1851). This was not always the position of federal agents, as in 1849 a representative of the United States told a group of half-breeds near Pembina, Minnesota, that "in virtue of their Indian extraction, those living on our side of the [border] were regarded as being in possession of the Indian's rights upon our soil; that they were on our frontiers treated with as component parts of Indian tribes; [and] that they either came under the Indians' laws or regulations, or formed such for themselves." H.R. EXEC. DOC. NO. 31-51, at 28 (1850). The same representative suggested the half-breeds enter into a treaty with the United States to open the area up for white settlement. *See id.* at 29.

115. Act of July 17, 1854, ch. 83, 10 Stat. 304.

or grant any actual land in the tract to the half-breeds.[116] Instead Congress authorized the distribution of scrip, or land certificates, with which the half-breeds could claim land within the tract, any unoccupied federal public land outside the tract, or land on which the half-breeds had made improvements.[117]

One interesting issue in the discussion of the Sioux half-breed statute was whether the term half-breed applied to all mixed-bloods or only to those of one-half Indian blood. The literal language of the treaty was "half-breeds," but individuals representing themselves as "half breeds and quarter-bloods of the Sioux Nation" petitioned for the dissolution and division of the tract.[118] The mixed-bloods who attempted to sell the land to the United States by treaty gave the term the same construction, and included "the half and quarter-bloods of white and said Sioux bands; that is to say, all such as have not less than one-quarter of Indian blood, of said bands."[119] The treaty commissioners' explanation for that construction shows at least the possibility that tribal negotiators interpreted the language of blood differently than federal officials:

> [The half-breeds] do not confine the right [to proceeds from the sale of the tract] to persons properly called half-breeds, it is proper to observe here that it is alleged by disinterested persons versed in the Sioux language that they have no word which expressed definitely the degree of relationship to either race in which those of mixed blood stand, and that they understand our term half-breeds as including all of mixed blood.[120]

Department of Interior officials and various advocates for the mixed-bloods argued for several years concerning the definition, as some contended half-breeds meant literally those of one-half Indian blood, while others defined it as "neither more nor less than those of mixed blood, 'without regarding the exact proportions.'"[121] Ultimately the House Committee on Indian Affairs reported that "[t]he term 'half-breed,' as applied by some to them, is a misnomer, for it was intended [in the treaty of 1830] to include all those having an admixture of *white* and Indian blood in their veins, in whatsoever degree."[122] The full

116. *See id.*

117. *See id.* Like Chippewa half-breed scrip, see *supra* note 73, the issuance of land certificates to the Sioux mixed-bloods created great controversy, as allegations of fraud followed the purchase of mixed-blood claims by land speculators. *See* Myrick v. Thompson, 99 U.S. 291 (1878); Gilbert v. Thompson, 14 Minn. 544 (1869) (alleging fraudulent transfers). Though the clear language of the statute prohibited sales of the certificates, Act of July 17, 1854, § 3, 10 Stat. 304, speculators successfully circumvented the provision. Half-breeds signed powers of attorney authorizing white agents to locate the certificates on specific parcels in the name of the half-breed, and then sell the land to non-Indian purchasers. *See Myrick*, 99 U.S. at 291-92; *Gilbert*, 14 Minn. at 546-47. Both the United States Supreme Court and the Minnesota state courts upheld such transactions as legitimate sales of land by interpreting the statute only to prohibit sales of the certificates themselves. *See Myrick*, 99 U.S. at 296-97; *Gilbert*, 14 Minn. at 546-47. Interestingly, unlike the earlier Winnebago half-breed contracts, the courts did not question whether half-breeds were competent to sign powers of attorney. *See supra* text accompanying notes 88-95. For a history of the scrip controversy from the point of view of white settlers, see JOSEPH W. HANCOCK, GOODHUE COUNTY, MINNESOTA, PAST AND PRESENT 119-24 (Red Wing Print Co. 1893).

118. H.R. REP. NO. 33-138, at 4 (1854).

119. MESSAGE, *supra* note 105, at 4.

120. *Id.* at 13.

121. H.R. REP. NO. 33-138, at 5.

122. *Id* at 2. The italicized reference to white blood is interesting, though there is no discussion of

Congress agreed, as the text of the statute refers to those entitled to an interest in the tract as "the half-breeds *or* mixed-bloods of the Dacotah or Sioux nation of Indians."[123]

The Attorney General of the United States articulated a citizen-Indian distinction in an 1856 administrative decision concerning the status of Chippewa mixed-bloods.[124] Attorney General Caleb Cushing specifically faced the question of whether mixed-bloods who collected half-breed scrip under an 1854 treaty[125] could also file separate claims to "pre-empt" federal public lands under the General Preemption Act of 1841,[126] a right only available to American citizens.[127] However, contrary to the apparent interpretation of the senators seven years before,[128] he did not recognize mixed-bloods as citizens based merely on their white ancestry. Cushing asserted that Indians were not citizens, but "subjects" of the United States, contending that "no person of the race of Indians is a citizen" due to the "incapacity of his race."[129] However, mixed-bloods posed a different question, as Cushing asked:

> May not that natural incapacity cease? May not the members of a family of Indians, by continual crossing of blood, cease to be Indians? Undoubtedly. In the organic or other legislation . . . the expression 'white man' is frequently used in contradistinction from Indians. . . . But, when questions of mixed blood arise, it appears at once that there is no intrinsic precision in the expression 'white man.' There exist, in various parts of the United States, men of indubitable citizenship, nay, of the highest mental, political, and social eminence, who have aboriginal blood in their veins. . . . We feel and see, therefore, that the incapacity of race, attached to the Indian as such, may and must be susceptible of being determined by intermarriage with persons of the dominant race of the country. But when? At what period or stage of descent? And how to be ascertained?[130]

Though Cushing suggested the possibility of a rule solely based on blood quantum, he did not apply one. Instead he distinguished Indians from citizens by their political allegiance.[131] Using the example of John Ross, chief of the

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the existence of mixed-bloods with black or other ancestry.

123. Act of July 17, 1854, ch. 83, § 1, 10 Stat. 304.

124. Relation of Indians to Citizenship, 7 Op. Att'y Gen. 746 (1856).

125. Treaty with the Chippewas, *supra* note 73, art. 2.

126. Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453, 455-56 [hereinafter General Preemption Act]. Preemption was the privilege of an actual settler on federal public land to buy the parcel for a set price. BLACK'S LAW DICTIONARY 1197 (7th ed. 1999).

127. *See* General Preemption Act, § 10; 7 Op. Att'y Gen. at 747.

128. *See supra* text accompanying notes 110-13.

129. 7 Op. Att'y Gen. at 750. Later cases perpetuated this attitude in the context of the naturalization of Canadian mixed-bloods, as courts ruled that they were not white for purposes of a statute allowing naturalization only for a "white person." *See In re* Camille, 6 F. 256, 257-58 (Or. 1880) (involving man of one-half Indian blood from Canadian father and British Columbian Indian mother); McKay v. Campbell, 16 F. Cas. 161, 162 (Or. 1871) (involving man of nine-sixteenths Indian blood from British father and Chinook mother). Interestingly, in *McKay* the court asserted that Indians residing in the United States were not citizens because they were "distinct political . . . communities, retaining the right of self-government, though subject to the protecting power of the United States." *Id.* at 166.

130. 7 Op. Att'y Gen. at 750-51.

131. *See id.* at 753.

Cherokee Nation, but of mixed ancestry, Cushing concluded that half-breeds had to cast off their tribal membership before becoming eligible for American citizenship.[132] Cushing concluded that the mixed-bloods were Indian because they had accepted scrip under the treaty provision identifying them as "belonging to [the] Chippewas," and therefore were not citizens legally entitled to claim federal public lands.[133]

As shown above, the primary distinction during the treaty period was between Indian and citizen. A person was either legally an Indian or a citizen, but not both. Federal officials applied two different theories to decide in which category a person of mixed ancestry belonged. Under one, the mixed-blood was a citizen by virtue of his or her white ancestry and therefore not an Indian. Under the other, a mixed-blood was an Indian if he or she was a tribal member, and therefore was not a citizen.

3. Judicial Approach to Indian Status in Criminal Cases

Federal courts created their own approaches to the status of mixed-bloods in criminal cases. Importantly, though the court opinions include references to blood, courts did not apply blood quantum to define the legal term Indian. The initial cases were criminal prosecutions in which defendants claimed they were legally Indian to elude federal jurisdiction. Congress created the issue by extending federal authority over some crimes, but not others, depending on the status of the offender and victim.[134] By statute the federal government had jurisdiction over interracial crimes, Congress specifically exempted crimes committed by one Indian against another.[135] Congress failed to define Indian, however, in the statute,[136] requiring the courts to interpret the term when individual defendants challenged federal authority to prosecute them.

Though the federal courts created a bright line between whites and Indians for criminal jurisdiction, they varied in their approach to mixed-bloods. There were two cases during the treaty period that discussed the definition of Indian. In *United States v. Rogers*,[137] the Supreme Court ruled that a white person who married into a tribe was not an Indian under the statutory exception for crimes between Indians, and therefore the federal government could prosecute the defendant for an offense against an Indian.[138] The Court ruled that the term Indian referred not to tribal members, but to a race of Indians.[139] The first

132. *Id*.

133. *See id.* at 754.

134. *See* Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 (codified as amended at 18 U.S.C. § 1152 (2000)).

135. *See id.* The Act also exempted Indians whom the tribe prosecuted for the offense, even if the crime was committed against a non-Indian. *See id.*

136. *Id*.

137. 45 U.S. (4 How.) 567 (1846).

138. *Id.* For a detailed discussion of the historical background and effect of *Rogers* on federal Indian law, see DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 38-51 (1997); Bethany R. Berger, *"Power Over this Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004). For examples of treaties that negated *Rogers* for several tribes, see *infra* text accompanying notes 173-76, 297.

139. *Rogers*, 45 U.S. (4 How.) at 573.

published case on mixed-bloods was *United States v. Sanders*.[140] The defendant was Cherokee, but the issue in the case was whether the mixed-blood victim was an Indian.[141] Lacking any information on the blood quantum of the victim, the court applied the *ventrem* doctrine previously utilized in slave emancipation cases:[142]

> [W]e concur in laying down this rule as the safest: that the child must follow the condition of the mother. If the mother is an Indian woman her offspring must be considered Indians . . . whether the father be a white man or an Indian . . . the condition of the mother, *and not the quantum of Indian blood in the veins, determining the condition of the offspring*.[143]

The court cited *Hudgins v. Wrights*[144] and other slave cases for the *ventrem* rule, and concluded that the victim was an Indian.[145] Under the *Sanders* rule, mixed-bloods whose mothers were Indian would be legally Indian in perpetuity, regardless of the potential decrease of Indian blood through the generations, at least for purposes of federal criminal jurisdiction.

B. THE RESERVATION PERIOD (1871-1887)

The period between the end of treaties and the beginning of allotment saw the rise of congressional and executive control over internal tribal affairs.[146] Though Congress did not abandon completely its approach to tribes as political entities, it increasingly involved the federal government in the day-to-day existence of tribal groups and individual Indians. Congress abolished treaty-making with tribes in 1871, declaring no tribe would in the future be considered "an independent nation, tribe, or power with whom the United States may contract by treaty."[147] Instead, Congress sanctioned agreements between tribes and the United States to serve the same purpose.[148] These agreements only required a simple majority of each house of Congress to pass, instead of the two-thirds majority of the Senate.[149] Congress also expanded federal criminal jurisdiction, for the first time asserting authority over certain major crimes between Indians.[150] Through legislation and regulation, Congress and the Bureau of Indian Affairs (BIA) encouraged the assimilation of individual Indians into American society.[151] The BIA expanded to a vast bureaucratic system that

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140. 27 F. Cas. 950 (C.C.D. Ark. 1847) (No. 16,220).

141. *Id.* at 951.

142. *See supra* text accompanying notes 26-38.

143. *Sanders*, 27 F. Cas. at 951 (emphasis added).

144. 11 Va. (1 Hen. & M.) 134 (1806). For a discussion of that case, see *supra* text accompanying notes 31-38.

145. *Sanders*, 27 F. Cas. at 951-52.

146. *See* COHEN, *supra* note 15, at 127-29.

147. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2000)).

148. *See* 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979 249-50 (1999).

149. *See id.*

150. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)).

151. *See* COHEN, *supra* note 15, at 127-29; FRANCIS PAUL PRUCHA, THE GREAT FATHER 643-52 (1984) (discussing BIA civilization programs). The BIA has been referred to by various names throughout its history, including the Bureau of Indian Affairs, the Office of Indian Affairs, and the

managed day-to-day affairs on reservations, including the distribution of annuity payments and other benefits,[152] the establishment and regulation of police forces and courts,[153] and the education of Indians in western ways.[154] With increasing federal control, questions concerning mixed-blood status for federal benefits or federal jurisdiction became more common. However, though questions arose, there were few clear answers.

1. Congressional Statutes

For most of the nineteenth century Congress remained generally silent on defining Indian status. In 1862 Congress barred "any person of Indian blood," presumably including mixed-bloods, from trespassing on lands of an Indian who had adopted "the habits and customs of civilized life."[155] Congress explicitly included mixed-bloods in an 1872 statute removing the Flathead tribe to their reservation.[156] Congress approved an agreement with the Cheyenne-Arapaho and certain bands of the Sioux in 1877 which allowed the Commissioner of Indian Affairs to deny benefits under the agreement or previous treaties to any "person other than an Indian of full blood."[157] Congress also amended a statute concerning regulation of traders on Indian lands in 1882 to explicitly ban any persons "other than an Indian of the full blood" from trading without a license.[158] Beyond these specific provisions, Congress left the question of Indian status to the BIA and the courts.

2. Bureau of Indian Affairs Policies

The BIA was (and is) the most powerful part of the federal government over the day-to-day lives of those considered legally Indian. As discussed, with the extension of federal power over Indian Territory, the BIA created a bureaucratic apparatus to control Indian reservations.[159] As part of their duties, BIA agents who managed reservations discussed and asked for guidance on the legal status of mixed-bloods. Again, though BIA agents used the language of blood to describe persons of mixed ancestry, there was no nationally applied rule of blood quantum.

Enrollment with other Indians for distribution of rations, annuities, and other benefits was the most important recognition of mixed-bloods by the BIA.

Indian Bureau. For simplicity, it is referred to as the Bureau of Indian Affairs throughout this article.

152. *See* BUREAU OF INDIAN AFFAIRS, REGULATIONS OF THE INDIAN OFFICE §§ 150-69 (1884).

153. *See id.* §§ 497 (courts), 577-78 (police). *See generally* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES (Bison Books 1980) (1966) (discussing BIA establishment of police and Courts of Indian Offenses).

154. *See* BUREAU OF INDIAN AFFAIRS, *supra* note 152, §§ 500-17.

155. Act of June 14, 1862, ch. 101, § 2, 12 Stat. 427, 427 (codified at 25 U.S.C. § 163) (repealed 1934).

156. Act of June 5, 1872, ch. 308, § 1, 17 Stat. 226, 226.

157. Agreement with the Cheyenne-Arapaho and Sioux ch. 72, art. 7, Feb. 28, 1877, 19 Stat. 254, 256.

158. Act of July 31, 1882, ch. 360, 22 Stat. 179, 179 (codified at 25 U.S.C. § 264 (2000)). The Act exempted the Five Civilized Tribes. *Id.*

159. *See supra* text accompanying notes 150-54.

BIA reports explicitly included mixed-bloods as a separate enumerated category of Indians under federal supervision in annual lists in certain years.[160] Agents included mixed-bloods in censuses of individual reservations at certain times and recorded their names on various entitlement lists as members of the tribe.[161] As long as the tribe recognized the mixed-bloods as part of the community, federal policy-makers appeared to as well.[162] However, some officials did complain to the Commissioner of Indian Affairs, asking him to clarify the definition of Indian or tribal member by cutting off all or certain mixed-bloods from tribal benefits.[163] For example, an agent among the Osage reported in 1877 that:

> It is extremely difficult to determine, at all times, who have rights in the tribe, and who have not. . . . Some of these so-called 'mixed-bloods' claim rights in several tribes at one time, when probably all the Indian blood of the several nationalities, upon which rights are claimed, would not exceed one-sixteenth. . . . The good of the service requires some law of Congress, or some department regulation, governing tribal membership. The question should be settled whether a white person with one-thirty-second part Indian blood, or even less, is entitled to recognition and rights within the tribe equal to those of full-bloods.[164]

In various reports to the Commissioner, agents directed their animosity to mixed-bloods and non-Indian men married to Indian women, contemptuously referred to as "squaw-men."[165] Some agents accused mixed-bloods and intermarried whites of being bad influences on pure Indians and requested at times that they be removed from the rolls or ejected from the reservation.[166] On the other hand, some agents saw mixed-bloods as a positive influence in terms of the values the agents attempted to instill in their tribes.[167]

Despite requests from agents, there was no national administrative clarification of Indian status in BIA regulations.[168] In one minor exception, the Bureau included mixed-bloods in an 1883 regulation concerning the Courts of Indian Offenses[169] that prohibited "any Indian or mixed blood" from paying

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160. *E.g.*, 1885 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 336-54 [hereinafter ANN. REP. COMM'R IND. AFF.]; 1876 ANN. REP. COMM'R IND. AFF. 206-10. In other years the BIA reported the number of Indians divided by those who "wore citizen's dress" or not, or by other social factors, with no reference to mixed or full blood. *See, e.g.*, 1882 ANN. REP. COMM'R IND. AFF. 328-47.

161. *See, e.g.*, 1877 ANN. REP. COMM'R IND. AFF. 75, 92.

162. *See, e.g., id.* at 70-71.

163. *See, e.g., id.*

164. *Id.* at 93.

165. *See id.* at 74; 1878 ANN. REP. COMM'R IND. AFF. 45-46, 93.

166. *See, e.g.*, 1878 ANN. REP. COMM'R IND. AFF. 33; 1877 ANN. REP. COMM'R IND. AFF.71; 1874 ANN. REP. COMM'R IND. AFF. 261-62, 286.

167. *See, e.g.*, 1878 ANN. REP. COMM'R IND. AFF. 97.

168. An agent for the Seneca did reference a decision of the Bureau of Indian Affairs that he interpreted as ruling that mixed-bloods were entitled to tribal property. *See* 1888 ANN. REP. COMM'R IND. AFF. 207. This decision is not named, and it does not appear to have had any precedential value in later discussions by the Bureau and other Department of Interior officials. *See id.* Interestingly, the agent discussed this decision in the context of a dispute among the Seneca about whether the traditional rule of matrilineal descent should continue to apply to mixed-bloods. *See id.* For a further discussion of the Iroquois matrilineal descent rule and federal law, see *infra* text accompanying notes 329-35.

169. Courts of Indian Offenses were, and still are for some tribes, tribunals set up by the BIA. *See* HAGAN, *supra* note 153, at 104-25. The regulations governing such courts are codified in the Code of Federal Regulations. Law and Order on the Indian Reservations, 25 C.F.R. §§ 11.100-11.1115 (2005).

relatives of an Indian woman to cohabitate with her.[170] BIA regulations stated that agents should distribute annuity payments to "individual members of the tribe" and not to "citizens or persons not Indians, who have not been adopted by the tribal authorities," with no definition of members or Indians.[171] Importantly, the regulation could have been read to support the entitlement of mixed-bloods and those adopted or married into the tribe, as it allowed distribution of annuities even to non-Indians if tribal leaders recognized them as tribal members.

3. Changing Judicial Definitions

Later federal courts considering criminal cases did not follow the *ventrem* rule of *Sanders*,[172] and instead adopted a rule of patrilineal descent. The first was *Ex Parte Reynolds*,[173] a case concerning a white defendant and a white victim, both of whom were married to Choctaw Indians in the Indian Territory, which is now Oklahoma.[174] Though the Supreme Court ruled that white men generally were subject to federal jurisdiction in *Rogers*,[175] a post–Civil War treaty with the Choctaws reserved to the tribe exclusive criminal jurisdiction over white citizens, as long as they were married to Choctaws.[176] The court therefore analyzed the ancestry of the wives of the accused and the victim to decide whether both were legally Choctaw.[177]

The court did not apply a rule based on a threshold amount of Indian blood, but did ask rhetorically whether:

> [T]he quantum of Indian blood in the veins of the party determine[s] the facts as to whether such party is of the white or Indian race? If so, how much Indian blood does it take to make an Indian, or how much white blood to make a person a member of the body politic known as American citizens? Where do we find any rule on the subject which makes the quantum of blood the standard of nationality? Certainly not from the statute law of the United States; nor is it to be found in the common law.[178]

Despite previous state cases and the 1856 decision of the Attorney General, the court only acknowledged *Sanders* as a source of guidance on mixed-blood status.[179] However, noting that the grandfather of the victim's wife was a white citizen of Mississippi, the court reversed the *ventrem* doctrine for its paternal equivalent, *partus sequitur patrem*.[180] Building on theories of citizenship in Vattel's *Law of Nations*, a well-known international law treatise, the court

170. BUREAU OF INDIAN AFFAIRS, *supra* note 152, § 497(8).
171. *Id.* §§ 158, 162.
172. 27 F. Cas. 950, 951 (C.C.D. Ark. 1847) (No. 16,220). *See supra* text accompanying notes 139-44.
173. 20 F. Cas. 582, 582-83 (C.C.W.D. Ark. 1879) (No. 11,719).
174. *See id*.
175. United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846). *See supra* text accompanying notes 137-38.
176. *See Reynolds*, 20 F. Cas. at 582.
177. *See id.* at 582-85.
178. *Id.* at 585.
179. *See supra* text accompanying notes 40-55, 124-33; *Reynolds*, 20 F. Cas. at 585.
180. *See Reynolds*, 20 F. Cas. at 585.

contended that the *ventrem* rule was applicable only to cases involving slaves, while the *patrem* rule defined the status of "free persons."[181] The court stated that the rule applying to mixed-blood Indians was the same "as if one parent was a citizen of the United States and the other a citizen of a foreign nation."[182] The victim's wife was therefore not a Choctaw by law, but a white American citizen.[183] The victim was then not a citizen of the Choctaw Nation under the treaty, and the federal government could prosecute the defendant.[184]

The United States Supreme Court never ruled on the *patrem* theory of citizenship for Indians. In *Elk v. Wilkins*[185] the Court adopted reasoning similar to Attorney General Cushing's 1856 opinion[186] to conclude that Indians owed primary allegiance to their respective tribes, and therefore had to be naturalized to become United States citizens.[187] Mere abandonment of tribal relations was insufficient, however, as the federal government had to affirmatively recognize Indians as citizens.[188] As it was not an issue in the case, the Supreme Court did not consider whether the *patrem* theory provided an alternative means for mixed-blood citizenship.

Despite the lack of Supreme Court endorsement, the *patrem* rule would become the most important test for the status of mixed-bloods up to the beginning of the twentieth century.[189] Blood quantum, though widely used to describe individuals of mixed ancestry, was not used to exclude mixed-bloods from the legal status of Indian. All those with a non-Indian paternal ancestor were non-Indian under the *patrem* rule, whether of one-sixty-fourth or sixty-three sixty-fourths Indian blood.

C. THE ALLOTMENT PERIOD (1887-1934)

The various strands of legal thought on Indian status in the nineteenth century coalesced in the allotment era, as the three branches of the federal government sought to define entitlement to tribal property, especially tribal lands. Through the 1887 General Allotment Act[190] and specific congressional acts,[191] the federal government divided communal tribal lands into individual parcels called allotments. Federal officials distributed allotments to Indians,

181. *See id. See also* 3 E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 87 (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758) ("The country of a father is . . . that of his children, and they become true citizens by their mere tacit consent.").

182. *Reynolds*, 20 F. Cas. at 585.

183. *See id.*

184. *See id.* at 585-86.

185. 112 U.S. 94 (1884).

186. *See supra* text accompanying notes 124-33.

187. *See Wilkins*, 112 U.S. at 99-103.

188. *See id.* at 100-07.

189. *See infra* text accompanying notes 212-16, 227-31, 237, 305-15.

190. General Allotment Act, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (2000)).

191. *E.g.*, Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 (allotting land to the Minnesota Chippewa); Act of Mar. 3, 1885, ch. 319, 23 Stat. 340 (allotting land to the Umatilla Reservation); Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 (allotting land to the Omaha Reservation).

with the remaining lands ceded by the tribe through agreements[192] with the United States for non-Indian settlement.[193] The explicit purpose of allotment was to dissolve tribes as collective entities by encouraging individual family farming.[194] The General Allotment Act and other statutes also authorized allotments under certain circumstances on federal public domain lands outside reservations.[195] The question arose whether mixed-bloods were eligible for allotments. All three branches of the federal government considered the issue.

1. Administrative Definitions in Allotment Eligibility Cases

While the Department of Interior generally applied tribal membership to define eligibility for on-reservation allotments, its approach to public domain allotments varied for the first twenty years. BIA regulation compilations did not include rules defining eligibility for reservation allotments,[196] but local agents received instructions to grant allotments to those deemed members of a tribe.[197] In practice, allotment agents held enrollment councils with tribal officials and applied, with some modifications, the council decisions on membership to distribute allotments, including to mixed-bloods.[198] Though some allotment

192. *See supra* text accompanying notes 146-48. The General Allotment Act authorized representatives of the President to negotiate agreements for the sale of "surplus" lands left over after allotments were made to tribal members. General Allotment Act § 5.

193. *See generally* COHEN, *supra* note 15, at 130-36; FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 70-81 (1984). For a description of the specific method of allotment on the Nez Perce and Jicarilla Apache Reservations, see EMILY GREENWALD, RECONFIGURING THE RESERVATION (2002).

194. *See* COHEN, *supra* note 15, at 143-44; HOXIE, *supra* note 193, at 77.

195. Act of Mar. 2, 1889, ch. 405, § 13, 25 Stat. 888, 892 (allowing Sioux allotments on land not included in any separate reservation resulting from breakup of Great Sioux Reservation); General Allotment Act § 4.

196. *See* BUREAU OF INDIAN AFFAIRS, REGULATIONS OF THE INDIAN OFFICE (1904); BUREAU OF INDIAN AFFAIRS, REGULATIONS OF THE INDIAN OFFICE (1894).

197. *See, e.g.*, Julia Cox, 20 Pub. Lands Dec. 167, 169 (1895) (referencing regulations that instructed allotment agents to distribute allotments to those recognized as tribal members or those whose mother or father was a tribal member); Letter of Acting Commissioner of Indian Affairs to Special Allotting Agent Charles H. Bates (Aug. 8, 1904), at 3, 4-5 (instructions for allotment of Pine Ridge Reservation anticipating grant of allotments to mixed-bloods and white men "legally incorporated" into tribe) (on file with author).

198. *See, e.g.*, La Clair v. United States, 184 F. 128, 130-33 (C.C.E.D. Wash. 1910) (regarding the approval of Yakima council and federal allotment agents for half-Yakima, half-Puyallup Indians to receive allotments); Smith v. Bonifer, 154 F. 883, 888 (C.C.D. Or. 1907) (involving the approval of Umatilla chiefs and federal allotment agents for a Walla Walla woman married to a white man and mixed-blood children to receive allotments); *Julia Cox*, 20 Pub. Lands Dec. at 169 (involving rejection of claimant by Nez Perce council); ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND THE PUGET SOUND 140-43 (1998) (discussing allotment eligibility decisions in Washington based on membership and denial of allotment by Tulalip council); Harmon, *supra* note 75, at 190-98 (involving approval of certain mixed-bloods by Colville council based on criteria suggested by federal allotment agents); Report of Pine Ridge Council, Apr. 23, 1908 (transcription of Pine Ridge Sioux Council proceedings considering acceptance or rejection of white men and mixed-bloods for allotments) (on file with author). The BIA and tribal officials did not always agree on whether mixed-bloods were tribal members. *See, e.g.*, Letter of Captain Shumpkin et al., to Commissioner of Indian Affairs, (Nov. 21, 1921) (letter of Umatilla tribal officials objecting to mixed-blood allotments) (on file with author); Letter from Commissioner of Indian Affairs to Captain Shumpkin (Oct. 25, 1921) (letter of Commissioner Burke to Umatilla tribal officials upholding allotment of mixed-bloods absent proof of fraud) (on file with author). That Congress and the Bureau of Indian Affairs later released whole classes of mixed-blood allottees from federal trust restrictions means, by definition, that mixed-bloods were granted allotments if otherwise eligible. *See infra* text accompanying notes 376-83. The policy concerning allotments to whites and others without Indian ancestry

agents did deny some mixed-bloods allotments, though not necessarily because they were mixed-bloods, the Department reviewed agent decisions and applied tribal membership to rule that certain mixed-bloods were or were not eligible for allotments.[199] However, public domain allotments involved the General Land Office, an office separate from the BIA within the Department of Interior.[200] The Secretary of Interior initially instructed officials in 1887 that Indian women married to white men and their mixed-blood children were eligible for public domain allotments.[201] Despite these initial instructions, the issue would linger for twenty years, as the Department of Interior issued contradictory decisions.

The most prolonged and nationally prominent situation concerned Jane Waldron, a Sioux mixed-blood, and her claim to an allotment in South Dakota. Through an agreement with the Sioux, purportedly approved by three-fourths of the adult male members of the nation,[202] the United States dissolved the Great

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intermarried or adopted into a tribe is more elusive. Interestingly, in at least one case, the Secretary of Interior denied an allotment to a white man adopted into the Wichita tribe based on the alleged requirement of Department of Interior approval of adoptions of those without Indian ancestry as tribal members. United States *ex rel.* West v. Hitchcock, 205 U.S. 80, 83 (1907). Further, though BIA agents were instructed to allow allotments for white men "legally incorporated" with the tribe, see Letter of Acting Commissioner of Indian Affairs to Special Allotting Agent Charles H. Bates, *supra* note 197, at 3, a council assembled by federal agents on the Pine Ridge Sioux Reservation rejected several white men, concluding they were not entitled to allotments separately from their Indian wives or mixed-blood children. Report of Pine Ridge Council, *supra*, at 2-13.

199. *See, e.g.,* Sully v. United States, 195 F. 113, 128-30 (C.C.D.S.D. 1912) (denying allotments to mixed-bloods within Rosebud Sioux Reservation by agents because they did not live on Great Sioux Reservation in 1889); Sloan v. United States, 118 F. 283, 291-95 (C.C.D. Neb. 1902) (denying allotments to mixed-bloods on Omaha Reservation because, among other reasons, they did not reside on the reservation in 1865); Chrichton v. Shelton, 33 Pub. Lands Dec. 205, 220-21 (1904) (ruling mixed-bloods were eligible for allotment because mother was a tribal member); William Banks, 26 Pub. Lands Dec. 71, 72-73 (1898) (ruling mixed-blood father eligible because mother was a member, but children were not eligible because father abandoned tribal membership); *Julia Cox*, 20 Pub. Lands Dec. at 169 (ruling mixed-bloods were not tribal members). The decisions in *Chrichton* and *William Banks* were based, in part, on a congressional statute recognizing the rights of mixed-blood children of white fathers and Indian mothers to tribal property if the mother was a member of the tribe. For a discussion of that statute, *see infra* text accompanying notes 267-69. In *Sloan*, attorneys for the United States did further attack the legitimacy of the mixed-blood claimants based on their mixed-blood status when they filed claims for allotments in the courts. *See Sloan*, 118 F. at 288. For a detailed discussion of *Sloan*, see *infra* text accompanying notes 274-278.

200. *See* General Allotment Act, § 4, 24 Stat. 388.

201. *See* Circular of the Secretary of the Interior, Sept. 17, 1887, *reprinted in* 2 BUREAU OF INDIAN AFFAIRS, REGULATIONS OF THE INDIAN OFFICE: MISCELLANEOUS 11 (n.d.).

202. It is clear that mixed-bloods and white men married into the Sioux Nation made up part of the "adult male Indians" who allegedly approved the agreement. The President appointed a three-member commission to travel to the various agencies on the Great Sioux Reservation to negotiate the break-up of the reservation. *See* S. EX. DOC. NO. 51-51 at 1 (1890). The Commission recorded the alleged approval of 4,463 adult male Indians out of 5,678 eligible voters. *See id.* at 8. A review of the voters shows an interesting group, as the lists in the President's report to Congress included the voter's Indian name, English name, and band affiliation. *See id.* at 242-307. Under "band," many Indians are identified as "mixed" or "mixed-blood," while others are identified as "squaw man," "white man," or by some similar term. *See, e.g., id.* at 243, 245, 246, 247 ("Mixed"), 251 ("Mixed blood"), 253 ("White; incorporated into tribe in 1868"), 259 ("Squaw Man"), 275, 276, 277 ("Squaw Man since 1868"), 289, 290, 291 ("White Man"). The reference to 1868 in some of the white men descriptions appears to derive from two references in the Treaty of Fort Laramie to persons legally incorporated with the tribe. Treaty with the Sioux art. 6, 10, Apr. 29, 1868, 15 Stat. 635, 637, 639. Curiously, there is great inconsistency in the descriptions from agency to agency, with individuals only listed with an English name (usually an Anglo or French surname) identified with a particular band in some agencies, and identified as mixed in other agencies. *Compare, e.g., id.* at 243, 245, 246, 247 (Rosebud Agency) ("Mixed"), *with id.* at 275 (Santee, Flandreau, and Ponca Agencies) ("Santee"), *and id.* at 290 (Cheyenne River Agency) (sons of white signatories identified as part of Minikanju band).

Sioux Reservation in 1889.[203] One section of the agreement authorized individual Sioux to claim allotments on lands outside the smaller reservations remaining after the agreement.[204] The agreement defined those eligible as "any Indian receiving and entitled to rations and annuities."[205] Jane Waldron filed a claim for a parcel in South Dakota.[206] A full-blood Sioux, Black Tomahawk, laid claim to the same parcel,[207] precipitating a legal battle that would last for fifteen years concerning whether Waldron was legally Indian.[208]

Waldron had to go through an administrative claims process to establish her right to the allotment.[209] At the time of her claim there was no remedy against Interior officials in the courts.[210] Between 1890 and 1898 Waldron argued for her right to the land multiple times through several levels of the Executive Branch bureaucracy.[211] Importantly, her tenacity caused the Branch's legal definition of Indian to change, moving from the *patrem* rule to a rule dependent on tribal definitions of membership and descent.

At first Interior officials applied the *patrem* rule from *Ex Parte Reynolds*[212] to deny Waldron and others allotments. In *Black Tomahawk v. Waldron*[213] Assistant Attorney General Shields concluded that Waldron was a citizen of the United States through her paternal white ancestry, and therefore not an Indian.[214] Interestingly, though Waldron claimed one-quarter Sioux blood, the Assistant Attorney General stated that Indian eligibility for an allotment did not "depend[] . . . upon the proportion of Indian blood flowing in the veins of the person whose status is in question."[215] The effect of the rule was to cut off mixed-bloods who had a non-Indian paternal ancestor from receiving public domain allotments. State and federal officials applied the *Waldron* decision to other mixed-bloods seeking allotments, contending that they also were citizens and not Indians.[216]

The denial of allotments to mixed-bloods revealed a significant

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203. *See* Act of Mar. 2, 1889, ch. 405, § 2, 25 Stat. 888.

204. *Id.* § 13.

205. *Id.*

206. *See* Black Tomahawk v. Waldron, 13 Pub. Lands Dec. 683, 683 (1891).

207. *See id.*

208. *See id.*; Waldron v. United States, 143 F. 413, 415 (D.S.D. 1905). For a perspective on Waldron's case in the context of race and American citizenship, see Lauren Basson, *Challenging Boundaries and Belongings: Mixed Blood Allotment Disputes at the Turn of the 20th Century*, *in* BOUNDARIES AND BELONGING 151 (Joel S. Migdal ed., 2004).

209. *See Waldron*, 13 Pub. Lands Dec. at 683.

210. *See* Act of Aug. 15, 1894, ch. 290, § 1, 28 Stat. 286, 286 (codified as amended at 25 U.S.C. § 345 (2000)) (providing cause of action against United States for denial of allotment).

211. *See* Black Tomahawk v. Waldron, 27 Pub. Lands Dec. 386 (1898); Black Tomahawk v. Waldron, 24 Pub. Lands Dec. 145 (1897); Black Tomawhawk v. Waldron, 19 Pub. Lands Dec. 311 (1894); Sioux Mixed Blood, 20 Op. Att'y Gen. 711 (1894); Sioux Mixed Bloods, 20 Op. Att'y Gen. 742 (1894); Black Tomahawk v. Waldron, 17 Pub. Lands Dec. 457 (1893).

212. 20 F. Cas. 582 (C.C.W.D. Ark. 1879) (No. 11,719). *See supra* text accompanying notes 172-84.

213. 13 Pub. Lands Dec. 683 (1891).

214. *See id.* at 685.

215. *Id.* at 686.

216. *See* Enuxis Buckland, 30 Pub. Lands Dec. 606, 606 (1901); Ulin v. Colby, 24 Pub. Lands Dec. 311, 311 (1897); Keith v. United States, 58 P. 507, 507 (Okla. 1899).

contradiction within the executive branch, as officials had accepted, and would continue to accept, mixed-blood signatures in cession agreements as Indians, and had distributed annuities and other benefits to mixed-bloods as tribal members.[217] Waldron correctly asserted that the Sioux agreement was signed not only by full-blood Sioux, but by mixed-bloods and white men married into the tribe as well, as Indians of the Sioux Nation.[218] Signatories included Jane Waldron's husband, a white man of no Indian ancestry, and two of her mixed-blood brothers.[219] Observers of the agreement negotiations reported that the Sioux cession would not have had the necessary three-fourths approval if the mixed-bloods and intermarried men had not voted and used their influence to get enough full-bloods to vote for approval.[220] The executive branch had embraced mixed-bloods for the purposes of ceding land, but now denied them allotments once it divided the remainder.

Commissioner of Indian Affairs Thomas Morgan was well aware of this contradiction. Morgan previously had discussed the question of Indian status in his 1890 annual report.[221] Like other federal officials before him, he suggested the possibility of a rule that incorporated blood quantum, but also believed Indian status could not be defined by blood alone:

> There is no doubt that there is a stage at which, by the admixture of white blood and non-affiliation with the Indian tribes, persons would be debarred from participating in tribal benefits. The admixture of blood, however, must be considered in connection with all the circumstances of each case; consequently, a fixed rule equally applicable to all cases can not be well adopted.[222]

In his 1892 annual report to Congress, Morgan specifically addressed Jane Waldron's case in his attempt to answer the question: What is an Indian?[223] Morgan traced eleven ways to define Indian that included mixed-bloods, and warned of the ramifications of denying allotments to mixed-bloods:

> These acts of the government . . . have fixed the status of mixed bloods as Indians in the sense that they have an interest in the common property of the tribe to which they belong. To decide at this time that such mixed bloods are not Indians . . . would unsettle and endanger the titles to much

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217. *See, e.g.*, Agreement with the Blackfeet ch. 398, art. 10, § 9, Sept. 26, 1895, 29 Stat. 321, 354-57 (indicating that mixed-bloods made up part of the majority needed to approve the agreement, their "rights to participate in all business proceedings of said tribe and to share in all the benefits accruing to said tribes from a sale of land or otherwise being hereby recognized as equal to the full bloods"). For a fuller discussion of previous BIA policies on mixed-bloods, *see supra* text accompanying notes 159-71.

218. *See* S. EX. DOC. NO. 53-59, at 5 (1894); S. EX. DOC. NO. 51-51, at 242-307. For a further discussion of the identity of those who approved the agreement, see *supra* note 202.

219. *See* S. EX. DOC. NO. 51-51, at 288, 291. The approval list for the Cheyenne River Agency includes a John Van Metre and Charles L. Van Metre, identified as affiliated with the Two Kettle Band, and a Charles Waldron, identified as a white man. *See id.* The listed Van Metres were Jane Waldron's brothers. *See Waldron*, 143 F. at 418. Charles Waldron was Jane Waldron's husband. *See* S. EX. DOC. NO. 53-59, at 3.

220. *See* S. EX. DOC. NO. 53-59, at 46-47. If all Indians identified as "mixed" and "white" on the lists of voters are subtracted (269), see S. EX. DOC. NO. 51-51, at 242-307, there indeed would not have been a three-fourths majority. This does not include those mixed-bloods not explicitly identified as such on the lists. *See supra* note 202.

221. 1890 ANN. REP. COMM'R IND. AFF. 76.

222. *Id.*

223. 1892 ANN. REP. COMM'R IND. AFF. 36-37.

> of the lands that have been relinquished by Indian tribes …. It is also worthy of consideration that the United States Government has been and is the trustee of vast sums of money, and that it has from time to time disbursed this money by paying it per capita to the Indians recognizing all who are borne upon the rolls and recognized by the Indians as members of their tribes including half-breeds and mixed-bloods. If therefore these latter are not Indians it is a serious question whether the "real Indians" . . . have not an equitable claim against the United States for misappropriations of funds.[224]

According to Morgan, the denial of benefits to mixed-bloods as Indians implicated the very foundation of the federal government's trust responsibility[225] to Indian tribes.[226]

Despite Morgan's objections, the succeeding Assistant Attorney General rejected Waldron's claim upon rehearing in 1893,[227] reiterating the *patrem* rule of descent and rejecting the argument that mixed-bloods were considered members competent to sign the agreement.[228] Interestingly, Waldron argued customary Sioux law to establish her right to an allotment.[229] She argued that there was a "mother right" among the Sioux that recognized Sioux mothers as the head of the family in mixed marriages, and that the offspring of such marriages were recognized as tribal members entitled to tribal property.[230] Assistant Attorney General Hall rejected the rule, stating that:

> Under the last rule if it exists, Mrs. Waldron, though only of one fourth Indian [sic], would follow the condition of the mother and also be an Indian like the grandmother and great-grandfather, whilst Mrs. Waldron's children, with but one-eighth of Indian blood would . . . likewise be Indians, and so on *ad infinitum* to the remotest generation. The

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224. *Id.*

225. The trust responsibility of the federal government arises in part from its assumption of control over Indian resources as guardian to Indian wards, see *supra* text accompanying notes 84-87, including land and other natural resources and money derived from treaty cessions, leases, and other sources. *See* United States v. Navajo Nation, 537 U.S. 488, 488 (2003). Through its oversight of Indian resources, the federal government assumed a fiduciary obligation to manage such resources in the best interests of the tribes, and a tribe may sue, under certain circumstances, for money damages for the violation of that obligation. *See id.*; United States v. White Mountain Apache Nation, 537 U.S. 465, 465 (2003). At the time of Commissioner Morgan's comments, however, Indian tribes had no general right to sue the United States for breach of its trust responsibility. *See* United States v. Mitchell, 463 U.S. 206, 214-15 (1983). Until the passage of the Indian Tucker Act in 1946, Act of Aug. 13, 1946, ch. 959, § 24, 60Stat. 1055, 1057 (codified as amended at 28 U.S.C. § 1505 (2000)), tribes had to convince Congress to pass specific acts to allow them to sue the United States for money damages. *See Mitchell*, 463 U.S. at 214-15.

226. 1892 ANN. REP. COMM'R IND. AFF. 36-37.

227. *See* Black Tomahawk v. Waldron, 17 Pub. Lands Dec. 461, 467 (1893).

228. *See id.* Assistant Attorney General Hall referenced the fact that the commissioners to the Sioux had told tribal people assembled at the various agencies that half-breeds had the right to sign the agreement because status was determined by the mother. *See id.* at 462-63. Curiously, the same commissioner claimed that white men would vote, but that the federal government would not count them unless mandated by a court, see *id.*, a statement belied by the actual counts made and submitted to Congress. *See* S. EX. DOC. NO. 51-51, at 242-307 (including white men in count). However, Hall denied any significance to the representations of the commission, claiming the commissioner had spoken "under a misapprehension." *Waldron*, 17 Pub. Lands Dec. at 463. Interestingly, Hall also justified his rejection of Waldron's claim because her grandfather, grandmother, and mother received Sioux half-breed scrip under the statute of 1854, see *supra* text accompanying notes 115-17. *See id.* at 460.

229. *See Waldron*, 17 Pub. Lands Dec. at 461.

230. *See id.*; S. EX. DOC. NO. 53-59, at 41.

proposition seems to carry its own refutation with it.[231]

The United States Senate eventually took an interest, and ordered the Secretary of Interior to submit all documents concerning Waldron's case.[232] Senators were concerned because they believed that the agreement to break up the Great Sioux Reservation required mixed-blood signatures to get the necessary three-fourths vote.[233]

Interestingly, after the Senate became involved, the Attorney General rejected the *patrem* rule and embraced tribal definitions of membership in allotment entitlement cases. In 1894 the Secretary of Interior submitted several questions concerning Waldron's situation to Attorney General Richard Olney, including:

> Whether the common-law rule that the offspring of free persons follow the condition of the father prevails in determining the status of children born to a white man, a citizen of the United States, and an Indian woman, his wife.[234]

In a strong recognition of tribal authority over membership, the Attorney General concluded that the definition of Indian for purposes of allotment eligibility depended on the particular rules and customs of the tribes.[235] Several months later, the Secretary of Interior concluded that "[w]hile the general rule [of the common law] is as has been before held, yet it must yield to the laws and usages of the tribe when laws and usage . . . are satisfactorily proven."[236]

Despite these decisions, the Department continued to apply the *patrem* rule to some public domain allotment claims.[237] To reconcile the conflicting decisions, the Secretary of the Interior in 1907 instructed that membership in a

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231. S. EX. DOC. NO. 53-59, at 41. For the opposite conclusion in the context of slavery, see *supra* note 29.

232. *See* S. MISC. DOC. NO. 53-21 (1893).

233. *See id.*

234. Sioux Mixed Blood, 20 Op. Att'y Gen. 712.

235. *See id.* Interestingly, the Attorney General supported his decision in part by citing a Supreme Court opinion that the Court had issued only a month before. *See* Smith v. United States, 151 U.S. 50 (1894). In that case, the Court ruled the victim was an Indian, as the United States had submitted no evidence to the contrary. *See id.* at 54-55. There were no facts identifying the victim as a mixed-blood, but only that he "looked like [an Indian], having the dark hair, eyes, and the complexion of an Indian," and was enrolled and received "bread money" as a Cherokee. *Id.* at 53. Attorney General Olney cited *Smith*, however, for the proposition that "[p]resumptively, a person . . . of mixed blood residing upon a reservation and claiming to be an Indian is, in fact, an Indian." 20 Op. Att'y Gen. 712. Felix Cohen repeated this representation of the *Smith* holding in his influential handbook. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 4 (Univ. of New Mexico Press 1982) (1945). In a follow-up opinion the Attorney General declined to rule on the direct question of Waldron's membership, indicating it was a question of fact. *See* Sioux Mixed Blood, 20 Op. Att'y Gen. 742 , 743 (1894). He did, however, reject the conclusion of Assistant Attorney General Hall that the receipt of half-breed scrip by Waldron's ancestors precluded her membership in the Sioux Nation, see *supra* note 228. *See id.* at 745-46.

236. Black Tomahawk v. Waldron, 19 Pub. Lands Dec. 311 (1894). The Secretary then instructed the Commissioner of Indian Affairs to appoint a special investigator to collect testimony "showing whether there were tribal laws and usages of the Sioux Indians bearing upon the citizenship of Mrs. Waldron." *Id.* at 311-12. Ultimately the Department of Interior denied her claim, ruling she was not a member of the Sioux Nation. *See* Black Tomahawk v. Waldron, 24 Pub. Lands Dec. 145 (1897). The Department finally denied a request for rehearing in 1898. *See* Black Tomahawk v. Waldron, 27 Pub. Lands Dec. 386, 389 (1898). Waldron's story, however, did not end there. *See infra* text accompanying notes 283-87.

237. *See generally* Enuxis Buckland, 30 Pub. Lands Dec. 606 (1901); Ulin v. Colby, 24 Pub. Lands Dec. 311 (1897).

tribe conferred the right to an allotment and further that "[t]he quantum of Indian blood . . . possessed by the applicant does not control and should not, of itself, influence the decision [to grant an allotment]."[238] Subsequent decisions rejected claimants who the Department ruled were not tribal members.[239] The Department made the rule permanent in 1918, clarifying once and for all that mixed-bloods were eligible for public domain allotments if members of a tribe.[240]

Tribal membership also became the rule of the BIA for annuity entitlement. BIA regulations had barred children of Indian women who had married white men after June 7, 1897, from receiving annuities, based on the Bureau's reading of an 1897 congressional statute[241] discussed below.[242] However, the Secretary of Interior ordered an amendment to the regulations in 1905, stating that mixed-bloods were entitled if their mothers were members and they were members, as recognized by the tribe and approved by the Department.[243] Again, though federal officials used the language of blood to describe individuals, they did not apply it.

2. Congressional Statutes on Indian Status

Parallel to administrative clarifications on the definition of Indian, Congress began to define Indian status in the allotment era. However, as before, Congress did not adopt a catch-all definition of Indian, and instead adopted specific rules for various situations. For example, Congress prohibited white men who married Indian women after August 9, 1888, and who were not "otherwise a member of any tribe of Indians" from sharing in tribal property.[244] Congress in 1897 made it a crime to distribute liquor to Indians "including mixed-bloods."[245] Congress also included "half-breed[s] who live[] and associate[] with Indians" in an 1899 provision of the Alaska criminal code prohibiting the sale of firearms to Indians.[246] A 1905 statute allowed mixed-blood children who "lead a civilized life" into Alaska public schools with white children.[247]

Congress recognized mixed-bloods as Indians in certain agreements arising under the General Allotment Act. As previously discussed, Congress approved

238. Allotment- Membership in Indian Tribe, 35 Pub. Lands Dec. 549, 550 (1907).

239. *See* Albert A. Coursolle, 44 Pub. Lands Dec. 188, 192-93 (1915) (rejecting non-member descendants of recipient of Sioux half-breed scrip); Ellen Bourassa, 43 Pub. Lands Dec. 149, 151 (1914) (rejecting mixed-blood mother and children for enrollment by Turtle Mountain Chippewa council); Louis Breuninger, 42 Pub. Lands Dec. 489, 490 (1913) (rejecting descendants of recipient of Menominee half-breed payment under treaty of 1848).

240. *See* Regulations for Indian Allotments on the Public Domain, Apr. 15, 1918, *reprinted in* GENERAL LAND OFFICE, CIRCULARS AND REGULATIONS OF THE GENERAL LAND OFFICE 658, 659, 663-64 (1930) (codified as amended at 43 CFR § 2531.1(a), (e) (2005)).

241. Act of June 7, 1897, ch. 3, §1, 30 Stat. 62, 90 (codified at 25 U.S.C. § 184 (2000)).

242. *See* BUREAU OF INDIAN AFFAIRS (1904), *supra* note 196, § 324.

243. Circular, June 30, 1905, *reprinted in* BUREAU OF INDIAN AFFAIRS (1904), *supra* note 196, at 58-59; Circular, Apr. 1, 1905, *reprinted in* BUREAU OF INDIAN AFFAIRS (1904), *supra*, at 58-59.

244. Act of Aug. 9, 1888, ch. 818, § 1, 25 Stat. 392, 392 (codified at 25 U.S.C. § 181 (2000)).

245. Act of Jan. 30, 1897, ch. 109, 29 Stat. 506, 506.

246. Act of Mar. 3, 1899, ch. 429, § 142, 30 Stat. 1253, 1274.

247. Act of Jan. 27, 1905, ch. 277, § 7, 33 Stat. 616, 619.

agreements with tribes to purchase surplus reservation lands after allotments were distributed.[248] Like treaties before,[249] each agreement applied to a specific tribe or tribes. Most agreements defined those eligible for benefits as members of the tribe, without clarifying whether mixed-bloods were members.[250] Importantly, some agreements between the United States and tribes explicitly recognized mixed-bloods as Indians empowered to approve the agreement or as eligible for allotments or other tribal property.[251] Agreements with the Assiniboine and Gros Ventre and the Blackfeet in 1895 stated that "[i]t is understood and declared that wherever the word Indian is used in this agreement it includes mixed bloods as well as full bloods."[252] Agreements with the Rosebud Sioux in 1902 and Yankton Sioux in 1892 recognized mixed-bloods as members of the tribe and their right to allotments:

> [A]ll persons . . . who have been allotted lands . . . and who are now recognized as members of the . . . tribe . . . including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians ….[253]

Interestingly, the Sioux agreements referenced and rejected the *patrem* rule, recognizing mixed-bloods regardless of the maternal or paternal origin of the Indian blood.

Congress also considered the situation of those mixed-bloods denied allotments by the Department of Interior. Aware of the controversy involving Jane Waldron and other mixed-bloods,[254] various congressmen sought to clarify allotment entitlement through proposed bills.[255] One example is a bill from 1896, which would have defined Indian for purposes of allotment eligibility as

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248. *See supra* notes 192-93 and accompanying text.

249. *See supra* text accompanying notes 69-75.

250. *See, e.g.*, Agreement with the Citizen Band Potawatomie art. 2, ch. 543, Mar. 3, 1891, 26 Stat. 989, 1017; Agreement with the Iowa Tribe of Indians art. 2, ch. 165, Feb. 13, 1891, 26 Stat. 749, 759; Agreement with the Sisseton and Wahpeton Sioux art. 4, ch. 543, Mar. 3, 1891, 26 Stat. 989, 1037.

251. *See* Agreement with Sioux Indians of Rosebud Reservation art. 4, ch. 1484, Apr. 23, 1904, 33 Stat. 254, 255 (recognizing mixed-blood title to allotments and equal status with full-bloods); Agreement with the Assiniboine and Gros Ventre art. 9, ch. 398, § 8, Oct. 9, 1895, 29 Stat. 321, 352 (recognizing mixed-bloods as Indians for benefits accruing from land cession); Agreement with the Blackfeet, *supra* note 217, art. 10, ch. 398, § 9 (same); Agreement with the Yankton Sioux art. 13, ch. 290, § 12, Dec. 31, 1892, 28 Stat. 286, 317 (recognizing mixed-blood title to allotments and equal status with full-bloods).

252. Agreement with the Assiniboine and Gros Ventre, *supra* note 251, art. 9.

253. Agreement with Sioux Indians of Rosebud Reservation, *supra* note 251, art. 4; Agreement with the Yankton Sioux, *supra* note 251, art. 13.

254. *See* S. EX. DOC. NO. 53-59 (1894) (transmitting Interior documents on *Waldron* case to Senate); S. MISC. DOC. 53-21 (1893) (requesting Senate for Secretary of Interior to transmit documents in Waldron's case); 27 CONG. REC. 2610-14 (1895) (discussing Jane Waldron's case in Senate).

255. *See, e.g.*, H.R. 9502, 57th Cong. (1902) (instructing that "all entries of land or allotments of land in severalty heretofore made to any mixed-blood Indian, of whatever degree, . . . are hereby ratified and confirmed, and said mixed-blood Indians shall hereafter enjoy all rights of Indians of their respective tribes"); S. 327, 57th Cong. (1901) (same); S. 2211, 56th Cong. (1900) (same); H.R. 3990, 56th Cong. (1899) (same); H.R. 8971, 55th Cong. (1898) (creating cause of action for Indian or "mixed-blood Indian in any degree" to sue tribe in federal court to establish rights as tribal member); S. 2966, 54th Cong. (1896) (same as H.R. 9502, *supra*); S. 102, 54th Cong. (1895) (defining "Indian" to include mixed-bloods "of whatever degree" and specifically recognizing female mixed-blood Indians married to white men receiving rations at agency on Great Sioux Reservation before March 2, 1889, as entitled to allotments).

"not only Indians of the full blood, but also Indians of the mixed blood of whatever degree, whenever such mixed-blood Indian, at the time of the passage of any [statute] or ratification of any . . . treaty, lived with and was a member of the tribe and maintained tribal relations with his tribe."[256] Foreshadowing later action by Congress and the Bureau of Indian Affairs,[257] the bill would have immediately released all mixed-bloods of one-quarter or less Indian blood from restrictions on selling their allotments, thereby opening up their land to taxation.[258] A similar bill in the House included the one-quarter blood provision because, according to the Committee on Indian Affairs, "Indians having so small a fraction of Indian blood, with the great assistance and help the Government has rendered to them, should assume all the obligations incumbent to the citizen."[259]

Similarly, proposed amendments to the annual appropriations bill attempted to create an all-purpose definition for Indian that would have included mixed-bloods as long as they maintained relations with their tribe.[260] Opponents defeated such amendments, using the Five Civilized Tribes[261] as examples of the alleged effects of intermixture.[262] As one Senator put it:

> This nation is generous, and means to be generous, to the Indians, but by that, I know, the people understand and mean the Indian aborigines, not the half-bloods, not the quarter-bloods, not the eighth-bloods, not those in whom you can not observe the physical admixture . . . this is growing to be a vast abuse. By intermarriages you may in that way virtually, to use a phrase, eradicate Indians as Indians, and yet you will have all the Western country full of white people, but clinging to whatever is to come from the Government on the ground that they are Indians. It seems to me one of the ways of getting rid of the Indian question is just this of intermarriage, and the gradual fading out of the Indian blood; the whole quality and character of the aborigine disappears, they lose all of the traditions of the race; there is no longer any occasion to maintain the tribal relations, and there is then every reason why they shall go and take their place as white people do everywhere.[263]

Echoing this sentiment, one failed 1895 provision sought to declare all mixed-bloods in the Five Civilized Tribes of more than one-half white blood to be legally white.[264] None of the proposed amendments or separate bills passed, and the question of mixed-blood status remained.

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256. S. REP. NO. 54-969, at 1 (1896).

257. *See infra* text accompanying notes 346-86, 396.

258. *See* S. REP. NO. 54-969, at 1. Other bills set the threshold for release at one-half. *See, e.g.*, H.R. 9502, 57th. Cong. § 1 (1902).

259. H.R. REP. NO. 54-2276, at 1 (1896). The bill also would have allowed "Indians possessing a higher fraction of Indian blood" to petition a state court to release them from restrictions upon a showing of competency. *Id.* Congress later accomplished this through "competency commissions," which decided whether an individual, regardless of blood, was competent to own their land free of federal restrictions on sale. *See infra* text accompanying notes 342-45.

260. *See, e.g.*, 27 CONG. REC. 2610.

261. *See supra* note 66.

262. *See* 27 CONG. REC. 2612-14.

263. 27 CONG. REC. 2614 (statement of Sen. Higgins). Interestingly, Senator Higgins made this statement during the discussion of an amendment proposed by Senator Kyle of South Dakota, who specifically used Jane Waldron's case as justification for statutorily defining mixed-bloods as Indian. 27 CONG. REC. 2610-14.

264. *See* 27 CONG. REC. 1040, 1108.

Though failing to define Indian for all purposes, Congress did pass several important pieces of legislation for the benefit of mixed-bloods seeking a share of tribal property. An act passed in 1894 and amended in 1901 granted "all persons who are in whole or in part of Indian blood" the right to sue the United States in the circuit courts if they believed they were improperly denied an allotment.[265] The law's reference to persons of "part" Indian blood suggested that mixed-bloods, but not white or other persons without Indian ancestry married or adopted into a tribe, had the right to receive allotments, or, at the very least, the federal courts had jurisdiction to establish that right.[266] An act passed in 1897 was the most significant, as it declared that

> [a]ll children born of a marriage heretofore solemnized between a white man and an Indian woman by blood . . . where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belonged . . . .[267]

Though a strong statement of the right of mixed-bloods to Indian status, if their mothers were recognized by the tribe, the provision did not apply to everyone. The Act only included mixed-bloods with white fathers. Also, the word "heretofore" kept open the question of the Indian status of mixed-blood children from marriages after June 7, 1897, the date of the Act. Further, the requirement of legal marriage left out the status of illegitimate children. Nevertheless, the statute did help to clarify the status of some mixed-bloods, supporting their claims for allotments.[268] More importantly, the statute did not base entitlement on common law paternal or maternal descent or on blood quantum, but on tribal membership or descent from a member.[269]

3. Changes in Judicial Definitions

With the shift in approach by Congress, courts moved away from previous common law rules of matrilineal or patrilineal descent, and looked to tribal law or other rules to define mixed-blood status. Importantly, through various laws certain Indians, including Indian women who married white men after August 9, 1888, became citizens of the United States.[270] These provisions complicated the

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265. Act of Feb. 6, 1901, ch. 217, § 1, 31 Stat. 760, 760; Act of Aug. 15, 1894, ch. 290, § 1, 28 Stat. 286, 305 (codified as amended at 25 U.S.C. § 345 (2000)).

266. *See* Drapeau v. United States, 195 F. 130, 136 (C.C.D.S.D. 1912) (holding court had no jurisdiction over allotment suit by white man married to Sioux woman). Another white man unsuccessfully petitioned for a writ of mandamus to challenge the rejection of his allotment claim. *See* United States *ex rel.* West v. Hitchcock, 205 U.S. 80 (1907) (declining to issue writ of mandamus against Secretary of Interior for failure to approve allotment for white man adopted into Wichita Tribe).

267. Act of June 7, 1897, ch. 3, §1, 30 Stat. 62, 90 (codified at 25 U.S.C. § 184 (2000)). For a critique of this provision as allegedly reflective of patriarchal biases in American law, see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 724 (1989).

268. *See, e.g.*, Vezina v. United States, 245 F. 411, 420-21 (8th Cir. 1917); Smith v. Bonifer, 154 F. 883, 889 (C.C.D. Or. 1907), *aff'd on other grounds*, 166 F. 846 (9th Cir. 1909); William Banks, 26 Pub. Lands Dec. 71, 73 (1898).

269. The literal language of the statute does not require that the mixed-blood child be recognized as a member, as long as his or her mother was a member. One scholar has interpreted this as a federal intrusion on the right of a tribe to define its own membership. Curry, *supra* note 12, at 183-84.

270. *See* Act of Nov. 6, 1919, ch. 95, 41 Stat. 350 (regarding Indian World War I veterans); Act of

rules, as the simple dichotomy between Indian mothers and "citizen" fathers discussed in earlier opinions no longer applied. In *United States v. Nice*,[271] the United States Supreme Court eliminated any doubt that Indians who became citizens could nonetheless remain members of tribes and Indians under federal supervision and control.[272]

a. Allotment Eligibility Cases

Under the statute allowing allotment suits,[273] mixed-bloods and intermarried whites brought claims against the government, both for on-reservation and public domain allotments. In one case, *Sloan v. United States*,[274] attorneys for the government argued the *patrem* rule, contending the mixed-blood Omaha plaintiffs were not entitled to allotments under an 1882 statute breaking up the tribe's reservation.[275] The court explicitly rejected "the artificial rule of the common law," stating that "[a]s ordinarily understood by white people, a person of white and Indian parentage is deemed to be [Indian], without regard to the source of the Indian blood."[276] Ultimately the court ruled that tribal membership determined the right to an allotment.[277] Curiously, though the court declined to follow decisions of the Department of Interior on the plaintiffs' eligibility, the court deferred to federal allotment agents on the question of tribal membership, taking reports of those agents on the purported tribal approval or disapproval of a mixed-blood as conclusive evidence.[278]

Mixed-bloods in other cases also established their rights to allotments because the courts deemed them tribal members.[279] While one court seemingly applied tribal membership, it also stated that the mixed-blood claimants were "Indians of sufficient Indian blood to substantially handicap them in the struggle

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May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 182 (concerning allottees after the end of the restriction period); Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447 (regarding the Five Civilized Tribes); General Allotment Act, § 6, 24 Stat. at 390 (concerning allottees and Indians who take up "civilized life"); Act of Aug. 9, 1888, ch. 818, § 2, 25 Stat. 392, 392 (codified at 25 U.S.C. § 182 (2000)) (regarding Indian women marrying white men after August 9, 1888). Earlier statutes had granted citizenship to Indians of specific tribes, but at the cost of tribal membership. *See* COHEN, *supra* note 15, at 142. All Indians became citizens in 1924. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (2000)). For a critical history of Indian citizenship, see Robert Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999). For a discussion of Indian citizenship in the context of the drafting of the Fourteenth Amendment, see Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555 (2000).

271. 241 U.S. 591, 598 (1916).

272. *See id*.

273. Act of Feb. 6, 1901, ch. 217, § 1, 31 Stat. 760, 760 (codified as amended at 25 U.S.C. § 345 (2000)).

274. 118 F. 283, 288 (C.C.D. Neb. 1902).

275. *See id*.

276. *Id*.

277. *Id.* at 291.

278. *Id.* at 290-92.

279. *See, e.g.* Vezina v. United States, 245 F. 411, 420 (8th Cir. 1917); Reynolds v. United States, 205 F. 685, 688 (D.S.D. 1913); Drapeau v. United States, 195 F. 130, 136-37 (C.C.D.S.D. 1912) (rejecting white husband's claim, but accepting mixed-blood childrens' claims); Sully v. United States, 195 F. 113, 124-25 (C.C.D.S.D. 1912).

for existence."[280] However, courts rejected other mixed-bloods, construing the 1897 statute concerning mixed-marriages as barring children of Indian women who had married white men and allegedly abandoned tribal membership by physically leaving the tribe.[281] According to these courts, a child was only eligible if, at the time of the claim for an allotment, the mother continued to be a tribal member, which they defined as living with the tribe.[282]

After being rejected several more times by Department of Interior officials,[283] Jane Waldron filed her suit against the United States.[284] She now claimed five-sixteenths Indian blood, and again asserted the existence of a mother right recognized by the Sioux for children of mixed marriages.[285] According to her witnesses, mixed-bloods followed the status of their Indian mother, and were considered Sioux for purposes of rights to tribal property.[286] Though similar to the common law *ventrem* rule, the mother-right rule derived from the authority of the tribe to determine membership, and not from federal common law. Waldron finally won, as the court in *Waldron v. United States* ruled that she was a member of the Sioux tribe under the mother-right rule and therefore eligible for an allotment.[287]

The Supreme Court finally considered mixed-blood allotment eligibility in *Halbert v. United States*.[288] The case concerned mixed-blood claims to allotments on the Quinaielt Reservation in Washington.[289] The Court held that tribal membership defined eligibility to tribal property.[290] Like previous cases, the Court recognized that an Indian woman who married a white man but remained with the tribe continued to be a tribal member.[291] According to the Court, it was the woman's physical separation from the tribe, and not mere

280. *Sully*, 195 F. at 129.

281. Act of June 7, 1897, ch. 3, §1, 30 Stat. 62, 90 (codified at 25 U.S.C. § 184 (2000)). For a discussion of the mixed-marriage provision, see *supra* text accompanying notes 267-69. *See, e.g.*, Pape v. United States, 19 F.2d 219, 220 (9th Cir. 1927); Oakes v. United States, 172 F. 305, 309-10 (8th Cir. 1909); *Reynolds*, 205 F. at 688.

282. *See Pape*, 19 F.2d at 220-21; *Oakes*, 172 F. at 309-10; *Reynolds*, 205 F. at 688.

283. *See generally* Black Tomahawk v. Waldron, 27 Pub. Lands Dec. 386 (1898); Black Tomahawk v. Waldron, 24 Pub. Lands Dec. 145 (1897).

284. *See generally* Waldron v. United States, 143 F. 413 (C.C.D.S.D. 1905).

285. *See id.* at 415-16.

286. *See id.* Apparently because of the national interest in the *Waldron* case, the testimony taken by a special examiner was published. IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION, JANE E. WALDRON V. THE UNITED STATES OF AMERICA (1904). The testimony presents a fascinating view of the complex mixture of Sioux and white society in early twentieth-century South Dakota.

287. *Waldron*, 143 F. at 419-20.

288. 283 U.S. 753, 755 (1931). The Court indirectly considered the eligibility of an adopted white man in *United States* ex rel. *West v. Hitchcock*, 205 U.S. 80, 83-85 (1907). In that case, the Court refused to issue a writ of mandamus against the Secretary of Interior to compel him to grant the white petitioner an allotment. *See id.* at 83-84. According to the Court's reading, an agreement with the Wichita Tribe authorized allotments to tribal members "native and adopted," with no definition of membership. *See id.* at 83. The Court ruled that the Secretary of Interior necessarily had the responsibility to approve the adoption by the Wichita Tribe. *See id.* at 86. Consequently, a writ of mandamus to compel the Secretary to issue an allotment to a white man whose adoption he did not approve was inappropriate. *See id.*

289. *Halbert*, 283 U.S. at 755.

290. *See id.* at 762-63.

291. *Id.* at 763.

marriage to a white man that severed tribal membership.[292] For the mixed-blood child from such a marriage, the Court acknowledged the *patrem* rule but rejected it when the mixed-blood was raised by an Indian mother:

> The children of a marriage between an Indian woman and a white man usually take the status of the father; but if the wife retains her tribal membership and the children are born in the tribal environment and these reared by her, with the husband failing to discharge his duties to them, they take the status of the mother.[293]

According to the Court, federal law recognized a mixed-blood child as a tribal member when his or her mother was a tribal member, apparently whether the tribe recognized that child or not.

These cases demonstrate without question that mixed-bloods were eligible for allotments without regard to blood quantum. Instead, the courts, like the Department of Interior, applied tribal membership. However, the courts saw fit to define tribal membership either through witness testimony, or, as eventually adopted by the Supreme Court, through federally-created rules emphasizing the abandonment of children by white fathers or the embrace of Indian mothers of civilized life.

b. Other Cases

The federal courts also attempted to clarify Indian status in other situations, especially in criminal cases. Interestingly, in *Alberty v. United States*,[294] the United States Supreme Court applied the *ventrem* rule to an individual of black and Choctaw descent.[295] Alberty, the defendant, was a Cherokee freedman, while the victim was the spouse of a Cherokee freed woman and also was the illegitimate son of a Choctaw father and a slave mother.[296] An 1866 treaty with the Cherokee made Alberty a citizen of the Cherokee Nation, and, along with an 1890 statute, also recognized the exclusive jurisdiction of the Cherokee Nation over crimes between tribal members, whether Indians by blood or naturalized citizens.[297] Alberty claimed he was exempt from federal criminal jurisdiction, because both he and his victim were Indian, or, at the very least, members of the Cherokee Nation.[298] The Court ruled that 1) Alberty was not an Indian because he was not of Indian blood, 2) the victim was legally a "negro" and not an Indian under the *ventrem* rule applied to slaves and illegitimate children, and 3) though Alberty was a member of the Cherokee Nation, the victim was not, based on the Court's reading of Cherokee law.[299]

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292. *Id.*

293. *Id.*

294. 162 U.S. 499 (1896).

295. *See id.* at 501. For a discussion of the *ventrem* rule, see *supra* text accompanying notes 27-30, 139-45.

296. *See id.* at 500-01. The terms "freedman" and "freed woman" refer to people of African descent who previously had been held as slaves by citizens of the Five Civilized Tribes in the Indian Territory, now Oklahoma. *See infra* text accompanying note 346-52.

297. *See Alberty*, 162 U.S. at 500-02.

298. *See id.* at 500-01.

299. *See id.* The Court relied on United States v. Rogers in concluding that Alberty was not an Indian under the criminal statute exempting crimes between Indians. *See id.* For a discussion of Rogers,

An interesting phenomenon occurred in criminal cases after the passage of the Major Crimes Act in 1885.[300] That Act extended federal authority over Indians who committed several enumerated major crimes.[301] Significantly, the Act closed the Indian-Indian exception for those crimes by allowing the prosecution of Indians regardless of the race of the victim.[302] Where criminal defendants claimed they and their victims were Indians,[303] defendants now attempted to escape federal jurisdiction by denying that they were Indians.[304]

Two cases demonstrate this phenomenon and the evolving judicial approach to criminal jurisdiction over mixed-bloods. In *United States v. Ward*[305] the court applied the *patrem* rule[306] to the status of a half-black, half-Indian defendant who argued he was exempt from federal prosecution.[307] The *Ward* court followed *Ex Parte Reynolds*,[308] ruling that Ward was not an Indian subject to federal jurisdiction because his black father was a citizen of the United States.[309] In *United States v. Hadley*,[310] an individual of Yakima and white descent claimed that he was exempt under the act because he was a United States citizen.[311] Interestingly, he had received an allotment from local federal officials.[312] The court stated that as a matter of "common knowledge" there were two classes of "half-breeds": one whose white fathers had abandoned them to be raised on reservations as Indians, and the other whose fathers raised them in white society under the laws of marriage and citizenship.[313] The court then held that the Major Crimes Act referred to "the legal status of the offender, and that the facts as to the blood of their parents are not to be considered."[314] Under the specific facts of the case the court concluded that Hadley was not an Indian.[315]

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see supra text accompanying notes 137-39. Interestingly, the Supreme Court ruled a year later in Nofire v. United States that federal courts lacked jurisdiction over two Cherokees who murdered a white man, based on its previous analysis in Alberty. 164 U.S. 657, 658-62 (1897). The victim had married a Cherokee woman under Cherokee law, and the Court held that he was a naturalized citizen of the Cherokee Nation. *See id.* at 659-62. Therefore, the crime was between citizens of the Cherokee Nation, and, based on the treaty and statute discussed in Alberty, was outside the jurisdiction of the federal courts. *See id.*

300. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 [hereinafter Major Crimes Act]. For the legal history of the events leading up to the passage of the Major Crimes Act, see SIDNEY L. HARRING, CROW DOG'S CASE AMERICAN SOVEREIGNTY, TRIBAL LAW, AND UNITED LAW IN THE NINETEENTH CENTURY (1994).

301. *See* Major Crimes Act, § 9. The present version of the Act includes fourteen enumerated crimes. 18 U.S.C. § 1153 (2000).

302. Major Crimes Act, § 9. *See* 18 U.S.C. § 1153 (2000).

303. *See supra* text accompanying notes 134-45, 172-84, 294-302.

304. *See, e.g.*, United States v. Gardner, 189 F. 690, 692 (E.D. Wis. 1911); United States v. Hadley, 99 F. 437, 437 (C.C.D. Wash. 1900).

305. 42 F. 320 (C.C.S.D. Cal. 1890).

306. *See supra* text accompanying notes 180-82.

307. *See Ward*, 42 F. at 321.

308. 20 F. Cas. 582 (C.C.W.D. Ark. 1879). For a discussion of this case, see *supra* text accompanying notes 172-84.

309. *Ward*, 42 F. at 322-23.

310. 99 F. 437 (C.C.D. Wash. 1900).

311. *See id.* at 438.

312. *See id.*

313. *Id*.

314. *Id.*

315. *See id.*

In *Farrell v. United States*[316] the Eighth Circuit Court of Appeals applied the *Hadley* rule to a case involving liquor trafficking.[317] The defendant challenged the government's ability to convict him for selling liquor to a man of three-quarters Sioux blood.[318] He specifically argued that the purchaser was not subject to federal restrictions on sale under the 1897 statute[319] that prohibited sale to "any Indian including mixed-bloods."[320] He argued, among other things, that the *patrem* rule meant that the purchaser was not a mixed-blood.[321] The court cited *Hadley* for the proposition that "the child of a white citizen and an Indian mother who is abandoned by the father, and is nurtured and reared by the Indian mother in the tribal relation . . . follows the status of the mother and becomes a member of the Indian tribe."[322] Under the facts of the case the court ruled that the purchaser was a mixed-blood subject to the statute and upheld the conviction.[323]

In the civil context, the federal courts in Montana dealt with mixed-blood status in four cases concerning exemptions from state taxation.[324] The county assessors in the State of Montana were eager to tax certain mixed-bloods, arguing they were not entitled to the exemption from state property taxes conferred on Indians within reservations.[325] The United States filed cases on behalf of mixed-bloods to enjoin the county authorities from further taxing or foreclosing on their property, arguing they were legally Indian.[326] In three out of the four cases the court ruled that recognition of membership by the tribe conferred Indian status, and therefore exemption from county taxation.[327] In *United States v. Higgins*, however, the court rejected the adoption of a quarter-blood Spokane as a member on the Flathead Indian Reservation, contending that his white father's citizenship and the mixed-blood's residence outside the reservation until age seventeen made him a white person for taxation purposes.[328]

An interesting 1905 case, *New York Indians v. United States*,[329] dealt with mixed-blood eligibility for damages against the United States.[330] In that case, the Court of Claims had to decide to whom the United States had to pay damages for illegally selling land set aside for removal of New York Indians under the

316. 110 F. 942 (8th Cir. 1901).
317. *See id.* at 945.
318. *See id.* at 943.
319. Act of Jan. 30, 1897, ch. 109, 29 Stat. 506.
320. *Farrell*, 110 F. at 946.
321. *See id.* at 945.
322. *Id.* at 944-45.
323. *See id.* at 945.
324. *See* United States v. Heyfron, 138 F. 964 (C.C.D. Mont. 1905); United States v. Heyfron, 138 F. 968 (C.C.D. Mont. 1905) [hereinafter *Heyfron II*]; United States v. Higgins, 103 F. 348 (C.C.D. Mont. 1900); United States v. Higgins, 110 F. 609 (C.C.D. Mont. 1901) [hereinafter *Higgins II*].
325. *See Heyfron*, 138 F. at 964; *Heyfron II*, 138 F. at 969; *Higgins*, 103 F. at 349; *Higgins II*, 110 F. at 610.
326. *See id.*
327. *See Heyfron*, 138 F. at 968; *Heyfron II*, 138 F. at 968; *Higgins*, 103 F. at 352.
328. *See Higgins II*, 110 F. at 610-11.
329. 40 Ct. Cl. 448 (1905).
330. *Id*.

Treaty of Buffalo Creek.[331] The Court of Claims rejected the argument that entitlement depended on Iroquois tribal law that defined status through the mother, and instead recognized mixed-bloods with white maternal ancestors as Indians entitled to payment.[332] According to the court, in seeking the removal of the New York Indians:

> The United States were [sic] not interested in academic questions of Indian blood or Indian citizenship. Whether an Indian family of half bloods residing on an Indian reservation in the State of New York or the State of Wisconsin were children of white men or of white women was, for the purposes of the [treaty], abstract and irrelevant. That one such family should be called Indian and be allowed to go to the West to acquire lands of the United States, but that the other should be called white and not be allowed to go or to acquire lands, would be an incongruity utterly foreign to the intent of the agreement.[333]

Ultimately the court applied a rule "which would embrace all persons whom it was the policy of the United States to remove," which included all those living with the tribes, including white women and their mixed-blood children.[334] The court applied a federal law of descent, and specifically rejected "the peculiarities of Indian laws and customs."[335]

As discussed above, as in allotment eligibility cases, courts moved away from common law rules to define mixed-blood status. They avoided the *patrem* rule if the mixed-blood was a tribal member, defined by some courts as being a child who was abandoned by a white father and raised by a tribal member mother in tribal society.[336] However, as in the *New York Indians* case, courts did not always defer to tribal law on membership. Importantly, regardless of the rule applied, blood quantum again was irrelevant. However, while courts continued to apply rules without regard to blood quantum, Congress moved to apply it to mixed-bloods after they received an allotment.

4. Blood Quantum in Release from Allotment Restrictions

After a century of use of blood quantum primarily to describe, but not to define individual Indians, Congress and the BIA applied blood quantum to release whole classes of Indian allottees from restrictions on sales of allotments. The discussion centered on the notion of wardship,[337] as officials advocated severing federal protections for those deemed competent to be full citizens while retaining protections for Indians who purportedly required continued supervision.

In *Lone Wolf v. Hitchcock*,[338] the Supreme Court bolstered the notion of

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331. *Id.* at 451.
332. *Id.* at 453-57.
333. *Id.* at 454.
334. *Id.* at 456.
335. *Id.* at 456-57.
336. For an interesting critique of the abandoned child approach and its effect on Indian women, see Berger, *supra* note 12, at 43-50.
337. *See supra* text accompanying notes 84-87.
338. 187 U.S. 553 (1903).

Indian wardship and confirmed to Congress that it had virtually unfettered power as guardian over Indians and their lands.[339] In that case the Court ruled that Congress could forcibly dissolve communal reservation lands regardless of the lack of a valid agreement required by a treaty.[340] According to the Court, Congress had "full administrative power" over the property of those who "were in substantial effect the wards of the government."[341] The ruling in *Lone Wolf* essentially freed Congress from any lingering concern that it had to get Indian consent before it could dispose of Indian lands.

Congress moved swiftly to use its now immense authority to selectively open allotments to sale, and, importantly, taxation. Initially Congress set a twenty-five year bar to sales of allotments,[342] but under the Burke Act it amended that bar for those Indians deemed competent to handle their affairs.[343] Originally federal officials judged the competency of the allottee on an individual basis, awarding a "certificate of competency" in an elaborate ceremony symbolizing an Indian's abandonment of tribal life.[344] The effect was significant, as competent Indians could sell their land and, importantly, be subject to state and local taxation.[345]

Apparently weary of individualized determinations, Congress applied blood quantum as a proxy for competency to release whole groups of Indians from their allotment restrictions. Congress first applied this use of blood quantum on a large scale to allottees of the Five Civilized Tribes of Oklahoma. The federal policy towards the Cherokee, Creek, Choctaw, Chickasaw, and Seminole was unique, as was the racial makeup of those nations.[346] Several of those tribes had intermarried or adopted whites who were considered entitled to various levels of citizenship.[347] Citizens of those tribes also had held black slaves, and, though not always accepted by the tribes themselves, the federal government considered the "freedmen," or ex-slaves to be entitled to tribal property.[348] Through various agreements the federal government broke up the land of each tribe into allotments.[349] As part of the process Congress set up a commission to decide

339. *Id.* at 565-68.

340. *Id.* at 565-69.

341. *Id.* at 568. For a detailed discussion of the case and its effect, see BLUE CLARK, *LONE WOLF V. HITCHCOCK*: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY (Univ. of Nebraska Press 1994).

342. Dawes Act, ch. 119, § 5, 24 Stat. 388, 389.

343. Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 183 [hereinafter Burke Act].

344. *See* JANET MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934, at 87-102 (1991).

345. Burke Act, § 6.

346. *See* W.F. SEMPLE, OKLAHOMA INDIAN LAND TITLES § 26 (1952).

347. *See id.* §§ 82, 95. The Supreme Court ruled in 1906 that white men who married Cherokees after 1875 were ineligible for allotments due to a Cherokee statute barring them from sharing in tribal property. *See* Red Bird v. United States, 203 U.S. 76, 78-79, 96 (1906). The Court also rejected white men who re-married or abandoned their Cherokee wives based on Cherokee law. *See id.* at 95-96. For a discussion of this and other similar cases, see Berger, *supra* note 12, at 30-34.

348. *See* SEMPLE, *supra* note 346, §§ 82, 95. For a discussion of slavery among these tribes, see Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61, 75-93 (2005).

349. *See* SEMPLE, *supra* note 346, § 16.

membership in each tribe.[350] The Dawes Commission created separate rolls for "Indians by blood," intermarried white citizens, and freedmen to determine allotment eligibility.[351] Importantly, the commission recorded the blood quantum of each Indian appearing on the "Indian by blood" roll, but apparently recorded only the blood of the mother's tribe for persons with fathers from a different tribe, and failed to record any Indian blood at all for many of African and Indian ancestry, whom the Commission listed on the "freedmen" rolls.[352]

With each group accounted for, Congress moved to make lands alienable based on the race and blood quantum of the allottees. First, Congress released whites and freedmen in 1904, called "Indians who are not of Indian blood" in the statute, from restrictions on the sale of all their allotted land except their homesteads.[353] In 1906 Congress extended the time for restrictions for full bloods, and required that the Secretary of Interior approve full-blood leases, sales, and wills devising allotments.[354] In 1908 Congress released Indians from restrictions on the sale of their allotments by their amount of Indian blood. Those Indians of less than one-half Indian blood, along with intermarried citizens and freedmen, were released from all restrictions.[355] Those of one-half or more Indian blood, but less than three-quarters Indian blood, were released from restrictions on all their land but their homestead.[356] Those of three-quarters or more Indian blood retained restrictions on all their land.[357] The act further released restrictions on allotments upon the allottee's death, but required a state probate court to approve any conveyance by a full-blood heir.[358] Further, lands of deceased Indians of one-half or more Indian blood remained unalienable if there was a child born since 1906.[359]

One stated motivation for the bill was the generation of revenue for Oklahoma state schools by enlarging the property tax base.[360] The committee

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350. *See* Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645.

351. *See* SEMPLE, *supra* note 346, § 82. For a detailed discussion of the preparation of the rolls by the Dawes Commission, see ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 37-47 (1940); KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914 (1999).

352. *See* SEMPLE, *supra* note 346, § 82; CARTER, *supra* note 351, at 49; Pratt, *supra* note 348, at 100-04. Some "Indians by blood" were adopted, and the Commission generally did not include a blood quantum for them. *See infra* text accompanying notes 373-75. For a discussion of the problems caused by the Commission's blood classifications and attempts to change or establish the quantum of various individuals, see *infra* text accompanying notes 368-75. The question of the classification of the freedmen has taken on a renewed importance, as several modern Oklahoma tribal governments have denied them enrollment or benefits based on their alleged lack of Indian blood. *See* Joyce A. McCray Pearson, *Red and Black—A Divided Seminole Nation:* Davis v. U.S., 14 KAN. J.L. & PUB. POL'Y 607 (2005); Pratt, *supra* note 348; Terrion L. Williamson, *The Plight of "Nappy Headed" Indians: The Role of Tribal Sovereignty on the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233 (2004).

353. *See* Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 204.

354. *See* Act of Apr. 26, 1906, ch. 1876, §§ 19, 22, 23, 34 Stat. 137, 144-45.

355. *See* Act of May 27, 1908, ch. 199, §1, 35 Stat. 312, 312.

356. *See id.*

357. *See id*.

358. *See id.* §§ 2, 9.

359. *See id*.

360. H.R. REP. NO. 60-1454, at 1-2 (1908); 42 CONG. REC. 5075 (1908). For a discussion of the various Oklahoma forces advocating for the Act, see DEBO, *supra* note 351, at 174-80.

reports to the full Congress emphasized the amount of land that would be free from restrictions, and therefore taxable, based on the number of intermarried whites, freedmen, full-bloods and mixed-bloods on the approved lists of tribal allottees.[361] After the passage of the act, the Commissioner of Indian Affairs justified the use of blood as indicative of competency and education:

> It was believed that, in view of their white parentage and of their opportunities for education, all Indians of less than one-half blood could be entrusted with the untrammeled management of their lands. It was also believed that Indians of less than 75 percent Indian blood should be authorized to sell their surplus lands, because they too had had opportunities for education, very few would have any excuse for making a foolish use of the privilege, and if they did sell their land for less than it was worth or make improvident use of the proceeds, they would still have their homesteads to fall back upon and would have learned a lesson.[362]

The Commissioner of Indian Affairs' emphasis on the connection of amounts of blood to competency denied a curious fact about the statute: The House and Senate had disagreed on the amounts of blood to apply. As originally submitted to the Senate, the House bill would have released mixed-bloods of less than one-half blood from restrictions on all their land, and released mixed-bloods of one-half or more Indian blood from restrictions on all land but their homesteads.[363] This was the proposal of the Department of Interior and Oklahoma state officials.[364] The Senate amended the bill to only release mixed-bloods of one-quarter or less Indian blood from all restrictions, and release mixed-bloods of more than one-quarter and less than three-quarters Indian blood from restrictions on all land except for homesteads.[365] The House and Senate agreed on the final language in conference committee, creating the one-half and three-quarters cut-off points.[366] Despite the commissioner's description of the clear connection between blood and competency, the two houses of Congress appear to have merely compromised on the quantum of blood.[367]

The selective lifting of restrictions revealed a significant problem in the use of blood quantum, as the Dawes Commission's method of recording blood quantum generated many legal challenges when land was sold by allottees. Important provisions in the 1906 and 1908 acts stated that the blood quantum listed on the Dawes Commission rolls would be conclusive.[368] In suits brought by the United States or the allottees, some mixed-bloods claimed they were of a higher blood than the quantum listed on the Dawes Commission roll.[369] Mixed-

361. H.R. REP. NO. 60-1454, at 2-4 (1908); S. REP. NO. 60-575, at 2-4 (1908).

362. 1908 ANN. REP. COMM'R IND. AFF. 100.

363. *See* 42 CONG. REC. 5074-75 (1908).

364. *See* S. REP. NO. 60-575, at 1.

365. *See* 42 CONG. REC. 5425-26.

366. *See* 42 CONG. REC. 6598.

367. For a description of the inevitable fraud and controversy resulting from land speculation after the release of restrictions of mixed-bloods and the application of other provisions of the 1908 Act, see DEBO, *supra* note 351, at 182-229.

368. Act of May 27, 1908, § 3, 35 Stat. 312, 313; Act of Apr. 26, 1906, § 19, 34 Stat. 137, 144.

369. *See, e.g.*, United States v. Ferguson, 247 U.S. 175 (1918) (involving a man of one-half Indian blood, as recorded by Dawes Commission, who claimed he was a full blood); Cully v. Mitchell, 37 F.2d 493 (10th Cir. 1930) (involving a woman of one-quarter Indian blood, as recorded by Dawes

bloods with black ancestry argued they were wrongly placed on the freedman roll when they had Indian blood.[370] These mixed-bloods submitted oral testimony and other evidence on their true quantum to dispute the rolls so that the court would invalidate sales of their land.[371] Both federal and state courts rejected these challenges, ruling that the Dawes Commission was a quasi-judicial tribunal and that its findings concerning the amount of blood or existence of Indian blood could not be attacked by outside evidence.[372] Courts did allow outside evidence in cases involving adopted children of Indians by blood, because the Dawes Commission generally failed to record their blood quantum on the rolls.[373] The Dawes Commission also apparently had enrolled some adopted children who had no Indian blood as full-bloods.[374] The blood recorded for those adoptees was conclusive under the 1908 provision.[375]

The 1906 Clapp Amendment removed restrictions for all mixed-bloods on the White Earth Reservation in Minnesota.[376] Congress did not define mixed-bloods in the amendment, requiring clarification by the Supreme Court in *United States v. First National Bank*.[377] Interestingly, lawyers for the United States seeking to set aside mixed-blood sales argued that the term meant those of more than one-half Indian blood on the grounds that "those of half-or-more white blood are more likely to be able to take care of themselves in making contracts and disposing of their lands than those of lesser admixture of blood."[378] However, the Supreme Court interpreted mixed-bloods as anyone with any trace of non-Indian ancestry.[379] Using the term "thoroughbred" to describe full-bloods, the Court legitimized all transfers of land by anyone with any verifiable non-Indian blood.[380] Interestingly, it was unclear which individuals who had sold their allotments were mixed-bloods, requiring that a roll be prepared to

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Commission, who claimed she was three-quarters Indian).

370. *See, e.g.*, Tiger v. Fewell, 22 F.2d 786 (8th Cir. 1927); Sango v. Willig, 249 P. 903 (Okla. 1926); Miller v. Allen, 229 P. 152 (Okla. 1924); Rowe v. Sartain, 230 P. 919 (Okla. 1924). In another interesting case, *Nunn v. Hazelrigg*, a mixed-blood of one-eighth Indian blood sold her land as a freed woman, and the purchaser sought to establish the non-existence of Indian blood by challenging the Dawes roll's classification. 216 F. 330 (8th Cir. 1930).

371. *See Ferguson*, 247 U.S. at 177-78; *Cully*, 37 F.2d at 494; *Tiger*, 22 F.2d at 786; *Sango*, 249 P. at 904-05; *Miller*, 229 P. at 152-53; *Rowe*, 230 P. at 920-21.

372. *See Ferguson*, 247 U.S. at 178-79; *Cully*, 37 F.2d at 495-96, 499; *Sango*, 249 P. at 904; *Miller*, 229 P. at 153-54; *Rowe*, 230 P. at 922-23. The court in *Nunn* made the same conclusion to invalidate the sale of the land. 216 F. at 334. In *Tiger*, the court relied on statutory construction of the 1904 act releasing freedmen from restrictions, see *supra* text accompanying note 353, but also referred to the "complexities and distressing situations as to title" that would arise from using outside evidence to establish Indian blood. 22 F.2d at 787.

373. Johnson v. Hickey, 211 P. 1036, 1038 (Okla. 1923) (involving a claim that adopted person placed on the "Seminoles by blood" roll was of sufficient Indian blood that his conveyances were void); Lula v. Powell, 166 P. 1050, 1051-52 (Okla. 1917). *See, e.g.*, United States v. Stigall, 226 F. 190, 192-93 (8th Cir. 1915).

374. *See* SEMPLE, *supra* note 346, § 95.

375. *See id.*

376. Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1034; Act of June 21, 1906, ch. 3504, 34 Stat. 325, 353.

377. 234 U.S. 245 (1914).

378. *Id.* at 260.

379. *See id.* at 262.

380. *Id.* at 258-59.

quiet claims that full-bloods had illegally sold their allotments.[381] In an action reminiscent of the old slave cases,[382] anthropologists investigated and classified individuals as full-bloods or mixed-bloods based on their physical features.[383]

After these congressional acts directed at specific tribes, Commissioner of Indian Affairs Cato Sells applied the power of the BIA in 1917 to release unilaterally all allotted Indians of less than one-half Indian blood and then in 1919 to Indians of one-half Indian blood.[384] Sells's "Declaration of Policy" connected competency directly to the amount of non-Indian blood:

> While ethnologically a preponderance of white blood has not heretofore been a criterion of competency, nor even now is it always a safe standard, it is almost an axiom that an Indian who has a larger proportion of white blood than Indian partakes more of the characteristics of the former than the latter. In thought and action, so far as the business world is concerned, he approximates more closely to the white blood ancestry.[385]

For Sells, blood quantum served as an easy distinguishing measure of competency. However, after several years of releasing mixed-bloods from restrictions solely based on blood quantum, the new Commissioner abandoned the half-blood rule.[386]

5. Blood Quantum in Other Congressional Statutes

Though the BIA accepted then rejected blood quantum for allotments, Congress embraced blood distinctions in other important legislation. In 1912 Congress restricted funding for Indian education according to blood.[387] The provision barred federal expenditures for the education of "children of less than one-fourth Indian blood" if their parents were citizens of the United States and their state, if there were adequate free schools, and if the Indian schools were "needed for pupils of more than one-fourth Indian blood."[388] After inclusion of this provision in individual appropriation acts,[389] Congress made the quarter-blood restriction permanent in 1918.[390] In 1919 Congress authorized the Secretary of Interior to create final rolls of tribal members, and explicitly required that the blood quantum of each member be included.[391] Importantly,

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381. *See* MELISSA MEYER, THE WHITE EARTH TRAGEDY 159-171 (Bison Books 1999).

382. *See supra* text accompanying notes 26-39.

383. *See* MEYER, *supra* note 381, at 159-71. *See also* David Beaulieu, *Curly Hair and Big Feet: Physical Anthropology and the Implementation of Land Allotment on the White Earth Chippewa Reservation*, 7 AM. INDIAN Q. 281 (1984).

384. *See* 1917 ANN. REP. COMM'R IND. AFF. 3-5; Nichols v. Rysavy, 809 F.2d 1317, 1322 (8th Cir. 1987) (referencing 1919 extension to Indians of one-half Indian blood).

385. 1917 ANN. REP. COMM'R IND. AFF. 3. For historical background on the policy and its supporters, see MCDONNELL, *supra* note 344, at 103-10.

386. *See* 1921 ANN. REP. COMM'R IND. AFF. 23.

387. *See* Act of Aug. 24, 1912, ch. 388, 37 Stat. 518, 519.

388. *Id.*

389. *See* Act of Mar. 2, 1917, ch. 146, 39 Stat. 969, 970; Act of May 18, 1916, ch. 125, 39 Stat. 123, 125; Act of Aug. 1, 1914, ch. 222, 38 Stat. 582, 584; Act of June 30, 1913, ch. 4, 38 Stat. 77, 78.

390. *See* Act of May 25, 1918, ch. 86, §1, 40 Stat. 561, 564 (codified at 25 U.S.C. § 297) (repealed 1985). Interestingly, Congress exempted funding to schools in the Five Civilized Tribes and Quapaw agency in Oklahoma from this provision. Act of May 24, 1922, ch. 199, 42 Stat. 552, 576.

391. *See* Act of June 30, 1919, ch. 4, § 1, 41 Stat. 3, 9 (codified at 25 U.S.C. § 163 (2000)).

like the Five Civilized Tribe acts, the statute mandated that the final roll was conclusive as to the blood quantum of each enrollee.[392] In 1921 Congress defined Native Hawaiian eligibility for land under the Hawaiian Homes Commission Act as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[393] In 1925 Congress barred future spouses who had no Indian blood from inheriting tribal property of Osage Indians of one-half or more Osage blood.[394] In 1928 Congress extended restrictions on allotments for those Indians of the Five Civilized Tribes of one-half or more Indian blood to 1956.[395] Like the previous allotment statutes, Congress in 1929 required the Secretary of the Interior to issue certificates of competency to all Osage Indians having less than one-half Osage blood.[396] A 1933 act extended federal supervision over income held by the Secretary of Interior for Indians of the Five Civilized Tribes of one-half or more Indian blood to 1956.[397]

Two separate acts directly defined tribal membership by blood. Apparently at the request of representatives of the tribe,[398] Congress in 1931 prohibited those of less than one-sixteenth Eastern Cherokee blood from being tribal members.[399] Previous federal legislation passed in 1924 had authorized the distribution of tribal funds to those of less than one-sixteenth blood instead of land allotments.[400] In that legislation, the quantum of blood recorded on the final roll again was deemed conclusive.[401] The congressional legislation replaced a North Carolina state law that had organized the Cherokees as a state corporation.[402] Interestingly, the state statute had restricted eligibility for the principal or assistant chief to those of one-quarter or more Cherokee blood and for councilmen to those of one-sixteenth or more Cherokee blood.[403] A 1934 act defined membership in the Menominee tribe.[404] The statute restricted enrollment of those not already on the rolls to Indians of one-quarter or more Menominee blood.[405] The statute also attempted to bar descendants of recipients of half-breed payments under the treaty of 1848[406] from enrollment.[407] In a curious definition of Indian ancestry, the act stated that "no person who participated in the so-called 'Half Breed Payment of 1849' shall, for the purposes of enrollment as a member of the tribe, be considered as possessing any Menominee Indian

392. *See id.*
393. Act of July 9, 1921, ch. 42, § 201(a)(7), 42 Stat 108, 108.
394. *See* Act of Feb. 27, 1925, ch. 359, § 7, 43 Stat. 1008, 1011 (codified as amended at 25 U.S.C. § 331 (2000)).
395. *See* Act of May 10, 1928, ch. 517, § 1, 45 Stat. 495, 495.
396. *See* Act of Mar. 2, 1929, ch. 493, § 3, 45 Stat. 1478, 1480.
397. *See* Act of Jan. 27, 1933, ch. 23, § 1, 47 Stat. 777, 777.
398. *See* H.R. REP. NO. 71-2633, at 2 (1931).
399. *See* Act of Mar. 4, 1931, ch. 494, 46 Stat. 1518.
400. *See* Act of June 4, 1924, ch. 253, § 13, 43 Stat. 376, 379 (codified at 25 U.S.C. § 331 (2000)).
401. *See id.* § 2.
402. *See* Act of Mar. 8, 1895, ch. 166, 1895 N.C. Sess. Laws 234-37.
403. *Id.* § 17.
404. Act of June 15, 1934, ch. 540, 48 Stat. 965.
405. *Id.* § 4.
406. *Id. See* Treaty with the Menominee, *supra* note 71, art. 4.
407. *See* Act of June 15, 1934, § 4, 48 Stat. at 965.

blood."[408] While Congress defined membership in specific tribes, the general federal approach to Indian affairs shifted significantly in 1934 through the Indian Reorganization Act.

D. THE INDIAN REORGANIZATION ACT (1934) AND THE DEFINITION OF INDIAN

The Indian Reorganization Act[409] (IRA) brought far-reaching changes to the federal administration of Indian affairs. Congress rejected the allotment policy and, among other things, provided land purchase and loan programs and a process by which tribes could organize constitutional governments and form corporate entities.[410] Because of the significant philosophical shift in Indian policy, the bill was controversial when presented to Congress.[411]

One item that created discussion was the definition of Indian advocated by Commissioner of Indian Affairs John Collier, the architect of reorganization.[412] Collier originally proposed a definition for the IRA that included all those of Indian descent who were members of recognized tribes, their descendants who resided on a reservation, and all other Indians of one-quarter or more Indian blood.[413] However, members of Congress, especially Senator Wheeler of Montana, objected to the one-quarter standard:

> I do not think the government of the United States should go out there and take a lot of Indians in that are quarter bloods and take them in under this act. If they are Indians in the half blood then the government should perhaps take them in, but not unless they are. If you pass it to where they are quarter blood Indians you are going to have all kinds of people coming in and claiming they are quarter blood Indians and want to be put on the government rolls, and in my judgment it should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.[414]

Wheeler perpetuated the rhetoric of competency, objecting to those of less than one-half Indian blood from participating at all, stating that Indians in Montana and California were "white people" who were "just as capable of handling their own affairs as any white man in this room."[415]

As passed by Congress, the IRA used Collier's hybrid definition, but raised

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408. *Id.* The Department of Interior had previously denied allotments to descendants of 1849 payment recipients, concluding that by accepting payment a recipient severed his or her connection to the tribe and ceased to be a tribal member. Louis W. Breuninger et al., 42 Pub. Lands Dec. 489, 493 (1913).

409. Indian Reorganization Act, ch. 576, 48 Stat. 984.

410. *Id.*

411. *See* ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 220-54 (2000).

412. For a discussion of John Collier's effect on Indian policy, see COHEN, *supra* note 15, at 146-51.

413. *See* THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 12, § 13(b) (Vine Deloria, Jr. ed., 2002). This definition originally applied only to the section authorizing the Department of Interior to issue a charter to a tribal group. *See* Karl A. Funke, *Educational Assistance and Employment Preference: Who is an Indian?*, 4 AM. INDIAN L. REV. 1, 18-19 (1976). The Senate bill applied the definition to all provisions, as did the final act. *See id.* at 19-20; Indian Reorganization Act, § 19.

414. *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing Before the Committee on Indian Affairs United States Senate*, 73d Cong. 263-64 (1934) (statement of Sen. Wheeler).

415. *Id.* at 151.

the threshold blood quantum to one-half.[416] The definition included:

> [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . persons of one-half or more Indian blood.[417]

The membership, descent and residence, and blood components were discreet methods to define Indian.[418] An individual could be a member of a tribe, a descendant of a member residing on a reservation, or could possess the requisite amount of blood. Importantly, the definition required some Indian blood in all three categories, thereby excluding persons with no Indian ancestry married into or adopted by the tribe. The half-blood and descendant categories expanded the definition of Indian beyond tribal membership. To come under federal administration under the act, one could be politically and biologically Indian or just biologically Indian.

The IRA also was an important crossroads for tribal membership. The Bureau of Indian Affairs' legal interpretation of the act recognized the inherent sovereignty of tribes to define their own membership.[419] With the ability to draft constitutions, the question of tribal membership, and whether to use blood quantum to define it, generally became the choice of tribes themselves.[420] However, definitions of Indian eligibility for federal programs, and the choice to use blood quantum or not, would remain within the authority of the federal government.

IV. CONCLUSION

The legal history of blood quantum to 1935 is more striking for its lack of use than its application. Rules defining the status of mixed-ancestry persons by blood and descent existed from at least 1705 in Anglo-American law, but the federal government only applied blood quantum to Indians on a large scale in the early twentieth century. Though early federal officials knew of blood quantum, and used it to describe individuals of mixed ancestry, they generally avoided its application. In the allotment era, federal officials applied blood quantum for a variety of purposes. Though federal policy shifted again in the Indian Reorganization Act to emphasize tribal self-government, blood quantum was by then firmly entrenched, though existing alongside political definitions. The main

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416. *See* Indian Reorganization Act, § 19.

417. *Id.* For a discussion of these three "classes" of Indians, see Brownell, *supra* note 1, at 285-88; Funke, *supra* note 413, at 18-28.

418. *See* Indian Reorganization Act, § 19.

419. *See* Powers of Indian Tribes, 1 Op. Solic. Ind. Aff. 445, 456-61 (1934).

420. Whether the Bureau of Indian Affairs exerted strong influence in the drafting of membership provisions is more properly examined elsewhere. For discussions of BIA influence over membership in IRA constitutions, see COHEN, *supra* note 15, at 149; GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45, at 96-98 (1980) (discussing BIA use of model constitution as template); Goldberg, *supra* note 8, at 446-47 (discussing Department of Interior's historical influence over membership provisions); Resnik, *supra* note 267, at 714 (discussing circular of Bureau of Indian Affairs encouraging the use of blood or other federal criteria for tribal membership provisions in constitutions).

question is: why blood quantum became a prominent method of defining Indian status, but remained only one of several methods?

The evolution in the use of blood quantum tracks the interaction of two sets of foundational contradictions in federal Indian law. At once Indians are citizens of political entities and members of an Indian race. Further, Indian tribes are autonomous governments with federally-recognized sovereignty over their territories, but Indians are dependent wards of the federal government subject to detailed controls over their lives. The muddled array of individual uses of the legal term Indian that developed to 1935, some requiring a threshold blood quantum (without a consistent quantum) and some requiring tribal membership, reflects that the United States failed to resolve these inherent contradictions in its Indian law. Instead, individual statutes, regulations, and court rulings emphasized different aspects of Indian status, with no cohesive explanation for the varied definitions.

As discussed, the perception of Indians as a biological population entered into nineteenth-century federal Indian law. In 1846 the Supreme Court extended federal criminal jurisdiction over white tribal members by interpreting the statutory term Indian to refer to a race of Indians. Further, federal law barred Indians from American citizenship, explained by some officials as due to the alleged incapacity of the Indian race. Consistent with this perception, the pre-existing colonial concept of different Indian, white, and black bloods and the expression of biological intermixture between Indians and non-Indians in terms of fractionated blood entered into early federal discussions of Indian policy.

However, nineteenth-century federal officials also treated tribes as autonomous political entities, and "Indian" as a political citizen of a tribe. The federal government negotiated treaties with tribes for various purposes, and mostly did not interfere with internal membership. Early treaty provisions included references to half-breeds or quarter-bloods, and a few treaties defined eligibility for specific benefits by blood, but no treaty stated that mixed-bloods were not tribal members or were not Indian. Indeed, some later treaties explicitly recognized mixed-bloods and even intermarried whites and black freedmen as tribal members. Bureau of Indian Affairs administrative practice generally made no distinction between mixed-bloods and other Indians for distribution of benefits, and generally left the decision up to tribal officials whether to recognize mixed-bloods as members. Even when the Attorney General and federal judges suggested a distinction between Indians and white citizens, defined by the amount of Indian blood, they declined to apply it. Instead, the branches of the federal government preferred rules of matrilineal or patrilineal descent or tribal membership to classify mixed-bloods.

While the federal government viewed Indians as members of political entities, it also exerted supervision and control over Indian property as the guardian of Indian wards. The government barred Indians from making contracts, from selling land, and from other activities associated with "competent" citizens of the United States under the notion of guardianship. Federal officials selectively extended their guardianship authority to protect mixed-bloods as Indians by supervising their transactions.

By the 1870s the federal government increasingly asserted its guardianship authority and de-emphasized the concept of Indians as citizens of autonomous tribes. Congress abolished treaty-making with tribes, though it continued to negotiate agreements. Citizen and Indian slowly ceased to be a viable distinction, as Congress bestowed citizenship on various groups of Indians. The Bureau of Indian Affairs grew to control the day-to-day activities of reservation Indians. Congress extended federal court jurisdiction in the Major Crimes Act to prosecute for the first time crimes between Indians. Congress moved to assimilate individual Indians into American society and established the allotment program to dissolve tribes as collective entities.

However, the political conception of Indian identity never completely went away. When the federal government distributed allotments, all three branches eventually applied tribal membership to define eligibility. Officials recognized intermarried white men as empowered to vote on land cession agreements, and these white men shared in the distribution of property at certain times as tribal members. Even when Congress in 1888 barred newly intermarried white men from sharing in tribal property, it still recognized the authority of tribes to recognize them as members.

In the early twentieth century the federal government asserted virtually absolute control over Indian lands and applied the pre-existing concept of blood quantum directly. Blessed by the Supreme Court, Congress dismantled Indian lands and selectively released allottees based on their relative competency. The use of blood quantum combined the concepts of Indian as a member of a biological group and Indian as an incompetent ward. Both Congress and the Bureau of Indian Affairs used blood quantum as one of the defining elements of competency to release whole classes of Indians, while retaining restrictions on others. Congress then conditioned funding and, for certain tribes, membership itself, based on blood quantum, limiting its responsibilities to a subset of biological wards.

However, even when Congress applied blood quantum during this time, there was no consistent approach. Status as an Indian for some purposes required a threshold blood quantum, while for other purposes it did not. Congress used different amounts for different purposes, with no cohesive explanation for the inconsistent applications of blood quantum or the specific amounts chosen.

To add to the confusion, the IRA combined the various conceptions of Indian identity in one piece of legislation. With the exception of adopted non-Indian tribal members, both political and biological Indians were beneficiaries of the act. Tribal membership continued to be important, as the IRA included all tribal members of "Indian descent." However, Congress also included on-reservation descendants of members and Indians of one-half or more Indian blood not affiliated with any tribe. Further, the IRA included both the notions of Indians as autonomous communities and as wards of the federal government. The IRA set up a process for tribes to organize constitutional governments and corporate entities, and subsequent BIA interpretation left membership to the tribes themselves. However, the increase of the blood quantum threshold from

one-quarter to one-half perpetuated the notion of Indian as biological ward, as powerful congressmen successfully objected to the extension of benefits to allegedly competent mixed-bloods.

The array of definitions built up over the span of federal Indian law during this period remains unresolved. Many of the definitions in the statutes, regulations, and cases discussed in this article are still in effect. They exist together in the United States Code, the Code of Federal Regulations, and in federal judicial decisions with subsequent definitions that continue to incorporate the various approaches. The resulting muddle will continue as long as the United States applies blood quantum and tribal membership inconsistently, frustrating future generations of Indian people, as well as those who practice federal Indian law, by perpetuating the inconsistencies of Indian legal identity.