INDIAN LAW AND THE RHETORIC OF RACE: USES OF BLOOD QUANTUM TO REORGANIZATION

Paul Spruhan
University of New Mexico
The definition of "Indian" in federal and state law has engendered endless controversy since the beginning of Indian policy in America. Much of the controversy derives from the tension between conceptualizing Indians as a biologically distinguishable "race," or as a political group possessing unique rights in American society. In Morton v. Mancari the Supreme Court apparently resolved such tension as a matter of federal constitutional law, declaring that the term "Indian" as defined by federal statutes denoted a political and not a "racial" group for purposes of the Fifth Amendment's Due Process Clause. However, definitions of Indian and tribal member inevitably still involve a biological component, as American law continues to infuse the "political" category of "Indian" with seemingly racial distinctions. The use of blood quantum still permeates notions of Indian status, blurring the line between biological and political definitions.

This tension results from the legacy of contact between "Indians" and "non-Indians" over the span of several hundred years. As a result of the intermixture of indigenous peoples with others, tribal, federal, and state governments have sought workable definitions to effectively parcel out rights and liabilities between those deemed "truly" Indian and those who are not. As "Indian" first developed as a social category to describe indigenous peoples in America, the later legal term necessarily incorporated a biological component. However, as the negotiation of treaties dealt with tribes as separate nations, the notions of membership in a biological group and citizenship in a politically constituted nation inevitably clashed.

Blood quantum, or the metaphorical description of ancestry through the fractional measurement of different types of "blood," is the most pervasive and controversial system of classification. The law has distinguished Indians from non-Indians through the

mixing of blood, eventually leading to the transformation of a political population through biological re-classification. The question is: Why does a term denoting a political group require the use of a system that apparently divides individuals by pre-existing socio-biological categories? More specifically, if the use of blood quantum does not render "Indian" a racial category, what are the purposes of such distinctions?

This paper traces the development of the use of blood quantum in federal law and policy up to the critical transition of the Indian Reorganization Act of 1934. The decisions of the federal government to use or not use blood quantum as a method of classification demonstrate some of the inherent contradictions in federal Indian law. While the federal government possesses a trust relationship to a group of political communities, the law has infused the administration of that relationship with a "racial" system of classification. For the sake of bureaucratic and legal clarity, the federal government adapted a system previously used to define race to refine the population entitled to federal services and to define the parameters of the sovereignty of Indian tribes.

The use of blood quantum originates in the construction of race in English colonial society. Colonization of America brought several different populations under the legal domination of the Anglo-American legal system, and its corresponding obsession with distinctions of race. The values of the ruling elite required not only discreet classification, but also a hierarchy of rights based upon the relative superiority or inferiority of different races. Such a system presumed the existence of identifiable populations that could continue to be divided into discreet categories of "Indian," "white," or "black." As people violated legally sanctioned prohibitions against intermixture, the legislature and the courts had to deal with individuals who did not fit within the "pure" racial paradigm.
The reality of inter-racial offspring necessitated new definitions of each racial group if the white power structure was to remain. Shifting scales of racial mixture refined notions of whiteness and worked to shield white America from perceived biological corruption. The law came to classify individuals by the racial classifications of their ancestors, granting or denying full civil rights based on the level of non-white heritage. The application of blood quantum to federal Indian law and policy developed within this greater context of racial domination in America.

The English colonies generated systems of racial categories in the early 18th century, classifying individuals by terms such as “negro,” “white,” “Indian,” “mulatto,” or “persons of mixt blood.” The English appear to have borrowed some terms from the Spanish, but also adapted pre-existing Anglo notions of consanguinity and descent into the emerging racial context. Lawmakers were primarily concerned with free blacks and non-tribal Indians within the power of the colonial legal system, often lumping multiple groups together in disabling legislation.

Colonial governments initially defined the parameters of each race and its corresponding legal position not through the language of “blood,” but by descent by a given number of generations. The earliest statute appears to be from 1705 in Virginia, defining "mulatto" as "the child of an Indian, and the child, grandchild, or great-grandchild of a negro." In 1723, North Carolina declared "persons of mixt blood, including the third generation" to be subject to special taxes for illicitly entering the colony. While these and other provisions used generational or familial measures of mixed descent, Virginia first applied the modern notion of blood quantum in 1785, in a statute defining a “mulatto” as:

3 An Act for an Additional Tax on all Free Negroes, Mulattoes, Mustees, and such Persons, 1723 N.C. Sess. Laws ch. 5.
Every 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 part or more negro blood, shall, in like manner be deemed a mulatto.  

The courts of the states of the new union initially dealt with the status of mixed-blood black/Indian individuals in the context of slavery. While free Indians, blacks, and persons of “mixed-blood” were eventually legislatively and judicially defined by blood quantum, the colonies and states adopted a doctrine of maternal descent, partus sequitur ventrem, to define the status of mixed-race slaves. There were therefore several layers of distinctions even within discreet “races” depending on an individual’s legal status as slave or free. Any person descended from a female slave would be a slave by law, regardless of the race of the father. A slave could by blood quantum standards be 1/16 or 1/32 “black” by blood, and have the physical appearance of whites, but still be a slave by law.

It is interesting to note that a series of suits in Virginia by slaves seeking to be judicially emancipated turned on the ventrem doctrine and Indian/black intermixture. The most influential case was Hudgins v. Wrights, where a mixed-race slave claimed to be descended from a free Indian great-grandmother, and therefore by partus sequitur ventrem to be legally free. Hudgins demonstrates the inherently problematic nature of the ventrem rule, as no written records existed to refute or confirm her contention of Indian maternal descent. Instead, depending on the physical characteristics of the slave, the court set up a presumption in favor of either the slave or the slave-owner. If the slave looked “Indian” or “white” by commonly held notions of physical racial characteristics the presumption would be in favor of the slave, and the slave-owner had the burden to

---

4 An Act Declaring What Persons Shall Be Deemed Mulattoes, § 1, 1785 Va. Acts Ch. LXXVIII.
5 See e.g. Gary v. Stevenson, 19 Ark. 580 (1858); Daniel v. Guy, 19 Ark. 127 (1857); Inhabitants of Andover v. Inhabitants of Canton, 113 Mass. 547 (1816); Gaines v. Ann, 17 Tex. 211 (1856).
disprove descent from a free female ancestor. However, if the slave manifested "black" physical features, the presumption would be reversed, and the slave would have to prove the existence and racial status of the free female ancestor. In Hudgins the individual in question was said to possess "the characteristic features, the complexion, the hair and eyes... of whites," and was therefore declared free. The ventrem rule would later influence the federal judiciary's attempts at defining "Indian" as a term of art in federal law.

While statutes defined the status of free "mulattoes" and "persons of mixt blood," colonial or post-revolutionary state legislation or common law seldom clarified the status of mixed-bloods among tribal Indians. Intermixture between Indians, blacks, and whites had occurred among the eastern tribes from the mid-17th century onward. Missionaries and other writers noted the existence of such intermixture and began to use such terms "mixed" and "clear-blooded," and "half-blood" or "half-breed" to describe Indians of the tribes in Massachusetts, Rhode Island, and Connecticut and among the Iroquois of New York. Generally state authorities do appear to have recognized mixed-bloods as members of Indian tribes. Massachusetts legislation explicitly referred to the "Indian and mulatto proprietors" of Mashpee, and eschewed blood distinctions by defining membership of the group as those proprietors and their lineal descendants. In an early Massachusetts Supreme Court case, the mother of a pauper was described as a "mulatto," though being the offspring of a Punkapoag Indian man and a free white woman.

---

6 11 Va. (1 Hen & M.) 134 (1806).
7 Id. at 140.
8 Id. at 134, 140.
12 Inhabitants of Andover v. Inhabitants of Canton, 113 Mass. 547 (1816).
However, the court concluded that her racial status as a mulatto was irrelevant to her status as a member of the tribe “provided she associated with the tribe, making one of their number.” The Court noted that “Mulattoes also, of that tribe...were treated as Indians by the government, and placed under the same guardianship.”

The phenomenon of Indian intermixture with blacks and whites in tribes did generate controversy in both white and tribal society. Some observers accused black male slaves of intermarrying with female tribal Indians as a pretext to assure that under the ventrem doctrine their offspring would be free. Writers also referred to white men marrying into tribes as “renegados,” decrying the negative influence on the tribes.

While intermixture within tribes was controversial, states avoided applying blood distinctions. Rhode Island faced the question of mixed status in relation to the administration of the Narragansett tribe. In a curious use of gender distinctions, the legislature of Rhode Island defined the members of the Narragansett eligible to vote in council elections in 1792 as: “Every Male Person of Twenty-one years, born of an Indian woman, belonging to said tribe, or begotten by an Indian man, belonging thereto, of any other than a Negro woman.” In 1832 investigators for the Rhode Island legislature conducted a census of the Narragansett tribe, dividing the group into categories of “genuine Narragansett blood” (i.e. full-blood), half blood, and “other grades” less than half blood. Lamenting that only 6 full-blood members remained, the committee

---

13 Id. at 550.
14 2 EDWARD AUGUSTUS KENDALL, TRAVELS THROUGH THE NORTHERN PARTS OF THE UNITED STATES 179 (1809).
17 Letter from Committee to Examine into the Condition of the Narragansett Tribe to the Rhode Island General Assembly (n.d. circa 1832).
suggested a clear definition of tribal membership based on blood quantum. However, no law appears to have been passed.\footnote{Id.}

Controversies over tribal membership were not always instigated by the state against the tribes. Interestingly, members of both the Narragansett and Mohegan tribes petitioned their respective state legislatures to deny benefits to descendants of Indian women and white or black men by codifying traditional rules of patrilineal descent.\footnote{See Letter from Narragansett Tribe to Rhode Island General Assembly (n.d. circa 1835); Letter of Benoni Occum and Others of the Mohegan tribe to the Connecticut General Assembly (April 30, 1819).} In the case of the Mohegans, members in 1819 attempted to block expenditures of tribal funds by the Connecticut legislature for the benefit of several “half-blood” paupers.\footnote{Occum, supra.} The members of the tribe requested the legislature adopt the traditional Mohegan rule of patrilineal descent, effectively disenfranchising mixed-bloods descended from a non-Mohegan father.\footnote{Id.} However, the government of the town of Montville alleged they were members of the tribe and contended they had expended money in the support of the half-bloods.\footnote{See Letter of Montville Selectmen to the Connecticut General Assembly (October 6, 1818).} A committee of the General Assembly sided with the town, and recommended the tribe’s petition not be granted.\footnote{Report of Committee on Rule of Inheritance as Practiced by the Mohegans (May 25, 1820).}

The first manifestation of blood distinctions in federal law occurred in the negotiation and drafting of treaties with tribes to the west of the original colonies. As the federal government took control over Indian affairs outside the 13 colonies, treaties with Indian nations included special stipulations for mixed-blooded individuals. Intermixture in the Midwest and plains between French and Indian predated the expansion of the new United States, as the fur trade brought the two peoples into contact.\footnote{See generally THE NEWPEOPLESBEMGANDBECOMINGMETIS(JacquelinePetersonet al.eds.,1985).} Beginning in 1817, treaties refer to certain individuals as "Indians by descent" and provide for reservations of

\footnote{Id.}
land within the territory ceded by the tribe. In several cases, the treaties describe the individuals as "half-blood," or "quarter-blood" Indians. In later treaties with tribes farther west, provisions refer to specific "half-breed" individuals. An 1826 Treaty with the Chippewas is an interesting example of the use of the term "half-breeds":

It being deemed important that the half-breeds, scattered through this extensive country, should be stimulated to exertion and improvement by the permanent possession of permanent property and fixed residences, the Chippewa tribe, in consideration of the affection they bear to these persons described...being half-breeds and Chippewas by descent...six hundred and forty acres of land.

There is no indication that these uses of blood quantum or mixed descent correlated with pre-conceived racial categories. There is no indication that these individuals ceased to be "Indian" for purposes of federal law based on their amount of non-Indian blood. The drafters of the treaties appear to have used blood quantum as a mere description of ancestry, and as evidence of the right to benefits as relatives of the tribe. Negotiators utilized a familiar language of mixed descent to record the identity of individuals entitled to special benefits reserved by the tribe.

The most interesting, and most controversial provisions promised payments or communal land grants to groups described only as "half-breeds," or "relatives...not less than ¼ blood." Treaties with the Sac and Fox, the Sioux, and the Omaha provided for parcels of land to be held in common "as other Indian lands are held," essentially creating reservations specifically for mixed-blooded Indians. Treaties with the Menominee, Winnebago and the Sioux provided for monetary payments totaling $80,000, $100,000...

---

27 Treaty with the Osages, June 2, 1825, 7 Stat. 240, 241; Treaty with the Kansas, June 3, 1825, 7 Stat. 244, 245; Treaty with the Sac and Fox, September 28, 1836, 7 Stat. 517, 518.
28 Treaty with the Chippewas, August 5, 1826, 7 Stat. 290, 291.
29 Treaty with the Sac and Fox, August 4, 1824, 7 Stat. 229; Treaty with the Sac and Fox, Sioux, And Omaha, July 15, 1830, 7 Stat. 328, 329.
and $110,000. However, none of the provisions named who these “half-breeds” or “relatives” were or how “half-breed” was defined. The provisions also did not clarify whether such individuals were “Indian”, “white,” or something in between.

The first major federal controversies over Indian status emerged from the attempted distribution of such “half-breed” benefits. One major obstacle was that French and Indian contact existed both in Indian villages and Métis settlements such as Green Bay, St. Louis and Detroit. The term “half-breed” appears to be somewhat of a misnomer derived from the English translation of the French term Métis or “mixed.” The term was not meant to denote simply those of ½ Indian and ½ white ancestry, but American authorities fought among themselves over whether the term was so restricted. Lacking written records of whom was indeed descended from the tribes, frauds and controversies exploded as claimants turned up to receive their benefits. Congress, federal officials, and state courts faced the question of whether these “half-breeds” were “Indians,” and by implication what generally constituted an “Indian” by law. The existence of mixed-blood recipients of treaty benefits scattered among French and Indian settlements tested these contradictions.

The collective legal identity of the “half-breeds” became a national debate when Congress extinguished the Indian title to the “Lake Pepin Half-Breed Tract” in Minnesota. The tract lay on potentially lucrative Mississippi River shoreline, and the reservation status prevented whites from legally settling on the land. A movement for its dissolution developed, but the mixed-bloods themselves pushed for a treaty between

---

30 Treaty with the Menominee, September 3, 1836, 7 Stat. 506, 507; Treaty with the Sioux, September 29, 1837, 7 Stat. 538, 539; Treaty with the Winnebagos, November 1, 1837, 7 Stat. 544, 545.
31 See generally NEW PEOPLES, supra.
33 Id.
34 Id.
the U.S. and themselves for the purchase of the land. The mixed-bloods authorized an attorney to negotiate such a treaty, with the United States paying a sum of money significantly higher than other tribal land transfers. Negotiators submitted the treaty to the Senate in 1849.

The ensuing discussion on the merits of the treaty introduced a potentially important legal distinction between "half-breeds" and "Indians." The treaty missed the requisite approval by one vote, as several senators objected to the legal ability of the mixed-bloods to negotiate a treaty as an Indian tribe. Members of Congress asserted that the mixed-bloods were not "Indians" but "citizens" of the United States. As the vast majority of Indians were not citizens in the mid-19th century, their status as non-citizens, and not their racial purity, provided one of the primary distinctions between them and white American society. By virtue of their white citizen heritage, the Sioux mixed-bloods had unwittingly acquired the status of United States citizens. Congress categorized them as political citizens of the United States, and therefore by implication legally "white." Such a classification essentially mirrored the ventrem doctrine dealing with slaves, but status was passed through the father. As citizens, they were not "Indians" or a tribe, and therefore could not legally negotiate a treaty.

Payments of money and the distribution of scrip certificates in other treaties inspired discussions of the individual legal status of "mixed-bloods." The payment of $100,000 to individual half-breed Winnebagos in Wisconsin resulted in corruption and chaos, as no one knew who was a half-breed and who was not. More importantly, white

35 See Message from the President of the United States Communicating a Treaty with the Half-Breeds of the Sioux Nation of Indians (1849).
36 Id. at 7.
37 Id.
38 See Journal of the Senate, 31st Cong. 1st Sess. 944 (1849).
speculators tracked down potential claimants and induced them to sign away their claims through powers of attorney. The situation became so serious that the federal government formed a special commission to investigate the situation. In 1839 the commission published a list of claimants, including the "degree of relationship" or blood quantum of each half-breed. During the investigation, the disbursing agent of the U.S. Army in charge of the payments questioned whether half-breeds were competent to make contracts with speculators. As the government barred Indians from contracting freely, the issue arose whether half-breeds were legally white or Indian, and therefore competent or incompetent to sign away their claims:

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, and absurdity.

The half-breeds were apparently considered competent to contract, as the sale of claims was allowed to stand. The question of the relative competency of mixed-bloods would become a common theme in the early 20th century.

Confusion over the status of mixed-bloods continued as the government distributed land certificates, or "scrip." After the Senate rejected the 1849 treaty with the mixed-blood Sioux, Congress dissolved the tract by legislation in 1854. The act promised to distribute individual parcels to each half-breed, creating one of the most

---

41 Id. at 12 (1839).
42 Id. at 28-32.
43 Id. at 7.
44 Id.
45 Act of July 17, 1854, ch. LXXXIII, 10 Stat. 304 (1854).
infamous scams in 19th century Indian policy: so-called “Half-Breed scrip.” The predictable controversies over identity ensued, as individuals of all different shades descended upon land offices to collect their scrip.

Treaties with other tribes included provisions for the issuance of scrip to mixed-bloods. A treaty with the Lake Superior Chippewa similarly authorized the issuance of scrip to half-breeds. Controversies and corruption again followed the distribution, as ethically questionable government officials extended eligibility from those of the Lake Superior band to half-breeds of any group of Chippewas. Speculators shipped individuals from Michigan to Manitoba down to land offices that had no objective criteria for who was entitled to land. Even more problematic, some mixed-blood Chippewas attempted to not only claim scrip, but also to pre-empt public lands as United States citizens. The situation prompted the first discussion of who was an “Indian” by a high-ranking federal official.

Attorney General Caleb Cushing wrote an official opinion on the status of mixed-bloods in 1856 under the title “Relation of Indians to Citizenship.” The Attorney General specifically faced the question of whether mixed-bloods who collected half-breed scrip could also pre-empt public lands. Caleb began by discussing the status of Indians in the American political system. He asserted Indians were not citizens, but “subjects” of the U.S. government, contending that “no person of the race of Indians is a

---

46 Id.
47 See generally WILLIAM FOWLELL, A HISTORY OF MINNESOTA 321-325; 481-486 (1921).
49 Treaty with the Chippewa, September 30, 1854, 10 Stat. 1109, 1110.
50 See ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 245 (1871).
51 Id. at 248.
citizen of the United States by local birth...It is an incapacity of his race.” However, mixed-bloods posed a different question, as Cushing asked,

May not that incapacity cease? May not the members of a family of Indians, by continual crossing of blood cease to be Indian? 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 exists, in various parts of the United States, men of indubitable citizenship, many, 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?

The Chippewa case presented a perfect opportunity for the federal government to define who was legally Indian by blood quantum alone. Mixing notions of race and citizenship, Cushing grasped for an all-purpose blood criteria, that when applied would yield a foolproof rule of both biological and political transformation. However, Cushing shied away from creating an over-arching definition, instead restricting his decision to the case before him. Cushing’s rule was not tied to blood, but was strictly one of political allegiance and citizenship. Using the example of John Ross, chief of the Cherokee Nation but by blood standards a “mixed-blood,” Cushing held that half-breeds had to “cast off” their allegiance to their tribe before becoming eligible as American citizens. Concluding that the mixed-bloods were “Indian” because they had accepted scrip, he contended that they were therefore not citizens:

I think the language of the 7th clause of the 3rd article of the treaty with the Chippewas...legally describes persons not citizens of the United States, but though half-bloods, yet still Indians. I think the persons so described, in asking and receiving the benefit of the clause, declare themselves to have been at that time not citizens, but Indians...It [is] reasonable and just that a half-blood Indian, who still ‘belongs to a tribe,’ and who claims to take the benefits of such tribal

53 Id. at 749-750.
54 Id. at 750-751.
55 Id. at 753.
membership, shall not be allowed at the same time to claim benefits which are only attached by law to persons not Indians.  

It is an interestingly contradiction in policy that the government rejected the Indian status of Sioux half-breeds when they sought to negotiate a treaty, but confirmed it when the Chippewa mixed-bloods sought to pre-empt land. However, throughout the controversies over land, blood quantum remained a mere description of ancestry, and was not used to divide individuals into “Indian” and “non-Indian” categories. Unlike colonial and state use as a dividing-line between the races, federal officials merely used the language of blood quantum to describe individuals within the political membership of tribes.

While legislative and executive officials struggled over the question of mixed-bloods, the courts developed their own definitions. Federal and state courts faced the question of “who is an Indian?” in a variety of contexts. Importantly, in lieu of an all-encompassing definition promulgated by Congress, the Bureau of Indian Affairs, or individual state legislature, each case developed a definition based on the issues or statutes at hand. The result was an overlapping, sometimes contradictory group of rules that culminated in a muddled confusion during the allotment period.

*United States v. Rogers* was the first federal case addressing the definition of Indian. In that case, a unmixed white citizen of the Cherokee Nation contended he was exempt from federal criminal jurisdiction arising from the 1834 Trade and Intercourse Act. That act authorized federal control over criminal prosecutions for crimes occurring in Indian country, but explicitly exempted crimes committed by an “Indian” against an “Indian.” Unfortunately the statute did not define what “Indian” meant, as the issue does not appear to have been a serious one in the early Congress. *Rogers* reached the Supreme

---

56 *Id.* at 756.
57 45 U.S. (4 How.) 567 (1846).
Court in the form of certified questions from the circuit court. Among those questions, the lower court specifically asked whether white citizens and mixed-bloods were "Indian" under the act.\textsuperscript{58}

The question was especially relevant to the Cherokee Nation, where white men married to Cherokee women were considered citizens of the Cherokee Nation. Statutes of Georgia during the Removal period referred to white men "claiming the privileges of an Indian," or to "others person[s] entitled to the privileges of an Indian."\textsuperscript{59} The Tennessee Supreme Court had previously held that a white citizen of the Cherokee Nation was "Head of an Indian family" for purposes of land allotment.\textsuperscript{60} Several white men also had served as representatives among the Five Civilized Tribes in treaty negotiations, and federal officials complained of their negative influence over the tribe in resisting attempts at removal.\textsuperscript{61}

Despite the lower court's question regarding the status of mixed-bloods, the Supreme Court explicitly restricted itself to the issue presented by Rogers, contending that "Indian" in the statute did not refer to white "members of a tribe, but of the race generally-- of the family of Indians."\textsuperscript{62} Judge Taney described white men living among the Indians as "the most mischievous and dangerous inhabitants of the Indian country," articulating an attitude that would become increasingly influential in federal Indian policy.\textsuperscript{63} As for mixed-bloods, Taney abstained from answering the question, contending "it most advisable not to express an opinion."\textsuperscript{64} For the Supreme Court, the term "Indian" then indeed possessed a racial component in federal law. However, the question of

\textsuperscript{58} \textit{Id.} at 568.
\textsuperscript{60} Tuten v. Martin, 11 Tenn. (3 Yerg.) 452 (1832).
\textsuperscript{61} \textit{See} \textit{American State Affairs Papers, Class II, Vol. II} 236, 239, 242 (1820).
\textsuperscript{62} Rogers, 45 U.S. at 572.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.} at 573.
whether mixed-bloods were part of this “race” or “family” of Indians remained unanswered.

The question of mixed-bloods under the Trade and Intercourse Act did reach the courts in the 1847 case, *United States v. Sanders.* In that case, a Cherokee Indian had murdered a young boy whose status was in question. Sanders contended the boy was an Indian, and that therefore under the Indian/Indian exception, the federal government lacked jurisdiction. Apparently the father of the victim had testified that “the mother of this boy was an Indian woman,” but, “on this point there was some contradictory evidence, but the weight of it was in favor of the position that the mother...was an Indian woman.” Importantly, the court noted that “it was not satisfactorily shown, for no one pretended to what tribe she belonged- whether she was a full blood, half breed, or quarter breed Indian.”

The court accepted the assertion of the father as admissible evidence. However, lacking any information on the quantum of Indian blood of the mother, the court applied the *ventrem* doctrine utilized in slave emancipation cases of the early 19th century:

> We 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.*

The court cited *Hudgins v. Wrights* and other slave cases as authorities for the *ventrem* rule. As intermixture between Indians and non-Indians occurred almost exclusively between white men and Indian women, mixed-bloods would then be legally Indian in perpetuity, regardless of the potential decrease of Indian “blood” through the generations.

---

65 27 F. Cas. 950 (C.C.D. Ark. 1847) (No. 16, 220).
66 *Id.* at 951.
67 *Id.*
68 *Id.* (emphasis added).
69 *Id.* at 951-52.
The social use of blood quantum distinctions as descriptions of individuals could then co-exist with a legal definition that utilized matrilineal descent to define "Indian."

While the federal court adopted the *ventrem* rule as the definition of Indian for federal criminal jurisdiction, state statutes and cases applied a variety of tests. The Ohio State courts faced the question in relation to who was "white" under the law. Though a northern state, certain officials in Ohio attempted to bar both blacks and Indians from white schools and from voting in state elections. The courts considered Indian/white intermixture in terms of a de-tribalized "race" whose civil rights relative to other races was within the power of the state legislature to define. In *Jeffries v. Ankeny*, the Ohio Supreme Court applied the law of "preponderance of blood" used for mulattoes, contending all those individuals less than ½ Indian blood would be considered "white."\(^{70}\) A later federal court applied the *Jeffries* rule to deny citizenship to a Canadian of half-white and half-Indian blood, who did not have a "preponderance" of white blood.\(^{71}\) While initially applied to non-tribal persons of Indian descent to define the white "race," the approach in *Jeffries* and *Camille* would surface in federal Indian policy later to define the political group known as Indians.

Statutory provisions of other states defined Indians by blood, usually grouping them with people of African and sometimes Asian descent. These statutes dealt with Indians again as a "race" within a group of other non-white races that shared second-class status. Such statutes fell into several categories of civil disabilities: the inability to marry whites, to contract with whites, and to appear as witnesses in trials against whites. While several southern states continued with the colonial use of generations,\(^{72}\) mere descent

---

\(^{70}\) 11 Ohio 372, 376 (1842).
\(^{71}\) In re *Camille*, 6 F. 256 (C.C.D. Oregon 1880).
\(^{72}\) 1871 N.C. Sess. Laws c. 193, § 1; 1858 Tenn. Code § 3808.
from an Indian, or use of terms such as “half-breed” other states used amounts of blood to circumscribe the civil freedom of mixed-bloods. In 1851 California disallowed “Indians, or persons having one-fourth or more of Indian blood” from acting as a witness in cases where a white person was a party. The state revised the statute in 1854, raising the quantum of blood to “one-half or more Indian blood.” In 1866 Oregon disallowed marriages between whites and “any person having more than one half Indian blood.”

An 1841 statute from Indiana presents an early example of the mix of political status with a biological component to define an apparently political group of “Indians.” Like other states Indiana disallowed Indians, along with “negroes” from testifying against whites, though without defining what “Indian” meant. However, Indiana used blood to attempt to protect Indians from service of a writ of capias as respondendum, defining the group as “all persons of Indian descent, who are recognized as members of any tribe residing in the Indiana, down to those having one eighth Indian blood.”

State courts dealing with tribal Indians never applied blood quantum to define “Indian” or tribal membership. Several aggressive states moved to apply their civil laws to Indians who were still members of existing tribes. In Wall v. Williams, a case decided the same year as Sanders, the Alabama Supreme Court faced the question of mixed-blood Indian status. Delila Wall was a Choctaw Indian woman of 1/2 Indian blood who had remained in Alabama after removal of most of the tribe to the Indian Territory. However, she had never renounced her Choctaw membership, and by treaty remained a member. She had signed a promissory note to Williams, and now asked the court to declare it void.

74 Act of December 12, 1879, No. 5, § 1, 1879 S.C. Acts 3.
75 Act of April 29, 1851, § 394, 1851 Cal. Stat. 114.
76 Act of May 15, 1854, § 42, 1854 Cal. Stat. 94.
Wall alleged she was both *feme couvert* and an "Indian" under a state statute disallowing contracts by Indians without proof of consideration by two credible witnesses. Interestingly, a similar statute in North Carolina explicitly limited the provision to "any Cherokee Indian, or any person of Cherokee Indian blood, within the second degree."\(^1\) Lacking a definition for "Indians" in the statute, the court applied the "common parlance" meaning of "Indians" in Alabama: "In common parlance, the word "Indians" includes not only those who have no admixture of blood with the white and 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."\(^2\) She was therefore incapable of contracting with Williams without the requisite witnesses.

A similar claim of mixed-blood incapacity was made in the Indiana Supreme Court the same year as the opinion of Attorney General Cushing. In *Doe v. Avaline*, lessees of a 3/8 Miami Indian woman brought suit to nullify a will made by the mixed-blood to her white husband.\(^3\) The court reviewed *Jeffries* and other extant law on Indian intermixture, but emphasized the "habits" of the individual, taking into account the general opinion of the community and governments at large.\(^4\) Catherine Lasselle was the daughter of a Miami chief, and the court contended that,

> Where there is Indian blood, conjoined with Indian habits and character, it would be taking dangerous liberties with the language for the courts to say that such persons were not included within the terms...of the act...Recognized as an Indian, as it is truly admitted she was, by the community, by the Indians themselves, by the State and federal authorities; her birth, education, and language stamping the same character upon her...We cannot set aside all these, and decide simply on the preponderance of blood.\(^5\)

\(^{1}\) 11 Alabama 826 (1847).
\(^{2}\) 1854 N.C. Code ch. 50 § 16.
\(^{3}\) *Williams*, 11 Ala. at 836.
\(^{4}\) 8 Ind. 6 (1856).
\(^{5}\) *Id.* at 14.
\(^{6}\) *Id.* at 15.
The federal case of *Ex parte Reynolds* marks the beginning of judicial attacks on mixed-blooded members of tribes as "Indians." Interestingly, neither the murderer nor the victim in that case possessed any Indian blood. *Reynolds* involved a white Choctaw citizen who had murdered another white Choctaw citizen. Unlike the defendant in *Rogers*, a post-Civil War treaty with the Choctaws reserved exclusive criminal jurisdiction over white citizens in the tribe as long as they were married to a "Choctaw." Judge Parker therefore analyzed the ancestry of both the wives of the accused and the victim to decide whether both were indeed "Choctaws."

Like Judge Daniel in *Sanders*, Parker eschewed a rule based on the quantum of blood, but did ask rhetorically,

> Does the quantum of blood in the veins of the party determine 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 a rule on the subject that 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.

Judge Parker's only federal source of guidance was *U.S. v. Sanders*. However, noting that the grandfather of the victim's wife was a white citizen of Mississippi, Parker reversed the *ventrem* doctrine for its paternal equivalent, *partus sequitur patrem*. Building on theories of citizenship in Vattel's Law of Nations, he contended that the *ventrem* rule was applicable only to cases involving slaves, while *patrem* defined the status of free persons. The victim's wife was therefore not a "Choctaw" by law, but a white American citizen.

The victim was then not a citizen of the Choctaw Nation, and the accused was therefore

---

86 20 F. Cas. 582 (C.C.W.D. Ark. 1879) (No. 11,719).
87 Id. at 582.
88 Id. At 585.
89 Id.
90 Id.
amenable to federal criminal prosecution.\textsuperscript{91} Another federal case upheld the \textit{patrem} rule in criminal cases where the defendant successfully evaded federal jurisdiction by claiming he was not an Indian.\textsuperscript{92} The \textit{patrem} rule would become the most important judicially created test for the definition of Indian up to the beginning of the 20\textsuperscript{th} century.

While courts promulgated a few over-arching rules over a 40-year period, the day-to-day practical definition of "Indian" was left to local agents of the Bureau of Indian Affairs. The most important manifestation of recognition of mixed-bloods by the federal government occurred through enrollment, and the distribution of rations, annuities, and other benefits. Mixed-bloods were generally included in censuses of individual reservations and agents recorded their names on lists of benefit entitlement as "members" of the tribe.\textsuperscript{93} As long as the tribe recognized the mixed-bloods as part of the community, federal policy-makers appeared to as well.\textsuperscript{94} However, officials did complain to the Commissioner of Indian Affairs, asking him to clarify the definition of Indian by cutting off all mixed-bloods.\textsuperscript{95} An agent among the Osage reported that,

\begin{quote}
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.\textsuperscript{96}
\end{quote}

Agents directed their animosity towards both mixed-blood and white men on the reservation, contemptuously referred to as "squaw-men."\textsuperscript{97} With the dawn of the

\begin{itemize}
\item \textsuperscript{91} Id. at 586.
\item \textsuperscript{92} \textit{U.S. v. Ward}, 42 F. 320 (C.C.S.D. Cal. 1890) (Holding that half black/half-Indian not an Indian for purposes of the Major Crimes Act).
\item \textsuperscript{93}\textsc{Annual Report of the Commissioner of Indian Affairs} 206-210 (1876).
\item \textsuperscript{94}\textsc{Annual Report of the Commissioner of Indian Affairs} 70-71 (1877).
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id. at 93.
\item \textsuperscript{97} Id. at 74; \textsc{Annual Report of the Commissioner of Indian Affairs} 45-46, 93 (1878).
\end{itemize}
allotment period, opponents of mixed-blood recognition within the federal government moved to refine the definition of "Indian."

The allotment period drastically changed federal Indian policy, as the overarching mission of the federal government was to dissolve tribes and create individual Indian farmers.98 The General Allotment Act authorized the distribution of individual parcels to "Indians," though again with no clarification of what or who constituted an Indian.99 The case of a woman of 5/16 Sioux blood, Jane Waldron, would polarize officials within the federal government over the eligibility of mixed-bloods for allotments. Waldron was a college-educated woman married to a white settler100 who had claimed an allotment off the recently divided Great Sioux Reservation near present-day Fort Pierre, South Dakota. She appeared on the lists for rations and annuities for the Cheyenne River Sioux, was related to Yankton chiefs, and spoke Lakota fluently.101 After her family settled on the land and built a homestead, Black Tomahawk, a full-blood Sioux, laid claim to the same parcel of land. Through a white attorney Tomahawk contended that Waldron was not an Indian due to her mixed blood.102

The case of Black Tomahawk v. Waldron appeared before the internal legal department of the Department of the Interior in 1891.103 In a monumental decision, Assistant Attorney General Shields applied the patrem rule of Reynolds to allotments. Shields contended Waldron was a citizen of the United States through her paternal white ancestry, and therefore not an Indian.104 The effect of such a rule was to effectively

100 See generally IRENE CALDWELL, BAD RIVER (WAPKA SICA), RIPPLES, RAGES, AND RESIDENTS 239 (1983).
disenfranchise every mixed-blood on every reservation to be allotted, regardless of whether they were ¼ or 63/64 Indian. Blood quantum was again irrelevant, as only "pure" Indians (or those few descended from an "Indian" father) were entitled to allotments. State and federal courts applied the Waldron decision to other mixed-blooms, contending that they also were citizens and not Indians. While the federal government again avoided using blood distinctions, the rhetoric of race began to influence definitions of tribal membership.

One of the great ironies of late 19th century federal Indian was the negotiation of cessions of land by "agreement." After Congress prohibited the making of treaties with tribes in 1871, the Sioux ceded land by ¾ of adult male "Indians" approving the agreement. Interestingly, the agreement to break up the Great Sioux Reservation was signed not only by full-blood Sioux, but by mixed-blooms and white "squaw-men" as well, as Indians of the Sioux Nation. Federal officials themselves reported that the cession would not have been approved if the mixed-blooms and white men had not voted. The federal government apparently had embraced mixed-blooms for the purposes of ceding land, but now denied them any right to allotments once the remaining land was divided.

The inherent contradiction in federal policy was not lost on Commissioner of Indian Affairs, Thomas Jefferson Morgan. The Commissioner addressed the Waldron case in his 1892 annual report to Congress, attempting to answer the question, "what is an Indian?" Morgan traced 11 ways to define "Indian," that included mixed-blooms, and

104 Id. at 686.
108 Id. At 46-47.
warned of the ramifications of denying allotment to mixed-bloods who had signed cession agreements:

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 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...recognizing all who are borne upon the rolls and recognized by the Indians...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.109

The acceptance of denial of mixed-bloods as entitled to benefits as Indians therefore implicated the very foundation of the federal government’s trust obligation to the Indian tribes. Despite Morgan’s objections, the succeeding assistant Attorney General rejected Waldron’s claim upon rehearing in 1893, reiterating the patrem rule of descent.110

While Congress and the executive branch attempted to define “Indian,” the courts themselves chipped away at the patrem doctrine. The Supreme Court faced the question for the first time in Famous Smith v. United States.111 Another Cherokee, already condemned to death, argued the federal government lacked criminal jurisdiction over him. Again the question turned on the status of a dead victim and the testimony of witnesses as to racial status. The victim was on the bread rolls for the Cherokee Nation, and witnesses reported that the victim “claimed to be a Cherokee Indian, and looked like one, having the dark hair, eyes, and complexion of an Indian, and that he was generally recognized as one.”112 The Court held that lacking any evidence to the contrary, Famous Smith was entitled to an acquittal, as the victim was apparently an Indian.113

109 ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 36-37 (1892).
111 151 U.S. 50 (1894).
112 Id. at 54.
113 Id. at 55.
Partially as a result of the *Smith* case, the executive branch flip-flopped on the use of the *patrem* rule just a month later. Both the General Land Office and the Attorney General explicitly rejected the use of common law principles of descent. In a strong recognition of the inherent sovereignty of Indian tribes to declare their own membership, The Attorney General recognized that the definition of "Indian" was contingent on the particular rules and customs of the tribes.\(^{114}\) Though *Famous Smith* made no mention of mixed-blood, Attorney General Olney cited the case for the proposition that:

"Presumptively, a person apparently of mixed blood, residing upon a reservation, drawing rations, and upon the rolls as an Indian, is in fact an Indian."\(^{115}\) Several months later, the Secretary of Interior contended that "while the general rule [of the common law] is as has been held before, yet it must yield to the laws and usages of the tribe when laws and usage are satisfactorily proven."\(^{116}\) While federal officials argued among themselves, the controversy over mixed-bloods reached the floor of the United States Congress.

The late 1880s and the 1890s saw a fundamental rift in Congress over mixed-bloods, as both sides attempted to clarify their status through legislation. Senator Dawes, mastermind of the General Allotment Act, successfully sponsored an act prohibiting white men from sharing in any tribal benefits by virtue of their marriage to an Indian woman.\(^{117}\) The Indian Trader statute was amended in 1882 to explicitly ban any persons "other than an Indian of the full blood" from engaging in commercial transactions without a license.\(^{118}\) The Senate rejected a later bill that attempted to reverse the ban on

---


\(^{115}\) Id. at 712.

\(^{116}\) 19 Land Dec. 311 (1894).


mixed-bloods. The Committee on Indian Affairs report disparagingly described “half-breeds” as: "an element wholly adverse to [the Indians'] interests." The language of blood now overtly entered into discussions to refine the definition of Indians entitled to allotments or federal services. One failed bill sought to declare all mixed-bloods in the Five Civilized tribes who possessed more than 1/2 white blood to be legally "white." Several amendments to the annual Appropriations Bill attempted to create an all-purpose definition for "Indian" that would "include not only all Indians of the full blood, but also all Indians of the mixed blood, of whatever degree" as long as they maintained relations with their tribe. Opponents defeated such amendments, using the Five Civilized Tribes as examples of the negative effects of intermixture:

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 intermarrying 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.

The rhetoric of race now overtly influenced the political discussion in Congress. For some members of Congress, mixed-bloods symbolized good-for-nothing “whites” masquerading as Indians by descent and draining federal monies. The discussion also revolved around the economics of the Trust Relationship and treaty obligations. Members clashed over expenditures by attempting to refine the recipient group of “Indians.” Between 1895 and 1902, several bills were introduced and buried in committee or rejected seeking to clarify the definition of Indian or to confirm the rights of mixed-
bloods to allotments. However, references to blood quantum increased, as the previously politically defined group came to be partially defined through levels of biological purity.

Congress did pass several important pieces of legislation to counteract the Department of Interior's hard line position on mixed-bloods. An act passed in 1894 and amended in 1901 waived the federal government’s sovereign immunity by allowing “all persons who are in whole or in part of Indian blood” to sue the United States in the circuit courts if they believed they were improperly denied an allotment. Interestingly, mixed-bloods were explicitly included in an act to control liquor traffic in Indian Country.

However, An act passed in 1897 was the most significant, as it declared that:

All children born of a marriage heretofore solemnized between a white man and an Indian woman by blood, where such Indian woman is, 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.

Though a strong recognition of the right of mixed-bloods to Indian status, the provision was not definitive. The word “heretofore” kept open the question of the Indian status of mixed-blood children of mixed marriages after June 7, 1897. Also, the provision did not resolve how someone might show recognition by the tribe. Nevertheless, the statute did assist to clarify the status of some mixed-bloods, supporting individuals’ suits for entitlement to allotments. More importantly, such entitlement was not based on

---

128 See e.g. Vezina v. United States, 245 F. 411, 420 (8th Cir. 1917); Oakes v. United States, 172 F. 305 (8th Cir. 1909); Reynolds v. United States, 205 F. 685 (W.D. S.D. 1913).
common law paternal or maternal descent or blood quantum, but on recognition by the tribe.

By virtue of the legislation of 1894 and 1901, mixed-bloods brought claims against the government for the false denial of allotments. In *Sloan v. United States*, attorneys for the government argued the *patrem* rule, contending the mixed-blood Omaha plaintiffs were not "Indians." The court explicitly rejected "the artificial rule of the common law," and applied a rule reminiscent of *Wall v. Williams*, stating: "As ordinarily understood by white people, a person of white and Indian parentage is deemed to be a mixed blood [i.e. "Indian"], without regard to the source of the Indian blood." 

The allotment suit provision also allowed Jane Waldron to secure an allotment. In a rehearing after the passage of the statute of 1897, the Secretary of the Interior again had rejected her claim. He contended it did not apply to her, as her mother and her grandmother were also "half-breeds," and therefore not "Indian," in the sense of members of the tribe. Jane Waldron filed her suit against the United States in 1905. In her case she asserted the existence of a "mother right" recognized by the Sioux for children of mixed marriages. According to her witnesses, mixed-bloods followed the status of their Indian mother, and were considered Sioux for purposes of rights to tribal property. Though similar to the common law *ventrem* rule, the "mother right" rule derived from the sovereign authority of the tribe to determine membership.

The 15 year saga ended in *Waldron v. United States* with the decision that Jane Waldron was indeed an "Indian" for purposes of allotment. The court accepted the

130 Id. at 288.
132 Id. at 388.
134 Id. at 415-416.
135 Id. at 419.
"mother right" of the Sioux, and reiterated the executive branch's decision that membership was an internal matter for the individual tribe to decide:

In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race as to which the children of a white man, married to an Indian woman, belong; but that...the children take the race and nationality of the mother. Presumptively, a person apparently of mixed blood, residing upon a reservation, drawing rations, and upon the rolls as an Indian, is in fact an Indian.\(^\text{136}\)

While \textit{Waldron} and other cases proved mixed-blood entitlement on an individual or family basis, The Department of the Interior revised their regulations to recognize mixed-bloods as a class. Importantly, The Commissioners of the Land Office and of Indian Affairs explicitly rejected any application of blood quantum to the question of mixed-blood allotment.\(^\text{137}\) The regulations stated that an Indian woman and her mixed-blood children were entitled to allotments "without reference to the quantum of Indian blood possessed by such woman and her children but solely with reference as to whether they are recognized members of an Indian tribe."\(^\text{138}\)

Beyond allotments, the federal judiciary sought to clarify the definition of Indian and the status of mixed-bloods in other contexts. In the realm of criminal jurisdiction, an interesting reverse phenomenon occurred after the passage of the Major Crimes Act in 1885. Where before prisoners attempted to avoid federal jurisdiction by claiming to be an Indian, some prisoners now attempted to escape federal jurisdiction by denying that they were Indians.\(^\text{139}\) In \textit{United States v. Hadley}, an individual of Yakima and white descent claimed he was a United States citizen, and exempt from federal prosecution under the

\(^{136}\) \textit{Id.} The judge again attributed the last sentence to Famous Smith v. United States.
\(^{137}\) \textit{CIRCULARS AND REGULATIONS OF THE GENERAL LAND OFFICE} 658, 663-664 (1930).
\(^{138}\) \textit{Id.}
\(^{139}\) United States v. Gardner, 189 F. 690 (E.D. Wis. 1911); United States v. Hadley, 99 F. 437 (C.C.D. Wash. 1900); United States v. Ward, 42 F. 320 (C.C.S.D. Cal. 1890).
act. Interestingly, he had received an allotment from local federal officials.\textsuperscript{140} 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 one whose fathers raised them in white society under the laws of marriage and citizenship.\textsuperscript{141} 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."\textsuperscript{142} The defendant was therefore not an "Indian."\textsuperscript{143}

The Hadley court's discussion of two classes of mixed-bloods was applied as a rule in a case involving the suppression of liquor. In Farrell v. United States, the defendant challenged the government's ability to convict him for selling liquor to a man of ¾ Sioux blood.\textsuperscript{144} 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."\textsuperscript{145} The mixed-blood was therefore an "Indian," and the defendant's appeal was denied.

The Supreme Court appears to have adopted the reasoning of the Hadley court in another allotment case, Halbert v. United States.\textsuperscript{146} In that case Judge Van Devanter articulated what might be identified as a "dead-beat father" standard seemingly to avoid the common law patrem rule:

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 there reared by her, with the

\textsuperscript{140} Id.
\textsuperscript{141} Id. at 438.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} 110 F. 942 (8th Cir. 1901).
\textsuperscript{145} Id. at 945.
\textsuperscript{146} 283 U.S. 747 (1931).
husband failing to discharge his duties to them, they take the status of the mother.  

Again, when given the opportunity, the courts rejected the use of blood quantum, relying on the carving out of exceptions of common law authority.

With the independent development of a judicial rule for Indian status, Congress and the Bureau of Indian Affairs looked to blood quantum to govern the post-allotment removal of restrictions. While by law individual allotments were to be held in trust for 25 years, pressure to open up such lands to sale moved officials to seek means to release certain Indians early. One primary means was the assessment of an individual Indian’s “competency” to manage his or her financial affairs. The notion that some Indians possessed the intelligence and ability equal to the average white man quickly inspired the idea that those who possessed white blood were per se “competent.”

While federal officials originally assessed the competency of Indians on an individual basis, pressure from tax-hungry state officials led to removal of restrictions for whole classes of Indians. Local officials in Montana had already attempted to tax mixed-bloods’ restricted allotments by contesting their “Indian” status. The 1906 “Clapp Amendment” removed restrictions for all “mixed-bloods” on the White Earth reservation in Minnesota. Again identity and classification generated great controversy, as no reliable records existed to establish an individual’s mixed status. Land speculators descended on White Earth to acquire newly alienable land by any means. Government officials and physical anthropologists attempted to classify Indians

---

147 Id. at 763.
of White Earth by blood to create two categories: those who could sell their land and those who could not.

It is not surprising that the term "mixed-bloods" was not defined in the amendment, leading to clarification by the Supreme Court in United States v. First Nat'l Bank of Detroit, Minn. Interestingly, lawyers for the United States government argued that the term meant those of less than 1/2 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." However, the Supreme Court applied a meaning that included anyone with any trace of non-Indian ancestry. Using the term "thoroughbred" to describe full-bloods, the Court legitimized all transfers of land by anyone with any verifiable non-Indian "blood."

The most ambitious Congressional action released certain members of the Five Civilized Tribes on a three-tiered system of blood status. Those Indians of less than 1/2 Indian blood were released from all restriction. Those between 1/2 and 3/4 were released from restrictions for all their land but their homestead, which remained in trust. Those above 3/4 Indian blood retained restrictions on all their land. The Commissioner of Indian Affairs justified these curious, ill-correlated distinctions by appealing to notions 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

---

153 234 U.S. 245 (1914).
154 Id. at 260.
155 Id. at 262.
156 Id. at 258-259.
158 Id.
159 Id.
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.”

After these Congressional Acts directed at specific tribes, Commissioner of Indian Affairs Cato Sells unilaterally applied the power of the Bureau of Indian Affairs to release all allotted Indians of less than \( \frac{1}{2} \) Indian blood. Sells’ “Declaration of Policy” is a fascinating culmination of a century of debate over mixed-bloods, as he connected competency directly with 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.”

For federal officials like Sells blood quantum served as an easy distinguishing measure of competency, easing the load of federal administration of Indian affairs. The surgical precision with which such distinctions could be made served to speed up the end of the “Indian problem.” Sells propagated the wishful fiction that biological purity, mental ability, and eligibility for federal services and guardianship could all be measured on the same scale. Applying the uniform, greater-than-less than fractional rule of blood quantum simplified the transition of Indians to citizens. Predictably, the removal of restrictions led to an explosion of land speculation, tax foreclosures, and fraud. Finally, after four years of release from restrictions, the new Commissioner abandoned the \( \frac{1}{2} \) rule.

Though the BIA accepted then rejected blood quantum for allotments, Congress embraced such distinctions in important legislation. The first direct application originated

---

160 Annual Report of the Commissioner of Indian Affairs 100 (1908).
161 Annual Report of the Commissioner of Indian Affairs 3-5 (1917).
162 Id. at 3.
163 See generally McDonnell, supra.
164 Annual Report of the Commissioner of Indian Affairs 23 (1921).
as a tack-on addition to the annual Indian Appropriation Bill.\(^{165}\) The provision prohibited federal expenditures of funds for the education of "children of less than one-fourth Indian blood."\(^{166}\) In 1929 Congress applied a \(\frac{1}{2}\) blood rule similar to Commissioner Sells' policy by authorizing distributions of tribal funds without restriction to those of less than \(\frac{1}{2}\) Osage blood.\(^{167}\)

However, two separate acts sought to directly define membership in a tribe by blood quantum. Seemingly at the request of the tribe,\(^{168}\) Congress prohibited those of less than \(\frac{1}{16}\) Eastern Cherokee blood from being members of the tribe.\(^{169}\) Interestingly, previous federal legislation had authorized the option to distribute tribal funds to those less \(\frac{1}{16}\) blood in lieu of land allotments.\(^{170}\) Such legislation replaced a North Carolina state law that had organized the Cherokees as a state corporation.\(^{171}\) The state statute had restricted eligibility for the principal or assistant chief to those "at least one-fourth (1/4) Eastern Cherokee blood," and for councilmen to those of \(\frac{1}{16}\) or more Cherokee blood.\(^{172}\)

The other act defined membership in the Menominee tribe. The statute restricted enrollment of those not already on the rolls to those of \(\frac{1}{4}\) or more Menominee blood.\(^{173}\) Curiously, the statute also banned any recipient of "Half Breed" treaty payments and their descendants from enrollment. 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 blood."\(^{174}\)

\(^{165}\) Act of May 25, 1918, c. 86, §1, 40 Stat. 564.

\(^{166}\) Id.

\(^{167}\) Act of March 2, 1929, § 4, 45 Stat. 1478.


\(^{171}\) Act of March 8, 1895, ch. 166, 1895 N.C. Sess. Laws 237.

\(^{172}\) § 17.


\(^{174}\) Id.
Seemingly racial distinctions now permeated the political status of Indian tribes. Through the use of biological mixture of metaphorical "blood" the federal government refined entitlements. Interestingly, each bill had underlying economic ramifications for the federal treasury. Importantly, varied bills that applied blood quantum were inconsistent in their definitions of eligibility. Far from definitively establishing an overarching quantum for all federal purposes, Congress used different levels of blood for separate tribes and separate goals. Such definitions were then not to define the parameters of an Indian "race," but to refine specific groups of individuals considered entitled to federal funds and services.

The "Indian Reorganization Act" brought far-reaching changes to federal administration of Indian affairs. The allotment policy was explicitly rejected, and the act presented the opportunity for Indian tribes to organize governments cognizable to the federal government. However, the bill was extremely controversial when presented to Congress.

One item that created discussion was John Collier's definition of "Indian" for purposes of the act. Originally Collier contemplated a definition that included all those who were members of established tribes, their descendants who resided on a reservation, and additionally all other Indians of 1/4 or more Indian blood. However, powerful members of Congress, especially Senator Wheeler, objected specifically to the 1/4 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 judgement it

177 Hearings on S. 2755 Before the Committee on Indian Affairs, 73rd Cong. 176.
should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.\textsuperscript{178}

For Wheeler and others the question again involved federal expenditures and the implications of expanding the definition of Indian for federal purposes. However, Wheeler also perpetuated the rhetoric of competency. He objected to less than half-bloods participating at all, stating that Indian in Montana and California were "white people" who were "just as capable of handling their own affairs as any white man in this room."\textsuperscript{179}

Ultimately Congress refined the definition to include:

"All persons of Indian descent, who are members of any recognized 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."\textsuperscript{180}

The IRA instituted a hybrid definition incorporating both tribal membership and blood quantum. However, the membership and blood components were discreet methods to define an "Indian." An individual could either be a member of a tribe or possess the requisite level of blood. Therefore to come under umbrella of federal political administration, one could be biologically or politically "Indian." It is important to note that the inclusion of a blood criterion worked to expand the definition beyond membership in a tribe, not to restrict membership within those tribes. The act and its subsequent legal interpretation constituted strong recognition of the inherent sovereignty of tribes to define its own membership.\textsuperscript{181}

Ultimately, the function of the IRA definition appears to have been to open up reorganization and the land program to individuals of "non-recognized" tribes. The administration of the 1/2 blood definition in the years following the passage of the act

\textsuperscript{178} Id. at 263-264 (statement of Senator Wheeler, Chairman of Committee) (emphasis added).
\textsuperscript{179} Id. at 151 (statement of Senator Wheeler, Chairman of Committee).
\textsuperscript{180} Indian Reorganization Act, § 19, 48 Stat. 984, 988 (1934).
involved identifying Indian groups previously not serviced by the federal government. Once identified, the Solicitor General issued several opinions on whether such groups were pre-existing "tribes" or "bands."\textsuperscript{182} If they were tribes or bands, reorganization was possible for all their members. However, if they were not, only those individuals of 1/2 or more blood initially could organize under the act.\textsuperscript{183} The Solicitor considered the Catawbas and the Wisconsin Winnebagos tribes.\textsuperscript{184} However, the Solicitor considered only those of 1/2 blood of the St. Croix Chippewas, the Shoshones of Nevada, and the Nahma and Beaver to be eligible for reorganization.\textsuperscript{185}

The application of the blood criterion was then filtered through the legal construction of tribal status. Once the requisite blood criterion was established, the group of individuals could then organize as a political entity. Though blood initially controlled the size of the group, the administration of the 1/2 criterion defined those eligible for the political relationship with the federal government. The 1/2 barrier did not define the essential "racial" status of individuals of Indian descent, but the extent of federal administration to those within political groups fulfilling or failing to fulfill notions of "tribe."

CONCLUSION

To conclude, the 18\textsuperscript{th} and 19\textsuperscript{th} centuries saw several strains of legal thought over what an Indian was in federal and state law and policy. The unique legal and political status of Indian Nations in American jurisprudence precluded a catchall definition that directly applied blood quantum to divide populations by prevailing social notions of racial biology. However, the federal government dealt with Indian tribes both as

\textsuperscript{183} Id.
individual entities and as a collective "race." The negotiation of treaties with political
entities had resulted in different legal obligations to different tribes according to each
treaty, including recognition of both white men and mixed-bloods as "Indians" for certain
purposes.

The courts followed such individual treatment with over-arching definitions, but
applied them only to specific statutes, or specific criminal or civil issues. Congress
passed statute after statute for and about "Indians" without ever clarifying the term. The
federal judiciary oscillated between defining Indian status by "race" or by political
citizenship through several different common law doctrines. Executive officials applied
judicial doctrines to cut-off practically all mixed-bloods from allotments, emphasizing
gender-based descent over appeals to distinctions of blood.

The muddle and confusion of the 19th century would inspire the application of
blood quantum by federal in the 20th century, as officials emphasized the need for a rule
of simple and uniform application. Grasping for a pre-existing body of thought
incorporating simple mathematical distinctions, the federal government surgically
removed individuals of Indian descent below a set blood level. However, different statues
used different criterion, precluding an absolute definition.

With the IRA, Congress created a two-track method to define eligibility for
political reorganization. However, the 1/2 blood criterion only applied to those groups not
previously recognized as entities with a political relationship with the federal
government. Therefore, blood quantum did not directly define an essential racial group,
as the federal government subsumed a pre-existing classification system under the
overarching obligations to political entities collectively defined as "Indians" in federal
law.