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“A Reflection of Our National Character”: Structurally and Culturally Violent Federal Policies and the Elusive Quest for Federal Acknowledgment

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“A Reflection of Our National Character”: Structurally and Culturally Violent Federal Policies and the Elusive Quest for Federal Acknowledgment

Abstract

On March 3, 1839, the Brothertown Indian Nation became the first American Indian tribe whose members had U.S. citizenship. One hundred and forty years later, the tribe learned that it no longer had a government-to-government relationship with the U.S. government. It soon entered the new administrative federal acknowledgment process, where it would remain for three decades. In August 2009, the Office of Federal Acknowledgment issued a Proposed Finding against federally acknowledging the Brothertown. This decision was based in part on the 1839 Act, which OFA determined was a congressional act of tribal termination. Having worked toward tribal survival since its inception in 1785, the Brothertown Indian Nation is once again a victim of the structural and cultural violence present in federal Indian policies, policies that make the government sole judge, juror, and executioner regarding federal acknowledgment. The Brothertown are not the only victims of these policies, but they are in the unique position of either continuing with the status quo or finally (and openly) acknowledging the illegitimacy of the federal government’s assertion that it, and it alone, controls tribal sovereignty.

Keywords

federal acknowledgment, federal recognition, federal Indian law, Brothertown Indian Nation, Office of Federal Acknowledgment, Bureau of Indian Affairs, Samson Occom

In 1868, Congress enacted the Fourteenth Amendment to the U.S. Constitution. It, along with the Thirteenth and Fifteenth Amendments, is one of the Reconstruction Amendments. Like most amendments, its language went through several incarnations before its final version was enacted. In no version, however, were these Amendments intended to “protect women, the environment, consumers, homosexuals, Indians, Chicanos, aliens, illegitimate off-spring, the poor, or any other minority group, class, or things” (Tollett, Leonard & James 1983). This lack of inclusion was particularly relevant to the Citizenship Clause of the Fourteenth Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside (U.S. Const., Amend. XIV).

The Citizenship Clause formalized the common law doctrine of *jus soli* (birthright citizenship), which “provides that all persons born on U.S. territory and not subject to the jurisdiction of another sovereign are native-born citizens, regardless of race” (Perez 2008). Congress included the Citizenship Clause in the Reconstruction Amendments to overturn the infamous 1857 Supreme Court ruling in *Dred Scott v. Sandford*, which held that African Americans could not be U.S. citizens (Perez 2008). Clearly, the broad language of the Citizenship Clause applied to African Americans, but the timing and purpose of the Reconstruction Amendments would have many nineteenth century jurists and scholars applying the Amendments *only* to former slaves and their descendants.

In response to this limited interpretation, scholar William Scruggs, who wrote about the Citizenship Clause less than twenty years after its enactment, noted that “it is sheer nonsense, then, to contend (as some people are still in the habit of contending) that persons of the African race are, or were ever intended to be, the sole beneficiaries of that amendment” (Scruggs 1886). The wording of the Clause was broad, but its application narrow and subject to judicial interpretation and contemporary politics. There was some congressional debate about including Indians, but that idea was summarily rejected (Roland 2000).

Despite Scruggs’ belief that the Citizenship Clause was broader than the interpretation many applied, he noted that “the amendment makes personal subjection to our jurisdiction an essential element of citizenship; and this excludes the [American] Indian.” It does not, however, exclude Indians who have become citizens by special act of Congress or treaty (Scruggs 1886). It is curious that Scruggs did not reference the recent (1884) Supreme Court case *Elk v. Wilkins*, which held that the Citizenship Clause did not provide citizenship for American Indians who were born to federally acknowledged tribes because they were not subject to U.S. jurisdiction at the time of their birth. In *Elk v. Wilkins*, the Court noted that “[American Indians] were never deemed citizens of the United States except under

explicit provisions of treaty or statute to that effect either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life. . .”

Several events took place in the 1880s that should be viewed together when considering tribal sovereignty, jurisdiction, and American Indian citizenship. First, the 1883 Supreme Court decision *Ex Parte Crow Dog* (109 U.S. 556) must be part of the equation. The Supreme Court overturned the federal court conviction of a Brule Lakota man named Crow Dog. Crow Dog had been convicted of the murder of Spotted Tail on the Rosebud Indian Reservation. The Supreme Court held that tribal sovereignty to punish tribal members continued to exist, as no act of Congress had taken this authority away. Congress responded in 1885 by enacting the Major Crimes Act, which took away tribal authority to punish an American Indian who commits one of the enumerated major crimes against another American Indian in Indian Country. This subjected American Indians to U.S. jurisdiction in such cases, yet they did not become U.S. citizens upon the passage of the Major Crimes Act.

The Citizenship Clause would never be interpreted to apply to American Indians. It would require other congressional acts, treaties, and legislation to bestow U.S. citizenship on the indigenous people of this land. The last such necessary congressional action took place in 1924 when Congress passed the Indian Citizenship Act:

Be it enacted. . . , That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States. *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. [Indian Citizenship Act 1924]

By the time Congress enacted the Indian Citizenship Act in 1924 many American Indians had already received U.S. citizenship under other acts, treaties, and provisions. The Treaty of Dancing Rabbit Creek (1831) gave citizenship to some of the Choctaw who agreed to certain treaty provisions. The first such tribe to receive U.S. citizenship as a whole (after requesting it of Congress) did so eighty-five years before President Coolidge signed the Indian Citizenship Act. On March 3, 1839, Congress responded to a petition submitted by the Brothertown Indian Nation that included a request for citizenship and individual allotment of the tribe’s reservation land in Wisconsin (Silverman 2010). This was an unusual request from an unusual tribe. It combined two actions that would later be imposed on many Indians and tribes: the Indian Citizenship Act and the General Allotment Act (GAA).

Congress passed the GAA in 1887 and, nearly four decades later, the Indian Citizenship Act. The GAA attempted to break apart tribes by allotting reservation land to individual tribal members. Indians who were given their own piece of land were, at least in theory, expected to farm the land and settle comfortably into their new agrarian lives. John Quincy Adams had earlier expressed his doubts that most Indians could adopt the agrarian lifestyle: “The greater part of the Indians could never be prevailed upon to adopt this mode of life” (Parsons 1973). Unless and until they did that, the Indians could not be considered to actual “possess” the land” (Parsons 1973). The GAA was intended to push Indians beyond what Adams would have considered their natural inclinations. It would allow for a life based on individualism and the nuclear family. Such a life would justify the citizenship status that would be bestowed upon those who were included in the GAA¹ (Stuart 1977). It might also remove the necessity for the tribal structure. While it predated the Indian Citizenship Act by several decades, the GAA was still nearly half a century *after* the 1839 act that bestowed citizenship on the Brothertown Indians. Who are the Brothertown Indians and what caused them to make such extraordinary request when they did?

The Brothertown Indian Nation was formed in November 1785, after many years of consideration and negotiation, from Christian members of several northeastern tribes: the Mohegan, Pequot, Niantic, and Tunxis tribes of Connecticut, the Narragansett of Rhode Island, and the Montauk of Long Island, New York. Samson Occom (Mohegan), David Fowler (Montauk), and Joseph Johnson (Mohegan) were instrumental in the tribe’s formation, brought together by their common vision of unity as a means of survival. They sought to avoid the destructive influences, wars, disease, and the continually increasing cultural and structural violence they endured when living amongst the colonists. They wanted to live in peace.

Sir William Johnson, British Superintendent of Indian Affairs, encouraged the new settlement and sent a message to the Oneida Indians on Occom’s behalf. Meetings between the Christian Indians and the Oneida were held throughout 1773, and the Oneidas promised a gift of land in New York to Occom’s Christian Indians. At a ceremony at Sir William’s estate, they received the following greeting from the Oneida: “... and now brethren we receive you into our body as it were, now may we

¹ “After allotments have been made, every member of the bands or tribes to whom allotments have been made are subject to laws of the state or territory in which they reside. Every individual Indian who receives trust patents is bestowed with United States citizenship” (General Allotment Act, sec. 6). This was amended by the Burke Act in 1906, which provided that “Furthermore, the Burke Act amends the General Allotment Act by granting citizenship to Indian allottees after a patent in fee simple is granted to them. Prior to this, the General Allotment Act had stated that citizenship was granted to an individual Indian once the allotment was completed and he or she was given a trust patent (or if he or she voluntarily takes up a residence separate and apart from any tribe therein and “adopted the habits of civilized life.”) (Burke Act).

say we have one head, one heart, and one blood. One ruler in the Father of us all. Brethren we look upon you as a sixth brother. The Oneidas, Kiyougas, Manticucks, Tuscaroras, and Tdelenhanas, they are your elder brothers. But as for the Mohawks, Onandagas, and Senecas, they are your fathers. Brethren in the spring, we will expect you all again” (Silverman 2010).

The American Revolution temporarily disrupted their plans, but shortly thereafter the tribe that would take the name “Brothertown” settled in Oneida Country in upstate New York. The Treaty of Paris, which formally ended the American Revolution, was ratified in May 1784. On Monday, November 7, 1785, Samson Occom – Presbyterian minister, hymn writer, and schoolteacher – memorialized in his journal that “we proceeded to form into a Body Politick - We Named our Town by the Name of Brothertown, in Indian Eeyamquittoowauconnuck.” The Brothertown remained there for nearly 50 years before unrelenting pressures from non-Indian settlers led them to seek land west in the 1820s. In the early 1830s, after extensive land negotiations, they began their move to Wisconsin (Love 1899). The new Brothertown Reservation would consist of 23,000 acres east of Lake Winnebago. They were accompanied by the Stockbridge-Munsee (first of Massachusetts, then New York) and some of the Oneida, who were all seeking a more peaceful life elsewhere.

The Brothertown, Stockbridge-Munsee, and Oneida were not the only tribes feeling the pressure to move west. In 1830, Congress passed the Indian Removal Act “to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi” (Indian Removal Act 1830). The Brothertown were not unaware of this important piece of legislation. It was, after all, the first political platform realized on a national level. Its passage was based in no small part on President (and land speculator) Andrew Jackson’s support of the bill. Six months prior to its passage Jackson sought congressional support by demonstrating the fairness and equity of the Act’s mandates. In a message to Congress, he stated that “This emigration should be voluntary, for it would be cruel as unjust to compel the aborigines to abandon the graves of their fathers, and seek a home in a distant land.” He added that “our conduct toward these people” would reflect on “our national character” (Cave 2003). The following May the Indian Removal Act passed by a narrow margin: 102 to 97 (Cave 2003). It would likely have not passed without the vigorous campaign that preceded the vote.

Following the passage of the Indian Removal Act, it was clear that the federal government’s true goal was to continue the displacement of American Indians and tribes until all indigenous land rights were extinguished. Following conversations with John Quincy Adams toward the end of the War of 1812, Henry Goulburn, a member of the British negotiating team, wrote that “I had till I came here no idea of the fixed determination which prevails in the breast of every American to extirpate the Indians and appropriate their territory; but I am now sure that there is nothing

which the people of America would so reluctantly abandon as what they are pleased to call their natural right to do so” (Parsons 1973).

The Brothertown Indians, having united in part to have their fate controlled less by those who wanted to “appropriate their territory,” were understandably fearful of becoming victims of the Indian Removal Act. Not long after most of the Brothertown Tribe arrived in Wisconsin Territory, the federal government attempted to remove the tribe to Kansas (Silverman 2010). The Brothertown requested citizenship and land allotment believing that U.S. citizens that owned their land could not be removed against their will. This assumption was correct, but the tribe would pay a price for seeking security in this manner. First, their land was no longer held in trust by the federal government, so local governments could assess tax on the property. Unlike the General Allotment Act, there was no grace period during which taxes could not be assessed (Stuart 1977). Many tribal members lost their land to tax sales, while others were swindled out of their property by unscrupulous land speculators (Jarvis 2010). Second, citizenship and the American agrarian lifestyle would eventually cause some to call into question the “Indian-ness” of the Brothertown.

Calling “Indian-ness” or tribal status into question continues into the twenty-first century. One of the ways in which it happens is the distinction between those tribes that are federally acknowledged and those that are not. Those tribes that are federally acknowledged² have a government-to-government relationship with the federal government and qualify for certain federal benefits (Pevar 2004). There are approximately 560 such tribes. Federal recognition causes some, Indian and non-Indian alike, to call into question the “legitimacy” of the approximately 200 tribes that are not federally acknowledged. While a tribe may be recognized by other tribes, without federal acknowledgment it does not have a government-to-government relationship with the U.S. government (Pevar 2004). Most of the tribes that are currently acknowledged have always been acknowledged, by treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity. A handful have become federally acknowledged since 1978 in accordance with Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (25 C.F.R. Part 83). Prior to these regulations, tribes were simply either acknowledged or not. There wasn’t an “application” process. Instead, it was an informal, arbitrary process. Now, thanks to the regulations, it is a formal, arbitrary process.

The Brothertown Indian Nation has been part of this formal, arbitrary process since 1980. On March 24th of that year, John Geary, Director of the Office of Indian Services, penned a memorandum to the Acting Minneapolis Area Director correcting what he referred to as an “error” of August 18, 1978. On that date, Donald Fosdick

² The terms “recognized” and “acknowledged” are interchangeable for purposes of this paper.

informed Senator Gaylord Nelson that the Brothertown was a federally acknowledged tribe. The memo went on to state that, in fact, “the Brotherton Community is not a federally-acknowledged tribe,” but would be “contacted and informed of the opportunity to petition for Federal acknowledgment.” The March 1980 memo was also apparently correcting the March 5, 1979 letter from Edmund Manydeeds of the Department of the Interior to historian John Turcheneske, Jr. in which Manydeeds stated that “Although the Brotherton’s are Federally recognized, we do not provide extensive services to this tribe at the present.”

The Brothertown quickly organized for the federal acknowledgment cause. Twenty-two days passed from the time Geary wrote his memo to the time the Department of the Interior received a letter from the Brothertown indicating the tribe’s intent to file a petition for acknowledgment. While the tribe was quick to react, it is unknown whether anyone in the tribe or in the Department of the Interior asked how the tribe could be federally acknowledged on March 5, 1979 but not federally acknowledged on March 24, 1980.

One question most certainly came up as the Brothertown prepared the tribe’s petition: Did the congressional act of March 3, 1839 terminate the tribal status of the Brothertown, thus making the tribe ineligible for the administrative federal acknowledgment process? In accordance with the regulations, any “Indian group in the continental United States that believes it should be acknowledged as an Indian tribe” may petition for federal acknowledgment except those whose government-to-government relationship was terminated by Congress (Procedures for Establishing that an American Indian Group Exists, 25 C.F.R. Parts 83.4(a) and 83.7(g)). Concern regarding criterion (g) resulted in a letter in 1990 and a memorandum in 1993 analyzing the issue.

On August 28, 1990, Marcia M. Kimball of the U.S. Department of the Interior, Office of the Solicitor, Twin Cities, Minnesota, drafted a letter to Earl J. Barlow, Area Director, Bureau of Indian Affairs, to “examine the historical background of the Brothertown Nation of Wisconsin in an attempt to assist the Brothertowns and their attorney in pursuing an appropriate course in seeking federal recognition.” The letter goes on to state that “the real issue in this request is whether the group would be precluded from seeking federal recognition through the federal acknowledgment process contained at 25 C.F.R. Part 83 (1990) because of the Act of March 3, 1839. . . . If the Act of March 3, 1839, is viewed as ‘termination’ legislation, then the Brothertowns would be prohibited from using the process outlined at 25 C.F.R. § 83.7.” It then quotes criterion (g), which prohibits those tribes that have been terminated by congressional legislation from becoming federally acknowledged through the administrative process.

In the 1990 letter, Kimball described the 1839 Act, then noted that “the Brothertown Act of 1839 can hardly be viewed in the same light as the termination

acts of the 1950's or the acknowledgment regulations which were published in the Federal Register on September 5, 1978. . . . The language of the Act of 1839 should not be compared to the twentieth century concept of termination. The modern concept of termination should not be imposed upon the understandings in 1839 of either the Brothertowns or the government." Kimball, representing the Office of the Solicitor, concluded that "in 1979, the BIA did not think of them as terminated so as to preclude them from using the process."

The conclusions reached by Kimball in 1990 were confirmed in a 1993 memorandum from David C. Etheridge, Acting Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary – Indian Affairs and the Director, Office of Tribal Services. This memorandum first looked at whether the Brothertown tribe was terminated by the 1839 Act. Etheridge noted that "if the Brothertown tribe was terminated, only Congress can restore the tribe's government-to-government relationship with the United States, and the Department [of the Interior] is powerless to recognize a group claiming to be the tribe's successor." Etheridge concluded that "since we believe that the Brothertown tribe was not terminated by the Act of March 3, 1839, 5 Stat. 349, the group calling themselves the Brothertown Indians is eligible to petition the Department for federal acknowledgment as an Indian tribe pursuant to 25 C.F.R. Part 83. The process is open to all non-federally recognized Indian groups whose tribal existence has not been terminated by Congress. . ."

In reliance on the 1990 letter and the 1993 memorandum, the Brothertown Indian Nation continued with the administrative federal acknowledgment process, receiving grants and expending large sums of money to compile evidence of tribal existence in a petition that could be submitted to the Office of Federal Acknowledgment (OFA). In February 1996, OFA received a complete petition from the Brothertown. The tribe submitted no evidence to support criterion (g), i.e., that the tribe had not been terminated by Congress, because the federal government had already determined that the 1839 Act did not result in tribal termination. Twelve years later, on June 23, 2008, OFA began reviewing the Brothertown petition. On August 17, 2009, OFA issued a Proposed Finding rejecting federal acknowledgment of the Brothertown Indian Nation. OFA staff determined that the Brothertown had failed on five of the seven mandatory criteria, (a), (b), (c), (e), and, most surprisingly, (g). The seven criteria outlined in 25 C.F.R. Part 83.7 of the federal regulations are:

- a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.
- b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
- c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

- d) A copy of the group's present governing document including its membership criteria.
- e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.
- f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.
- g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

If a petitioning tribe fails on even one of the seven criteria, OFA will not grant the tribe federal acknowledgment. Therefore, if OFA had wanted to issue a negative Proposed Finding on the Brothertown petition, it could do so based on criterion (a), (b), (c), or (e). However, none of these has quite the impact as failing on criterion (g). If a tribe fails on any of the other six criteria, the tribe can come back with evidence to the contrary and hope for a positive Final Determination. Failing on criterion (g) is different, because it is a determination by the federal government that the federal government previously terminated the tribe, making it ineligible for the administrative process.

The OFA determination that the Brothertown tribe was terminated by Congress as a result of the 1839 Act does not put the Brothertown in the same category as tribes that were terminated by Congress during what became known as the "termination era." Not until 1949 would the Hoover Commission determine that tribal termination was necessary so that Indians could be assimilated into mainstream society. 109 tribes that had survived disease, war, colonization, removal, reservations, and allotment and assimilation were, in the termination era, simply erased by the federal government. Congress has since restored the status of several terminated tribes but termination remains in force for others. The difference between "terminated" and "non-federally acknowledged" is which branch of the government acted, and which can un-do the act. A tribe whose status has been terminated by Congress can have its status restored only by an Act of Congress. A tribe that has been de-acknowledged can file a lawsuit to restore its status, or petition Congress, or – more commonly – petition the BIA for acknowledgment. Because the Brothertown Indian Nation (1) was not terminated during the termination era, (2) was recognized by the Department of the Interior until March 24, 1980, and (3) the federal government made determinations in 1990 and 1993 that the Brothertown were not terminated by the 1839 Act, the Brothertown petitioned for administrative federal acknowledgment.

On January 4, 2010, the Brothertown Indian Nation participated in an on-the-record technical assistance meeting with the Office of Federal Acknowledgment.

Jane Smith represented the Solicitor's Office and addressed the tribe's questions regarding the 1990 letter and the 1993 memorandum. Ignoring the 1990 letter, Smith noted that "the question the memo was answering was whether or not Brothertown could be acknowledged immediately or whether you needed to go through the process and the conclusion was that you needed to go through the process." She was questioned on whether going "through the process" meant we were eligible for it, keeping in mind that the process is not open for tribes that have been terminated by Congress. Smith responded that the process is open to tribes that have been terminated, "but acknowledgment of tribes that have been terminated is not possible." This is a curious response. Why would a tribe expend huge sums of money and participate in a process for years when it cannot actually receive federal acknowledgment in that manner? This question was directed at Smith along with the conclusion that "It seems like any tribe that could determine that it had been terminated by Congress would simply not approach the OFA." After hesitating in her response, Richard Schadewald, Brothertown Indian Nation tribal chairman, asked Smith "Do you agree with what she said?" Smith replied, "That tribes that believe they had been terminated by Congress would look at (g) and figure that they wouldn't be able to make it – yeah." Clearly, the federal government's treatment of Indians and tribes had changed little over the years.

Upon rejecting his appointment as Chairman of the House Committee on Indian Affairs, John Quincy Adams explained his actions in his diary: "I was excused from that service at my own request, from a full conviction that its only result would be to keep a perpetual harrow upon my feelings, with a total impotence to render any useful service" (Parsons 1973). In commenting on federal Indian policy, Adams added, "It is among the heinous sins of this nation, for which I believe God will one day bring them to judgement – but at His own time and by His own means. I turned my eyes away from this sickening mass of putrefaction. . . ." (Parsons 1973). Two hundred years later the problem continues. "Heinous sins of this nation" dot the landscape of its history. These sins include the federal government's determination that it, and it alone, could act as judge, juror, and executioner of Indian tribes. Federal Indian policies have changed name over the years but not purpose: get rid of the Indian problem. Destroying the tribal structure is an expedient way to force American Indians to assimilate into mainstream culture. Once assimilated, their dual role in society (as tribal members and U.S. citizens) is eliminated. Francis E. Leupp, Commissioner of Indian Affairs, wrote in his 1905 Annual Report that:

The Indian is a natural warrior, a natural logician, a natural artist. We have room for all three in our highly organized social system. Let us not make the mistake, in the process of absorbing them, of washing out of them whatever is distinctly Indian. Our aboriginal brother brings, as his contribution to the common store of character, a great deal which is admirable, and which needs only to be developed along the

right line. Our proper work with him is improvement, not transformation. . . . (Prucha 2000).

In determining the next phase of federal Indian policy, perhaps we should look to the past to see what has worked and what has not. The only true success story is that American Indians and tribes continue to exist within the United States. They exist despite the federal government's continuing attempts to eradicate them via disease, war, colonization, removal, reservations, allotment and assimilation, and, now, the federal acknowledgment process. Even the over 500 tribes that are federally acknowledged are victims of the process. Giving the power to recognize tribal governments to the U.S. government has a flip side. Any tribe that is federally acknowledged can lose that acknowledgment at any point in time. For the Brothertown, that was either in 1839 or 1980, but, regardless, it definitely happened. Now the tribe finds itself in a situation where it can either turn its back on the very idea of federal acknowledgment or it can approach Congress to pass an act "un-terminating" the tribe. It is a difficult decision and will not be taken lightly by the tribe. We have the benefit of hindsight, knowing that approaching Congress could either be our salvation or our demise. Whatever it may be, it will be remembered and, at that point, given its most convenient interpretation by the federal government.

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