

**IF YOU BUILD IT, THEY WILL COME:  
PRESERVING TRIBAL SOVEREIGNTY IN THE FACE OF INDIAN  
CASINOS & THE NEW PREMIUM ON TRIBAL MEMBERSHIP**

SUZIANNE D. PAINTER-THORNE

*This article considers recent disputes over membership decisions made by American Indian tribal governments. Since Congress passed the Indian Gaming Regulatory Act in 1988, Indian casinos have flourished on some tribal reservations. Some argue that the new wealth brought by casinos has increased fights over membership as tribes seek to expel current members or refuse to admit new members. It is difficult to discern whether there are more disputes over tribal enrollment as a consequence of gaming or whether such disputes are now more public because gaming has brought tribes to the forefront of U.S. culture. What is clear is that enrollment disputes are receiving increased attention, resulting in calls for some change to address what many perceive as a fundamental unfairness in tribal decisionmaking.*

*Aggrieved members' attempts to resort to federal or state court are blocked due to a lack of federal subject matter jurisdiction, standing, and because of the tribes' sovereign immunity. Activists and courts have sought to change this, seeking to curtail the tribes' sovereign immunity, expand federal court jurisdiction to permit oversight, or otherwise impose U.S. law on tribal membership decisions. Scholars are divided, with some arguing for the abrogation of immunity or sovereignty, while others argue that the tribes' decisions are sacrosanct. Still others argue over how the tribes should define membership—contending that it should be based on cultural identity, political participation, blood quantity, or even DNA.*

*This article argues that the focus should instead be on solutions that come from within the tribes. For too long the tribes have suffered from the imposition of legal and cultural norms that do not reflect their identity or culture. Because a tribe's right to define its membership lies at the heart of its sovereignty, the solution is more, not less, sovereignty for the tribes. To remedy the impasse, I propose that tribes create separate independent judicial bodies, or an intertribal appellate court that would provide independent review of tribal membership decisions.*



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INTRODUCTION

In 2004, U.S. District Court Judge Lawrence Karlton blasted the concept of tribal sovereign immunity in the face of a legal challenge to the Table Mountain Rancheria's refusal to admit four members to its tribe.<sup>1</sup> According to the court, the tribe would have no existence but for a court

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<sup>1</sup> Jerry Bier, "While their brethren enjoy riches spawned by gaming casinos, Indians barred from their tribes search for recourse, but U.S. laws and courts have left them with . . . Nowhere to Turn," FRESNO BEE, Aug. 22, 2004, at A1.

ordering that it be recognized by the United States.<sup>2</sup> Thus, it was “bizarre” to suggest that the court had no role in adjudicating a membership dispute.<sup>3</sup> While the court nonetheless concluded that it lacked subject matter jurisdiction, the court warned that if American Indian tribes did not appear to act in good faith, a court would eventually decide otherwise and permit federal involvement in tribal membership decisions.<sup>4</sup>

At the center of the court’s outrage was the belief that the membership dispute came down to a matter of greed.<sup>5</sup> Namely, the tribe’s desire to control and limit access to its lucrative gaming revenues.<sup>6</sup> This is a familiar charge made in nearly every case involving casinos and tribal membership decisions.

Since Congress passed the Indian Gaming Regulatory Act in 1988,<sup>7</sup> Indian casinos have flourished on some tribal reservations.<sup>8</sup> Members of tribes that operate successful casinos often receive thousands of dollars in casino profits each month.<sup>9</sup> Popular press accounts of tribal membership conflicts suggest that disputes over membership are tied to the tribes’

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> 15 U.S.C. § 2701-2721.

<sup>8</sup> *Nat'l Gambling Impact Study Comm'n, The Economic Impact of Indian Gaming in 2006* (2006), available at [http://www.indiangaming.org/info/pr/press-releases-2007/NIGA\\_econ\\_impact\\_2006.pdf](http://www.indiangaming.org/info/pr/press-releases-2007/NIGA_econ_impact_2006.pdf) [hereinafter *2006 Gaming Impact Study*]; Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 *Law & Soc. Inquiry* 313, 314 (2006); Eric Henderson, *Indian Gaming: Social Consequences*, 29 *Ariz. St. L.* 205, 206 (1997).

<sup>9</sup> *See* Kathryn R.L. Rand, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 *VA. J. SOC. POL'Y & L.* 381, 402-03 (1997); Eric Henderson, *supra* n.8 at 240-41; *see also* James May, “State Capitol Rally Protests Disenrollments,” *Indian Country Today*, July 16, 2004, available at <http://www.indiancountrytoday.com/archive/28212274.html> (last visited Feb. 2, 2009); Onell R. Soto, “Tribe Denies 50 Members Profits from Casino,” *SAN DIEGO UNION-TRIBUNE* A1 (June 28, 2008); Marc Cooper, “Tribal Flush,” *LA WEEKLY* (Jan. 3, 2008); Bier, *supra* n.1 at A1.

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increased casino wealth.<sup>10</sup> To the extent these conflicts are about greed, it is surely implicated on both sides.<sup>11</sup> Disputes over membership involve both claims by individuals seeking access to a portion of the gaming revenue pie<sup>12</sup> as well as efforts to exclude members to ensure the pie is not divided up quite as much so that each member's share is thereby reduced.<sup>13</sup>

It is difficult to discern whether there are more disputes over tribal enrollment as a consequence of gaming or whether such disputes are now more public because gaming has brought tribes to forefront of U.S. culture.<sup>14</sup> Ultimately, the answer may not matter. In either event, as enrollment disputes receive more attention, there will be increasing calls for some change to address what many perceive as a fundamental unfairness in tribal membership decisionmaking.<sup>15</sup> To the extent the issue

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<sup>10</sup> See e.g., Soto, *supra* n.9 at A1; Cooper, *supra* n.9; Michael Martinez, "Indians Decry Banishment by Their Tribes," CHICAGO TRIB., Jan. 14, 2006, at C9; Bier, *supra* n.1 at A1; May, *supra* n.9; Danna Harman, "Gambling on Tribal Ancestry," CHRISTIAN SCIENCE MONITOR, Apr. 12, 2004, at 15; Michael Hiltzek, "Fairness Is the Loser in Tribal Identity Crisis," L.A. TIMES, Apr. 5, 2004, at C1; Andrew Metz, "Identity Crisis; Survival of tribes at stake as strict rules weed out members," Newsday (New York), Dec. 21, 2003, at A07; Steve Young, "Woman Fights To Stay in Tribe," ARGUS LEADER (Sioux Falls, SD), Apr. 9, 2000, at 1A.

<sup>11</sup> Eric Henderson, *supra* n.8 at 241-42 (discussing membership disputes and how gaming revenue affects all parties' motivations).

<sup>12</sup> See Harman, *supra* n. 10 at 15 (noting increase from approximately twenty membership enrollment requests per year prior to gaming to more than 450 after Pechanga tribe opened lucrative casino); David Kelley, "Clan Says Tribe Dealt It a Bad Hand," LA Times, Sept. 9, 2007, at A1.

<sup>13</sup> See May, *supra* n.9 (noting American Indian Movement organizer's opinion that "per-capita system in which gaming tribes carve up proportion of their profits to pay to tribal members from their gaming establishments" caused majority of disenrollment efforts to ensure "bigger piece of monetary pie for the remaining members"); Jodi Rave, "Loss of Jodi Rave, "Loss of Tribal Membership a Contentious Issue," BISMARCK TRIB. (Oct. 9, 2005).

<sup>14</sup> See Angela R. Riley, *Tribal Sovereignty in a Post-911 World*, 82 N.D. L. REV. 953, 954, 960-61 (2006). This increased awareness of Indian tribes is itself a consequence of tribal gaming as tribal casinos bring more non-Indians onto reservations and in contact with tribes.

<sup>15</sup> See *id.* 959-60 (2006); see also Soto, *supra* n.1 at A1; Cooper, *supra* n.9; Martinez, *supra* n. 10 at C9; Jodi Rave, "Debate Heats Up As Tribes Cut Members," MISSOULIAN NEWS ONLINE, Oct. 9, 2005, available at

is about perception, is this perception that is spurring cries for reform as the parties try to press their claims in federal court.

The resulting membership lawsuits typically involve passionate and heartfelt claims to tribal identity, with each side claiming the right to define what that identity entails.<sup>16</sup> Thus, Judge Karlton's complaints are perhaps understandable. Ultimately, however, these heated debates are resolved through the bloodless rules of federal subject matter jurisdiction, standing, and sovereign immunity.<sup>17</sup> Simply put, the courts routinely find that they have no role in deciding tribal membership disputes.

Upset by the seeming unfairness to the excluded members, some activists and courts have begun to call for change to curtail the tribes' sovereign immunity, to expand federal court jurisdiction to permit oversight, or to otherwise impose U.S. law on tribal membership decisions.<sup>18</sup> Solutions range from abrogating sovereignty to permit federal involvement over membership disputes to instilling a more standardized method to determining membership such as cultural identity, political participation, blood quantum, or DNA identification.<sup>19</sup>

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[www.missoulian.com/articles/2005/10/09/news/mtregional/news04prt](http://www.missoulian.com/articles/2005/10/09/news/mtregional/news04prt); Bier, *supra* n.1 at A1; May, *supra* n.9; Harman, *supra* n.10 at 15; Hiltzek, *supra* n.10 at C1; Metz, *supra* n.10 at A07; Young, *supra* n.10 at 1A.

<sup>16</sup> See e.g., *Williams v. Gover*, 490 F.3d 785 (9th Cir. 2007); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007); *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005); *Arviso v. Norton*, 129 Fed. Appx. 391 (9th Cir. 2005); *Ordinance 59 Ass'n v. Dept. of the Interior*, 163 F.3d 1150 (10th Cir. 1998); *Akins v. Penobscot*, 130 F.3d 482 (1st Cir. 1997); *Hendrix v. Coffey*, 2008 WL 2740901 (W.D. Okla. July 10 2008); *St. Pierre v. Norton*, 498 F. Supp. 2d 214 (D.D.C. 2007); *Rosales v. United States*, 477 F. Supp. 2d 119 (D.D.C. 2007); *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004).

<sup>17</sup> See e.g., *Williams*, 490 F.3d 785; *Alvarado*, 509 F.3d 1008; *Lewis*, 424 F.3d 959; *Arviso*, 129 Fed. Appx. 391; *Ordinance 59 Ass'n*, 163 F.3d 1150; *Akins*, 130 F.3d 482; *Hendrix*, 2008 WL 2740901; *St. Pierre*, 498 F. Supp. 2d 214; *Rosales*, 477 F. Supp. 2d 119; *Quair*, 359 F. Supp. 2d 948.

<sup>18</sup> See May, *supra* n.9; Jodi Rave, "Debate Heats Up As Tribes Cut Members," MISSOULIAN NEWS ONLINE, Oct. 9, 2005, available at [www.missoulian.com/articles/2005/10/09/news/mtregional/news04prt](http://www.missoulian.com/articles/2005/10/09/news/mtregional/news04prt) [hereinafter *Debate Heats Up*]; see also *Lewis*, 424 F.3d 959; *Arviso*, 129 Fed. Appx. 391.

<sup>19</sup> See generally Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002); Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American*

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In this article, I argue that the focus should instead be on solutions that come from within the tribe.<sup>20</sup> For too long the tribes have suffered from the imposition of legal and cultural norms that do not reflect their identity or culture.<sup>21</sup> Part I discusses the development of Indian gaming, and the effect of the Indian Gaming Regulatory Act on tribal finances and membership.<sup>22</sup> Part II describes two typical tribal membership disputes that arose in California and were litigated to the U.S. Court of Appeals for the Ninth Circuit.<sup>23</sup> Part III discusses proposed solutions to the problem of tribal membership disputes and how these solutions would undermine tribal sovereignty or identity.<sup>24</sup> Part IV proposes instead that solution depends on more, not less, sovereignty for the tribes. Instead of federal intervention or resort to DNA, I propose that tribes create separate independent judicial bodies, or a intertribal appellate court, to review membership determinations. The creation of a judicial body with independent oversight would reconcile the seemingly competing goals of ensuring tribal autonomy while also providing tribal members and potential members with an impartial decisionmaker.

I.

BACKGROUND

A. *Indian Gaming Regulatory Act*

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*Identity*, 35 SETON HALL L. REV. 1241 (2005) [hereinafter *Tribal Kulturkampf*]; see also Eric Beckenhauer, *Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161 (2003); Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power Over Membership*, 92 VA. L. REV. 793 (2006) (arguing that "Congress should exercise its power over federally recognized Indian tribes and abrogate, at least in part, tribal citizenship power").

<sup>20</sup> See *infra* \_\_

<sup>21</sup> See generally Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. \_\_ (June 2009).

<sup>22</sup> See *infra* \_\_

<sup>23</sup> See *infra* \_\_

<sup>24</sup> See *infra* \_\_

In 1988, Congress opened the casino doors on Indian reservations with the passage of the Indian Gaming Regulatory Act (“IGRA”).<sup>25</sup> In passing IGRA, Congress was responding to gaming that was already taking place on Indian reservations but that was not being regulated (by state governments at least).<sup>26</sup>

While many view Indian gaming as an economic boon to tribes,<sup>27</sup> others decry gaming as anathema to tribal values and an unstable basis on which to build tribal economies.<sup>28</sup> Moreover, critics charge that IGRA undercuts tribal sovereignty by permitting states to interfere with tribal governance.<sup>29</sup> There is truth in the latter charge. The driving force behind passage of IGRA was state concern with unregulated Indian gaming as well as regulated gaming that would compete with non-Indian gaming operations.<sup>30</sup> Consequently, IGRA permits some state regulation of some types of gaming on Indian reservations.<sup>31</sup> Nevertheless, Congress’s stated goal was to “promote tribal economic development, tribal self-sufficiency, and strong tribal government.”<sup>32</sup>

To reconcile these competing interests, Congress divided gaming into three separate classes.<sup>33</sup> Jurisdiction to regulate gaming, and the extent to which state governments could be involved, would depend on the type of gaming involved. Tribes have exclusive jurisdiction over Class I gaming, or those social games typically associated with traditional tribal celebrations.<sup>34</sup> As long as state law permits Class II gaming, defined as games of chance such as bingo or certain card games, tribes may also operate such games free of state interference.<sup>35</sup>

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<sup>25</sup> See *infra* \_\_\_\_

<sup>26</sup> Rand, *supra* n.9 at 382.

<sup>27</sup> *Id.* at 402-03.

<sup>28</sup> *Id.* at 382-83.

<sup>29</sup> See Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. ON C.L. & C.R. 137, 167-68 (2006).

<sup>30</sup> Rand, *supra* n.9 at 399.

<sup>31</sup> See *infra* \_\_\_\_.

<sup>32</sup> 25 U.S.C. § 2701(4); Rand, *supra* n.9 at 400.

<sup>33</sup> See 25 U.S.C. § 2703.

<sup>34</sup> 25 U.S.C. §§ 2703(6), 2710(a)(1).

<sup>35</sup> 25 U.S.C. §§ 2703(7), 2710(b)(1)(A).

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All other gaming that is not classified as Class I or Class II gaming is considered Class III gaming.<sup>36</sup> Class III games are those typically associated with casinos, such as slot machines and “banked” card games. To operate a Class III gaming facility, the state where the tribe is located must permit such gaming.<sup>37</sup> Further, the tribe must adopt an ordinance permitting gaming that is approved by the National Indian Gaming Commission.<sup>38</sup> Last, but certainly not least, the tribe and state must enter into a gaming compact that will govern the gaming activities.<sup>39</sup>

IGRA requires that profits from gaming be used for the benefit of the tribe itself.<sup>40</sup> Specifically, IGRA mandates that profits may not be used for any purpose other than funding tribal government services, providing for the tribe’s general welfare, promoting economic and community development, donations to charitable organizations, and aiding local governments.<sup>41</sup> Only after those expenditures may the tribe seek to make per capita payments to tribal members from gaming revenues.<sup>42</sup> To do that, the tribe must prepare and submit a plan for per capita distributions for approval to the Secretary of the Interior.<sup>43</sup> It is these expenditures, many critics allege, that are at the root of tribal enrollment disputes.<sup>44</sup>

*B. Effect of IGRA Gaming on Tribal Economies*

Although tribal gaming existed before Congress passed IGRA in 1988,<sup>45</sup> there is no question that IGRA changed the face of Indian gaming

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<sup>36</sup> 25 U.S.C. § 2703(8).

<sup>37</sup> 25 U.S.C. § 2710(d)(1)(B).

<sup>38</sup> 25 U.S.C. § 2710(d)(1)(A).

<sup>39</sup> 25 U.S.C. § 2710(d)(1)(C). IGRA mandates that states negotiate tribal-state compacts in good faith upon the tribe’s request to enter into a compact. § 2703(d)(3)(A).

<sup>40</sup> 25 U.S.C. § 2710(b)(2)(B).

<sup>41</sup> *Id.*

<sup>42</sup> 25 U.S.C. § 2710(b)(3); *see also* Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738, 742-43 (D.S.D. 1992).

<sup>43</sup> 25 U.S.C. § 2710(b)(3).

<sup>44</sup> *See* Eric Henderson, *supra* n.8 at 241-42.

<sup>45</sup> Rand, *supra* n.9 at 396-97; *see generally* Eric Henderson, *supra* n.8.

and also the economic prospects of many Indian tribes.<sup>46</sup> For many tribes, casinos have been a boon. Casinos have brought jobs to native communities.<sup>47</sup> Gaming revenue has helped fund needed government and social services, provided for schools and scholarships.<sup>48</sup>

At the time of IGRA's passage, Indian gaming generated revenues of approximately \$200 million per year.<sup>49</sup> Nearly twenty years later, that number had increased dramatically. Indeed, by 2007 gaming generated \$26 billion in revenues from 382 gaming tribes.<sup>50</sup> This represents a five percent increase over the previous year.<sup>51</sup>

Tribal gaming has especially thrived in California, where the Table Mountain Rancheria—the tribe at issue in *Lewis*—is located. In the last two years, Indian casinos in California generated approximately \$8 billion in gaming revenue, constituting nearly thirty percent of all gaming revenue.<sup>52</sup> In the hear the Ninth Circuit dismissed the *Lewis*'s appeal, the Table Mountain Rancheria brought in \$100 million from its casino.<sup>53</sup>

It is undeniable that gaming enterprises have brought many tribes their first prospects for economic self-determination in over two hundred years.<sup>54</sup> In fact, for many tribes, casino revenue constitutes the bulk of the

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<sup>46</sup> Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. PUB. L.* 1, 105-08 (2004).

<sup>47</sup> National Indian Gaming Commission Press Release (PR-93 06-2008), "NIGC Announces 2007 Indian Gaming Revenues," available at <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR93062008/tabid/841/Default.aspx> [hereinafter NIGC 2007 Press Release].

<sup>48</sup> *2006 Gaming Impact Study*, *supra* n.8 at 10.

<sup>49</sup> *NIGC 2007 Press Release*, *supra*, n.49.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Howard Stutz, *Tribal Casinos Feeling Pinch*, *LAS VEGAS REVIEW-JOURNAL*, Aug. 19, 2008; see Kate Coe, *Engorged With Money, Four Tiny Tribes Spend a King's Ransom To Get More*, *LA WEEKLY*, Jan. 31, 2008.

<sup>53</sup> See Jerry Bier, *Indians' Lawsuit Targets Rancheria*, *FRESNO BEE*, Jan. 30, 2005, at B1.

<sup>54</sup> McCarthy, *supra* n.48 at 105-08; *2006 Gaming Impact Study*, *supra* n.8 at 1; Kelley, *supra* n.12 at A1. However, it is equally true that gaming has not benefited all tribes equally. See McCarthy, *supra* n.48 at 105-08. Of 562 federally recognized tribes, only 225 operated casinos as of 2006. *2006 Gaming Impact Study*, *supra* n.8 at 1. For some tribes, this was a decision driven by the tribe's particular cultural or

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average tribal budget, and in some cases far exceeds federal aid or revenue from other sources.<sup>55</sup> Gaming revenue contributes directly to the economic development of reservations.<sup>56</sup> Under the IGRA, tribes are required either to use gaming revenue for public purposes or to distribute the proceeds to tribal members on a per capita basis.<sup>57</sup> Typically, tribes have used the profits from gaming to build schools, construct roads, finance scholarships, and make other community investments.<sup>58</sup>

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religious beliefs. Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1345 (2000); see also Heidi L. McNeil, *Indian Gaming in Arizona: The Great Casino Controversy Continues*, ARIZONA ATTORNEY, 13 (1998); Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 53 (2008). For other tribes the decision was more economic after the tribe concluded that casino operations would not be successful due to the remoteness of the tribe's reservation land. Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1012 & n.11 (2007). Moreover, even within gaming tribes, not all benefit to the same degree. Some tribes have operated casinos at a loss or have closed financially failing casinos. *Id.* ("Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities."). Of those tribes that do operate casinos, only a small number generate the lion's share of revenue. See *id.*; Coe, *supra* n.54 (reporting that "much of the wealth [from California's Indian casinos] flows to a tiny group of Native Americans among the state's 108 federally recognized tribes"). Indeed, the top twenty casinos generate more than half of all gaming revenue. Clarkson, *supra* (citing Nat'l Gambling Impact Study Comm'n, National Gambling Impact Study Commission Report 2-10 (1999) and noting that "20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for [only] 41.2 percent."). Of California's 108 tribes, only a handful bring in the bulk of that state's nearly \$8 billion in gaming revenue. See Coe, *supra* n.54.

<sup>55</sup> Cooter & Fikentscher, *supra* n.56 at 53; see Mike Gallagher, *Gaming Tribes Cash In*, ALBUQUERQUE J., Jan. 2, 2005, at A6.

<sup>56</sup> See *2006 Gaming Impact Study*, *supra* n.8 at 8-26; McCarthy, *supra* n.48 at 105-08; see also Kelley, *supra* n.12 at A1 (describing rampant poverty on reservation before tribe started casino operations).

<sup>57</sup> See McCarthy, *supra* n.48 at 105-08.

<sup>58</sup> *Id.*; *2006 Gaming Impact Study*, *supra* n.8 at 8-26.

Gaming has also had more intangible benefits. For instance, gaming and casino development has help foster connections between the tribes and other businesses.<sup>59</sup> Gaming revenues have supported cultural programs viewed as vital to preserving and protecting Indian culture for future generations.<sup>60</sup> The Mohegan Tribe in Connecticut used gaming revenue to purchase land containing the tribe's burial grounds.<sup>61</sup> Other tribes have contributed to the preservation of Indian basketweaving and languages as well as the creation of cultural centers and museums.<sup>62</sup>

Money not used for tribal services is distributed in monthly or annual distributions to tribal members. For individual members, gaming distributions can mean the difference between a life of poverty and one of unimagined wealth.<sup>63</sup> For instance, in 2002, each enrolled tribal member in the Table Mountain Rancheria received a \$200,000 annual bonus in addition to a monthly distribution of \$15,000.<sup>64</sup> By 2008, some tribal members in California received \$30,000 a month in casino distributions.<sup>65</sup> Further, ousted members lose out on other tribal benefits such as education and healthcare services.<sup>66</sup>

Given these figures, it is perhaps understandable why those who believe they are tribal members would want to ensure their membership is recognized and that they are accepted into the tribe. It is equally understandable why currently enrolled members would want to exclude

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<sup>59</sup> See Joe Lyons, *The Man in Charge of a Fantasy*, INLAND EMPIRE BUSINESS J. 11 (Mar. 1, 2007) (discussing Cabazon's casino which included several restaurants, a Starbucks, and Pizza Kitchen); see also James May, *San Manuel Looks to Diversify*, INDIAN COUNTRY TODAY (May 11, 2005).

<sup>60</sup> 2006 *Gaming Impact Study*, *supra* n.8 at 13.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Coe, *supra* n.54; Kelley, *supra* n.12 at A1; Cooper, *supra* n.9.

<sup>64</sup> Donald L. Barlett & James B. Steele, *Indian Casinos Have Fallen Far Short of Benefiting the Wider Native American Population*, TIME (Dec. 8, 2002).

<sup>65</sup> See Coe, *supra* n.54.

<sup>66</sup> See Rave, *supra* n.13 ("Not only did they lose their tribal identity, the family also lost education, health and other citizenship benefits, including a monthly casino per-capita payment amounting to about \$2,500."); Kelley, *supra* n.12 at A1 (describing loss of gaming revenue, tribal health insurance, and schooling); see Jason B. Johnson, "Former Pomo Leader Expelled from Tribe," S.F. GATE, May 1, 2006, at B-1 (describing ousted members' loss of scholarships and right to vote in tribal elections).

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newcomers. Not only do members receive casino revenue distributions, but as tribes have become wealthier they have been able to provide better services to their members in things like school clothing, vocational training, eldercare, etc.<sup>67</sup> Each additional member the current members' revenue distributions and increases the tribe's cost of providing these government and social services. Thus, while many American Indians living outside of tribal reservations may now have an additional incentive to return to reservation life, for tribes to maintain economic development by means of gaming enterprises they may feel pressured to constrain population growth to be able to continue to provide these services.<sup>68</sup>

Consequently, the success of tribal gaming enterprises has the potential to alter the way that tribes view themselves in relation to both non-Indians and other tribes, producing or reinforcing a narrow, exclusive conception of tribal identity.<sup>69</sup> As a way to narrow tribal enrollment, some tribes have turned to restrictive, race-based conception of tribal citizenship, and blood quantum has become proxy for tribal identity.<sup>70</sup> Seeking to vindicate their claim to membership, tribal members and potential members have resorted to legal action.<sup>71</sup>

## II.

### MEMBERSHIP CONTROVERSIES

In the past eight years, Indian tribes in California have removed five thousand people from their membership rolls.<sup>72</sup> According to the tribes, these disenrollments were necessary to correct longstanding mistakes in membership rolls.<sup>73</sup> For the individuals affected, however, disenrollment from their tribe can mean the division of family and separation from their

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<sup>67</sup> *See infra* \_\_\_.

<sup>68</sup> *See infra* \_\_\_.

<sup>69</sup> *See infra* \_\_\_.

<sup>70</sup> *See infra* \_\_\_.

<sup>71</sup> *See infra* \_\_\_.

<sup>72</sup> Kevin Fagan, "Tribes Toss Out Members In High-Stakes Conflict," S.F. CHRON. A1 (April 20, 2008)

<sup>73</sup> *See id.* ("The council explains it as a readjustment of records to more accurately reflect who deserves to be a Picayune Chukchansi and an official member of the tribe.").

tribe and culture.<sup>74</sup> It can also mean unemployment, the loss their homes, and the loss of a share in the revenues generated by the billion dollar Indian casino industry.

Contesting these decisions, disaffected members and those excluded from membership have file suite in both state and federal courts to contest tribal membership decisions. In some cases, individuals seeking to become enrolled members of the tribes sue when their applications are denied.<sup>75</sup> In others, currently enrolled members sue when they are suddenly disenrolled from the tribe.<sup>76</sup> And, in a third category of cases, members seek to exclude already enrolled members and sue when the tribe refuses to act.<sup>77</sup>

In April 2005, a Ninth Circuit panel heard two cases involving disputes over tribal membership.<sup>78</sup> Though they involved different tribes and different claims, the cases were really two sides of same coin in that they both represented efforts to force federal agencies to become involved in a tribal membership dispute. In one suit, the plaintiffs sought to exclude certain members from the tribe on the ground that they did not meet enrollment criteria.<sup>79</sup> In the other, the plaintiffs sought to become enrolled members of a tribe that had thus far failed to act on their enrollment applications.<sup>80</sup> Both cases were resolved on the same point—lack of federal standing and jurisdiction.<sup>81</sup>

The first case, *Arviso v. Norton*, involved what the district court characterized as a “bitter intra tribal dispute” concerning whether certain members of the Rincon Band of San Luiseño Indians (“Rincon Band” or “Band”) properly met the blood quantum requirements for tribal membership.<sup>82</sup> Underlying the dispute was a judgment of funds awarded to

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<sup>74</sup> Cooper, *supra* n.9; Kelley, *supra* n.12 at A1.

<sup>75</sup> See Riley, *supra* n.14 at 960.

<sup>76</sup> See e.g., Salinas v. Barron, 2008 WL 699205 (Cal. App. 4 Dist., March 17, 2008); Lamere v. Superior Court, 131 Cal. App.4th 1059, 31 Cal. Rptr.3d 880 (2005); Quair v. Sisco, 359 F.Supp.2d 948, (E.D. Cal., 2004).

<sup>77</sup> See e.g., *Arviso v. Norton*, 129 Fed. Appx. 391, 392 (9th Cir. 2005).

<sup>78</sup> *Id.*; Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005).

<sup>79</sup> *Arviso*, 129 Fed. Appx. at 392.

<sup>80</sup> *Lewis*, 424 F.3d at 961.

<sup>81</sup> *Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 960.

<sup>82</sup> Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*4 (July 14 2004).

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the Band in 1987 under U.S. Court of Claims Docket No. 80-A.<sup>83</sup> Only those applicants meeting the enrollment criteria would receive a distribution of the funds.<sup>84</sup>

The plaintiffs, all members of the Band, alleged that seventy-two people who are not eligible for membership in the Rincon Band were nonetheless enrolled members because of the improper actions and omissions of the Secretary of the Interior and officials of the Bureau of Indian Affairs (“BIA”).<sup>85</sup> Specifically, plaintiffs complained that the *Assistant* Secretary of the Interior for Indian Affairs violated the law by ordering BIA officials to cease further administrative proceedings involving the membership of the disputed members.<sup>86</sup> According to the plaintiffs, the federal defendants had breached their trust obligations and fiduciary duties, as well as their obligations under federal and tribal law regarding membership.<sup>87</sup>

As a consequence of the defendants’ inaction, plaintiffs had been deprived of their right to a fair election because persons who were not eligible to vote would be permitted to vote in future tribal elections, thereby diluting the plaintiffs’ votes.<sup>88</sup> Other injuries complained of included (1) the failure of the tribe to act on one plaintiff’s application to enroll his two children as tribal members; (2) the tribe’s denial of one plaintiff’s application for tribal housing; and (3) a third plaintiff’s defeat in a tribal election as a consequence of the disputed members being permitted to vote.<sup>89</sup>

To remedy these perceived wrongs, plaintiffs sought declaratory and injunctive relief that would recognize the BIA’s failure to take any administrative action with respect to the membership of the disputed members.<sup>90</sup> They also sought to prohibit the BIA from failing to take such

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<sup>83</sup> *Id.*

<sup>84</sup> *Arviso*, 129 Fed. Appx. at 392.

<sup>85</sup> *Id.*

<sup>86</sup> Appellants’ Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*5 (May 4 2004).

<sup>87</sup> *Id.*

<sup>88</sup> *Arviso*, 129 Fed. Appx. at 393.

<sup>89</sup> *Id.* at 393 n.1.

<sup>90</sup> *Id.*

administrative action in the future as purportedly required by federal regulations and tribal law.<sup>91</sup>

The Band intervened and moved to dismiss on the ground that it was a necessary and indispensable party to the suit.<sup>92</sup> Before the hearing on the Band's motion, the plaintiffs and federal defendants entered into a Settlement Agreement.<sup>93</sup> Under the Agreement, the BIA would withdraw certain decision letters issued by the Assistant Secretary and reconsider earlier protests prior enrollment decisions, including reconsideration of correction to the Band's Base Roll.<sup>94</sup> It further required that the BIA would base enrollment decisions on the disputed members' common ancestor as having a blood quantum of three-quarter.<sup>95</sup> The BIA would then issue a determination of eligibility for enrollment that would be appealable to the BIA.<sup>96</sup> The names of ineligible members would be stricken from the Band's Roll.<sup>97</sup>

The district court entered judgment on the Settlement Agreement before considering the Band's motion to intervene.<sup>98</sup> It then stayed

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* 392.

<sup>93</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*5 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*3 (July 14 2004).

<sup>94</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*6 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*2-3 (July 14 2004).

<sup>95</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*24-25 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*16-17 (July 14 2004).

<sup>96</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*6 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*16-17 (July 14 2004).

<sup>97</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*6 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*16 (July 14 2004).

<sup>98</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*6 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*17 (July 14 2004).

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enforcement of the Agreement and later permitted the Band to intervene.<sup>99</sup> Afterwards, the Band moved to vacate the judgment and to dismiss on the grounds that the district court lacked subject matter jurisdiction and that under Federal Rule of Civil Procedure 19, the Band was an indispensable party.<sup>100</sup> Finding for the Band, the district court deemed it a necessary and indispensable party, and dismissed plaintiffs' suit because the Band's sovereign status precluded it from being joined.<sup>101</sup>

Although the Ninth Circuit agreed with the district court that the Band was an indispensable party, it concluded that the plaintiffs' suit was more fundamentally flawed.<sup>102</sup> According to the circuit court, the plaintiffs lacked standing to assert their claims because the federal courts would be unable to fashion any relief to redress any perceived injury.<sup>103</sup> In reaching this conclusion, the court first disposed of all the plaintiffs' claimed injuries save the vote dilution claim on the ground that plaintiffs could not establish that the alleged injuries were caused by any action or inaction by the federal defendants.<sup>104</sup>

Finding the vote dilution claim "marginally traceable" to the actions of the defendants, the court nonetheless concluded that the federal court could not grant the plaintiffs any relief even if it were to find in plaintiffs' favor.<sup>105</sup> According to the court, plaintiffs' claim necessarily failed because "any relief fashioned by the district court—either enforcement of the Settlement Agreement or an order directing the BIA to reconsider the enrollment of the disputed individuals—directly implicates the Band's sovereign right to determine its own membership and enrollment procedures."<sup>106</sup> Ultimately, "the district court ha[d] no authority to order

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<sup>99</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*7 (May 4 2004); Answering Brief for the Federal Defendants-Appellees, *Arviso v. Norton*, 2004 WL 5469167, \*17 (July 14 2004).

<sup>100</sup> Appellants' Opening Brief, *Arviso v. Norton*, 2004 WL 1284076, \*6-7 (May 4 2004).

<sup>101</sup> *Arviso v. Norton*, 129 Fed. Appx. 391, 392 (9th Cir. 2005).

<sup>102</sup> *Id.* at 393.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 393 & n.1.

<sup>105</sup> *Id.* at 393.

<sup>106</sup> *Id.*

any relief favorable to Plaintiffs' complaint because any such relief would impermissibly impair the Band's sovereign right to determine its membership."<sup>107</sup> Because there could be no redress for their complained of wrongs, plaintiffs lacked standing to sue.<sup>108</sup>

It was the second case, *Lewis v. Norton*, that was particularly troubling to the Ninth Circuit panel and that raised the district court's ire.<sup>109</sup> In *Lewis*, the plaintiffs were four siblings and the children of an enrolled member of the Table Mountain Rancheria.<sup>110</sup> The plaintiffs had all who had grown up in a shack on the reservation, but had left the reservation to seek employment elsewhere because of the economic impoverishment.<sup>111</sup> After the tribe's fortunes changed with passage of the Indian Gaming Regulatory Act and development of a lucrative casino, plaintiffs sought to return to the reservation.<sup>112</sup> They were not exactly welcomed with open arms.<sup>113</sup> Instead, the tribe refused to act on their membership applications.<sup>114</sup> Indeed, for the five years after plaintiffs first attempted to enroll in the tribe, the Rancheria had taken no action on their membership applications.<sup>115</sup>

Plaintiffs complained that they were entitled to recognition as members of the tribe because they were lineal descendants of tribal members and had the requisite one-quarter blood quantum for membership.<sup>116</sup> Tribal membership in the Rancheria definitely had its privileges. At the time of the suit, the Rancheria had seventy-four members who each received tens of thousands of dollars per month in gaming

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<sup>107</sup> *Id.* at 394.

<sup>108</sup> *Id.*

<sup>109</sup> See *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005); Bier, *supra* n.1 at A1.

<sup>110</sup> Donald L. Barlett & James B. Steele, "Who Gets The Money?," TIME MAG. 48 (Dec. 16, 2002); Brian Melley, "Coalition Plans Tribal Takeover," SAN JOSE MERCURY NEWS 3B (Aug. 1. 2000).

<sup>111</sup> Barlett & Steele, *supra* n.112 at 48; Melley, *supra* n.112 at 3B.

<sup>112</sup> Barlett & Steele, *supra* n.112 at 48.

<sup>113</sup> *Id.*; Melley, *supra* n.112 at 3B; see also *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

<sup>114</sup> Barlett & Steele, *supra* n.112 at 48; Melley, *supra* n.112 at 3B; see also *Lewis*, 424 F.3d at 961.

<sup>115</sup> *Lewis*, 424 F.3d at 961.

<sup>116</sup> *Id.*

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revenue.<sup>117</sup> Thus, the difference between membership and exclusion was the difference between life of luxury and one of poverty.<sup>118</sup> Plaintiffs contended that, as eligible members, they were entitled to share in the revenue of the Rancheria's very successful casino, which brought in approximately \$100,000 million per year.<sup>119</sup>

Rather than sue the Rancheria, plaintiffs' lawsuit targeted officials of the BIA and Department of Interior ("DOI"), and the National Indian Gaming Commission ("NIGC").<sup>120</sup> According to the plaintiffs, defendants had failed to comply with U.S. laws and regulations by refusing to order the Ranchero to recognize all qualified individuals as members.<sup>121</sup> To remedy this, plaintiffs sought declaratory and injunctive relief requiring the BIA and DOI to act and preventing the distribution of government funds to the Ranchero until it complied with its constitution and enrollment ordinance.<sup>122</sup> Plaintiffs also sought to require NIGC to prohibit the Rancheria from disbursing casino profits to its members until it recognized appellants as enrolled members.<sup>123</sup> The district court dismissed for lack of subject matter jurisdiction.<sup>124</sup>

Although its decision upheld tribal sovereignty, the district court was clearly incensed. During oral arguments on the Rancheria's motion, Judge Karlton blasted the Rancheria:

You know, all of this is just sort of extraordinary. The only reason this Ranchero has whatever it is 30 millionaires and 20 impoverished people is because of a court order which ordered the United States to reinstate the Ranchero. So, I mean the argument that the court has no place in this dispute is bizarre. But for the fact that a court ordered the

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<sup>117</sup> Barlett & Steele, *supra* n.112 at 48; Melley, *supra* n.112 at 3B; Appellants' Opening Brief, Lewis v. Norton, 2004 WL 1175919, \*12 (Apr. 20, 2004).

<sup>118</sup> See Barlett & Steele, *supra* n.112 at 48; Melley, *supra* n.112 at 3B.

<sup>119</sup> Appellants' Opening Brief, Lewis v. Norton, 2004 WL 1175919, \*12 (Apr. 20, 2004); see also Barlett & Steele, *supra* n.112 at 48; Melley, *supra* n.112 at 3B.

<sup>120</sup> Lewis v. Norton, 424 F.3d 959, 960 (9th Cir. 2005).

<sup>121</sup> *Id.* at 961.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

United States to reinstate the Ranchero, nobody would have a dime. I mean, this is just disgraceful.<sup>125</sup>

To the district court, the problem was clear: the tribe was being unfair and greedy.<sup>126</sup> Thus, the solution was equally clear: court intervention. As the court explained, “You know, somebody ought to warn the tribe that this is the kind of facts where some court is going to say we’re outraged and put it to them.”<sup>127</sup>

On appeal, the Ninth Circuit affirmed the district court’s dismissal.<sup>128</sup> In so doing, the court determined that dismissal of the siblings’ claim was warranted due to lack of subject matter jurisdiction, because the dispute involved an internal tribal matter that the court lacked power to adjudicate.<sup>129</sup> First, tribal immunity barred suit against the tribe to force the tribe to comply with its membership provisions.<sup>130</sup> Nor could the plaintiffs avoid around tribal immunity and sovereignty by suing federal agencies.<sup>131</sup> Because only the tribe possessed the authority to determine its membership, a federal court order compelling federal-agency action could not force the tribe to disenroll the disputed members.<sup>132</sup> Further, a tribal remedy existed for plaintiffs’ claims because the tribal council and the general council were not inadequate merely because they had not granted the siblings membership.<sup>133</sup>

Finally, the court held that the Indian Gaming Regulatory Act<sup>134</sup> and related regulations did not act to waive the tribe’s sovereign immunity over

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<sup>125</sup> Bier, *supra* n.1 at A1.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Lewis, 424 F.3d at 960.

<sup>129</sup> *Id.* at 961-62.

<sup>130</sup> *Id.* at 962. The court also held that the and the tribe’s waiver of sovereign immunity in 1983 to obtain federal recognition of the tribe and its membership roll did not constitute a waiver of the tribe’s sovereign immunity in perpetuity for the resolution of all claims to tribal membership. *Id.*

<sup>131</sup> *Id.* at 963.

<sup>132</sup> *Id.* (citing Ordinance 59 Ass'n. v. United States DOI Secy., 163 F.3d 1150, 1160 (10th Cir. 1998)).

<sup>133</sup> *Id.* at 962.

<sup>134</sup> 25 U.S.C. §§ 2701-2721.

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an intra-tribal membership dispute.<sup>135</sup> The court explicitly rejected plaintiffs' argument that IGRA conferred jurisdiction over tribal membership by granting the government oversight over distribution of gaming revenues.<sup>136</sup> Instead, the court concluded that nothing in IGRA provides federal government oversight of membership issues.<sup>137</sup> In fact, IGRA itself states that allocation and distribution of revenue is to be decided by tribal court or administrative processes.<sup>138</sup>

In addition to affirming the district court's dismissal, the appeals court shared the district court's frustration.<sup>139</sup> Based on the appellate record, it was clear to the court that the plaintiffs met the tribe's own stated membership criteria.<sup>140</sup> Despite that, the tribe had refused to act on their applications, effectively denying them membership and a portion of tribal gaming revenue.<sup>141</sup> For the panel, the solution seemed clear: it was time to revisit the wisdom of tribal sovereign immunity in light of the new premium gaming revenues had placed on tribal membership.<sup>142</sup> Although straightforward, this proposed solution would undo the fundamental notion of tribal sovereignty that permits the tribe to determine its own membership.<sup>143</sup> Because, unlike other U.S. citizens, American Indians are also tribal citizens, and the tribe has a parallel right to sovereignty.<sup>144</sup>

Nevertheless, concluding that the plaintiffs' could not "survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes," the *Lewis* panel affirmed the district court's dismissal for lack of subject matter

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<sup>135</sup> *Lewis*, 424 F.3d at 962-63.

<sup>136</sup> *Id.* at 963.

<sup>137</sup> *Id.* at 962-63.

<sup>138</sup> 15 U.S.C. § 2701-2721; *Lewis*, 424 F. at 963.

<sup>139</sup> *Lewis*, 424 F.3d at 960 & 964.

<sup>140</sup> *Id.* at 960.

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* at 963.

<sup>143</sup> *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

<sup>144</sup> DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 3, 29, (5th ed. 2005); *see Santa Clara Pueblo*, 436 U.S. at 72 n.32.

jurisdiction.<sup>145</sup> The attempt to sue federal agencies instead of the tribe was not a way around these jurisdictional roadblocks.<sup>146</sup>

The panel responded to the seeming unfairness of the plaintiffs' plight by concluding its opinion with this plea: "These doctrines of tribal sovereign immunity were developed decades ago, before the gaming boom created a new and economically valuable premium on tribal membership. . . . We agree with the district court's conclusion that this case is deeply troubling on the level of fundamental substantive justice. Nevertheless, we are not in a position to modify well-settled doctrines of tribal sovereign immunity. This is a matter in the hands of a higher authority than our court."<sup>147</sup>

Like countless other state and federal decisions involving tribal membership disputes, the Ninth Circuit's decisions in *Arviso* and *Lewis* decisions rested on *Santa Clara Pueblo v. Martinez*,<sup>148</sup> the leading Supreme Court case on the issue of tribal sovereignty and membership. In *Santa Clara*, the Court held that a tribe's right to define its own membership for tribal purposes was central to its existence as an independent political community and, thus, that federal courts have no jurisdiction to resolve intra-tribal disputes over memberships.<sup>149</sup> Following *Santa Clara*, federal courts have repeatedly recognized that "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership . . . from the general rule that otherwise applicable federal statutes apply to Indian tribes."<sup>150</sup> Accordingly, they "have consistently held that tribal immunity bars suits to force tribes to

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<sup>145</sup> *Lewis*, 424 F.3d at 960.

<sup>146</sup> *Id.* at 962-63.

<sup>147</sup> *Id.* at 963 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996)).

<sup>148</sup> *Santa Clara Pueblo*, 436 U.S. at 69-72.

<sup>149</sup> *Id.*

<sup>150</sup> *Lewis*, 424 F.3d 959, 961 (9th Cir. 2005) (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996)); *see also e.g.*, *N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003); *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, (11th Cir. 1999); *Chao v. Spokane Tribe of Indians*, Slip Copy, 2008 WL 4443821 (E.D. Wash., September 24, 2008); *Chao v. Matheson*, 2007 WL 1830738 (W.D. Wash., June 25, 2007); *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 730 F. Supp. 324 (E.D. Cal. 1990).

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comply with their membership provisions, as well as suits to force tribes to change their membership provisions.”<sup>151</sup>

Although *Santa Clara* would appear to foreclose federal court remedy in tribal membership disputes, that has not stopped plaintiffs from seeking to avoid its implications. For instance, in *Lewis*, the plaintiffs argued that *Santa Clara* left open possibility that where there is no law-applying body (such as a tribal court or council), there may be federal review because in *Santa Clara* there was an adjudicative body to which the plaintiffs could complain.<sup>152</sup> However, the Ninth Circuit rejected that contention.<sup>153</sup> Instead, the court concluded that the lack of a tribal court was not a sufficient reason to avoid *Santa Clara*, as there was a tribal council and general council to which plaintiffs could complain and appeal.<sup>154</sup> In so concluding, the court again relied on *Santa Clara*, which had noted that even non-judicial tribal institutions could nevertheless be competent law-abiding bodies.<sup>155</sup> Indeed, the competency of these bodies was to be presumed.<sup>156</sup> Moreover, the appeals court reasoned that the issue was not whether the plaintiffs’ claims would be successful in these tribal forums, but only whether tribal forums exist that could potentially resolve the plaintiffs’ claims.<sup>157</sup>

Persevering, federal plaintiffs—like those in *Arviso* and *Lewis*—attempted to avoid *Santa Clara* by suing federal agencies under the

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<sup>151</sup> *Lewis*, 424 F.3d at 961 (citing *Ordinance 59 Ass'n. v. United States DOI Secy.*, 163 F.3d 1150, 1157 (10th Cir. 1998)); *Apodaca*, 19 F.3d at 1015-16.

<sup>152</sup> 436 U.S. 49, 69-72 (1978).

<sup>153</sup> *Lewis*, 424 F.3d at 962.

<sup>154</sup> *Id.*

<sup>155</sup> *Santa Clara Pueblo*, 436 U.S. at 69-72.

<sup>156</sup> *Id.*

<sup>157</sup> *Lewis*, 424 F.3d at 962. On the other hand, if there is *no* tribal remedy, the possibility for federal jurisdiction may remain. *See Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (19th Cir. 1980). However, even in *Dry Creek*, the court found federal jurisdiction where the issue related to a matter outside internal tribal affairs and there was no adequate tribal remedy. *Id.* Thus, *Dry Creek* does not necessarily support the same conclusion where there is no tribal remedy but the dispute involves something so closely internal to tribal affairs as membership.

Administrative Procedure Act rather than the tribes directly.<sup>158</sup> Under this approach, plaintiffs contend that the defendant federal agencies had breached their duty to act under applicable federal regulations and tribal law.<sup>159</sup> Just as the Ninth Circuit did in *Lewis*, federal courts have consistently held that plaintiffs cannot get around *Santa Clara* by bringing suit against the government.<sup>160</sup> Instead, in any such suit against these federal agencies, the tribe would be an indispensable party because of its sovereign interest in membership and in protecting its sovereignty.<sup>161</sup> Moreover, because of that sovereign immunity, the tribe could not be joined.<sup>162</sup> Thus, even when tribal law empowers the BIA to have some involvement in tribal membership decisions, that authority is limited to what is permitted by the tribe's articles of association or enrollment ordinances.<sup>163</sup>

Accordingly, any decision implicating the tribe's membership, even with respect to the BIA's action or inaction, would necessarily be bound up in tribal law and its sovereign right to determine its own membership.<sup>164</sup> As the Tenth Circuit explained, a "federal court order compelling the [federal agency] to comply with the requests of [alleged members] would not have the effect of enrolling [alleged members] in the tribe because tribes, not the federal government, retain authority to determine tribal membership."<sup>165</sup> Ultimately, because the tribe's interest in sovereignty outweighs the plaintiffs' interest in litigating, dismissal was appropriate.<sup>166</sup>

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<sup>158</sup> *Arviso v. Norton*, 129 Fed. Appx. 391, 392 (9th Cir. 2005); *Lewis*, 424 F.3d at 962.

<sup>159</sup> *Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 962.

<sup>160</sup> *See e.g.*, *Ordinance 59 Assn. v. United States Dept. of the Interior Secretary*, 163 F.3d 1150 (10th Cir. 1998); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1997); *Hall v. Babbitt*, 208 F.3d 218, 218 (8th Cir. 2000); *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007); *Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 962.

<sup>161</sup> *See Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 962-63.

<sup>162</sup> *Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 962.

<sup>163</sup> *See Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 963.

<sup>164</sup> *See Arviso*, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 963.

<sup>165</sup> *Ordinance 59 Assn.*, 163 F.3d at 1160; *see also* *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

<sup>166</sup> *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-25 (9th Cir. 2002).

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Finally, as did the plaintiffs in *Lewis*, federal plaintiffs have tried to skirt *Santa Clara* and tribal sovereign immunity by invoking the Indian Gaming Regulatory Act (IGRA).<sup>167</sup> IGRA grants federal courts jurisdiction over “any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into.”<sup>168</sup> This provision has been read as abrogating tribal sovereign immunity “in the narrow category of cases where compliance with IGRA’s provisions is at issue and where only declaratory or injunctive relief is sought.”<sup>169</sup> Despite the narrowness of the waiver, plaintiffs have contended that IGRA permits federal jurisdiction over membership disputes.<sup>170</sup> According to this reasoning, because membership disputes implicate tribal gaming revenue, IGRA’s immunity waiver applies and federal jurisdiction is proper.<sup>171</sup>

Federal courts have repeatedly rejected attempts to broaden IGRA’s waiver of immunity to permit federal jurisdiction over membership disputes.<sup>172</sup> Instead, courts emphasize that IGRA waives tribal sovereign immunity only when compliance with the IGRA is at issue.<sup>173</sup> In so holding, it is significant that nothing in IGRA provides federal oversight or

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<sup>167</sup> See e.g., *Lewis*, 424 F.3d at 962; see also *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996); *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*, 967 F. Supp. 966 (1997). For instance, in *Smith v. Babbitt*, tribal members and nonmembers sued tribal and federal officials alleging that ineligible persons were improperly receiving gaming proceeds, while others were being improperly denied gaming proceeds to which they were entitled. 100 F.3d at 557. The court held that the plaintiffs were alleging violations of federal gaming regulations in an attempt to get an intra-tribal conflict over the tribe’s membership determinations into federal court. *Id.* at 559.

<sup>168</sup> 25 U.S.C. § 2710(d)(7)(A)(ii).

<sup>169</sup> *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997).

<sup>170</sup> See *Lewis*, 424 F.3d at 962; see also e.g., *Smith*, 100 F.3d 556; *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*, 967 F. Supp. 966 (1997).

<sup>171</sup> See e.g., *Lewis*, 424 F.3d at 962; see also *Smith*, 100 F.3d 556; *Lincoln*, 967 F. Supp. 966.

<sup>172</sup> See e.g., *Lewis*, 424 F.3d at 962; see also *Smith*, 100 F.3d 556; *Lincoln*, 967 F. Supp. 966.

<sup>173</sup> *Lewis*, 424 F.3d at 962 (citing *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997)); see also *Smith*, 100 F.3d 556; *Lincoln*, 967 F. Supp. 966.

jurisdiction over tribal membership disputes and IGRA makes no attempt to define membership.<sup>174</sup> To the contrary, IGRA's regulations explicitly exempt government involvement in disputes over gaming distributions.<sup>175</sup> Rather, IGRA provides that such disputes are properly handled by tribal courts or administrative processes.<sup>176</sup> As the Eight Circuit explained,

This is an internal tribal membership dispute. It is not a dispute over compliance with IGRA, and does not belong in federal court. Congress did not define "member" when it enacted IGRA, nor would federally imposed criteria be consonant with federal Indian policy. The great weight of authority holds that tribes have exclusive authority to determine membership issues. A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations.<sup>177</sup>

Consequently, stuck between "the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction," aggrieved tribal members and prospective members are left without a federal remedy in tribal membership disputes. Nevertheless, as these cases—and resulting press coverage—have increased, so have calls for congressional action to abrogate tribal sovereign immunity to allow federal oversight over tribal enrollment decisions. This is the wrong approach.

### III.

#### PROPOSED SOLUTIONS

At their crux, tribal membership disputes are more about tribal identity than gaming.<sup>178</sup> Too often, however, the proposed solutions have

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<sup>174</sup> See *Lewis*, 424 F.3d at 962; 25 C.F.R. § 290.23.

<sup>175</sup> 25 C.F.R. § 290.23 ("[D]isputes arising from the allocation of net gaming revenue and the distribution of per capita payments" are to be resolved through "a tribal court system, forum or administrative process"); see *Lewis*, 424 F.3d at 963; *Smith*, 100 F.3d at 557-59; *Alvarado v. Table Mountain Rancheria*, 2005 WL 1806368, \*4 (N.D. Cal. 2005).

<sup>176</sup> 25 C.F.R. § 290.23.

<sup>177</sup> *Smith*, 100 F.3d at 559 (citation omitted).

<sup>178</sup> It is important to note that these membership disputes are taking place within the context of changing ideas of identity, with more and more people claiming mixed-

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sought to reduce a complex issue of cultural identity into a one-size-fits all measurement, relying on federal intervention or biological markers. Such solutions also undermine sovereignty by diminishing or erasing the tribal role in membership decisionmaking.

*A. Federal Intervention Means Less Sovereignty*

The *Lewis* court's plea to "higher authorities" was in essence a call for the Supreme Court or Congress to take corrective action.<sup>179</sup> Presumably, any federal action would likely curtail tribal sovereignty by injecting federal courts or Congress into tribal membership decisions. This is an approach the Supreme Court rejected in *Santa Clara Pueblo*. Nevertheless, it has been more than thirty years since the Supreme Court issued its decision in *Santa Clara Pueblo*.<sup>180</sup> Since that time, Indian gaming has grown, possibly raising the premium on tribal membership. Certainly the stakes are higher than were when *Santa Clara* decided as tribal membership can now mean difference between a life of poverty or one of wealth.<sup>181</sup> Perhaps it is this disparity that makes the lack of a federal remedy so troubling. However, while it is perhaps frustrating to imagine that tribal gambling proceeds are interfering with tribal membership determinations, federal court intervention is not the answer.

Arguably, *Santa Clara* involved a set of facts even more disturbing than those presented by cases such as *Arviso* or *Lewis*. In *Santa Clara*, the plaintiff Julia Martinez was an enrolled member of the Santa Clara

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ethnicity, which makes it more difficult to put people into tidy "identity" boxes. Accordingly, while recognizing that this topic touches on a much broader discussion, this paper focus on one small piece of that discussion, namely tribal definitions of "Indian" for enrollment purposes and whether, and to what extent, Congress or the federal courts should be involved in resolving disputes over membership. This is about finding a solution once a tribe has its membership criteria, how it applies it and whether it is fair. Not talking about cases where tribe's change criteria, there is already federal involvement in that through the BIA. Several scholars have written about the value of using blood quantum, cultural identity, political affiliation, or tribal involvement as hallmarks to tribal membership. There are serious considerations to be given each as criteria, and that issue is outside the scope of this paper.

<sup>179</sup> *Lewis*, 424 F.3d at 963.

<sup>180</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>181</sup> *See Cooper, supra* n.9.

Pueblo.<sup>182</sup> Martinez had lived on the Pueblo's reservation her entire life.<sup>183</sup> Martinez married a Navajo Indian and the couple had several children together.<sup>184</sup> Martinez's children were raised on the Pueblo's reservation and continued to live there as adults.<sup>185</sup>

Before Martinez's marriage, the tribe passed an ordinance that denied membership to the children of female members who married outside the tribe, but not to the children of male members who married outside the tribe.<sup>186</sup> Because of this ordinance, Martinez's children could not become enrolled members of the Pueblo.<sup>187</sup> Consequently, her children could not vote in tribal elections or hold tribal office.<sup>188</sup> Perhaps more unsettling, in the event of their mother's death, Martinez's children would have no right to remain on the reservation and could not inherit their mother's home or her interest in the Pueblo's communal lands.<sup>189</sup>

Before filing suit, Martinez worked to persuade the Pueblo to change its membership rules.<sup>190</sup> When those efforts failed, Martinez filed suit in federal court against the tribe and its governor on behalf of all women who were members of the Pueblo but whose children were denied membership on the basis of the tribal ordinance.<sup>191</sup> Martinez's suit asserted that the Pueblo's ordinance violated the Indian Civil Rights Act's ("ICRA") equal protection clause.<sup>192</sup>

In dismissing Martinez's suit, the Supreme Court held that the Pueblo was immune from suit.<sup>193</sup> In so ruling, the Court first acknowledged that "Indian tribes are 'distinct, independent political communities retaining

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<sup>182</sup> *Santa Clara Pueblo*, 436 U.S. at 52.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 51.

<sup>187</sup> *Id.* at 52.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 52-53.

<sup>190</sup> *Id.* at 53.

<sup>191</sup> *Id.* at 53 & n.3.

<sup>192</sup> *Id.* at 51.

<sup>193</sup> *Id.* at 58-59.

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their original natural rights' in matters of local self-government."<sup>194</sup> Although the tribes might not possess full sovereignty, they nonetheless "remain a 'separate people, with the power of regulating their internal and social relations.'"<sup>195</sup> This sovereign status rendered them immune from suit in the same way it protected other sovereign governments.<sup>196</sup> While Congress's plenary power permitted it to abrogate that immunity, Congress had not, with one exception, done so with respect to suits brought under ICRA.<sup>197</sup> In the absence of congressional action, the tribes remained immune.<sup>198</sup>

The Court then turned to examine whether Martinez's claim against the Pueblo's governor, who was not protected by sovereign immunity, was cognizable under ICRA.<sup>199</sup> On this point, the Court first recognized that "providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself."<sup>200</sup> As the Court explained, "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,' may 'undermine the authority of the tribal cour[t] . . . [and hence] . . . infringe on the right of the Indians to govern themselves.'"<sup>201</sup> With that understanding, the Court then considered whether ICRA provided an implied cause of action.<sup>202</sup> While it was clear to the Court that Martinez was within the class of persons the Act was designed to benefit, it

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<sup>194</sup> *Id.* at 55 (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)); *see also* *Montana v. United States*, 450 U.S. 544, 564 (1981); WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 187 (West 1998).

<sup>195</sup> *Santa Clara Pueblo*, 436 U.S. at 55 (quoting *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)).

<sup>196</sup> *Id.* at 58.

<sup>197</sup> *See id.* at 57-58. Under ICRA, Congress had only provided for federal review of tribal decisions under ICRA's habeas corpus provision. *Id.*

<sup>198</sup> *Id.* at 58.

<sup>199</sup> *Id.* at 59.

<sup>200</sup> *See id.* (citations omitted).

<sup>201</sup> *See id.* (citations omitted).

<sup>202</sup> *See id.* at 60-61.

was equally clear that Congress had not intended to provide for a cause of action.<sup>203</sup>

Congress drafted ICRA to serve two distinct purposes. On the one hand, Congress sought to “secur[e] for the American Indian the broad constitutional rights afforded to other Americans,” and thereby to “protect individual Indians from arbitrary and unjust actions of tribal governments.”<sup>204</sup> On the other hand, Congress “also intended to promote the well-established federal policy of furthering Indian self-government.”<sup>205</sup> Consequently, Congress did not apply the entirety of the Bill of Rights to tribal governments. Rather, it took a more piecemeal approach so as to account for the unique cultural, social, and economic needs of the tribes.<sup>206</sup> According to the Court, in passing ICRA Congress did not wish to intrude on tribal self-government.<sup>207</sup> Indeed, Congress deliberately chose to omit federal remedies from ICRA.<sup>208</sup>

Instead, Congress believed that tribal forums were better positioned to evaluate tribal traditions and customs than federal courts.<sup>209</sup> While the Court rejected the notion that tribes are the equivalent of foreign nations, it acknowledged that “the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.”<sup>210</sup> Permitting federal court interference in tribal membership decisions could “substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity.”<sup>211</sup>

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<sup>203</sup> *See id.* at 61-99.

<sup>204</sup> S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967).

<sup>205</sup> *Santa Clara Pueblo*, 436 U.S. at 62 (internal quotations omitted).

<sup>206</sup> *Id.* at 62-63. According to the Court, Congress was primarily concerned about abuses of tribal power in the administration of criminal justice. *Id.* at 71. Hence, ICRA’s inclusion of a habeas review, which targeted that concern. *Id.*

<sup>207</sup> *Id.* at 71.

<sup>208</sup> *See id.* at 61-99.

<sup>209</sup> *Id.* at 65 (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”).

<sup>210</sup> *Id.* at 71.

<sup>211</sup> *See id.*

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As the Court explained, “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”<sup>212</sup> “Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.”<sup>213</sup> In light of these considerations, federal courts lacked jurisdiction over tribal membership disputes.<sup>214</sup> Through *Santa Clara*, the Supreme Court recognized that the tribes’ sole authority to determine their own membership lie at the core of tribal sovereignty.

Not surprisingly, although *Santa Clara* is considered as strongly supportive of tribal sovereignty, it has received quite a bit of criticism.<sup>215</sup> Nonetheless, federal courts have repeatedly recognized that “the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership . . . from the general rule that otherwise applicable federal statutes apply to Indian tribes.”<sup>216</sup> Consequently, tribal immunity continues to bar suits seeking to compel tribes to change their membership criteria or to comply with already established criteria.<sup>217</sup>

This is as it should be. Tribal membership decisions go to the heart of tribal sovereignty.<sup>218</sup> The right to accept or exclude persons from a nation’s

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<sup>212</sup> *Id.* at 72 n.32.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 72.

<sup>215</sup> See Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN’S L.J. 347 (2002); GETCHES, *supra* n.146 at 399-405 (discussing Santa Clara tribe’s perspectives on concept of membership in their community in terms of tribal custom, tradition, and history); Rave, *supra* n.13 (noting that courts rely on *Martinez* in dismissing membership suits and quoting critic’s contention that “*Martinez* is handcuffing judges”).

<sup>216</sup> *Donovan v. Coeur d’ Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *see also Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996).

<sup>217</sup> See *Ordinance 59 Ass’n. v. U.S. Dep’t of the Interior Sec’y*, 163 F.3d 1150, 1157 (10th Cir. 1998); *Apodaca*, 19 F.3d 1015-16.

<sup>218</sup> *Mather*, *supra* n.26 at 1833; *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18-19 (D. N.M. 1975) (“Much has been written about tribal sovereignty. If those

citizenry is critical to its sovereign survival.<sup>219</sup> Moreover, it is unlikely that the Court will act absent congressional action. As the *Santa Clara* Court explained, Congress's authority over Indian tribes is broad, but "the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."<sup>220</sup> It is Congress that "retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions."<sup>221</sup> However, "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."<sup>222</sup>

Congressional action is, in fact, the solution proposed by many courts, many plaintiffs, and several scholars.<sup>223</sup> And, it is a possibility.<sup>224</sup> Despite

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words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decisions wise. To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.").

<sup>219</sup> See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 133 (1941) ("Only a tribal government may define its membership through prescribed criteria in tribal codes and ordinances. No other governmental body, such as another tribe, an individual state, or the United States may decide who will become a member.").

<sup>220</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> See Reitman, *supra* n.19.

<sup>224</sup> Indeed, federal involvement in tribal decision-making about citizenship is already alive and well. Nicole J. Laughlin, *Identity Crisis: An Examination Of Federal Infringement on Tribal Autonomy To Determine Membership*, 30 HAMLIN L. REV. 97, 117 (2007). Federal involvement is most apparent "when federal decision-making intersects with definitions of tribal citizenship." Goldberg, *supra* n.15 at 448. The Chief of the BIA's Division of Tribal Government Services described this involvement:

The Bureau of Indian Affairs exercises its authority to intervene in enrollment matters when the tribe is preparing a membership roll for distribution of tribal assets held in trust [by the federal government], when Federal interests are involved, such as challenges to a Secretarial election, or when the governing

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the strong pronouncements of tribal sovereignty over membership contained in *Santa Clara Pueblo*, Congress still retains plenary power over the tribes.<sup>225</sup> Although the history of federal law as regards to tribal sovereignty is too complex to go into here, suffice it to say that Supreme Court precedent and congressional action has created a bind. On the one hand, it has provided tribes with sovereign immunity, which can “deny a remedy to those with legitimate grievances against tribal governments.”<sup>226</sup> On the other hand, it has also held that Congress can override tribal governments by exercising its plenary power over the tribes.<sup>227</sup> Thus, “an aggressive assertion of tribal immunity could endanger tribes by inviting further federal incursions on their sovereignty.”<sup>228</sup>

Given the increased stakes brought by gaming, it is conceivable that Congress may be pressed to act to curb what are increasingly being viewed as tribal excesses when it comes to enrollment decisions. One target of reform is the Indian Civil Rights Act of 1968.<sup>229</sup> Passed over tribal

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document authorizes the Secretary of the Interior's involvement, such as an appeal from an adverse tribal decision. Even then, however, our decision would be based on the tribal constitution or other organic documents such as constitutions and bylaws, articles of association, ordinances, and resolutions.

*Id.* (quoting Letter from Chief, Division of Tribal Government Services, Bureau of Indian Affairs, to Leroy Salgado (Sept. 24, 1998)).

<sup>225</sup> See *United States v. Wheeler*, 435 U.S. 313, 318 (1978); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1831).

<sup>226</sup> Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 137 (2004); see Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 732 (2002) (“[W]hen there is no separation of powers within tribal governments and tribal sovereign immunity protects tribal government from civil rights claims, tribal members are left without recourse.”).

<sup>227</sup> See *Wheeler*, 435 U.S. at 318; *Morton*, 417 U.S. at 551-552; *Worcester*, 31 U.S. (6 Pet.) at 559 (1831); see also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 133 (1941); Struve, *supra* n.228 at 137.

<sup>228</sup> Struve, *supra* n.228 at 137.

<sup>229</sup> 25 U.S.C. § 1301, et seq.

protests,<sup>230</sup> Congress enacted ICRA to selectively apply some of the rights enshrined in the Constitution's Bill of Rights on Indians subject to tribal governments.<sup>231</sup>

As *Santa Clara* makes clear, ICRA provides no remedy to aggrieved tribal members in membership disputes as currently written.<sup>232</sup> Nevertheless, Congress could amend the ICRA to create new remedies for tribal violations of civil liberties. In fact, in the last several years, some tribal members have called for federal court intervention and a waiver of tribal sovereign immunity if tribes fail to act in accordance with ICRA.<sup>233</sup> And, at least one group is calling on Congress to amend ICRA.<sup>234</sup>

In October 2005, a group calling itself the American Indian Rights and Resource Organization (AIRRO) began pressing for an amendment to ICRA that would permit individuals to sue tribes in federal court if the tribes failed to comply with ICRA by waiving tribal sovereign immunity.<sup>235</sup> AIRRO is comprised of former tribal members who were disenrolled from the Pechenga Band of Indians.<sup>236</sup> Focusing on California, AIRRO launched its efforts with a public demonstration in Ukiah, California, seeking to call attention to the plight of disenrolled members of the Band.<sup>237</sup> AIRRO

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<sup>230</sup> Kent McNeil, *Aboriginal Governments and the Charter: Lessons from the United States*, 17 NO. 2 CAN. J.L. & SOC'Y 73, 91 (2002).

<sup>231</sup> Before ICRA, the Constitution's Bill of Rights did not apply to tribal governments. See *Talton v. Mayes*, 163 U.S. 376 (1896). For its part, ICRA incorporates only part of the Bill of Rights. GETCHES, *supra* n.146 at 390. Specifically, it does not include First Amendment protection against the establishment of religion; (2) a guarantee of a republican form of government; (3) a privileges and immunities clause; (4) a provision for the right to vote; (5) a requirement for the right to free counsel for those accused of crimes; (6) the right to a jury in a civil trial; or (6) the right to bear arms. *Id.*

<sup>232</sup> See 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69-72 (1978).

<sup>233</sup> Rave, *Debate Heats Up*, *supra* n.18.

<sup>234</sup> See Louis Galvan, "American Indians Protest Tribal Injustices: Protesters at Friant Rally Say They Were Unfairly Treated By Tribes That Own Casinos," FRESNO BEE, June 11, 2006, at B5.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> See Rave, *supra* n.13. Given that California casinos have garnered the largest percentage of gaming revenues while also having the largest numbers of disenrollments, AIRRO's focus on California appears apt.

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continued its calls to amend ICRA in other protests throughout California.<sup>238</sup>

Two years later, the California Democratic Convention considered a resolution to reform ICRA to permit federal review of membership decisions under the guise of protecting members from civil rights violations.<sup>239</sup> According to its advocates, the “California Native American Justice and Equal Economic Opportunity Legislative Initiative,” would provide redress to tribal members whose rights have been denied in violation of ICRA.<sup>240</sup> The primary objective of the initiative is to permit nontribal review of tribal enrollment decisions.<sup>241</sup> Although the Native American Caucus of the California Democratic Party passed the resolution, it does not appear to have progressed beyond these initial stages.<sup>242</sup>

It is worth noting that despite the lackluster results of current efforts, amending ICRA to provide for federal court review is not a far-fetched notion. Indeed, sixteen years earlier, Senator Orrin Hatch had introduced a bill that would have provided a federal remedy in situations where the tribal court is not sufficiently independent of the tribal council.<sup>243</sup> Senate Bill 517 would have granted federal courts jurisdiction to hear civil rights claims alleging that a tribe violated ICRA after the aggrieved plaintiff exhausted all tribal remedies.<sup>244</sup> The district court was required to adopt the tribal court’s findings of fact unless it determined that the tribal court was not independent of the tribal council or executive.<sup>245</sup> Although the bill was introduced in both the 100<sup>th</sup> and 101<sup>st</sup> Congress, and was referred to

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<sup>238</sup> See Johnson, *supra* n.68 at B-1 (describing plan of protesters to demonstrate whenever tribes attempt to build new casinos); Galvan, *supra* n. 236.

<sup>239</sup> Mary Weston, “Democrats to Hear Resolution on Indian Civil rights Reform,” OROVILLE MERCURY REG., Apr. 24, 2007.

<sup>240</sup> *Id.*

<sup>241</sup> See *id.* (discussing proposed initiative with sole focus on membership disputes); Mary Weston, “Disenrolled Native Americans Ask for Redress,” OROVILLE MERCURY REG., July 23, 2007 [hereinafter *Redress*]; see Johnson, *supra* n.68 at B-1.

<sup>242</sup> Mary Weston, *Redress*, *supra* n.243.

<sup>243</sup> Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 881-83 (1990) [hereinafter *Tribal Courts*].

<sup>244</sup> *Id.* at 881-83 & n.111.

<sup>245</sup> *Id.*

the Judiciary Committee for review, it does not appear to have made it out of committee.<sup>246</sup> Neither have later efforts.<sup>247</sup>

In addition to these efforts, activist groups have employed other tactics to more directly influence the tribes' decisionmaking.<sup>248</sup> For instance, the American Indian Legacy Center in Fresno, California, began a letter writing campaign aimed at discouraging celebrities from appearing at casinos owned by a tribe embroiled in a membership dispute.<sup>249</sup> Initial efforts proved successful, with the group prompting the likes of Bill Cosby to cancel his scheduled performance at the tribe's casino.<sup>250</sup>

Despite public calls for change, Congress has not acted to expressly abrogate tribal immunity.<sup>251</sup> For instance, in 1993, Congress passed Indian Tribal Justice Act (ITJA),<sup>252</sup> which was intended to provide funding and otherwise strengthen tribal court systems.<sup>253</sup> Significantly, Congress did not take that opportunity to amend ICRA or to abrogate sovereign immunity despite calls to do so.<sup>254</sup> Instead, "Congress has consistently reiterated its approval of the immunity doctrine. Although free to dispense with immunity or limit it, Congress has only occasionally authorized limited classes of suits, . . . . At the same time, it has consistently reflected a desire to promote Indian self-governance, including tribal self-sufficiency."<sup>255</sup> Thus, even assuming that Congress should act, it seems unlikely that it will act. Likewise, the federal courts have continued to hold

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<sup>246</sup> See Rave, *supra* n.13 (describing more recent efforts to amend ICRA along lines of Hatch's proposed amendment).

<sup>247</sup> Galvan, *supra* n. 236 at B5; see also Rave, *supra* n.13 (noting that moves to amend ICRA to provide federal oversight of tribal membership decisions is likely to receive little tribal support).

<sup>248</sup> Kelley, *supra* n.12 at A1.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> McNeil, *supra* n.232 at 88 n.93 & 89.

<sup>252</sup> 25 U.S.C. §§ 3601-3631 (1994).

<sup>253</sup> Carl H. Johnson, *A Comity of Errors: Why John v. Baker Is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 20-21 (2001); see 25 U.S.C. § 3601 (stating that "tribal justice systems are an essential part of tribal governments," and that "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes").

<sup>254</sup> McNeil, *supra* n.232 at 89.

<sup>255</sup> Okla. Tax Commn., 498 U.S. 505 (1991).

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that they lack jurisdiction to consider membership disputes absent an explicit move by Congress.

While Congress's restraint is laudable, it is unclear whether Congress will continue to avoid the issue. To the extent tribal membership disputes are viewed as overreaching, Congress could intervene and limit tribal sovereignty and permit federal jurisdiction over membership claims to rectify any perceived unfairness.<sup>256</sup> Thus, it is essential that the tribes act first to protect their right to self government and self determination. Any solution to this issue must ensure fairness to the parties in enrollment disputes without trampling on tribal sovereignty.<sup>257</sup>

*B. Biological Markers:  
Blood Quantum & DNA Are Bad Proxies for Culture*

To some, an obvious solution to the legal quandary posed by membership disputes is to use DNA to scientifically determine biological affiliation.<sup>258</sup> Under this theory, DNA would provide for more conclusive—and less messy—determinations of tribal membership.<sup>259</sup> A central problem with such an approach, however, is that it would necessitate a shift away from a tribal membership based on cultural affiliation to one based on a biological marker.<sup>260</sup> Nevertheless, Indian law has long relied on the biological marker of blood quantum to define “Indian.” Indeed, while DNA testing may represent the latest challenge to tribal and ethnic identity, it is by no means the first biological test of “Indianness.”

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<sup>256</sup> See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 133 (1941).

<sup>257</sup> Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347 (2002).

<sup>258</sup> See e.g., Beckenhauer, *supra*, n.19 at 168-70 (discussing rationales for using blood quantum requirements); Goldberg, *supra* n.19 at 459-71 (discussing varying viewpoints on use of blood quanta as membership criteria); Pratt, *Tribal Kulturkampf*, *supra* n.19 at 1259 (discussing use of DNA to resolve dispute over inclusion of Black Seminoles into tribe).

<sup>259</sup> See Rave, *supra* n.13 (explaining that disenrolled members attempted to use DNA analysis to establish kinship and, thereby, prove eligibility for membership).

<sup>260</sup> Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law*, 51 S.D. L. REV. 1 (2006); Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on “Indigeneity” and “Whiteness,”* 18 WASH. U. J.L. & POL'Y 55 (2005).

The federal government first referenced blood quantum in treaties with individual tribes in the early seventeenth century.<sup>261</sup> Initially, however, blood quantum was not used to determine tribal ancestry and there was no legal significance to a blood quantum description.<sup>262</sup> However, in later treaties, blood quantum began to be used to determine eligibility for certain property or benefits under federal law, but not to determine tribal membership.<sup>263</sup> It was not until 1935 that blood quantum began to operate as a proxy for Indian identity under federal law.<sup>264</sup>

In 1934, Congress passed the Indian Reorganization Act (IRA), which permitted Indian tribes to draft their own constitutions.<sup>265</sup> The constitutions, however, were subject to federal approval.<sup>266</sup> Consequently, the IRA compelled many tribes to adopt blood quantum tests in order to receive federal recognition and assistance.<sup>267</sup> Under the Act, “Indian” was defined to include “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and *shall further include all other persons of one-half or more Indian blood.*”<sup>268</sup> Thus, to be “Indian” under federal law required the requisite one-half blood quantum, as the IRA excluded those persons who had no biological connection to a tribe such as by adoption or marriage from the definition of “Indian.”<sup>269</sup> In

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<sup>261</sup> Spruhan, *supra* n.262 at 10-11.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 10-11. In some treaties, however, the federal government did recognize persons of “mixed blood” as tribal members. *Id.* at 12.

<sup>264</sup> 25 U.S.C. § 476(b); Spruhan, *supra* n.262 at 45-47. However, even earlier, at the request of the certain tribes, Congress had specifically limited tribal membership in certain tribes based on blood quantum. Spruhan, *supra* n.262 at 45-46. For instance, in 1831 Congress passed an act that restricted membership in the Eastern Cherokee to those persons possessing more than one-sixteenth Cherokee blood. *Id.* at 45. In similar legislation, Congress restricted membership in the Menominee tribe to those with one-quarter or more of Menominee blood. *Id.*

<sup>265</sup> 25 U.S.C. § 476(b).

<sup>266</sup> *Id.*

<sup>267</sup> Indian Reorganization Act, ch. 576, 48 Stat. 984; Spruhan, *supra* n.262 at 10-11.

<sup>268</sup> Indian Reorganization Act, § 19 (emphasis added); Spruhan, *supra* n.262 at 47.

<sup>269</sup> Spruhan, *supra* n.262 at 47.

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effect, biology became proxy for tribal affiliation at least under federal law, though not necessarily under tribal law.<sup>270</sup>

The guiding principle behind the adoption of this definition was a desire “to limit the application of Indian benefits [under the Act] to those who are Indians by virtue of actual tribal affiliation or by virtue of possessing one-half degree or more of Indian blood.”<sup>271</sup> As Senator Wheeler more bluntly put it, in explaining why a one-half blood condition was preferable to one-quarter, “What we are trying to do is get rid of the Indian problem rather than to add to it.”<sup>272</sup> By requiring a higher degree of Indian blood, the definition would limit those who qualified, thereby limiting those who could receive federal monies.<sup>273</sup> In short, the point of the DOI’s definition of “Indian” was to define Indians out of existence.<sup>274</sup>

In keeping with this goal, the DOI would “urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should limit such membership to persons who

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<sup>270</sup> *See id.*

<sup>271</sup> Goldberg, *supra* n.19 at 446-47 (citing statement Secretary of the Interior in Circular No. 3123, United States Dept. of Interior (Nov. 18, 1935)).

<sup>272</sup> Spruhan, *supra* n.262 at 46 (citing *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing Before the Committee on Indian Affairs United States Senate*, 73d Cong. 263-64 (1934) (statement of Sen. Wheeler)). Senator Wheeler explained:

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

*Id.*

<sup>273</sup> *See id.*

<sup>274</sup> Goldberg, *supra* n.19 at 447.

reasonably can be expected to participate in tribal relations and affairs.”<sup>275</sup> Consequently, because tribal constitutions were subject to DOI approval, the IRA definition of “Indian,” including its blood quantum requirement, found its way into tribal constitutions.<sup>276</sup> Even those tribes that opted to forego tribal constitutions or to avoid Department approval could still be persuaded to adopt this definition as a consequence of the BIA’s control over federal services and tribal monies.<sup>277</sup>

Such views have persisted, with the DOI insisting that tribes may only offer membership to those persons who maintain connections with the tribe. Indeed, in 1988, ten years after *Santa Clara*, the Assistant Solicitor of the DOI stated that “while it is true that membership in an Indian tribe is for the tribe to decide, that principle is dependent on and subordinate to the more basic principle that membership in an Indian tribe is a bilateral, political relationship.”<sup>278</sup> According to this view, “[a] tribe does not have authority under the guise of determining its own membership to include as members persons who are not maintaining some meaningful sort of political relationship with the tribal government.”<sup>279</sup> Rather, the DOI has “‘broad and possibly *nonreviewable* authority’ to disapprove or withhold approval of a tribal constitutional amendment regarding membership criteria.”<sup>280</sup> Such authority would be exercised if a tribe were to amend its constitution to permit persons without any tribal relationship with the tribe to become members on the ground that it would convert tribes from political to a racial classification.<sup>281</sup> As one group has complained, “The BIA has acted to undermine tribal governments by . . . usurping one of the most basic powers of self-government—the right to determine

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<sup>275</sup> *Id.*; see also John Collier, Commissioner of Indian Affairs, Membership in Indian Tribes, Circular 3123 (Nov. 13, 1985), *quoted in* American Indian Policy Review Comm’n, Task Force on Law Consolidation, Revision and Codification, Final Report of Task Force 9 to the United States Congress 200 (1970).

<sup>276</sup> See Indian Reorganization Act.

<sup>277</sup> Goldberg, *supra* n.19 at 447.

<sup>278</sup> Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 307 (Fall & Winter 2000 & 2001) (citing Memorandum from Scott Keep, Ass’t Solicitor, U.S. Dep’t of the Interior, to the Chief of the Division of Tribal Government Services 6 (Mar. 2, 1988)).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (emphasis added).

<sup>281</sup> *Id.*

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membership, by conditioning BIA funding on BIA-determined membership requirements.”<sup>282</sup>

Consequently, today many tribes now include some blood quantum requirement in their membership criteria.<sup>283</sup> In so doing, such “tribes now accept an explicitly racial conception of Indian identity for purposes of tribal membership.”<sup>284</sup> Rather than being imposed from without, “tribes [now] voluntarily invoke race-based definitions of ‘Indian’ because they narrow the pool of tribal members,” perhaps in an effort to limit gaming revenue and federal dollars to “‘bona fide’ (usually full-blooded) tribal members.”<sup>285</sup>

More important, by embracing blood quantum requirements, the tribes threaten to accomplish Senator Wheeler’s goal: the elimination of the tribe itself.<sup>286</sup> It is easy to see that blood quantum requirements may permit a tribe to limit its membership, thereby preserving larger gaming revenue payouts for a smaller cadre of members.<sup>287</sup> However, by so doing, tribes risk overly restricting membership to the point that the tribe can no longer

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<sup>282</sup> *Id.* (citing American Indian Policy Review Comm’n, Task Force on Law Consolidation, Revision and Codification, Final Report of Task Force 9 to the United States Congress 189 (1970)).

<sup>283</sup> Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U CHI. L SCH. ROUNDTABLE 689, 698 (1995).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*; see also Beckenhauer, *supra*, n.19 at 171.

<sup>286</sup> See Beckenhauer, *supra*, n.19 at 171. It is important to note that this argument differs from the notion that by using blood quantum the tribes are somehow being inauthentic because this is not “traditional” tribal practices that pre-date European contact. As one commentator has aptly noted, to the extent that the tribes choose such criteria based on current tribal concerns does not render the criteria illegitimate simply because “merely because they depart from ‘traditional’ measures.” Goldberg, *supra* n.19 at 459-71. Nevertheless, it is somewhat disconcerting to think of tribes deliberately reducing their own membership. Kelley, *supra* n.12 at A1. As David Littlefield, director of the Sequoyah Research Center at the University of Arkansas in Little Rock, explained, “After the self-determination period in the 1960s and ‘70s they were looking for members, but as gaming came on there were a number of tribes looking at membership rolls and trying to restrict them.” *Id.*

<sup>287</sup> Neath, *supra* n.284 at 698; see also Beckenhauer, *supra*, n.19 at 163.

perpetuate itself.<sup>288</sup> Indeed, “[i]f tribes maintain blood quantum requirements for tribal membership, they face two likely consequences: population decline and increased federal encroachment on tribal sovereignty.”<sup>289</sup>

Such concerns, however, have not fully halted a move to a more modern variation on blood quantum, i.e., the use of DNA testing.<sup>290</sup> DNA labs on the internet offer customers the opportunity to test for Indian heritage from the comforts of home.<sup>291</sup> Several of these labs report that some of their most eager clients are those seeking to prove Indian identity, despite no cultural or other affiliation with a tribe.<sup>292</sup> Nevertheless, DNA testing is viewed by some as a final determiner of tribal and ethnic identity.<sup>293</sup>

Contrary to the labs’ often overstated claims, however, DNA testing is not a panacea and actually raises more questions than it resolves.<sup>294</sup> First, the efficacy of DNA testing to determine tribal heritage is itself in dispute.<sup>295</sup> Such tests rely on genetic markers as an indicator of membership in a particular ethnic group.<sup>296</sup> One wrinkle in this is that all human beings share 99.9% of their DNA and there are more differences *within* a particular ethnic group than *between* any two groups.<sup>297</sup> Of course, there is some genetic variation between groups that tend to results in outward differences such as eye, skin, hair color, or nose and eye shapes.<sup>298</sup> Similarly, at the genetic level there can be markers for predispositions to certain diseases or different blood type patterns<sup>299</sup> that can indicate genetic similarity. The problem, however, is that such variants are often scattered

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<sup>288</sup> Neath, *supra* n.284 at 698; *see also* Beckenhauer, *supra*, n.19 at 161.

<sup>289</sup> Neath, *supra* n.284 at 698; *see also* Beckenhauer, *supra*, n.19 at 163.

<sup>290</sup> Tsosie, *supra* n.262.

<sup>291</sup> *Id.*; Beckenhauer, *supra*, n.19 at 163 & 184.

<sup>292</sup> Tsosie, *supra* n.262.

<sup>293</sup> Beckenhauer, *supra*, n.19 at 161-63 & 184-85.

<sup>294</sup> *See id.* at 162-63.

<sup>295</sup> *See generally id.*

<sup>296</sup> *Id.* at 175.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 176.

<sup>299</sup> There are several different blood group systems. The A, B, O, etc is just one. *Id.* at 176.

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in the general population, meaning that any individual, regardless of ancestry, could have a similar marker simply as a result of universal variation.<sup>300</sup>

Further, each individual does not receive an equal proportion of genetic data from each parent or grandparent.<sup>301</sup> Consequently, a specific individual might not express sufficient genes to register on a DNA test even though she has a documented Indian lineage.<sup>302</sup> Similarly, a non-Indian could have a random mutation that matches an “Indian” line even though the reality is that the latter person has absolutely no Indian heritage.<sup>303</sup> In other words, a negative test does not necessarily mean a specific individual has no indigenous ancestry, only that she or he did not get that marker or that the marker was not passed on because individual is descended from the opposite gender ancestor.<sup>304</sup> For example, a negative test relying on DNA through the mother’s lineage would not account for ancestry through father’s lineage.<sup>305</sup>

Moreover, DNA cannot tie an individual to a specific tribe.<sup>306</sup> At most, DNA can identify North American ancestry, but it cannot link a particular individual’s genes to a specific tribe, because tribes have not been isolated enough to develop tribe-specific genetic markers.<sup>307</sup> This

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<sup>300</sup> Thus, for example, even if all of one tribe had type O blood, we could not conclusively say that a specific person with blood type O was member of that tribe because O is a universal variant. *Id.* at 175-76.

<sup>301</sup> *Id.* at 178-79; see also Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61, 110 (2005) [hereinafter *Tribes and Tribulations*].

<sup>302</sup> Beckenhauer, *supra*, n.19 at 180-81.

<sup>303</sup> *Id.* at 180-82 .

<sup>304</sup> Pratt, *Tribes and Tribulations*, *supra* n.302 at 110 (explaining that even with autosomal testing, which captures broad picture of individual DNA could still yield false negatives).

<sup>305</sup> Beckenhauer, *supra*, n.19 at 182; see Pratt, *Tribes and Tribulations*, *supra* n.302 at 110.

<sup>306</sup> Beckenhauer, *supra*, n.19 at 184; Pratt, *Tribes and Tribulations*, *supra* n.302 at 110.

<sup>307</sup> See Beckenhauer, *supra*, n.19 at 184; see also Pratt, *Tribes and Tribulations*, *supra* n.302 at 110.

means that there is no tribe-specific marker that could be used for enrollment purposes.<sup>308</sup> Further, most tribes do not require that members be descended entirely from tribal members.<sup>309</sup> Most require one-eighth to one-quarter blood quantum for membership.<sup>310</sup> Thus, while certain tests might identify that an individual is descended from a particular region, the degree of ancestry (or tribal affiliation) cannot be established.<sup>311</sup>

Putting the lack of scientific consensus aside, even if DNA testing could conclusively determine an individual's biological ancestry, reliance on DNA testing raises more troubling cultural and legal concerns.<sup>312</sup> First, while some tribes have embraced DNA testing as a way to weed out imposters, many tribes object vigorously to its use on the ground that being "Indian" is a cultural, not a biological determination.<sup>313</sup> In this view, the use of DNA testing would actually usurp tribal sovereignty by substituting a blood test for the tribe's membership determination.<sup>314</sup> These critics argue that the blood quantum rule was started by Anglo Americans—prior to Dawes Act, tribes did not indicate blood quantum as part of their membership criteria.<sup>315</sup> To the extent that reliance on DNA would signal an embrace of the "one drop" rule, it would ultimately reduce Indian heritage to a blood marker, rather than cultural identity determined by a tribal community.<sup>316</sup>

Further, it is unclear whether DNA results would be workable within the legal definitions already established in federal law. For instance, many tribes trace membership to membership rolls drafted by the Dawes Commission.<sup>317</sup> However, the Dawes Commission did not record blood

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<sup>308</sup> See Beckenhauer, *supra*, n.19 at 184; see also Pratt, *Tribes and Tribulations*, *supra* n.302 at 110.

<sup>309</sup> Beckenhauer, *supra*, n.19 at 172-73.

<sup>310</sup> See *id.* at 163 & 167-72.

<sup>311</sup> *Id.* at 183-84.

<sup>312</sup> Tsosie, *supra* n.262; Beckenhauer, *supra*, n.19 at 184-91; Pratt, *Tribal Kulturkampf*, *supra* n.19 at 1257.

<sup>313</sup> Beckenhauer, *supra*, n.19 at 186-90; see Tsosie, *supra* n.262.

<sup>314</sup> Beckenhauer, *supra*, n.19 at 187-88.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 186; Tsosie, *supra* n.262.

<sup>317</sup> Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 458 & n.284 (2007).

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quantum of all Indians. Rather, the Dawes Commission rolls included only those persons either of Indian or of European and Indian heritage.<sup>318</sup> Persons of mixed African American and American Indian heritage were excluded.<sup>319</sup> Further, the Supreme Court has upheld entitlements to Indian tribes as not violative of the Fourteenth Amendment on the ground that tribes are political entities, not ethnic groups.<sup>320</sup> A reliance on DNA would abolish that distinction by reducing tribal membership and Indian identity to a biological marker.

Finally, reliance on DNA or blood quantum would likely exacerbate current membership disputes and intertribal tension. Indeed, such an approach raises a number of troubling possibilities. For instance, what would a tribe do in the case of a longstanding tribal member, who had lived her entire life on the reservation, had participated in cultural and social aspects of the tribe, was involved in tribal governance.<sup>321</sup> What if such a member's DNA lacked the appropriate biological marker? Would the tribe be forced to overlook deep cultural affiliation in favor of a biological marker of uncertain utility? If so, should federal law require that result?

Ultimately, neither congressional intervention nor DNA analysis offer the best solution to a complex problem implicating tribal culture, politics,

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<sup>318</sup> Pratt, *Tribal Kulturkampf*, *supra* n.19 at 1254-55.

<sup>319</sup> *Id.*

<sup>320</sup> Brownell, *supra* n.279 at 295-99 (discussing challenge to use of blood quantum in definition of "Indian" in hiring preference regulations); *see also* Morton v. Mancari, 417 U.S. 535, 555 (1974) (upholding Indian hiring preference that required tribal membership and one-quarter blood quantum on ground that these criteria were based on political rather than racial classification and granted Indians preference "as members of quasi-sovereign tribal entities."). The *Mancari* Court explained that "[t]he [hiring] preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 54.

<sup>321</sup> Brownell, *supra* n.279 at 307 ("The [Interior Department has] stated that it would exert [its] authority [to withhold approval of a tribal constitution] if a tribe amended its constitution to grant memberships to descendants, who were not maintaining any sort of tribal relation because that would constitute a racial criterion").

and sovereignty. There are more than 560 federally recognized tribes,<sup>322</sup> each with varying traditions, cultures, social structures, and histories. Given the diversity among these tribes, it would be impracticable for Congress to craft a single test to determine tribal membership that would reflect the tribes' myriad values and beliefs. While reliance on DNA markers might seem to offer a quick solution, even if it were reliable it is overly dependant on biology to the exclusion of cultural or tribal affiliation. Even if some tribes opted to take that route, many others would likely reject that approach.

Instead, solutions to the complex legal issues implicated in tribal membership disputes must recognize the tribes as individual governments and political entities so that solutions can be tailored to the needs of each tribe, as determined by that tribe.<sup>323</sup> To that end, the solution lies not in abrogating tribal sovereignty or reducing tribal membership to a biological marker, but in a more vigorous assertion of tribal sovereignty and self-determination.

#### IV.

#### MORE SOVEREIGNTY, NOT LESS

Any solution to tribal membership disputes must reconcile two fundamental objectives: the need to ensure justice for those seeking tribal membership and the need to preserve tribal autonomy and tribal culture in membership decisionmaking.<sup>324</sup> To the extent tribal autonomy is viewed as incompatible or inconsistent with the goals of those seeking membership, it may seem paradoxical to call for increased sovereignty and self-determination in resolving these disputes. However, it is through the assertion of more tribal sovereignty that tribes would be able to reconcile both concerns. Specifically, tribes should more fully assert their right to determine tribal membership by creating wholly independent judicial bodies such as an intertribal appellate court that would provide independent review of tribal membership decisions. Such a system would also provide redress for those aggrieved by enrollment decisions, quieting critics cries for federal oversight.

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<sup>322</sup> Kathleen A. Ward, *Before and After the White Man: Indian Women, Property, Progress, and Power*, 6 CONN. PUB. INT. L.J. 245, 254 (2007).

<sup>323</sup> Skenandore, *supra* n.259.

<sup>324</sup> *Id.*

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Ideally, an intertribal appellate court would oversee appeals from the courts of multiple tribes, in much the way the United States Courts of Appeal review appeals from district courts in their constituent states. Each tribe would have the option to become a member of an intertribal appellate court as an addition to their current tribal court system. The courts would be staffed and operated by the tribes themselves.<sup>325</sup> In so doing, these “intertribal court of appeals” would provide a level of judicial independence in the review of membership decisions critics charge is currently lacking under the current structure of tribal governments and court systems.<sup>326</sup>

Currently, whether a particular membership decision is subject to any review depends entirely on the individual tribe involved. Tribal

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<sup>325</sup> There are already models for such a system. For instance, in the Pacific Northwest, the Northwest Intertribal Court System is a consortium through which member tribes share judicial resources to ensure that each tribe is able to support a tribal justice system. Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics In Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 833-34 (1996); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1087 (2007) [hereinafter *Good (Native) Governance*]; Jose Luis Jim Nez, “Indians Establish Own Court System,” San Diego Union-Tribune, May 28, 2006, at N1; Northwest Intertribal Court System, available at <http://www.nics.ws> (last visited Jan. 14, 2009). Similarly, in southern California, the new Intertribal Court of Southern California (ICSC), which represents tribes in Southern California by providing mediation and alternative dispute resolution services, and judges who travel to various reservations to hear cases. Jose Luis Jim Nez, “Indians Establish Own Court System,” SAN DIEGO UNION-TRIBUNE, May 28, 2006, at N1; *Intertribal Court of Southern California: A Tribal Court System Serving the Native American Community*, available at <http://www.icsc.us/Welcome.html> (last visited Aug. 10, 2008). Tribes decide individually whether to join ICSC, and member tribes do not surrender general jurisdiction to the court, rather the court only hears matters specifically designated by tribal law and ordinances. Jose Luis Jim Nez, “Indians Establish Own Court System,” SAN DIEGO UNION-TRIBUNE, May 28, 2006, at N1. Each tribe in the region remains able to set up its own tribal court system, but the ICSC operates as a “circuit court.” *Id.* The goal of ICSC is to provide an independent judiciary “to preserve the integrity, autonomy and sovereignty, of the Native American communities it serves in a culturally sensitive and traditionally aware environment.” <http://www.icsc.us/Tribal%20Court.html> (last visited Sept. 8, 2008).

<sup>326</sup> Struve, *supra* n.228 at 182 (citing American Indian Law Center, Inc., Survey of Tribal Justice Systems and Courts of Indian Offenses app. D at 44 (May 2000)).

government and court structures vary widely. Generally, most tribes are governed by a tribal council, which enacts tribal laws and establishes any tribal judiciary.<sup>327</sup> Although some tribes maintain separate judicial and executive branches, this is not uniformly true.<sup>328</sup> Fewer than half (approximately 275) of federally recognized tribes have any form of formal tribal court system.<sup>329</sup> Rather, in some tribes the tribal leader is also the tribal judge and there is no written code.<sup>330</sup>

Even among those tribes that do have a formal court system, there is little to no uniformity among those courts.<sup>331</sup> While some tribes have trial and appellate courts, others do not and may have only one level of judicial decisionmaking.<sup>332</sup> In such tribes, the tribal court system may not provide for any review process.<sup>333</sup> Indeed, in many tribes there is no judicial body with any oversight over membership decisions, an omission that essentially

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<sup>327</sup> Charles Wilkinson, "Peoples Distinct From Others": *The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 392 (2006).

<sup>328</sup> Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 590 (2000); Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 108-09 (2005).

<sup>329</sup> Tribal Court History, <http://www.tribalresourcecenter.org/tribalcourts/history.asp> (last visited Feb. 5, 2009); David Selden & Monica Marten, *Basic Indian Law Research*, 34-AUG. COLO. LAW. 115, 116 (2005). It should be noted that the importance of formality is a concept that does not necessarily originate with the tribes and may not be shared by Indians or all tribes equally. See Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 568-69 (1997). Moreover, the lack of a tribal court does not necessarily mean that there is no mechanism to resolve disputes or that tribal members can invoke federal court oversight. See *Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978). Indeed, in *Lewis*, the panel concluded that the lack of a tribal court was not sufficient, as there was a tribal council and general council to which plaintiffs could complain and appeal. 424 F.3d at 962.

<sup>330</sup> Atwood, *supra* n.328, at 593.

<sup>331</sup> Minzner, *supra* n.328, at 103-13.

<sup>332</sup> Atwood, *supra* n.328, at 593.

<sup>333</sup> *Id.*

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makes the enrollment committee's decision unreviewable.<sup>334</sup> In other tribes, the tribal council may be entrusted with reviewing tribal court decisions.<sup>335</sup> To the extent the tribal council is involved in enrollment decisions, it is essentially reviewing its own rules or decisions. Moreover, even in those tribes where there is tribal court oversight, the tribal court and tribal council may be comprised of all or some of the same members.<sup>336</sup> Where tribal council, enrollment council, and tribal courts are comprised of either the same people or of people all with the same interests, there is at least the appearance of a lack of independent oversight.<sup>337</sup>

It is these perceived or actual conflicts of interest that can undermine tribal courts as the final arbiters of tribal membership decisions. For instance, in his dissent in *Santa Clara Pueblo*, Justice White highlighted this conflict by noting that “both [the] legislative and judicial powers are vested in the same body, the Pueblo Council.”<sup>338</sup> For White, “to suggest that this tribal body is the ‘appropriate’ forum for the adjudication of alleged violations of the ICRA is to ignore both reality and Congress’ desire to provide a means of redress to Indians aggrieved by their tribal leaders.”<sup>339</sup> Picking up this theme, plaintiffs in cases like *Lewis* and *Arviso* argue for federal court jurisdiction on the ground that their complaints are not being addressed by an independent judiciary either because there is no judicial body and they must go to the tribal council or because the tribal court and council are comprised of the same members.<sup>340</sup> Thus, they contend that federal courts must step in to provide meaningful review.<sup>341</sup>

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<sup>334</sup> See e.g., *Rave*, *supra* n.13 (describing ousted members’ attempts to appeal of membership decision, which would be heard by same political body that had ousted them from tribe).

<sup>335</sup> *Atwood*, *supra* n.328, at 593.

<sup>336</sup> See *Lewis*, 424 F.3d at 961.

<sup>337</sup> See *Santa Clara Pueblo*, 436 U.S. at 82 (White, J., dissenting).

<sup>338</sup> See *id.*

<sup>339</sup> See *id.*

<sup>340</sup> *Arviso v. Norton*, 129 Fed. Appx. 391, 392 (9th Cir. 2005); *Lewis*, 424 F.3d at 962. Decisions by tribal courts do not necessarily show tribal courts unable to reach independent decisions. Of approximately forty-four cases decided by the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon between 2001 and 2003, twenty-four were remanded—suggesting at least that the

An intertribal appellate court system would provide these plaintiffs with such a forum, but one operated by the tribes rather than an outside government. Moreover, providing aggrieved members with a forum to review their claims would strengthen the credibility of tribal courts and render any claim for federal review unnecessary.

Likewise, the view that tribal courts lack the requisite judicial independence has spurred calls for congressional intervention to curtail tribal sovereignty where that independence is thought lacking.<sup>342</sup> For instance, Senator Orrin Hatch's 1989 proposed amendments to ICRA sought to afford a federal remedy for tribal members where tribal courts lacked independence from tribal councils.<sup>343</sup> More recently, the proponents of amending ICRA to provide federal oversight of membership decisions argued that the amendment is necessary to provide an independent level of review and members with meaningful redress. The establishment of an intertribal appellate court would mean that parties' cases could be heard before a neutral panel, leading to a greater perception of fairness and due process, and thus, legitimacy of tribal enrollment decision.<sup>344</sup>

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courts do not adhere to a knee-jerk reaction to affirm membership decisions. But, the standard of review is very light, requiring remand only when the membership decision is "arbitrary and capricious." Indeed, in most of the decisions, the court invokes *Santa Clara* to uphold rejection of application on the ground that the tribe has the absolute right to define own membership even if determination is considered unfair by applicant.

<sup>341</sup> Arviso, 129 Fed. Appx. at 392; *Lewis*, 424 F.3d at 962.

<sup>342</sup> See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210 (1978)); Hon. Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, 54-APR Fed. Law. 40, 45 (Mar./Apr. 2007); At least one scholar has pointed out that the judicial independence is a Euro-American notion that may not be equally valued by Indians or all tribes. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 279 (1997) ("The concept of involving uninterested third parties to impose a solution on the parties if they fail to reach a settlement is another aspect of the American legal system that tears at the fabric of tribal societies.").

<sup>343</sup> S. 517, 101st Cong., 1st Sess. (1989); Clinton, *Tribal Courts*, *supra* n.245 at 881-83; Rave, *Debate Heats Up*, *supra* n.18.

<sup>344</sup> See *e.g.*, Minzner, *supra* n.328, at 109; SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE* (1978); see also Kevin K. Washburn, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona*

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Consequently, the main complaint against tribal sovereignty over membership decisions would be silenced.

Convincing tribes to participate in such a system and to permit intertribal courts to have jurisdiction to decide enrollment disputes is a critical first step. An obvious incentive for the tribes is avoiding congressional abrogation of tribal sovereignty over membership disputes. If tribes fail to respond to their critics' complaints, they risk federal intervention if the cries of disaffected or ousted members convince Congress or the courts to take action. As already discussed, that risk is very real and would cost much in terms of sovereignty.

It would be wrong to suggest, however, that tribes do not have their own inherent incentives to find a solution to this impasse. While gaming revenue could, of course, create a disincentive to enact any meaningful reforms, demographic realities likely provide countervailing incentives to the tribes to be fair in their dealings with members and prospective members.<sup>345</sup> Specifically, if tribes continue to adhere to overly strict membership criteria, they will further shrink their population and political base, undermining recent gains and weakening their ability to perpetuate their own cultures.<sup>346</sup> Further, to the extent federal benefits are tied to tribal population, there exists a reason for the tribe to expand its membership base to receive more funding.<sup>347</sup> More simply, tribal members may wish to relax membership criteria to ensure that gaming revenues pass onto their own offspring and descendants.<sup>348</sup>

Even assuming tribal leaders wish to exclude newcomers and to prevent diminishing their share of the gaming revenues, they face the reality that by defining membership too narrowly, their own children may be swept out of the tribe and that they may very well define the tribe out of existence.<sup>349</sup> This is particularly true given the reality that many Indians

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*Rule*, 31 WM. MITCHELL L. REV. 479, 522 (2004); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 343 (4th Ed. 2003) (describing "growing trend in Indian country favoring greater separation of powers").

<sup>345</sup> See Goldberg, *supra* n.19 at 453; Neath, *supra* n.284 at 698.

<sup>346</sup> See Goldberg, *supra* n.19 at 453; Neath, *supra* n.284 at 698.

<sup>347</sup> Goldberg, *supra* n.19 at 453.

<sup>348</sup> *Id.*

<sup>349</sup> Neath, *supra* n.284 at 698.

marry outside their tribe, making it increasingly unlikely that even “half blood” Indians will remain a significant percentage of tribal populations.<sup>350</sup> Thus, tribes face competing priorities—protecting resources and revenues for current members without so narrowly defining membership that they kill off the tribe itself.<sup>351</sup> An independent appellate system could assist in balancing these priorities, leading to a greater perception of fairness and due process, and thus, legitimacy of tribal membership decisions.

For such a system to work, it would require that tribes waive their immunity so that the appeals court would have authority to review membership decisions.<sup>352</sup> Doing so would ensure that such decisionmaking stays in tribal hands by addressing the main concern of those rallying for change—the lack of independent decisionmakers. It would also ensure that the system helps preserve, rather than usurp, tribal sovereignty by requiring tribal consent and participation in the development of the court.

Indeed, the creation of an intertribal appellate court system would not require a change to any existing tribal government or court structure. Instead, it would provide an external layer of review in addition to whatever court system the tribe currently possessed. In fact, the structure of the court would be in tribal hands, ensuring continued tribal autonomy and sovereignty over its courts and membership decisionmaking process. Further, decisions would be based on tribal law, tribal culture, and traditions. This would be possible because such a court system would be created, staffed, and operated by the tribes themselves. Consequently, such a court system would have a level of cultural awareness lacking in federal court adjudications of claims involving membership disputes.

The importance of this cultural awareness cannot be overstated. The goal of any intertribal court of review would have to be preservation of the tribes’ right to determine their own membership based on tribal values rather than outsider values being imposed on them.<sup>353</sup> However, any

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<sup>350</sup> See Goldberg, *supra* n.19 at 453; Neath, *supra* n.284 at 698.

<sup>351</sup> See Goldberg, *supra* n.19 at 453; Neath, *supra* n.284 at 698.

<sup>352</sup> See generally Struve, *supra* n.228, at 137.

<sup>353</sup> See Skenandore, *supra* n.215, at 367 (noting that tribal authority to define membership includes authority to alter membership criteria and noting that nonmembers “are not in a position to judge the validity of tribal customs and traditions” but that lies with the tribe itself); Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457, 466 (1997) (arguing that sovereignty requires “trying to think through in terms of what the tribe thinks is best for itself . . . because if sovereignty means

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intertribal court system would have to interpret laws and customs from various tribes with differing legal codes and traditions. But, because these courts would grow out of the tribes themselves, they would be better positioned than the state or federal courts to appreciate and consider these differences.<sup>354</sup> Indeed, given the diversity between 560 tribes, it is nearly impossible for one federal solution, particularly given the competing interests in enrollment decisions.<sup>355</sup> A court system designed by the tribes could account for this diversity by organizing it so that tribes with similar histories or cultures were grouped together. Further, because one court would not be charged with reviewing decisions from all tribal courts, each court would have oversight over fewer tribes, reducing the complexity that would be a natural consequence were federal courts involved.

In short, by forestalling critics' main objection about a lack of independent review of enrollment decisions, an intertribal appellate court would ensure continued tribal control over membership decisionmaking. Such control is essential as an assertion of tribal sovereignty itself and to ensure that tribal law and culture is what ultimately determines enrollment decisions.

#### CONCLUSION

Given the increased stakes of tribal membership often meaning the difference between a life of abject poverty and a life of riches, Congress or the courts may be moved to rethink its commitment to the principles of *Santa Clara Pueblo*. It is undeniable that the individual stories of those ousted from their tribes or denied membership are troubling on many levels. Nevertheless, the underlying premise of the *Santa Clara* decision—that the ability of a tribe to define its own membership lies at the heart of its existence as an independent political community—remains as appealing today as it did more than thirty years ago. Indeed, tribal sovereignty may be more relevant today when tribes are grappling with the impact of gaming on their economies and citizenry. Rather than focus on individual decisions, however troubling they may be, it is far more constructive and

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anything, it means the ability of tribes to talk about very serious issues and to choose from the array of choices which are available”).

<sup>354</sup> Riley, *Good (Native) Governance*, *supra* n.352, at 1087.

<sup>355</sup> Ward, *supra* n.334, at 254.

less damaging to tribal sovereignty to craft a solution that protects both tribal sovereignty and tribal members. By providing for independent oversight of their membership decisions, tribes would silence their critics by increasing the perception that they are dealing fairly with their members and those who claim membership. Through building an independent appellate court system, tribes would ensure that their members come to tribal, rather than federal, courts to resolve membership disputes.