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If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos & the New Premium on Tribal Membership

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ARTICLE

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

by
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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 decision making.

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

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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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I. 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.[1] According to the court, the tribe would have no existence but for a court ordering that it be recognized by the United States.[2] Thus, it was "bizarre" to suggest that the court had no role in adjudicating a membership dispute.[3] While the court nonetheless concluded that it lacked subject matter jurisdiction, it 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.[4]

[1] Jerry Bier, *Nowhere to Turn*, FRESNO BEE, Aug. 22, 2004, at A1.
[2] *Id.*
[3] *Id.*
[4] *Id.*

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

Since Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988,[7] Indian casinos have flourished on some tribal reservations.[8] Members of tribes that operate successful casinos often receive thousands of dollars in casino profits each month.[9] Popular press accounts of tribal membership conflicts suggest that disputes over membership are tied to the tribes' increased casino wealth.[10] To the extent these conflicts are about greed, it is surely implicated on both sides.[11] Disputes over membership involve both claims by individuals seeking access to a portion of the gaming revenue pie,[12] as well as efforts to exclude members to ensure the pie is not divided up quite as much and each member's share thereby reduced.[13]

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[5] *See id.*

[6] *See id.*

[7] Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–21 (2006).

[8] NAT'L INDIAN GAMING ASS'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; 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.J. 205, 206 (1997).

[9] *See* Henderson, *supra* note 8, at 240–41; Kathryn R.L. Rand & Steven A. Light, *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); *see also* Bier, *supra* note 1; Marc Cooper, *Tribal Flush: Pechanga People "Disenrolled" en Masse*, LA WEEKLY, Jan. 3, 2008, *available at* http://www.laweekly.com/2008-01-03/news/tribal-flush-pechanga-people-disenrolled-en-masse; James May, *State Capitol Rally Protests Disenrollments*, INDIAN COUNTRY TODAY, July 16, 2004, *available at* http://www.indiancountrytoday.com/archive/28212274.html; Onell R. Soto, *Tribe Denies 50 Members Profits from Casino: San Pasqual Band Says Some Lack Indian Blood*, SAN DIEGO UNION-TRIB., June 28, 2008, at A1.

[10] *See, e.g.*, Bier, *supra* note 1; Cooper, *supra* note 9; Danna Harman, *Gambling on Tribal Ancestry*, CHRISTIAN SCI. MONITOR, Apr. 12, 2004, at 15; Michael Hiltzik, *Fairness Is the Loser in Tribal Identity Crisis*, L.A. TIMES, Apr. 5, 2004, at 1; Michael Martinez, *Indians Decry Banishment by Their Tribes: Protesters Say Power Struggles, Mainly over Casinos, Have Stripped Them of Gaming Profits*, CHI. TRIB., Jan. 14, 2006, at 9; May, *supra* note 9; Andrew Metz, *Identity Crisis: Survival of Tribes at Stake as Strict Rules Weed Out Members*, NEWSDAY, Dec. 21, 2003, at A7; Soto, *supra* note 9, at A1; Steve Young, *Woman Fights to Stay in Tribe*, ARGUS LEADER, Apr. 9, 2000, at 1A.

[11] Henderson, *supra* note 8, at 241–42 (discussing membership disputes and how gaming revenue affects all parties' motivations).

[12] *See* Harman, *supra* note 10 (noting increase from approximately 15 to 30 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—A Family Finds Itself Cut Off from the Pechanga Group and Its Casino Wealth Despite Long Ties to the Reservation*, L.A. TIMES, Sept. 9, 2007, at 1.

[13] *See* May, *supra* note 9 (noting American Indian Movement organizer's opinion that the "per-capita system in which gaming tribes carve up a proportion of their

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.[14] 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 decision making.[15] To the extent the issue is about perception, it 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.[16] 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.[17] 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

profits to pay to tribal members from their gaming establishments" caused the majority of disenrollment efforts to ensure a "bigger piece of monetary pie for the remaining members"); Jodi Rave, *Loss of Tribal Membership a Contentious Issue*, BISMARCK TRIB., Oct. 8, 2005, *available at* http://www.bismarcktribune.com/news/local/article_869c7ca5-1778-544e-962d-c3a3a9fc7cd4.html.

[14] *See* Angela R. Riley, *Tribal Sovereignty in a Post-9/11 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.

[15] *See id.* at 959–60; *see also* Bier, *supra* note 1; Cooper, *supra* note 9; Harman, *supra* note 10; Hiltzik, *supra* note 10,; Martinez, *supra* note 10; May, *supra* note 9; Jodi Rave, *Debate Heats Up as Tribes Cut Members*, MISSOULIAN, Oct. 9, 2005, http://www.missoulian.com/news/state-and-regional/article_38e0a53f-de74-593b-ad52-bc59f5908116.html; Metz, *supra* note 10; Soto, *supra* note 9; Young, *supra* note 10.

[16] *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 F. App'x 391 (9th Cir. 2005); Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y, 163 F.3d 1150 (10th Cir. 1998); Akins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997); Hendrix v. Coffey, No. CIV-08-605-M, 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).

[17] *See, e.g., Williams*, 490 F.3d 785; *Alvarado*, 509 F.3d 1008; *Lewis*, 424 F.3d 959; *Arviso*, 129 F. App'x 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.

decisions.[18] Solutions range from abrogating sovereignty by permitting federal involvement over membership disputes to instilling a more standardized method for determining membership, such as by cultural identity, political participation, blood quantum, or DNA identification.[19]

In this Article, I argue that the focus should instead be on solutions that come from within the tribe.[20] For too long the tribes have suffered from the imposition of legal and cultural norms that do not reflect their identity or culture.[21] Part II discusses the development of Indian gaming and the effect of IGRA on tribal finances and membership.[22] Part III describes two typical tribal membership disputes that arose in California and were litigated to the U.S. Court of Appeals for the Ninth Circuit.[23] Part IV discusses proposed solutions to the problem of tribal membership disputes and how these solutions would undermine tribal sovereignty or identity.[24] Part V proposes instead that the solution depends on more, not less, sovereignty for the tribes. Instead of federal intervention or resorting to DNA, I propose that tribes create separate independent judicial bodies, or an 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 decision maker.

II. BACKGROUND

A. Indian Gaming Regulatory Act (IGRA)

In 1988, Congress opened the casino doors on Indian reservations with the passage of IGRA.[25] In passing IGRA, Congress was responding to

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[18] *See* May, *supra* note 9; Rave, *supra* note 15; *see also Lewis*, 424 F.3d 959; *Arviso*, 129 F. App'x 391.

[19] *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 Identity*, 35 SETON HALL L. REV. 1241, 1259 (2005); *see also* Eric Beckenhauer, Note, *Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161 (2003); Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 VA. L. REV. 793, 863 (2006) (arguing that "Congress should exercise its power over federally recognized Indian tribes and abrogate, at least in part, tribal citizenship power").

[20] *See infra* Part V.

[21] *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. 329 (2009).

[22] *See infra* Part II.

[23] *See infra* Part III.

[24] *See infra* Part IV.

[25] *See* Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–21 (2006).

gaming that was already taking place on Indian reservations but that was not being regulated (by state governments at least).[26]

While many view Indian gaming as an economic boon to tribes,[27] others decry gaming as anathema to tribal values and an unstable basis on which to build tribal economies.[28] Moreover, critics charge that IGRA undercuts tribal sovereignty by permitting states to interfere with tribal governance.[29] 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.[30] Consequently, IGRA permits some state regulation of some types of gaming on Indian reservations.[31] Nevertheless, Congress's stated goal was to "promote tribal economic development, tribal self-sufficiency, and strong tribal government."[32]

To reconcile these competing interests, Congress divided gaming into three separate classes.[33] 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.[34] 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 from state interference.[35]

All other gaming that is not classified as Class I or Class II gaming is considered Class III gaming.[36] 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.[37] Further, the tribe must adopt an ordinance permitting gaming that is approved by the chairman of the National Indian Gaming Commission.[38] Last, but certainly not least, the tribe and state must enter into a gaming compact that will govern the gaming activities.[39]

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[26] Rand & Light, *supra* note 9, at 382.

[27] *Id.* at 402–03.

[28] *Id.* at 382–83.

[29] *See* Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. C.L. & C.R. 137, 167–68 (2006).

[30] Rand & Light, *supra* note 9, at 400.

[31] *See* Indian Gaming Regulatory Act of 1998, 25 U.S.C. §§ 2701–21 (2006).

[32] *Id.* § 2701(4); Rand & Light, *supra* note 9, at 399.

[33] *See* 25 U.S.C. § 2703.

[34] *Id.* §§ 2703(6), 2710(a)(1).

[35] *Id.* §§ 2703(7), 2710(b)(1)(A).

[36] *Id.* § 2703(8).

[37] *Id.* § 2710(d)(1)(B).

[38] *Id.* § 2710(d)(1)(A)(iii).

[39] *Id.* § 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. *Id.* § 2710(d)(3)(A).

IGRA requires that profits from gaming be used for the benefit of the tribe itself.[40] 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.[41] Only after those expenditures may the tribe seek to make per capita payments to tribal members from gaming revenues.[42] To do that, the tribe must prepare and submit a plan for per capita distributions for approval to the Secretary of the Interior.[43] It is these expenditures, many critics allege, that are at the root of tribal enrollment disputes.[44]

B. Effect of IGRA Gaming on Tribal Economies

Although tribal gaming existed before Congress passed IGRA in 1988,[45] there is no question that IGRA changed the face of Indian gaming and the economic prospects of many Indian tribes.[46] For many tribes, casinos have been a boon. Casinos have brought jobs to native communities.[47] Gaming revenue has helped fund needed government and social services and has provided for schools and scholarships.[48]

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

Tribal gaming has especially thrived in California, where the Table Mountain Rancheria, the tribe at issue in *Lewis*,[52] 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.[53] In the year the Ninth Circuit dismissed the Lewis's

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[40] *Id.* § 2710(b)(2)(B).

[41] *Id.*

[42] *Id.* § 2710(b)(3); *see also* Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738, 742–43 (D.S.D. 1992).

[43] 25 U.S.C. § 2710(b)(3).

[44] *See* Henderson, *supra* note 8, at 241–42.

[45] Rand & Light, *supra* note 9, at 396–97; *see generally* Henderson, *supra* note 8.

[46] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indian*s, 19 BYU J. PUB. L. 1, 105–08 (2004).

[47] Press Release, National Indian Gaming Commission, NIGC Announces 2007 Indian Gaming Revenues, (June 18, 2008), http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR93062008/tabid/841/Default.aspx.

[48] NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 10.

[49] Press Release, *supra* note 47.

[50] *Id.*

[51] *Id.*

[52] Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005).

[53] Howard Stutz, *Tribal Casinos Feeling Pinch*, LAS VEGAS REV.-J., Aug. 19, 2008, at 1D; *see* Kate Coe, *Propositions 94, 95, 96 & 97: Engorged with Money, Four Tiny Tribes*

appeal, the Table Mountain Rancheria brought in $100 million from its casino.[54]

It is undeniable that gaming enterprises have brought many tribes their first prospects for economic self-determination in over two hundred years.[55] In fact, for many tribes, casino revenue constitutes the bulk of the average tribal budget, and in some cases far exceeds federal aid or revenue from other sources.[56] Gaming revenue contributes directly to the economic development of reservations.[57] Under 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.[58]

Spend a King's Ransom to Get More, LA WEEKLY, Jan. 31, 2008, *available at* http://www.laweekly.com/2008-01-31/news/propositions-94-95-96-97.

[54] *See* Jerry Bier, *Indians' Lawsuit Targets Rancheria*, FRESNO BEE, Jan. 30, 2005, at B1.

[55] *See* NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 5; Kelley, *supra* note 12, at 1; McCarthy, *supra* note 46, at 105–07; *see also* Heidi L. McNeil, *Indian Gaming in Arizona: The Great Casino Controversy Continues*, ARIZ. ATT'Y, Jan. 1998, at 13, 35. However, it is equally true that gaming has not benefited all tribes equally. *See* McCarthy, *supra* note 46, at 106. Of 564 federally recognized tribes, only 225 operated casinos as of 2006. NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 1; Indian Affairs, U.S. Dep't of Interior, Frequently Asked Questions, http://www.bia.gov/biaSearch/cached.jsp;jsessionid=58c9f55bee8f23fe90d9f73b5b6d61a4699143b9833d0ddadcfbba0768e72a9a?id=495&q=number+of+tribes. For some tribes, this was a decision driven by the tribe's particular cultural or religious beliefs. Daniel Twetten, Comment, *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* 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, 1012–13 (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.* at 1012 & n.11 ("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." (quoting NAT'L GAMBLING IMPACT STUDY COMM'N, 106TH CONG., FINAL REPORT 2-10 (Comm. Print 1999), *available at* http://govinfo.library.unt.edu/ngisc/reports/2.pdf)). Of those tribes that do operate casinos, only a small number generate the lion's share of revenue. *See id.* at 1012; Coe, *supra* note 53 (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*, at 1012 n.11 ("[The] 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for [only] 41.2 percent." (quoting NAT'L GAMBLING IMPACT STUDY COMM'N, *supra*)). Of California's 108 tribes, only a handful bring in the bulk of that state's nearly $8 billion in gaming revenue. Coe, *supra* note 53.

[56] Cooter & Fikentscher, *supra* note 55, at 53; *see* Mike Gallagher, *Gaming Tribes Cash In*, ALBUQUERQUE J., Jan. 2, 2005, at A6.

[57] *See* NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 8–25; McCarthy, *supra* note 46, at 105–06; *see also* Kelley, *supra* note 12 (describing rampant poverty on reservation before tribe started casino operations).

[58] *See* McCarthy, *supra* note 46, at 105.

Typically, tribes have used the profits from gaming to build schools, construct roads, finance scholarships, and make other community investments.[59]

Gaming has also had more intangible benefits. For instance, gaming and casino development have helped foster connections between the tribes and other businesses.[60] Gaming revenues have supported cultural programs viewed as vital to preserving and protecting Indian culture for future generations.[61] The Mohegan Tribe in Connecticut used gaming revenue to purchase land containing the tribe's burial grounds.[62] Other tribes have contributed to the preservation of Indian basket weaving and languages as well as the creation of cultural centers and museums.[63]

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.[64] 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.[65] By 2008, some tribal members in California received $30,000 a month in casino distributions.[66] Further, ousted members lose out on other tribal benefits such as education and healthcare services.[67]

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 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.[68] Each additional member decreases the current members' revenue distributions and increases the tribe's cost of

[59] *Id.*; NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 8–26.

[60] *See* Joe Lyons, *The Man in Charge of a Fantasy*, INLAND EMPIRE BUS. J., Mar. 2007, at 11 (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, *available at* http://www.indiancountrytoday.com/archive/28165674.html.

[61] NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 13.

[62] *Id.*

[63] *Id.*

[64] *See* Coe, *supra* note 53; Kelley, *supra* note 12; Cooper, *supra* note 9.

[65] Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44, 47.

[66] *See* Coe, *supra* note 53.

[67] *See* Jason B. Johnson, *Former Pomo Leader Expelled from Tribe*, S.F. CHRON., May 1, 2006, at B1 (describing ousted members' loss of scholarships and right to vote in tribal elections); Kelley, *supra* note 12 (describing loss of gaming revenue, tribal health insurance, and schooling); Rave, *supra* note 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.").

[68] *See* NAT'L INDIAN GAMING ASS'N, *supra* note 8, at 2, 8–26.

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, in order 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.[69]

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.[70] As a way to narrow tribal enrollment, some tribes have turned to restrictive, race-based conceptions of tribal citizenship, and blood quantum has become proxy for tribal identity.[71] Seeking to vindicate their claim to membership, tribal members and potential members have resorted to legal action.[72]

III. MEMBERSHIP CONTROVERSIES

In the past eight years, Indian tribes in California have removed five thousand people from their membership rolls.[73] According to the tribes, these disenrollments were necessary to correct longstanding mistakes in membership rolls.[74] For the individuals affected, however, disenrollment from their tribe can mean the division of family and separation from their tribe and culture.[75] It can also mean unemployment, the loss of 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 filed suit 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.[76] In others, currently enrolled members sue when they are

[69] *See* Cooper, *supra* note 9.

[70] *See* Hiltzik, *supra* note 10.

[71] *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006). *See, e.g.*, Beckenhauer, *supra* note 19, at 167–72 (discussing tribal uses of blood quantum requirements); Goldberg, *supra* note 19, at 459–71 (discussing use of blood quanta as membership criteria); Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 698 (1995).

[72] *See, e.g.*, Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005); Arviso v. Norton, 129 F. App'x 391 (9th Cir. 2005).

[73] Kevin Fagan, *Tribes Toss Out Members In High-Stakes Quarrel*, S.F. CHRON., Apr. 20, 2008, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/04/20/MNJNVJC72.DTL.

[74] *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.").

[75] Cooper, *supra* note 9; Kelley, *supra* note 12.

[76] *See* Riley, *supra* note 14, at 960.

suddenly disenrolled from the tribe.[77] And, in a third category of cases, members seek to exclude already enrolled members and sue when the tribe refuses to act.[78]

In April 2005, a Ninth Circuit panel heard two cases involving disputes over tribal membership.[79] 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.[80] In the other, the plaintiffs sought to become enrolled members of a tribe that had thus far failed to act on their enrollment applications.[81] Both cases were resolved on the same point—lack of federal standing and jurisdiction.[82]

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 (Band) properly met the blood quantum requirements for tribal membership.[83] Underlying the dispute was a judgment of funds awarded to the Band in 1987 under U.S. Court of Claims Docket No. 80-A.[84] Only those applicants meeting the enrollment criteria would receive a distribution of the funds.[85]

The plaintiffs, all members of the Band, alleged that seventy-two people who were not eligible for membership in the 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).[86] 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.[87] 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.[88]

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[77] *See, e.g.*, Salinas v. Barron, No. RIC427295, 2008 WL 699205, at *2 (Cal. Ct. App. March 17, 2008); Lamere v. Superior Court, 31 Cal. Rptr. 3d 880, 881 (Cal. Ct. App. 2005); Quair v. Sisco, 359 F. Supp. 2d 948, 952 (E.D. Cal. 2004).

[78] *See, e.g.*, Arviso v. Norton, 129 F. App'x 391, 392 (9th Cir. 2005).

[79] *Id.*; Lewis v. Norton, 424 F.3d 959, 960 (9th Cir. 2005).

[80] *Arviso*, 129 F. App'x at 392.

[81] *Lewis*, 424 F.3d at 961.

[82] *Arviso*, 129 F. App'x at 392; *Lewis*, 424 F.3d at 960.

[83] Answering Brief for the Federal Defendants-Appellees at 5, 20, *Arviso*, 129 F. App'x 391 (No. 03-56893).

[84] *Id.* at 4.

[85] 25 U.S.C. § 163 (2006).

[86] *Arviso*, 129 F. App'x at 392.

[87] Appellants' Opening Brief at 5, *Arviso*, 129 F. App'x 391 (No. 03-56893).

[88] *Id.*

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.[89] 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.[90]

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.[91] They also sought to prohibit the BIA from failing to take such administrative action in the future as purportedly required by federal regulations and tribal law.[92]

The Band intervened and moved to dismiss on the ground that it was a necessary and indispensable party to the suit.[93] Before the hearing on the Band's motion, the plaintiffs and federal defendants entered into a Settlement Agreement.[94] Under the Agreement, the BIA would withdraw certain decision letters issued by the Assistant Secretary and reconsider earlier protests to prior enrollment decisions, including reconsideration of correction to the Band's Base Roll.[95] It further required that the BIA would base enrollment decisions on the disputed members' common ancestor having a blood quantum of three-quarters.[96] The BIA would then issue a determination of eligibility for enrollment that would be appealable to the BIA.[97] The names of ineligible members would be stricken from the Band's Roll.[98]

The district court entered judgment on the Settlement Agreement before considering the Band's motion to intervene.[99] It then stayed enforcement of the Agreement and later permitted the Band to

[89] *Arviso*, 129 F. App'x at 392–93.
[90] *Id.* at 393 n.1.
[91] *Id.* at 393.
[92] *Id.*
[93] *Id.* at 392.
[94] Appellants' Opening Brief, *supra* note 87, at 6; Answering Brief for the Federal Defendants-Appellees, *supra* note 83, at 2–3.
[95] Appellants' Opening Brief, *supra* note 87, at 24–25; Answering Brief for the Federal Defendants-Appellees, *supra* note 83, at 16–17.
[96] Appellants' Opening Brief, *supra* note 87, at 14–15, 23–25; Answering Brief for the Federal Defendants-Appellees, *supra* note 83, at 16–17.
[97] Appellants' Opening Brief, *supra* note 87, at 26; Answering Brief for the Federal Defendants-Appellees, *supra* note 83, at 17.
[98] Appellants' Opening Brief, *supra* note 87, at 23. *See* Answering Brief for the Federal Defendants-Appellees, *supra* note 83, at 16–17.
[99] Appellants' Opening Brief, *supra* note 87, at 2–3; Answering Brief for the Federal Defendants-Appellees, *supra* note 83, at 3, 17.

intervene.[100] 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.[101] 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.[102]

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.[103] 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.[104] 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.[105]

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.[106] According to the court, the 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."[107] Ultimately, "the district court ha[d] no authority to order any relief favorable to Plaintiffs' complaint because, any such relief would impermissibly impair the Band's sovereign right to determine its membership."[108] Because there could be no redress for their complained of wrongs, plaintiffs lacked standing to sue.[109]

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.[110] In *Lewis*, the plaintiffs were four siblings and the children of an enrolled

[100] Appellants' Opening Brief, *supra* note 87, at 7; Answering Brief for the Federal Defendants-Appellees, *supra* note 83 at 18.

[101] Appellants' Opening Brief, *supra* note 87, at 6–7; Answering Brief for the Federal Defendants-Appellees, *supra* note 83 at 17.

[102] Arviso v. Norton, 129 F. App'x 391, 392 (9th Cir. 2005).

[103] *Id.*

[104] *Id.* at 393.

[105] *Id.* at 393 n.1.

[106] *Id.* at 392.

[107] *Id.* at 393.

[108] *Id.* at 394.

[109] *Id.*

[110] Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005). *See* Bier, *supra* note 1.

member of the Table Mountain Rancheria.[111] The plaintiffs had all grown up in a shack on the reservation, but had left the reservation to seek employment elsewhere because of the economic impoverishment.[112] After the tribe's fortunes changed with passage of IGRA and the development of a lucrative casino, plaintiffs sought to return to the reservation.[113] They were not exactly welcomed with open arms.[114] Instead, the tribe refused to act on their membership applications.[115] Indeed, for the five years after plaintiffs first attempted to enroll in the tribe, the Rancheria had taken no action on their membership applications.[116]

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.[117] 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 revenue.[118] Thus, the difference between membership and exclusion was the difference between a life of luxury and one of poverty.[119] 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 million per year.[120]

Rather than sue the Rancheria, plaintiffs' lawsuit targeted officials of the BIA and the Department of the Interior (DOI), and the National Indian Gaming Commission (NIGC).[121] According to the plaintiffs, defendants had failed to comply with U.S. laws and regulations by refusing to order the Rancheria to recognize all qualified individuals as members.[122] To remedy this, plaintiffs sought declaratory and injunctive relief to require the BIA and DOI to act and to prevent the distribution of government funds to the Rancheria until it complied with its constitution and enrollment ordinance.[123] Plaintiffs also sought to require NIGC to prohibit the Rancheria from disbursing casino profits to its

[111] Donald L. Barlett & James B. Steele, *Whose Tribe Is It, Anyway?*, TIME, Dec. 16, 2002, at 57; Brian Melley, *Coalition Plans Tribal Takeover*, SAN JOSE MERCURY NEWS, Aug. 1, 2000, at 3B.

[112] Barlett & Steele, *supra* note 111, at 57; Melley, *supra* note 111.

[113] Barlett & Steele, *supra* note 111, at 57.

[114] *Id.*; Melley, *supra* note 111; *see also Lewis*, 424 F.3d at 961.

[115] Barlett & Steele, *supra* note 111, at 57; Melley, *supra* note 111; *see also Lewis*, 424 F.3d at 961.

[116] *Lewis*, 424 F.3d at 961.

[117] *Id.* at 960–61.

[118] *See* Brief for Appellants at 12, Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005) (No. 03-17207); Barlett & Steele, *supra* note 111 at 57; Melley, *supra* note 111.

[119] *See* Barlett & Steele, *supra* note 111, at 57; Melley, *supra* note 111.

[120] Barlett & Steele, *supra* note 111 at 57; *see also* Brief for Appellants, *supra* note 118, at 12; Melley, *supra* note 111.

[121] *Lewis*, 424 F.3d at 960.

[122] *Id.* at 961.

[123] *Id.*

members until it recognized appellants as enrolled members.[124] The district court dismissed the action for lack of subject matter jurisdiction.[125]

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 Rancheria has whatever it is, 30 millionaires and 20 impoverished people is because of a court order which ordered the United States to reinstate the rancheria. 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 United States to reinstate the rancheria, nobody would have a dime. I mean, this is just disgraceful.[126]

To the district court, the problem was clear: the tribe was being unfair and greedy.[127] Thus, the solution was equally clear: court intervention. As the court explained, "You know, somebody ought to warn the tribe this is the kind of facts where some court is going to say 'we're outraged' and put it to them."[128]

On appeal, the Ninth Circuit affirmed the district court's dismissal.[129] 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.[130] First, tribal immunity barred suit against the tribe to force the tribe to comply with its membership provisions.[131] Nor could the plaintiffs avoid tribal immunity and sovereignty by suing federal agencies.[132] 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 enroll the disputed members.[133] 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.[134]

Finally, the court held that IGRA and related regulations did not act to waive the tribe's sovereign immunity over an intra-tribal membership

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[124] *Id.*

[125] *Id.*

[126] Brief for Appellants, *supra* note 118, at 3–4.

[127] *See id.*

[128] *Id.* at 3.

[129] *Lewis*, 424 F.3d at 960.

[130] *Id.* at 961–62.

[131] *Id.* at 962. The court also held that 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.*

[132] *Id.* at 963.

[133] *Id.* (citing Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y, 163 F.3d 1150, 1160 (10th Cir. 1998)).

[134] *Id.* at 962.

dispute.[135] The court explicitly rejected plaintiffs' argument that IGRA conferred jurisdiction over tribal membership by granting the government oversight over distribution of gaming revenues.[136] Instead, the court concluded that nothing in IGRA provides federal government oversight of membership issues.[137] In fact, the regulations promulgated under IGRA state that allocation and distribution of revenue is to be decided by a tribal court or administrative processes.[138]

In addition to affirming the district court's dismissal, the appeals court shared the district court's frustration.[139] Based on the appellate record, it was clear to the court that the plaintiffs met the tribe's own stated membership criteria.[140] Despite that, the tribe had refused to act on their applications, effectively denying them membership and a portion of tribal gaming revenue.[141] 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.[142] Although straightforward, this proposed solution would undo the fundamental notion of tribal sovereignty that permits the tribe to determine its own membership.[143] Because, unlike other U.S. citizens, American Indians are also tribal citizens, the tribe has a parallel right to sovereignty.[144]

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 jurisdiction.[145] The attempt to sue federal agencies instead of the tribe was not a way around these jurisdictional roadblocks.[146]

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

[135] *Id.* at 962–63.
[136] *Id.* at 963.
[137] *Id.* at 962–63.
[138] 25 C.F.R. § 290.23 (2009); 25 U.S.C. § 2710(b)(3); *see Lewis*, 424 F.3d at 963.
[139] *Lewis*, 424 F.3d at 960, 963.
[140] *Id.* at 960.
[141] *Id.* at 961.
[142] *See id.* at 963.
[143] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978).
[144] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 3 (5th ed. 2005); *see Santa Clara Pueblo*, 436 U.S. at 72 n.32.
[145] *Lewis*, 424 F.3d at 960.
[146] *Id.* at 963.

> doctrines of tribal sovereign immunity. This is a matter in the hands of a higher authority than our court.[147]

Like countless other state and federal decisions involving tribal membership disputes, the Ninth Circuit's decisions in *Arviso* and *Lewis* rested on *Santa Clara Pueblo v. Martinez*,[148] 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.[149] 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."[150] Accordingly, they "have held that tribal immunity bars suits to force tribes to comply with their membership provisions, as well as suits to force tribes to change their membership provisions."[151]

Although *Santa Clara* would appear to foreclose a 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 the 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.[152] However, the Ninth Circuit rejected that contention.[153] 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.[154] 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.[155] Indeed, the competency of these bodies

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[147] *Id.* (citing Seminole Tribe v. Florida, 517 U.S. 44, 48 (1996)).

[148] *Santa Clara Pueblo*, 436 U.S. 49.

[149] *Id.* at 71–72.

[150] *Lewis*, 424 F.3d at 961 (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)); *see* Smith v. Babbitt, 100 F.3d 556, 558 (8th Cir. 1996); Apodaca v. Silvas, 19 F.3d 1015, 1016 (5th Cir. 1994) (per curiam); *see also, e.g.*, NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 999 (9th Cir 2003); EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1078–79 (9th Cir. 2001); Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1129 (11th Cir. 1999); Chao v. Spokane Tribe of Indians, No. CV-07-0354-CI, 2008 WL 4443821, at *2 (E.D. Wash., Sept. 24, 2008); Chao v. Matheson, No. C06-5361RBL, 2007 WL 1830738, at *2 (W.D. Wash., June 25, 2007); Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indust., 730 F. Supp. 324, 327 (E.D. Cal. 1990).

[151] *Lewis*, 424 F.3d at 961(citing 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 at 1016.

[152] *Santa Clara Pueblo*, 436 U.S. at 65.

[153] *Lewis*, 424 F.3d at 962.

[154] *Id.*

[155] *Santa Clara Pueblo*, 436 U.S. at 66.

was to be presumed.[156] 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."[157]

Persevering, federal plaintiffs—like those in *Arviso* and *Lewis*—attempted to avoid *Santa Clara* by suing federal agencies under the Administrative Procedure Act[158] rather than the tribes directly.[159] Under this approach, plaintiffs contended that the defendant federal agencies had breached their duty to act under applicable federal regulations and tribal law.[160] 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."[161] 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.[162] Moreover, because of that sovereign immunity, the tribe could not be joined.[163] 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.[164]

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.[165] 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

[156] *See id.*

[157] *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, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682, 684–85 (10th 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.

[158] Administrative Procedure Act, 5 U.S.C. §§ 701–02. (2006); Appellants' Opening Brief, *supra* note 87, at 1; Brief for Appellants, *supra* note 118, at 34.

[159] Arviso v. Norton, 129 F. App'x 391, 393 (9th Cir. 2005); *Lewis*, 424 F.3d at 962.

[160] *Arviso*, 129 F. App'x at 393; *Lewis*, 424 F.3d at 962–63.

[161] *Lewis*, 424 F.3d at 963; *see, e.g.*, Williams v. Gover, 490 F.3d 785, 791 (9th Cir. 2007); *Arviso*, 129 F. App'x at 394; Hall v. Babbitt, No. 99-3806ND, 2000 WL 268485, at *1–2 (8th Cir. Mar. 10, 2000); Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y, 163 F.3d 1150, 1160 (10th Cir. 1998); Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996).

[162] *Arviso*, 129 F. App'x at 392, 394; *see Lewis*, 424 F.3d at 962–63.

[163] *Arviso*, 129 F. App'x at 392; *Lewis*, 424 F.3d at 962.

[164] *See Arviso*, 129 F. App'x at 393–94; *Lewis*, 424 F.3d at 963.

[165] *See Arviso*, 129 F. App'x at 394; *Lewis*, 424 F.3d at 963.

determine tribal membership."[166] Ultimately, because the tribe's interest in sovereignty outweighs the plaintiffs' interest in litigating, dismissal was appropriate.[167]

Finally, as did the plaintiffs in *Lewis*, federal plaintiffs have tried to skirt *Santa Clara* and tribal sovereign immunity by invoking IGRA.[168] 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."[169] 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."[170] Despite the narrowness of the waiver, plaintiffs have contended that IGRA permits federal jurisdiction over membership disputes.[171] According to this reasoning, because membership disputes implicate tribal gaming revenue, IGRA's immunity waiver applies and federal jurisdiction is proper.[172]

Federal courts have repeatedly rejected attempts to broaden IGRA's waiver of immunity to permit federal jurisdiction over membership disputes.[173] Instead, courts emphasize that IGRA waives tribal sovereign immunity only when compliance with IGRA is at issue.[174] In so holding, it is significant that nothing in IGRA provides federal oversight or jurisdiction over tribal membership disputes and IGRA makes no attempt to define membership.[175] To the contrary, the regulations promulgated under IGRA explicitly exempt government involvement in disputes over gaming distributions.[176] Rather, the regulations provide that such

[166] *Ordinance 59 Ass'n*, 163 F.3d at 1160; *see also* Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991).

[167] *See* Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1025 (9th Cir. 2002).

[168] *See, e.g., Lewis*, 424 F.3d at 962; *see also* Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996); Lincoln v. Saginaw Chippewa Indian Tribe, 967 F. Supp. 966, 966 (E.D. Mich. 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. *Smith*, 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.

[169] Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710(d)(7)(A)(ii) (2006).

[170] Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379, 1385 (10th Cir. 1997).

[171] *See Lewis*, 424 F.3d at 962; *see also, e.g., Smith*, 100 F.3d at 558; *Lincoln*, 967 F. Supp. at 967.

[172] *See, e.g.*, *Lewis*, 424 F.3d at 962–63; *see also Smith*, 100 F.3d at 558; *Lincoln*, 967 F. Supp. at 967.

[173] *See, e.g., Lewis*, 424 F.3d at 963; *see also Smith*, 100 F.3d at 559; *Lincoln*, 967 F. Supp. at 967.

[174] *Lewis*, 424 F.3d at 962 (citing *Mescalero Apache Tribe*, 131 F.3d at 1385); *see also Smith*, 100 F.3d at 559; *Lincoln*, 967 F. Supp. at 967.

[175] *See Lewis*, 424 F.3d at 962–63; *see* 25 C.F.R. § 290.23 (2009).

[176] 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

disputes are properly handled by tribal courts or administrative processes.[177] 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.[178]

Consequently, stuck between "the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction,"[179] 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.

IV. PROPOSED SOLUTIONS

At their crux, tribal membership disputes are more about tribal identity than gaming.[180] Too often, however, the proposed solutions have 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 decision making.

tribal court system, forum or administrative process . . . ."); *see Lewis*, 424 F.3d at 963; *Smith*, 100 F.3d at 558; Alvarado v. Table Mountain Rancheria, No. C 05-00093 MHP, 2005 WL 1806368, at *4 (N.D. Cal. July 28, 2005).

[177] 25 C.F.R. § 290.23.

[178] *Smith*, 100 F.3d at 559 (quoting Smith v. Babbitt, 875 F. Supp. 1353, 1360–61 (D. Minn. 1995)).

[179] *Lewis*, 424 F.3d at 960.

[180] 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-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 Article focuses 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 Article does not address those cases where a tribe changes its criteria.

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.[181] 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*. Nevertheless, it has been more than thirty years since the Supreme Court issued its decision in *Santa Clara*.[182] Since that time, Indian gaming has grown, possibly raising the premium on tribal membership. Certainly the stakes are higher than when *Santa Clara* was decided, as tribal membership can now mean the difference between a life of poverty or one of wealth.[183] 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 Pueblo.[184] Martinez had lived on the Pueblo's reservation her entire life.[185] Martinez married a Navajo Indian and the couple had several children together.[186] Martinez's children were raised on the Pueblo's reservation and continued to live there as adults.[187]

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.[188] Because of this ordinance, Martinez's children could not become enrolled members of the Pueblo.[189] Consequently, her children could not vote in tribal elections or hold tribal office.[190] 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.[191]

Before filing suit, Martinez worked to persuade the Pueblo to change its membership rules.[192] When those efforts failed, Martinez filed suit in federal court against the tribe and its governor on behalf of all women

[181] *Lewis*, 424 F.3d at 963.
[182] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[183] *See* Cooper, *supra* note 9.
[184] *Santa Clara Pueblo*, 436 U.S. at 52.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 52 & n.2.
[189] *Id.* at 52.
[190] *Id.*
[191] *Id.* at 52–53.
[192] *Id.* at 53.

who were members of the Pueblo but whose children were denied membership on the basis of the tribal ordinance.[193] Martinez's suit asserted that the Pueblo's ordinance violated the Indian Civil Rights Act's (ICRA) equal protection clause.[194]

In dismissing Martinez's suit, the Supreme Court held that the Pueblo was immune from suit.[195] In so ruling, the Court first acknowledged that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."[196] Although the tribes might not possess full sovereignty, they nonetheless "remain a 'separate people, with the power of regulating their internal and social relations.'"[197] This sovereign status rendered them immune from suit in the same way it protected other sovereign governments.[198] 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.[199] In the absence of congressional action, the tribes remained immune.[200]

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.[201] On this point, the Court first recognized that "providing a federal forum for issues arising under [25 U.S.C.] § 1302 constitutes an interference with tribal autonomy and self-government

[193] *Id.* at 53 & n.3.

[194] *Id.* at 51; Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8).

[195] *Id.* at 58–59.

[196] *Id.* at 55 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)); *see also* Montana v. United States, 450 U.S. 544, 564 (1981); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW: IN A NUTSHELL 400–01 (5th ed. 2009).

[197] *Santa Clara Pueblo*, 436 U.S. at 55 (quoting United States v. Kagama, 118 U.S. 375, 381–382 (1886)).

[198] *Id.* at 58.

[199] *See id.* Under ICRA, Congress had only provided for federal review of tribal decisions under ICRA's habeas corpus provision. *Id.* The Ninth Circuit has recently rejected an attempt to employ the habeas provision in a membership dispute. Jeffredo v. Macarro, No. 08-55037, 2009 WL 4912143, at *3–6 (9th Cir. Dec. 22, 2009). In *Jeffredo v. Macarro*, the Circuit court held that the appellants, who had been disenrolled from their tribes, could not use ICRA's habeas provision to challenge their disenrollments from the Pechenga Tribe. *Id.* at *6. According to the court, because the appellants were not detained or "in custody," the habeas provision did not apply and the court had no subject matter jurisdiction over the dispute. *Id.* at *3.

As the court explained: "We cannot circumvent our lack of jurisdiction over these matters by expanding the scope of the writ of habeas corpus to cover the exact same subject matter. At its heart, this case is a challenge to disenrollment of certain members by the tribe. It is precisely because we lack jurisdiction to hear such claims, however, that Appellants brought this case under habeas corpus law. We find (and the parties direct us to) nothing in the legislative history of § 1303 that suggests the provision should be interpreted to cover disenrollment proceedings. Because nothing in the legislative history suggests otherwise and because binding precedent precludes review of disenrollment proceedings, we cannot accept Appellants' invitation to expand habeas corpus here." *Id.* at *6.

[200] *Santa Clara Pueblo*, 436 U.S. at 58.

[201] *Id.* at 59.

beyond that created by the change in substantive law itself."[202] 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.'"[203] With that understanding, the Court then considered whether ICRA provided an implied cause of action.[204] While it was clear to the Court that Martinez was within the class of persons the Act was designed to benefit, it was equally clear that Congress had not intended to provide for a cause of action.[205]

Congress drafted ICRA to serve two distinct purposes.[206] 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.'"[207] On the other hand, "Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'"[208] 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.[209] According to the Court, in passing ICRA Congress did not wish to intrude on tribal self-government.[210] Indeed, Congress deliberately chose to omit federal remedies from ICRA.[211]

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[202] *Id.*

[203] *Id.* (alterations in original) (citations omitted) (quoting Fisher v. District Court, 424 U.S. 382, 387–88 (1976); Williams v. Lee, 358 U.S. 217, 223 (1959)).

[204] *Id.* at 60.

[205] *See id.* at 61–69.

[206] *See* Eric Wolpin, Comment, *Answering* Lara*'s Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?*, 8 U. PA. J. CONST. L. 1071, 1080 (2006) ("The ICRA was passed by Congress with the dual intent of preventing tribal interference with individual civil rights and preserving tribal capacity to self-govern.").

[207] *Santa Clara Pueblo*, 436 U.S. at 61 (quoting COMM. ON THE JUDICIARY, PROTECTING THE RIGHTS OF THE AMERICAN INDIAN, S. REP. NO. 90-841, at 5–6 (1967)); *see* Wolpin, *supra* note 206, at 1080.

[208] *Santa Clara Pueblo*, 436 U.S. at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)); Wolpin, *supra* note 206, at 1080.

[209] *Santa Clara Pueblo*, 436 U.S. 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.*

[210] *Id.* at 71; *see* Wolpin, *supra* note 206, at 1080 (noting the "Court has upheld congressional intent to provide only a minimally intrusive mechanism for enforcing the ICRA, and has refused to read implicit authorizations of civil actions or actions for declaratory or injunctive relief into the ICRA").

[211] *See Santa Clara Pueblo*, 436 U.S. at 61–69; Wolpin, *supra* note 206, at 1080 ("The statute only permits federal review of tribal court action through federal habeas corpus review.").

Instead, Congress believed that tribal forums were better positioned to evaluate tribal traditions and customs than federal courts.[212] 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."[213] 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."[214]

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. . . . 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.[215]

In light of these considerations, federal courts lacked jurisdiction over tribal membership disputes.[216] Through *Santa Clara*, the Supreme Court recognized that the tribes' sole authority to determine their own membership lies 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.[217] 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."[218] Consequently, tribal immunity continues to bar suits seeking to compel tribes to change their membership criteria or to comply with already established criteria.[219]

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[212] *Santa Clara Pueblo*, 436 U.S. 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.").

[213] *Id.* at 71.

[214] *Id.* at 72.

[215] *Id.* at 72 n.32 (citations omitted).

[216] *Id.* at 72.

[217] *See* Francine R. Skenandore, Comment, *Revisiting* Santa Clara Pueblo v. Martinez*: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347 (2002); GETCHES ET AL., *supra* note 144, 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* note 13 (noting that courts rely on *Martinez* in dismissing membership suits and quoting critic's contention that "*Martinez* is handcuffing judges").

[218] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985); *see also* Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996); Apodaca v. Silvas, 19 F.3d 1015, 1016 (5th Cir. 1994).

[219] *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 at 1016.

This is as it should be. Tribal membership decisions go to the heart of tribal sovereignty.[220] The right to accept or exclude persons from a nation's citizenry is critical to its sovereign survival.[221] 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 [is] correspondingly restrained."[222] It is Congress that "retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [25 U.S.C.] § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions."[223] 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.[224]

Congressional action is, in fact, the solution proposed by many courts, many plaintiffs, and several scholars.[225] And it is a possibility.[226] Despite the strong pronouncements of tribal sovereignty over

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[220] Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1833 (2003); Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18 (D.N.M. 1975) ("Much has been written about tribal sovereignty. If those 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.").

[221] *See* Skenadore, *supra* note 217, at 348–49 ("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.").

[222] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

[223] *Id.*

[224] *Id.*

[225] *See* Reitman, *supra* note 19, at 863.

[226] 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 HAMLINE L. REV. 98, 117 (2007). Federal involvement is most apparent "when federal decision-making intersects with definitions of tribal citizenship." Goldberg, *supra* note 19, 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 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)).

membership contained in *Santa Clara*, Congress still retains plenary power over the tribes.[227] Although the history of federal law regarding tribal sovereignty is too complex to go into here, it suffices 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."[228] On the other hand, it has also held that Congress can override tribal governments by exercising its plenary power over the tribes.[229] Thus, "an aggressive assertion of tribal immunity could endanger tribes by inviting further [federal] incursions on their sovereignty."[230]

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 ICRA.[231] Over tribal protests,[232] Congress enacted ICRA to selectively apply some of the rights enshrined in the U.S. Constitution's Bill of Rights to Indians subject to tribal governments.[233]

As *Santa Clara* makes clear, ICRA provides no remedy to aggrieved tribal members in membership disputes as currently written.[234] Nevertheless, Congress could amend 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

[227] *See* United States v. Wheeler, 435 U.S. 313, 319 (1978); Morton v. Mancari, 417 U.S. 535, 551–52 (1974); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[228] 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.").

[229] *See Wheeler*, 435 U.S. at 319; *Morton*, 417 U.S. at 551–52; *Worcester*, 31 U.S. at 559; *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 133 (1942); Struve, *supra* note 228, at 137.

[230] Struve, *supra* note 228, at 137.

[231] Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–41 (2006).

[232] Kent McNeil, *Aboriginal Governments and the* Charter*: Lessons from the United States*, 17 CAN. J.L. & SOC'Y 73, 91 (2002).

[233] Before ICRA, the Constitution's Bill of Rights did not apply to tribal governments. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (finding the Fifth Amendment did not operate upon the Cherokee nation). For its part, ICRA incorporates only part of the Bill of Rights. GETCHES ET AL., *supra* note 144, at 390. Specifically, it does not include First Amendment (1) 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. Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959).

[234] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–72 (1978).

tribal sovereign immunity if tribes fail to act in accordance with ICRA.[235] Further, at least one group is calling on Congress to amend ICRA.[236]

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 by waiving tribal sovereign immunity if the tribes failed to comply with ICRA.[237] AIRRO is comprised of former tribal members who were disenrolled from the Redding Rancheria.[238] 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 Rancheria.[239] AIRRO continued its calls to amend ICRA in other protests throughout California.[240]

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.[241] 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.[242] The primary objective of the initiative is to permit nontribal review of tribal enrollment decisions.[243] Although the Native American Caucus of the California Democratic Party passed the resolution, it does not appear to have progressed beyond these initial stages.[244]

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 introduced a bill that would have provided a federal remedy in situations where the tribal court is not sufficiently independent of the tribal council.[245] Senate

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[235] Rave, *supra* note 15.

[236] *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.

[237] *Id.*

[238] *Id.*

[239] *See* Rave, *supra* note 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.

[240] *See* Johnson, *supra* note 67 (describing plan of protesters to demonstrate whenever tribes attempt to build new casinos); Galvan, *supra* note 236.

[241] Mary Weston, *Democrats to Hear Resolution on Indian Civil Rights Reform*, OROVILLE MERCURY REG., Apr. 24, 2007.

[242] *Id.*

[243] *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; *see* Johnson, *supra* note 67.

[244] Weston, *supra* note 243.

[245] Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 881–83 (1990) (citing Indian Civil Rights Act Amendments of 1989, S. 517, 101th Cong. (1989)).

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.[246] The district court would have been 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.[247] Although the bill was introduced in both the 100th and 101st Congresses, and was referred to the Judiciary Committee for review, it does not appear to have made it out of committee.[248] Neither have later efforts.[249]

In addition to these efforts, activist groups have employed other tactics to more directly influence the tribes' decision-making.[250] 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.[251] Initial efforts proved successful, with the group prompting the likes of Bill Cosby to cancel his scheduled performance at the tribe's casino.[252]

Despite public calls for change, Congress has not acted to expressly abrogate tribal immunity.[253] For instance, in 1993, Congress passed the Indian Tribal Justice Act (ITJA),[254] which was intended to provide funding and otherwise strengthen tribal court systems.[255] Significantly, Congress did not take that opportunity to amend ICRA or to abrogate sovereign immunity despite calls to do so.[256] Instead,

> Congress has consistently reiterated its approval of the immunity doctrine. . . . Congress has always been at liberty to dispense with such tribal immunity or limit it . . . . [However, Congress's] Acts reflect Congress' desire to promote the "goal of Indian self-

[246] *Id.* at 881–83 & n.111 (citing S. 517).

[247] *Id.*

[248] *See* Rave, *supra* note 13 (describing more recent efforts to amend ICRA along the lines of Hatch's proposed amendment).

[249] *See* Galvan, *supra* note 236; *see also* Rave, *supra* note 13 (noting that moves to amend ICRA to provide federal oversight of tribal membership decisions is likely to receive little tribal support).

[250] Kelley, *supra* note 12.

[251] *Id.*

[252] *Id.*

[253] McNeil, *supra* note 232, at 88–89 & n.93.

[254] Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended 25 U.S.C. §§ 3601–3631 (2006)).

[255] 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 (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").

[256] *See* 25 U.S.C. §§ 3601–3631; *see also* Clinton, *supra* note 245, at 881–83.

> government, including its overriding goal of encouraging tribal self-sufficiency and economic development."[257]

Thus, even assuming that Congress should act, it seems unlikely that it will act. Likewise, the federal courts have continued to hold 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.[258] 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.[259]

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.[260] Under this theory, DNA would provide for more conclusive—and less messy—determinations of tribal membership.[261] 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.[262] 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."

The federal government first referenced blood quantum in treaties with individual tribes in the early nineteenth century.[263] Initially, however, blood quantum was not used to determine tribal ancestry and there was no legal significance to a blood quantum description.[264] However, in later

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[257] Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991) (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

[258] *See* COHEN, *supra* note 229, at 133.

[259] Skenandore, *supra* note 217, at 369.

[260] *See, e.g.*, Beckenhauer, *supra* note 19, at 168–70 (discussing rationales for using blood quantum requirements); Goldberg, *supra* note 19, at 458–71(discussing varying viewpoints on use of blood quanta as membership criteria); Pratt, *supra* note 19, at 1259 (discussing use of DNA to resolve dispute over inclusion of Black Seminoles into tribe).

[261] *See* Rave, *supra* note 13 (explaining that disenrolled members attempted to use DNA analysis to establish kinship and, thereby, prove eligibility for membership).

[262] Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 2–3 (2006); Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness,"* 18 WASH. U. J.L. & POL'Y 55, 87 (2005).

[263] Spruhan, *supra* note 262, at 10–11.

[264] *Id.*

treaties, blood quantum began to be used to determine eligibility for certain property or benefits under federal law, but not to determine tribal membership.[265] It was not until 1935 that blood quantum began to operate as a proxy for Indian identity under federal law.[266]

In 1934, Congress passed the Indian Reorganization Act (IRA),[267] which permitted Indian tribes to draft their own constitutions.[268] The constitutions, however, were subject to federal approval.[269] Consequently, the IRA compelled many tribes to adopt blood quantum tests in order to receive federal recognition and assistance.[270] 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*.[271]

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."[272] In effect, biology became proxy for tribal affiliation at least under federal law, though not necessarily under tribal law.[273]

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."[274] As Senator Wheeler more bluntly put it in explaining why a one-half blood condition was preferable to one-quarter, "[w]hat we are trying to do is get rid of the

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[265] *Id.* at 11. In some treaties, however, the federal government did recognize persons of "mixed blood" as tribal members. *Id.* at 12.

[266] *Id.* 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. *Id.* at 45–46. For instance, in 1931 Congress passed an act that restricted membership in the Eastern Cherokee tribe 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.*

[267] Indian Reorganization Act of 1934, Pub. L. No. 383, 48 Stat. 984, 984–88 (codified as amended 25 U.S.C. §§ 461–79 (2006)).

[268] 25 U.S.C. § 476(a).

[269] *Id.*

[270] *See id.* § 479; Spruhan, *supra* note 262, at 4.

[271] 25 U.S.C. § 479 (emphasis added); *see also* Spruhan, *supra* note 262, at 47.

[272] Spruhan, *supra* note 262, at 47.

[273] *See id.*

[274] Goldberg, *supra* note 19, at 446–47 (alteration in original) (citing OFFICE OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, CIRCULAR NO. 3123 (1935), *reprinted in* 2 AM. INDIAN POLICY REVIEW COMM'N, 94TH CONG., TASK FORCE NO. 9 FINAL REPORT app. at 337 (Comm. Print 1977) [hereinafter CIRCULAR NO. 3123]).

Indian problem rather than to add to it."[275] By requiring a higher degree of Indian blood, the definition would limit those who qualified, thereby limiting those who could receive federal monies.[276] In short, the point of the DOI's definition of "Indian" was to define Indians out of existence.[277]

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 reasonably can be expected to participate in tribal relations and affairs."[278] 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.[279] Even those tribes that opted to forego tribal constitutions 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.[280]

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 Pueblo*, 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." [281] 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."[282] Rather, the DOI has "broad and possibly *nonreviewable* authority to disapprove or withhold approval of a tribal constitutional

[275] Spruhan, *supra* note 262, at 46 (quoting *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong. 263 (1934) [hereinafter Sen. Wheeler Statement] (statement of Sen. Burton K. Wheeler, Chairman, Comm. on Indian Affairs)). Senator Wheeler explained: "I do not think the government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of 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 upon 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." Sen. Wheeler Statement, *supra*.

[276] *See* Spruhan, *supra* note 262, at 46.

[277] Goldberg, *supra* note 19, at 447.

[278] *Id.* (quoting CIRCULAR NO. 3123, *supra* note 274, at 334).

[279] *See* Indian Reorganization Act of 1934, Pub. L. No. 383, 48 Stat. 984, 984–88 (codified as amended 25 U.S.C. §§ 461–79 (2006)).

[280] Goldberg, *supra* note 19, at 447.

[281] Margo S. Brownell, Note, *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 (2000–2001) (quoting Memorandum from Scott Keep, Ass't Solicitor, U.S. Dep't of the Interior, to the Chief of the Div. of Tribal Gov't Servs. 6 (Mar. 2, 1988)).

[282] *Id.*

amendment regarding membership criteria." [283] 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.[284] 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 membership, by conditioning BIA funding on BIA-determined membership requirements."[285]

Consequently, today many tribes now include some blood quantum requirement in their membership criteria.[286] In so doing, such "tribes now accept an explicitly racial conception of Indian identity for purposes of tribal membership."[287] 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."[288]

More important, by embracing blood quantum requirements, the tribes threaten to accomplish Senator Wheeler's goal: the elimination of the tribe itself.[289] 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.[290] However, by so doing, tribes risk overly restricting membership to the point that the tribe can no longer perpetuate itself.[291] 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."[292]

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[283] *Id.* (emphasis added).

[284] *Id.* (internal quotation marks omitted).

[285] *Id.*

[286] Neath, *supra* note 71, at 698.

[287] *Id.* at 690.

[288] *Id.*; *see also* Beckenhauer, *supra* note 19, at 171.

[289] *See* Beckenhauer, *supra* note 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 "merely because they depart from 'traditional' measures." Goldberg, *supra* note 19, at 438. Nevertheless, it is somewhat disconcerting to think of tribes deliberately reducing their own membership. Kelley, *supra* note 12. 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.*

[290] Neath, *supra* note 71, at 698; *see also* Beckenhauer, *supra*, note 19, at 163, 168–69.

[291] Neath, *supra* note 71, at 698; *see also* Beckenhauer, *supra* note 19, at 163.

[292] Neath, *supra* note 71, at 698; *see also* Beckenhauer, *supra* note 19, at 163.

Such concerns, however, have not fully halted a move to a more modern variation on blood quantum, i.e., the use of DNA testing.[293] DNA labs on the internet offer customers the opportunity to test for Indian heritage from the comforts of home.[294] 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.[295] Nevertheless, DNA testing is viewed by some as a final determiner of tribal and ethnic identity.[296]

Contrary to the labs' often overstated claims, however, DNA testing is not a panacea and actually raises more questions than it resolves.[297] First, the efficacy of DNA testing to determine tribal heritage is itself in dispute.[298] Such tests rely on genetic markers as an indicator of membership in a particular ethnic group.[299] 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.[300] Of course, there is some genetic variation between groups that tends to result in outward differences such as eye, skin, and hair color, or nose and eye shapes.[301] Similarly, at the genetic level there can be markers for predispositions to certain diseases or different blood type patterns[302] that can indicate genetic similarity. The problem, however, is that such variants are often scattered in the general population, meaning that any individual, regardless of ancestry, could have a similar marker simply as a result of universal variation.[303]

Further, each individual does not receive an equal proportion of genetic data from each parent or grandparent.[304] Consequently, a specific individual might not express sufficient genes to register on a DNA test even though she has a documented Indian lineage.[305] 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.[306] In other words, a negative test does not necessarily mean a

[293] Tsosie, *supra* note 262, at 86.
[294] *Id.* at 87; Beckenhauer, *supra* note 19, at 162–163, 184.
[295] Tsosie, *supra* note 262, at 87.
[296] Beckenhauer, *supra* note 19, at 162, 184.
[297] *See id.* at 163.
[298] *See generally id.*
[299] *Id.* at 175–76.
[300] *Id.* at 175.
[301] *Id.* at 175–76.
[302] There are several different blood group systems. The ABO blood group system is just one. *Id.* at 176.
[303] 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 a member of that tribe because O is a universal variant. *Id.* at 177.
[304] *Id.* at 178; *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).
[305] Beckenhauer, *supra* note 19, at 182.
[306] *Id.* at 182–83.

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 the individual descended from the opposite gender ancestor.[307] For example, a negative test relying on DNA through the mother's lineage would not account for ancestry through the father's lineage.[308]

Moreover, DNA cannot tie an individual to a specific tribe.[309] 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.[310] This means that there is no tribe-specific marker that could be used for enrollment purposes.[311] Further, most tribes do not require that members be descended entirely from tribal members.[312] Most require one-eighth to one-quarter blood quantum for membership.[313] 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.[314]

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.[315] 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.[316] In this view, the use of DNA testing would actually usurp tribal sovereignty by substituting a blood test for the tribe's membership determination.[317] These critics argue that the blood quantum rule was started by Anglo Americans—prior to the Dawes Act,[318] tribes did not indicate blood quantum as part of their membership criteria.[319] To the extent that reliance on DNA would signal an embrace of the "one drop rule,"[320] it would ultimately reduce Indian heritage to a blood marker, rather than cultural identity determined by a tribal community.[321]

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[307] Pratt, *supra* note 304, at 109 (explaining that even autosomal testing, which captures broad picture of individual DNA, could still yield false negatives).

[308] Beckenhauer, *supra* note 19, at 182; *see* Pratt, *supra* note 304, at 108–09.

[309] Beckenhauer, *supra* note 19, at 184; Pratt, *supra* note 304, at 110.

[310] *See* Beckenhauer, *supra* note 19, at 184; Pratt, *supra* note 304, at 110.

[311] *See* Beckenhauer, *supra* note 19, at 184; Pratt, *supra* note 304, at 110.

[312] Beckenhauer, *supra* note 19, at 172.

[313] *See id.* at 163, 167–72.

[314] *Id.* at 184.

[315] Beckenhauer, *supra* note 19, at 186; Tsosie, *supra* note 262, at 87–88; *see* Pratt, *supra* note 19, at 1256.

[316] Beckenhauer, *supra* note 19, at 186; *see* Tsosie, *supra* note 262, at 88.

[317] Beckenhauer, *supra* note 19, at 187–88.

[318] Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).

[319] *See* Pratt, *supra* note 19, at 1249–50, 1254–55; Tsosie, *supra* note 262, at 87–88 *see also* Beckenhauer, *supra* note 19, at 186–88.

[320] Pratt, *supra* note 19, at 1241.

[321] Beckenhauer, *supra* note 19, at 186; Tsosie, *supra* note 262, at 87–88.

Further, it is unclear whether DNA results would be workable within the legal definitions already established by federal law. For instance, many tribes trace membership to membership rolls drafted by the Dawes Commission.[322] However, the Dawes Commission did not record blood quantum of all Indians. Rather, the Dawes Commission rolls included only those persons either of Indian or of European and Indian heritage.[323] Persons of mixed African American and American Indian heritage were excluded.[324] Further, the Supreme Court has upheld entitlements to Indian tribes do not violate the Fourteenth Amendment on the ground that tribes are political entities, not ethnic groups.[325] 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, and was involved in tribal governance?[326] 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, and sovereignty. There are more than 560 federally recognized tribes,[327] each with varying traditions, cultures, social structures, and

[322] Carla D. Pratt, Loving *Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 457 & n.284 (2007).

[323] Pratt, *supra* note 19, at 1254–55.

[324] *Id.*

[325] Morton v. Mancari, 417 U.S. 535, 554 (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 553–54. *See also* Brownell, *supra* note 281, at 295–98 (discussing challenge to use of blood quantum in definition of "Indian" in hiring preference regulations).

[326] Brownell, *supra* note 281, at 307 ("The DOI 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.").

[327] *See* Kathleen A. Ward, *Before and After the White Man: Indian Women, Property, Progress, and Power*, 6 CONN. PUB. INT. L.J. 245, 254 (2007); National Tribal Justice Resource Center, Tribal Court History, http://www.tribalresourcecenter.org/tribal courts/history.asp.

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.[328] 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.

V. 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 decision making.[329] 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.

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.[330] In so

[328] Skenandore, *supra* note 217, at 363–64.

[329] *Id.*

[330] 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, 833–35 (1996); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1087 (2007); Jose Luis Jiménez, *Indians Establish Own Court System: Mainly Civil Cases Handled by a Judge*, SAN DIEGO UNION-TRIB., May 28, 2006, at N1; *see generally* Northwest

doing, these "intertribal courts of appeal" would provide a level of judicial independence in the review of membership decisions that critics charge is currently lacking under the current structure of tribal governments and court systems.[331]

Currently, whether a particular membership decision is subject to any review depends entirely on the individual tribe involved. Tribal government and court structures vary widely. Generally, most tribes are governed by a tribal council, which enacts tribal laws and establishes any tribal judiciary.[332] Although some tribes maintain separate judicial and executive branches, this is not uniformly true.[333] Fewer than half (approximately 275) of federally recognized tribes have any form of formal tribal court system.[334] Rather, in some tribes the tribal leader is also the tribal judge and there is no written code.[335]

Intertribal Court System, http://www.nics.ws. 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. *See* Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309 (1994) (discussing Southwest Intertribal Court of Appeals); Jiménez, *supra*; Intertribal Court of Southern California, http://www.icsc.us. 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. Jiménez, *supra*. 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." Intertribal Court of Southern California, Tribal Court, http://www.icsc.us/Tribal%20Court.html.

[331] Struve, *supra* note 228, at 180 (citing AM. INDIAN LAW CTR., INC., SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES FINAL REPORT app. D at 44 (2000)); *see also* Zuni, *supra* note 330, at 309.

[332] Charles Wilkinson, *"Peoples Distinct From Others": The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 392 (2006).

[333] 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).

[334] National Tribal Justice Resource Center, *supra* note 327; David Selden & Monica Martens, *Basic Indian Law Research Tips—Part II: Tribal Law*, COLO. LAW., Aug. 2005, at 115, 116. 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 appellate 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.

[335] Atwood, *supra* note 333, at 592.

Even among those tribes that do have a formal court system, there is little to no uniformity among those courts.[336] While some tribes have trial and appellate courts, others do not and may have only one level of judicial decision making.[337] In such tribes, the tribal court system may not provide for any review process.[338] Indeed, in many tribes there is no judicial body with any oversight over membership decisions, an omission that essentially makes the enrollment committee's decision unreviewable.[339] In other tribes, the tribal council may be entrusted with reviewing tribal court decisions.[340] 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.[341] 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.[342]

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*, Justice White highlighted this conflict by noting that "both [the] legislative and judicial powers are vested in the same body, the Pueblo Council."[343] For White, "[t]o 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."[344] 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.[345] Thus, they contend that federal courts must step in to provide meaningful review.[346]

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[336] Minzner, *supra* note 333, at 103–13.

[337] Atwood, *supra* note 333, at 592.

[338] *Id.*

[339] *See, e.g.*, Rave, *supra* note 13 (describing ousted members' attempts to appeal a membership decision that would be heard by the same political body that had ousted them from tribe).

[340] Atwood, *supra* note 333, at 592.

[341] *See* Lewis v. Norton, 424 F.3d 959, 962 (9th Cir. 2005).

[342] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 82 (1978) (White, J., dissenting).

[343] *Id.*

[344] *Id.*

[345] *See* Arviso v. Norton, 129 F. App'x 391, 392 (9th Cir. 2005); *Lewis*, 424 F.3d at 962. Decisions by tribal courts do not necessarily show tribal courts are unable to reach independent decisions. For example, 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, the majority (twenty-four) were remanded—suggesting at least that the court did not adhere to a knee-jerk reaction to affirm

An intertribal appellate court system would provide these plaintiffs with such a forum, but one operated by the tribes rather than an outside government.[347] 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.[348]

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.[349] 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.[350] 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.[351] 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

tribal membership decisions. *See* Analysis of Cases Decided by the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon between 2001 and 2003 (copy on file with author). This suggestion is further supported by the standard of review, which, under the Tribal Court Code of the Confederated Tribes, requires remand only if the membership decision is found to be "arbitrary and capricious." *See* CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, TRIBAL CODE § 4.10(d)(4)(H) (2003), *available at* http://www.tribalresourcecenter.org/ccfolder/gr410enroll.htm.

[346] *See Arviso*, 129 F. App'x at 392; *Lewis*, 424 F.3d at 962.

[347] *See, e.g.*, Zuni, *supra* note 330, at 309.

[348] *See id;,* Minzner, *supra* note 333, at 109; SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 6 (1978); *see also* Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 522 (2004); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 343 (rev. 4th ed. 2003) (describing the "growing trend in Indian country favoring greater separation of powers").

[349] *See* Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (citing Oliphant v. Suquamish Tribe, 435 U.S. 191, 210 (1978)); Elizabeth Ann Kronk, *Promoting Tribal Self-Determination in a Post-*Oliphant *World: An Alternative Road Map*, FED. LAW., Mar.–Apr. 2007, at 41, 45–46. At least one scholar has pointed out that 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, 280 (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.").

[350] Indian Civil Rights Act Amendments of 1989, S. 517, 101st Cong. (1989); Clinton, *supra* note 245, at 881–83; Rave, *supra* note 15.

[351] Rave, *supra* note 15.

of tribal enrollment decisions.[352] Consequently, the main complaint against tribal sovereignty over membership decisions would be silenced.[353]

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, Congress's intent in passing ICRA was to secure individual rights of tribal members against overreaching by tribal government.[354] To the extent membership decisions are viewed as running afoul of individual rights, the risk of congressional intervention 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.[355] 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.[356] 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.[357] More simply, tribal members may wish to relax membership criteria to ensure that gaming revenues pass onto their own offspring and descendants.[358]

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.[359] This is particularly true given the reality that many Indians marry outside their tribe, making it increasingly unlikely that even "half blood" Indians will remain a significant percentage of tribal populations.[360] Thus, tribes face competing priorities—protecting

[352] *See, e.g.*, Minzner, *supra* note 333, at 109 & n.118; BRAKEL, *supra* note 348, at 108–09; *see also* CLINTON ET AL., *supra* note 348, at 343; Washburn & Thompson, *supra* note 348, at 522.

[353] *See generally* Zuni, *supra* note 330.

[354] *See* discussion *supra* notes 206–14 and accompanying text; Wolpin, *supra* note 206, at 1080.

[355] *See* Goldberg, *supra* note 19, at 453; Neath, *supra* note 71, at 698.

[356] *See* Goldberg, *supra* note 19, at 453; Neath, *supra* note 71, at 698.

[357] Goldberg, *supra* note 19, at 453.

[358] *Id.*

[359] Neath, *supra* note 71, at 698.

[360] *See* Goldberg, *supra* note 19, at 453; Neath, *supra* note 71, at 698.

resources and revenues for current members without so narrowly defining membership that they kill off the tribe itself.[361] 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.[362] Doing so would ensure that such decision-making stays in tribal hands by addressing the main concern of those rallying for change—the lack of independent decision makers. 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.[363]

Indeed, the creation of an intertribal appellate court system would not require a change to any existing tribal government or court structure.[364] Instead, it would provide an external layer of review in addition to whatever court system the tribe currently possessed.[365] In fact, the structure of the court would be in tribal hands, ensuring continued tribal autonomy and sovereignty over its courts and membership decision making process.[366] Further, decisions would be based on tribal law, tribal culture, and traditions.[367] This would be possible because such a court system would be created, staffed, and operated by the tribes themselves.[368] Consequently, such a court system would have a level of cultural awareness lacking in federal court adjudications of claims involving membership disputes.[369]

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

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[361] *See* Goldberg, *supra* note 19, at 453; Neath, *supra* note 71, at 698.

[362] *See generally* Struve, *supra* note 228.

[363] *See* Zuni, *supra* note 330, at 309–11 (discussing the structure of and tribal membership in the Southwest Intertribal Court of Appeals).

[364] *See generally id.*

[365] *See id.* at 310.

[366] *See id.* at 309–11.

[367] *See id.* at 312.

[368] *See id.*

[369] *But see* Cooter & Fikentscher, *supra* note 55, at 49 n.75. There, the authors suggest that reliance on tribal law, culture, and traditions would hamper intertribal appellate panels because such panels would be required to learn about the law, culture, and tradition of the particular tribe implicated in an appeal through testimony of various tribal leaders. *Id.* However, the same would also be true of any federal court reviewing tribal court decisions. The only solution to avoid the necessity of such testimony would be the complete abrogation of tribal authority over membership decisions, which would thereby make tribal law irrelevant to such decisions. That solution is not acceptable for the reasons discussed above. *See supra* Part IV.A; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("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.").

values rather than outsider values being imposed on them.[370] However, any 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.[371] Indeed, given the diversity between 564 tribes, it is nearly impossible for there to be one federal solution, particularly given the competing interests in enrollment decisions.[372] A court system designed by the tribes could account for this diversity by organizing it so that tribes with similar histories or cultures are 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 if federal courts were 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 decision making. 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.

VI. 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*. 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 less damaging to tribal sovereignty to craft a solution

[370] *See* Skenandore, *supra* note 217, at 367 (noting that tribal authority to define membership includes authority to alter membership criteria and that nonmembers "are not in a position to judge the validity of tribal customs and traditions," but rather they lie 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 anything, it means the ability of tribes to talk about very serious issues and to choose from the array of choices which are available").

[371] *See* Riley, *supra* note 330, at 1087.

[372] *See* Ward, *supra* note 327, at 254; Indian Affairs, U.S. Dep't of Interior, *supra* note 55.

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.