Washington and Lee Journal of Civil Rights and Social Justice

Volume 4 | Issue 1 Article 3

Spring 4-1-1998

ANCESTRY AND CASINO DOLLARS IN THE FORMATION OF TRIBAL IDENTITY

Eric Henderson

ANCESTRY AND CASINO DOLLARS IN THE FORMATION OF TRIBAL IDENTITY

Eric Henderson*

Table of Contents

I. INTRODUCTION

The indigenous peoples of the United States are enmeshed in a complex and unique web of socio-economic and jural-political relations. They are, collectively, an "ethnic" group or class known as American Indians recognized in American law.[1] This generic categorization, however, is less conspicuous than the distinct tribal identities of indigenous peoples. Unlike other ethnic "groups," recognized Indian tribes maintain a distinct political relationship with the federal government.[2] Certain tribal entities however, are not recognized at all.[3] The tribal entities that are recognized by the federal government are governed, at least in part, by numerous specific federal statutes and rules.

To some degree an individual's "ethnic identity" involves attributes of both self-identification and ascription by others.[4] Historically, one's ancestry or race has

*Eric Henderson teaches anthropology and criminal justice at Great Basin College (Elko, Nevado). He holds Ph.D. (anthropology) and J. D. degrees, both from the University of Arizona, and clerked for Justice Stanley Feldman of the Arizona Supreme Court and Judge Joseph Livermore of the Arizona Court of Appeals. I would like to thank Dr. Thomas Hill for his comments on an earlier draft of this paper and Elizabeth Garcia for her dedicated and patient editing.

[1] *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 613 (1987) (the Court held that the legislative history of 42 U.S.C. ß 1981 indicated that "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").

[2] *Worcester v. Georgia,* 31 U.S. 515 (1832). (holding that statute to prevent the exercise of assumed and arbitrary power by persons under pretext of authority from the Cherokee Indians, and providing for imprisonment of persons who should reside among such Indians within the Cherokee Nation without first obtaining authority to do so from the governor of the state, is a nullity, because the Cherokee Nation within the state of Georgia, having been recognized by the laws and treaties of the United States as subject to the control and dominion of the Cherokee Nation of Indians, is not within the territorial jurisdiction of Georgia).

[3] American Indian Policy Review Commission, Final Report, vol. I 461-84 (1977); See generally, Sharon O'Brien, Tribes and Indians: *With Whom Does the United States Maintain a Relationship?* 66 Notre Dame L. Rev. 1461, 1472-76 (1991).

[4] *Saint Francis College,* 481 U.S. at 610 n.4 ("some, but not all, scientists . . . conclude that racial classifications are for the most part socio-political").

had a central role in the American social norms of ethnic ascription.[5] In addition, other factors such as community of residence, appearance, language, religion, and culture may also be important.[6] For an American Indian the social norms of the wider society are interwoven with specific tribal norms and laws governing affiliation with the tribal polity. This is apparent because "[e]ach tribe, recognized as a distinct political community, has the power to determine its own tribal membership."[7]

Theoretically, one may become a member of a tribe without having any tribal or even Indian ancestry as the Cherokee intermarriage and freedmen cases show[8]. Conversely, all of one's ancestors may have been tribal members and yet one may not qualify for tribal membership.[9] In most situations, individuals fall between these theoretical poles. Many individuals have several ancestors who were members of a particular tribe, while other ancestors were members of a different tribe or were non-Indian. These individuals may self-identify themselves as Indians or view themselves as members of a specific tribe,[10] but whether they are members of a particular federally recognized tribe is a separate question.[11] Thus, individual self-identification as an Indian may not suffice to qualify as an Indian, at least for tribal purposes[12] despite meeting federal criteria for "Indian-ness" under one or more statutes.[13]

Historically there has been a sort of semi-permeable barrier through which some individuals' identities shift among the categories of tribal member,[14] "Indian" and non-Indian. The shifts may occur and reoccur throughout the lives of some individuals and depend upon specific situational contexts.[15] Perhaps most individuals retain a specified and seemingly unalterable identity throughout life, but the number of individuals whose status entails ambiguity is substantial.[16]

Racial ascription, of course, has long been an important element in American social relations.[17] On occasion, the concept of race has intruded into American legal

---

[5] Eric Wolf, *Europe and The People Without History,* 380-381 (1982), (distinguishes between racial and ethnic distinctions. He views the former as imposed as a result of the subjugation of populations in the course of European mercantile expansion. Ethnic categories, on the other hand, express the ways particular populations come to relate themselves to given segments of the labor market in capitalist systems.) *See also,* Carol Mukhopadhyay and Yolanda Moses, *Reestablishing Race in Anthropological Discourse,* American Anthropologist 99:517-533 (1997); *But see,* S.O.Y. Keita and Rick Kittles, *The Persistence of Racial Thinking and the Myth of Racial Divergence,* American Anthropologist 99:534-44 (1997).

[6] Pauline Strong and Barrik Van Winkle, *Indian Blood: Reflections on the Reckoning and Refiguring of Native North American Identity,* Cultural Anthropology 11:547-576, (1996) (discussing contemporary Washoe identity); *See also,* Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity,* American Sociological Review 60:947-965 (1995).

[7] Felix S. Cohen, *Handbook of Federal Indian Law,* at 248 (1982) [hereinafter Cohen]; citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) (discussed, infra, part IIA); *See also* the Cherokee Intermarriage Cases, 203 U.S. 76 (1906) (discussed, infra, at part IV-A); *But see Roff v. Burney,* 168 U.S. 218 (1897). The Supreme Court noted in *Morton v. Mancari,* 417 U.S. 535, 553 (1974), that "employment preferences as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the Bureau of Indian Affairs in a unique fashion. The preference is reasonably and directly related to a legitimate, nonracially based goal."

[8] *See* discussion, infra part IV A.

[9] *See* discussion of Herreras at Zia, infra part IV B and *Poodry v. Tonawanda Band of Seneca Indians,* 117 S.Ct. 610 (1996); discussed infra part III B.

[10] The United States census currently relies on self-identification in enumerating the Indian population and tribal affiliation. C. Matthew Snipp, *American Indians: The First of This Land,* at 36-37 (1989).

[11] This was asserted by the Supreme Court in *Morton v. Mancari,* 417 U.S. at 553 n. 24, (limiting the employment preference to members of recognized tribes operates to exclude many individuals who are racially to be classified as Indians).

[12] "The basic concept of retaining tribal relations, . . . continues to be manifested in the notion that an essential element of Indian status is a relationship with an Indian tribe." Cohen, *supra* note 7 at 23. Cohen notes that Congress has occasionally specified the scheme of tribal membership or delegated that authority to the Secretary. *Id.* at 248.

[13] Cohen, *supra* note 7, at 23. (There is no single statute that defines Indian for all federal purposes).

[14] This may include meeting the criteria of membership in more than one tribe.

[15] On ethnic boundaries generally, *See* Frederik Barth, *Ethnic Groups and Boundaries,* (1969); *See also* Nagel, *supra* note 6, at 948-51, (discussing the process among American Indians). *But see* William Unrau, *Mixed-Bloods and Tribal Dissolution: Charles Curtis and The Quest For Indian Identity,* (1989) (biography of Vice-President Curtis provides a case study of one person's shifting identity).

[16] Nagel, *supra* note 6 at 950-53, notes that the 1960 Census Bureau decision to rely on self-identification led to increases in the Indian population that cannot be accounted for by natural increase. She describes these new Indians as frequently intermarried, English-speaking urban residents of states with historically small Indian populations. Snipp, *supra* note 10 at 57, believes many of these people formerly passed unrecognized into white society.

[17] Mukhopadhyay and Moses, *supra* note 5.

decisions regarding tribal membership.[18] Tribal membership criteria usually includes some showing of tribal ancestry and nearly all tribes specify some "quantity" of tribal or Indian heritage, usually designated as a threshold blood quantum.[19] Despite the criteria utilized to determine tribal membership, a blood quantum threshold, most tribes incorporate notions of race into membership requirements. The connotations of blood quantum are myriad and problematic.[20] Individuals who may be full blood Indians may not meet tribal membership criteria for other reasons.[21] On the other hand, individuals who have only a single remote tribal ancestor and who have never participated in tribal culture may be enrolled as a tribal member.

For reasons embedded in the history of relations between indigenous Americans and non-Indian populations, intermarriage has been extensive.[22] As a result, many people of mixed Indian and non-Indian ancestry have ethnic identity options. This is part of the social and political milieu into which Indian gaming was introduced.

Indian gaming has also been incorporated into a legal domain, federal Indian law, which lacks coherency. Some of the fundamental premises of federal Indian law are contradictory. Many judicial decisions stress the elements of sovereignty that inhere to the tribal polity. At times, there has been some deference to tribal sovereignty generally. On the other hand, numerous other decisions bow to the plenary power of Congress to set Indian policy. Congress has sought to dissolve tribal polities and to submerge individual tribal members in the wider American political economy. Federal policy has also treated various legal domains differently regardless of general trends in policy. In some domains tribal sovereignty has been severely delineated, while in others[23] policy has placed fewer restrictions on tribal autonomy.

Criminal jurisdiction is an example of a legal domain in which restrictive views of sovereignty has prevailed.[24] Federal courts have continued to take a restrictive view of sovereignty in matters of criminal jurisdiction.[25] When the federal courts have recognized a relatively wider sphere of tribal jurisdiction, as in *Ex Parte Crow Dog,*[26]

---

[18] *See United States v. Candelaria,* 271 U.S. 432, 441 (1926) (holding that "Pueblo are Indians in race"); *United States v. Rogers,* 45 U.S. 567, 573 (1846) (intermarried white person considered a citizen of the Cherokee Nation under Cherokee law, remains subject to federal criminal jurisdiction under the Trade and Intercourse Act because the statute does not speak of members of a tribe but of the race generally); But see *Nofire v. United States,* 164 U.S. 657 (1896) (which without reference to Rogers, seems antithetical to it). In *Nofire,* full-blooded Cherokee Indians were convicted in federal court for killing Fred Rutherford. Rutherford, "although a white man . . . had been adopted into the Cherokee Nation." The Supreme Court reversed the convictions because jurisdiction over the offence was "vested in the courts of that [the Cherokee] Nation." *Id.* at 662.

[19] Snipp, *supra* note 10 at 362-65 provides an incomplete list of federally recognized tribes and their blood quantum requirements for membership. There may be some errors in the listing (e.g., the Ute: Untahi [sic] Ouray are reported as requiring 1/16 as the threshold blood quantum, but see discussion of Chapoose in part IV C, *infra*). Only 18 of the 163 tribes require more than 1/4 blood and 33 tribes require less. Thus, over two-thirds (69%) of this sample set the same ancestry threshold common to a number of federal entitlements. *Id.* at 34.

[20] *Id.* at 32-35; See Strong and Van Winkle, *supra* note 6.

[21] Such a situation can be illustrated by considering the operation of the unilineal descent rule, such as that present in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), discussed, *infra,* part IIA. For example, using the patrilineal rule implemented in *Santa Clara,* if a woman from a polity were to marry a man from a polity following a matrilineal rule such as some Iroquois tribes, then the children would be considered a full Indian in ancestry but would not be eligible for enrollment in either tribe. By contrast, if the Santa Clara woman's brother married the Iroquois man's sister, the children of that couple would be eligible for enrollment in either tribe. Thus, some people with identical grandparents could be tribal members while others would not qualify.

[23] John Moore and Janis Campbell, *Blood Quantum and Ethnic Intermarriage in the Boas Data Set,* Human Biology 67(3):499-516 (1995); A.J. Jaffe, *The First Immigrants From Asia: A Population History of The Indians of North America,* 169-178 (1992). Indians marry members of other groups (especially whites) far more frequently than do members other minority groups. Snipp, *supra* note 10 at 156-61; Nagel, *supra* note 6 at 952-53.

[23] *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). *See* infra, part II-A.

[24] Evidence of this restrictive approach can be found in the earliest treaties and Congressional acts. The first treaty between the United States and an Indian Nation, the 1778 Treaty with the Delaware Indians provided that offenses committed by citizens of one nation against those of any other would be tried by judges or juries of both parties. Congress, however asserted criminal jurisdiction over U.S. citizens and inhabitants who committed crimes against Indians in Indian territory by the terms of the first Trade and Intercourse Act. 1 Stat. 137, chapter XXXIII, section 5 (1790).

[25] *See U.S. v. Rogers,* 44 U.S. 567 (1846); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978); *Duro v. Reina* 495 U.S. 676 (1990).

[26] 109 U.S. 556 (1883). Crow Dog, a Sioux Indian, killed Spotted Tail, also a Sioux. The Court held that the Sioux had retained exclusive criminal jurisdiction over crimes in which both the victim and the defendant were tribal members because no treaty or act of Congress had limited Sioux sovereignty in this domain.

Congress has often responded by narrowing the scope of tribal power.[27]

This paper explores some implications of a recently enacted expression of federal policy, the Indian Gaming Regulatory Act ("IGRA"),[28] for the relationship between tribal polities and their constituent members. When a federal policy is designed to diminish the sphere of tribal sovereignty and to confer a purported economic benefit on a tribe or its members, federal scrutiny of tribal membership criteria is heightened. With this greater scrutiny, federal intervention into this crucial arena of tribal sovereignty is more likely. As Indians challenge tribal actions related to IGRA, some courts have avoided the clear import of the *Martinez* decision.[29] Rather, many courts seek threads in the law to connect an individual's right to benefit from tribal assets with the collective rights[30] of the tribal sovereign to determine membership in the tribal polity. Such decisions reflect the difficulties of a "liberal"[31] American jurisprudence in weighing both individual and collective rights.[32] These decisions also reflect an enduring controversy concerning the establishment of Indian self-identity in the United States.[33] Such decisions, read by an unsympathetic Congress, potentially predict new incursions into the domain of tribal sovereignty and to a certain extent tribal membership criteria, which has historically been given strong protection.

There are connections among a number of factors influencing Congress to enter the domain of tribal membership rules. These factors include: popular[34] views of Indian identity that may reflect notions of the republican[35] Congress; individuals' self-identification as tribal members; the nature and extent of the economic benefit accruing to the tribe; how benefits are enjoyed by members of the tribal polity; the history of each tribes relationship with the federal government; and the surrounding non-Indian population.

Part II of this paper provides an overview of the IGRA and briefly discusses the way in which enactment of the IGRA may subvert sovereignty. Part III focuses on several recent disputes concerning tribal membership which invoke IGRA as well as a few other membership disputes with no apparent connection to IGRA. Part IV presents case studies of three earlier tribal membership controversies. These cases illustrate the nexus of tribal membership and identity, economic benefits, and federal policy. The cases allow for a comparative and historical understanding of contemporary, IGRA related membership controversies.

II. THE INDIAN GAMING REGULATORY ACT, TRIBAL SOVEREIGNTY AND TRIBAL MEMBERSHIP

The Indian Gaming Regulatory Act (IGRA)[36] was enacted by Congress in 1988 following more than a decade of controversy between tribes and states over the ability of states to constrain on-reservation economic enterprises. Congress, finding federal policy was to promote tribal economic development, tribal self-sufficiency, and strong tribal government,[37] passed the Act expressly to provide a statutory basis for achieving these goals[38] through regulated gaming activities.

---

[27] Congress passed the Major Crimes Act, 18 U.S.C. 1153 in 1885 to limit the holding in *Ex Parte Crow Dog.* Cohen, supra note 7, at 300. Even though Congress expanded tribal jurisdiction to a degree in the wake of *Duro,* it did not fully recognize tribal authority over all persons within the territory of the tribal polity. Rather, it crafted a limited, seemingly racially based, expansion of tribal jurisdiction to Indians who were not members of the tribal polity. *See generally,* Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions,* 66 S. Cal. L. Rev. 767 (1993).

[28] 25 U.S.C. §§ 2701-21. (1988).

[29] These cases include *Maxam* and *Ross,* discussed *infra* at 21-24 n. 104-125. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49,72 (1978) held that tribal membership determinations were generally an area of tribal discretion because the "right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."

[30] Discussions of the relationship of individual and collective rights can be found in Lawrence Rosen, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory,* 107 Yale L. J. 227 (1997) and Richard Thompson, *Ethnic Minorities and the Case for Collective Rights,* 99 American Anthropologist 786 (1997).

[31] Liberal is used here in a broad sense as a political philosophy espoused by such theorists as Locke, J. S. Mill, and Rawls. *See* Rosen, *supra* note 30 at 233. *See also* Louis Hartz, *The Liberal Tradition In America* (1955). Thompson, *supra* note 30 at 787 asserts that Liberals are fundamentally concerned with individual and not group rights.

[32] Thompson, *supra* note 31 at 788, argues that collective rights neither trump, supplant or justify abuses of individual rights. They are rights *in addition to* individual rights that speak to certain group relationships (original emphasis).

[33] Rosen, *supra* note 30 at 229-231 discusses, with special reference to American Indians, the ambivalence that citizens of many nations feel toward the indigenous people living within their borders.

[34] *See generally* Robert Berkhofer, *The White Man's Indian Images of the American Indian From Columbus to the Present* (1978); Rayna Green, *The Indian in Popular American Culture,* IN Handbook of the North American Indians, Vol. 4: History of Indian-White Relations (587-606) (1988).

[35] Republican is used here in Madison's sense in Federalist Paper #10. Clinton Rossiter (ed.), The Federalist Papers (1961).

[36] 25 U.S.C. §§ 2701-21 (1988).

[37] 25 U.S.C. § 2701(4) (1988).

[38] 25 U.S.C. § 2702(1) (1988).

A. Background on the Indian Gaming Regulatory Act

In the 1970s, some tribes sought to generate revenue through the sale of tobacco products. All on-reservation tobacco sales were exempt from state taxation.[39] As a result, tribal smoke-shops held a competitive advantage over nonIndian sellers.[40] The United States Supreme Court curtailed the benefits from this revenue source when it ruled that Indians had no right to the "artificial" advantage of the jurisdictional tax differential.[41] Following this set-back, several tribes began to promote high stakes bingo as a modern revenue source.[42] Jurisdictional disputes with surrounding states developed with regard to the regulation of this new economic enterprise. One such dispute involved California's attempt to hinder tribal bingo operations within its borders.

In *California v. Cabazon Band of Mission Indians,*[43] the Supreme Court held that state regulation of a tribe's bingo business would impermissibly infringe upon tribal government.[44] Because California had adopted a public policy that did not prohibit gambling generally,[45] the *Cabazon* court further held that the state could not regulate gaming that was taking place on reservation lands.[46] The court opined that the economic development represented by the gaming enterprise was an integral component of tribal self-determination.[47]

Many state governments expressed concern over the outcome of the *Cabazon* case.[48] Although legislation was considered by Congress prior to the *Cabazon* decision,[49] the outcome hastened the enactment of the IGRA within a year. Congress echoed the *Cabazon* Court's view that gaming was "a means of promoting tribal economic development which was necessary to strengthen tribal governments."[50] Notwithstanding the policy objectives of IGRA, Congress also crafted provisions that restricted the sphere of tribal sovereignty in pursuing those goals.[51]

The statutory scheme of the IGRA creates three classes of gaming and apportions jurisdiction over the classes among different entities. Class I gaming is within the Indian tribes' exclusive jurisdiction[52] and consists of social games for prizes of minimal value. Traditional forms of Indian gaming such as tribal ceremonies or celebrations are also classified as Class I.[53] Class II gaming consists of bingo and certain types of card games.[54] Jurisdiction over Class II gaming is primarily tribal,[55] but must comply with IGRA's mandates and receive approval from the National Indian Gaming Commission (NIGC).[56] The NIGC is funded, in part, through fees imposed on each class II gaming activity.[57] The NIGC consists of a three members[58] and has authority to approve tribal gaming ordinances[59] and management contracts,[60] monitor

---

[39] *See Washington v. Confederated Colville Tribes,* 447 U.S. 134, 150 (1980).

[40] *Id.*

[41] *Confederated Colville Tribes,* 447 U.S. at 151 (holding that the state could collect taxes from nonIndian cigarette purchasers on reservations because the burden on the reservation merchant in collecting the tax was "minimal."); *See Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 483 (1976). *See also* Cohen, supra note 7 at 41316.

[42] In 1979, the Seminole's began using bingo to generate revenue. The New York Oneida Tribe began its bingo operation at about the same time. Amendments to the Indian Gaming Regulatory Act: Hearings on S. 2230 Before the Select Comm. on Indian Affairs, 103d Cong. 260 (1994). *See generally* Eduardo E. Cordeiro, *The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations, in What Can Tribes Do,?* Strategies and Institutions in American Indian Economic Development 205-11 (1992). The New York Oneida Tribe began its bingo operation at about the same time. Amendments to the Indian Gaming Regulatory Act: Hearings on S. 2230 Before the Select Comm. on Indian Affairs, 103d Cong. 260 (1994).

[43] 480 U.S. 202 (1987).

[44] *Id.* at 222.

[45] California encouraged gambling in several forms. *Id.* at 211.

[46] *Id.*

[47] *Id.* at 219.

[48] *See* Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and TribalState Compacts Under the Indian Gaming Regulatory Act,* 29 Ariz. St. L. J. 25, 47 (1997).

[49] Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida,* 29 Ariz. St. L. J. 121, 129 (1997). *See also* US Code Congressional and Administrative News, 100th Congress, 2d Session, vol. 5 at 3073-74 (1988) (Senate Report No. 100-446).

[50] 25 U.S.C. § 2702(1) (1988).

[51] *See infra,* part II-B. See also, Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations, in What Can Tribes Do,?* (1992) (stressing the importance of tribal sovereignty as a prerequisite for successful economic development).

[52] 25 U.S.C. § 2710(a)(1) (1988).

[53] 25 U.S.C. § 2703(6) (1988).

[54] 25 U.S.C. § 2703(7) (1988).

[55] 25 U.S.C. § 2710(a)(2) (1988).

[56] 25 U.S.C. §§ 2710(b), (c) 2704-2706, 2711-2716 (1988).

[57] 25 U.S.C. § 2717 (1988).

[58] 25 U.S.C. § 2704(b) (1988).

[59] 25 U.S.C. §§ 2710(b)-(c), 1712(b) (1988).

[60] 25 U.S.C. §§ 2711, 1712(c) (1988).

and investigate gaming practices,[61] and to levy fines for violations of the Act.[62] Class III gaming[63] is a residual category which includes all forms of gaming falling outside of Class I or Class II gaming, and is usually equated with casino gaming. Class III gaming involves regulation, pursuant to a compact, by both the tribe and the state within which the tribe is located.[64] The Secretary of the Interior has the authority to approve or, under certain conditions, reject the compact.[65] The Act also contains a severability clause.[66]

Indian gaming has expanded enormously since the passage of IGRA. In 1987 there were 108 gaming facilities on Indian land that mostly consisted of bingo enterprises.[67] By 1997, however, slightly over 40% of the 328 federally recognized tribes had entered into tribal-state compacts to conduct Class III gaming.[68] In many states every federally recognized tribe has a Class III compact.[69] In other states there are no compacts.[70] Some states with numerous federally recognized tribes, notably California, Nevada and Oklahoma have entered into compacts with only a few tribes. California's governor and attorney general have been particularly hostile to Indian gaming interests.[71] Several tribes have also rejected gaming proposals in electoral referenda.[72]

---

[61] 25 U.S.C. §§ 2706, 2715 (1988).

[62] 25 U.S.C. §§ 2706(a), 2713 (1988).

[63] 25 U.S.C. § 2703(8) (1988).

[64] 25 U.S.C. § 2710(d)(3) (1988).

[65] 25 U.S.C. § 2710 (d)(8) (1988).

[66] 25 U.S.C. § 2721 (1988). See Skibine supra note 49 at 132-42, for a discussion of the severability issues in the wake of the holding in *Seminole Tribe v. Florida,* 116 S. Ct. 114 (1996).

[67] Prepared statement of Ross Swimmer, Assistant Secretary for Indian Affairs, in Hearing before The Committee on Interior and Insular Affairs, House Of Representatives, 100th Congress, First Session on H.R. 964 (to provide for the regulation of gaming on Indian lands, and for other purposes); H.R. 2507 (to establish federal standards and regulations for the conduct of gaming activities on Indian reservations and lands, and for other purposes).

[68] The 328 federally recognized tribes are listed in 62 Fed. Reg. 55270, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs (October 23, 1997). The Indian Gaming Management Staff of the BIA maintains a listing of tribal state compacts at http://www.doi.gov/bia/foia/compact.htm. As of September 2, 1997 there were 171 compacts listed. The list notes that 24 states had entered into compacts with 146 tribes. Unambiguous precision is difficult for several reasons. (1) In some states there is more than a single compact with a single tribe. For example, in Minnesota each tribe has one compact for video games of chance and a separate compact for blackjack. (2) In some cases, separate reservations that are components of a single federally recognized tribe have separate compacts with the state. Thus, the Barona Group and the Viejas Group, both of the Capitan Grande Band of Digueno Mission Indians of California, have separate compacts with the state. Each of the six component reservations of the Minnesota Chippewa Tribe has a separate compact with Minnesota. (3) Several tribes have entered into compacts with more than a single state. For example, the Fort Mojave Tribe, with territory in three states, has compacts with both Arizona and Nevada but not California and two tribes the Sisseton-Wahpeton Sioux and the Standing Rock Sioux) have compacts with both South Dakota and North Dakota. (4) Some compacts that have been approved by the BIA have been challenged and may not be legally valid. A prime example of this situation is Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir.) *cert. denied,* 118 S.Ct. 45 (1997) (holding that compacts between the state of New Mexico and various tribes were invalid because the governor lacked the authority to sign the compacts). The New Mexico legislature subsequently enacted a statute that conferred authority on the governor to enter into compacts but specified certain provisions that were to be included in such compacts. Mescalero Apache Tribe v. New Mexico, [1997 U.S.App. Lexis 34495]. Various tribes have since renegotiated compacts with the state. The Secretary has allowed the compacts to go into effect without his approval because of concerns over two of the provisions dictated by state law. *See also* 62 Fed Reg. 59878 (notice of tribal-state compacts between New Mexico and the Picuris, Santa Ana, Jicarilla and Nambe tribes); 62 Fed Reg. 53650 (notice of San Juan - New Mexico Compact).

[69] Kansas, Minnesota, North Dakota, Oregon, South Dakota and Wisconsin are the states with more than two tribes in which all tribes have entered into tribal-state compacts. There are two tribes in both Colorado and Connecticut and each of these tribes has a compact. In Mississippi, North Carolina and Rhode Island the only recognized tribe within the state has a compact. Iowa has a compact with the Meskwaki as well as with two Nebraska tribes, the Omaha and the Winnebago operating casinos along the Missouri River.

[70] In six states where there is at least one federally recognized tribe, there are no tribal compacts: Alabama, Florida, Maine, Texas, Utah and Wyoming. Only two states, Utah and Hawaii, completely prohibit gambling. Tsosie, supra note 48 at 47 n.125. Hence, none of the five Utah tribes conducts class II or III gaming. Florida's refusal to negotiate compacts is well documented. *Seminole Tribe v. Florida,* 116 S.Ct. 1114 (1996). The Passamaquoddy were precluded from compelling the state to enter into Class III compacts by the terms of the Maine Indian Claims Settlement Act. *See Passamaquoddy Tribe v. Maine,* 75 F.3d 784 (1st Cir. 1996).

[71] Eric Henderson, *Indian Gaming: Social Consequences,* 29 Ariz. St. L.J. 205, 248 (1997). There are about 100 federally recognized tribes in California, but California has entered into only five state-tribal compacts. Nearly 60% of tribes outside of California have tribal-state gaming compacts.

[72] These include the Navajo, Hopi and Seneca. Henderson, *supra* note 71 at 239.

B. Restraints on Tribal Sovereignty Under IGRA

Although IGRA has established a framework that promotes the statutory goal of "economic development," its impact on strengthening tribal government is less clear. Most tribes initially opposed the passage of IGRA.[73] This opposition was based primarily of the "compact" provisions[74] which gives states considerable influence over gaming on Indian lands.[75]

While self-determination has been the explicit theme of federal Indian policy during the last third of the twentieth century,[76] a paternalistic limitation on self-determination is embedded in IGRA's limitations on the use of Class II gaming revenues. A tribal ordinance that authorizes Class II gaming must provide that net revenues from any tribal gaming are not to be used for purposes other than to:

(i) fund tribal government operations or programs;

(ii) provide for the general welfare of the Indian tribe and its members;

(iii) promote tribal economic development;

(iv) donate to charitable organizations; or

(v) help fund operations of local government agencies.[77]

Furthermore, per capita distribution of any of these revenues can only occur following approval of the plan by the Secretary of Interior.[78] These provisions grant federal officials significant influence over the way tribes allocate Class II gaming proceeds and, consequently, allow federal officials to influence, if not dictate, the terms by which tribal governments relate to tribal members.

The tripartite classification of gaming and apportionment of jurisdiction also can potentially diminish tribal sovereignty. State governments, through the Class III compact process, have a direct impact on the contours of a tribe's gaming enterprises.[79] Such impacts may have implications for how a tribe approaches membership issues. In Arizona, for example, the standard form of gaming compacts authorizes a specified number of gaming facility locations based on the tribe's number of enrolled members.[80] Thus, IGRA provides a state with influence in a domain historically within the sphere of tribal sovereignty and protected from state interference.

III. IGRA AND THE LAW OF TRIBAL MEMBERSHIP

The leading case affirming the right of tribes to determine membership criteria, *Santa Clara Pueblo v. Martinez,*[81] centered on the importance of tribal sovereignty in vindicating Puebloan cultural values.[82] Commentators sympathetic to both the collective rights inherent in tribal sovereignty and liberal values of equal protection have described the case as the "difficult."[83]

A. Santa Clara Pueblo v. Martinez

In 1941 a Santa Clara Pueblo woman, Julia Martinez, married a Navajo man. The couple lived at Santa Clara and raised their children within the pueblo. The Martinez children spoke Tewa and participated in Santa Clara life.[84] Santa Clara law provided that all children of a Santa Clara father were eligible for membership but that children of a Santa Clara mother and non-Santa Clara father were not eligible. Mrs. Martinez and her daughter claimed that the membership criterion constituted discrimination on the basis of sex and ancestry in violation of the Indian Civil Rights Act of 1968 (ICRA).[85] Justice Marshall's opinion echoed the district court's view that membership rules were "no more or less than a mechanism of social ... definition, and as such were basic to the tribe's survival as a

---

[73] Skibine, *supra* note 49 at 129.

[74] *Id.*

[75] Thus, the requirements that Class III gaming be authorized under state law and pursuant to a compact erodes tribal sovereignty. *See* Skibine, *supra* note 49 at 12122, 13032 (1997); *See* Tsosie, *supra* note 48.

[76] Cohen, *supra* note 7 at 180-188.

[77] 25 U.S.C. § 2710(b)(2)(B) (1988).

[78] 25 U.S.C. § 2710(b)(3) (1988).

[79] For example, the location of casino sites may be subject to negotiation. *Wisconsin Winnebago Nation v. Thompson,* 824 F.Supp 167, 171 (W.D.Wis. 1993), aff'd, 22 F.3d 719 (7th Cir. 1994).

[80] *Salt River Pima-Maricopa Indian Community v. Hull,* 945 P.2d 818 (1997).

[81] 436 U.S. 49 (1978).

[82] Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts,* 56 U. Chi. L. Rev. 671, 720-21 (1989). Resnik argues that the availability of federal benefits is central to understanding why the Martinez family tried to obtain recognition of its children of members of the Pueblo. Resnik has amply documented this contention with reference to trial briefs and interviews and provides a partial list of federal benefits available to members of Indian tribes. It is worth noting, however, that the Martinez children were also eligible for enrollment through their father's line in the Navajo Tribe and thus could have met the tribal member's criterion for federal benefits without ever qualifying for membership at Santa Clara Pueblo.

[83] Both the American Civil Liberties Union and the Department of Justice entered the case after debating which side to support. Resnik, *supra* note 82 at 726-727 n. 260. Resnik asserts the case tells more about United States' norms than it does about tribal norms. She further asserts that because federal norms about the treatment of women were not really threatened by the Santa Clara Pueblo membership rule, the case was an "easy" one for the Court to proclaim its commitment to tribal sovereignty. "For those of us who believe in women's rights and are also concerned about federal government imperialism, the case becomes hard."

[84] 436 U.S. at 53 n.5.

[85] 25 U.S.C. §§ 1301-1303; 436 U.S. at 51.

cultural and economic entity."[86] The Court held that ICRA authorized a federal review of tribal decisions only in habeas corpus proceedings.[87]

The terms of the controversy were set several decades earlier.[88] Santa Clara Pueblo passed its ordinance in 1939 to create an ad hoc, but explicit, *per se* membership criterion based on patrilineal descent.[89] This amendment was a response to a specific situation. At times non-Indians who have married into a Pueblo have manipulated village affairs.[90]

Thus, the membership rule adopted by the Pueblo, perhaps overbroad in design, was enacted to preserve the cultural order. The *Martinez* case indicates that *per se* rules for membership eligibility, such as the patrilineal descent rule at Santa Clara and the many instances of "blood quantum" levels used by other tribes, are frequently a proxy for the more fundamental criterion of adherence to tribal values.

B. Per Capita Distributions of Gaming Revenues Under IGRA: A Federal and Tribal Court Analysis

It is doubtful that Congress would have specified how tribes might allocate revenues among its members if Indian gaming had not been viewed as extremely lucrative. The Second Circuit has alluded to such a consideration in *Poodry v. Tonawanda Band of Seneca Indians.*[91] Poodry alleged that his loss of tribal membership violated the Indian Civil Rights Act (ICRA).[92] The majority saw the case as significant because it arose "at a time when some Indian tribal communities have achieved unusual opportunities for wealth [presumably Class III gaming], thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason.'"[93] The *Poodry* court dismissed the claim against the tribe but not the tribal officials and remanded the case for a hearing on the merits.[94] The majority suggested the ICRA may be[95] a new law allowing it to avoid the Supreme Court's holding in *Roff v. Burney*[96] that no provision of federal law restricted the power of the Chickasaw Nation in withdrawing privileges of membership.[97] Whatever doubts the majority entertained about construing the ICRA in this way was assuaged by the knowledge that, if we are wrong, Congress will have ample opportunity to correct our mistake.[98]

1. Federal Cases

The ICRA emphasis on individual rights limits, to some degree, collective tribal prerogatives.[99] Several recent challenges to tribal actions related to the distribution of gaming revenues have been based on ICRA.[100]

Federal District Courts were solicitous in fashioning equitable relief in two early cases brought by tribal members challenging tribal government per capita distributions of gaming revenues. In both *Ross v. Flandreau Santee Sioux Tribe*[101] and *Maxam v. Lower Sioux Indian Community*[102] tribal governments distributed a portion of gaming revenues as per capita payments to certain enrolled tribal members but not others.[103] In both cases the distributional plans had not been specifically approved by the Secretary of Interior as required by Section 25 U.S.C. § 2710(b)(3) of IGRA.[104] The courts found that enrolled members not receiving per capita payments met the standards for standing[105] and that tribal sovereign immunity was waived because "[a]ny tribe which elects to reap the benefits of gaming authority created by IGRA must comply with the Acts requirements."[106] Finally, both courts concluded that, unless the

---

[86] 436 U.S. at 53.

[87] *Id.* at 66-67.

[88] W. W. Hill, *An Ethnography Of Santa Clara Pueblo New Mexico,* Albuquerque, University of New Mexico Press, (1982) 190-20, details the political factionalism at Santa Clara in the 1930s. He also noted that between about 1900 and 1940, marriage to non-Puebloans increased and, by the latter date there were a greater number of non-Tewa spouses who ha[d] taken up residence in the village. *Id.* at 156. People at Santa Clara expressed disapproval of marriages with non-Tewas. *Id.* at 155.

[89] 436 U.S. at 52

[90] In the 1870s the Keresan Pueblo of Laguna had incorporated at least two Anglo-American men who had married Laguna women. Edward H. Spicer, Cycles of Conquest 177 (1962). One, Walter Marmon, later became Pueblo Governor. *Id.* Factionalism at Laguna in the ensuing decades is sometimes traced to the entry of Marmon and his brother into tribal affairs. *Id.* at 177-78. The relative lack of intermarriage at the Tewa Pueblo of Tesuque has been credited as the most important factor promoting village solidarity. John Bodine, *Acculturation Processes and Population Dynamics,* In New perspectives on The Pueblos (Alfonso Ortiz, ed. 270 (1972).

[91] 85 F.3d 874 (2d. Cir.), cert. denied, 117 S. Ct. 610 (1996).

[92] *Id.* at 876.

[93] *Id.* at 897.

[94] *Id.* at 901.

[95] *Id.* at 898.

[96] *Roff,* 168 U.S. 218 (1897).

[97] *Id.* at 222.

[98] *Id.* A less sanguine observer might note that Congress could exercise its plenary power to incorporate the majority's "mistake" into federal statute.

[99] *See* Rosen *supra* note 30 and Thompson *supra* note 30.

[100] See *infra,* part III(B)(2).

[101] 809 F. Supp. 738 (D.S.D. 1992).

[102] 829 F. Supp. 277 (D. Minn. 1993).

[103] Ross, 809 F.Supp. at 741; Maxam 829 F. Supp. at 279.

[104] Ross, 809 F.Supp. at 743; Maxam 829 F. Supp. at 281.

[105] Ross, 809 F.Supp. at 743-44; Maxam 829 F. Supp. at 279-81

[106] Maxam 829 F. Supp. at 281; see also Ross, 809 F.Supp. at 745 ("Engaging in gaming pursuant to the IGRA constitutes an express waiver of sovereign immunity on the issue of compliance with the IGRA").

tribe articulated a justification for distinguishing among enrolled members that was approved by the Secretary, all enrolled members had a right to share in per capita payments under the Indian Civil Rights Act.[107] The *Ross* court ordered the tribe to cease all per capita payments until a per capita plan was approved by the Secretary.[108] In *Maxam* the court took control of a portion of tribal funds designated for per capita distribution.[109]

Subsequent decisions have rejected or limited the *Ross* and *Maxam* holdings concerning the waiver of tribal immunity under IGRA.[110] This has been especially true in cases involving membership disputes.[111] The judges in *Ross* and *Maxam* were apparently quite concerned by what they viewed as an inequitable distribution of gaming proceeds among tribal members.[112] Both tribes limited most distributions only to enrolled members residing on or near tribal lands.[113] Under these formula both tribes distributed gaming revenues to less than a third of enrolled tribal members.[114]

Both *Ross* and *Maxam* involved Santee Sioux tribes. The Flandreau and Lower Sioux are two of seven recognized Santee tribal entities.[115] Unlike their Lakota Sioux congeners to the west, the Santee have little land. In fact, several communities have only been recently recognized by the federal government.[116] These tribes have a history of providing incentives for members remaining within the community.[117]

After *Ross* the Secretary approved the Flandreau Santee Sioux plan for per capita distributions.[118] Other individuals denied tribal membership then sought relief in federal court.[119] In *Montgomery v. Flandreau Santee Sioux*,[120] the plaintiffs alleged that tribal officials had granted "membership to others with lesser degrees of Indian blood."[121] The *Montgomery* court determined that it lacked subject matter jurisdiction under both IGRA and ICRA and dismissed the complaint.[122] Another case

---

[107] Ross, 809 F.Supp. at 746; Maxam 829 F. Supp. at 282, 284.

[108] Ross, 809 F.Supp. at 747.

[109] Maxam 829 F. Supp. at 285.

[110] *Davids v. Coyhis*, 869 F. Supp. 1401, 1407-08 (E.D. Wis. 1994) (finding neither [*Maxam* nor *Ross*] persuasive because they are contrary to the Supreme Court's holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D. C. S.D. 1995) (finding Ross and Maxam "stand at most for the proposition that federal courts may find a waiver of tribal sovereign immunity for the purpose of enforcing the provisions of the IGRA where prospective injunctive relief, and not monetary relief, is sought"); *Federico v. Capital Gaming Int'l, Inc.*, 888 F. Supp. 354, 357 (D.R.I. 1995) (the waiver of immunity under IGRA in Maxam is narrowly limited and does not support a waiver of sovereign immunity in a breach of contract action related to lobbying services to secure class III gaming eligibility). *But see Mescalero Apache Tribe v. New Mexico*, [U.S. LEXIS 34495 at*19] (While there is sparse case law on the issue, it appears the majority supports the view that IGRA waived 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).

[111] *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*, 967 F. Supp. 966, 967 (E.D. Mich. 1997); *Smith v. Babbitt*, 875 F. Supp. 1353, 1360 (D. Minn. 1995) (questioning the *Maxam* and *Ross* decisions and finding that to extend their holdings to a membership dispute was contrary to the explicit purpose of IGRA), aff'd, 100 F.3d 556 (8th Cir. 1996), *cert. denied*, 118 S. Ct. 46 (1997).

[112] In this sense both cases seem to have been viewed as implicating 25 U.S.C. § 1302(8) of the Indian Civil Rights Act.

[113] In *Ross*, the Flandreau Santee Sioux government had adopted ordinances which distributed payments only to enrolled members who resided within the tribal community. Only those enrolled tribal members who lived within the de facto boundary of the disestablished reservation received per capita payments. Ross, 809 F.Supp. at 741. Similarly, in Maxam, the tribe distributed gaming revenues only to members that either lived within a ten mile radius of the reservation or who received approval from a majority of eligible members in a community referendum. Maxam, 829 F. Supp. at 279.

[114] The Flandreau Santee Sioux had a total enrollment of 611 members but only 158 lived within the "de facto boundary." Ross, 809 F.Supp. at 740-41. Thus, approximately 25% of tribal members received about $8,000 per year while the non-resident remainder received nothing. The Lower Sioux Indian Community made per capita distributions to 141 members, while at least 300 other members were ineligible. Maxam 829 F. Supp. at 279. At most, 32% of enrolled members received per capita payments. It was alleged that 47 members residing within the area defined by the tribal ordinance did not receive per capita payments. *Id.* at 284. These individuals were of special concern to the court: [p]articularly with regard to enrolled members residing within the defined boundaries of the reservation, it is not clear that the defendants have a rational basis for refusing per capita payments. *Id.*

[115] 62 FR 55270-78

[116] For a comprehensive history of the Santee Sioux *see* Roy W. Meyer, History of the Santee Sioux: United States Indian Policy on Trial (rev. ed., Lincoln: University of Nebraska Press, 1993).

[117] *Id.* at 273-93 (late 19th century re-establishment of Santee Communities in Minnesota), at 314-315. (Nebraska Santee opposition to termination), at 337 (mid 20th century out-migration from Flandreau and Minnesota communities "largely compensated for by a high birth rate"), at 356-57 (1958 revival of powwow at Prairie Island), and 356 n.42 ("community spirit" at Lower Sioux).

[118] *Montgomery v. Flandreau Santee Sioux*, 905 F. Supp. 740, 745 (D.S.D. 1995).

[119] The tribal ordinance waived the sovereign immunity defense for cases involving persons denied per capita payments based on failure to meet residency requirements or other qualifications. *Id.* The ordinance required that such actions be brought in tribal court. *Id.*

[120] 905 F. Supp. 740, 745 (D.S.D. 1995).

[121] *Id.* at 746.

[122] *Id.* at 745-747.

involving enrollment in a Santee polity and entitlement to gaming revenues was decided upon similar grounds. In *Smith v. Babbitt*[123] persons who had applications for membership in the Shakopee Mdewakanton Sioux Community denied or delayed brought suit in tribal court and federal court.[124] In the federal action the plaintiffs alleged that the tribal government and Interior Department had violated numerous federal laws. Recognizing the plaintiffs could suffer irreparable harm through loss of voting rights and per capita payments,[125] the district court, nevertheless, dismissed the action because it was based on determinations of tribal membership which could only be resolved in tribal court.[126] As in *Montgomery,* the court explicitly noted that the tribe had "expressly waived sovereign immunity from suit in tribal court for actions disputing an individual's qualified status to receive per capita payments."[127]

The problematic parameters of federal subject matter jurisdiction can be illustrated by three related cases involving political factionalism and the operation of a gaming facility by Stockbridge-Munsee Community Band of Mohican Indians in Wisconsin.[128] Although membership determinations are not directly at issue, these cases reveal some interesting aspects of jurisdiction that may be relevant to future membership disputes. The Stockbridge Tribe is governed by a seven member council that includes the tribal president.[129] The council controls membership of the gaming board and oversees the operation of the tribe's casino.[130] In early 1994, the council was bitterly divided and the four member majority ignored the three member minority.[131] The council minority sued the president and other three members of the council majority alleging violations of IGRA.[132] The president and council majority, on behalf of the tribe, also filed a complaint seeking to enjoin the minority from interfering with the operation of the tribal government and casino.[133] The court granted the tribe's request because "denial of injunctive relief here would be to encourage a coup d'etat."[134] The court, classifying the dissident council members' complaint as one seeking a private cause of action under IGRA,[135] dismissed the dissidents' complaint for lack of jurisdiction. The court reasoned that an inference "to infer a waiver of tribal sovereign immunity would disserve the congressional policy of promoting strong tribal governments because any federal remedy would supplant the tribes' ability to determine "disputes affecting important personal and property interests of both Indians and non-Indians."[136] Furthermore, it would oblige the federal courts to enter the quagmire of political dissension in the Community's governing body.[137]

In two other recent cases, federal courts have dismissed suits regarding tribal enrollment controversies that have no explicit (or apparent) relationship to gaming.[138] In a third case, *Shenandoah v. United States,*[139] the district court dismissed an ICRA claim by Oneida plaintiffs whose tribal membership had been revoked and who had been "deprived of their voice."The plaintiffs were political dis-

---

[123] 875 F. Supp. 1353, 1360 (D. Minn. 1995), *aff'd,* 100 F.3d 556 (8th Cir. 1996), *cert. denied,* 118 S. Ct. 46 (1997).

[124] A brief summary of this controversy is found in Henderson, *supra* note 71 at 240-41.

[125] 875 F. Supp. at 1369-70.

[126] Id. at 1361, 1366-67. The Eighth Circuit affirmed the district court's dismissal because all the allegations were "merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court." *Smith v. Babbitt,* 100 F.3d 556, 559 (8th Cir. 1996), cert. denied, 118 S. Ct. 46 (1997).

[127] *Id.* at 559.

[128] *Miller v. Coyhis,* 877 F. Supp. 1262 (E.D. Wis. 1995); *Davids v. Coyhis,* 869 F. Supp. 1401 (E.D. Wis. 1994); *Davids v. Coyhis,* 857 F. Supp. 641 (E.D. Wis. 1994).

[129] Davids, 869 F. Supp. at 1402-1403.

[130] *Id.* at 1403.

[131] Miller, 877 F. Supp. at 1264. In May, 1994 during a disturbance at the tribal headquarters, the tribal police chief attempted to remove the tribal president, Coyhis, from the premises. 877 F. Supp. at 1264-65. The following day the four member majority of the council succeeded in passing an ordinance that, inter alia, provided that a tribal employee could be terminated for failure to comply with an order of the president. Id. at 1265. The police chief was then terminated, ex post facto. Id. In June, the council minority managed to seize control of tribal headquarters, operation of the casino and control over casino funds. Davids, 857 F. Supp. at 644. The federal district court dismissed the police chief's wrongful termination suit for lack of jurisdiction because the action "sought adjudication of the merits of an intratribal dispute." Miller 877 F. Supp. at 1268.

[132] Davids, 869 F. Supp. at 1402.

[133] Davids, 857 F. Supp. at 644.

[134] *Id.* at 647.

[135] *Davids,* 869 F. Supp. at 1405 n.7, 1409 n.11, 1412.

[136] *Santa Clara,* 438 U.S. at 65.

[137] *Davids,* at 869 F. Supp. at 1411. The cases that emerge from the Stockbridge factional strife are problematic. The court characterizes the cases as ones that involve strictly intra-tribal political questions. Hence, the federal court lacks subject matter jurisdiction. The actions brought by dissidents are consequently dismissed. Nevertheless, the court asserts jurisdiction in order to grant the relief requested by the tribal governing body recognized by the BIA. It is difficult to understand how subject matter jurisdiction can be found as to one party but not the other.

[138] *Apodaca v. Silvas,* 19 F.3d 1015 (5th Cir. 1994) (appellants were "removed from tribal membership rosteri of Ysleta del Sur Pueblo); *Ordinance 59 Association v. Babbitt,* 970 F. Supp. 914 (D. Wyo. 1997) (43 applicants for membership in Eastern Shoshone Tribe sought enforcement of a tribal court order that they be enrolled).

[139] 1997 U.S. Dist. LEXIS 5138 (N.D.N.Y.).

sidents who challenged the tribal authorities, at least in part, over development and operation of the tribe's gaming enterprise. As in the Stockbridge-Munsee cases, the factionalism may predate the introduction of gaming.

2. Tribal Court Determinations

There are few reported cases of membership determinations decided by tribal courts. Even fewer relate to IGRA issues. Nevertheless, the tribal court cases provide a glimpse of how membership issues related to IGRA might be resolved.

The reported tribal court enrollment cases do not reveal any explicit connection to gaming issues. One case involves the Hoopa, a California tribe without a class III gaming compact.[140] In the late 1980's, a woman petitioned for enrollment based upon her putative father's tribal membership.[141] Although the petition was opposed by the deceased father's sister, the petitioner was enrolled by the tribe.[142] An appeal by other family members was dismissed by the tribal court.[143] Another case,[144] also apparently involving disputed paternity, comes from a gaming tribe, the Ho-Chunk, but makes no reference to gaming considerations.[145] The petitioner, supported by his father's sister and mother, obtained a decision from the "Clan Leader Traditional Court" that he was "4/4th Winnebago blood, born of the Winnebago fire place."[146] The Ho-Chunk trial court confirmed the decision of the "Traditional Court Elders."[147] These two cases do not indicate any particular interest in limiting tribal membership, at least in situations of disputed paternity.

The Colville Confederated Tribes[148] have developed a more comprehensive approach to membership issues in two recent cases *Hoffman v. Colville Confederated Tribe*[149] and *Pouley v. Colville Confederated Tribe.*[150] In 1959 the Colville Constitution was amended to require that members have "one fourth (1/4) degree blood of the tribes which constitute the Confederated Tribes."[151] The blood quantum recorded on the official census rolls of 1937 are regarded as authoritative,[152] although the blood quantum of individuals on these rolls is inconsistent with information in other records.[153] Apparently recognizing this, tribal law waives sovereign immunity to allow members to petition for "a correction of their blood degrees."[154] The petitioner must meet an "onerous burden" of presenting clear and convincing evidence that her "blood degree" has been miscalculated.[155]

There is some indication that individuals may seek membership in order to obtain material benefits that come with tribal membership. In *Hoffman,* for instance, a member listed on the tribal roll apparently sought an increase in blood degree so that his children could obtain settlement payments.[156] In *Pouley,* however, several of the plaintiffs had applications for tribal membership made on their behalf over two decades prior to the litigation.[157] Moreover, the *Hoffman* court viewed the matter "as more than a simple, mechanical blood degree correction. Rather, this is an action to establish one's identity."[158]

Among the frequently mentioned benefits of tribal membership are certain economic advantages, including a potential pro rata share of tribal property.[159] Congress implicitly seems to have shared this utilitarian view of tribal mem-

---

[140] *Baldy v. Hoopa Valley Tribal Council,* 22 Indian Law Reporter 6015 (Hoopa V. Ct. App. 1994).

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *White v. Ho-Chunk Nation Enrollment Office,* 24 Indian Law Reporter 6031 (Ho-Chunk Tr. Ct. 1996).

[145] Formerly known as the Winnebago.

[146] 24 ILR at 6031.

[147] *Id.*

[148] The Colville are one of the few tribes in Washington that have not entered into a Class III gaming compact with the state.

[149] 22 Indian Law Reporter 6127 (Colv. Tr. Ct. 1995) *aff'd* 24 ILR 6163 (Colv. Ct. App. 1997).

[150] 23 Indian Law Reporter 6143 (Colv. Tr. Ct. 1996).

[151] Hoffman 24 ILR at 6165 n. 5. Prior to this "one-fourth Indian blood" was the prevailing threshold. *Id.* at 6164-65.

[152] *Id.* at 6165 citing a 1988 amendment to the Tribal Constitution.

[153] *See generally, Hoffman,* 24 ILR at 6168-70; *Hoffman,* 22 ILR at 6130-33; *Pouley,* 23 ILR at 6145-6150.

[154] *Pouley,* 23 ILR at 6144; see also Hoffman 22 ILR at 6128-29.

[155] Hoffman 22 ILR 6129. "It is not easy to establish entitlement to a blood degree correction because the membership intended for it not to be easy. There is thus a strong tribal interest in preserving the 1937 roll as a starting point for all membership matters, and accordingly a statutory presumption that the blood degrees on the roll are correct." Hoffman, 24 ILR at 6168.

[156] Hoffman, 22 ILR 6127. The children, non-members, were dismissed as plaintiffs for lack of standing.

[157] *Pouley,* 23 ILR 6145.

[158] *Hoffman,* 22 ILR 6130. A study conducted on the neighboring Spokane Tribe in the late 1960s found that self-identity as whites of enrolled tribal members was correlated, to some degree, with one's white ancestry among urban residents but not among reservation residents. See Lynn White and Bruce Chadwick, *Urban Residence, Assimilation and Identity of the Spokane Indians,* In Native Americans Today: Sociological Perspectives 239, 244-46 (Howard Bahr, Bruce Chadwick and Robert Day, eds., 1972).

[159] See, Max Gluckman, Gossip and Scandal, 4 Current Anthropology 307, 310 (1963); George Castile, The Commodification of Indian Identity, 98 American Anthropologist 743 (1996). Gluckman and Castile note, however, some non-economic benefits to tribal membership. Castile adds that "other, largely non-economic, corporate benefits to official tribal status ... are probably more valuable in the long run to tribal peoples ...." *Id.* at 746.

bership in mandating the parameters for the distribution of gaming revenues. While the plaintiffs did not prevail in either the *Pouley* or *Hoffman* cases, there is no indication in these carefully reasoned opinions that a tribal interest in limiting the distribution of economic benefits was a decisive factor.[160] An examination of tribal membership controversies from earlier times provides an historical perspective for weighing the importance of economic considerations in the maintenance of Indian identity. It also supplies a richer and deeper understanding of how Congressional policies may affect tribal identity in unanticipated ways.

IV. TRIBAL PROPERTY, TRIBAL INTEGRITY AND MEMBERSHIP: CASE STUDIES OF THE CHEROKEE, PUEBLO AND UTE TRIBES

Dissolution and Allotment: The Cherokee Experience

Roff v. Burney was decided at a time when tribal membership was regarded as offering opportunities for economic benefits because it would entitle the member to a portion of tribal assets.[161] *Roff* was one of numerous cases involving Congressional acts designed to dissolve the tribal governments of Indian Territory, including the Cherokee, and to distribute the tribal assets to tribal members.

The Cherokee experience with federal dissolution and allotment policies provides a framework for understanding the nexus among federal policies, tribal governance and membership, and ethnicity. The Cherokee occupied a large portion the southeastern United States prior to the removal of most to Indian Territory in the 1830's. For a brief time in the early 19th century, the United States recognized two Cherokee polities — the Western Cherokee (or Old Settlers), who had relocated to the west prior to the 1830s,[162] and those who remained in the southeast until the removal.[163] After a period of bitter and sometimes violent conflict,[164] the two groups formally reunited in Indian Territory.[165]

However, through a series of federal acts passed from the 1880's to the early 1900's, the Cherokee Nation of Indian Territory was dissolved.[166] These acts were consistent with the then prevailing federal allotment policy that was designed to convert tribal communal property into individually owned small plots of land.[167] To effect this policy, Congress created the Dawes Commission and authorized it to prepare an official roll of Cherokees entitled to a share of the tribe's communal assets.[168]

---

[160] The Confederated Salish and Kootenai Tribes of northwestern Montana, like the Colville Tribes, have a history of extensive intermarriage. Ronald L. Trosper, *Native American Boundary Maintenance: The Flathead Indian Reservation, Montana,* 1860-1970, 3 Ethnicity 256 (1976). Trosper argues that the tribes' definition of membership are "part of a defensive strategy to protect tribal wealth." *Id.* at 257. These tribes, like the Colville Tribes, also have a long history of concern with ancestry and enrollment criteria. *Id.* Russell *Thornton, The Cherokees: A Population History* 142-43 (Lincoln: University of Nebraska Press, 1990) (citing Trosper's article) contrasts the restrictive approach to tribal membership with that of the Cherokee discussed, *infra,* part IVA: "Whereas the Confederated Salish and Kootenai Tribes attained tribal survival through development of a new policy of exclusiveness, the Cherokees in Oklahoma have more or less maintained a policy of inclusiveness."

[161] *See generally,* Cohen, *supra* note 7, at 130-134 (discussing the assimilative purposes of the General Allotment, Act 24 Stat. 388); Dew Wisdom, an Indian Territory agent, wrote in 1894 that Cherokee "prosperity would be enhanced greatly if the land in this nation was sectionized, and each Indian felt sure that in making an improvement of any kind would be his in fee simple." Annual Report of the Commissioner of Indian Affairs [RCIA] 1894 at 142 [published 1895].

[162] James Mooney, Myths of the Cherokee, in Nineteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 189798, pt. 1, 168 (1900).

[163] *The Cherokee Trust Funds,* 117 U.S. 288, 298-99 (1886). In 1785, the United States government and the Cherokee nation signed the Treaty of Hopewell (7 Stat. 18; Charles Kappler, LAWS AND TREATIES II: 8-11; Washington DC: US Government Printing Office; 1904). By this agreement the United States recognized the Cherokee as comprising a single polity. *The Cherokee Trust Funds,* 117 U.S. at 295 (1886). Between the 1780s and 1820s, the Cherokee economy was transformed and lands were ceded. *United States v. Old Settlers,* 148 U.S. 427 (1893). Federal policy stressed removal of Indians from their homelands to areas west of the Mississippi River. *The Cherokee Trust Funds,* 117 U.S. at 300; *See generally,* Cohen, *supra* note 7, at 78-92. In the first three decades of the 19th century about a third of the Cherokee population moved west. *United States v. Old Settlers,* 148 U.S. at 430. In 1838 most Eastern Cherokee were removed to Indian Territory where they settled among the "Old Settlers." *Id.*

[164] Among the new-comers there were also bitter differences between those that had promoted and those that had resisted removal from the southeast. *The Cherokee Trust Funds,* 117 U.S. at 306. *See generally* Gerard Reed, *Postremoval Factionalism in the Cherokee Nation,* In The Cherokee Indian Nation: A Troubled History (Duane H. King, ed.) 148-163 (Knoxville: University of Tennessee Press, 1979); Duane Champagne, Social Order and Political change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw and the Creek 178-182 (Stanford: Stanford University Press, 1992).

[165] *The Cherokee Trust Funds,* 117 U.S. at 303-307. In a 1846 treaty, the United States again recognized only a single Cherokee polity. *Id.* at 306. A small portion of the Eastern Cherokee population, somewhat over 1,000 people, escaped removal and settled in a remote location in the Appalachian Mountains of North Carolina. Mooney, *supra* note 164, at 167-68. The North Carolina Cherokee are discussed at notes 185-197, *infra.*

[166] Report of the Commissioner to the Five Civilized Tribes IN Annual Report of the Commissioner of Indian Affairs for 1906 [RCIA 1906] 589-95 (1907), summarizes this legislation.

[167] *See generally,* Cohen, *supra* note 7, at 128-141.

[168] RCIA, 1906, *supra* note 166, at 590-91.

Although the Dawes Commission was empowered to make decisions regarding Cherokee citizenship,[169] it generally followed Cherokee laws regarding citizenry.[170] The final rolls show the Cherokee Nation encompassed an ethnically diverse citizenry. Less than a quarter of the population was designated as "fullblood."[171] Most Cherokee citizens were of mixed ancestry.[172] Over ten percent of the population was of predominately African ancestry,[173] primarily former Cherokee slaves and their descendants.[174] There were also some "intermarried whites"[175] and Cherokee citizens "by adoption." The last category included people of Indian ancestry, notably Delawares.[176]

There were several thousand individuals whose claims of Cherokee citizenship were denied.[177] Some of these folks wished validation of their claims to Cherokee status in order to receive a pro rata share of tribal property.[178] Whether most invalidated claims were motivated by such utilitarian interests rests upon inference rather than clarity in the historical record. Even if instrumental interests or economic "rationalism" was the basis of the "Cherokee identity" in some marginal cases, the circumstances surrounding Cherokee dissolution and the resistance of Ketoowah society show many other individuals grounded their Cherokee identity on other considerations.

There was tremendous opposition to the dissolution of the Cherokee Nation among certain elements of the Cherokee population.[179] The opposition was spearheaded by a secret society, the Ketoowah, led by Redbird Smith.[180] This group is almost universally identified with the "fullblood" segment of the population.[181] Many refused to cooperate with the Dawes Commission which, therefore, had difficulty placing these people on the rolls.[182] The racial rhetoric of the times equated support of tribal communal land holding with high Indian "blood quantum." The Keetoowah's explicit theme, however, was preservation of Cherokee sovereignty and culture.[183] Rather than cooperate with the Dawes Commission by placing their names on the final tribal roll, many risked losing access to a pro rata share of the tribal property.[184] The irony is that many of those most vehemently seeking to preserve tribal integrity refused to be officially identified as tribal members. It is difficult to reconcile this political stance with the utilitarian and rational choice assumptions implicit in the work of the Dawes Commission.

To compound irony, during the years that the Cherokee Nation of Indian Territory was being dissolved, the Cherokee in North Carolina were gradually accruing elements of sovereignty and the status of a semi-independent polity. These Cherokee, particularly those residing in a community at Qualla,[185] maintained an ambivalent relationship with the state.[186] They were considered a distinct community and incorporated under state

---

[169] *Id.* 592-97.

[170] *Id.* at 622-26. *Delaware Indians v. Cherokee Nation,* 193 U.S. 127 (1904) (adopted members of Delaware ancestry); *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906) (status of intermarrying whites determined with reference to changes in Cherokee law); *United States ex rel. Lowe v. Fisher,* 223 U.S. 95 (1912) (status of Cherokee freedmen); *Cherokee Nation v. Whitmire,* 223 U.S. 108 (1912) (status of Cherokee freedmen).

[171] Morris L. Wardell, A Political History of the Cherokee Nation 332-333 (Norman: University of Oklahoma Press, 1938).

[172] Russell Thornton, *The Cherokees: A Population History,* 124-26 (Lincoln: University of Nebraska Press, 1990) (over three-fourths of all Cherokees in the 1910 census were of mixed ancestry, primarily white and Cherokee).

[173] Wardell, *supra* note 171, at 333; Some of those denominated as "freedmen" were undoubtedly of mixed Cherokee and African heritage. *See* Daniel F. Littlefield, *The Cherokee Freedmen: From Emancipation To American Citizenship,* 75-78 (Westport: Greenwood Press, 1978) (intermarrying "blacksî were not recognized as citizens).

[174] *Id. See also United states ex rel Lowe v. Fisher,* 223 U.S. 223 (1912).

[175] Wardell, *supra* note 171, at 333; *The Cherokee Intermarriage Cases,* 203 U.S. 76 (1906).

[176] Wardell, supra note171, at 333; *Delaware Indians v. Cherokee Nation,* 193 U.S. 127 (1904); see also; *Cherokee Nation v. Journeycake,* 155 U.S. 196 (1894).

[177] RCIA 1906, *supra* note 166, at 626.

[178] RCIA 1896, supra note 166, at 155-57 (agent Wisdom's report on persistence of rejected claimants).

[179] RCIA 1906, *supra* note 166, at 594, 623, 625.

[180] Russell Thornton, *Boundary Dissolution and Revitalization Movements: The Case of the Nineteenth Century Cherokees,* Ethnohistory 40(3):359- (1993); Robert Thomas, *The Redbird Smith Movement,* IN Symposium on Cherokee and Iroquois Culture, Bureau of American Ethnology, Bulletin 180 (1961) pages 161-66.

[181] Testifying through an interpreter before a Senate Committee Redbird Smith stated that he had been sent by the fullbloods. Statement of Redbird Smith In Report of the Select Committee to investigate matters connected with Affairs in the Indian Territory. Senate Report No. 5013, Part 1, 59th Congress, 2d Session (1907), vol. 1, page 97. Asked if he were a fullblood Indian, Smith responded, "I think I must be a full blood; I don't know, but I think I am." *Id.*

[182] *Id.* at 97-100; RCIA 1906, *supra* note 166, at 623.

[183] Thomas, *supra* note 180; Thornton, *supra* note180, at 373-74; Wardell, *supra* note 171, at 327-28.

[184] Thomas, *supra* note 180, at 164.

[185] Having escaped the sabers of General Winfield Scott's troops in the late 1830s, these Cherokee found refuge and, through the agency of an interested white entrepreneur and politician, obtained lands known as the Qualla Boundary. Mooney, supra note 164, at 157-59. After the Civil War, they sought a portion of the funds of the Cherokee Nation. *Id.* 172-77. In 1886 the U.S. Supreme Court held that the North Carolina Cherokee was not a tribe distinct from the Cherokee Nation of Indian Territory. *Cherokee Trust Funds,* 117 US 288 (1886).

[186] *United States v. Wright,* 53 F.2d 300, 302-305 (4th Cir. 1931) (subject to state law but not admitted to citizenship in the state).

law.[187] The Bureau of Indian Affairs gradually began providing services for the Qualla population.[188] In 1924 a Congressional act placed the Qualla lands in trust for the purpose of future allotment.[189] Congress also authorized a tribal membership roll and determined the degree of Cherokee required, specifically rejecting "a clause in the Band's corporate charter limiting membership to individuals with at least one-sixteenth Indian blood."[190] There were over 12,000 applications for membership but the final roll consisted of only 3,157.[191] Slightly over half the enrollees were designated as possessing less than 50% Cherokee ancestry.[192] The trust lands had not been allotted by the 1930's when the allotment process, and assimilationist policies generally, were halted.[193]

Currently a federally recognized tribe, the Eastern Band Cherokee set their own criteria for tribal membership. There has been contention over these criteria throughout the century.[194] By 1986, nearly two-thirds of tribal members were less than one-half Cherokee in ancestry.[195] The tribal charter was amended in the 1980s to allow any enrolled member to serve as principal chief[196] and to allow "first-generation, non-enrolled descendants of a tribal member to inherit that individual's possessory rights."[197]

Cherokee history, both in Indian Territory and North Carolina, shows shifts in membership (citizenship) criteria. At times, changes have been a response to federal policies or have been directly shaped by Congress. Economic factors influence, but rarely seem to determine, citizenship criteria. Socio-political and cultural factors are at least equally important. The rhetoric of "race" or "blood" persists, but these idioms tend to mask, rather than clarify, a more fundamental consideration — an emphasis on tribal sovereignty and communal control of assets. This "cultural" focus, rather than individual economic self-interest or degree of Cherokee ancestry, occurs again and again in Cherokee history as the *sine qua non* of Cherokee identity.

Moreover, Cherokee history reveals that tribal entities are not static. Portions of the Cherokee population have separated from each other, resulting in the creation of distinct political communities. Distinct tribal entities have sometimes merged as well.[198] This history also reveals inconsistency in federal policy. The United States government once denied recognition of any Cherokee government but currently recognizes three Cherokee polities[199] each having elements of sovereignty and control over the qualifications of its members or citizens.

B. Dissidents and Cultural Norms: The Pueblo Experience

The *Martinez*[200] case, unlike the Cherokee cases, contains little explicit reference to the economic importance of tribal membership. This is significant. The Puebloan peoples of New Mexico have maintained a distinctive cultural stance despite a history of sustained contact with non-Indians that is lengthier than that of any other group of Indians in the United States. Although property presumably plays some role in tribal identity among Puebloans, other considerations seem to be far more salient.

Historically the Puebloans were an agricultural people in a precarious environment subject to periodic drought and other factors that probably set an upper bound on population in any particular settlement. Pueblo society is frequently described emphasizing on conformity to group norms.[201] Nonconformists and those

---

[187] *Id.* at 304; RCIA 1891, *supra* note 166, at 680-81 (reprinting the 1889 North Carolina Act of incorporation).

[188] *Wright,* 53 F.2d at 304-306.

[189] *Id.* at 305.

[190] John R. Finger, Cherokee Americans: *The Eastern Band of Cherokees in the Twentieth Century,* 47 (Lincoln: University of Nebraska Press, 1991).

[191] *Id.* at 48.

[192] *Id.* at 48-49; those "with less than one-sixteenth Cherokee blood . . . [were] denigrated as "White Indians." *Id.* at 22; *see also Id.* at 48, 123-124, 135.

[193] *Id.* at 84.

[194] *Id.* at 46 (1920s), 51 (1930), 124-125 (1940s), 146-47 (1960s); *see also* 25 CFR part 75 (Revision of the Membership Roll of the Eastern Band of Cherokee Indians, North Carolina). These regulations were to govern revision of the rolls pursuant to a 1957 Congressional Act (71 Stat. 374). 25 CFR 75.2.

[195] Finger, *supra* note 190, at 172.

[196] *Id.* at 173 (previously this officer had to have at least one-half Cherokee blood).

[197] *Id.* at 174.

[198] *See supra* notes 162-165, (reunification of Old Settlers with newly removed southeastern Cherokee).

[199] In addition to the Eastern Band Cherokee in North Carolina, two Oklahoma Cherokee polities, Cherokee Nation of Oklahoma and United Keetoowah Band, are federally recognized. 62 Fed Reg. 55270, 55271, 55274.

[200] *See* 436 U.S. 49 (1978) , discussed, supra, part II A.

[201] Edward Dozier, *The pueblo Indians of North America,* 177 (1970) ("Because Pueblo society . . . is so highly structured and communal life is emphasized, individual freedom is not always given the expression found in other societies"). *See also* Ruth Benedict, Patterns of Culture, 57-129 (Houghton Mifflin, 1959 [1934]); Esther Goldfrank, *Socialization, Personality, and the Structure of Pueblo Society,* American Anthropologist 47:516-39 (1945). Jerrold Levy has suggested that in times of drought, lower status Hopi families were ejected from villages. Families with important religious and political offices remained. Jerrold E. Levy, Orayvi Revisited: Social Stratification in an "Egalitarian" Society 7982 (1992). In this fashion the basic cultural pattern may be preserved.

who resist directives of village leaders, risk accusations of witchcraft, including responsibility for droughts.[202] Given the 'theocratic' nature of Puebloan society external pressures to alter religious practices and the conversion of tribal members to new religions both are viewed as threats to preservation of Puebloan culture.[203]

In 1921, the BIA initiated a campaign to restrict Puebloan ceremonies.[204] The policy was designed to "christianize" and "assimilate" — an explicit attempt to alter the content of Puebloan culture. John Collier helped organize Pueblo opposition to the BIA policy. As one means of mobilizing non-Indian opposition to the BIA policy, Collier framed the issue as one of "personal liberty."[205]

By 1934 Collier was Indian Commissioner and was seeking to strengthen tribal sovereignty. A controversy, involving the "collective rights" of a tribal sovereign and the "liberal" value of religious freedom, confronted Collier. In the early 1930's several members of the Herrera family at Zia Pueblo converted to a fundamentalist Christian sect (Holy Rollers).[206] They began proselytizing at Zia and, for religious reasons, refused to participate in a number of communal activities.[207] Eventually, the Zia council ordered that the Herreras' land be cut off from irrigation and that their livestock be removed from Zia land.[208] One of the Herreras suspected that the council might order a 'hunting accident' in lieu of the 'old punishment' for witchcraft. Beginning in 1939, and backed by the Indian Agent in Albuquerque, the Zia governing body took steps to expel the Herreras from the Pueblo.[210] In 1948 "the heretics living in Sia were given one last chance to recant or accede to the pueblo's terms: some capitulated, others agreed to leave the pueblo."[211]

In this case the tribal sovereign, backed by the BIA,[212] took steps to 'revoke' the tribal membership of individuals whose views and actions had the "potential power for disintegration of the closely organized theocratic social structure of the Pueblo . . .."[213] Thus the Herrera controversy exemplifies adherence to fundamental cultural values and norms as paramount criterion for tribal membership. The Herreras, evicted from Zia, remained Zia in ancestry and upbringing. Many relatives remained resident in the village. The fundamental question was one of cultural values considered intrinsic to tribal identity.

C. Terminating the Mixed-Blood Northern Utes

Beginning in the late 19th century, the Utes[214] of Colorado and Utah sought compensation for loss of lands.[215] Some funds were received in 1911 and 1934, contributing to strife between mixed-blood and full-blood Northern Utes regarding the use of tribal assets.[216]

---

[202]Edward Dozier, Hano: A Tewa Indian Community in Arizona, 67-68 (New York: Holt, Rinehart & Winston, 1966) provides a succinct description of the nature of witchcraft accusations in one Pueblo. At Zuni, only the crimes of witchcraft and cowardice in battle carried the death penalty. Watson Smith and John M. Roberts, Zuni Law: A Filed of Values, 38 (Papers of the Peabody Museum of American Archaeology and Ethnology, vol 43, no. 1, 1953). The confession of a young man indicates that differences in wealth and social status played a role in some witchcraft cases: "Whenever any one had fine children, . . . or any kind of animals, sheep or cattle, or anything by which he prospers then our [witches] hearts ache. Therefore we kill them." *Id.* at 40.

[203]Following attempts by Franciscan missionaries to suppress Pueblo religion in the 17th century, the Puebloans of the Rio Grande united to expel the Spaniards from the region in the "Pueblo Revolt" of 1680. Edward Dozier, Rio Grande Pueblos, in Perspectives in American Indian Culture Change, 130-33 (Edward H. Spicer ed., 1961). Following the Spanish "reconquest," Puebloans continued to practice their religion although they "hid much of the ceremony from those who were not members of the tribe". Id. at 139-40, 149-51, 164-65.

[204]Lawrence C. Kelly, The Assault on Assimilation: John Collier and the origins of Indian policy Reform, 303-314 (Albuquerque: University of New Mexico Press; 1983) (discussing Burke's issuance of Circular No. 1665 and its supplement and the subsequent controversy).

[205]Id. at 340.

[206]The Herrera controversy has been described by E Adamson Hoebel, Keresan Pueblo Law, In Law in Culture and society, 112-16 (Laura Nader, ed., Chicago: Aldine, 1969); Florence Hawley, The Keresan Holy Rollers, Social Forces, 26:272-280 (1948); Leslie White, The Pueblo of Sia, New Mexico 67-78 (Bureau of American Ethnology Bulletin 184, 1962). White's observation that "[m]any of the converts have married non-Sia," Id. at 71, primarily people of other tribes, is interesting given that the Herrera controversy was brewing at the time the nearby Pueblo of Santa Clara adopted it's per se rule on patrilineal descent.

[207]Hoebel, supra note 206, at 112-113.

[208]Id. at 113-114; White, supra note 206, at 72.

[209]Hawley, supra note 206, at 275.

[210]Hoebel, supra note 206, at 113.

[211]Id. at 114.

[212]Id. at 113.

[213]Hawley, supra note 206, at 274. Presumably because the vital link between religion and cultural preservation, Congress did not include the first amendment provisions regarding the establishment of religion when, in 1968, it placed new limitations upon tribal sovereignty by passing the Indian Civil Rights Act (ICRA; 25 USC 1301 et seq.). See Santa Clara Pueblo v. Martinez, 436 U.S. at 62-63.

[214]Several Ute tribes were involved in these claims including the Northern Ute.

[215]Joseph G. Jorgensen, The Sun Dance Religion: Power for the Powerless 112 (1972).

In 1950 the Northern Utes were awarded $17.5 million.[217] Most of these funds were used for tribal projects but there was also a $1,000 per capita distribution.[218]

This award was received at a time when the dominant federal policy stressed termination.[219] Many mixed-bloods supported "individualism" and diminished tribal control.[220] Factionalism was exacerbated and the full-bloods sought to have mixed-bloods expelled from the tribe.[221] The BIA encouraged "this action as the first step in terminating both fullbloods and mixed-bloods from federal obligations."[222]

Designated as the "Affiliated Ute Citizens," the 490 mixed-bloods dissociated from the Northern Ute tribe in 1954[223] and received 27% of the claims award plus a section of the reservation.[224] They anticipated improved social and economic conditions by disassociating from the tribe and termination.[225] Congress defined the "blood quantum" level necessary for membership in the non-terminated group:

"Fullblood" means a member of the tribe who possesses onehalf degree of Ute Indian blood and a total of Indian blood in excess of onehalf, excepting those who become mixedbloods by choice ....[226]

In the 1950's Northern Ute tribal members were "almost wholly dependent upon unearned income derived from land claims judgments."[227] The distributions were reduced in the 1960's and in 1966 "an annual dividend" was $150.[228] By 1984 the dividend payment had risen to $4,800 per capita per year.[229]

Tribal membership issues have persisted despite the termination of the Affiliated Ute Citizen "mixed-bloods." In 1958 the Northern Ute Tribe, by ordinance, increased to 5/8ths the proportion of Ute ancestry necessary for tribal enrollment.[230] The tribal constitution, however, provided that tribal members included all children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of such children.[231]

In the 1970s, children of enrolled tribal members challenged the blood quantum threshold in 1958 ordinance.[232] The tribal court held that the Tribal Constitutional provision controlled over the ordinance and ordered the children be enrolled.[233] Responding to the tribal court decision, the tribe enacted a resolution in 1982 declaring the blood quantum level in the 1954 federal act controlled over the 1958 tribal ordinance and asked the BIA to approve enrollment of the children.[234] The BIA refused.[235] The federal decision was overturned in *Chapoose v.*

---

[216] *Id.* at 112-113, 147, 263; Gottfried Lang, *Economic Development and Self-Determination: The Northern Ute Case.* 20 Human Organization 164, 165 (1961). The terms Full Blood and Mixed Blood were used by the Utes. Robert L. Bennett, *Building Indian Economies with Land Settlement Funds,* 20 Human Organization 159, 160 n. 2 (1961). The terms were apparently not precisely defined, however. Bennett includes any one "having ancestry other than Ute" as a mixed blood. *Id.* Jorgensen, *supra* note 215, at 152, counts as fullbloods those with "over 50 percent Ute blood.îThe 1954 statutory definition is found at note 226, *infra.*

[217] Bennett, *supra* note 216, at 159.

[218] *Id.* at 159-60 (noting certain restrictions placed on per capita distributions; Lang, *supra* note 216, at 167-68; Jorgensen, *supra* note 215, at 113.

[219] Cohen, *supra* note 7, at 152-180.

[220] Lang, *supra* note216, at 168.

[221] Jorgensen, *supra* note215, at 151-52.

[222] *Id.* at 151.

[223] Act of Aug. 27, 1954, Pub. L. No. 670, 68 Stat. 868 (codified as amended at 25 U.S.C. § 677).

[224] Jorgensen, *supra* note 215, at 152

[225] *Id.* "The 1954 Act divided the Ute Tribe . . . into two groups, the mixedbloods and the fullbloods, and terminated only one of those groups, the mixedbloods. The mixedbloods were given their share of the tribal assets and their tribal identity was terminated. This termination was effective on August 24, 1961, when the Secretary of the Interior issued a proclamation removing restrictions on mixedblood property and terminating federal recognition of the mixedbloods as an Indian tribe. The fullbloods, however, were not terminated as a tribe. Congress intended that the fullbloods continue their tribal identity, and that the federal government continue to fulfill its trust responsibilities toward the fullbloods." *Chapoose v. Clark,* 607 F.Supp 1027, 1029 (C.D. Utah 1985), *aff'd,* 831 F.2d 931 (10th Cir. 1987).

[226] 25 U.S.C. § 677a(b) quoted in *Chapoose,* 607 F. Supp. at 1029.

[227] Jorgensen, *supra* note 215, at 160. The total per capita distributions between 1951 and 1959 came to somewhat over $11,000 per member.

[228] *Id.* at 161.

[229] Donald G. Callaway, Joel C. Janetski and Omer C. Stewart, *Ute,* IN Handbok of North American Indians, vol 11: GREAT BASIN 358 (Warren d'Azevedo, ed., Smithsonian Institution, 1986).

[230] *Chapoose,* 607 F.Supp. at 1031.

[231] Constitution and Bylaws of the Ute Indian Tribe of the Uintah and Ouray Reservation, art.II, § 1(b) quoted in *Chapoose,* 607 F.Supp. at 1036.

[232] Chapoose, 831 F.2d at 933. By 1980 there were 1,000 individuals with 50% or less Ute ancestry who were children of enrolled tribal members. Callaway, Janetski, and Stewart, *supra* note 229, at 358. Joseph Jorgensen, *Sovereignty and the Structure of Dependency at Northern Ute,* 10(2) American Indian Culture and Research Journal, 75, 84, 88-89 (1986), provides an overview of the enrollment issue. He notes that the Northern Ute Tribe expresses "fears" over both the dilution of full blood "culture" and "the drain of resources." *Id.* at 88.

[233] *Chapoose,* 831 F.2d at 933.

[234] *Id.*

[235] *Chapoose,* 607 F.Supp. at 1032.

Clark.[236] The district court found that "Congress intended that the bloodquantum requirements ... be used only at the time of division, to separate the fullbloods and mixedbloods so that the mixedbloods could be terminated."[237] The Northern Ute Tribe's right to determine its own membership was unaffected.[238] "The only change was that the mixedbloods were no longer tribal members for the purposes of sharing in trust fund distributions."[239]

Property interests are implicated in the examples presented here but so are interests in less tangible assets — tribal values and community self-government. While tribes may adopt membership rules stressing a particular line of descent or a threshold proportion of ancestry, the Cherokee, Pueblo and Ute experiences indicate that the central concern is generally the preservation of values conceived of as essential to cultural distinctiveness and autonomy. It is of paramount importance for tribal members to maintain allegiance to the tribe's sphere of sovereignty and a sense of cultural values. The advisability and consequences of specific *per se* membership criteria based on ancestry generally (or lineal descent, specifically) may be debated but tribes, by setting membership rules, clearly channel cultural content in certain ways and not others.

CONCLUSION

Some writers claim that tribes adopting gaming under IGRA have altered membership criteria.[240] Specifically, Rand and Light assert that concern over distribution of gaming revenues "reinforces a narrow and exclusive view of tribal membership."[241] They add, based on several "empirical examples," that gaming tribes generally seem to elect to alter their membership criteria. In using their sovereign powers to make those changes, tribes thus alter their numerical composition, along with what it means to be a tribal member. In changing tribal membership, tribes also alter individuals' conceptions of the self, as well as of the collective; that is, of individual and tribal identity. Because this entire process is initiated by the incentives created by IGRA's gaming revenue provisions, IGRA's impact extends beyond membership criteria to tribal identity.[242]

It is clear that federal policy has long influenced both the definition of tribes and individual identity. Federal policy has helped shape the criteria incorporated into tribal definitions of membership. What is not clear from the limited available "empirical examples" is how gaming is being integrated into this process.[243] The historical examples presented in part II caution against simple rational choice utilitarian assumptions. The few recent cases that involve membership disputes also present a less than clear picture.

Most tribal members self-identify primarily as a member of the tribe in which they are enrolled.[244] They may share interests with those of other tribes, especially in certain contexts[245] (urban centers, powwows, religious bodies, rodeos), but they often view themselves and their

---

[236] 607 FSupp 1027, 1029 (C.D. Utah 1985), *aff'd* sub nom *Chapoose v. Hodel,* 831 F.2d 931 (10th Cir. 1987).

[237] *Chapoose,* 607 FSupp. at 1034.

[238] *Id.*

[239] *Chapoose,* 607 FSupp. at 1034. The court reasoned that the terminated mixedbloods received assets they could bestow upon their children. The full bloods, however, remained tribal members whose property is held in trust by the federal government. According to the court, "[t]he only thing of value a fullblood tribal member can pass on to his children is the right to become a tribal member." *Chapoose,* 607 FSupp. at 1036.

[240] K.R.L. Rand and S.A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity,* Va. J. Soc. Pol'y & L. 381 (1997); Mark Neath, American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future, 2 U Chicago Law School Roundtable 689 (1995).

[241] Rand and Light, *supra* note 240, at 424.

[242] *Id.* at 434.

[243] Several "empirical examples" of membership controversy cited by commentators — the Pequot (Naomi Mezey, Note, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming,* 48 Stan. L. Rev. 711, 724-728 (1996); Joseph Kelly, *Indian Gaming Law,* 43 Drake L. Rev. 501, 511-512; Rand and Light, *supra* note 240, at 422-23; Neath, *supra* note 241, at 695), Santee Sioux tribes (Kelly at 543; Rand and Light at 419-23, Neath at 695-96) and New York Iroquois (Mezey at 729, Rand and Light at 431) — have a far more ambiguous relationship to gaming than the commentators suggest. For example, Rand and Light, at 423, and Neath, at 695, view the Mdewakanton Santee Sioux membership controversy at Shakopee involving primarily a minimum "blood quantum" requirement for membership. In fact, some of the plaintiffs were not enrolled tribal member. The crux of the dispute seems related more to contesting membership decisions made by tribal officials seeking to enroll supporters rather than a wish to limit distribution of gaming revenues (see text and notes at 123-127, *supra*). Moreover, Neath, at 695, and Rand and Light, at 423, also suggest that the reason the Eastern Band Cherokee increased blood quantum requirements (from 1/32 to 1/16) was related to gaming. In fact the controversy over ancestry has persisted throughout the century. *See* text and notes 189-195, *supra.*

[244] At a recent American Indian Movement Conference, a Mescalero speaker told the story of a young boy who asked him and a friend if they were "real" Indians. "No," replied the friend, "I'm a Hopi. Real Indians live in India." Jennifer Lugowski, *American Indians hold Fresno Forum,* The Fresno Bee, Nov. 23, 1997, B-3.

[245] *See,* Robert K. Thomas, *Pan-Indianism,* The Emergent Native Americans 739 (Deward E. Walker, ed., Boston: Little, Brown, 1972); Henderson, *supra* note 71, at 243.

[246] *See generally,* Joan Weibel-Orlando, *Indian Country, L.A. Maintaining Ethnic Community in Complex Society,* (University of Illinois Press, 1991).

tribes as quite distinctive.[246] "Indian" identity (as distinct from, say, Navajo identity) is simply a box checked on a census form or for some other bureaucratic purpose. It often lacks personal relevance.

However, many non-Indian, and some Indian, people maintain decidedly stereotyped views of what constitutes Indian identity. Phillip Deloria observed that because the "United States wants to preserve a romantic ideal of the Indian way life"[247] federal policy would likely stress termination if Indians were "no longer poor or viewed by the majority as being culturally distinct."[248] In a similar vein, Rosen comments that "[a]s westerners think about indigenous peoples, they may, with the best of intentions, tend to freeze such groups at a particular moment in time or to create a climate in which certain 'natural' processes will not be disrupted by outside influences."[249] Rosen adds that this romantic imagery has been used by non-Indian opponents of Indian gaming.[250]

The romanticism critiqued by Deloria and Rosen, leads to the conclusion that the success of tribal operations under Indian Gaming Regulatory Act will motivate individuals to claim Indian identity and seek tribal membership.[251] The utilitarian response of tribes may be, some argue, to develop more restrictive membership criteria.[252] Given the paucity of empirical research on this issue, this paper has addressed some of the conceptual aspects of the question by examining some legal controversies involving tribal membership. The implication is often that individual self-interest in expanding economic benefits confronts tribal interests limiting benefits. But gaming is rarely an unalloyed underlying 'cause' of membership controversies. It is essential to continue to examine the specific history of the numerous tribal controversies over membership before concluding that disputes over the distribution of gaming proceeds involve simply or primarily a rational choice utilitarian calculus.

The troubling questions of gaming and perceived intratribal inequities have led federal courts to suggest alternative fora for individual Indian plaintiffs. For example, the *Davids* court suggested that, in addition to tribal court, the dissident plaintiffs could seek relief from the National Indian Gaming Commission(NIGC),[253] via the Tribal-State compact,[254] or Congress.[255] The suggestion of alternatives seems to indicate that the federal courts are somewhat uneasy about the substantive results flowing from the current jurisdictional jurisprudence.[256]

The suggestion that a state, through a compact, would play a role in tribal political controversies, membership questions or the distribution of gaming revenues should bring a chill to tribal governments.[257] This is so because, today as in the past, states are often the "deadliest enemies" of tribal interests.[258] It is difficult to know what a state interest in tribal membership or governance would be or how that might be manifested in a provision of a compact.

Likewise, the NIGC interest in enrollment and other membership issues is remote.This is especially so once a distribution plan has been approved. Moreover, there is no indication that NIGC has ever intervened in a case involving issues of membership or factional strife.

Thus, the only suggested alternatives remaining are tribal courts and Congress. Although many in Congress have an interest in Indian gaming, the membership controversies do not appear to be a central concern. Such controversies, however, could be used as justifications for more extensive changes to IGRA that would almost certainly further curtail this sphere of tribal sovereignty.

---

[247] Philip S. Deloria, *The Era of Indian Self-Determination: An Overview, in Indian Self-Rule,* 191 (Kenneth R. Philip ed., 1986).

[248] *Id.* at 193. Deloria added that the Indian activism captured the national imagination in the 1960s and 1970s but "Indians did not discover they were Indians in the early 1970s. We were not reborn; we were simply noticed." *Id.* at 204.

[249] Rosen, *supra* note 30, at 252.

[250] *Id.* (chiding Donald Trump for disparaging Indians running casinos for not looking like Indians). *See also* Rand and Light, *supra* note 240, at 424 (suggesting that tribes may alter membership criteria in response criticism from Trump and others); Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at The Bingo Palace,* 29 Ariz. St. L. J. 97, 110-111 (1997) (hypothesizing that Indian gaming "will undermine sovereignty if it negates the view of tribes as poor and culturally distinct"); James Clifford, *Identity in Mashpee,* In The Predicament of Culture (1988).

[251] *See,* Clifford, *Id.* at 284; Castile, *supra* note 159.

[252] Neath, *supra* note 240; Rand and Light, *supra* note 240.

[253] Davids v. Coyhis, 869 F. Supp. at 1412 n.13 (noting that the NIGC has "the power to enforce IGRA's provisions and tribal ordinances through civil fines . . . and . . . closures of gaming operations").

[254] *Id.* (noting that the state may initiate an IGRA action to enjoin class III gaming conducted in violation of the compact).

[255] *Id.;* Montgomery, 905 F. Supp. at 747, citing Davids, also suggests that plaintiffs could bring alleged violations of tribal gaming ordinances to attention of the NIGC or the state.

[256] *See* especially the discussion of *Poodry, supra* notes 91-98.

[257] It is possible that courts suggest such recourse as a veiled threat to tribal sovereignty.

[258] *United States v. Kagama,* 118 U.S. 375, 384 (1886).