American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future

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American Indian tribal gaming is, by some accounts, the fastest growing industry in the United States. In recent years, over two hundred of the nation's 544 federally-recognized tribes have introduced some form of gaming—from small bingo halls to multimillion dollar casinos—on reservations or other tribal lands. In 1993, Indian gaming grossed over five billion dollars, exceeding the total federal budget for Indian assistance programs by two billion dollars. Gaming enterprises have brought many tribes their first prospects for economic self-determination in over two hundred years.

But with prosperity comes a paradox: many American Indians living outside of tribal reservations now, for the first time, have a good incentive to return to reservation life; yet, for tribes to maintain economic development by means of gaming enterprises they must constrain population growth. The success of tribal gaming enterprises has altered the way that tribes view

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1. This Comment excludes Alaskan and Hawaiian natives and thus avoids using the term “Native American.” It is worth noting, however, that the economic incentives and social effects created or reinforced by the success of tribal gaming enterprises parallel those created by the Alaska Native Claims Settlement Act, 43 USC § 1601 (1988 & Supp 1993), which awarded Alaskan Natives $962.5 million and approximately 40 million acres of land. See Robert D. Arnold, et al, Alaska Native Land Claims 137, 142-44 (Alaska Native Foundation, 1976). One would expect to see the same social and political forces described in this Comment at work in Alaska in a quite different context.


themselves in relation to both non-Indians and other tribes, producing or reinforcing a narrow, exclusive conception of tribal identity.

Indian tribes, as semi-sovereign “domestic, dependent nations,” have the authority to set their own membership requirements, which are usually outlined in tribal constitutions. In contrast to Indian self-identity before contact with Europeans, most tribes now accept an explicitly racial conception of Indian identity for purposes of tribal membership: typically, one-quarter or more tribal “blood quantum” and birth to a tribal member. Whereas in the past two hundred years this race-based conception of tribal identity was often imposed on Indians by the federal government, today tribes voluntarily invoke race-based definitions of “Indian” because they narrow the pool of tribal members, whom gaming revenue and federal subsidies benefit. This, in turn, leaves more money for “bona fide” (usually full-blooded) tribal members.

As a result, tribes today face a fundamental, largely unrecognized dilemma. On the one hand, they must control population growth to apportion the benefits of gaming revenue to deserving tribal members and thereby sustain reservation economic development. A strict blood quantum requirement for tribal membership offers a simple, efficient way of doing this. On the other hand, if tribes continue to abide by current blood quantum membership requirements, they face two equally bleak prospects: shrinking population and political bases and stricter federal court or congressional scrutiny of tribal laws.

This Comment will seek to explain and resolve this dilemma. Section I introduces the scope of tribal gaming enterprises and describes their use as a means of economic development on reservations. Section II describes the dilemma posed by such economic development and the ironic reinforcement it gives to racial conceptions of Indian identity. Section III examines anthropological and historical studies of Indian identity in hopes of better understanding why most Americans, including many American Indians, currently view Indian identity solely in racial terms.

In Section IV, this Comment will recommend that Indian tribes act for themselves to resolve the dilemma presented by gaming success by adopting inclusive, cultural standards for tribal membership. The success of tribal gaming enterprises provides tribes with a historic opportunity to reject racial

5. Cherokee Nation v Georgia, 30 US (5 Pet) 1, 17 (1831). This Comment presupposes the reader's familiarity with general principles of federal Indian policy. The most basic aspects of this policy are: (1) Indian tribes are sovereign nations; (2) the sovereignty of the tribes is subject to wide congressional authority to regulate or modify the status of the tribes; (3) the power to deal with and regulate the tribes is almost wholly federal, meaning that states are usually excluded unless they receive delegated power from Congress; and (4) the federal government has a “trust responsibility” to protect the tribes and their properties from intrusion by outsiders, including state governments. For an excellent overview of these principles as applied today, see William C. Canby, Jr., The Status of Indian Tribes in American Law Today, 62 Wash L Rev 1, 1-2 (1987).


7. See, for example, Jicarilla Apache Const, Art III, § 1 (1968).
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conceptions of Indian identity and instead establish independent perceptions of tribal history, culture, and ethnicity. Gaming tribes will, however, have no incentive to adopt such culture-based membership requirements unless those requirements can duplicate the efficiency of blood quantum tests. Durational residency requirements—as part of larger culture-based tribal membership standards—can duplicate the efficiency of blood quantum tests and solve the gaming dilemma. Only by adopting such membership requirements can tribes hope to sustain economic development by means of gaming revenue while also enlarging Indian political power and avoiding federal legal encroachments on tribal sovereignty.

I. Gaming as a Means of Economic Development on Indian Tribal Lands

With a limited population base, geographic isolation, high rates of illiteracy and alcoholism, and an often hostile federal government "trustee," it comes as no surprise that Indian reservations have languished as America's poorest communities. The unemployment rate on Indian reservations has averaged from 50 percent to 90 percent in recent years. Indian tribes usually lack the capital to finance successful enterprises of their own, and few American investors are willing to risk ventures on remote Indian lands.

But what if Indian tribes had a monopoly on a valuable economic good, such as the legal right to establish gaming enterprises in states that ban most forms of gambling? This was the effect of the federal Indian Gaming Regulatory Act (IGRA), which gave congressional approval to Indian gaming activities on tribal-owned land: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."
The IGRA has effected nothing short of an economic miracle for Indian reservations. Gaming has drawn scores of visitors to Indian lands. In 1993, the average gaming tribe grossed twenty-five million dollars from gaming enterprises, a figure that is estimated to be doubling annually. This revenue represents 70 percent of the average tribal budget, far exceeding federal aid or revenue from other sources.

In addition, gaming revenue contributes directly to the economic development of reservations. Under the IGRA, tribes are required either to use gaming revenue for public purposes or to distribute the proceeds to tribal members on a per capita basis. Typically, tribes have used the profits from gaming to build schools, construct roads, finance scholarships, and make other community investments.

In a handful of cases, formerly poor tribes have become wealthy practically overnight. The Sycuan Band of Mission Indians in California grossed an estimated $120 million from its casino in 1992. It has used the casino's profits to fund police and fire services and to build a day care center and library. The Mashantucket Pequot tribe in Connecticut has used casino gambling to rescue itself from near extinction. Down to one reservation resident in the 1970s, today the Pequots run the “largest, most successful casino in the Western hemisphere.” Its success has caused more than three hundred Pequots to return to the reservation and share in the casino’s estimated yearly gross profit of three hundred to four hundred million dollars.

Such large windfalls are rare, but most tribal leaders would nonetheless agree that “Indian tribal gaming is a necessity if economic development is to occur in Indian country in our lifetimes.” The sustainability of gaming as a

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15. Total 1993 revenue from gaming, five billion dollars, Annin, Newsweek at 44 (cited in note 3), divided by two hundred gaming tribes, id, equals an average of twenty-five million dollars per tribe.
18. Id at 21; 25 USC § 2710 (b)(2)(B), (b)(3), and (d)(1)(ii).
19. See 60 Minutes: Wampum Wonderland 11, 14 (CBS television broadcast, Sept 18, 1994) (transcript) (noting the Pequots have plans for a cultural center, offer classes in Native American history, offer college tuition to tribal members, and have hired anthropologists to reconstruct their lost language); CBS Evening News 7 (CBS television broadcast, Oct 4, 1994) (transcript) (profiling the Shakopee Mdewakanton Sioux, who have built a new cultural center and a sports arena). See also Kirk Johnson, Gambling Helps Tribe Invest in Education and the Future, NY Times A1 (Feb 21, 1995) (profiling the Pequots’ investment in tribal education).
21. Id.
22. See 60 Minutes: Wampum Wonderland at 12 (cited in note 19) (profiling the Pequot reservation’s Foxwoods Casino).
23. Id at 8.
24. Id at 10.
25. Indian Economic Development Oversight Hearing, 103d Cong, 1st Sess at 18 (cited
means of economic development is, however, an open question. Gaming success may be limited by geography and access to capital. Furthermore, studies of the multi-billion dollar Atlantic City gaming industry reveal that gambling has not been the panacea for which city planners had hoped. The benefits of gaming profits have been slow to reach most Atlantic City residents. Gaming success also breeds competition. As the number of Atlantic City casinos increased throughout the 1980s, the industry's profit margins dropped from 9.5 percent to about 0.6 percent. Already, successful gaming tribes like the Pequots are facing stiff new competition from their Indian neighbors. Finally, some critics argue that the distribution of gaming profits directly to tribal members may discourage them from attending school or working on their own.

Nevertheless, Indian tribes have few choices in selecting forms of economic development, and tribal gaming does have advantages over non-Indian gaming. As semi-sovereign entities, tribes are exempt from most state and federal taxes, giving them a significant advantage over private American casinos. The present profitability of gaming enterprises provides tribes with access to non-Indian capital, the absence of which has historically been the main impediment to economic development on reservations. Partly because of the IGRA, tribes have wisely used gaming revenue to “jump-start” and diversify their moribund economies. Tribes often use gaming revenue to invest in commu-
nity development projects and to create ancillary tourism businesses, such as gas stations, souvenir shops, and hotels.\textsuperscript{35} A study of Wisconsin's seventeen tribal casinos, conducted by the Wisconsin Policy Research Institute, concludes that gaming is a net benefit for tribes.\textsuperscript{36} As Anthony Hope, Chairman of the National Indian Gaming Commission, explains, “[f]or tribes that don't have a lot of alternatives, [gaming] is a means of economic self-determination.”\textsuperscript{37}

II. The Dilemma: Gaming Success and Tribal Membership Requirements

A. Blood Quantum as a Measure of Indian Identity

Beyond the issue of whether tribal gaming is economically sustainable, gaming tribes face a more serious but less recognized danger: the pernicious effects of using blood quantum as a proxy for tribal identity. As semi-sovereign nations, Indian tribes have the authority to define their own citizenship requirements,\textsuperscript{38} although Congress may define the term “Indian” for purposes of federal recognition.\textsuperscript{39} Gaming success, however, has led tribes to favor a restrictive, race-based conception of tribal citizenship. Typical is the Revised Constitution of the Jicarilla Apache Tribe, which limits future tribal enrollment to “persons of three-eighths or more Jicarilla Apache Indian blood . . . whose mother or father is a member of the Jicarilla Apache Tribe.”\textsuperscript{40} Blood quantum tests act as simple means of constraining population growth, thereby restricting the available pool of gaming revenue to existing tribal members.

Two examples from tribes running the largest Indian casinos illustrate this trend. For Connecticut's Mashantucket Pequot Tribe, the success of its multi-billion dollar casino complex “has brought a lot more than prosperity to the Pequot reservation; it has brought Pequots to the Pequot reservation.”\textsuperscript{41} Because the tribe guarantees members free college tuition, affordable housing, and a guaranteed tribal job (in the casino), starting at sixty thousand dollars per year,\textsuperscript{42} there is “no shortage of aspiring Indians from London to Louisiana, eager to sign up and share the wealth.”\textsuperscript{43} From barely thirty voting members ten years ago, the tribe now boasts more than three hundred members\textsuperscript{44} and

\begin{itemize}
  \item 35. Id at S21.
  \item 36. Rogers Worthington, Poor Casinogoers Get Poorer, Study Shows, Chi Trib A6 (Apr 11, 1995).
  \item 37. Turner, Institutional Inv at S21 (cited in note 34).
  \item 38. Santa Clara Pueblo, 436 US at 72 n 32.
  \item 39. See, for example, United States v Carneal, 788 F2d 1335, 1338 (8th Cir 1986) (“Clearly, Congress knows how and has the right to define the term Indian when it chooses to do so.”).
  \item 40. Jicarilla Apache Const, Art III, § 1(b).
  \item 41. 60 Minutes: Wampum Wonderland at 10 (cited in note 19).
  \item 42. Id at 11.
  \item 43. Id at 10.
  \item 44. Id.
\end{itemize}
receives about ten new enrollment applications a week. The tribe has met this enrollment demand by instituting a one-sixteenth Pequot blood quantum requirement for tribal membership. One-sixteenth is a relatively liberal requirement (more typical is one-fourth), but the extremely small size of the tribe and dearth of Pequot offspring mean that a one-sixteenth requirement serves its purpose: it provides a simple, race-based means of identifying tribal members and controlling population growth to meet the needs of the reservation.

In 1969, the thirteen members of the Shakopee Mdewakanton Sioux tribe in Minnesota lived with their children in trailer homes at the end of unpaved roads. Last year, the tribe’s 250 members received equal shares of their casino’s one hundred million dollar profit. But this rags-to-riches story has embroiled the tribe in a conflict over tribal enrollment standards. The tribal constitution, adopted in 1969, requires that potential members have at least one-quarter Shakopee Mdewakanton blood. The tribal chairman wants to amend the constitution to make the tribal government the sole arbiter for determining membership (on a case-by-case basis). He argues that such a change is necessary to keep the tiny community alive. Many tribal members, however, want to maintain the existing blood quantum requirement in an effort to protect their gaming entitlements. They have sued in tribal court to stop the chairman, alleging that his goal is not to protect the tribe but rather to increase his political base of support.

The voluntary adoption of racial membership standards is not confined to the smallest or the most successful gaming tribes. The Eastern Band of Cherokees in North Carolina, for example, counts more than nine thousand enrolled members. The Cherokees began a bingo gaming operation in 1982, which now produces between six hundred thousand dollars and one million dollars in profits annually. The tribe, in an effort to make the process of acquiring tribal membership less attractive to outsiders, has adopted a one-sixteenth Cherokee blood quantum membership requirement, increased from one-thirty-second in past

46. *60 Minutes: Wampum Wonderland* at 10 (cited in note 19).
47. Annin, *Newsweek* at 44 (cited in note 3).
49. Id at *2.
50. Id.
51. Id at *3.
52. Id at *1.
53. Id at *2.
54. Id.
56. Id at 33.
years.\textsuperscript{57}

The voluntary use of racial membership standards is not necessarily confined to gaming tribes, although gaming success is the most important incentive to make use of such standards. In a non-gaming context, Santa Clara Pueblo’s leaders in 1939 enacted a blood quantum membership ordinance that also discriminated on the basis of gender.\textsuperscript{58} Like gaming tribes, the Pueblo was motivated by financial concerns:

The increase in mixed marriages produced concern about the enlarged demands for allocation of land and other tribal resources. The Pueblo's elders were apprehensive that the population increase resulting from intermarriage would strain the Pueblo's finite resources. It was, then, in response to the economic consequences of mixed marriages that the Pueblo Council determined that the offspring of female line mixed marriages would be denied membership while the offspring of male line mixed marriages would be admitted to membership.\textsuperscript{59}

As the Santa Clara Pueblo case suggests, the use of blood quantum as a measure of Indian identity is not new; the federal government first used it as a direct proxy of Indian identity in the General Allotment Act of 1887, also known as the “Dawes Act.”\textsuperscript{60} The Indian Reorganization Act of 1934 (IRA), also called the “Wheeler-Howard Act,”\textsuperscript{61} likewise compelled many tribes to adopt blood quantum tests in order to receive federal recognition and assistance from the Bureau of Indian Affairs.\textsuperscript{62} What is new today is that many tribes, in response to gaming success and a shrinking pool of federal resources, have voluntarily “impos[ed] the burden of stark racism upon \textit{themselves}.”\textsuperscript{63}

The fact that federal practices that were designed to assimilate the Indian population employed blood quantum as the measure of Indian identity suggests a deep irony in tribal acceptance of similar blood quantum requirements. The irony is compounded by the fact that the economic and political incentives faced by gaming tribes today are exactly the opposite of those faced in the past few years.

\textsuperscript{57} Id at 37, 41.


\textsuperscript{59} \textit{Martinez}, 540 F2d at 1040-41.

\textsuperscript{60} 25 USC § 331 et seq (1988 & Supp 1993) (providing for the individual division and sale of collective tribal lands).


\textsuperscript{62} The IRA states, in relevant part:

\begin{quote}

The term ‘Indian’ . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.
\end{quote}

\textit{Id} at § 479.

decades. In previous years, tribes were forced to rely on federal subsidies for the largest portion of their revenues. This income source, together with the “Indian pride” movement in the 1970s, encouraged tribes to expand tribal registries; as the tribe’s population increased, it received more aid and wielded more political clout.64 Of course, the federal government caught on to such practices and tightened its criteria for Indian assistance eligibility even as it cut funding for Indian programs throughout the 1980s, a policy that some observers labelled “termination by accountants.”65 But the incentive structure nevertheless encouraged tribes to resist efforts to limit their population as blatant and foreign forms of racism. By 1986, the National Congress of American Indians adopted a statement rejecting the federal identification policy: “[T]he federal government, in an effort to erode tribal sovereignty and reduce the number of Indians to the point where they are politically, economically and culturally insignificant, [is being censured] by many of the more than 500 Indian leaders....” Today, most new federal Indian assistance statutes, applying a policy of promoting Indian “self-determination,” determine an individual’s right to assistance based on his or her membership in a tribe, however that membership is determined.66 Notably, this policy change may have occurred simply because tribes themselves, through the voluntary use of blood quantum requirements, have proven as effective as the federal government in limiting tribal membership.

64. This process is described in Joane Nagel, Activism & Identity: Red Power and American Indian Ethnicity, Presentation to the 1994 Conference of the American Sociological Association (Aug 10-13, 1994) (on file with the University of Chicago Law School Roundtable). Nagel cites three developments that led many Americans in the period from 1970 to 1990 to switch their chosen ethnicity and race from non-Indian to Indian: (1) the incentive structure created by federal policy; (2) changes in U.S. ethnic politics brought about by the civil rights movement, which supported “Indian pride” and Indian ethnic identification; and (3) the Red Power Indian activist movement, which started a tidal wave of ethnic renewal that surged across reservations. Id at 2.

65. For a detailed analysis of this development in the 1980s, see C. Patrick Morris, Termination by Accountants: The Reagan Indian Policy, in Fremont J. Lyden and Lyman H. Legters, eds, Native Americans and Public Policy 63 (Pittsburgh, 1992). Morris describes the policy in the following terms:

Every conceivable criterion—Indian blood quantum, tribal enrollment, residence, personal and family income, employment, even education—was used by the [Reagan] administration to deny Indians access to federal programs. Today, an Indian seeking federal support faces a formidable maze of new forms and must jump over new and higher administrative hurdles, often only to discover that needed programs no longer exist.

Id at 68.


67. Russell Thornton, American Indian Holocaust and Survival: A Population History Since 1492 190 (Oklahoma, 1987).
B. THE DILEMMA POSED BY GAMING SUCCESS AND THE USE OF RACE-BASED TRIBAL ENROLLMENT STANDARDS

What the National Congress of American Indians recognized in 1986 is just as true today: strict blood quantum definitions of "tribe" and "Indian" have pernicious effects and pose a fundamental dilemma. On the one hand, tribes need to sustain economic growth and protect their limited gaming resources from Indian "wannabes." A strict blood quantum requirement serves this purpose by excluding many potential tribal members. On the other hand, if tribes maintain blood quantum requirements for tribal membership, they face two likely consequences: population decline and increased federal encroachment on tribal sovereignty.

1. Intermarriage and population decline.

First, demographic trends suggest that if tribes continue to adhere to strict blood quantum enrollment standards, they threaten to define themselves out of existence. Intertribal marriage has always been common in Indian society. In 1980, 50 percent of all American Indians were married to non-Indians, a 20 percent increase from 1970. While 96 percent of Indians today have one-quarter or more Indian blood, projections are that by the year 2080, 59 percent of those who consider themselves Indian will not meet a one-quarter tribal blood quantum requirement. Russell Thornton, the author of the seminal population history of American Indians, predicts, "If these trends continue—and I suspect they will—we can expect even more blending of the American Indian and non-Indian populations. . . ." Even short of outright extinction, a diminishing tribal population base will diminish tribal political power in Washington. Tribes might recognize and correct the problem by amending their constitutions, but by then it might be too late. They cannot afford to lose any of the already tenuous political voice that they have in American politics.

In addition, tribes with small populations face the specter of "termination" by the federal government. Between 1954 and 1962, the federal government terminated its recognition of more than one hundred tribes, bands, and Indian rancherias whose populations were deemed too small or too assimilated to warrant continuation of the federal trust responsibility. Because

68. See Annin, Newsweek at 44 (cited in note 3) (statement by Rick Hall of the National Indian Gaming Association).
69. Lenore A. Stiffarm and Phil Lane, Jr., The Demography of Native North America, in Jaimes, ed, The State of Native America at 23, 40 (cited in note 66).
70. Thornton, Holocaust and Survival at 236 (cited in note 67).
71. Id at 236-37.
72. Id at 237 (citing U.S. Congress, Office of Technology Assessment, Indian Health Care 78 (GPO, 1986)).
73. Id.
74. U.S. Commission on Human Rights, A Historical Context for Evaluation, in Lyden
"[a]cknowledgment of tribal existence... is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes," termination of federal recognition means the death of a tribe as a political entity. Today, "[a]s a result of social dynamics, tribes increasingly adopt the incidents of European culture. ... Consequently, tribes are more and more likely to be faced with the assertion that they have lost the distinguishing characteristics that entitle them to their special position in the American political and legal system." The "social dynamic" most prevalent today is the success of gaming on American Indian reservations. While giving tribes more economic independence from American society, it has, paradoxically, led tribes to identify themselves using the "incidents of European culture."

2. Federal encroachment on tribal sovereignty.

Legal termination is one form of federal action threatening gaming tribes that define themselves in terms of race. But even if such tribes somehow manage to avoid population decline or cultural abandonment, they may face equally unpleasant, though less extreme, fates at the hands of the federal court system or Congress.

a) Federal court action. In recent years, equal protection challenges to tribal laws and federal Indian assistance programs have become increasingly popular. Because tribes are "distinct, independent political communities, retaining their original natural rights... [t]hey have power to make their own substantive law in internal matters." Thus, the United States Constitution does not limit racial discrimination on tribal lands. Congress may, however, through its plenary power, "limit, modify or eliminate the powers of local, self-government which the tribes otherwise possess." Thus, while Indian tribes may enjoy sovereign immunity from suit, "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress."

The Indian Civil Rights Act (ICRA), enacted in 1968, represents an important use of Congress's plenary power. The Act contains an equal protection
clause\textsuperscript{84} that protects Indians and non-Indians from discriminatory tribal laws. Given that blood quantum definitions of tribal membership are race-based, federal courts could well apply strict scrutiny to such laws, although doing so might misinterpret the historical development of equal protection jurisprudence. In any case, federal court action could damage the political authority of Indian tribes and further limit tribal sovereignty—both undesirable prospects for tribes where “self-determination” is the key argument for the legitimacy and protection of tribal gaming enterprises.

Fortunately for tribes, the Supreme Court in its landmark 1978 decision in \textit{Santa Clara Pueblo v Martinez}\textsuperscript{85} held that the only remedy authorized by Congress under the ICRA is a writ of habeas corpus.\textsuperscript{86} Thus, a Santa Clara Pueblo woman whose mixed-blood children were denied membership in the pueblo on the basis of a gender-discriminatory tribal ordinance had no remedy in federal court.\textsuperscript{87} The Court noted that because the right to establish tribal membership standards is an integral feature of tribal sovereignty, “the judiciary should not rush to create causes of action that would intrude on these delicate matters.”\textsuperscript{88} Therefore, issues such as the legitimacy of tribal membership requirements “depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.”\textsuperscript{89} Only by explicit congressional action would Mrs. Martinez have access to a federal forum to challenge arbitrary or unjust actions by the tribal government.\textsuperscript{90}

\textit{Santa Clara Pueblo} would seem to put to rest any legal challenges in federal or state fora to race-based tribal membership requirements. Nonetheless, the issue is far from settled for three main reasons. First, at least one lower court has already diverged from \textit{Santa Clara Pueblo} by allowing a non-Indian corporation to recover damages in federal court under the Indian Civil Rights Act. In \textit{Dry Creek Lodge, Inc. v Arapahoe & Shoshone Tribes},\textsuperscript{91} the Tenth Circuit distinguished \textit{Santa Clara Pueblo} on its facts:

Much emphasis was placed [in \textit{Santa Clara Pueblo}] on the availability of tribal courts and, of course, on the intratribal nature of the [dispute]. With the reliance on the internal relief available the Court in \textit{Santa Clara} places the limitations on the Indian Civil Rights Act as a source of a remedy. But in the absence of such other relief or remedy the reason for the limitations disappears.\textsuperscript{92}

The holding of \textit{Dry Creek Lodge} suggests that the constitutional rights of

\textsuperscript{84} Id at § 1302(8).
\textsuperscript{85} 436 US 49 (1978).
\textsuperscript{86} Id at 70.
\textsuperscript{87} Id at 72.
\textsuperscript{88} Id at 72 n 32.
\textsuperscript{89} Id at 71.
\textsuperscript{90} Id at 72.
\textsuperscript{91} 623 F2d 682 (10th Cir 1980).
\textsuperscript{92} Id at 685.
American citizens outweigh tribal sovereignty interests when there is no adequate tribal forum available to the aggrieved party. Thus, at least in the Tenth Circuit, a non-Indian could seek a remedy in federal court to challenge a race-based tribal enrollment standard.

Second, the very dilemma presented by Indian tribal gaming as a form of economic development is that its economic consequences overwhelm "tribal tradition and custom" by creating an incentive for tribes to adopt race-based membership requirements. As the experiences of the Mashantucket Pequots, Shakopee Sioux, and numerous other gaming tribes show, gaming success encourages tribes to limit the disbursement of gaming revenue to "bona fide" tribal members. Tribes have increasingly turned to blood quantum as a simple, if arbitrary, test of Indian identity. As Section III describes, this process is completely at odds with centuries of tribal culture. Thus, the Supreme Court's main policy argument in Santa Clara Pueblo—that tribes are better-suited to evaluate the effects of membership requirements on tribal traditions and customs than are federal courts—may not apply to gaming tribes. Tribes should be wary of the fact that the more arbitrary a tribal law is, the less likely it is to reflect tribal tradition or culture and the more likely it is to be overturned by federal courts.

Finally, Santa Clara Pueblo does not foreclose non-ICRA equal protection remedies that might be available to Indians and non-Indians who wish to challenge race-based tribal enrollment standards. Fifty-nine tribal constitutions include provisions that guarantee that tribal members enjoy additional rights as citizens of the United States or a state. A plausible interpretation of such provisions is that they go far beyond the ICRA to apply against tribal governments the full panoply of individual rights developed in non-Indian contexts. Federal courts could well view such incorporation of federal law as granting them jurisdiction over equal protection challenges to tribal membership requirements.

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93. Santa Clara Pueblo, 436 US at 71. The Tenth Circuit recognized this irony by noting that the patrilineal tribal membership ordinance at issue in Santa Clara Pueblo "was the product of economics and pragmatics," rather than tradition or culture. Martinez v Santa Clara Pueblo, 540 F2d at 1047.


95. Id at 274-75 (citing Chehalis Reservation Const, Art VIII).

96. Id at 291.
b) Further congressional action. The most obvious and likely challenge to race-based tribal membership requirements is, however, the possibility of further congressional action. Given the Supreme Court's continued acceptance of congressional plenary power over Indian affairs, Congress could well amend the ICRA to create new remedies for tribal violations of civil liberties. Indeed, Congress has an incentive to do so. As bumper stickers like "Save a salmon; can an Indian?" attest, many Americans are hostile to the idea of preferential legal treatment for Indian tribes. Furthermore, many Americans have urged Congress to expand the legal protection of non-Indians living or working on tribal lands. Providing non-Indians further equal protection remedies in federal court would allow Congress to claim that it is simultaneously protecting Americans and "civilizing" American Indian law.

Unless tribes act for themselves to identify tribal members in non-racial terms, they risk the prospect that either federal courts or Congress will implement federal standards for tribal membership. Such action would further erode tribal sovereignty and acculturate Indians into mainstream American society. Both would increase the risk of federal termination of tribal recognition. Both would also compromise the potential of gaming as a tool for economic development on reservations. If, however, tribes were unable to replace blood quantum membership requirements with something equally effective, thousands of putative Indians would arrive from across the country, eager to share in the wealth, and tribes would be unable to use gaming revenue to promote tribal economic development. Gaming, like the appropriation of reservation timber, oil and gas, and uranium reserves before it, would become yet another case of Indian exploitation by the white man.

III. An Alternative: Culture-Based Standards for Indian Tribal Identity

Gaming success therefore presents a dilemma for American Indian tribes. On the one hand, the social, political, and economic effects of gaming revenue create an incentive structure that encourages tribes to adopt narrow, exclusive conceptions of tribal identity. On the other hand, if tribes use blood quantum measurements as tests of tribal identity, they risk any or all of the consequences described in Section II. How can tribes resolve this dilemma?

In short, the cause of the dilemma—gaming success—also provides a solution. By enabling tribes to reassert their economic independence from American society, gaming allows them to rediscover and reapply native Indian traditions


98. Gaming success has fueled this animosity. The Pequots' neighbors, for example, complain about the increased construction and traffic, as well as the preferred treatment tribes receive in federal taxation and regulation by the Securities and Exchange Commission. See 60 Minutes: Wampum Wonderland at 13 (cited in note 19).
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and culture. It allows tribes to reject race-based citizenship requirements and replace them with more inclusive, culture-based conceptions of tribal identity. Although tribes may hesitate to substitute a bright-line rule for something as indeterminate as "tribal culture," doing so will protect their future growth and sovereignty.

A. ANTHROPOLOGICAL AND HISTORICAL STUDIES OF INDIAN SELF-IDENTITY

Besides its dubious interpretation of legislative history, the Supreme Court's decision in *Santa Clara Pueblo* involves an irony that is at the center of tribal usage of race as an identifying feature of Indian identity. With an eye toward protecting Indian culture, the Court interpreted the ICRA as narrowly as possible; racial identification and discrimination, however, were never features of traditional Indian culture. Both were outgrowths of contact with European, and later, American, colonizers. Within this irony lies the cause of, and the solution to, the gaming dilemma.

An important step in solving the problem is identifying how and why Indians came to view themselves in terms of race. Studies suggest that before contact with Europeans, the concept of "tribe" did not exist among American Indians. Instead, Indian groups identified themselves both conceptually, based on a shared culture, and politically, based on small village, band, or lineal networks. As anthropologist Gerald M. Sider has explained, "[T]he whole notion of clearly demarcated and separated 'tribes' at the point of contact [with Europeans], with substantial empty space between them, collapses. In its place, we can come to see a social landscape in the pre-contact southeast that was constituted by networks of native villages and towns with multiple and diverse kinds of connections between them." These networks of people determined their conceptual identities or "membership" simply by determining who shared each network's culture. Lineage, or assumed lineage, was often important, simply because most group members shared a common lineage. But shared lineage was never the sine qua non of group identity that it is today. Before their first contact with Europeans, most Indian groups would have identified their members primarily on the basis

99. 436 US at 49.
103. Cornell, 11 Ethnic & Racial Stud at 29-30 (cited in note 101) (Pre-contact Indian groups were "bound together by, among other things, their collective participation in common symbolic beliefs, cultural practice, social networks and interactions.").
104. Id at 30 ("At the heart of most [groups] lay real or assumed lineal ties, shared language and belief systems, and historical and often territorial continuities.").
105. Id at 29 (noting the rarity of pre-contact Indian group-identities in which kinship and other political boundaries coincided with language and other cultural features).
of a shared culture: language, residence in the community, familiarity with the
group's traditions, etc. Kinship boundaries, crudely defined today by "blood
quantum," were more often used to define a group's political organization,
which was "only one aspect of groupness." Contact with white colonizers, however, forced a consolidation of Indian
cultural and political identities. This consolidation occurred largely be-
cause whites insisted on negotiating with Indians using European conceptions of
political hierarchy and racial identity. Instead of defining themselves in re-
lationship to other Indians (based on a shared culture), Indians began to define
themselves in relationship to "non-Indians" (based on race), and they used the
concept of "tribe" as a political and legal means of differentiation: "Tribal mem-
bership, once synonymous with tribal identity, [became] a distinct legal, as
opposed to cultural or conceptual, category. As it came to mean less in cultural
terms, it came to mean more as a foundation for the assertion of individual and
group rights to land, services, or exemptions guaranteed by treaty or legis-
lation." This process, whereby Indian self-identity flows "both within and against"
the dominant society's perception of Indian history and ethnicity, has continued
to the present day. In his groundbreaking study Lumbee Indian Histories,
Sider examined this dynamic of identity formation among the forty thousand
present-day Lumbee Indians of North Carolina. Sider found that the formation
of Indian identity occurs through an "unavoidable and irresolvable" antagonism
between Indians and the dominant society. To obtain federal recognition and
protection, Indians, unlike other American ethnic groups, must constantly prove
their identity both individually and collectively. This forces them to adopt
whatever Indian histories or identities are needed to convince themselves and
outsiders of their Indian identity. The voluntary adoption of race-based tribal
membership requirements can be viewed as a continuing feature of this process.

106. Id at 29-30. In a study of the Flathead Indian Reservation in Montana from 1860
to 1970, Ronald Trosper found that the reservation in 1960 adopted a "new definition of
Indian for tribal membership [that] emphasized blood quantum rather than community,
which had been stressed previously." Thornton, Holocaust and Survival at 197 (cited in
note 67) (citing Ronald L. Trosper, Native American Boundary Maintenance: The Flathead
Indian Reservation, Montana, 1860-1970, 3 Ethnicity 256, 271 (1976)).
108. Id at 31.
109. Id.
110. Id at 41 (citing Vine Deloria, Jr., God is Red (Dell, 1973)).
111. For a description of this phenomenon, see Sider, Lumbee Indian Histories at 3-16
(cited in note 102).
112. Id at 9.
113. Id at 21.
114. Id.
B. CULTURE-BASED TRIBAL MEMBERSHIP REQUIREMENTS

How does the formation of autonomous identities and histories address the dilemma posed by contemporary tribal gaming? Simply put, gaming success, unlike any other past or present development on reservation lands, offers tribes a unique chance to reject foreign conceptions of tribal identity and return to a definition of themselves they once held: an inclusive definition whereby shared culture defines tribal membership.

Tribal gaming enterprises and the revenue they produce provide tribes an historic degree of autonomy from the dominant American society. Besides the obvious ways in which gaming revenue contributes to this process, such as freeing tribes from dependence on federal assistance, it has increased tribal autonomy in less obvious ways. For example, gaming success has allowed tribes to fund both small powwows and huge, state-of-the-art Indian cultural centers. Members of successful gaming tribes, frequently employed by the tribal casino or bingo hall, now have the economic means to participate and share in the creation and transmission of tribal tradition. This newfound autonomy allows tribes to define and apply tribe-specific, tribe-chosen, cultural definitions of tribal identity, such as the ability to speak the tribal language or familiarity with and acceptance of tribal traditions.

At least one tribe has already taken this step, and its success in balancing tribal registration and gaming profits may serve as a model for other tribes. The Cherokee Nation runs a sizeable bingo hall. It also has achieved political power in Oklahoma by adopting an inclusive definition of what it is to be a Cherokee. At the time of the Cherokee removal from southeastern homelands in the 1830s, mixed-bloods represented less than one-quarter of the Cherokee population. By the 1950s, the Cherokee Nation of Oklahoma had become "a population of predominately assimilated mixed-bloods." In response to this population loss, the Cherokee Nation developed a new constitution in 1975, one that established no minimum blood quantum for tribal membership. The new constitution requires only that one be able to trace descent along Cherokee lines.

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115. The Mashantucket Pequots of Connecticut, for example, have used gaming profits to fund classes in Indian history, hire anthropologists to resurrect the tribe's lost language, and plan construction of an American Indian museum and cultural center. See 60 Minutes: Wampum Wonderland at 11, 14 (cited in note 19).
118. Id at 199.
119. Id.
120. Id.
121. Id (citing Cherokee Nation of Oklahoma Const, Art III, § 1 (1975)).
This generous, inclusive conception of tribal identity has expanded the Cherokee Nation's population from fewer than ten thousand in 1970 to 156,000 (mainly mixed-bloods) in 1994 and has given the Cherokee a new degree of political power in Oklahoma, even as the tribe runs a sizeable bingo hall.124

Given the desirability of adopting traditional, culture-based tribal membership requirements, why, during the pivotal, historic opportunity presented by gaming success, have tribes instead continued to embrace foreign, racial conceptions of Indian identity, with their concomitant demographic and legal effects? Why has not every gaming tribe followed the Cherokee model?122

The answer lies in the incentive structure created by the very gaming success that allows tribes to seek their own identities. This is the fundamental paradox of gaming-based economic development: even as it presents a historic opportunity for American Indians to define their identities in non-racial terms, its incentive structure—the political, social, and fiscal pressures to control gaming revenue—encourages tribes to exclude potential members on the basis of race. Blood quantum tests offer a simple, inexpensive means of determining (and limiting) tribal identity. Just as American colleges and universities prefer “objective,” “standardized” admissions tests over seemingly subjective and difficult-to-score essay tests, tribes prefer blood quantum over other measures of cultural identity.

IV. Shared Culture and Residency as Substitutes for Race

Gaming tribes thus face the following problem: how can they protect their gaming revenue from greedy outsiders and thereby continue economic development on reservations? An inclusive, cultural definition of citizenship will avoid bleak demographic and legal futures but may not solve this economic dilemma, or, if it does, will do so at a higher cost than blood quantum tests. Tribes will not be able to overcome this dilemma and adopt culture-based enrollment standards unless those standards prove as effective as blood quantum tests in controlling population growth.

There is, however, a way for tribes to devise culture-based membership requirements that are every bit as effective but far less legally and historically suspect than blood quantum tests. Tribes can solve the problems presented by gaming success by adopting inclusive, traditional definitions of tribal citizenship, as the Cherokee Nation has done, combined with durational residency requirements for tribal members to receive gaming proceeds or non-emergency tribal

122. Cherokee Nation of Oklahoma Const, Art III, § 2 (1975). Of course, if the Registration Committee makes its enrollment determinations based on arbitrary factors, this system might prove no better than blood quantum measurements. I assume, however, that the Committee, in making its decisions, considers primarily factors such as an individual's identification with Cherokee tradition, knowledge of Cherokee history, ability to speak the Cherokee language, service to the Cherokee people, and similar factors.


services. Residency on the reservation or other tribal land would test one's acceptance of tribal culture, just as it did in the days before race replaced tribal tradition and culture as the identifying feature of tribal identity.125

This proposed durational residency requirement would parallel the State of Alaska's early attempt to limit payment from the Alaska Permanent Fund for Mineral Resources based on length of residency in Alaska. Much like the windfall that gaming revenue provides many tribes today, the 1967 discovery of oil reserves on State-owned land in Alaska produced a windfall for the State.126 The State saw its revenues increase by $3.7 billion in 1981 alone.127 In response to this surge in State revenue, the citizens of Alaska passed a constitutional amendment in 1976 that created the Alaska Permanent Fund.128 The amendment requires that the State deposit at least 25 percent of its mineral income into a Fund, which is off-limits to most legislative appropriations.129 In 1980, the Alaska legislature enacted a dividend program, intending to provide one dividend unit from the Permanent Fund (worth fifty dollars) to each adult Alaska citizen for each year of residency subsequent to 1959, the first year of statehood.130 This method of distributing the Fund's revenue was designed to reward long-term residents of Alaska, reduce turnover in the state's population, and "preserve 'Alaskan' cultural characteristics threatened by the oil boom."131 In Zobel v Williams,132 the Supreme Court held that Alaska's dividend program was an unconstitutional violation of the Equal Protection Clause because it distributed revenue unequally based solely on an individual's length of residency in Alaska. In response to the Zobel ruling, the Alaska legislature revised the dividend program to distribute equal dividend checks to each eligible resident, a practice that continues today.133

Unlike Alaska, however, Indian tribes could easily overcome constitutional challenges to durational residency requirements. Even if Congress or the Supreme Court were to reverse the Court's holding in Santa Clara Pueblo,134 it seems doubtful that either would hold a tribal durational residency requirement to strict equal protection scrutiny under the ICRA. Gaming tribes could likely demonstrate a legitimate tribal interest (providing a rational, historical, and cultural non-race-based test for tribal membership) to justify the use of durational residency requirements. Furthermore, unlike the U.S. Constitution, there is no "right to travel,"135 privileges and immunities clause, or other provision in the

125. See note 103 and accompanying text.
127. Id.
128. Id at 57.
129. Id.
130. Id.
133. O'Brien and Olson, 18 Pub Fin Q at 144 (cited in note 131).
134. 436 US at 49.
135. For an excellent discussion of the Supreme Court's recognition of the right to
ICRA that would provide courts with a sound legal basis for holding tribal residency requirements to anything other than minimal equal protection scrutiny.

A durational residency requirement by itself, however, will not solve the gaming dilemma. The prospect of thousands of dollars in revenue or tribal services will attract many outsiders to move to reservations, just as similar economic benefits attracted many to move to Alaska. Unless the required period of residency was quite lengthy—and thereby effectively useless—it alone would not deter non-Indians from establishing residency. But if residency were combined with other culture-based tests of Indian identity, such as knowledge of tribal tradition or ability to speak the tribal language, it would become an effective, relatively simple replacement for blood quantum tests.

A durational residency requirement may be simple, but it is not a panacea. The analogy to Alaska’s durational residency requirement at issue in Zobel is not perfect, for one very important reason. Alaska is not a semi-sovereign nation; an Indian tribe is. It would seem impossible for a tribe to invoke a durational residency requirement as the sole test for citizenship because much of a tribe’s activities will occur off of the reservation or tribal land base. How should a tribe treat, for example, an Indian lobbyist in Washington, D.C. or an Indian lawyer working for the Native American Rights Fund in Boulder, Colorado, both of whom may not maintain residence on a reservation but nonetheless contribute to the tribe?

Problem cases such as these bolster the argument that a durational residency requirement cannot stand alone. In the above examples, for instance, a tribe might choose to institute a tribal service requirement in lieu of residency, or it might include service to the tribe as an important, or even a determinative, feature of the cultural component of its membership regime. The point is that residency and culture-based membership tests must act in concert, along a spectrum, to be effective. Tribes could use durational residency requirements to fine-tune their membership needs, much as they use blood quantum requirements today. When membership rises too quickly, tribes could lengthen the durational component of the citizenship test and vice versa, all the while using tribe-specific, tribe-chosen measures of history, tradition, and culture to identify tribal members in Indian terms.

V. Conclusion

The most promising benefit provided by tribal gaming is the newfound freedom it gives tribes to seek their own independent identities and histories. Tribal membership requirements should form the centerpiece of this process. Unfortunately, many tribes, bound by the political, social, and fiscal incentives created by gaming success, have adopted race-based membership requirements. The use of blood quantum as an identifying feature of tribal citizenship poses

travel as a “fundamental right and interest” under the Equal Protection Clause, see Ronald Kahn, The Supreme Court & Constitutional Theory: 1953-1993 147-52 (Kansas, 1994).
several important problems. It strengthens existing demographic trends that have enlarged the population of mixed-blooded Indians and highlighted a conflict between full- and mixed-blooded Indians on many reservations. It increases the risk of federal court or congressional scrutiny of tribal laws, which would further erode tribal sovereignty.

Only by abandoning race-based conceptions of citizenship and returning to traditional, cultural measures of Indian identity can tribes solve the new dilemma presented by tribal gaming success. The use of a durational residency requirement, combined with tribe-specific, culture-based membership standards provides tribes with one viable alternative to stark racism. Only by adopting such a non-race-based enrollment system can tribes hope to continue gaming as a means of economic development while protecting the future sovereignty and vitality of Native America.