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WHAT LIES AHEAD

Tribal Disenrollment Demands a Tribal Answer

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Few topics in Indian law carry more weight or import than the issues around tribal membership—including enrollment and disenrollment. The question of tribal membership and affiliation is not only determinative for many federal questions such as criminal jurisdiction and eligibility for programs made available only to Indians, but it lies at the very heart of the most essential tribal question: Who are we?

The question is also controversial in Indian Country, as tribes nationwide have engaged in membership disputes that have threatened or resulted in "disenrollment" of members or entire families that were previously considered part of the tribe. One count puts the number of tribes with disenrollment proceedings at nearly 80, and that those actions have affected more than 11,000 people. https://indiancountrymedianetwork.com/news/native-news/belongs-epidemic-tribal-disenrollment. The topic has given rise to numerous websites opposing the practice, including a dedicated social media movement, http://stopdisenrollment.com, and national media coverage, https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html. In March 2017, the University of Arizona's College of Law held a two-day conference focusing on the topic. https://law.arizona.edu/tribal-disenrollment-who-belongs-conference.

Our aim in this article is not to determine the cause of disenrollments—which range from claims of inappropriate initial enrollments to efforts to seize larger shares of gaming profits—but to argue that tribal sovereignty precludes demands that the questions of citizenship and enrollment be addressed by federal or other non-tribal institutions, and to state that tribes alone must decide whether disenrollment is appropriate for their communities. There are many important aspects to this debate that are outside the scope of this article—what drives disenrollment, the effects of disenrollment on individuals, and what the idea of tribal membership means vis-a-vis indigeneity and the racial aspects of Indianness—but are worthy of full discussion elsewhere. The debate on the cause of disenrollment is also for others to engage as the focus here is on how any response must be tribally based.

Tribal sovereignty demands tribal exclusivity over decisions in this arena, and that recent calls for outside influence—from approving jurisdiction of federal courts to intervention by the Bureau of Indian Affairs (BIA)—must be rejected. There is undoubtedly room for political and rights-based arguments to be made against disenrollment, but—given that citizenship reaches to the very core of tribal identity—these arguments must be addressed to the tribes themselves to prevent further erosion of tribes' power over themselves as entities.

Tribal Citizenship and Enrollment

Tribes, like the United States and the States, are sovereign governments recognized in the U.S. Constitution. *See* Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. J. 1, 1 (1997). Like other governments, tribes define their own polities, including setting the requirements to be a citizen. There is no one definition of tribal citizen (or members), and the definitions between tribes vary widely from lineal descent from a person on an identified "roll" of members, to rules that require a "blood quantum" or degree of Indian ancestry, to a mix of ancestry and residency requirements. *See* Carole Goldberg, *Members Only: Designing Citizenship Requirements for Indian Nations*, 50 Kan. L. Rev. 437, 441–45 (2002). Regardless of the definition, tribal members are considered "Indian" for formal legal purposes. Note that federal definitions of "Indian" vary and may include people who are not tribal members, such as descendants of tribal members of federally recognized tribes who were residing on Indian reservations on June 1, 1934, and people who have a blood quantum of one-half or more Indian blood (Indian Reorganization Act, 25 U.S.C. § 5129).

The power to define one's own membership is purely a tribal prerogative, but has been influenced greatly—primarily in the last century—by the federal government. Note that tribal power to determine membership is wide, but may be affected by treaty or statutory language that sets membership criteria. *See, e.g.*, Coquille Restoration Act, Pub. L. No. 101–4, 103 Stat. 91 (1989). Before efforts to delineate members, membership and group identities were formed around shared lands, culture, and family frameworks that did not require formal definitions. *See* David E. Wilkins, *A Most Grievous Display of Behavior: Self-Decimation in Indian Country*, 2013 Mich. St. L. Rev. 325, 329 (2013). Federal efforts to determine tribal membership began when the purchase of Indian lands by treaty required the federal government to provide payment in the form of goods, services, or money to tribes. Limiting the membership pool limited the federal payment obligations. Federal efforts to define tribal citizenries continued in connection with the efforts to destroy tribal landholdings through small allotments to individual Indians. Most famously, in 1893 the Dawes Commission created tribal rolls for the Five Civilized Tribes, forced them to dissolve their reservations, and used "excess" lands for non-Indian settlement. The formation of the rolls was contested. For example, many Native people refused to be listed, others were left off the list, some included themselves with a lower blood quantum to avoid government control, and some who were not eligible found their way on the rolls anyway. *See, e.g.*, Rose Stremlau, Sustaining the Cherokee Family: Kinship and the Allotment of an Indigenous Nation 144 (2011).

The 1934 Indian Reorganization Act (IRA) created another mode of membership, as the "model" constitutions provided for tribes by the BIA contained provisions instituting membership rules that we see often today, such as parental membership requirements, residency, and blood quantum that were derived from federal goals rather than tribal goals. (For a discussion of how federal bureaucrats asserted power over tribal membership decisions through interpretation of the IRA, *see* Goldberg, 437, 445–48. Even for those tribes that did not adopt IRA constitutions, the influence of the BIA was present in tribal codes and constitutions that were passed in the 1930s, 1940s, and 1950s. (For a discussion of the origins of the Navajo Nation's one-quarter blood quantum requirement as introduced by BIA officials, see http://lawschool.unm.edu/tlj/volumes/vol8/8TLJ1LSPRUHAN.pdf.)

This history shows the concept of formal membership is in no sense a purely tribal one and that the history of the process is certainly flawed. However, the common theme in this turbulent history is the hand of federal officials and efforts to arrive at non-tribal goals. In today's era of self-determination, the federal government has largely withdrawn from tribal membership determinations—except when a tribe has a provision in its constitution that calls for federal review of changes to their constitutions or bylaws—and usually resists calls for intervention in such actions due to having no authority under tribal law. However, the federal government does play some role when disenrollments result in competing governing bodies, as it may need to choose which government to work with in order to provide services to tribal members. *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016).

Primacy of Tribal Sovereignty Demands Tribal Exclusivity in Enrollment Discussions

The U.S. Supreme Court stated in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 n.32 (1978), that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *See also Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013). Federal courts have steadfastly recognized that tribal membership decisions are beyond their jurisdiction to reach, and repeatedly reject cases asking them to intervene in tribal disputes. *See Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). It is appropriate that they do so, partly due to the fact that the federal courts are ill-equipped to make identity-constituting decisions for communities of which the courts are not a part, but also that enabling non-tribal institutions to mold tribes themselves usurps tribes' most central power of self-definition.

The "high-water mark" for formal recognition of tribal rights to self-constitute is arguably the 2008 U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) (www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf), which recognizes indigenous peoples' rights to self-determination and autonomy in internal affairs and the right to determine their own identity of membership. *See* arts. 4, 12, 13, 20, 31, and 33 regarding protecting cultural, political, and membership rights. The rights described in the UNDRIP hew to those recognized as reserved to tribes in U.S. case law as

well. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) *citing Cherokee Intermarriage Cases*, 230 U.S. 76 (1906) and *Roff v. Burney*, 468 U.S. 218 (1897) to note that, unless limited by treaty or statute, a tribe has the power to determine tribal membership. *Equal Employment Opportunity Comm'n v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001) (holding that a dispute between a tribal member and a tribal institution is "entirely intramural," and that generally applicable federal laws do not apply when touching on "exclusive rights of self-governance.") The tribal rights must also be considered alongside other rights, like those in UNDRIP Article 9, which states that indigenous peoples *and individuals* have the right to belong to an indigenous community or nation, in accordance with the traditions of the community. The question then becomes, which institution or entity must adjudicate rights in questions of membership?

It is our assertion that only the tribe itself, as a sovereign, may consider and decide who is a member of their own community, and that no other institution should (or properly can) assume such power over a tribal government. The primary reason is self-evident: A group itself is defined by the members in it, so the act of defining membership is the fundamental act of self-determination. Despite the outside influence of the federal government in forming tribal membership standards, tribes now engage in internal conversations about who they are, and do so on tribal terms. Tribal scholars have examined this concept as "cultural sovereignty," arguing that the cultural self-determination is the important core of tribal institutions, over which a shell of "state-like" sovereignty exists. *See* Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in Economic Development in American Indian Reservations, 22 (Roxanne Ortiz, ed.) (1979); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan L. & Pol'y Rev. 191 (2001).

> There is no one definition of tribal citizen, and the definitions between tribes vary widely.

Whether, and how, a tribe will use disenrollment as a means of self-definition is a question for the tribe to answer. Some tribes have decided that the process is inappropriate for their community, and have banned its use. The Federated Indians of Graton Rancheria has amended its Tribal Constitution to prohibit disenrollment (except in limited cases), and explicitly states the Tribal Council may not terminate citizenship rights, www.gratonrancheria.com/disenrollment. Note that recently the Robinson Rancheria in California re-enrolled more than 60 members who had been disenrolled eight years prior and is now in the process of revising its documents to prevent future disenrollments, www.willitsnews.com/general-news/20170214/robinson-rancheria-reverses-disenrollment. Other tribes have used the disenrollment process to reverse errors or malfeasance, such as the San Pasqual Band of Mission Indians, which disenrolled members because the BIA had enrolled an individual with no blood relation to the band. *Alto v. Jewell*, No. 15-56527 (9th Cir., Sep. 20, 2016) (memo. op.); *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013). There are many *tribal court* cases that review disenrollment and membership decisions, naturally coming down on both sides of the issue. These cases illustrate not only that tribes are capable of handling these questions internally, but also do so in a way that reflects tribal values. *See, e.g., Alexander v. Confederated Tribes of Grand Ronde*, No. A-15-008, 13 Am. Tribal L. 353 (Grand Ronde Tribal Ct. App., Aug. 8, 2015), available at https://weblink.grandronde.org/WebLink8/DocView.aspx?id=69560&dbid=0 (holding the tribe was barred by laches and equitable estoppel from disenrolling members); *Cherokee Nation Registrar v. Nash*, No. SC-2011-02, 10 Am. Tribal L. 307 (Cherokee (OK) Nation Sup. Ct., Aug. 22, 2011) (upholding the right of the tribe to change membership criteria and effect disenrollment). *See also* www.narf.org/nill/ilr/enrollment.html (collecting tribal court opinions on membership and enrollment).

This is not to say that disenrollments are not hotly contested and often result in very messy, protracted struggles that play out in media coverage, sharp court filings, or the political arena. At the core of these battles lie concerns about due process and fairness, as well as quite real struggles with identity and belonging. When considering enrollments questions, the Little River Band of Ottawa Indians' Tribal Court of Appeals explained:

> Tribal membership for Indian people is more than mere citizenship in an Indian Tribe. It is the essence of one's identity, belonging to a community, connection to one's heritage and an affirmation of their human being place in this life and world. […] Tribal membership completes the circle for the member's physical, mental, emotional, and spiritual aspects of human life. *Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n*, 2007 WL 69900788, at *2 (Little River Ct. App., June 24, 2007).

Because this is so, it is unsurprising that discussions surrounding disenrollment are sounding in emergency terms—"epidemic," "wave," and "new wave of genocide" are a few recent headlines—because the issue is so central to individual and group identity. In this urgent environment, some are calling for outside intervention by federal or international bodies to prevent or roll-back disenrollments.

For example, some scholars and commentators raise the possibility that in the absence of tribal solutions, disenrolled tribal members should have remedies in federal court or via administrative review by federal agencies. Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 Ariz. L. Rev. 383 (2015); David Wilkins, *Two Possible Paths Forward for Native Disenrollees and the Federal Government?*, https://indiancountrymedianetwork.com/news/opinions/two-possible-paths-forward-for-native-disenrollees-and-the-federal-government. Others call for an amendment to the Indian Civil Rights Act to legislatively reverse *Santa Clara Pueblo v. Martinez* and partially abrogate tribal authority over membership to give federal courts jurisdiction to review membership cases. *See* Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 Va. L. Rev. 793 (2006). Scholars also mention that disenrollment disputes could be handled through human rights approaches like a "truth and reconciliation" commission or U.S. enforcement of international human rights against tribal governments. *See* Galanda & Dreveskracht at 453–68, 469–72.

At the heart of arguments examining federal litigation or administrative review of disenrollment is the idea that while the power to define membership is tribal, disenrollment is a federal construct that should be available for federal review or control (and thus subject to due process and other constitutional limitations). As we explain above, membership questions are the central questions of tribal identity, and the federal government has shown an inability to handle these questions in ways that are informed by tribal culture and tribal priorities and thus appropriate for tribes. Even considering that some problems are of federal making, conceding any power now that was properly tribal in the first place is a retreat from self-governance and tribal sovereignty.

It would be dangerous to now engage in a semantic partitioning of which tribal powers are truly inherent and which are the product of government influence: The history of the federal-tribal relationship is one rife with usurpation of tribal power under swindle, force, and neglect, and an intrusion into tribal sovereignty in a core area of tribal power like membership could readily lead to diminution of other powers such as territorial governance or sovereign immunity (particularly where there are non-tribal interests). Courts—even when membership is not the issue in cases—have shown they may impose their own ideas of who an Indian should be; take as an example Justice Samuel Alito's opening sentence in *Adoptive Couple v. Baby Girl*, 70 U.S. ___ (2013), which raised and questioned the sufficiency of a child's blood quantum despite the fact the tribe in the case did not use quantum for membership. To bring central questions of tribal identity into these fora would give judges leeway to narrow tribal membership on their whim.

The justification for non-tribal answers is that core rights such as due process would be protected under U.S. constitutional standards or their international analogues. Due process is indeed an important aspect of rights protection—and one that the Native American Bar Association has highlighted as critical in membership questions (*see* www.nativeamericanbar.org/wp-content/uploads/2014/01/Formal-Opinion-No.-1.pdf)—but the argument that the way to provide it is by diminishing tribal sovereignty is contrary to precept of self-determination. Similarly, a human rights framework may be a fruitful way to think about disenrollment, but the case must be made to the tribes themselves to adopt *tribal* laws and rules to respond.

Tribes may be well served to create institutions like accountable, independent tribal courts and Courts of Appeal that are empowered to handle disenrollment. Others may find that an intertribal forum would be the best, particularly if pursuing human rights solutions. *See, e.g.*, Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 San Diego L. Rev. 567, 611–25 (2012). We also believe that, depending on the circumstance, tribal strategies for conflict resolution like peacemaking courts or other traditional dispute resolution may be best to produce culturally appropriate responses and solutions to disenrollment. Note that the Native American Rights Fund has collected examples of tribal peacemaking codes and processes, http://peacemaking.narf.org/models/laws.

These responses may provide the protections to disenrolled members that many seek, but if not, in recognition of tribal self-determination, *external* pressure on tribes is the answer, not internal intervention. Former Assistant Secretary of Indian Affairs Kevin Washburn discusses the possibility of U.S. "diplomatic" pressure for what it sees as unfair human rights practice in disenrollment, including sanctions up to an extreme one: loss of a tribe's federal recognition. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 Harv. L. Rev. F. 200, 228-29 (2017). The upside of such a response is that it recognizes the right of tribes to self-constitute and leaves the tribal polity intact even while intervening in disenrollment. Even in the event of termination of federal recognition, a tribe can continue as a self-determined entity with the possibility federal restoration in the future; can one say the same for a tribe whose authority to define its own people has been stripped from it?

We believe it is for tribes to decide whether they want or need to keep disenrollment as an option for their own communities. We also believe that tribes are perfectly able to limit or cease disenrollment on their own terms. Tribal self-governance and sovereignty are bedrock principles of tribal success and must also serve as the foundation for critical conversations over membership and enrollment. While focusing on tribally based responses may be frustrating politically and slow in progress, the long-term benefit of protecting tribal rights and tribal sovereignty from further erosion is well worth the effort.

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