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Cover Page Footnote

Tommy Miller is a 2015 J.D. Candidate at Harvard Law School and a member of the Colville Confederated Tribes. He would like to thank his family for their constant support and inspiration, Professor Joe Singer for his guidance, and the staff of the American Indian Law Journal for their hard work.

BEYOND BLOOD QUANTUM

THE LEGAL AND POLITICAL IMPLICATIONS OF EXPANDING TRIBAL ENROLLMENT

Tommy Miller*

INTRODUCTION

Tribal nations take many different approaches to citizenship. Many tribes require their members to have a certain blood percentage, or blood quantum. Some require that blood quantum match the specific tribe,[1] while others simply require a blood quantum of Indian descent.[2] Membership determinations in other tribes is based on lineal descent,[3] or matrilineal or patrilineal descent.[4] However, membership in a tribe does not by itself ensure full and equal rights. In the Choctaw Nation of Oklahoma, for example, there are no blood quantum requirements for membership, but the Chief, Assistant Chief, and Members of the Tribal Council must be at least one-quarter Choctaw.[5] History provides a unique lens through which to view the rise and current use of blood quantum requirements for tribal membership.

Blood quantum laws were first used in the United States to prevent mixed race people from holding public office or intermarrying with Europeans.[6] In 1817, the federal government began using blood quantum in treaties to separate "half-

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[1] *See, e.g.,* HOOPA VALLEY TRIBE CONST. ART. IV (2012)

[2] *See, e.g.*, CONSTITUTION AND BY-LAWS OF THE COLORADO RIVER INDIAN TRIBES, ART. II; *See also* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1139-45 (1994).

[3] *See*, *e.g.*, CHOCTAW NATION CONST., ART. VI, § 2 (1838) *available at* http://s3.amazonaws.com/choctaw-msldigital/assets/325/1838constitution_original.pdf.

[4] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978).

[5] *See*, *e.g.*, CHOCTAW NATION CONST., ART. VI, VII.

[6] Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 5.

breeds" from those with a lower blood quantum, conferring benefits only on the former.[7] These early treaties did not speak of blood quantum in terms of tribal membership, but rather as a criterion to determine eligibility for specific benefits.[8] At least as early as 1847, however, treaties reflected that people of mixed blood were members of the Indian tribes the government was dealing with.[9] Through much of its history, however, the United States used a rule of patrilineal descent to describe who it would recognize as Indian,[10] with a gradual shift to deference to tribal definitions of membership.[11]

Blood quantum started to become more relevant during the Allotment Era. During that era the federal government's goal was to dissolve reservations and apportion the reservation lands among tribal members in the form of "allotments".[12] As part of the guardian-ward responsibilities the United States believed it had with Indians, it placed restrictions on alienation of the allotments it created from reservation lands.[13] The restriction was originally to last for 25 years from the granting of the allotment. When that failed to free up the land quickly enough, Congress passed a statute allowing Indians that were deemed "competent" by federal officials to sell their parcels immediately.[14] To expedite the allotment and division process, Congress began to use blood quantum and race as proxies for competency, particularly for the Five Civilized Tribes in Oklahoma.[15] At one end of the spectrum were whites and freedmen who had been incorporated into the tribe, referred to as "Indians who are not of Indian blood,"[16] and at the other were full blood Indians.[17] The less Indian blood an individual possessed, the sooner he could alienate his interests in the land, and the fewer restrictions he was under generally.[18]

As tribes gained autonomy, many included blood quantum as a prerequisite for membership. Under the Indian Reorganization Act of 1934, many tribes

[7] *Id.* at 10.
[8] *Id.* at 11.
[9] *Id.* at 12; TREATY WITH THE CHIPPEWA ART. 4, Aug. 2, 1847, 9 Stat. 904, 905.
[10] *See generally* Spruhan*, supra,* note 6.
[11] *Id.* at 29-30.
[12] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2012).
[13] *See* General Allotment Act (Dawes Act) of 1887, 24 Stat. 388, 389, ch. 119, 25 USCA 331 (1887) [hereinafter Dawes Act]; *See also*, Spruhan, *supra* note 6, at 40.
[14] Act of May 8, 1906, 34 Stat. 182, 183, ch. 2348 (1906); Spruhan, *supra* note 6, at 40.
[15] Spruhan, *supra* note 6, at 40-41.
[16] *See* Act of Apr. 21, 1904, 33 Stat. 189, 204, ch. 1402 (1904); Spruhan, *supra* note 6, at 41.
[17] Spruhan, *supra* note 6, at 41.
[18] *Id.*

adopted constitutions that included blood quantum at the urging of the Department of the Interior.[19] Elimination of these blood quantum requirements would require approval by the Secretary of the Interior.[20] However, the Department itself has advocated for the removal of this review requirement, on the grounds that it violates tribal self determination.[21] Additionally, many tribal constitutions also contain express provisions that require federal approval before they can change membership criteria.[22] Despite the formal support of the Department for self-determination, the Bureau of Indian Affairs (BIA) seems to remain hostile to the idea of opening up membership.[23] Accordingly, some of the potential changes to membership requirements presented by this article may be difficult to implement, even with strong tribal support. Since 1975, tribes have moved towards self-determination. Part of this movement has been the revision of constitutions drafted by the federal government, to bring them in line with the values, traditions, and goals of the tribe.[24] One of the major stumbling blocks in this process of constitutional reform is how the tribe will define its membership.[25] Above all, tribes must design membership, and other institutions to reflect their unique tribal culture. This paper seeks to facilitate the reform process by laying out some of the legal and policy implications of various kinds of citizenship criteria, to add to legal and tribal conversations about reform. Section I explores the legality of tribes incorporating non-Indians as members; Section II examines the legal effects of non-Indian enrollment in various areas of Federal Indian Law; and Section III looks at the policy implications of adopting different kinds of membership criteria.

II. THE LEGALITY OF TRIBES ENROLLING NON-INDIANS AS TRIBAL MEMBERS

[19] Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 446-447 (2002).
[20] Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 255-57 (2009).
[21] S. Rep. No. 100-577 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3925 (comments of Ross Swimmer, Assistant Secretary of the Department of the Interior).
[22] *See*, *e.g.*, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION CONST., art. II, § 3 ("Future membership may be regulated from time to time by ordinance of the Confederated Tribes subject to review by the Secretary of the Interior.") *available at* http://www.cskt.org/gov/docs/cskt_constitutionbylaws.pdf, (last visited Oct. 12, 2014).
[23] *See* Goldberg, *supra,* note 19, at 448-449 (*citing* Thomas v. United States, 141 F. Supp. 2d 1185, 1192 (W.D. Wis. 2001)).
[24] *See* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, 2 (Eric Lamont ed., 2006).
[25] *See* Goldberg, *supra,* note 19 at 437.

In order for tribes to create membership criteria that are independent of blood quantum it must be constitutional for tribes to include non-Indians as members, and it must be within tribal inherent authority to recognize the non-Indians as such. While there seem to be no cases directly testing either proposition, it seems from the weight of the authority that it would be both constitutional and within the inherent powers of tribes to adopt non-Indians as members.

A. The Constitutionality of Non-Members Being Tribal Members

It is likely constitutional for tribes to enroll non-Indians as tribal members. Although some old Supreme Court cases suggest that there is an Indian lineage requirement for tribal enrollment, the principles of Indian law and historical practice indicate the opposite. Constitutional federal authority over Indian affairs derives from the commerce clause, the treaty clause, and the necessary and proper clause.[26] These clauses have been interpreted broadly to give the federal government "plenary" authority over Indian affairs.[27] Historically, Congress and the Executive branch have had primary authority in recognizing Indians and Indian Tribes, with the Supreme Court giving deference to the decisions of the other branches.[28] After the Civil War, the political branches forced some tribes that previously held slaves to adopt the former slaves as tribal members.[29] Although there have not been any Supreme Court challenges to this scheme of non-Indian tribal membership, the longstanding historical practice and broad deference given to the political branches mean that this scheme is likely constitutional.[30] The following cases suggest the opposite, but only in unpersuasive dicta.

In *United States v. Rogers*, the Supreme Court decided that a White man who had been adopted by the Cherokee Tribe was not subject to an exemption to

[26] COHEN, *supra* note 12, at § 5.01.
[27] United States v. Lara, 541 U.S. 193, 200 (2004).
[28] *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 47 (1913) (quoting United States v. Holliday, 70 U.S. 407, 419 (1865)) ("In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them Indians are recognized as a tribe, this court must do the same.").
[29] *See*, *e.g.*, Treaty with the Seminole Nation, 1866, art. 2, 14 Stat. 756; Treaty with the Cherokee, 1866, art. 9, 14 Stat. 799.
[30] Several Supreme Court cases rely on historical practice to determine the validity of federal action. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Thus, the longstanding recognition of these non-Indian "freedmen" as tribal members would likely influence a decision about the validity of that enrollment scheme.

federal criminal jurisdiction that applied only to "Indian[s]."[31] Rogers was a White man who had been moved to Cherokee country, made his home there, married a Cherokee woman, had several children, and had no "intention of returning to the United States."[32] Furthermore, the Cherokee Tribe had adopted Rogers, and treated him as a Cherokee, with the full privileges of membership.[33] In order to combat lawlessness, Congress had extended federal criminal jurisdiction over Indian Country, but left an exemption for "crimes committed by one Indian against the person or property of another Indian," over which tribes retained exclusive jurisdiction.[34] The Court in *Rogers* wrote that "a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned."[35]Although this language appears strong, the holding itself is simply that Rogers remains subject to federal jurisdiction; his adoption was not enough to sever his ties and responsibilities to the United States.[36] Additionally, the Court, interpreting Congress' intent, wrote that the exception "does not speak of members of a tribe, but of the race generally,-of the family of Indians," in an effort to preserve intra- and inter-tribal autonomy over Indians.[37] The Court read the racial requirement into the statute based on presumptive congressional intent regarding crime in Indian Country.[38] There is no indication that tribes lack the general ability to naturalize non-Indians, or make them members of tribes, just that tribes lack the specific power to bring non-Indians under the exception to criminal jurisdiction, because "Indian" in that statute is a purely racial term.

In *Montoya v. United States,* the court held that Victoria's Band, which had attacked settlers, constituted a distinct band that was not in amity with the United States, and therefore the settlers were not entitled to remuneration under a federal statute.[39] The Court defined an Indian tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and

[31] United States v. Rogers, 45 U.S. 567 (1846).
[32] *Id.* at 568.
[33] *Id.* at 568.
[34] *Id.* at 572.
[35] *Id.* at 572-73.
[36] *Id.* at 573-74.
[37] *Rogers,* 45 U.S. at 573 ("[the exception] intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.")
[38] *Id.* at 573 (The court's reasoning also relies on the fact that it would be against congressional intent to extend the exception to Rogers, as that would invite the criminally inclined to settle among the Indians, and would frustrate Congress' goal of preserving peace.)
[39] Montoya v. United States, 180 U.S. 261 (1901).

inhabiting a particular though sometimes ill-defined territory" and a "band" as "a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design."[40] It also says that "tribe" implies a separate racial origin.[41] The Court's purpose in creating this definition, however, was not to limit the definition of a tribe to members of the same race, but to distinguish a band from a tribe for the purposes of designating a specific band as distinct from the tribes to which its members were racially linked. Any requirement that tribes be composed of members of the same race was dicta. The court offers absolutely no reasoning to support including ancestry as a prerequisite to tribal membership. The only reasoning that could be inferred to support the inclusion of the racial requirement is that the court believes Indians are too inferior to organize on a permanent basis unless connected by race,[42] which is both racist and inaccurate. As the racial requirement for tribal membership was not relevant to the holding of the case, and unsupported by reasoning, it should not be considered evidence that tribes lack the ability to adopt non-Indians.

Like *Montoya*, there is language in *United States v. Sandoval* to suggest that race is a requirement for tribal membership. *Sandoval* involved the trafficking of alcohol in Indian country, which was a federal crime.[43] The question was whether Congress validly designated the Pueblo land as Indian Country, that is, whether the Congress could validly consider the Pueblos to be Indians and govern them with special laws.[44] The court held that as long as a community was distinctly Indian, Congress could deal with them as a tribe for as long as it wanted, which included the Pueblo.[45] Although Congress could not arbitrarily assert that a group of people were "Indians" for the purpose of governing them separately, the designation was not arbitrary for the Pueblo, considering their "Indian lineage, isolated and communal life, primitive customs and limited civilization."[46] Although this list was sufficient to justify congressional action in that case, there is no indication that all, or even any, of the factors on the list are necessary to recognize a group as a tribe. In other words, the court does not hold that Indian lineage is a

[40] *Id.* at 266.
[41] *Id.* at 266.
[42] *See Id*. at 265 (discussing the aspects of Indians' characters that make it impossible for them to form a true "nation"). *See also* Sarah Krakoff*, Inextricably Political: Race, Membership, and tribal Sovereignty,* 87 WASH. L. REV. 1041, 1072-1073 (2012) (providing a historical context for the court's rhetoric).
[43] United States v. Sandoval, 231 U.S. 28, 36 (1913).
[44] *See Id.* at 38.
[45] *See Id.* at 46-49.
[46] *See Id.* at 46-47.

constitutional requirement for federal recognition of a tribe, or those tribes would be unable to enroll non-Indians.

A central theme in the dicta of these cases is the association of "Indian" status with race. These cases were the products of a different era in United States history, however, and conceptions of race and the appropriate role it should play in legal decisions has changed dramatically. In the area of Federal Indian Law in particular, the Supreme Court has determined that "Indian" is a political term, rather than a racial one.[47] Accordingly, the race-based reasoning of these cases is no longer valid. Although there remains a descent component,[48] current federal recognition requirements emphasize political existence of tribes.[49] Additionally, the descent aspect is not explicitly racial, but requires members of a tribe seeking recognition to "descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."[50] To the extent that this regulation attempts to place a limitation based on race rather than political affiliation on tribal membership, it would likely trigger equal protection concerns explored in Section II of this paper.

Overall, the enrollment of non-Indians in tribes is likely constitutional, and is supported by historical actions of both tribes and the political branches of the federal government.

B. The Inherent Ability of Tribes to Adopt Non-Indians as Members

It is an established principle of Indian law that Indian tribes possess "inherent powers of a limited sovereignty which has never been extinguished."[51] A corollary of this principle is that tribes retain all of their sovereign powers except those "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[52] Indian tribes likely possess the ability to recognize someone as a tribal member for the purposes of granting them rights and

[47] Morton v. Mancari, 417 U.S. 535 (1974).
[48] 25 C.F.R. § 83.7 (f) (2014).
[49] *See*, *e.g.*, *Id* at (b) (the group must comprise a distinct community that traces its roots to historical times); *Id* at (c) (The group has maintained political control over its members since historical times).
[50] 25 C.F.R. § 83.7 (e) (2014).
[51] United States v. Wheeler, 435 U.S. 313, 322-323 (1978). *See also* COHEN, *supra* note 12, at § 4.01[1][a].
[52] *Wheeler*, 435 U.S. 313, 323 (1978). *See also* COHEN, *supra* note 12, at § 4.01[1][a].

privileges of citizenship,[53] but whether or not they may be recognized for more general purposes, such as receiving federal benefits, is less clear.[54] The ability of tribes to control their membership has been recognized as an important element of tribal sovereignty.[55] Therefore, tribes likely still retain the ability to recognize non-Indians as tribal members.

It is unlikely that tribes have been implicitly divested of the power to enroll non-Indians. The Supreme Court first articulated the principle of implicit divestiture in *Oliphant v. Suquamish Indian Tribe*. [56] There, the Court noted that tribes had already lost the ability to freely alienate their lands and form political connections with foreign powers.[57] Post-*Oliphant*, the implicit divestiture doctrine has been applied to other forms of jurisdiction as well,[58] although the rationale behind the theory is unclear.[59] *Oliphant* itself seems to suggest that tribal powers are only implicitly divested when they come into conflict with the interests of the United States, which has "overriding sovereignty."[60] In *Montana v. United States*, however, the Court held that tribes lost the power to regulate non-member hunting and fishing activity on reservations not because it conflicted with federal authority or interests, but because tribes had lost that power as a result of their "dependent" status.[61] The Supreme Court has not yet directly decided whether tribes can enroll non-Indians as members for general purposes such as receiving federal benefits, although the principles of implicit divestiture and federal Indian law generally suggest that tribes have not been divested of this power.[62]

Tribal enrollment of non-Indians does not seem overly in conflict with the interests of the United States. Unlike in *Oliphant*, where the federal government

[53] *See* Roff v. Burney, 168 U.S. 218 (1897).
[54] *See infra* Section II. (a discussion of potential treatment of non-Indian tribal members under various areas of law.)
[55] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[56] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[57] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (citing Johnson v. M'Intosh, 21 U.S. 543 (1823) and Cherokee Nation v. Georgia, 30 U.S. 1 (1831)).
[58] *See*, *e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981).
[59] COHEN, *supra* note 12, at § 4.02[3][a].
[60] *Oliphant*, 435 U.S. 191 at 209.
[61] *See Montana*, 450 U.S. 544 at 564; *See also* COHEN, *supra* note 12, at § 4.02[3][a].
[62] *See infra* Section III. (Status as a tribal member or an Indian is used in different ways in different areas of federal statutory and common law, and the inability to adopt non-Indians for one purpose does not foreclose adoption for another purpose). United States v. Rogers, 45 U.S. 567 (1846). (Tribes cannot exempt non-Indians from federal jurisdiction by enrolling them as members under a particular statute, but that does not mean that Indian tribes are similarly limited in other areas).

had legislated in the area of criminal jurisdiction and therefore expressed its interests clearly,[63] Congress has made no indication that tribes should not be enrolling non-Indians. Indeed, to the contrary, Congress and the President have demanded that certain tribes enroll non-Indian former slaves as members.[64] On the other hand, massive increases in tribal membership would increase the burden on the federal government to provide certain services, like healthcare, to Indians. Since these programs are generally underfunded, it is not clear that the addition of more tribal members would by itself result in any actual increased financial or other burden for the federal government. If the "overriding interests" version of the implicit divestiture test is applied to determine the scope of the tribal power, it seems like the tribe will be held to have the power. Later sections of this paper address some of these concerns.

It is also unlikely that this power to expand membership has been lost as a result of the status of tribes as a result of their dependent status. In *Roff v. Burney,* the Supreme Court recognized the broad power of tribes to control their membership decisions, including with regards to non-Indians.[65] Indeed, in *Montana* the court recognized a difference between powers necessary to self-government and internal relations and decisions affecting outside groups, and specifically reaffirmed tribal control over membership determinations.[66] Once again, the ability to enroll tribal members who would then receive federal benefits is unclear, but the enrollment of non-Indians would only directly increase the number of people vying for a piece of the existing pie, and would not force the federal government to increase appropriations. Accordingly, because there is no conflict between tribal and federal interests, tribes likely have not lost the power to expand membership as a result of their dependent status.

II. LEGAL IMPACTS OF ENROLLING NON-INDIANS

Non-Indians enrolling as tribal members would have implications for many areas of federal Indian law, and would change the constitutional legal analysis for some established legal doctrines. In the following examination, I will assume that the adoption law that is followed would allow non-Indians to become full tribal

[63] *Oliphant*, 435 U.S. 191 at 203.
[64] *See supra* Section I.A.
[65] Roff v. Burney, 168 U.S. 218 (1897). (The disenrollment of a White man was acceptable, but did not rule directly on the acceptability of his original adoption.)
[66] Montana v. United States, 450 U.S. 544, 564 (1981), (citing United States v. Wheeler, 435 U.S. 313, 322 n. 18 (1978)).

members, as opposed to tiered membership as discussed in Section III. The court in *Morton v. Mancari* held that distinctions based on status as an Indian were "political" rather than "racial" distinctions,[67] so anything less than full tribal citizenship might be considered another level of political classification, and may not trigger the equal protection analysis that I describe for certain laws. Parts A, B, and C will examine the impact of non-Indian enrollment on federal, tribal, and state criminal jurisdiction, respectively. Parts D and E will examine the minor effect on tribal and state civil jurisdiction, while Part F will explore the impact on federal statutory benefits.

A. Federal Criminal Jurisdiction

Federal Criminal Jurisdiction in Indian Country is governed by the General Crimes Act and the Major Crimes Act.[68] The General Crimes Act applies only to interracial crimes between Indians and non-Indians within Indian Country,[69] while the Major Crimes Act applies to any "major" crimes committed by Indians in Indian Country.[70]

In order to count as "Indian" for the purposes of federal criminal jurisdiction, a defendant must be shown to have some degree of Indian blood, and be recognized as Indian by a federally recognized tribe, although this does not always require membership in the tribe.[71] The requirement of "some Indian blood"[72] comes from the case *United States v. Rogers*, in which a White man adopted by the Cherokee was held to not be an Indian for the purposes of federal criminal jurisdiction.[73] That case involved the Indian-against-Indian exception to the General Crimes Act, and held that Rogers was not subject to the exemption

[67] Morton v. Mancari, 417 U.S. 535 (1974).
[68] COHEN'S HANDBOOK, *supra* note 12, § 9.02.
[69] 18 U.S.C. § 1152 (2014). Cohen, *supra* note 12, at § 9.02[1]. (Indian-on-Indian crime is exempted from the General Crimes Act by the statute itself, and the Supreme Court has held that non-Indian-on-non-Indian crime within Indian Country is subject to state jurisdiction). United States v. McBratney, 104 U.S. 621 (1882).
[70] 18 U.S.C. § 1153 (2014).
[71] COHEN'S HANDBOOK, *supra* note 12, § 9.02[1][d].
[72] *See* Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1086-87 (2012). The Supreme Court has never stated how much Indian blood is required, and lower courts have come to various conclusions. *Id*. Courts have adopted amorphous requirements ranging from "some" to "substantial." *Id*. Because the amount of Indian blood required does not affect the equal protection analysis, this paper will use the "some" standard when referring to the requirement.
[73] United States v. Rogers, 45 U.S. 567 (1846).

because he was White.[74] This case, however, was decided before the ratification of the 14th Amendment and the Supreme Court's equal protection jurisprudence, and this rule may no longer be good law. Now, the requirement of "some Indian blood" could be an impermissible racial classification foreclosed by *Morton v. Mancari*.[75]

After *Morton*, federal laws targeting Indians are generally understood as being political, rather than racial classifications, and are therefore not subject to the strict scrutiny applied to classifications based on race.[76] However, tribal members are still subject to the protections of the 14th Amendment, such as protections from racial discrimination.[77] Therefore, if non-Indians could be enrolled as members, the blood requirements for both the General Crimes Act and the Major Crimes Act would be suspect, because they would create different outcomes based solely on race. For instance, under the General Crimes Act, a non-Indian tribal member defendant who committed a crime against an Indian in Indian Country (e.g. Rogers) could argue that he should be subject to the exemption for Indian-on-Indian crime, and not be subject to federal prosecution. Since a similarly situated person of Indian descent would be exempt, and the only difference is his ancestry, this is a compelling claim.

Additionally, the requirement of Indian blood in the Major Crimes Act could be challenged by an Indian prosecuted in federal court under the act. In *United States v. Antelope*, the Supreme Court rejected a similar challenge brought by a Coeur D'Alene tribal member who argued that his federal prosecution violated equal protection because it subjected him to the federal felony murder rule, while a non-Indian would have been subject to Idaho law, which had rejected the felony murder rule. [78] The court held that the distinction was based on the tribal member's political affiliation with a federally recognized tribe, rather than a racial distinction, and was therefore constitutional.[79] The court did not address the fact that a similarly situated non-Indian tribal member would presumably have been

[74] *Id.*
[75] *Mancari*, 417 U.S. 535.
[76] *Id. But see* COHEN, *supra* note 12, at § 14.03[2][b] (arguing that *Morton* is about fulfilling the "unique obligations toward the Indians," rather than a political/racial distinction).
[77] *See, e.g.*, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385 (W.D. Wis. 1992); COHEN, *supra* note 12, at § 14.
[78] United States v. Antelope, 430 U.S. 641 (1977).
[79] 430 U.S. at 645.

exempt from federal prosecution, simply by virtue of his ancestry. Had this issue been considered, the court might have found an equal protection violation.

An equal protection challenge framed in either of these ways would likely result in the end of the "some Indian blood" requirement. The requirement does not appear on the face of either statute, and was added as a gloss on the General Crimes Act by the court in *Rogers*, based on presumed congressional intent.[80] Since *Rogers* was before the equal protection clause of the 14th Amendment, the court did not have to deal with the equal protection clause in construing congressional intent. Under the modern constitutional avoidance canon, this requirement would raise a constitutional question; a reasonable interpretation that avoids the question should be adopted before the constitutionality question is even reached.[81] The Major Crimes Act was first passed in 1885,[82] after the ratification of the 14th Amendment, so it should be easy for the court to say that the blood requirement does not apply to that Act, unless there is overwhelming evidence of congressional intent to the contrary. The General Crimes Act, however, is somewhat more complicated. The current statute was passed in 1948,[83] but the law itself has not been substantively changed since 1854,[84] before the passage of the 14th Amendment in 1868. Additionally, the relevant parts of the law (the exceptions to federal jurisdiction) are the same as they were in *Rogers*, when the gloss was added. The Court could therefore presume that congress intended the subsequent versions of the act to incorporate the requirement that the Court added in *Rogers*. This presumption, however, likely does not rise to the level of clear congressional intent required to overcome the constitutional avoidance canon, and the word "Indian" in the statute would likely be interpreted to require only tribal affiliation. As a result, it is likely that any non-Indians enrolled as tribal members would be treated as "Indians" for the purpose of federal criminal jurisdiction.

B. Tribal Criminal Jurisdiction

[80] *Rogers*, 45 U.S. at 573.
[81] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397, 99 L. Ed. 2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").
[82] 82 Act of Mar. 3, 1885, § 9, Stat. 362 (1885).
[83] 83 Act of June 25, 1948, ch. 6, 62 Stat. 683, 757 (1948).
[84] COHEN'S HANDBOOK, *supra* note 12, at § 9.02[1][a].

Tribes retain the inherent authority to prosecute tribal members in their tribal courts.[85] Accordingly, non-Indians who become tribal members would be automatically subject to tribal jurisdiction. Additionally, opening up tribal membership to non-Indians would make it more likely that the Supreme Court would uphold expansions of tribal jurisdiction over non-Indians and non-member Indians, such as the Violence Against Women Act amendment, or the *Duro* fix.

The ability of non-member Indians to enroll in a tribe would increase the likelihood that the *Duro* fix, subjecting non-member-Indians to tribal jurisdiction, would survive judicial scrutiny. In *Oliphant v. Suquamish*, the Supreme Court held that tribes lacked inherent jurisdiction over non-Indians.[86] In *Duro v. Reina*, the Court extended this holding to say that tribes could not exercise jurisdiction over non-member Indians.[87] In response, congress passed "Duro-fix" legislation, which recognized the "inherent power" of tribes to prosecute non-member Indians.[88] This recognition of tribal authority was upheld in *Lara*, a double jeopardy case where the defendant was being tried in federal court for a crime that he had already been convicted of in tribal court.[89] However, Lara's challenge was narrowly constrained to the issue of whether tribal prosecution was a delegation of federal power or recognition of inherent tribal power, and whether the recognition of tribal power is valid.[90] Importantly, *Lara* did not address the due process or equal protection problems that might arise from prosecuting a non-member in tribal court.[91] Because the Court determined that those challenges related to the original tribal conviction, and not this subsequent federal prosecution, those challenges were left for another day. These are not frivolous challenges, as the court may not be inclined to uphold a tribal prosecution of a non-member. Justice Kennedy, in particular, who concurred with the result in *Lara*, was very concerned with subjecting non-members to tribal jurisdiction.[92] Of the justices who remain on the court, only Justice Breyer and Justice Ginsburg signed the majority opinion that said congress could and did recognize the tribe's inherent authority. Justice Scalia and Justice Thomas both expressed concerns about the power of congress even

[85] United States v. Wheeler, 435 U.S. 313, 326 (1978).
[86] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[87] Duro v. Reina, 495 U.S. 676 (1990).
[88] 25 U.S.C. § 1301(2) (2014).
[89] United States v. Lara, 541 U.S. 193 (2004).
[90] *Id.*
[91] *Id.* at 207-09.
[92] *Id.* at 211-14.(Kennedy, J., concurring).

to delegate this authority,[93] and seem inclined to vote against further expansion of tribal authority.

The constitutional basis for invalidating the *Duro* fix is unclear. In terms of equal protection, the *Duro* fix is based on membership in a federally recognized tribe, which seems to place *Duro*-esque prosecutions clearly on the political side of the political, racial *Mancari* divide. As a result, equal protection claims are unlikely to succeed.[94] For due process, Indian tribal courts are required to comply with the Indian Civil Rights Act (ICRA), but ICRA does not encompass the same range of protections as the Bill of Rights. Notably, the right to counsel for indigent defendants is not present in ICRA.[95] This could lead to a successful due process claim being brought against a tribal prosecution, although, since the tribe would be prosecuting as a separate sovereign not subject to the Constitution, the real issue might lie with Congress' decision to recognize this tribal sovereign power at all. The Violence Against Women Act amendment, which subjects non-Indians to prosecution in tribal court in limited circumstances, does require tribes to provide full constitutional protections to defendants, which should alleviate any due process concerns, especially since those protections can be enforced in federal court through a *habeas* petition.[96]

Justice Kennedy suggests it is unconstitutional to subject non-members to tribal prosecution; as such prosecutions violate the principle of consent of the governed.[97] Professor Fletcher frames the unease that Justice Kennedy and some scholars have with tribal court jurisdiction as a problem with "democratic deficit."[98] Under this theory, nonmembers should not be subject to tribal jurisdiction because

[93] *Id.* at 216-17, 231 fn. 3 (2004) (Thomas, J., concurring, and Souter, J. dissenting, which Scalia joined.)
[94] *See* Means v. Navajo Nation 432 F.3d 924 (9th Cir. 2005) (holding that tribal prosecution of non-member did not violate equal protection).
[95] 25 U.S.C. § 1301 20130.
[96] VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 (2013), *available at* http://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0.
[97] *Lara*, 541 U.S. at 213-14 (Kennedy, J., concurring) However, he also answers this contention with regard to Lara and similarly situated Indians, because they could avoid tribal prosecutions by simply renouncing their tribal citizenship; *Id.* at 214 (Kennedy, J., concurring). Because this does mostly answer Kennedy's concern with regard to non-member Indians, it seems like Kennedy's real concern might be with expansions of tribal criminal jurisdiction to non-Indians, who would have no such means of escape. *But see* Duro v. Reina, 495 U.S. 676, 693 (1990) (Kennedy writing that tribal membership was not consent to criminal jurisdiction by other tribes).
[98] Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 Wyo. L. Rev. 295 ,319 (2011).

they "cannot and could not ever have participated in the political processes that created the tribal laws and regulations at issue."[99] Regardless of the questionable merit of this argument,[100] by expanding tribal membership and removing or changing the blood quantum requirement, non-members and non-Indians would find themselves able to eventually become tribal members and even if they did not take advantage of that opportunity, the potential for participation would remove this "democratic deficit." The impact of opening up membership, then, would seem to go beyond expanding jurisdiction to those that join the tribe, and make constitutional the exercise of criminal jurisdiction over a much larger portion of the populace.

C. State Criminal Jurisdiction

Like its federal counterpart, state jurisdiction in Indian country usually depends on the Indian status of the defendant. If both the defendant and the victim are non-Indians then the state has jurisdiction.[101] Otherwise, in most cases, the General Crimes Act and the Major Crimes Act preclude state prosecutions.[102] Because the same statutes apply, the same equal protection analysis from that section also applies, and non-Indian tribal members would likely be treated the same as Indian tribal members for the purposes of state criminal jurisdiction.[103] In cases where the state has jurisdiction over Indians in Indian Country by virtue of Public Law 280,[104] or some other statute, the state would logically have the same amount of jurisdiction over new tribal members as it had over tribal members before, whatever that jurisdiction may be.[105]

D. Tribal Civil Jurisdiction

[99] *Id.*
[100] This kind of argument is not given much force in other contexts. For instance, travelling to another state subjects a citizen to the laws of that state, regardless of the lack of meaningful opportunity to vote in the elections of that state unless the citizen changes residency. The real motivation for this argument may then be a discomfort with Tribal justice systems generally, which would still be somewhat alleviated by allowing non-members to potentially join.
[101] United States v. McBratney, 104 U.S. 621 (1882).
[102] COHEN'S HANDBOOK, *supra* note 12, at § 9.03[1] (citing United States v. John, 437 U.S. 634 (1978) (for preclusion by Major Crimes Act) and Williams v. United States, 327 U.D. 711, 714 (1946) (for preclusion of interracial crimes)).
[103] *See* Section II.A, *supra*.
[104] Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note).
[105] For a discussion of the various implications of Public Law 280 in different jurisdictions, see COHEN, *supra,* note 12 at § 6.04[3].

Like tribal criminal jurisdiction, allowing non-Indians to become members would have a number of benefits for tribal communities. Tribes generally have broad civil regulatory and adjudicatory jurisdiction over members,[106] so new members would be subject to that same authority. Additionally, there are two ways allowing non-Indians to become members could potentially expand jurisdiction even to non-Indians who *do not* become members.

First, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* suggests that by consolidating the ownership of land the tribe could regain the ability to exclude from a majority of the land and therefore also exercise greater jurisdiction over the whole area, particularly for zoning purposes.[107] However, *Atkinson Trading Co., Inc. v. Shirley* dramatically limited *Brendale*, such that it only applies when the non-Indian fee land is "closed," and development would place the entire area in jeopardy.[108] As a result, this approach would be unlikely to expand tribal jurisdiction greatly.

The second approach deals with the same "democratic deficit" problem that exists for tribal criminal jurisdiction,[109] that is, the idea that non-members should not be subject to tribal laws that they can never play a role in creating. For the same reasons identified in Section II.B, by making it possible for non-Indians to enroll in tribes, jurisdiction might theoretically extend to all those that could potentially join the tribe, because they would no longer be necessarily excluded from tribal decision-making. However, tribal civil jurisdiction over non-members is currently governed by the *Montana* test and its exceptions.[110] *Montana* says that tribes generally lack jurisdiction over non-member on non-member owned fee lands within the reservation, except for those non-members who enter consensual business relationships with the tribe or its members, or where such jurisdiction would be necessary to protect "the political integrity, the economic security, or the health or welfare of the tribe."[111] Accordingly, merely opening up membership would not be enough to expand jurisdiction to all non-member activities on a reservation, although including more members would increase the sweep of the

[106] *Id.* at § 4.01.
[107] *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 433-443 (1989).
[108] Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 658 (2001).
[109] Section II.B, *supra*.
[110] *See* Montana v. U. S., 450 U.S. 544, 565-66 (1981).
[111] *See Id.* at 565-66; *See also*, *Shirley*, 532 U.S. at 657 (applying the *Montana* test).

first *Montana* exception, as any activity that involves tribal members satisfies the exception.

E. State Civil Jurisdiction

States generally have limited civil jurisdiction over Indians in Indian Country,[112] and by enrolling in tribes, non-Indians would be able to avoid some forms of state jurisdiction. In particular, some forms of taxation would likely be barred by on-reservation non-Indians enrolling in a tribe.[113] Non-Indians who enrolled would still have to pay ad valorem taxes on fee land they owned on the reservation,[114] but they would likely be free from paying personal property taxes.[115] Additionally, these new tribal members would not have to pay taxes for activities or income earned on the reservation.[116] This would provide an incentive for non-members to enroll in a tribe if they lived on the reservation.

F. Statutory Benefits

Most statutory benefits and services are based on membership in a federally recognized tribe, instead of Indian ancestry.[117] Fletcher attributes this deference to Indian membership determinations partially to the Supreme Court's race jurisprudence.[118] Some programs, like the Bureau of Indian Affairs employment preference, used to require a certain blood quantum in addition to

[112] COHEN'S HANDBOOK, *supra* note 12, at § 6.03[1][a].
[113] Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) ("But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians.""") (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251(1992)).
[114] *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (holding that by making the land alienable Congress intended to allow state taxation of the land regardless of ownership by the Tribe).
[115] *See* Bryan v. Itasca County, 426 U.S. 373 (1976).
[116] COHEN'S HANDBOOK, *supra* note 25, at § 8.03[1][b].
[117] Fletcher, *supra* note 101, at 302. *See also* Krakoff, *supra* note 42, at 1084-1085. Some programs, however, extend to Indians who are not members of federally recognized tribes. Cohen's handbook on Federal Indian Law suggests that these can be reconciled with Supreme Court jurisprudence by understanding *Morton v. Mancari* as requiring that Indian-specific programs fulfill Congress' "unique obligations towards the Indians." *See also,* COHEN'S HANDBOOK, *supra* note 12, at § 14.03[2][b] (citing *Mancari*, 417 U.S. at 555). It has also been argued that the racial/political distinction that *Mancari* has been held to stand for is a false dichotomy, and that apparently "racial" classifications involving Indians are also political. S*ee* Krakoff, *supra* note 42.
[118] Fletcher, *supra* note 101, at 303.

membership in a federally recognized tribe, but in the wake of *Morton v. Mancari* those requirements have been dropped.[119] As a result, it appears that non-Indian tribal members would be eligible for the full range of services that Indian tribal members are eligible for, and they would be treated as Indian for other purposes such as Indian Child Welfare Act protections. As discussed in Section III, however, if tribes begin separating membership from rights, and creating tiered citizenship, the federal government may rework its benefits criteria.

III. EVALUATING MEMBERSHIP CRITERIA

There are many alternatives available for expanding tribal enrollment, each with its own costs and benefits. The ideal membership requirements will depend on the tribe and tribal values at issue, but Professor Carole Goldberg presents a useful framework for thinking about the advantages and disadvantages of various alternative criteria for membership.[120] This paper emulates that approach by beginning with the goals and considerations for tribal membership, and then examining how various criteria and approaches meet those goals.

A. Goals and Considerations of Tribal Membership

In designing membership criteria, there are many factors that a tribe might consider, based on the unique goals and circumstances of the tribe, to ensure its long-term strength and survival.

1. Community Belonging

Creating a strong sense of community is clearly an important element of tribal survival. Relying on blood quantum to determine membership can help facilitate the natural community that comes with kinship. Additionally, Professor Goldberg argues that enrollment criteria based on descent or blood are in-line with

[119] VERIFICATION OF INDIAN PREFERENCE FOR EMPLOYMENT IN THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN HEALTH SERVICE, FORM BIA-4432 (expires Nov. 30, 2014), available at http://www.bia.gov/cs/groups/public/documents/text/idc015598.pdf.http://www.bia.gov/cs/groups/public/documents/text/idc015598.pdf. Strangely, the change seems to make the preference *less* defensible from an equal protection challenge by a non-Indian, as it now extends to applicants who possess one-half degree Indian blood but have no tribal membership. *Id*. It did drop the blood quantum requirement for applicants who are members of federally recognized tribes, however. *Id*.
[120] Goldberg, *supra* note 19 at 437.

traditional means of determining membership in a tribe, since tribes have always used kinship as a primary marker of who belongs to the group.[121]. As a historical matter, this seems accurate, and is an interesting counterpoint to the common arguments that blood quantum should be discarded because of its "untraditional" origins.[122] However, it seems like this was less the result of any conscious decision to use blood quantum to determine membership, and more a consequence of historical context. When people were less mobile and more isolated generally, their genealogical roots were less diverse. Community belonging, in the sense of mutual connection between an individual and the community, is generally considered to be less about distant genetic roots and more a sense of being born and raised in the same place, or otherwise having close ties and relationships. Blood quantum, conversely, focuses on the most distant genealogical roots possible, and ties membership to those roots. Different tribes have different conceptions of descent and for some bloodlines may be paramount in determining membership and role in society. For those tribes that do not have longstanding traditions of this sort, it may be useful to examine the role of blood quantum in shaping contemporary understandings of community belonging, and question whether blood quantum and the related values are the most useful to ensuring the strength and survival of the tribe.

2. Maintaining Cultural Cohesion

Cultural survival is one of the fundamental motivations of tribal governments. Without the attributes that make a tribe unique, it is essentially just a municipal government. In order to continue to exist as separate sovereigns, native nations must preserve their cultural sovereignty.[123] A membership criterion that takes cultural affinity into account will help support tribal survival by causing the tribe to reflect on its cultural values, and by screening out those with weaker cultural ties. Professor Goldberg notes that one of the issues with loosening enrollment restrictions is the loss of cultural cohesion, and less of an emphasis on cultural strength as a political goal for tribal leaders.[124] This framework assumes that individuals with less blood quantum will have weaker cultural ties. As a

[121] *Id.* at 459-61.
[122] *Id.* at 459 fn. 114 (2002) (citing authors that argue that blood quantum should be discarded for being a departure from pre-contact modes of determining membership).
[123] For a discussion of the importance of a focus on internal cultural sovereignty, *see* Coffey and Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191 (2001).
[124] Goldberg, *supra* note 101, at 462-63.

general matter this is probably true, since lower blood quantum will mean more generations of marriage with people outside of the tribe, and logically, more influence from outside culture. On an individual basis, however, this is less true, and there are frequently cases where members with lower blood quantum or non-members will be more engaged in the tribal community and culture than those with a higher blood quantum. Thus, it might seem intuitively appealing to base tribal enrollment on individual cultural connection, or proxies for that connection, such as residency. There are several problems with cultural connection to determine membership discussed below.[125]

3. Maintaining Numbers

Blood quantum requirements combined with intermarriage rates suggests that some tribes will see drastic reductions in tribal membership, and potentially extinguishment of the tribe.[126] Loss of tribal identity is a serious problem, particularly for smaller tribes. As a result, in order to maintain tribal populations or existence, it may be necessary to adopt less stringent forms of enrollment criteria.

4. Ensuring that future generations can remain tribal members

It is likely painful for many tribal members to think that their children or grandchildren might not be able to be members of their tribe. Rates of intermarriage are high, and members might want to ensure that their descendants are allowed to keep their tribal identity.[127] This is related to the issue of tribal survival just discussed.[128] Balancing personal desires to continue Indian heritage with the goals of the tribe and the goal of creating objective, universal rules for membership will be a difficult but necessary task for tribal members. Some tribal members might favor loose restrictions that would allow their children to become members of the tribe, even if that level of restriction would not be good for the tribe as a whole. These individual preferences could determine the success of a constitutional reform effort, and should be carefully considered in designing membership criteria.

[125] *Id.* at 462-465; Section III.B.v, *supra*;
[126] Goldberg, *supra,* note 101 at 461(citing Russell Thornton, *Tribal Membership Requirements and the Demography of 'Old' and 'New' Native Americans, in Changing Numbers, Changing Needs: American Indian Demography and Public Health* 103, 108-11 (Gary Sandefur et al. eds., 1996)).
[127] *See* Goldberg, *supra* note 101, at 466-67.
[128] Section III.A.iii, *supra*.

5. Increasing Political Power

By increasing tribal enrollment, tribes could theoretically increase their political power at the state and federal levels by representing a larger voting bloc and being able to mobilize more people for certain political goals. The Cherokee are an example of this strategy in action.[129] There are some problems with this plan, however. First, since Indians make up such a small percentage of the overall population, for many tribes, even expanding membership to include all lineal descendants would still not result in a very large voting bloc, relatively speaking. Second, the Department of the Interior has demonstrated hostility to expanding tribal membership,[130] and expanding tribal membership may alienate the Department and make it harder to accomplish the tribe's political goals. Third, tribes have become much more effective politically in recent years, regardless of their small numbers, by banding together in intertribal organizations. One tribe greatly expanding its own membership may be seen as more of a political threat by the other tribes, and would at least put more of a strain on the already overburdened federal benefits system, which could lead to less intertribal cohesion and less effective advocacy. Fourth, the federal government, with encouragement from state governments, might see this as a transparently political move, rather than a move based on tribal self-determination. Accordingly, the government may begin to see tribes less as independent sovereign entities and more as political clubs, not entitled to special recognition. This could invite another round of termination.[131]

Opening up membership could have other political benefits beyond purely raising population numbers, however. As discussed earlier, tribes currently suffer from a "democratic deficit" in the sense that non-Indians can never have political voice in the tribe.[132] In addition to the legal benefits discussed earlier, a thoughtful program of opening up enrollment could lead to an increase in perceived democratic accountability, and the federal government might be more open to increasing tribal jurisdiction as it did in the Violence Against Women Act amendments of 2013. Further expansions of tribal civil and criminal jurisdiction

[129] Goldberg, *supra* note 101, at 461.
[130] *See Id.* at 449.
[131] *Cf*. *Id.* at 449 (2002) (citing Thomas v. United States, 141 F. Supp. 2d 1185, 1192-93 (W.D. Wis. 2001) (citing a 1992 letter from then Deputy Commissioner of the Bureau of Indian Affairs David Matheson which threatened termination by Congress or the courts if the tribe defined membership in such a way as to "'self-determin[e]' its sovereignty away.")).
[132] *See* Section II.B, *supra*.

and increased sovereignty over reservations would be more politically palatable. The tribe would still have to be wary of several of the problems described above, but focusing on internal political participation rather than external political influence could alleviate some of the federal government's potential concerns.

6. Distributing benefits

An important concern in designing membership rules is how membership changes will affect the distribution of tribal benefits like social services and per capita payments. In particular, Professor Goldberg notes that one hesitancy current tribal members might have with extending membership is that many of the current members or their ancestors endured hardships to remain with the tribe and keep the tribe alive.[133] They may feel that whatever benefits they are receiving now are their reward for staying with the tribe, while others left to seek opportunities elsewhere or assimilate, and are now trying to return and claim the benefits for themselves.[134] These are valid concerns, and there are no easy answers. However, relying solely on blood quantum might miss the point and include new arrivals with higher blood quantum while excluding some of those that have always been there, or their children. Additionally, trying to block newcomers from enrolling could lead to media or political problems.[135] This is an important consideration, and one that will play an important role in the discussions of any tribe that seeks to change its membership requirements.

7. Extending tribal jurisdiction

A common goal for tribes is to consolidate control over their reservations and the people that live there, in order to better govern and ensure peace and safety. Tribes should consider their goal when designing membership criteria, as well-designed rules for enrollment can directly and indirectly increase tribal jurisdiction.[136]

8. Internal and external perception

Like other kinds of constitutional reform, changing or reevaluating existing membership requirements can change the way tribal members think about the

[133] Goldberg, *supra* note 101, at 465-66.
[134] *Id.* at 465-66.
[135] *Id.*
[136] Section II.B, *supra*.

purpose of the tribe and their relationship to it. A fair process of reform that reflects cultural values has the intrinsic value of increasing the legitimacy of the tribal government in the eyes of its members. Undertaking the reforms to bring membership criteria in line with traditional understandings could also give members a sense that the tribe is more in control of its own destiny.

External perception is indirectly tied to the political influence discussion above, but applies even more broadly. Perception of a tribe as being more or less inclusive or more or less culturally cohesive can impact the way state and federal governments, as well as non-Indians behave with regards to the tribe. There are many misconceptions about tribes, and if tribes can seem like more legitimate governments that deserve sovereignty, they will be more likely to make political gains. Additionally, a greater respect for tribal sovereignty in a community might encourage individual non-members to respect tribal laws and decisions, even when the tribe lacks formal legal jurisdiction.

B. Alternative requirements for tribal enrollment

There are several common features in tribal citizenship rules, but they are not the exclusive possibilities. Tribes can go beyond these or use various forms and combinations of requirements in order to craft membership criteria that is appropriate to the specific tribe. The common requirements this paper will analyze include blood quantum, lineage requirements, and adoption procedures, as well as birthplace requirements as part of a broader residency analysis. Another common requirement is no dual citizenship,[137] which seems like a secondary factor that will depend on the nature of the tribe and the tribe's decision with regards to the other criteria and its relationships with other tribes. In addition to these common requirements, this section will look at cultural connection criteria. The next section will look at potential solutions to some of the tensions that emerge in designing membership criteria.

1. Blood Quantum

The advantages of a blood quantum requirement include the ease of application and the rough approximation of tribal cultural connection. However, as discussed above, blood quantum requirements emerged from unsettling federal

[137] Goldberg, *supra* note 101, at 467.

policies. They might also lead to dangerously exclusionary ways of thinking about membership, and risk extinguishing the tribe.

There are two common forms of blood quantum requirements: those based on tribal ancestry and those based on Indian ancestry generally.[138] Blood quantum is one of the simplest requirements to apply and does approximate the way membership worked pre-contact (when everyone was 100% Indian). It also limits membership to kin, and encourages people to marry and reproduce within the tribe, both of which may in turn encourage greater cultural participation. Additionally, people who have a higher percentage of Indian blood are more likely to look Indian, which could lead to greater affinity with their tribe and Indians generally.[139] These requirements are also well-established for many tribes, having existed since at least 1934. There are a number of problems with using blood quantum criteria, however. The historical use of blood quantum, and the way it was incorporated by the federal government into tribal constitutions, makes its application suspect. As Professor Goldberg notes, "tradition" is not static, so discarding blood quantum solely for being "nontraditional" is somewhat antithetical to the idea that tribes are living cultures.[140] However, the historical roots of blood quantum are dangerous, and taint their contemporary application.[141] Just as blood quantum was used to divide up resources for tribal members, the continued use of blood quantum encourages tribal members to think of membership as a limited resource, like money, rather than as a cultural and governmental entity.[142] Blood quantum rules encourage selfish exclusion instead of forward thinking inclusion. This is not true for all tribes, and those with a long historical tradition of defining membership this way should not feel compelled to change. Those tribes that only adopted these rules in 1934, however, should examine their culture and traditions and see if blood quantum is consistent and necessary to their perception of tribal

[138] *Id.* at 467.
[139] *Cf*. Bruce Ackerman, *Beyond Carolene Products*, 98 HARVARD L. REV. 713 (1985) (arguing that being a member of a recognizable and insular group could create solidarity and improve political power).
[140] See Goldberg, *supra* note 19, at 459.
[141] *See* Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 301-02 (1993).
[142] *Id* at 305. Disenrollments are some of the most salient examples of this perspective on tribal membership. While a tribe may have legitimate reasons to disenroll members, many of the disenrollment decisions seem to be linked to cutting membership numbers to increase benefits for the remaining members. This version of events has also been picked up by the media and contributes to negative external perceptions of tribes. *See*, *e.g.*, James Dao, *In California Indian Tribes With Casino Money Cast Off Members*, N.Y. TIMES, December 13, 2011, at A20.

belonging. This is not to say that race can have no legitimate role in determining membership, just that using it as the sole criterion often fails to capture elements that are likely more important to long term tribal survival. Additionally, as mentioned above, a strict blood quantum combined with high rates of intermarriage between Indians and non-Indians could lead to the extinction of the tribe.

2. Lineal Descent

Lineal descent rules also capture many of the benefits of blood quantum requirements, such as kinship and ease of application, but risk weaker cultural connections and the perception of the tribe solely as a financial resource. Like blood quantum, there are multiple forms of lineal descent rules that tribes use today.[143] Some tribes require enrollment of a single parent, some require a specific parent to be enrolled, some require both parents to be enrolled, and some just require the enrollment of an ancestor on a particular roll compiled by the federal government. The latter category in particular is a very loose requirement and employed by some of the largest tribes today.[144] As mentioned above, these looser rules have led to greater external political clout for these tribes by increasing membership. There will also be a lesser chance of the tribe eventually running out of members through intermarriage, unless the rule is that both parents must be members. A disadvantage of lineal descent is that it could lead to a greater percentage of the population having weak ties to the reservation and the tribe. Logically, the greater the geographic dispersion of tribal members, the greater the likelihood that tribal laws and expenditures will reflect individual interests rather than tribal interests. People living off the reservation will be more inclined to vote for per capita distribution of funds than investment in tribal infrastructure, for instance. Once again, this leads to a view of the tribe as a piggy bank, which is almost certainly not conducive to the long term survival of the tribe. Another problem is that descent rules alone fail to create any kind of necessary tie to the tribe other than applying for and receiving membership. Under blood quantum rules, members are encouraged to marry other members, and therefore spend time near the reservation interacting with other tribal members. This investment can encourage members to be more tribally minded. Under loose lineal descent rules, however, there is no such incentive.

[143] See *supra* note 19, at 467.
[144] CONSTITUTION OF THE CHOCTAW NATION OF OKLAHOMA, July 9, 1983, art. II; CONSTITUTION OF THE CHEROKEE NATION, 1999, art. IV.

A problem shared by blood quantum and lineal descent rules are the negative reaction various outsiders have to race based rules for membership. The Supreme Court's race-blind equal protection jurisprudence, for instance, demonstrates a level of hostility to differential treatment of groups based on race.[145] Additionally, many people are concerned with special treatment of Indians, and do not like that they receive special rights.[146] These considerations counsel against the use of race as the sole criteria for tribal membership.

3. Residency

Using residency on or near the tribal land as a membership requirement helps ensure a cultural connection, as well as encouraging members to think about the reservation as a whole rather than focusing on their separate individual desires. Even if members are voting entirely in self-interest, if they live on the reservation it is more likely to be in their interest to choose investment in infrastructure over per capita distribution of funds. There are shortcomings to a strict residency requirement, however. As Professor Goldberg notes, residency requirements could prevent people from leaving for legitimate tribal reasons, especially if they would lose membership or rights while absent from the reservation.[147] In addition, tribal governments as landowners have the power to control who resides on the reservation,[148] which could lead to exclusions of certain people based on illegitimate political reasons. Additionally, people who live just outside of the reservation might be just as interested in cultural affairs as those on the reservation, but would be excluded by a rule that requires residency within the reservation boundaries. These concerns could be dealt with by carefully constructed rules based on the individual circumstances of each tribe, but the line-drawing issues they present may make strict residency requirements untenable, as people might be unable to agree on how to implement them.

Birthplace requirements are a subset of residency requirements. Like other residency requirements, they attempt to capture the value of having people remain

[145] *See*, *e.g.*, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2418, 186 L. Ed. 2d 474 (2013).
[146] *See*, *e.g.*, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385 (W.D. Wis. 1992). *See also,* Terri Hanson, *Anti-Indian CERA Doesn't Like the Law of the Land in United States, or Us, Apparently*, INDIAN COUNTRY TODAY MEDIA NETWORK, March 28, 2011, *available at,* http://indiancountrytodaymedianetwork.com/2014/03/28/anti-indian-group-works-undermine-sovereignty-least-15-states-154225 (last visited Oct. 10, 2014).
[147] *See supra* note 19, at 464.
[148] *Id*.

near the reservation. Instead of being aimed at the individual member, however, they are aimed at the parents, who will be incentivized to live near the reservation, or at least go to the reservation for the child's birth. If the requirement is that the parents be domiciled on the reservation, there is the potential advantage that the child will be more likely to be raised on the reservation and with the tribal culture, but there is also no guarantee that the child will maintain that connection later in life.

4. Adoption

Several tribes have adoption or naturalization procedures for non-members to become members of the tribe, but the requirements for adoption vary from tribe to tribe. Professor Goldberg lists several varieties of requirements.[149] Some tribes seem to have no Indian blood requirement, at least in the constitution,[150] while others do.[151] Some tribes also have additional requirements in order to be adopted, such as residency[152] or spousal connection.[153] Adoption procedures have the advantage of being flexible and taking the most information into account, but a reliance solely on adoption proceedings to fix other errors in the system is unwise. These proceedings will likely have a great deal of discretion built in,[154] which could be abused to exclude personal or political enemies of the person or persons in charge of deciding adoptions. If appeals of adoption decisions are used to combat these potential errors, it could greatly increase the burden on tribal courts or administrative bodies.

5. Cultural connection

Complications in measuring and evaluating "cultural connection" could make it difficult to agree on a standard for determining membership. Residency, discussed above, is often used as a kind of proxy for cultural connection, but there are other ways of testing an individual's ties to the community. Other factors

[149] *See supra* note 19, at 463 n.132.
[150] CONSTITUTION OF THE NEZ PERCE TRIBE, Art. IV, § 2.
[151] CONSTITUTION OF THE YAVAPAI-APACHE NATION, 1947, Art. II, § 2.
[152] CONSTITUTION OF THE LOWER BRULE SIOUX TRIBE, 1986, Art. II, § 2.
[153] CONSTITUTION OF THE FORT MCDERMITT PAIUTE AND SHOSHONE TRIBE, 1936, Art. II, § 2(b).
[154] The Constitution of the Yavapai-Apache Nation, for instance, says that the Tribal Council will have sole discretion in adopting new members, except for spouses and adopted children of tribal members, in which case the decision can be overturned if it is arbitrary and capricious. CONSTITUTION OF THE YAVAPAI-APACHE NATION, 1947, Art. II, §2(b)-(c). Additionally, tribes might be reluctant to remove discretion from these decisions, because it would allow non-members to basically force the tribe to accept them, which might not sit well with tribal members.

include: language fluency, community service, elders' certification, and ceremonial participation.[155] There could also be a civics test, ala the United States naturalization process,[156] which could test familiarity with tribal culture, history, and laws. Any combination of these factors could be used, based on the circumstances of the tribe, and it could take the form of a test or cultural knowledge, or a checklist of requirements, or both. Using cultural criteria has the benefits of ensuring the tribal members are knowledgeable about the tribe, and the investment of learning about the tribe could inspire them to be more civic minded. Additionally, it has the obvious advantage of helping to preserve tribal culture and language against external influences. However, there are a number of potential issues with using cultural affiliation as the test for citizenship.

Like adoption, the question of who will administer a cultural test and the possible appeals process for that test are difficult to resolve, and a tribe wishing to implement a test will have to consider administrative costs against the costs of wrongfully excluding people from the tribe. Furthermore, designing these tests could be controversial, as culture and tradition are not static, and different tribal members might have different ideas about what it means to be a member of a given tribe. These are not insurmountable obstacles, but they may delay or disrupt the process of membership reform.

One issue that Professor Goldberg notes is that the criteria that could be used as proxies for cultural connection, e.g. residency, language fluency, are "unnervingly" similar to the criteria set forth in the controversial "existing Indian family" test some courts have used in applying the Indian Child Welfare Act.[157] Courts applying the "existing Indian family" test look at various factors to determine whether a child is "Indian enough" to trigger ICWA provisions, contrary to the language of the statute and congressional intent.[158] The test is applied in a substantial minority of states, and the Supreme Court avoided ruling on the doctrine in its recent ICWA case.[159] "Existing Indian family" doctrine devalues the

[155] *See supra* note 19, at 463.
[156] *Civics (History and Government) Questions for the Naturalization Test*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, (2011), http://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/100q.pdf.

[157] *See* Goldberg, *supra* note 19, at 463.
[158] COHEN'S HANDBOOK, *supra* note 12, at § 11.07.
[159] *Id.* (Listing Alabama, Indiana, Louisiana, Missouri, and Tennessee, as states that apply the test; and Alaska, Arizona, Idaho, Illinois, Kansas, Michigan, Minnesota, Montana, New Jersey, New

opinion of the tribe as to the Indian status of the child, and usurps tribal and federal authority for state authority. Hesitancy to employ a test that resembles the "existing Indian family" test is therefore understandable. However, as Professor Goldberg notes, "what seems presumptuous when undertaken by state courts may be less troubling when the deciding authority is a tribal enrollment board."[160] Additionally, developing their own culturally tailored requirements would allow tribes to set authoritative criteria for their own tribes, rather than leaving it to state courts to decide. Lack of federal action[161] means that many states will continue to employ the doctrine and tribes having clearly developed their own criteria may encourage state courts to defer to tribal judgments based on those criteria. Perhaps more importantly, even if the requirements are not ultimately used for enrollment purposes, the development of culturally-based criteria could help in these cases, and could help a tribe define its cultural goals.

Deciding who would be allowed to prove their cultural connection is another potential difficulty, as some tribes might be inundated with potential members trying to get a share of the gaming revenues.[162] Professor Goldberg also notes that applying an expedited version of the test to those with family ties, or giving them special treatment on the test, would bring race back into the equation, which some scholars oppose.[163] These challenges seem to counsel more for adopting thoughtful, nuanced rules, rather than for rejecting cultural connection criteria completely. Requiring recommendations from elders, or residency, for instance, would prevent a large number of false applicants, as would a system that delays or denies per capita payments to members who join this way, which will be discussed more later in this paper. Additionally, while some critics might oppose the use of race at all in determining tribal membership, giving preferential treatment to biological Indians would make sense, as they would be presumptively more likely to have cultural affiliation that might not be captured by whatever cultural connection test is employed. Giving preference to those with tribal blood while keeping some form of membership open to a broader population would seem to capture many of the legal benefits discussed in Section II.

York, North Dakota, Oklahoma, South Dakota, Utah, and Washington as states that have rejected the test). *See also* Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013).

[160] *See* Goldberg, *supra* note 19 at 463.

[161] COHEN'S HANDBOOK, *supra* note 12, at § 11.07 (citing accounts of failed legislation to either affirm or reject the doctrine). *See also* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

[162] *See* Goldberg, *supra* note 19, at 463.

[163] *Id.* at 463-634.

Another problem discussed by Professor Goldberg is the possibility of disenrollments based on lack of cultural connection, or lack of such connection for a period of time, or a generational gap.[164] Furthermore, some tribes believe that one cannot lose connection to their tribe, because they are born with it and that connection stays with them even after death.[165] Both of these concerns are better left to the tribes on an individual basis, and do not counsel against tribes adopting cultural criteria based on their own traditions. To reiterate, the paramount concern in defining membership criteria for tribes is the tradition and culture of the individual tribe. Each tribe must arrive at its own decisions about what it means to be a member. Ultimately, incorporating some sort of cultural connection test is a good strategy for tribes to help maintain cultural survival, and encourage more participation in cultural activities.

C. Solutions to Design Problems

In order to resolve some of the tensions that were discussed above, tribes can combine existing requirements, or create new criteria that balances traditional goals with modern circumstances. There are several potential solutions including: separate voting districts for off-reservation and on-reservation members, a "right-of-return" for off-reservation individuals, and severing benefits from tribal enrollment.[166] Professor Goldberg mentions that some of the criteria might have the effect of creating "multiple categories of citizenship,"[167] which as a general principle merits further discussion. Professor Goldberg also mentions expanding adoption procedures, [168] which is discussed above.

1. Separate voting rights for off-reservation and on-reservation members

Separate voting districts can allow non-residents of the reservation to maintain their connection with the tribe, while keeping most of the tribal control in the hands of reservation residents. An example is a recent Cherokee constitutional convention, where the draft constitution has now been adopted as the Cherokee

[164] *See* Goldberg, *supra* note 19, at 464. (Disenrollments are already a problem for some tribes under existing blood quantum requirements, as discussed above).
[165] *Id.*
[166] *See Id.* at 467-471.
[167] *See Id.* at 467.
[168] *See* Goldberg, *supra* note 19, at 470-71.

Constitution.[169] Under the Cherokee Constitution, 15 of the 17 legislative seats are apportioned for Cherokees residing in Oklahoma, while the remaining two seats are elected by non-residents,[170] who comprise about 40% of the Cherokee population.[171] This measure helps ensure that the legislature is focused internally on developing the tribe and its infrastructure, while giving a voice to the non-resident Cherokee and helping maintain their connection to the tribe. This is an elegant solution for the Cherokee, but it may not work for all tribes. For some, non-resident members may feel that their voices are just as important as those on the reservation, and they should not be allocated such a small proportion of the votes. At the same time, residents may feel that only those who are willing to maintain close ties to the tribe should be allowed to participate in tribal government. Additionally, this approach fails to capture the benefits of residency requirements that strongly incentivize interaction with the tribe and the potential that has for investment in tribal culture and development. However, it is probably better than no residency requirement in terms of cultural preservation, and provides a degree of flexibility for tribal members who might leave for legitimate reasons. Tribes that are interested in this kind of tier voting system should also consider how much weight to give non-resident voters for referendums, or constitutional amendments that require popular vote.

2. "Right-of-return"

Under a reactivation system, it seems like those living off the reservation would lose their normal citizenship in the tribe, but retain the right to reactive it easily when they returned, and if they met certain criteria.[172] Like off-reservation voting, this might help maintain ties to the tribe, although it could lead to confusion and alienate people who leave the reservation for college. It seems like a better solution might be to consider them members in most regards but remove or restrict their ability to vote.

3. Severing benefits from tribal enrollment

Separating tribal enrollment from the automatic receipt of benefits can help ensure that members choose to identify with the tribe for more legitimate purposes than monetary reward, and encourage a focus on tribal development and

[169] *See Id.* at 468; CONSTITUTION OF THE CHEROKEE NATION, 1999, art. VI § 3.
[170] CONSTITUTION OF THE CHEROKEE NATION, 1999, art. VI § 3.
[171] *See* Goldberg, *supra* note 19, at 468.
[172] *See id.* at 469.

investment. Professor Goldberg discusses a system where tribal enrollment is not necessary to receive tribal benefits. Core tribal decisions can be made by those with the strongest cultural connection, while a broader class can receive benefits, i.e. the children of tribal members who do not qualify for membership.[173] Goldberg notes however, that this might only extend to tribal benefits, and that the federal government might not provide services to those who are not members of the tribe.[174] One solution Goldberg suggests is to call everyone tribal members, but only allow some to vote.[175] This could have a negative effect, however, if the federal government decides it only wants to provide services to traditional tribal members, it might stop deferring to tribal definitions of membership and adopt criteria to decide who is Indian enough to receive benefits. Government intervention is a potential threat with any system that divides up rights based on tiered citizenship, but it is particularly acute when benefits are being provided without the right to vote, as it might be seen as an attempt to game the federal system.

Another possibility is the inverse system, where certain members are allowed to vote but not partake in certain benefits. Some tribes already have a form of this, such as the Colville Confederated Tribes, which allows only descendants of certain constituent tribes to hunt or fish in certain areas.[176] It could be hard to maintain an inverse system, since the voters might just vote to include themselves as beneficiaries, but incorporating the requirement into the constitution, or requiring a 2/3 vote or some similar provision, could possibly alleviate this problem, depending on tribal demographics. Expanding voting rights has several potential advantages. If voting was universal but per capita payments were conditioned on tribal residency, for example, non-reservation voters would have no personal incentive to vote for per capita payments, and on reservation votes would have to choose between two options that both benefit them. This would make tribes more likely to invest in important infrastructure, while keeping the decision somewhat democratic and legitimate. Another possibility would be to limit per capita payments to members with sufficient blood quantum, while extending voting rights to others who joined through a cultural test. This would discourage people from attempting to join a tribe just to receive monetary

[173] *Id.* at 469-70.
[174] *Id.* at 470.
[175] *Id.* at 470.
[176] *Icicle Creek Fishery Opening, resolution 2014-250, 2014 Colville Ps'quosa Spring Chinook Fishing Regulations* (2014),

payments, which is a concern when loosening membership requirements.[177] Since voting membership would still be open to non-Indians, however, this scheme would solve the "democratic deficit" problem and allow tribes to exercise greater jurisdiction, even over those who choose not to become members. Finally, this type of system would attract non-members with an actual interest in the tribal cultural and governance, and allow those who have maintained certain ties but insufficient blood quantum to maintain their tribal identity.

4. Tier levels of citizenship

The examples discussed above each involve giving different membership rights to different individuals, based on a variety of factors. Thinking about membership and tribal enrollment in terms of degrees of rights, as opposed to an on/off switch where an individual is either in or out, can lead to much more nuanced citizenship laws that capture many of the benefits with fewer of the costs. The two main disadvantages of a tiered system are the possibility that the federal government might decide to limit federal benefits to members that fit certain criteria, and that the system might end up being overly complex. If the membership system is too complicated it could seem overly legalistic and lose its cultural character, and members might start to think of themselves as belonging to a category of beneficiaries, rather than as members of a tribe. As long as tribes are conscious of this potential problem, however, they should be able to avoid it, by tying and framing the requirements to the traditions and goals of the tribe.

Some tribes already have different levels of membership rights that vary according to different membership criteria. The Choctaw Tribe of Oklahoma, for instance, allows voting by all lineal descendants of people who were on the Dawes Rolls, but only allows members with at least ¼ blood quantum to hold the positions of Chief, Assistant Chief, or Tribal Council Member.[178] Residency is also a common requirement for holding office, although this is more often thought of in terms of geographic representation rather than as an indication that the candidate will be more culturally connected.[179]

These establish precedent for tiered levels of membership rights, according to proxies for cultural affiliation. The same theory could be extended to benefits,

[177] *See* Goldberg, *supra* note 19, at 462-63.
[178] CONSTITUTION OF THE CHOCTAW NATION OF OKLAHOMA, July 9, 1983, art. II.
[179] *See, e.g.*, COLVILLE TRIBAL CODE, 8-3-60 (1979).

such as per capita payments, which should ease some of the concerns with expanding tribal membership. Federal Regulations require that tribes seeking to distribute per capita payments to a subset of the population must justify their decision and show that it is "reasonable and not arbitrary" and that it does not violate the Indian Civil Rights Act.[180] The Indian Civil Rights Act contains a guarantee of equal protection, like the 14th Amendment,[181] which means that the tribe might have to justify its action according to a similar standard, i.e. the strict scrutiny standard that is normally applied to race-based classifications.[182] However, there are several answers to the protection concern. First, the Bureau of Indian Affairs (BIA) has generally left enforcement of ICRA provisions to tribal courts, rather than getting directly involved,[183] which is in-line with congressional policy as explained in *Santa Clara Pueblo v. Martinez*.[184] Accordingly, the BIA might be willing to defer to tribal judgments regarding the validity of such a plan, particularly since it is tied to tribal membership determinations which are firmly in the realm of the tribe's sovereignty.[185] Second, blood quantum has been used to draw lines in federal and tribal law for a long time, and might be treated as a special case that does not trigger strict scrutiny analysis.[186] Third, even if the determination is subject to strict scrutiny, it does serve a compelling government interest, as discussed above, and the potential infeasibility of finding other ways to deter newcomers who are only interested in per capita payments might mean that the classification is sufficiently narrowly tailored to survive strict scrutiny. Essentially, if full strict scrutiny is applied, the burden would be on the tribe to demonstrate that "available, workable race-neutral alternatives do not suffice,"[187] which is generally a very high bar, but not necessarily insurmountable.

CONCLUSION

This paper had three goals. The first was to explore what legal road-blocks, if any, would prevent tribes from enrolling non-Indians as members. It appears that tribes would have the power to begin enrolling non-Indians, without any further action needed from Congress. The second was to highlight and begin a

[180] 25 C.F.R. § 290.14 (2001).
[181] 25 U.S.C. § 1302(a)(8) (2010) (ICRA).
[182] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2420 (2013).
[183] COHEN'S HANDBOOK, *supra* note 12, at § 14.04[2].
[184] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[185] *Id.*
[186] Krakoff, *supra* note 75. (Arguing that all use of Indian race has some political aspect).
[187] Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2420 (2013).

conversation about some of the legal implications of expanding tribal membership criteria. In particular, the potential that expanded criteria would have for bringing tribes closer to a pre-*Oliphant* level of tribal criminal jurisdiction. The final goal was to expand on the discussion of the policy implications that tribal membership decisions would have for tribes, and look at ways to reconcile competing objectives. By combining different membership requirements, and tying certain benefits and rights to certain criteria, tribes can achieve a more flexible, nuanced approach to tribal membership that more closely reflects the goals of the specific tribe. As discussed above, tribes that seek to redefine their membership rules must focus on their own culture and traditions. However, there are many legal and political consequences that would emerge from changing enrollment criteria, thoughtful constitutional reform should take those implications into account.