

# The American Indian Disenrollment Epidemic: Finding a Cure

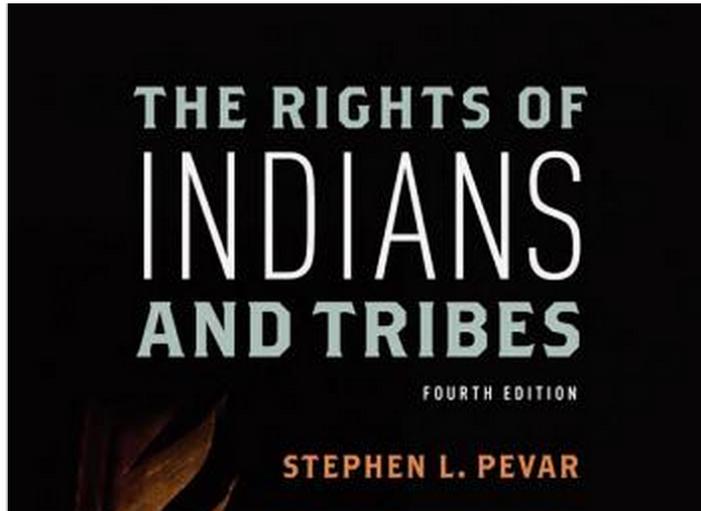
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October 27, 2014

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# Disenrollment: It is Now Epidemic



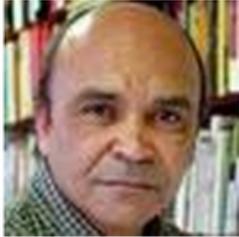
In recent years, thousands of tribal members have been disenrolled from their tribes, usually from those with profitable casinos whose remaining members would then receive a larger share of the profits. Some of these people had



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# Disenrollment: It is Now Epidemic



## Two Possible Paths Forward for Native Disenrollees and the Federal Government?

DAVID WILKINS | 6/4/13

Disenrollment is expanding throughout Native America, with Native nations in at least seventeen states engaging in the practice. Precise numbers are nearly impossible to track down since the nations carrying out the practice are loathe to reveal their numbers, and the Bureau of Indian Affairs will not divulge the data,

**Cedric Sunray: Tribes abandon traditional aspects of inclusion**

**MONDAY, OCTOBER 20, 2014**

**uncontrollable. Of the more than 60 tribes who have disenrolled their tribal members in the last 20 years, there exists a significantly larger number who have done so outside of the watchful eye of news reporters**

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# What is Causing the Epidemic?

## Tribal Per Capitas and Self-Termination

GABRIEL S. GALANDA | 8/13/14

Tribal per capita payments are a creature of the United States and its Indian termination policies. In 1907, Congress passed the Lacey Act so that tribal trust funds could be “apportioned and allotted” on a “pro rata” basis to any Indian “capable of managing his or her own affairs.” While Congress ended allotment in 1934, it superimposed Indian “membership” upon tribes at the same time.

By the mid-20<sup>th</sup> century, Congress reauthorized tribal cash apportionment to tribal members on a “per capita” basis as a mode of tribal termination. The convergence of federal Indian membership and per capita constructs—and resultant tribal disenrollment, community division and political unrest—have plagued Native America ever since.

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# What is Causing the Epidemic?

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ALBERT P. ALTO; ANDRE E. ALTO;  
ANTHONY ALTO; BRANDON ALTO;  
CHRISTY ALTO; CHRISTOPHER J.  
ALTO; DANIEL J. ALTO, JR.; DANIEL  
J. ALTO, SR.; DOMINIQUE N. ALTO;  
RAYMOND E. ALTO, SR.; RAYMOND  
E. ALTO; RAYMOND J. ALTO, a  
Representative for Ben Alto,

No. 12-56145

D.C. No.  
3:11-cv-02276-  
IEG-BLM

OPINION

## Tribal Per Capita

<sup>2</sup> Such membership disputes have been proliferating in recent years, largely driven by the advent of Indian gaming, the revenues from which are distributed among tribal members. *See generally* Suzianne D. Painter-

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# What is Causing the Epidemic?

436 U.S. 49, 56 L.Ed.2d 106  
**SANTA CLARA PUEBLO et  
al., Petitioners,**

v.

**Julia MARTINEZ et al.**

**No. 76-682.**

Argued Nov. 29, 1977.

Decided May 15, 1978.

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# What is Causing the Epidemic?

## Reframing “The Debate Over Disenrollment”

Professor Champagne suggests, like legions of others, that the 1978 *Santa Clara v. Martinez* bestows upon tribal governments some form of absolute power to disenroll Indians. Most notably the U.S. Department of Interior has proclaimed, time and again, that *Santa Clara* requires “a proper respect’ for tribal sovereignty” and “cautions’ that [the Fed] tread lightly” in the realm of disenrollment, even in the face of related federal illegality. Reliance on *Santa Clara* is outdated, and frankly, unhelpful in the face of what Professor David Wilkins rightly calls a “disenrollment epidemic.”

### Inside the Dirty-Tricks Playbook of Jack Abramoff

GABRIEL S. GALANDA | 10/20/14

**Play 3—Cause a Tribal Membership Dispute.** The bad guys know that if they style the Tribal *leadership* dispute as a *membership* dispute, nobody will touch it. They know that under banner of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), federal, state and local officials will simply say: “Sorry, the matter is internal to the Tribe. Tribes are sovereign and self-governing.”

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# Who Isn't (Yet) Finding a Cure?

## Tribal Per Capitas, Disenrollment & Academia

AUGUST 26, 2014

That is because those issues remain taboo within the Indian Country academic establishment, despite the current Indian disenrollment epidemic and the ability of our brightest minds to identify the causes and develop the cures.

As a Native person rightfully commented on a recent column by Professor David Wilkins: "There are no easy answers but I believe academia deserves as much of the blame as anyone for not facing this reality and attacking it head on."

## Inside the Dirty-Tricks Playbook of Jack Abramoff

GABRIEL S. GALANDA | 10/20/14

**Play 6—Exploit National Tribal Silence.** The bad guys know that Tribal leadership and disenrollment disputes are taboo in forums like the National Congress of American Indians and National Indian Gaming Association. They leverage this silence to further advance their cause. Even worse, the bad guy-

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# The Truth About The Epidemic

- The American indigenous right to tribal citizenship is a **human right**.
- Article I of the UNDRIP guarantees that indigenous peoples, as “individuals, [receive] all human rights and fundamental freedoms as recognized in . . . international human rights law.”
- Article 9 of the UNDRIP: “indigenous peoples *and individuals* have the right to belong to an indigenous community or nation, in accordance with the tradition and customs of the community or nation concerned.”

# The Truth About The Epidemic

- The American indigenous right to tribal citizenship is an **absolute right**.
- Indian Constitutions guarantee a “right of membership to all persons meeting the requirements contained therein . . . [I]t is an absolute right of membership. Indian tribes are not social fraternities or sororities in which the right to membership depends on the votes and disposition of other members.” *Terry–Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01, 01-02, at 10-11 (Las Vegas Paiute Ct. App. 2003).

# The Truth About The Epidemic

- “Disenrollment”—the deprivation of the American indigenous right to tribal citizenship—is **not indigenous**, in any way, shape or form.

## An Essay on the Federal Origins of Disenrollment

MARCH 6, 2014

The origins of disenrollment are traced to the United States’ paternalistic assimilation policies of the 1930s. In 1934 the U.S. Congress passed the Indian Reorganization Act (“IRA”), wherein the federal government took an extremely active role in framing tribal membership rules. The IRA contained a definition of who would be recognized as an indigenous person by the federal government: The individual must be a descendant of a member residing on any reservation as of June 1, 1934, or a person “of one-half or more Indian Blood.” 25 U.S.C. § 476.

In all, for the last 80 years, the United States has set the terms of tribal membership, i.e., “Indian,” “blood quantum,” “membership,” “base rolls,” and of course “disenrollment.” And for good measure, tribal acceptance and implementation of those unconscionable terms have been conditions precedent to self-determination funding since the 1970s.

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# The Truth About The Epidemic

- The deprivation of the American indigenous right to tribal citizenship is **irreparable**.
- “[A] deprivation of [tribal] citizenship does more than merely restrict one’s freedom to go or remain where others have the right to be: it often works a destruction of one’s social, cultural and political existence . . . [I]t is a total destruction of the individual’s status in organized society...a form of punishment more primitive than torture...” *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2nd Cir. 1996).

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# The Truth About The Epidemic

- The absolute American indigenous right to tribal citizenship is **not redressible**, practically.
  - Absent “banishment” *qua habeas corpus*, the Indian Civil Rights Act affords no federal forum. *Poodry*.
  - State courts don’t want to intercede in membership disputes. So they don’t. *See e.g. Healy Lake v. Mt. McKinley Bank*, Supreme Court No. S-14987, No. 6890 (Alaska 2014) (*citing Santa Clara v. Martinez*).
  - Tribal courts are challenged to enjoin disenrollments and related unconstitutionality for many reasons, especially jurisdictionally.

# The Truth About The Epidemic

- When faced with the non-indigenous/redressible “destruction of one’s social, cultural and political existence,” American indigenous people are increasingly taking justice into their own hands.



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# The Truth About The Epidemic

NATION WORLD

## California casino closed after armed standoff

*By The Associated Press*



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# The Truth About The Epidemic

## Update: 11 Hour Stand-Off Ends at Berry Creek Rancheria



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# The Truth About The Epidemic

## The Deadly Trend of American Indian Disenrollment

*Posted on March 13, 2014* | **By Jim Diamond**



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# The Truth About The Epidemic

- Tribal violence and incivility in the disenrollment context then becomes a self-fulfilling prophecy.



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# The Truth About The Epidemic

- In so many ways, tribal disenrollment is **Indian self-termination**.

# We Must Find the Cure

- Tribes: Declare disenrollment unconstitutional.



## Disenrollment Demands Serious Attention by All Sovereign Nations

RYAN SEELAU | 12/10/13

and are looking for different options. For example, the Graton Rancheria government recently revised their constitution to put in place significant protections for its people. Although disenrollment is still legally possible under Graton Rancheria law, it can only occur in cases of fraud or mistake, and even then the proceedings must take place within a three-year statute of limitations. To further protect its citizenry, any changes to citizenship laws can only occur when with the approval of two-thirds the adult population. Examples like this one,

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# We Must Find the Cure

- Tribes: Declare disenrollment unconstitutional.

## Graton Rancheria's disenrollment rules defy trend

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Wass described the changes to the tribe's constitution as a return to an historically important Indian cultural value, that preserving the "balance" of a tribe is paramount.

"It's the old way, not a new phenomena," she said of the Graton Rancheria constitutional revisions. "It's tradition."

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# We Must Find the Cure

- **Tribes: Declare disenrollment unconstitutional.**
  - Consider, by analogy, the U.S. Constitution’s protections against restrictions on American citizenship.
  - “The fourteenth amendment . . . has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.” *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).
  - U.S. citizenship can only be divested voluntarily. 8 U.S.C. § 1481. There is no basis for undoing “erroneous” citizenship.
  - Again, *Poodry v. Tonawanda Band of Seneca Indians* found that tribal banishment was akin to revocation of U.S. citizenship, meaning “total destruction of the individual's status in organized society” and “a form of punishment more primitive than torture.”

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# We Must Find the Cure

- **Tribes: Cultivate Strong, Culture-Based Tribal Government.**
  - When doing any of the following Tribal activities, imagine yourself facing disenrollment, and decide accordingly:
    - Listening to your **Elders** and learn your **Teachings**
    - Engaging in your **General Council** governance
    - Electing your **Chairman** or **Tribal Council**
    - Developing your **Tribal Court** or appointing your **Tribal Judges** or **Police Chief**
    - Revamping your **Constitution** or other **Tribal Laws** concerning Indian constitutional rights

# We Must Find the Cure

- **Congress: Amend the Indian Civil Rights Act.**
  - Allow for 28 U.S.C. 1331-federal question review of disenrollment challenges, by the U.S. District Courts.
  - By analogy, Congress just amended ICRA via the Violence Against Women Reauthorization Act to allow offenders to petition for federal court 1331 *habeas corpus* review of their detention. 25 U.S.C. 1304(e).
  - There is already no meaningful distinction between banishment, which gets federal court 1331 review under *Poodry*, and disenrollment, which doesn't.
  - For Indian civil rights to have any meaning, Congress must act.

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# We Must Find the Cure

- **Tribes/Interior: Create Indian Citizenship Truth & Reconciliation Tribunals.**
  - A la the United States Indian Claims Commission, or Northwest Inter-Tribal Court System.
  - Current Tribal judicial systems are largely without the capacity needed to properly adjudicate disenrollment disputes.
  - The tenets of the UNDRIP could be guiding, if not governing, law.

# We Must Find the Cure

- **Tribes/United Nations: Walk the Walk of International Indigenous Human Rights.**
  - Article 46(2) of the UNDRIP requires American indigenous peoples to “respect” human rights while exercising their rights under the Declaration: “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected.”
  - Article 34 states that “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, **in accordance with international human rights standards.**”

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# We Must Find the Cure

- **Tribes/United Nations: Walk the Walk of International Indigenous Human Rights.**
- As UN Special Rapporteur on the rights of indigenous peoples, S. James Anaya, explains:
  - “[The] wide affirmation of the rights of indigenous peoples in the Declaration does not only create positive obligations for States, **but also bestows important responsibilities upon the rights-holders themselves.** This interaction between the affirmation of rights and the assumption of responsibilities is particularly crucial in areas in which the Declaration affirms for indigenous peoples a large degree of autonomy in managing their internal and local affairs.”

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# We Must Find the Cure

- **Tribes/United Nations: Walk the Walk of International Indigenous Human Rights.**
- As UN Special Rapporteur Anaya further explains:
  - “In exercising their rights and responsibilities under the [UNDRIP], **indigenous peoples themselves should be guided by the normative tenets of the Declaration. . . .** The Declaration recalls that **the functioning of indigenous institutions should be ‘in accordance with international human rights standards’ . . . including in the elimination of all forms of discrimination.”**
- Offending tribes cannot and should not be allowed to have it both ways.

# Thank You

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