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# The Past, Present & Future of Tribal Per-Capitalism & Gaming Lawyer Ethics

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Gabriel S. Galanda  
20<sup>th</sup> Annual Gaming Law Summit  
December 14, 2022

# Indian Country Today



## Tribal Per-Capitalism: Political Destabilization

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- Unearned per capita income has “become an indomitable force in tribal policy and governance, to the detriment of Indian political stability and self-governance.”
- Gabriel S. Galanda, “Tribal Per Capitas and Self-Termination,” *Indian Country Today Media Network* (2014)
- “[A] tribe’s involvement in gaming leads to a large and statistically significant increase in the probability of the tribe experiencing a disenrollment episode.”
- Malinovskaya, Anna, *Understanding the Native American Tribal ‘Disenrollment Epidemic’: An IV Approach* (2021)

# Tribal Per-Capitalism: Stunted Revitalization

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- Per capita distributions dissipate tribal communal wealth and defeat “larger goals of community revitalization.”
- Eric C. Henson, Megan M. Hill, Miriam R. Jorgensen, & Joseph P. Kalt, *Policy Brief No. 6, Recommendations for the Allocation and Administration of American Rescue Plan Act Funding for American Indian Tribal Governments*, Harvard Project on American Indian Economic Development and Native Nations Institute 16-17 (Apr. 9, 2021)

## Federal Indian Per-Capitalism (1790-Present)

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- 1790: First “Indian pay roll”
- 1835: “Per capita”/“personal” money apportionment
- 1847: Treaty monies paid to “heads of families and other individuals”
- 1907: Tribal members entitled to a “pro rata share of any tribal or trust funds on deposit” with Treasury
- 1978: *Santa Clara Pueblo v. Martinez* (1978)
- 1983: Per Capita Act & amendment to 1973 Indian Tribal Judgment Funds Use and Distribution Act
- 1988: Indian Gaming Regulatory Act
- 2020-21: CARES Act/American Rescue Plan

## IGRA (1988)

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- Intended “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting...strong tribal governments.”
- IGRA instilled regulatory mechanisms to guard against organized crime and “other corrupting influences.”
- Permitted net gaming revenues to fund “per capita payments” to tribal members, provided:
  - “All enrolled members” must receive them absent “reasonable justification for....excluding [some] enrolled members.” NAT’L INDIAN GAMING COMM’N, No. 01-05, USE OF NET GAMING REVENUES BULLETIN (2005)

## NIGC Gaming Per-Capita Deregulation (2010s)

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- 2003: NIGC Chairman Phil Hogen: “where gaming revenues are spent in a manner that does not benefit the tribal government or tribal membership as a whole, the NIGC will investigate”
- 2010: NIGC refocused; ceased review of “[i]mproper per capita payments”
- 2013: NIGC further refocused; on “non-tribal-governmental interests”
- 2016: NIGC deflects on per capita; “has no jurisdiction to insert itself into a Tribe’s enrollment decisions”

# Tribal Per-Capitalism

The New York Times

## *In California, Indian Tribes With Casino Money Cast Off Members*

LAW | NATIONAL

### Grand Ronde Tribes to disenroll 86 descendants of treaty signer

## Tribe expels Foreman clan

Family says DNA links ancestor to rancheria's roots

By Kimberly Bolander  
*Record Searchlight*

nine members recently erased from the tribe's roster.

The Foreman family is no longer part of the rancheria after a vote of seven tribal council members. Tribal Chairwoman Tracy Edwards said.

"We were basically following through with what the (tribe's) general membership had decided," she said.

Virginia Timmons. All rancheria members must be descendants of Timmons or one of 16 other original tribal members.

But the tribal council is unconvinced logical

On Tuesday, the tribal council is unconvinced logical

said. Tuesday, a meeting to consider the remaining 67 Foremans' enrollment was cut short after emotional exchanges between the family and the

NEWS

## New Generation of Native Americans Faces Exclusion from Parents' Tribes

JIMMY MAGAHERN | March 3, 2022

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# Tribal Per-Capitalism/Neocolonialism

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- Over 90 tribes—15% of the federally recognized—have disenrolled 10,000 relatives...and counting
- Countless tribes are no longer enrolling their babies and grandbabies
- Countless more tribes are fixated on per-capitalism, including gaming welfare
  - Many engage in Section 20 land development or dispute.

# Tribal Per-Capitalism: Poverty/Unemployment (2022)

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- While member income and employment levels have risen since 1988, tribal unemployment remains more than double national averages and tribal family poverty rates are three times higher.
  - Thaddieus W. Connor & Aimee L. Franklin, *20 Years of Indian Gaming: Reassessing and Still Winning*, 100 SOC. SCIENCE Q. 793, 805 (2019)
- Gaming per capita dollars disincentivize tribal member employment and higher education.
  - *See* Meriam Report (1928); Commission on Indian Reservation Economies (1983)

# Tribal Per-Capitalism: Human Rights Abuse (2022)

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- Gaming per capita monies have catalyzed violent unrest and tribal citizenship-related human rights violations on a great many reservations.
- Randall K. Q. Akee, Katherine A. Spilde, & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. OF ECON. PERSP. 185, 199 (2015)
- Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IRGA Shapes the Politics of Native American Gaming, Sovereignty, and Identity* 4 Va. J. Soc. Pol'y & L. 381, 422 (1997)

# Tribal Per-Capitalism: Mass Disenrollment (2022)

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- Gaming per capita monies are a but-for cause of tribal disenrollment.
- David E. Wilkins & Shelly Hulse Wilkins, “Dismembered: Native Disenrollment and the Battle for Human Rights” (2017)
- *See also* Malinovskaya, Anna, Understanding the Native American Tribal ‘Disenrollment Epidemic’: An IV Approach (2021)

## Tribal Per-Capitalism: Enrollment Moratoria (2022)

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- Twenty years ago, a UCLA Indian law scholar suggested that “in the view of existing citizens, the proper solution may seem to be closing the rolls”—the goal being to preserve concentrated wealth.
  - Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 464 (2002))
- Twenty years later, gaming per capita monies are also a but-for cause of enrollment moratoria, forsaking Indigenous “Seven Generations” principles.

## Inter-Tribal Silence (2022)

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- “Faced with an inconvenient history, the first defense is silence.”
  - Elliot Jaspin, “Buried in the Bitter Waters: The Hidden History of Racial Cleansing in America”


# Inter-Tribal Silence (2022)



**Gabe Galanda, Indigenous Rights Lawyer**  
@NDNlawyer



Today, for the first time in its 76 years, @NCAI1944 resolved to affirm the inherent sovereign right of Native Nations to decide who belongs as citizens, and to recognize the Indigenous human/civil right to belong, free from discrimination. NCAI will form a Task Force.



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**The National Congress of American Indians**  
Resolution #PDX-20-001

**TITLE: Tribal Citizenship Policy and Protection Task Force**

**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants, the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, each Indigenous nation in the United States possesses and has always possessed the inherent sovereign right to decide who are citizens of that nation; and

**WHEREAS**, Article 9 of the United Nations Declaration On The Rights of Indigenous Peoples separately recognizes that "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right"; and

**WHEREAS**, Indigenous tribal citizenship have been impacted by colonial and federal treaties, laws, federal regulations and policies since the eighteenth century, including the Indian Reorganization Act of 1934, which defined "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood"; and

**WHEREAS**, a growing body of Indigenous scholarship warns that arbitrary and incongruent governing authority and definitions of tribal citizenship threaten the future of Indigenous citizenries and nations.; and

**WHEREAS**, NCAI has not heretofore passed any Resolution affirming Indigenous tribal citizenship; and

**WHEREAS**, it is within NCAI's purview to offer education, guidance, and advocacy needed by Indigenous nations as they exercise their sovereign powers in order to establish and maintain civil rights of their citizens.

**NOW THEREFORE BE IT RESOLVED**, that the National Congress of American Indians (NCAI) affirms that, since time immemorial, each Tribal Nation retains the inherent sovereign right to determine its own citizenship; and

**BE IT FURTHER RESOLVED**, that the President and the Executive Committee of NCAI are encouraged to establish a Tribal Citizenship Protection Task Force to study, educate, and develop recommendations regarding issues of Indigenous tribal citizenship for consideration by NCAI; and

**BE IT FURTHER RESOLVED**, that the NCAI Executive Committee establish a charge and purpose for the Task Force including membership, specific objectives and a schedule for completion of the charge; and

**BE IT FURTHER RESOLVED**, that nothing in this resolution shall be construed as support for any present or future advocacy effort, whether administrative, legal, or legislative, to waive tribal sovereign immunity or to modify any federal or tribal laws, court decisions, or practices that would diminish or in any way affect the inherent sovereign authority of Indian tribal governments to determine their own membership and implement procedures, if any, that they determine appropriate for review of such determinations; and

**BE IT FINALLY RESOLVED**, that this resolution shall stand until it is withdrawn or modified by subsequent resolution.

**CERTIFICATION**

The foregoing resolution was adopted by the General Assembly at the 2020 Annual Session of the National Congress of American Indians, held Nov 8, 2020 - Nov 13, 2020, with a quorum present.

**ATTEST:**

Fawn Sharp, President

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Juana Majel Dixon, Recording Secretary

# Inter-Tribal Silence (2022)

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**Gabe Galanda, Indigenous Rights Lawyer**

@NDNlawyer



"@NCAI1944 approved...a Tribal Citizenship Policy & Protection Task Force during its 2020 convention....However, amid leadership changes that have occurred at NCAI over the past 2 years, [Galanda] described the task force as all but 'dead.'"

[twitter.com/indianz/status...](https://twitter.com/indianz/status...) @indianz

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# Inter-Tribal Complicity (2022)



# *Brackeen v. Haaland (2022)*



*#StopColonizers: ICWA at U.S. Supreme Court*

- “They don’t get us.”—NCAI President Fawn Sharp

# Tribal Lawyer Ethical Duty

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National Native American Bar Association  
Formal Ethics Opinion No. 1  
June 26, 2015



NATIONAL  
NATIVE AMERICAN  
BAR ASSOCIATION

*National Native American Bar Association  
Formal Ethics Opinion No. 1  
Adopted June 26, 2015*

*Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals  
Targeted for Disenrollment*

# Tribal Lawyer Ethical Duty

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- “The responsibility of a tribal advocate differs from that of the usual advocate; **his or her duty is to further justice in the greater Native American community**, not merely to win his or her case. This is particularly true in the context of disenrollment case”—and of Indian gaming-fueled tribal neocolonialism.

# Tribal Gaming Leadership

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- In 2008, the Mashantucket Pequot Tribe began to “slowly ween” its members off of gaming per capita dependence, and to reinvest the savings in new programs that establish social “safety nets not only for individual tribal members but for the community at large.”
- Harvard Ash Center, *Navigating the American Rescue Plan Act: A Series for Tribal Nations*, Session 7, at 30:30, YOUTUBE (Sep. 8, 2021)

# Tribal Clarion Call

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- Revitalize Indigenous kinship societal and cultural tradition.
- Defend against Tribal per-capitalism qua neocolonialism.

# Thank You

