

Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming¹

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AN UNDERCURRENT IN DEBATES ABOUT American Indian economic development is the concern that tribes are departing from certain notions of "Indianness" when they engage in commercial enterprises, especially gaming. The Supreme Court, for example, wonders if tribal sovereign immunity should still apply when tribes engage in commercial activities occurring off the reservation as opposed to "traditional tribal customs and activities."² Scholars postulate that gaming detracts from authentic

tribal identity.³ And the political mudslinger argues, "they sure don't look Indian."⁴ Even where such thinking manifests as more of a nagging suspicion than free-standing rationale, articulating concerns about "Indianness," "tradition" and "tribalism" helps foes of Indian tribes set the tone for legal decisions that diminish tribal rights. If tribes are not acting "Indian enough," it's not a stretch to abrogate some of the rights they enjoy by virtue of their tribal status.⁵ On the other hand, if tribes ap-

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¹ As described in the opening paragraphs of this paper, we take inspiration from Rennard Strickland's *Beyond the Ethnic Umbrella and the Blue Deer: Some Thoughts for Collectors of Native Painting and Sculpture*, in TONTO'S REVENGE, 63-75 (1997) [hereinafter "Strickland"].

² See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 758, 760 (1998).

³ See, e.g., Naomi Mezey, *The Distribution of Wealth, Sovereignty and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 724-35 (1996) [hereinafter "Mezey"].

⁴ Many have quoted Donald Trump's memorable attempt to oppose Indian gaming by sharing his perception of the correlation between "Indianness," physical appearance, and blood quantum: "I have seen these Indians, and you have more Indian blood than they have." *Id.* at 726 (citing Francis X. Clines, *The Pequots*, N.Y. TIMES, Feb. 29, 1994 § 6 Magazine, at 50).

⁵ See, e.g., *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (deciding the Mashpees were not a "tribe" on certain dates and therefore lacked standing to bring a land claims suit under the

Nonintercourse Act). Many have commented on the extent to which conceptions of tribalism and Indianness affected the outcome of the Mashpee case. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 355 (1990) ("The jury's resistance to the question posed may reflect problems with the notion of "tribe," especially as a concept defined by whites to describe and regulate non-whites. . . . The Mashpee plaintiffs saw themselves as members of a tribe; how should that count in the assessment of difference?"); James Clifford, *Identity in Mashpee*, reprinted in JO CARILLO, *READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL*, 19-26 (1998) (the Mashpees were "active in the economy and society of modern Massachusetts" as "businessmen, schoolteachers, fishermen, domestic workers, small contractors [many of apparent mixed race]. . . . In Boston Federal Court a jury of white citizens would be confronted by a collection of highly ambiguous images. Could [a] jury of four women and eight men (no minorities) be made to believe in the persistent 'Indian existence' of the Mashpee plaintiffs without costumes and props?"). Many other tribes have also experienced legal attempts to wipe them off the map, despite their continued vitality. See, e.g., Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 572 n.68 (1994) ("there are those who say we do not exist" quoting a federal judge's statement that "from . . . [1849] I think that [the Oneida] tribal relation ceased to exist as a matter of law") [hereinafter "Halbritter and McSloy"]; Mezey, *supra* note 3, at 725 (the State of Connecticut declared the Pequot tribe "officially extinct" in the 1970s).

pear "too Indian," it's easy to decide that they are not capable of handling the responsibilities of a sovereign nation.⁶

Rennard Strickland's *Beyond the Ethnic Umbrella and the Blue Deer: Some Thoughts for Collectors of Native Painting and Sculpture* analyzes the problematic search for "Indianness" in Indian art in a way that helps us look critically at the similar debate on Indian gaming. According to Strickland, non-Indian collectors, as well as some in the Indian art community, cherish certain stylized, traditional symbols in Indian art—especially the little blue deer. "Innocent-eyed creatures, they stare out in cervine splendor, peering from hundreds (perhaps thousands) of American Indian paintings."⁷ So ubiquitous, the little blue deer has somehow become Indian art, for supporters and detractors of Indian art, alike.

But the preoccupation with the little blue deer obscures the depth and diversity of Indian art, and, indeed, of American Indian life and culture as it exists in over five hundred tribes. It also puts American Indian artists in a precarious situation:

The painter who was an Indian was denied his or her Indianness if one of the accepted symbols was not used in his or her work, while at the same time the painter who was an Indian might alternatively be condemned as trite and repetitive if one of the symbols were employed.⁸

Indian artists can neither paint, nor fail to paint, the little blue deer without being attacked by the collectors on whom they depend to purchase their art. With additional pressures to have the right blood quantum and enrollment status, Indian artists are truly trapped in an "ethnic umbrella."⁹

American Indian tribal governments find themselves under a similar umbrella when they "participate in the Nation's commerce" (as the Supreme Court recently put it).¹⁰ Instead of a little blue deer, commentators on tribal commercial ventures keep looking for a buffalo.¹¹ Tribes that do not exhibit a certain level of economic success are lamented as backward, undeveloped, and failing to embrace modern so-

⁶ See, e.g., N. Bruce Duthu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling and Games of Chance*, 29 ARIZ. ST. L. J. 171, 175 (1997) [hereinafter "Duthu"] (noting that in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), "the Supreme Court divested tribes of criminal jurisdiction over non-Indians relying, not on positive expressions of law, but rather on an atavistic narrative construct of tribalism, recalling a time when tribes were "characterized by a 'want of fixed laws [and] of competent tribunals of justice,' and where 'dangers' still await non-Indians in tribal court") (internal citations omitted).

⁷ Strickland *supra* note 1, at 72.

⁸ *Id.* at 74. Strickland further queries: "What does a Native American painter do when he or she wants to say something about the deer or the deer people or the deer spirit? Is the work only "Bambi art"? Can it be more? Or, on the other hand, what is to be the fate of the American Indian painter who finds all of this about deer and buffalo to be a great bore unrelated to his or her present-day life like as an Indian and wants to paint about law school or video arcades or motorcycle symbols or bars and drunks?" *Id.*

⁹ See *id.* at 73.

¹⁰ *Kiowa Tribe*, 523 U.S. at 758.

¹¹ See, e.g., Hon. Pierre L. Van Rysselberghe, *People of the White Buffalo: Gambling is the Modern Version of the Myth of Survival for Many Native Americans*, 56-DEC OR. ST. B. BULL. 41, 41 (1995) ("Gone now are the tremendous herds of buffalo . . . and bands of people who lived upon this continent before it was taken from them. . . . Whereas Na-

tive Americans can no longer hunt the buffalo, a number of tribes . . . have embraced the new buffalo, 'casino gambling'. . . . Gaming is for many isolated, neglected and destitute Native Americans the modern myth of survival, called by some the White Buffalo."). This is not to say that any connection between Indian gaming and the buffalo is necessarily flawed but rather to inspire reflection on the pervasive use of this symbolism. For just a few of the many examples, see Michael Grant, *Seminole Tribe v. Florida, Extinction of the "New Buffalo?"*, 22 AM. INDIAN L. REV. 171 (1997); Amy L. Cox, *The New Buffalo: Tribal Gaming as a Means of Subsistence Under Attack*, 25 B.C. ENVTL. AFF. L. REV. 863 (1998); Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Gaming Compacts*, 47 WASH. U. L. URB. & CONTEMP. L. 51 (1995); William E. Horwitz, *The Scope of Gaming and the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS AND ENT. L. J. 153 (1996).

¹² Perceptions of Indian poverty and incompetence have long been used as a rationale to divest tribal people of control over many spheres of life, especially in the area of child welfare. See, e.g., Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 27 (1998); see also Kathryn R.L. Rand and Steven A. Light, *Virtue or Vice: How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 435 (1997) [hereinafter "Rand & Light"] (suggesting the success of Indian gaming may help to dispel the myth than Indian tribes cannot manage successful business enterprises).

ciety.¹² As in, “Why can’t those Indians recover from the loss of the buffalo?” But when Indians do engage in successful commercial enterprises—from shipyard and media holdings to smokeshops and Indian gaming—they are criticized as departing from customary Indian activities.¹³ As in, “Why is there no buffalo in this picture?”

Both critiques play on stereotypes to fight political and economic wars over Indian gaming. Like the art world’s little blue deer, the gaming world’s buffalo (or “new buffalo” as it is often called¹⁴) masks the diversity of tribal economies.¹⁵ Moreover, it suggests that all five hundred tribes are looking for a single panacea, one that might someday disappear at the hands of conquering whites.¹⁶ But most of all, arguments invoking typified emblems of Indian activities redirect the dialogue from legitimate legal and economic analysis, paving the way for tenuous concepts like Indianness or tribalism to affect Indian rights.¹⁷ As Strickland puts it, “Whether or not an Indian is an Indian artist when he paints an abstracted umbrella is a different issue from how successfully the Indian artist paints that abstracted umbrella.”¹⁸

This paper paints the ethnic umbrella and then steps out from under it. First we identify several critiques of tribal commercial enterprises that seek to condition tribal rights on continued adherence to stylized notions of customary or traditional Indian activities. With that backdrop, we next draw on the experiences of the Oneida Nation to tell one story of Indian gaming as a step toward tribal self-determination over lifestyle and livelihood.¹⁹ We argue that rights to pursue tribal business endeavors, including Indian gaming, should not be based on any external measuring stick of Indianness, tradition or tribalism. The meaningful test is the extent to which gaming and other commercial enterprises enable tribes to determine their own socio-economic landscapes in ways that are both culturally relevant and contemporary.

THE ETHNIC UMBRELLA (OR TRIBES ARE NOT TRADITIONALLY INVOLVED IN THE NATION’S COMMERCE)

The concern about whether tribes engaged in Indian commercial enterprises are acting as In-

¹³ See, e.g., Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at The Bingo Palace*, 29 ARIZ. ST. L. J. 97, 110-11 (1997) (hypothesizing that Indian gaming “will undermine sovereignty if it negates the view of tribes as poor and culturally distinct”); see also Noah Sachs, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics*, 36 NAT. RESOURCES J. 641, 641, 656 (1996) (When the Mescalero Apache proposed to host a nuclear waste site, some opponents decried “the bribery of a poor community,” to which a Mescalero tribal official responded, “They come to save the poor Indian from himself. This creates great anger and resentment. What do they know of our way of life?”); Bruce Selcraig, *Tribal Links, Why are New Mexico’s Indian Tribes Embracing the Ultimate White Man’s Game*, HIGH COUNTRY NEWS, June 4, 2001 <www.hcn.org> (analyzing southwestern Pueblo development and ownership of golf courses).

¹⁴ Paul H. Brietzke and Teresa L. Kline, *The Law and Economic of Native American Casinos*, 78 NEB. L. REV. 263, 289 (1999) [hereinafter “Brietzke & Kline”] (“many tribes see a tribally-owned casino as the ‘new buffalo,’ the main means for nurturing a self-sufficiency and tribal sovereignty”).

¹⁵ Given vast difference in region and culture, the hundreds of tribes have pursued different socio-economic patterns over time. While Lakota tribes on the Great Plains historically hunted buffalo, the northeastern Wampanoags harvested shellfish and herring, and the

Southwestern Pueblos cultivated corn. Today, as the Mohegan Tribe initiates a telecommunications venture in Connecticut, the Neets’ aii Gwich’in peoples in Alaska follow a subsistence lifestyle based on caribou and salmon. Of course, even this description fails to account for the multi-faceted nature of each tribal economy. See generally, STEPHEN CORNELL & JOSEPH P. KALT, *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* (1992) (discussing various tribes’ historical and contemporary economic experiences); see also Rand & Light *supra* note 12, at 347, n.237 (remarking on attempts to diversify tribal gaming economies).

¹⁶ Cf. Duthu, *supra* note 6, at 204 (as a result of state power and interests in tribal gaming, “tribe[s]’ grip on the ‘new buffalo’ may go the way of the original buffalo,” but “tribes will survive even this threat, much as they survived the loss of the original buffalo”).

¹⁷ See *supra* note 6.

¹⁸ Strickland *supra* note 1, at 65.

¹⁹ This paper does not present a comprehensive view of the history and culture of the Oneida Nation or the Haudenosaunee Confederacy. In a sense, it picks up where a previous piece, Halbritter & McSloy *supra* note 5, left off. We direct the reader to that article, as well as to the many sources cited therein, for a broader view of Oneida culture, society, language, and history. See also <<http://www.oneida-nation.net>> for a fuller description of tribal history, culture, and experiences, including regular updates.

dian tribes often arises as a subtext in lawsuits, scholarship, and political battles where foes of Indian tribes seek to abrogate tribal rights.²⁰ In this section we outline several instances of this phenomenon.

The Ethnic Umbrella in the Supreme Court

The United States Supreme Court has not recently been kind to American Indian tribes and, particularly in the Rehnquist era, has decided against the tribes in the vast majority of cases.²¹ There are many potential explanations for this trend.²² We might add to this list the possibility that the Supreme Court is uncomfortable with increasing tribal involvement in commercial enterprises because such involvement challenges the Court's conception of Indian tribes' place in American law and society.²³ The recent case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*²⁴ illustrates this discomfort.

An entity of the Kiowa Tribe called the Kiowa Industrial Development Commission entered into a contract with a non-Indian owned corporation, agreeing to buy certain stock.²⁵ As part of the deal, a tribal executive

signed a promissory note on behalf of the tribe. Although there was some dispute about whether the note was signed on or off tribal lands, its terms clearly obligated the tribe to make payments off the reservation. The note also contained a "Waivers and Governing Law" section stating, "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."²⁶ When the tribe defaulted, the non-Indian corporation sued in state court and the tribe moved to dismiss based on its sovereign immunity from suit. Following decisions in the lower courts, the Supreme Court held that tribes retain their sovereign immunity from suit, even when they engage in commercial activities outside of their reservations.²⁷

Despite holding in favor of the tribe, Justice Kennedy spent pages of dicta denigrating the doctrine of tribal sovereign immunity as anachronistic, unfair, and accidental.²⁸ Where Congress may *once* have supported the doctrine in the interests of tribal economic development and self-sufficiency, the "rationale . . . can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well

²⁰ Of course non-Indians are not the only ones looking for stylized notions of Indian tribes. The Lakota newspaper editor Tim Giago contributed the following comments to a debate about Pequot gaming rights: "Have you ever wondered why tourists come out west when they want to see Indians instead of going to Connecticut? I don't believe tourists come out west to visit Indian casinos. I believe they come out west to experience real Indians." Tim Giago, Letters to the Editor, *THE NEW LONDON DAY*, June 1, 2001. For a particularly inflammatory contribution to the Indianness and gaming issue, see JEFF BENEDICT, *WITHOUT RESERVATION: THE MAKING OF AMERICA'S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD'S LARGEST CASINO* (2000).

²¹ See John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and the Denial of Indian Rights in Coeur D'Alene Tribe*, 31 *ARIZ. ST. L. J.* 787, 789-70 (1999) (hereinafter "LaVelle") (After 1986, when President Reagan appointed Associate Justice Rehnquist to the position of Chief Justice, the Supreme Court abandoned its historical role as protector of the rights of Indian tribes under the Constitution, in favor of states-rights activism. "Today, this striking trend of anti-tribal adjudication by the Rehnquist Court has engendered great consternation and dismay among tribal leader and Indian law scholars.").

²² See *id.* at 944, n.3-7 (citing David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism and the Supreme Court in Indian Law*, 84 *CAL. L. REV.* 1573, 1573-

74 (1996)) [suggesting the Court is "abandoning entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests"]; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L. J.* 1425, 1425, 1520 (1987) (discussing the Court's "states rights" ideology); Ralph W. Johnson & Bernie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 *PUB. LAND L. REV.* 1, 24, 24-25 (1995) (arguing that Rehnquist is advocating and advancing the "termination" of Indian tribes, even though Congress abandoned the same policy after realizing it was devastating for tribes).

²³ See Duthu, *supra* note 6 at 175 ("The history of federal-tribal state relations, especially as reflected in jurisprudential narratives, reveals an entrenched tendency on the part of majoritarian rulemakers: (a) to differentiate between Indian and non-Indian values, experiences and worldviews; (b) assign those differences certain values; and (c) produce social arrangements which rationalize systems of dominance—usually of non-Indians over Indians. . . . [W]hen majoritarian society has felt an imperative to 'reorder' tribal societies, it has done so and provided the narrative constructs to justify it.").

²⁴ 523 U.S. 751 (1998).

²⁵ See *id.* at 753-54.

²⁶ *Id.* at 754.

²⁷ See *id.* at 760.

²⁸ See *id.* at 756-59.

beyond traditional tribal customs and activities."²⁹ After all, tribes now "take part in the Nation's commerce, [including] ski resorts, gambling, and sales of cigarettes to non-Indians."³⁰

Notwithstanding the incongruous images in his head, Justice Kennedy had to admit that the Court's own sovereign immunity precedents, while founded on a "slender reed,"³¹ made no distinction between on and off-reservation activities of the tribe, nor between tribes' governmental and commercial activities.³² Writing for the majority, Justice Kennedy thus reluctantly upheld the tribe's immunity from suit in this case, but called on Congress to consider the "need to abrogate tribal immunity, at least as an overarching rule."³³

While there are certainly legitimate concerns about the effects of tribal sovereign immunity on both Indian and non-Indian litigants,³⁴ there

are equally important tribal interests in maintaining sovereign rights.³⁵ But the Justices' limited notion of customary tribal activities hinders their ability to see the tribe's side of the dispute.³⁶ As Professor Anaya has commented, the Court in *Kiowa Tribe* "ignored the historical inequities and considerations of self-determination, which, from the perspectives of the indigenous litigants favor maintaining those attributes of indigenous sovereignty that indigenous peoples have not freely given up."³⁷

Kiowa Tribe and other cases³⁸ set up a seductive and false dichotomy between tribes acting traditionally and commercially,³⁹ and suggest the Supreme Court is less likely to protect tribal rights when the tribe is engaged in business versus so-called customary activities.⁴⁰ Interestingly, several lower courts have avoided the Supreme Court's traditional/commercial distinction, even in cases where the dispositive is-

²⁹ *Id.* at 757-58.

³⁰ *Id.* at 758.

³¹ *Id.* at 757.

³² *See id.* at 755-60.

³³ *Id.* at 758, 60. A future article might compare *Kiowa Tribe* with *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996), *see infra* notes 43 and 64, where the Court allowed the State of Florida's sovereign immunity to serve as a bar to a suit by the Seminole Tribe.

³⁴ As the Court pointed out, these may include the interests of tort victims "who have no opportunity to negotiate a waiver of sovereign immunity." *Id.* at 766. It is well beyond the scope of this paper to delve into the broader sovereign immunity debate except to point out that parties injured on a reservation may often seek remedies in tribal court. *See generally* Pommersheim at 57-135 (providing a tribal court judge's view of tribal courts and tribal sovereignty). Of course *Kiowa Tribe* did not involve an individual tort victim but rather a corporate entity which, during the course of negotiating the business deal, presumably could have requested a limited waiver of the tribe's sovereign immunity. Such waivers are routinely requested and granted by Indian nations in large commercial transactions involving Indian nations.

³⁵ *See* Christopher W. Day, *Kiowa Tribe v. Manufacturing Technologies: Doing the Right Thing for All the Wrong Reasons*, 49 CATH. U. L. REV. 279 (1999) (arguing that "by criticizing the doctrine of tribal sovereign immunity and ignoring the historical underpinnings of this concept of tribal sovereign immunity, the Court greatly increases the likelihood that the federal government . . . will breach its obligation to protect the Indian tribes from the destruction of their way of life.").

³⁶ The Supreme Court has a very long history of bringing its own ethnocentric impressions to bear on Indian cases

before it. *See, e.g.*, *U.S. v. Kagama*, 188 U.S. 375, 384-85 (1885) ("These Indian tribes . . . are communities dependent on the United States. Dependent for their daily food . . . their weakness and helplessness, so largely due to the course of dealing with the Federal government. . . . The power of the general government over these remnants of a race once powerful, now weak in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."). In some areas of the law, the Court has abandoned principles now considered abhorrent; it does not, for example, cite to its cases upholding African American slavery. But in Indian law, the Court continues to rely on precedents containing offensive descriptions of tribes. In *State of Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), for example, the Court decided the Native Village of Venetie was not a "dependent Indian community" and therefore could not exercise jurisdiction over its lands, relying significantly its much earlier opinion in *United States v. Sandoval*, 231 U.S. 28 (1913). In *Sandoval*, the Court's decision that the Pueblo was a "dependent Indian community" included analysis of "the reports of the super-intendents charged with guarding [the Indians'] interests [which] show that they are dependent upon the fostering care and protection of the government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants." *Id.* What possible relevance can such a standard have to tribal rights today? *See* S. James Anaya, *In the Supreme Court of the American Indian Nations, Lone Wolf, Principal Chief of the Kiowas, et al.*, 7-WTR KAN J.L. & PUB. POL'Y 117, 129 (1997) ("The operative law in the United States should not be infected by doctrine or theory that is contrary to modern values, as reflected in international law.").

sue is whether a tribe acting as an employer is a "tribe" and therefore exempt from suit under certain statutes.⁴¹ Instead, they have considered "both the control that federal Indian tribes have over the employer and the nature of the employing entity's business as it relates to tribal independence, economic development, and political or cultural integrity."⁴² Closer to the tribal communities, these lower courts perhaps recognize the nuanced and multi-factored realities of tribal commercial activities.

The Ethnic Umbrella in Legal Scholarship

While the Supreme Court is concerned about tribal involvement in commercial activities

generally,⁴³ debate in scholarly circles reveals similar ambivalence about the more specific question of Indian gaming.⁴⁴ A recurring theme is that although Indian gaming has provided important revenue for cash poor tribal economies, it is ultimately harmful to tribes⁴⁵ or benefiting the wrong ones.⁴⁶ This line of analysis seems influenced by the traditional versus commercial approach to tribal economic activities. And, in an era where political opponents of tribes are unafraid to win votes by appealing to exaggerated images of both overt⁴⁷ and slightly more subtle⁴⁸ stereotypes about Indian tribes, such scholarly work may inadvertently support arguments to diminish tribal gaming rights.⁴⁹

³⁷ S. James Anaya, *The United States Supreme Court and Indigenous Peoples: Still a Long Way to Go Toward a Therapeutic Role*, 24 SEATTLE U. L. REV. 229, 233 (2000).

³⁸ In *Rice v. Rehner*, 463 U.S. 713 (1983), for example, the Court held that the State of California could require an Indian trader, who was federally licensed to sell alcohol from a general store located on a reservation, to adhere to state liquor regulation. Justice O'Connor wrote, "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Id.* at 722. Indeed, old notions of what Indians could and could not do were on Justice O'Connor's side. "The colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802. . . . Congress imposed complete prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances." *Id.* at 713. Moreover, "liquor trade among the Indians has been regulated largely due to early attempts by the tribes themselves to seek assistance in controlling Indian access to liquor." *Id.* at 732. This decision prompted the authors of a leading Indian law case book to ask rhetorically, "Does Justice O'Connor's opinion in *Rice v. Rehner* fall prey to the menagerie theory of Indian law that treats Indian reservations as historic human zoos?" CLINTON, NEWTON & PRICE, *AMERICAN INDIAN LAW*, 561 (1991) (citing F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 288 (1942 ed.) (cautioning against a menagerie theory of Indian property rights that denied Indian ownership because Indians merely "roamed" over their property [in search, of course, of buffalo]).

³⁹ See also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (Stevens J. concurring) (criticizing tribal immunity as founded upon an anachronistic fiction that should probably not apply to tribal commercial activities occurring off the reservation).

⁴⁰ It does not seem entirely coincidental that most Indian law cases in the 1990's implicated tribes' economic activities and the Supreme Court decided nearly all of them against the tribes. See *supra* note 21. See also, Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska*

v. Native Village of Venetie, 35 TULSA L. J. 73, 115 n. 259-60 (listing Supreme Court decisions issued in the late 1990s during which period tribes lost cases involving gaming, taxation, operation of a landfill, and other "non-traditional" activities but won in the rare instance where they sought to exercise treaty rights to hunting and fishing). Cases in 2000 and 2001 have followed the trend. See, e.g., *Atkinson Trading Co. Inc. v. Shirley*, 121 S. Ct. 1825, 1832-35 (2001) (Navajo Nation could not impose an occupancy tax on a hotel located on non-member fee land within the boundaries of the reservation, in part because the hotel was held to have "no direct effect on the Nation's political integrity, economic security, health or welfare").

⁴¹ See Kaighn Smith, *Civil Rights and Tribal Employment*, 47 FED. LAW. 34, 38 (2000) [hereinafter "Smith"] (citing *Giedosh v. Little Wound School Bd.* 995 F. Supp. 1052 (D.S.D. 1997) (Indian tribe exception under Title VII applied to the Little Wound School Board, classified by state law as a nonprofit corporation, because of its close connection to the tribe and important role in tribal self-determination over education); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389 (E.D. Wis. 1995) (tribal casino and gaming commission, as subordinate economic enterprises of the Menominee Indian tribe, could not be sued under Title VII by former game table operator); *Setchell v. Little Six Inc.*, 1996 WL 162560 (Minn. App. 1996) (casino wholly owned by Mdewakanton Sioux Community and incorporated under tribal law but holding a Minnesota license to do business as a foreign corporation in Minnesota falls within the Indian tribe exemption of the ADA). Cf. *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989) (North Dakota corporation owned 51 percent by Devils Lake Sioux Tribe and 49 percent by a Delaware corporation, engaged in manufacturing on reservation, was not exempt as an Indian tribe under Title VII).

⁴² *Id.*; see also *id.* at 42, n. 8 (asserting the Title; VII and ADA exemptions for "Indian tribes" should not turn on the nature of the activity of the "subordinate economic enterprise" of a particular tribe [because], the purpose of the provision was to allow federal Indian tribes 'to conduct their own affairs and economic activities').

A particularly poignant article is Naomi Mezey's *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*.⁵⁰ Mezey sketches three portraits: examples of "post-modern," "traditional," and "negotiated" approaches to Indian gaming. Somewhat curiously, given her apparent awareness of the limitations of the terminology and identity constructions,⁵¹ Mezey echoes the Supreme Court's approach to tribal rights in commercial settings.

First defining post-modernism as "a shameless accommodation with the market [that] puts it firmly in the tracks of an entrepreneurial culture,"⁵² Mezey identifies the Mashantucket Pequots with their relatively recent federal recognition, mixed blood membership, and lucrative casino operation in populated South-eastern Connecticut as the quintessential example. The Pequots, argues Mezey, have used

gaming to construct a tribal identity which "if not the original, may be better; it . . . allows them to easily incorporate unexpected wealth, to diversify their investment portfolios, and to produce a cultural identity while trafficking in postmodern consumerism."⁵³ Such "post-modern" tribes like the Pequots "might have the weakest claim to IGRA's⁵⁴ benefits."⁵⁵

At the other end of the spectrum, according to Mezey, are "traditionalists . . . most attached to those cultural practices that have not endured . . . [and] committed to the cultural values and practices of an agrarian past;" they include a group of Akwesasne Mohawks that, according to Mezey, split from the rest of the tribe over gaming, and moved to ancestral lands to raise vegetables, cattle, and buffalo.⁵⁶ With their "economic vulnerability," "fidelity to the past," and "cultural integrity," "traditional" tribes have the "strongest claim" to

⁴³ We should say that the Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (holding unconstitutional, as a violation of state's 11th Amendment sovereign immunity, the provision of the Indian Gaming Regulatory Act [IGRA] that allowed tribes to sue states failing to engage in good faith negotiations over gaming compacts), did not, at least in the text, resort to tribal stereotypes. Cf. Brietzke & Kline, *supra* note 14, at 312 at n.181 ("by treating [the] *Seminole* [tribe] as a private individual suing a state, the Court neglected the Tribe's collective and sovereign status"). Among the many criticisms of *Seminole*, is the charge that it exemplifies the Court's "outcome determinative decisionmaking" in Indian law and that it "licenses states to act as holdouts" over Indian gaming. *Id.* at 312, n. 181, 313. See *infra* note 54 for additional discussion about the IGRA and note 64 for discussion of its tribal-state compacting requirements.

⁴⁴ Very little scholarship unambiguously calls for the outright limitation of Indian gaming. *But see* Nicholas S. Goldin, *Castig a New Light on Tribal Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798 (1998) (Indian gaming should be limited because it harms surrounding communities and represents an incursion on state sovereignty).

⁴⁵ See Paul Pasquaretta, *On the Indianness of Bingo: Gambling and the Native American Community*, 20 CRITICAL INQUIRY at 700, cited in Mezey, *supra* note 3, at 729 ("Insofar as casino gambling fosters materialism, acquisitiveness, and self-interested divested of group interest, it might also represent the last phase in the complete assimilation of indigenous North American peoples."); Brietzke & Kline, *supra* note 14, at 292, n.112 (quoting Oren Lyon's comment on "'teflon' leaders of Indian nations who are willing to give it all up for the quick money of casinos"); see also FRANK POMMERSHEIM, BRAID OF FEATH-

ERS, AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 179-87 (1995) (suggesting that gaming imposes on tribes "Western ideas of economic transfer" incompatible with tribal culture).

⁴⁶ See, e.g., Neil Scott Cohen, *In What Often Appears to be a Crapshoot Legislative Process, Congress Throws Snake Eyes When it Enacts the Indian Gaming Regulatory Act*, 29 HOFTSRA L. REV. 227, 279 (2000) ("Much to the chagrin of the western politicians who pushed the IGRA through Congress, out West, where most American Indians dwell, big tribes like the Navajos continue to live in squalor. The Navajo reservation, which spans across Arizona, Utah, and New Mexico, is home to about 200,000 tribe members, yet they are among the poorest people in the United States. There is not a single casino operating on or planned for their lands.") (internal citations and quotations omitted); Mezey, *supra* note 3, at 727 ("one must ask whether the Pequots are the kind of tribe Congress intended to benefit from [the IGRA]").

⁴⁷ See *supra* note 4.

⁴⁸ See, e.g., Dan Walters, *Are California's Indian Tribes Private Entities or Local Governments?* THE SACRAMENTO BEE NEWS, June 29, 2001 (http://www.capitolalert.com/news/capalert05_20010629.html) (questioning the governmental status of Indian tribes that "lavish campaign contributions on politicians, as if they were private entities").

⁴⁹ See *infra* pp. 319-321 and n.69 (describing proposals for reforming the IGRA because of "unforeseen inequities").

⁵⁰ Mezey, *supra* note 3.

⁵¹ See *id.* at 726 ("Any charge of inauthenticity rests on the assumption that something like a pure Indian exists from which degrees of Indianness can be measured" and "There are as many ways of modeling a traditional culture as a post modern one.").

⁵² *Id.* at 724.

IGRA but reject it "as yet another materialistic evil introduced into Indian communities."⁵⁷ In the middle of Mezey's analysis are the tribes that make choices between "sacredness and utility," such as the Oneida Nation; they may not need gaming money as much as the traditionalists but they "look more like the 'Indians' the IGRA contemplates than the Pequots do."⁵⁸

Having set up a spectrum of entitlement to gaming rights based on "admittedly stylized . . . cultural models,"⁵⁹ Mezey then asks lawmakers to take action: "IGRA should sound warnings to legislators, lawyers, and judges alike."⁶⁰ Moreover, the lawmakers who engineer such reform must avoid the "danger of ignoring the social and cultural context."⁶¹ This important exhortation to take into account tribal culture when making federal Indian law is, however, undercut by the limited cultural constructs on which Mezey has relied. She

leaves the impression that legislators should amend IGRA to diminish the rights of financially successful, mixed blood, suburban tribes and enhance the rights of poor, buffalo-raising, Indian-looking tribes. In short, tribal rights should be conditioned on stereotypic and external⁶² notions of Indianness, tradition and tribalism.⁶³

The Ethnic Umbrella in Politics

Politicians have heard the various calls to reform Indian gaming and are trying to do so on several fronts. Current proposals include increasing state authority over gaming compacts;⁶⁴ bolstering federal and state regulation of tribal gaming enterprises;⁶⁵ reforming the federal recognition process;⁶⁶ limiting the ability of tribes to obtain "trust status" for newly acquired lands,⁶⁷ and diminishing tribal sovereign immunity from suit.⁶⁸ We cannot address

⁵³ *Id.* Having been "declared officially extinct" by the State of Connecticut in the 1970s, the Pequots now use gaming "to turn profit into cultural tradition and identity." *Id.* The casino features "'wampum' betting cards and cocktail waitresses in generically fringed and beaded tunics." *Id.* at 726. The tribe had to "hire an archaeologist to uncover its history and to stock its new museum." *Id.* at 725. Tribal members "freely admit" to hanging generic Indian paintings on the walls (one wonders if there are little blue deer in these paintings) and "confess" they had to learn tribal history from an archaeologist "retain[ed]" by the tribe. *Id.* at 726. There are "black Pequots" and "Mormon Pequots." *Id.* In Mezey's view, these factors make the Pequots seem "inauthentic to outsiders."

⁵⁴ Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701-2721 (Supp. 1996), following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that, absent an outright state ban on gambling as a matter of public policy, a state could not regulate Indian gaming activities and federal and tribal interests in tribal self-determination and economic development preempted state bingo regulations). The IGRA codified *Cabazon*, set out three classes of Indian gaming activities, required states and tribes to negotiate gaming "compacts," and created the National Indian Gaming Commission to regulate them. For a discussion of the history and provisions of the IGRA, see Rand & Light, *supra* note 12, at 396-402.

⁵⁵ Mezey, *supra* note 3.

⁵⁶ *Id.* at 728-30 (quoting Tom Porter, spiritual leader of the departing Akwesasne Mohawks: in addition to environmental pollutants, "there is another kind of pollutant . . . a poisoning of the spirit, an erosion of cultural integrity . . . it comes in the form of bingo halls, cigarette smuggling . . . and casinos.").

⁵⁷ *Id.* at 728-31. "At best [the IGRA] gives the right beneficiaries nothing they want or can use; at worst it undermines the very aspects of the group they most value." *Id.* at 731.

⁵⁸ *Id.* at 737.

⁵⁹ *Id.* at 731. Cf. Fred Lomayesva, *Indian Identity—Post Indian Reflections*, 35 TULSA L.J. 63, 66 (1999) ("[T]he problem with linking Indian identity to a cultural archetype is that what is culturally or spiritually Indian varies from tribe to tribe, and varies within the same tribe over time. For example, it may be culturally acceptable to practice some form of Catholicism among the Pueblos of New Mexico and the Tohono O'odham but not among the Hopi. Also, tribes with no cultural tradition of pow-wows now may have . . . members fancy dancing on the pow-wow circuit. As tribal cultures change over time and across tribes, it is not merely problematic, but impossible to construct archetypes that would universally characterize an Indian.").

⁶⁰ Mezey, *supra* note 3, at 737.

⁶¹ *Id.* Mezey's more specific suggestions that gaming law be reformed to deal with the problems of harm to tribal culture, inequitable distribution of revenues among tribes and saturation of the market, are similarly problematic. They suggest Congress must act because Indians are not sufficiently savvy to realize gaming is hurting them, when in fact tribes make their own assessments and some, such as the Navajo Nation, reject gaming as a means of economic development. And if Indian gaming leads to inequitable levels of wealth and market saturation, perhaps, instead of cutting back on IGRA, Congress should support additional tribal economic development programs thereby empowering tribes to select the paths that best suit them.

⁶² See *infra* note 142 regarding insider and outsider perspectives on Indian law issues.

all of these political attempts to limit Indian gaming but wish to point out several appearances of the ethnic umbrella in these debates.

Republican Congressman Frank Wolf of Virginia recently introduced a bill, the "Tribal and Local Communities Relationship Improvement Act," that would expand state authority over gaming compacts and also set up a commission to study living and health conditions in Indian country.⁶⁹ More specifically, the Wolf bill would require that tribal-state gaming compacts, usually negotiated and signed by the governor, also gain state legislative approval.⁷⁰ It

would set and impose on tribal gaming operations certain federal "minimum standards."⁷¹ And, finally, the bill would create a commission "to examine U.S. policy toward Native Americans and make recommendations to improve the welfare of tribes in the areas of health, education, economic development, housing and transportation infrastructure and to evaluate "the effectiveness of current federal programs designed to improve such conditions."⁷² The same commission "will also study the influence of non-Native American private investors on the establishment and operation of the Indian

⁶³ Mezey does acknowledge that her models represent "extremes" but still uses them in support of her argument that Congress must amend IGRA. Despite our critique of this approach, we do not mean to imply that there can be no meaningful discussion of Indian "tradition" or "traditionalists." Indeed, we describe some of the Oneida Nation's own efforts to reconcile Oneida tradition with contemporary circumstances below. But stereotypic notions of "tradition" are problematic in discussions about Indian economic enterprises, especially when such broad and often external definitions are applied to the experiences of individual tribes.

⁶⁴ IGRA requires states and tribes to enter into "compacts" or agreements on the operation and regulation of casinos before any Class III gaming can occur. States often thwart tribal gaming by stalling or making onerous demands at the compacting stage. See Brietzke & Kline, *supra* note 14, at 311. IGRA originally provided that tribes could sue states for failing to exhibit good faith in compact negotiations but in *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996), the Supreme Court declared that provision was unconstitutional in that it violated states' sovereign immunity under the 11th Amendment.

⁶⁵ See *infra* notes 69-70.

⁶⁶ "Federal acknowledgement" (more popularly called "federal recognition") by the United States establishes a nation-to-nation relationship between the tribe and the federal government, and subjects the tribe to hundreds of federal Indian law statutes and regulatory schemes, including IGRA. Federal acknowledgment is administered by the Bureau of Indian Affairs, and requires a tribe to produce evidence showing it meets certain standards of tribal cohesiveness, cultural distinctiveness, geographic connections, and other factors. See 25 C.F.R. § 83.12(a); see also Duthu, *supra* note 6, at 202 ("Tribes petitioning the federal government for acknowledgment of tribal governmental status encounter a seriously politicized process because of tribal gambling. Observers frequently fail to note that recently acknowledged or recognized tribes now operating profitable gaming enterprises sought federal acknowledgement or recognition long before gambling surfaced as a potentially lucrative form of tribal economic development.").

⁶⁷ Federal law permits newly acquired land to be granted

"trust status" by the Department of the Interior. See 25 U.S.C. §§ 465, 467 (1988) (the Secretary of the Interior has the power to acquire land in the name of the United States in trust for an Indian tribe and such lands are exempt from state and local taxes); see also Stephanie A. Levin, *Betting on the Land: Indian Gambling and Sovereignty*, 8 STAN. L. & POL'Y REV. 125, 132 (1997) ("The drive to reclaim and rebuild their land base has been a significant goal of many tribes in establishing gaming enterprises."); Eileen McNamara, *Residents: Land-trust fight must continue*, THE NEW LONDON DAY, July 13, 2001 (reporting that residents in three towns surrounding the Mashantucket Pequot reservation strongly oppose the Pequots' attempts to acquire additional trust lands, and generally would prefer to litigate the issue than work toward a negotiated settlement).

⁶⁸ See David M. LaSpaluto, *A 'Strikingly Anomalous,' 'Anachronistic Fiction': Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 SAN DIEGO L. REV. 743, 795 (1999) (describing proposals to waive tribes' sovereign immunity from suit and suggesting Congress will finally take action "if enough individuals enter tribal land to purchase cigarettes, ski, or gamble"). LaSpaluto also criticizes tribal sovereign immunity by way of comparison to the immunities of federal and state governments. While it is well beyond the scope of this Article, a comparison of tribal and state experiences in carrying out both governmental and commercial activities could yield interesting results. For example, many states, like tribes, derive revenues from gaming operations (including lotteries) and recreational facilities (ski areas and golf courses). Both states and tribes provide courts for the resolution of civil disputes growing out of commercial activities occurring within their jurisdictions. On the other hand, states have not been subjected to the same history of colonization and oppression as tribes have, and do not maintain the same "trust relationship" with the federal government. See generally POMMERSHEIM *supra* note 45, at 37-56 (discussing the "colonized context" of tribes). The Supreme Court seems presently focused on establishing tribal sovereignty as "less than" state sovereignty. See *Atkinson Trading*, 121 S. Ct. at 1832, n.5 (analogies to state taxing authority are "inapt" because unlike states, tribes are not "full territorial sovereigns").

gambling facilities [and] the influence of organized crime on Indian gaming."⁷⁴

Appearing as it does in the context of a bill designed to place additional barriers in the way of Indian gaming,⁷³ Wolf's concern for the welfare of Native Americans looks disingenuous or at least conflicted.⁷⁵ Even if we set aside the question of whether, outside of the gaming context, Wolf has ever previously worked to alleviate the very longstanding social and economic ills of Indian tribes, we must ask why his "Commission on Federal Native American Policy" would be comprised almost entirely of non-tribal parties, many of whom have a long history of adversity to tribal socio-economic development.⁷⁶ He calls for minimum federal gaming standards because "the level of regulations that currently exist is inadequate [and] leaves the tribes susceptible to organized crime and other outside pressures," without even mentioning that many gaming tribes spend millions of dollars annually on their own sophisticated and strict gaming regulatory commissions. It is unclear why Wolf needs a commission to evaluate the "existing programs" aimed to improve the welfare of Native Americans when he has already concluded: "The intent behind IGRA was that it would allow Native Americans to lift themselves out of poverty through self-reliance, but the law has not worked as it was intended."⁷⁷ It seems more likely that any study produced by Wolf's commission would be used in future attempts to amend IGRA to gaming tribes' detriment, than in any sincere proposal to enhance tribal welfare.

Indian leaders are not fooled. As National Indian Gaming Association Ernie Stevens, Jr., surmised, "For those legislators to say they are doing this in the interests of tribes is just nonsense."⁷⁸ In fact, the only context in which such a proposal could make sense is under the shadow of the ethnic umbrella where symbols and stereotypes prevail over facts and law. Wolf conjures up images of Indian tribes as poor, unhealthy, and vulnerable "pawns" of unscrupulous investors and organized crime.⁷⁹ And, in the same breath, he portrays tribes as calculating and opportunistic: "[C]ertain tribes already operating casinos will make efforts to

de-legitimize other tribes. What was once the territory of academic researchers [the federal acknowledgment process] has become a billion dollar battleground."⁸⁰ Ignoring internal tribal institutions and a whole scheme of tribal and federal laws regulating gaming and federal recognition, Wolf employs rhetoric at the furthest ends of the spectrum to argue the only way Congress can protect Native Americans is to enact new legislation diminishing tribal gaming rights.

⁶⁹ H.R. 2244, 107th Congress (2001). See Press Statement of Congressman Frank Wolf, Press Conference on Introduction of Tribal and Local Communities Relationship Improvement Act, Tuesday, June 19 2001 (<http://www.house.gov/wolf/2001619wolfindianleg.htm>) [hereinafter "Wolf Press Statement"].

⁷⁰ See *id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *id.* ("State legislatures should be able to have a say whether or not casinos are allowed to open in their state").

⁷⁴ *Id.*

⁷⁵ See Brietzke and Kline, *supra* note 14, at 280, n.70 (citing Timothy Egan, *New Prosperity Brings New Conflicts to Indian Country*, N.Y. TIMES, March 8, 1988, at 22 ("Congress has been sending conflicting signals over Indian gaming—on the one hand pushing for greater autonomy and self-determination, on the other warning that assertive tribal governments are going too far.").

⁷⁶ The Wolf Press Statement explains, "The Commission on Federal Native American Policy established under the bill would be a 13-member panel of representatives from the National Governors Association, the National Association of Attorneys General and the offices of the Attorney General, Treasury, Interior, Commerce, and the National Indian Gaming Commission. In addition there would be representatives from local or municipal government, the small business community, non-gambling Indian tribes and tribes operating gambling facilities." Wolf Press Statement, *supra* note 69. Assuming at least one representative in each named category, 10 of the 13 slots would be filled by non-tribal representatives.

⁷⁷ More specifically, Wolf has already answered the question of whether IGRA helps Native American economies with his assertion that, "Nearly 80 percent of Native Americans don't receive anything from gambling revenues." Wolf laments "the overall portrait of America's most impoverished racial group continues to be dominated by disease, unemployment, infant mortality, and school drop-out rates that are among the highest in the nation." *Id.* We do not discount the ongoing poverty and related problems of the majority of Indian tribes. See, e.g., Rand & Light, *supra* note 12, at 394 (providing statistics including that between one and two thirds of Indians on reservations live below the poverty level and 60-70% are unemployed). Such facts have influenced the Oneida Nation's decision to return federal monies, asking that they be redistributed to tribes with need. See *infra* p. 324.

STEPPING OUT

There are alternatives to the ethnic umbrella approach to Indian gaming and other commercial activities. As at least one state court has recognized, "raising revenue and redistributing it for the welfare of a sovereign nation is a manifestly governmental purpose."⁸¹ This vision is consistent with Congress' enactment of IGRA to "promote tribal economic development, tribal self-sufficiency, and strong tribal government."⁸² Moreover, the exercise of meaningful control over economic activities is a necessary element of self-determination, the fundamental principle of indigenous rights in international law.⁸³ In fact, "the free pursuit of [a] nation's economic, social and cultural development, [are] indispensable reconditions to the realization of other human rights."⁸⁴ Several international legal instruments call for indigenous self-determination over livelihood and lifestyle.⁸⁵

Consistent with tribal sovereignty and self-determination, we believe that tribal economic experiences should be evaluated in the context of the particular tribe, and with attention to the perspectives of the tribe's leaders and members.⁸⁶ Sweeping generalizations tend to obscure specific cultural and historical contexts, and also impose external value judgments on tribal communities. For these reasons, we now focus on some of the Oneida Nation's recent experiences with gaming. To the extent possible, we rely on the perspectives of the Nation's leaders and members to tell the story.

Tribal Government and the Well-being of Members

Located since time immemorial in the region between the Hudson River and the Great Lakes, from the St. Lawrence to Susquehanna, in the area that is now central New York State, the Oneida Nation is a member of the Haudenosaunee Confederacy.⁸⁷ Despite hundreds of years of contact with Europeans and Americans, and internal and external change of all kinds, the Oneida Nation continues to live in its ancestral homeland and govern itself according to the Great Law of Peace of the Haudenosaunee.⁸⁸

As has been recounted elsewhere, the Oneida Nation's decision to open a gaming operation began with a tragedy.⁸⁹ In 1975, a fire broke out on Oneida lands. The City of Oneida would not

⁷⁸ See Brian Stokes, *Tribes Descend on Washington*, INDIAN COUNTRY TODAY, June 27, 2001 (<http://indiancountry.com/articles/headline-2001-06-27-04.shtml>).

⁷⁹ See Wolf Press Statement *supra* note 69.

⁸⁰ *Id.* See *supra* note 66 for a discussion of the federal acknowledgement process.

⁸¹ *Cohen v. Litte Six Inc.*, 543 N.W.2d 376 (Minn. App. 1997); see also *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986), *aff'd.*, 480 U.S. 202 (1987).

⁸² 25 U.S.C. § 2701(4) (Supp. 1996). Congress was at least equally interested exercising control over Indian gaming, as evinced by the provisions allowing for the regulation of Indian gaming and the establishment of the National Indian Gaming Commission to carry out federal oversight. See also *Rand & Light*, *supra* note 12, at 499 ("[M]ost commentators agree that the major impetus behind IGRA's enactment was state fear of competition from both regulated and unregulated gaming.")

⁸³ See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, 97-112 (1996) [hereinafter "ANAYA"] (identifying the international law norms that elaborate the principle of self-determination, including social welfare and economic development).

⁸⁴ Brietzke & Kline *supra* note 14, at 324 (citing Article 1 of the Covenant on Civil and Political Rights ("CCPR"), G.A. res. 2200A(XXI), 21 U.S. G.A.O.R, Supp. 16 at 52, U.N. Doc. A/6316 (1966), signed by President Carter in 1979 and ratified by the U.S. Senate in 1992). Brietzke and Kline argue IGRA actually infringes self-determination via its provisions affecting membership and political status. See *id.*

⁸⁵ As Professor Anaya points out, several of these documents specifically pertain to indigenous peoples, including ILO 169 (establishing as "a matter of priority" the "improvement of conditions of life and work and levels of health and education of indigenous peoples," and calling for the development of special programs to be established in cooperation with indigenous peoples to meet such goals) and the Draft United Nations Declaration on the Rights of Indigenous People (indigenous peoples are entitled to financial and technical assistance from States "to pursue freely their political economic, social, cultural, and spiritual development." ANAYA *supra* note 83, at 108-09. Other instruments of international law that do not specifically mention indigenous peoples may, nonetheless, contribute to a body of customary law creating expectations of behavior for member nation-states such as the United States. See *id.* at 108 (citing The United Nations Charter, Chapter IX, Article 55 (Out of respect for equal rights and self-determination of all peoples to the U.N. shall promote "higher standards of living, full employment, and conditions of economic and social progress and development; and solutions of international economic, social, health, and related problems") and the International Covenant on Economic, Social, and Cultural Rights (emphasizing an adequate standard of living for "everyone").

send its fire department to the reservation and two people died. "Even after the fire, the city would not send a coroner, and the bodies of my aunt and uncle just lay in the smoldering ashes of their home. Our children had to walk by them on the way to school."⁹⁰

Leaders of the Oneida Nation realized that something had to be done. Oneida people living on the reservation had little access to basic governmental services, either externally or internally; the Nation could no longer ensure the wellbeing of its members. This state of affairs was inconsistent with beliefs about what it meant to be a sovereign nation: "Long before the United States was formed, that's what tribes did. They made sure everyone was fed and sheltered. They made sure their elderly and their children were cared for. They made sure everyone was safe."⁹¹ And so, following the model of other volunteer fire departments around the United States, the Nation's leaders decided to start a bingo operation to raise funds for governmental services.⁹²

Following the enactment of IGRA in 1988, the Oneida Nation Men's Council and Clan Mothers carefully considered whether to expand the bingo into a casino operation. One of the important issues was what such a business would mean in the context of Oneida culture and experiences:

Was it a sell-out, a sacrifice of what we believed as traditional Haudenosaunee people? In answer, we felt that the way we were forced to live, on the small, thirty-two acre piece of land, had put our backs to the wall, and no one seemed to offer any alternative solutions. Our elders were passing on every year, and our language, culture, and ceremonies were being forever lost with them, never to be retrieved. The federal and state governments were in no rush to settle our land claims, even with two Supreme Court victories behind us. We had no natural resources to exploit, and we could not even obtain credit against the land we had.⁹³

In light of the circumstances, "Our only option was to exercise our sovereignty and simultaneously exploit the long-standing principle of United States law that barred New York State

statutes and taxation from reaching our activities."⁹⁴ The leaders of the Oneida Nation decided to open the casino because it was "one

⁸⁶ The international law principle of self-determination requires that decisions on governmental authority include some level of participation "on the part of all affected peoples commensurate with their respective interests." *ANAYA supra* note 83, at 82. Moreover, "ongoing" self-determination mandates that "individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis," including "economic, social and cultural development." *Id.* Consistent with these principles, it seems crucial that Indians be actively involved in legal discussions and proceedings affecting their authority over economic activities.

⁸⁷ See Halbritter & McSloy, *supra* note 5, at 534-50 (relating additional information on the history and culture of the Oneida Nation).

⁸⁸ Under The Great Law of Peace (as it's called in English) of the Haudenosaunee, the Oneida Nation is matrilineal and organized in clan families:

The Clan Mothers nominate the leaders of the nation from among the men. Each clan can nominate a certain number of leaders who must be approved by a consensus of their clan and then by a consensus of all the clans in the nation. This requirement of consensus is also mandated for general political decisions by the individual nations. Each nation is an equal, sovereign entity who holds lands communally. The Haudenosaunee nations are joined in a solemn Confederacy, which acts by unanimity among its members and is accorded certain responsibility to act in international matters that would affect the Confederacy as a whole.

Halbritter & McSloy, *supra* note 5, at 539-40. The Haudenosaunee include the Mohawk, Seneca, Onandaga, Cayuga and Oneida Nations; the Tuscarora Nation joined the Confederacy in the 18th Century. It would be impossible to give a complete description of traditional Haudenosaunee law here, in part because the law and culture exist orally, not in English, and in a context quite different from a law review article. See *id.* at 572, nn. 11 & 34. There are, however, some written sources that relate the Peacemaker's delivery of the Great Law to the Haudenosaunee. See, e.g., Brian Patterson, *Preserving the Oneida Nation Culture*, 13 ST. THOMAS L. REV. 121, 126 n. 1 (2000) (citing TRADITIONAL TEACHINGS, North American Indian Traveling College (Ontario, Canada, 1984) and JOHN ARTHUR GIBSON, CONCERNING THE LEAGUE: THE IROQUOIS LEAGUE TRADITION AS DICTATED IN ONANDAGA (Hanni Woodbury trans. 1982)).

⁸⁹ See Halbritter and McSloy, *supra* note 5, at 560.

⁹⁰ *Id.*

⁹¹ Oneida Nation Annual Report 2000, Section II, The Role of Tribal Government (quoting Franklin Keel, Director, Eastern Region, Bureau of Indian Affairs) (March 12, 2001).

⁹² This document is available at <<http://oneidanews.net>> and is hereinafter referred to as "Annual Report" with reference to section numbers. See Annual Report, Section II.

way for us to obtain income, resources that we desperately needed to be a sovereign people."⁹⁵

Since opening in 1993, the Oneida Nation's Turning Stone Casino Resort has become one of the most financially successful gaming operations in the country.⁹⁶ Consistent with the provisions of the IGRA,⁹⁷ the Nation can now provide governmental services to its members including housing, health care, elder care, education, road maintenance, and employment.⁹⁸ It has repurchased ancestral lands and initiated cultural revitalism programs.⁹⁹ The concern for public safety is addressed by the Oneida Nation's own police department, as well as through cooperative arrangements with local governments.¹⁰⁰

To the extent that providing governmental services requires a government to have revenues, gaming has been the source of the Nation's ability to fulfill the needs of its members.¹⁰¹ Gaming has not diminished the Nation's identity or responsibilities as an Indian tribe. Rather, "our inherent right to self-government gives us the tools we need to bridge the gap between merely surviving and thriving."¹⁰²

Oneida Self-Sufficiency

While the Oneida Nation's gaming operation is a new and transformative facet of Oneida life, the Nation strives to apply its cultural norms to contemporary developments. In particular, the Oneida value of self-sufficiency manifests in the Nation's internal and external relations.

Internally, self-sufficiency guides the Nation's resource allocation practices:

Back in the days when we hunted and fished, we had to teach our children how to fish, we had to teach them how to hunt. We're trying to do what our grandparents did before a non-Indian ever set foot here. That's how we want to use the resources we have, to do exactly that.¹⁰³

Accordingly, the Oneida Nation avoids fostering members' dependence on the Nation. Having examined several tribal models,¹⁰⁴ the Nation decided not to provide annual per capita payments to each tribal member out of gaming revenues. Rather the Nation allocates casino funds to capital projects that benefit the com-

munity, while also giving members a small "boost, in the form of a modest quarterly divided generated by the Nation's non-casino businesses."¹⁰⁵ It also provides financial assistance for academic study, from pre-kindergarten through the doctorate level.¹⁰⁶ But above all, the Nation encourages its members to be self-reliant.

⁹³ Halbritter & McSloy, *supra* note 14, at 566.

⁹⁴ *Id.* at 566-67.

⁹⁵ Annual Report, *supra* note 92, (quoting Ray Halbritter). Compare this struggle by Oneida Nation leaders to understand and envision Oneida identity, including "traditional" Oneida values, in the context of specific socioeconomic pressures with the generic conceptions of "Indianness" and "tradition" proposed by Mezey, Giago, and Benedict.

⁹⁶ The Nation is the largest employer in Madison and Oneida counties, and the 13th largest employer in Central New York, and has been the key factor in fueling the region's economic recovery. See Annual Report, *supra* note 92, Section I, An Engine for Economic Growth (citing a study by Zogby International measuring the effects of the Nation's activities on the region's economy).

⁹⁷ The IGRA limits tribes' use of gaming revenues to the following purposes: (1) funding tribal government operations or programs; (2) providing for the general welfare of the Indian tribe and its members; (3) promoting tribal economic development; (4) donating to charitable organizations; or (5) funding local governmental agencies. See 25 U.S.C. § 2710(b)(2)(B).

⁹⁸ See generally <<http://www.oneida-nation.net>> for detailed information on all of these programs.

⁹⁹ See Annual Report, *supra* note 92, Section III (noting that by September 30, 2000, the Nation had gained possession of about 13,000 acres of its ancestral land; additional cultural programs are described in further detail *infra*).

¹⁰⁰ See <<http://www.oneida-nation.net/police.html>>.

¹⁰¹ State governments raise such funds by various taxes on income, property, and transactions (not to mention state lotteries). Historically, tribes have not had any significant tax base both because reservations have been starkly poor and because federal Indian law limits the taxing powers of tribes when non-Indians are involved in on-reservation economies. See generally Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming*, 29 ARIZ. ST. L. J. 251 (1997). Many tribes use gaming revenues in the way that federal, state and local governments use tax proceeds. This use is consistent with Congress' provision in IGRA that gaming revenues can be directed to governmental services. See *supra* note 97.

¹⁰² Statement of Ray Halbritter, Oneida Nation Annual Report 2000, Section I.

¹⁰³ Annual Report, *supra* note 92, Section II (quoting Ray Halbritter).

¹⁰⁴ See *id.*, Section II (including the statement of Richard Milanovich, leader of the Agua Caliente Band of Cahuilla Indians in Palm Springs, California, "It's difficult for anybody, in any culture, to keep working, to keep bettering themselves when they get a handout. They'll clamor for more. It's happening at this tribe and at other reservations.").

The Oneida Nation has also sought to reduce its economic dependence on outside funding.¹⁰⁷ In 1997, the Nation became the first Indian tribe to return monies it was entitled to receive from the U.S. Department of the Interior.¹⁰⁸ Since that time, the Nation has returned nearly five million dollars, requesting that these funds be redistributed to needy tribes in the east. As of December 2000, these funds had reached the Seneca, Mohawk and Aroostook Band of Micmac nations, as well as members of the United South and Eastern Tribes.¹⁰⁹ Thus, of its own volition, the Nation has been able to assist¹¹⁰ and partner with other tribes.¹¹¹

Finally, the Oneidas are limiting their dependency on gaming itself. The Men's Council and Clan Mothers originally intended to use gaming as a temporary measure to help the Oneidas emerge from the cycle of poverty and dependence on other governments.¹¹² They were well aware of state and federal pressures on Indian gaming, as well as market forces that would make complete reliance on the casino unwise.¹¹³ "From the beginning, we knew we

had to diversify our businesses so that we could be more recession proof."¹¹⁴ Thus, while the casino continues to expand¹¹⁵ the Oneida Nation also owns and operates a chain of gas stations, convenience stores, a media company, a textile company, and a separate gaming-related entity which manufactures, markets, and sells the Nation's new gaming technology.¹¹⁶

Cultural Revitalism

Like a number of gaming tribes, the Oneida Nation has found that gaming can contribute to cultural revitalism.¹¹⁷ Drawn by new job opportunities, members return to the homeland, often bringing children who would have grown up away from the community. The Nation sponsors Oneida language programs, including a Web site version. In common spaces such as the Children and Elders Center, Oneida members share and learn traditions.¹¹⁸ The Nation is able to pursue claims under the Native American Graves and Repatriation Act,¹¹⁹ and in the past decade, has brought home human remains and important artifacts that had been alienated from the Onei-

¹⁰⁵ *Id.*, Section II.

¹⁰⁶ Even this kind of direct financial support for education required tribal introspection. Bear Clan Mother Marilyn John explains "As conflicted as the Men's Council and Clan Mothers felt about offering these rewards, they work. Our kids are staying in school and learning, and that will only help the Nation and the future generations." *See id.*, Section III.

¹⁰⁷ *See Halbritter & McSloy, supra note 14, at 571* ("Even if resources were made available to us by grant or charity, it is immeasurably more satisfying to have achieved all of this from our own effort and hard work.").

¹⁰⁸ *See Annual Report, supra note 92, Section II.*

¹⁰⁹ *See id.*

¹¹⁰ Compare this internal decision with federal threats to impose some kind of wealth redistribution regime among tribes. *See Jacob Viarrial, Remarks of Pojoaque Pueblo Governor Jacob Varrial, 14 T.M. COOLEY L. REV. 553, 539* (criticizing (former) Senator Slade Gorton's proposal [H.R. 2107, 105th Cong. § 118 (1997)] to cut federal tribal funding according to the amount of tribal business revenue, including gaming revenue). While acknowledging that some Indian tribes enjoy certain demographic and geographic advantages over others, we note that the same can be said of states. Yet we are not aware of Congressional proposals to require states with budget surpluses to give their excesses to other jurisdictions.

¹¹¹ In 2000, for example, the Oneida Nation entered into a joint venture with the Swinomish Indian Tribal Com-

munity to test the Nation's new gaming technology. *See Annual Report, supra note 92, Section I.*

¹¹² *See id.*, Section I. Like the Oneida Nation, "Indian nations across the U.S. understand that casinos are far from being a panacea for all of their economic and social ills." *Id.* at Section II.

¹¹³ *See id.*; cf. Matt Kitzi, *Miami County Vice & Why Not the Wyandottes? Two tales of the struggle to bring new Indian gaming facilities to Kansas*, 68 UMKC L. REV. 711, 717 (2000) (noting that if the Supreme Court in *Cabazon* had ruled against the tribes, "[t]he Indian gaming parlors effectively would have been closed and the sole source of income for the tribes eliminated").

¹¹⁴ *Id.* (quoting Keller George).

¹¹⁵ With a 285-room luxury hotel, a conference center, showroom, restaurants, gift shops, beauty salon, and health spa, Turning Stone Resort has recently added a new golf course and aims to become a four-season destination resort. *See Annual Report, supra note 92, Section I.*

¹¹⁶ *See generally* <<http://www.oneida-nation.net>> for information and links to the various enterprises of the Oneida Nation. As this Article was going to press, the Oneida Nation had just moved into the entertainment industry. *See Oneida Nation Partners with Veteran Producers to Form Productions Company*, June 15, 2001, NBC and Oneida Nation's *Four Directions Talent Search Goes Online Entries Sought in the U.S. and Canada for Native American Talent Search*, July 12, 2001 <<http://www.ondeidanews.net>>.

das.¹²⁰ Now cared for in the Shako:wi Cultural Center, cultural patrimony helps tribal members “see how the story of the Oneida Nation unfolds over the centuries,” and fosters deeper understanding of tribal culture.¹²¹ Margaret Splain (Turtle Clan), the Oneida Nation’s manager of community relations, explains: “As an Oneida person, these things bring my own heritage to life and help me understand where our values, traditions, and beliefs come from.”¹²²

External Relations

With a renewed sense of internal community and self-esteem,¹²³ the Oneida Nation has also sought to improve its external relationships with local neighbors and international governments. While the economic benefits to the Central New York region are very significant,¹²⁴

these do not always translate into positive community relations.¹²⁵ The Oneida Nation has worked on its relationship with neighboring communities in several ways. Through a creative grant system, the Nation makes payments to schools in towns where Oneida lands have been removed from the tax rolls.¹²⁶ It administers a non-profit foundation “to stimulate and contribute to the quality of life of the Haudenosaunee people, other surrounding communities, and members and friends who live and work for the empowerment of American Indians on Turtle Island”¹²⁷ and has sponsored public forums on racism and tolerance.¹²⁸ Finally, the Nation has also renewed international indigenous relations and is working toward joint economic development projects with Mayan farmers in Guatemala and with the state of Morelos, Mexico.¹²⁹

¹¹⁷ See Patterson, 13 ST. THOMAS L. REV. at 122 (“As Bear Clan representative to the Oneida Nation’s Men’s Council. . . . A large part of my job involves preserving Oneida culture, the language, the ceremonies, and the traditions that have been handed down for dozens of generations. I am also heavily involved in repatriation efforts—bringing Oneida artifacts and human remains back to our ancestral homelands where they belong. The Oneida Nation has had some success in this area, partly because we now have the financial resources. . . . We have used the money [from Turning Stone Casino Resort and other businesses] to literally rebuild the Oneida Nation community.”). *But see* Bardie C. Wolf, Jr. & Oren Lyons, Chief, Onandaga Nation, *Sovereignty and Sacred Land*, 13 ST. THOMAS L. REV. 19 (2000) [hereinafter “Wolf & Lyons”] (“The [IGRA] has accelerated the assimilation of Native Peoples and Nations into America’s main stream of social and political life. It’s one of the realities of these times; our Peoples, knowingly and unknowingly are giving up sovereignty piece by piece.”).

¹¹⁸ See *Oneida Children Learn Joys of Social Dancing*, June 27, 2001 <<http://www.oneidanews.net>>.

¹¹⁹ 25 U.S.C. § 3001-3013 (1994).

¹²⁰ For example, in 1999 the Nation repatriated a 150-year old wampum string that commemorates the title of a Turtle Clan leader. This string had been out of Oneida possession for nearly 100 years.

¹²¹ Annual Report, *supra* note 92, Section III (quoting Margaret Splain, manager of community relations for the Oneida Nation).

¹²² *Id.*

¹²³ See Halbritter & McSloy, *supra* note 14, at 570 (“The greatest accomplishment of all, however is to a large degree intangible. It is the renewed self-esteem and the renewed hope that has accompanied new opportunity.”).

¹²⁴ See Zogby International, Executive Summary, *The Economic Impact of the Oneida Indian Nation* (2001). This report describes the Oneida Nation’s critical role in bringing economic prosperity to Madison, Oneida, and Onandaga counties; for example, the Nation provides jobs for 2850-3000 people, of whom 86% are non-Indian, with an annual payroll of \$63 million, largely subject to federal, state, and county income taxes. In addition to employment and tax benefits, the Zogby report contains additional statistics showing the Nation’s positive impact on tourism dollars, the business climate, and overall financial picture of the Central New York region.

¹²⁵ Members of financially successful Indian tribes are often subjected to resentment. See, e.g., Brietzke & Kline, *supra* note 14, at 291, n.105 (relating local non-Indians’ racial and economic backlash against Mashantucket Pequot tribal members and former Tribal Chairman Skip Hayward’s response: “maybe if we were still getting water from an open well and going outside to two-hole outhouses . . . , nobody would be paying any attention to us”). Although it does not comment on any connection to gaming, a recent study shows racist treatment of Indian people can be violent. See U.S. Department of Justice, Special Report, *Violent Victimization and Race* (establishing that between 1993 and 1998, American Indians nationwide were significantly more likely to be the victim of interracial violence than were either Whites or Blacks).

¹²⁶ See Annual Report, *supra* note 92, Section IV (describing Silver Covenant Chain Education Grant program).

¹²⁷ See <<http://oneida-nation.net/foundation/>>.

¹²⁸ See <<http://oneidanews.net/currentnews.shtml>> (describing “Lessons in Tolerance,” a panel presentation on racism).

¹²⁹ See Annual Report, *supra* note 92, Section I.

THE REALITY CHECK

Of course the Oneida Nation's recent experiences in tribal government and business have not been without struggle. There are governing controversies,¹³⁰ the contentious land claim,¹³¹ and members' ongoing attempts to understand what it means to be an Oneida person in 2001.¹³² Moreover, there remain economic goals to accomplish.¹³³ The point of the above description has not been to depict a flawless image of the Oneida Nation but rather to give some sense of one tribe's real experiences with Indian gaming and economic development. Other tribes have different stories to tell.¹³⁴

The point is also to suggest that for the Oneida Nation, as for many Indian tribes, the

question of what it means to be a tribe is evolving.¹³⁵ Thus, judicial and legislative attempts to condition tribal rights on static and external visions of what constitutes an Indian tribe put tribes in an unwinnable situation.¹³⁶ Lawmakers must recognize that tribal rights derive from the tribes' inherent sovereignty and their nation-to-nation relationship with the United States,¹³⁷ not on a particular style of tribal government or business methods.¹³⁸

At the level of scholarly and political debate, it is not meaningful for commentators or lawmakers to attack tribes for appearing insufficiently Indian—or too Indian—when they engage in commercial activities.¹³⁹ Perhaps an alternative model is to take into account the goals tribes have set for themselves. The Oneida Nation, for example, has a mis-

¹³⁰ See Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 855-64 (1998); see also Halbritter & McSloy, *supra* note 14, at n.6.

¹³¹ Several court decisions provide a lengthy summary of the now decades-old Oneida Land claims. See *Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226 (N.D. N.Y., 2001) (holding certain Oneida lands had never been severed from the Oneida Reservation and are thus not subject to city and county taxes); *County of Oneida v. Oneida Indian Nation of N.Y.*, 414 U.S. 661 (1974), *further proceeding*, 470 U.S. 226 (1985); see also John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFF. L. REV. 1001 (1998); Arlinda F. Locklear, *The Oneida Land Claims: A Legal Overview*, in *IROQUOIS LAND CLAIMS*, 141-53 (1988). (Christopher Vecsey & William A. Starna eds.).

¹³² Economic developments sometimes bring about important and difficult reflection on tribal community and change. One example is the Nation's new housing program. See, e.g., Annual Report, *supra* note 92, Section III. For decades many tribal members lived in second hand trailers on Territory Road in the Nation's remaining 32-acres. Their homes were accessible by dirt road, with no street lights, sewer, water, playground or central meeting place. Then in 1994, the Nation made housing available at the Village of the White Pines with significant rental discounts. Yet some members did not want to move. "Ties to the last undisturbed parcel of Oneida homeland were strong, and [people] were concerned as much about the social impact of moving as they were about the financial costs." *Id.* As Kandice Watson (Wolf Clan), a thirty year resident of Territory Road, "The people have been my family. A lot of the reluctance to move was the fear of losing our community. . . . We were poor. We didn't have a lot of things. But we had a very good community filled with people who would go to bat for each other at any time. We took care of each other's kids and watched out for each other. We didn't want to lose that." *Id.* Aware of such deep feelings, the Men's Council and Clan Mothers

moved slowly on the housing program: "We spent many, many hours talking with residents on Territory Road. It took a long time to evaluate and balance the needs of these residents with the Nation's philosophy of encouraging self-sufficiency." *Id.* (quoting Richard Lynch, Oneida Nation Operations Service Group). The result of the discussions was to offer residents several choices, including financial assistance for families who wanted to repair substandard housing on Territory Road; assistance in moving to a new location at the Nation or elsewhere; subsidized rental housing at the Nation's Village at White Pines; or building permanent, safe housing on Territory Road. *Id.*

¹³³ See *id.*, Section II ("Obviously we can't hope to overcome two centuries of poverty in just a few short years, but we are making progress.") (quoting Ray Halbritter).

¹³⁴ See, e.g., Kitzi, *supra* note 113, at 735 (noting a difference of opinion between the Wyandot Nation of Kansas and the Wyandotte Tribe of Oklahoma over the cultural appropriateness of building a high stakes bingo hall over a tribal cemetery); Wolf & Lyons, *supra* note 117, at 23-24 (describing the Onandaga Nation's decision not to pursue gaming under the IGRA).

¹³⁵ See Halbritter & McSloy, *supra* note 14, at 551 ("Today my people must constantly determine and decide the question of their existence. What I mean is the constant question posed by our simply being here, no longer alone on Turtle Island, but within the United States, within New York State, within the County of Oneida, and within the City of Oneida. We have our Territory, we have our people, we have our culture, and we have struggled to maintain and to rebuild our society and to live the way we decide. But we also have an enduring struggle for independence because we live within a society and within a nation that is very powerful, whose laws claim 'plenary power' over us, which claims to control our government. This same United States, however, holds itself out as a leader in the protection of human rights. This irony is part of being an Oneida."); see also Jo Carillo, *Identity as Idiom: Mashpee Reconsidered*, 28 INDIANA L. REV. 511 (1995).

sion statement identifying three long range goals:

To help Nation Members achieve their highest potential in academics, careers and physical and mental health; to protect the Nation's treaty rights, sovereignty and relationships with other governments; and to develop resources to achieve economic and social empowerment and self-sufficiency.¹⁴⁰

The Men's Council and Clan Mothers further explain "we must care for our elders and provide for our children. We must preserve our unique heritage and culture."¹⁴¹

To know whether the Nation is moving toward achieving these goals, one would have to be familiar with the history, culture, and contemporary affairs of the Nation.¹⁴² But maybe it makes sense for those with some real knowledge of specific tribes to conduct such evaluations and shape policy on economic development.¹⁴³ The Oneida Nation demonstrates a

number of tangible financial indicators; these are readily observable to outsiders but do not provide the full measure of success. As one leader has stated:

You can go to the Village of the White Pines and say "Look at this housing we built for our people" and that's important. But to look in the eyes of our Elders, who are able to live on their ancestral homeland, or to hear one of our children speaking the Oneida language, that's building for the future of the Oneida Nation. That's what will ensure that the Oneida people will still be here for the next seven generations.¹⁴⁴

Perhaps as tribes exercise increasing self-determination over their socio-economic development, generalized conceptions of traditional tribal activities will finally give way to this kind of culturally based, specific, and contemporary reflection on economic enterprises. Out from under the ethnic umbrella, tribes will paint their own futures.

¹³⁶ See ANAYA, *supra* note 36 (arguing that long-rejected values [such as racism] should not affect legal decision-making today).

¹³⁷ See William J. Clinton, "Remarks to American Indian and Alaska Native Tribal Leaders," April 29, 1994, 30, WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, No. 18, 941, 942 (May 9, 1994) ("This then is our first principle: respecting your values, your identity, and your sovereignty. This brings us to the second principle that should guide our relationship: We must dramatically improve the Federal Government's relationships with the tribes and become full partners with the tribal nations.").

¹³⁸ Cf. Ann Tweedy, *The Liberal Forces Driving The Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INTEREST L. J. 147, 147 (2000) (observing the Supreme Court's "recent characterization of tribal sovereignty as a special right, which may be claimed only by weak and dependent tribes").

¹³⁹ See also, Elizabeth Mertz, *A New Social Constructionism for Sociological Studies*, 28 LAW & SOC'Y REV. 1243, 1254 (1994) (quoted in Rand & Light, *supra* note 12, at 437, n.278) (noting "long and labored attempts to delineate the "true" boundaries of a tribe, the "authentic" history of Indian people, or the "real" (singular) identity of particular Native Americans only add to a process of misunderstanding that insistently translates indigenous histories, concepts of identity, and group membership in terms of distinctly non-indigenous categories and forms of thought").

¹⁴⁰ Annual Report, *supra* note 92, Section III. Cf. *The People Incorporated: A Successful Tribal Conglomerate*, in HONORING NATIONS 2000, TRIBAL GOVERNANCE STORIES (a publication of the Harvard Project on American Indian

Economic Development, on file with the authors) (noting that for Ho-Chunk, Inc., a wholly owned subsidiary of the Winnebago Tribe of Nebraska, "the ultimate objective is to make the Winnebago Tribe self-sufficient and to provide job opportunities for tribal members").

¹⁴¹ Annual Report, *supra* note 92, A Message from the Men's Council & Clan Mothers.

¹⁴² The question of who can appropriately analyze the experiences of American Indian tribes is a complicated one—and we cannot answer it in the context of this paper. Critical Race Theory suggests that members of a minority community may be best situated to tell the stories of their people. See, e.g., Richard Delgado, *When is a Story Just a Story: Does Voice Really Matter*, 76 VA. L. REV. 95 (1990) ("Some members of marginalized groups, by virtue of their marginal status, are able to tell stories different from the ones legal scholars usually hear."); see also ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE 6 (1997) (criticizing the "White Man's Indian Law" as leaving out indigenous perspectives).

¹⁴³ See, e.g., Alex Tallchief Skibine, *The Cautionary Tale of the Osage Indian Nation Attempt to Survive its Wealth*, 9-SUM KAN. J.L. & PUB. POL'Y 815 (2000) (discussing "whether the Osage Tribe has survived as an 'Indian' tribe or whether the onslaught of wealth along with its seemingly inevitable by-product of federal legislation and BIA regulations has either quasi-terminated the Tribe or transformed it into more of a corporation than an Indian tribe").
¹⁴⁴ Annual Report, *supra* note 92, Section II (quoting Brian Patterson, Bear Clan representative to the Men's Council).