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Rebekah Ross

LET INDIANS DECIDE: HOW RESTRICTING BORDER PASSAGE BY BLOOD QUANTUM INFRINGES ON TRIBAL SOVEREIGNTY

Rebekah Ross*

Abstract: American immigration laws have been explicitly racial throughout most of the country's history. For decades, only White foreign nationals could become naturalized citizens. All racial criteria have since vanished from the Immigration and Nationality Act (INA)—all but one. Section 289 of the INA allows "American Indians born in Canada" to freely cross into the United States if they possess at least 50% blood "of the American Indian race." Such American Indians cannot be prohibited from entering the United States and can obtain lawful permanent residence status—if they meet the blood quantum requirement. Such racialized immigration controls arbitrarily restrict cross-border Indigenous communities and have since their inception in the mid-1800s.

Indigenous communities were never confined within national borders prior to colonization, and they continue to span both the U.S.-Canada and U.S.-Mexico borders. The free passage of these individuals is restricted by INA section 289. This Comment focuses on how the question of who is "Indian" should be defined not by the federal government based on blood quantum, but by Indigenous nations themselves. Ultimately, this Comment argues that Congress should remove the blood quantum requirement entirely and expand the free passage right to include American Indians born in Mexico.

INTRODUCTION

In late 2007, Peter Roberts approached the U.S.-Canada border crossing at Point Roberts, Washington as he always had, unaware that he would face any issues with his green card.[1] This time, Mr. Roberts was stopped by U.S. Customs and Border Protection (CBP) officers and questioned extensively.[2] A Campbell River Indian and Canadian citizen living on the Tsawwassen Indian Reserve in British Columbia, Mr. Roberts had traveled easily between Canada and the United States for decades to visit his property in Washington.[3] His green card had a notation

* J.D. Candidate, University of Washington School of Law, Class of 2021. The author is a citizen of the Sault Ste. Marie Tribe of Chippewa Indians. I thank Professors Eric Eberhard, Christine Cimini, and Bob Anderson as well as my colleagues at *Washington Law Review* for their insightful comments and helpful edits. I also want to thank my family and friends for their unwavering support. Any errors are my own.

1. Lornet Turnbull, *Canadian Indian Wonders Why U.S. Yanking Back Welcome Mat*, SEATTLE TIMES (Jan. 15, 2008, 12:00 AM), https://www.seattletimes.com/seattle-news/canadian-indian-wonders-why-us-yanking-back-welcome-mat/ [https://perma.cc/24DL-36Q3].

2. *Id.*

3. *Id.*

indicating that it was issued under section 289 of the Immigration and Nationality Act (INA)[4] which provides that American Indians born in Canada who possess at least 50% Indian blood cannot be denied admission into the United States.[5] Rather than allowing Mr. Roberts to enter the United States, the CBP officers confiscated his green card and informed him of the U.S. government's intent to revoke it.[6] Mr. Roberts was convinced the CBP officers targeted him due to his light skin and hair.[7] Whatever the reason, the officers did not think that Mr. Roberts possessed 50% or more Indian blood quantum.[8]

CBP referred Mr. Roberts's case to Immigration and Customs Enforcement (ICE) which initiated proceedings in immigration court to revoke Mr. Roberts's green card.[9] His case was based on the government's belief that Mr. Roberts did not possess the requisite 50% Indian blood.[10] Ultimately, Mr. Roberts lost his initial green card—the one issued pursuant to INA section 289 that was confiscated by CBP. However, Mr. Roberts received a different kind of green card that required him to live in the United States at least half of the year, rather than freely travel back and forth, which he accepted.[11] Mr. Roberts's INA section 289 green card had allowed him to freely travel between the United States and Canada as he wished, whereas the new card he accepted had the same residency requirements as all other green cards, which require the holder to live in the United States for the majority of the year.[12]

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4. Immigration and Nationality Act § 289, 8 U.S.C. § 1359.

5. *See id.* A related regulation allows individuals who are covered by INA section 289 to become lawful permanent residents, or green card holders, if they have "maintained residence in the United States" since their last entry. 8 C.F.R. § 289.2 (2020).

6. Turnbull, *supra* note 1.

7. Lornet Turnbull, *B.C. Dentist Won't Press Treaty Right*, SEATTLE TIMES (Apr. 14, 2008, 12:00 AM), https://www.seattletimes.com/seattle-news/bc-dentist-wont-press-treaty-right/ [https://perma.cc/T4J5-TWJA].

8. *See* Turnbull, *supra* note 1; Lornet Turnbull, *Immigration Case Hinges on Degree of Indian Blood*, SEATTLE TIMES (Jan. 19, 2008, 12:00 AM), https://www.seattletimes.com/seattle-news/immigration-case-hinges-on-degree-of-indian-blood/ [https://perma.cc/KXX2-K4HN]; Turnbull, *supra* note 7 (U.S. officials possessed documentation from Mr. Roberts's family which they said raised questions about his blood quantum, while Mr. Roberts argued he was targeted due to his appearance.). Blood quantum is the quantity of Indian blood possessed by a person, expressed as a percentage. *See* Tommy Miller, Comment, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 323 (2014).

9. Turnbull, *supra* note 7.

10. *Id.*

11. *Id.*

12. *See* 8 U.S.C. § 1101(a)(13)(C)(ii). Additionally, remaining outside the United States for more than twelve consecutive months may result in the loss of lawful permanent resident status for green card holders. *See* 8 C.F.R. § 211.1(a)(2) (2020); 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL:

Mr. Roberts's case luckily had a relatively happy ending: he was able to retain his green card, but he lost his freedom to live in Canada while doing so. His story highlights the issues faced by American Indians who try to exercise their free passage right. Many American Indian tribes do not require their citizens to have a minimum 50% blood quantum.[13] So this begs the question: why does INA section 289 have a 50% blood quantum requirement when many Indian tribes do not use this criteria to define eligibility for tribal citizenship?

Before North America was delineated by borders, American Indians[14] like Mr. Roberts passed freely throughout Turtle Island—the area now known as Canada, the United States, and Mexico.[15] Some attempts have been made over time by the British (now Canadian) and American governments to ensure that American Indians retain some of their rights

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RETURNING RESIDENT STATUS § 502.7-2(B) (2020), https://fam.state.gov/fam/09FAM/09FAM050207.html [https://perma.cc/5PGJ-Q5LB] (indicating that green card holders that have remained outside of the United States wishing to return must prove that they left the country with the intent to return and their extended stay abroad was for reasons beyond their control).

13. *See* Sonny Skyhawk, *What Percentage Indian Do You Have to Be in Order to Be a Member of a Tribe?*, INDIAN COUNTRY TODAY (Jan. 17, 2012), https://indiancountrytoday.com/archive/what-percentage-indian-do-you-have-to-be-in-order-to-be-a-member-of-a-tribe-E2Nk86ICOEiAgDH1dnDGBg [https://perma.cc/N9NR-6XY5] (indicating that, of a representative sample of seventy-one of the 574 federally-recognized tribes in the U.S., only six tribes require at least one-half blood quantum for citizenship, whereas seventeen require at least one-quarter blood quantum, eighteen require at least one-eighth blood quantum, seven require one-sixteenth, and at least twenty-three tribes simply require proof that you are a direct descendant from a citizen with no blood quantum requirement).

14. In this Comment, "American Indian," "Indian" and "Indian tribe" refer to individuals and groups who are indigenous to the present-day United States, Canada, and Mexico. "Canadian Indian" and "American Indian born in Canada" refer to individuals who are indigenous to present-day Canada and are presently affected by INA section 289. Similarly, "American Indian born in Mexico" refers to individuals who are indigenous to present-day Mexico; these individuals would be affected by this Comment's proposed expansion of INA section 289. These semantic choices are made purely to comport with the language used in the relevant INA section as well as other statutes affecting Indigenous peoples in the United States. The terms "tribe" and "nation" are European constructs that have been forced upon the peoples who are indigenous to the Americas. As discussed infra note 82, each Indigenous nation has the inherent sovereign right to define itself and its citizens. Any attempt to lump all Indigenous peoples together with generic terminology is problematic because there are hundreds of separate cultural groups located in the present-day United States. *See* Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN Q. 1, 3 (1999).

15. Many (but far from all) American Indian groups, including the Ojibwe/Chippewa and the Haudenosaunee/Iroquois, have origin stories describing the earth as being held on the back of a turtle. *See* Amanda Robinson, *Turtle Island*, THE CANADIAN ENCYCLOPEDIA (Nov. 6, 2018), https://www.thecanadianencyclopedia.ca/en/article/turtle-island [https://perma.cc/QVH9-ND75]. Due to these stories, the term "Turtle Island" has been used by many American Indians in present-day to refer to the area that includes Canada, the United States, and parts of Mexico. *See* ROBERT J. MUCKLE, INDIGENOUS PEOPLES OF NORTH AMERICA: A CONCISE ANTHROPOLOGICAL OVERVIEW 3–4 (2012).

to freely cross the northern and southern borders of the United States.[16] However, INA section 289, which purports to protect this right for American Indians born in Canada,[17] instead imposes and perpetuates colonial concepts of race on American Indians and infringes on inherent tribal sovereignty. Additionally, INA section 289 applies only to certain individuals born in Canada and not to those born in Mexico.[18] Many American Indians who live in Mexico or who have less than 50% Indian blood have been denied the ability to exercise their free passage right for decades due to this racist relic of U.S. immigration law.[19] The federal government should give more consideration to the rights of Indigenous peoples in both U.S.-Canada and U.S.-Mexico border policy, regarding the free passage right.

Part I of this Comment provides a historical background of how race became part of and was perpetuated in both American Indian law and immigration law. Part II discusses the origins of the Indian free passage right in American law via the Jay Treaty of 1794 and the adoption of INA section 289 in 1952. The history of the U.S.-Mexico border in relation to American Indian groups in that region is also examined in Part II. Part III examines arguments for and against the blood quantum restriction in INA section 289. Part IV discusses House Bill 6598, a proposed change to INA section 289 that includes an alternative to the use of blood quantum, as well as actions taken by Indigenous nations to facilitate a better border crossing program for American Indians. Finally, this Comment concludes with three main arguments: (1) that INA section 289 is unnecessarily racialized and violates principles of tribal sovereignty; (2) that the blood quantum requirement in INA section 289 should be replaced with an Indigenous political criterion; and (3) that Indians from Canada and Mexico should have equal rights under INA section 289.

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16. *See, e.g.*, Treaty of Amity, Commerce and Navigation, U.K.-U.S., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty] (stating that "it shall at all times be free . . . to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties"); Act of April 2, 1928, ch. 308, 45 Stat. 401, 401 (current version at 8 U.S.C. § 1359) (providing that "the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States").

17. Immigration and Nationality Act § 289, 8 U.S.C. § 1359.

18. *Id.*

19. *See* Joshua J. Tonra, Comment, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L L. & COM. 221, 238–53 (2006) (providing an overview of Indigenous border crossing rights in Mexican law by comparing the Mohawk tribe on the U.S.-Canada border and the Tohono O'odham tribe on the U.S.-Mexico border and illustrating how free passage rights of Indigenous peoples along both borders are threatened, but that such rights among most American Indians on the U.S.-Mexico border have yet to be recognized in law).

I. RACE AT THE INTERSECTION OF AMERICAN INDIAN LAW AND IMMIGRATION LAW

To understand the issue of blood quantum within the context of the American Indian free passage right, it is important to understand some of the historical and legal context surrounding race in America. With this foundation, this Comment will dive into how race has been used in both American Indian law and immigration law to define the rights of individuals in those areas of the law. Finally, this Comment will merge these areas to show how INA section 289 no longer fits into the legal context of either of these fields of law, and why it must be changed.

A. Race as a Construct in American Law

The American concept of race is a legal construct, informed and reinforced by sociocultural factors, and created over years of congressional action, state action, and court decisions.[20] Since the colonial period, the U.S. government has enacted laws that categorize people by their descent from non-White ancestors.[21] Racial classifications have been extensively ingrained throughout the American legal system to define identity, privilege, and status[22]—especially in immigration law and Indian law. This system was developed over time to further the priorities and interests of the White colonizers of the United States.[23]

Sometimes those interests resulted in seemingly contradictory ideas of race, and especially, blood.[24] For example, individuals with African

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20. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7 (2d ed. 2006) ("Law is one of the most powerful mechanisms by which any society creates, defines, and regulates itself . . . . It follows, then, that to say race is socially constructed is to conclude that race is at least partially legally produced. Put most starkly, law constructs race."). Some individual states even had their own laws defining who was "Indian" based on blood quantum. *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 5–6 (2006) (citing Act of Feb. 27, 1866, ch. 17, § 1, 1866 Va. Acts 84, 84) (mentioning an 1866 Virginia statute that defined "Indian" as "every person, not a colored person, having one-fourth or more of Indian blood"). These statutes were used for a variety of purposes, including imposing different punishments for crimes based on the race of the criminal; to assess a fine against a White person who married an Indian or Black person; to assess special taxes on free Black people; and to disallow testimony offered by an Indian or Black person in court. *See id.* at 5 n.19, 20 & 24.

21. *See* Spruhan, *supra* note 20, at 4–5 (describing state laws restricting the rights of individuals if they were within certain generations removed—usually three or four generations removed—from Black or Indian ancestors).

22. *See* HANEY LÓPEZ, *supra* note 20, at 8 ("[L]aw does far more than merely legalize race; it defines as well the spectrum of domination and subordination that constitutes race relations.").

23. *See id.* at xvi (stating that race is a "system for amassing and defending wealth and privilege").

24. *See, e.g.*, KATHERINE ELLINGHAUS, BLOOD WILL TELL: NATIVE AMERICANS AND ASSIMILATION POLICY 93 (2017) ("One has not been able to say, 'I'm one-eighth African American'

American blood were governed by state laws implementing the "one-drop rule," which dictated that those with any African ancestry were classified as Black, to the exclusion of their other ancestry.[25] In contrast, Indians were required to prove they possessed at least 25% or 50% Indian blood to claim Indian status under some laws,[26] including the 50% requirement in the INA section 289.[27] These legal concepts of blood and race were developed based on the "imagined role" of each group in American society.[28] By creating as many Black people as possible through these laws, there were more people who could legally be enslaved for the financial benefit of White people.[29] However, it was in the U.S. government's best interest to ensure an ever-decreasing number of people could be classified as Indians in order to open up land to White settlement.[30]

B. Blood Quantum and the Racialization of American Indians

From the late 1800s to the early 1900s, the federal government adopted criteria for determining which people were members of tribes for purposes of land allotment.[31] The General Allotment Act of 1887[32] began the process of national land allotment whereby the federal government took reservation lands collectively held by Indian tribes and broke them up into

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without giving up socially, if not legally, the seven-eighths part of one's self that is not . . . . You can be one-eighth Cherokee and still be seven-eighths something else, but if you are one-eighth black you are not likely to be counted as white at all." (quoting David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 108 AM. HIST. REV. 1363, 1368 (2003)).

25. *See* HANEY LÓPEZ, *supra* note 20, at 20 ("Under this [one-drop] rule, historically given legal form in numerous state statutes, any known African ancestry renders one Black."); *see, e.g.*, Racial Integrity Act of 1924, VA. CODE ANN. § 20.54 (1960 Repl. Vol.) (prohibiting interracial marriage and defining as White a person "who has no trace whatever of any blood other than Caucasian"), *invalidated by* Loving v. Virginia, 388 U.S. 1 (1967).

26. *See, e.g.*, Indian Reorganization Act of 1934, § 19, 25 U.S.C. § 479 (requiring one-half or one-quarter Indian blood to be considered "Indian" for purposes of the Act).

27. Immigration and Nationality Act § 289, 8 U.S.C. § 1359.

28. ELLINGHAUS, *supra* note 24, at 94. The idea of the "imagined role" has also been attributed to colonizer perceptions of Black people as "savage[s]" and American Indians as "noble savage[s]." *Id.* at 93.

29. *Id.* at xxiii, 94.

30. *Id.*; *see also* Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 397 (2015) ("[T]he perpetuation of blood-quantum notions has only served to extend this Eurocentric philosophy, by subjugating American Indian notions of belonging and kinship, and replacing those indigenous norms with racialized criteria that serve 'federal objectives for Native government dissolution and land dispossession.'" (quoting JOANNE BARKER, NATIVE ACTS: LAW, RECOGNITION, AND CULTURAL AUTHENTICITY 94 (2011)).

31. *See* Steve Russell, *The Racial Paradox of Tribal Citizenship*, 46 AM. STUD. 163, 170 (2005).

32. General Allotment Act, 25 U.S.C. §§ 331–358 (also known as the Dawes Act).

parcels for individual Indians.[33] This dispossessed many tribes and individual Indians of ancestral lands, in order to make way for White settlement.[34] At the insistence of federal law and federal officials, many tribes adopted criteria, which notably included blood quantum, in order to establish exactly who was eligible to receive land during the allotment process.[35] This land allotment process led to the mass collection of information on the supposed blood quantum of many Indians in the United States.[36] Tellingly, in the 1934 Indian Reorganization Act (IRA),[37] the U.S. government defined an "Indian" as an individual with "one-half or more Indian blood," in addition to those who are otherwise "members of any recognized Indian tribe" in one section of the Act.[38] While this did not explicitly impose the idea of blood quantum or a specific blood quantum on tribes,[39] it is an example of the regularity with which Indians were described in terms of their quantity of Indian blood at that time in history. The IRA also provided the process by which Indian tribes codified membership criteria—including blood quantum requirements—by writing tribal constitutions.[40]

Blood quantum contributes to the genocide of American Indians on paper by ensuring that, as Indian blood is diluted over years of intermarriage with other groups, fewer and fewer individuals may be

33. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 78 (1942).

34. *Id.*

35. *See* Russell, *supra* note 31, at 170; *see also* Galanda, *supra* note 30, at 401 ("In 1906, Congress passed the Burke Act, which in conjunction with the [General Allotment Act], instituted a system for canceling individual Indians' trust allotments through the issuance of 'fee patents' to tribal members who had become 'competent' . . . through 'education and civilization.' Blood quantum served as the seminal factor in determining whether a patent should be issued . . . ." (citations omitted)).

36. *See* Spruhan, *supra* note 20, at 40–41; *see, e.g.*, U.S. DEP'T OF THE INTERIOR, THE FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES IN INDIAN TERRITORY 1–2 (1907) https://catalog.archives.gov/id/300321 [https://perma.cc/2AEN-8BDA] (listing members of the Choctaw Nation and recording each person's "blood" by indicating if they were "full" blood or a percentage thereof).

37. Indian Reorganization Act of 1934, § 19, 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall 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 shall further include all other persons of one-half or more Indian blood.").

38. *Id.*

39. *See generally* John P. LaVelle, *The General Allotment Act "Eligibility" Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 WÍČAZO ŠA REV. 251 (1999) (arguing that the federal government did not explicitly force tribes to adopt blood quantum requirements for tribal citizenship).

40. Spruhan, *supra* note 20, at 3, 46–47.

legally defined as "Indian."[41] In 1905, the Commissioner of Indian Affairs viewed blood quantum as a "policy of shrinkage" that would allow the United States to "reduce[] the dimensions of [its] red race problem."[42] The concept of blood quantum was adopted by the Bureau of Indian Affairs (BIA) as a "tangible" and "certain[]" way to easily categorize and quantify Indians in order to simplify implementation of their programs.[43] In fact, the BIA at times consulted with "scientists" in the early 1900s to classify people as Indian based on perceived racial characteristics.[44] These classifications were based on eugenics,[45] a pseudoscience later utilized by Nazi Germany. As with all laws and policies based on eugenics, this allowed the U.S. government to support its programs "with the ring of science, but no basis in it."[46]

This racialized concept of identity that has been perpetuated by blood quantum still serves to separate Indians into those who are "full-bloods," who are "real Indians," and "mixed-bloods," who may not be "real Indians."[47] Generally, blood quantum imposes constructs of a colonizer culture—the United States and its colonial British origins—onto American Indian concepts of community and belonging.[48] By imposing such concepts of identity on tribes, blood quantum colonizes and complicates how sovereign governments determine tribal citizenship.[49]

Blood quantum is currently used to determine tribal citizenship in some tribes, which, in turn, determines eligibility for federal programs and benefits.[50] It was also originally used to determine "competency" of individuals and restrict Indians, especially so-called full-blood Indians,

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41. ELLINGHAUS, *supra* note 24, at xxiii; *see also* Russell, *supra* note 31, at 168 ("Citizenship by blood quantum alone is a guarantee of physical extinction. Know the tribal population, the required blood quantum, birth and death rates, rate of exogamous marriage, and the date of extinction is easily calculated. This is not opinion. This is arithmetic.").

42. ELLINGHAUS, *supra* note 24, at xxii.

43. *Id.* at xvii.

44. *Id.*

45. *Id.*

46. *Id.* at xviii.

47. *See id.*

48. *See* Kat Chow, *So What Exactly Is 'Blood Quantum'?*, NAT'L PUB. RADIO (Feb. 9, 2018, 6:00 AM), https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum [https://perma.cc/JTX5-5YK9] (discussing blood quantum as a "[c]olonialist construct" but also as a complex means by which tribes can define their community and assert their survival).

49. *See* ELLINGHAUS, *supra* note 25, at 47 ("Competency was the first policy of the assimilation period that directly used the language of blood. Competency policies were imposed . . . with no tribal consultation or even limited effort to follow tribal policies or practices as there had been during the processes of enrollment and allotment.").

50. *See id.* at xvi (noting how Indian agents recorded the blood quantum of Indians that were to be affected by the 1887 Allotment Act).

from exercising any control over their property and affairs.[51] Specifically, in 1917 "the federal government declared all Indians of less than one-half Indian 'blood' to be competent" for purposes of releasing these individuals from the twenty-five year trust period restriction on their land allotments.[52] This policy was in full-force in the late 1800s as part of the federal government's plan to forcibly assimilate Indians by, among other things, forcing a European system of land ownership onto tribes and requiring Indian children to attend government-sponsored boarding schools.[53] At these institutions, children were "forced to cut their hair and were punished for speaking Native languages" to "kill the Indian in [them] and save the man."[54] Historically, many states had laws in force that forbade American Indians from being called as witnesses in court.[55] American Indians were routinely deemed "incompetent" to manage their own land or estates if they had a high degree of Indian blood.[56] The BIA even restricted the right of individuals with Indian blood, including "mixed-blood[]" Indians, to conduct business transactions through contracting or selling land.[57]

This legacy of partially successful genocide has shaped today's perceptions of blood quantum. Today, blood quantum is a hotly contested issue in Indian country.[58] Indian tribes traditionally used concepts like lineage and community ties to determine membership in the tribal community.[59] Many (but not all) tribes also have or had processes to allow non-kin individuals to become citizens of the community by adoption.[60] However, some American Indians prefer to retain blood quantum as a way to assert their survival and retain a feeling of community, while some

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51. *Id.* at xx, 40.

52. *Id.* at xx.

53. Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 980 (2011).

54. *Id.* at 980–81 & n.101 (explaining that the phrase "kill the Indian in [them] and save the man" is credited to Captain Richard Pratt, the founder of the first Indian boarding school in Carlisle, Pennsylvania).

55. COHEN, *supra* note 33; *see also* Spruhan, *supra* note 20, at 4–5 nn.19, 20 & 24.

56. ELLINGHAUS, *supra* note 41, at 40, 66.

57. These restrictions were based on the trust relationship between the federal government and Indians, which is often described as similar to the relationship between a guardian and a ward. *See* Spruhan, *supra* note 20, at 48.

58. *See infra* notes 61–70 and accompanying text.

59. *See* Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. OF ANTHROPOLOGY 1, 1–2, http://downloads.hindawi.com/archive/2011/549521.pdf [https://perma.cc/KW8P-RWWP].

60. Schmidt, *supra* note 59, at 2; *see, e.g.*, CONST. AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, art. III, § 1(c) (extending tribal membership to individuals who have been "adopted into the tribe").

would prefer to remove the criterion because it guarantees that their communities will continue to shrink over time.[61] While most tribes require some degree of Indian blood for individuals to enroll or for subsequent generations to maintain status,[62] some tribes do not.[63] Furthermore, some Indian tribes in the United States and First Nations in Canada are acting to remove blood quantum from their enrollment criteria.[64] But the process of removing blood quantum presents challenges for many tribes, including differing ideas within each tribe, on whether blood quantum is something they want to retain.[65] In some instances, tribes are continually pressured by the federal government to keep blood quantum requirements in their citizenship criteria.[66]

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61. *See* Chow, *supra* note 48.

62. *See* Spruhan, *supra* note 20, at 1; *see, e.g.*, NAVAJO NATION CODE ANN. tit. 1, § 701 (2010) (restricting citizenship in the Navajo Nation to individuals with at least one-quarter Navajo blood); STANDING ROCK SIOUX TRIBAL CODE OF JUST., tit. X, § 10-102 (2009) (requiring all individuals possess at least one-fourth Sioux blood to be members of the Standing Rock Sioux Tribe).

63. *See, e.g.*, CONST. AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, art. III, § 1 (extending membership to individuals who generally "possess Indian blood" and are descendants of historical groups of Chippewa that are enumerated in the tribal constitution or who have been adopted into the tribe); CONST. OF THE CHEROKEE NATION, art. IV, § 1 (providing Cherokee citizenship to individuals "originally enrolled on, or descendants of those enrolled on" the Dawes Rolls or those classified as "Cherokees by blood" on the Delaware Agreement and the Shawnee Cherokees).

64. *See, e.g.*, Dan Gunderson, *White Earth Band Votes to End 'Blood Quantum' for Tribal Membership*, MINN. PUB. RADIO NEWS (Nov. 20, 2013, 12:02 PM), https://www.mprnews.org/story/2013/11/20/white-earth-band-votes-to-end-blood-quantum-for-tribal-membership [https://perma.cc/JQ68-BYS4] (reporting that tribal members of the White Earth Nation in the United States voted to adopt a new constitution in 2012 that would eliminate the one-quarter blood quantum requirement and instead adopt a family lineage policy); *How a Non-Indigenous Man Became a Member of the Fort William First Nation*, CBC RADIO (Apr. 4, 2017, 4:55 PM), https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.4054748/how-a-non-indigenous-man-became-a-member-of-the-fort-william-first-nation-1.4054752 [https://perma.cc/EAY4-J3QX] (reporting that the Fort William First Nation in Canada has given membership status to four individuals who do not meet the Canadian government's definition of "Indian"); Mary Louise Kelly, *Cherokee Nation Strikes Down Language that Limits Citizenship Rights 'by Blood,'* NAT'L PUB. RADIO (Feb. 25, 2021), https://www.npr.org/2021/02/25/971084455/cherokee-nation-strikes-down-language-that-limits-citizenship-rights-by-blood [https://perma.cc/V38Y-E4VC] (reporting the Cherokee Nation Supreme Court's ruling that the Nation's blood descendancy requirement for tribal citizenship must be removed). *But see* Jon Lurie, *White Earth Constitutional Reform Stalled by Infighting*, TWIN CITIES DAILY PLANET (Apr. 20, 2015), https://www.tcdailyplanet.net/white-earth-constitutional-reform-stalled-infighting/ [https://perma.cc/8MME-KSJM] (detailing how some White Earth members do not want to remove the blood quantum requirement, which has prevented the new constitution from being implemented).

65. *See* Lurie, *supra* note 64.

66. *See* Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES MAG. (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html [https://perma.cc/AJN9-SCDA] ("[I]n 1994, the Blackfeet Nation considered doing away with its blood-quantum requirement, a Bureau of Indian Affairs official warned that a tribe that

Some tribes have weaponized blood quantum to reduce the number of people on citizenship rolls, especially in tribes with gaming enterprises that pay out profits from those enterprises on a per-capita basis to tribal citizens.[67] Many tribes that run gaming enterprises are monetarily incentivized to keep citizenship numbers low in order to keep per-capita payments of casino profits higher,[68] even though such capitalistic and exclusionary practices are foreign to Indigenous ideas of community and kinship.[69] Indeed, some Indians argue that keeping blood quantum policies in place can help keep out people who are only interested in becoming an enrolled citizen in order to take advantage of per-capita payments.[70] While this rarely happens,[71] it is a prevalent idea, furthered by the misinformed stereotype that American Indians receive monetary payments from the "government" generally.[72]

'diluted' its relationship with its members might find that 'it has "self-determined" its sovereignty away.'").

67. *See* Galanda, *supra* note 30, at 429 ("While some [IRA-based tribal] constitutions have been amended to eliminate the blood quantum requirement, BIA-imposed tribal membership and disenrollment standards persist . . . . [T]his criterion, like blood quantum, merely encourages exclusion as an incentive to cut membership numbers and increase benefits to remaining members." (citations omitted)); *see also* Mark Neath, Comment, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 694–95 (1995) (describing how the 300-person Mashantucket Pequot tribe in Connecticut, which runs a successful casino, adopted a one-sixteenth blood quantum requirement for new applications for tribal enrollment after seeing ten new applications per week in the early 1990s).

68. *See* Jarvis, *supra* note 66.

69. *See* Melissa L. Meyer, *American Indian Blood Quantum Requirements: Blood Is Thicker than Family*, *in* OVER THE EDGE: REMAPPING THE AMERICAN WEST 231, 233 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999) ("The IRA gave long-overdue support to Indian political organizations, but at the expense of indigenous forms and practices. Critics argue that elective IRA governments supplanted consensus governmental structures, created a permanent, voiceless, conservative minority, and were dominated by a capitalistically oriented reservation elite.").

70. *See* Chow, *supra* note 48 ("You hear every time a tribe changes over to lineal descent, or that there is a newly recognized tribe, for example, that usually there's a mass group that's interested in joining. And potentially, some of those incentives would be financial gain if the tribe, for example, has gaming revenue or other industries.").

71. *See id.* (stating that "that is certainly the minority of this side of the cases" in regard to people only seeking tribal enrollment for money or preference within affirmative action schemes).

72. Walter C. Fleming, *Myths and Stereotypes about Native Americans*, 88 PHI DELTA KAPPAN 213, 213–14 (2006); *see also* Meghanlata Gupta, *Debunking 10 Misconceptions About Michigan's Native Americans*, BRIDGE MICH. (June 24, 2020), https://www.bridgemi.com/guest-commentary/opinion-debunking-10-misconceptions-about-michigans-native-americans [https://perma.cc/7G4C-YQ7N] (stating that this misconception exists in Michigan and debunking it); Kim Wheeler, *Indian Status: 5 More Things You Need to Know: Dispelling Commonly Held Myths Around First Nations and Status Cards*, CBC (June 16, 2015, 6:00 A.M.), https://www.cbc.ca/news/indigenous/indian-status-5-more-things-you-need-to-know-1.3109451 [https://perma.cc/FMS5-QF6M] (stating that this stereotype also exists in Canada and debunking it); *Frequently Asked Questions: Do American Indians Receive Free Money from the Federal*

Determining citizenship is a basic function of self-governance and tribal sovereignty.[73] Indian tribes have an inherent right to determine how citizenship is defined and regulated in their community.[74] Numerous federal statutes that affect various aspects of life for Indians, from child welfare[75] to education,[76] rely on tribes to determine who is Indian for purposes of those statutes.[77] On the way to more fully recognizing tribal sovereignty, the federal government has moved away from imposing blood quantum requirements on tribes. In fact, Congress recently removed the blood quantum criteria in the Stigler Act[78]—a statute affecting transfers of land allotments between citizens of the Cherokee, Chickasaw, Choctaw, Muskogee, and Seminole Nations in Oklahoma.[79] Previously, transfers of allotted land were restricted to heirs with "one-half or more Indian blood."[80] Now, such land can be transferred to any lineal descendants "of whatever degree of Indian blood."[81] This alteration shows that Congress is willing to change existing federal law in order to defer to tribes when defining who is Indian.[82]

C. Race in American Immigration Law

The United States has a long history of excluding individuals from entering its territory based on racial criteria. Perhaps the best-known

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Government?, UTAH DIV. OF INDIAN AFFS., https://indian.utah.gov/resources/faq/ [https://perma.cc/J4C4-HT2J] (indicating this misconception is a frequently asked question in Utah and debunking it).

73. *See* COHEN, *supra* note 33, at 122.

74. *See* Roff v. Burney, 168 U.S. 218, 222 (1897); South Dakota v. Bourland, 508 U.S. 679, 694–95 (1993) (citing United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978)); Montana v. United States, 450 U.S. 544, 564 (1981) (citing *Wheeler*, 435 U.S. at 322 n.18).

75. *See* Indian Child Welfare Act, 25 U.S.C. § 1903(3) (defining "Indian" as "any person who is a member of an Indian tribe").

76. *See* Tribally-Controlled Community College Assistance Act, 25 U.S.C. § 1801(2); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(d).

77. *See infra* note 214 for examples of federal statutory definitions of "Indian."

78. *See* Stigler Act Amendments of 2018, Pub. L. No. 115-399, 132 Stat. 5331, 5331–32; *see also* Caroline Halter, *Congress Strips Stigler Act of Blood Quantum Requirement*, KGOU (Dec. 21, 2018), https://www.kgou.org/post/congress-strips-stigler-act-blood-quantum-requirement [https://perma.cc/LKC4-D5TL].

79. Halter, *supra* note 78.

80. Stigler Act, Pub. L. No. 80-336, 61 Stat. 731, 731 (1947) (amended 2018).

81. Stigler Act Amendments of 2018.

82. Additionally, United States Supreme Court precedent states that tribes have the right to determine membership. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981) ("[T]he Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." (citing United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978))).

series of laws relating to racial restrictions in immigration is the Chinese Exclusion Act of 1882[83] and its subsequent amendments. From 1875 to 1943, Congress implemented laws aimed at restricting the ability of Chinese nationals and individuals with origins in other Asian countries to enter or stay in the country.[84] These laws began during a time of extreme anti-Asian racism in the western United States.[85] After Chinese laborers finished work on the Transcontinental Railroad in the 1860s, employment opportunities shrank and labor union leaders feared for the jobs of White Americans.[86] As American historian Andrew Gyory explains, "[t]he Chinese Exclusion Act represented . . . a painless way for politicians to ensnare working people's support without providing any genuine solution to their problems."[87]

Since 1790, the United States has restricted the ability to obtain citizenship on the basis of race.[88] In fact, the ability to naturalize as a U.S. citizen was limited to those who were White[89] or "of African nativity" or "African descent"[90] until the mid-twentieth century.[91] This racial dichotomy in American immigration law was further cemented by United

83. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58, 58–59 (repealed 1943).

84. *See* Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477, 477 (excluding immigrants from China, Japan, or "any Oriental country" who were entering the United States for "immoral purposes" or who were working as indentured laborers and was primarily aimed at curbing immigration from China). These policies were expanded by the Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58, which was not repealed until 1943 by the Magnuson Act. *See* Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600, 600–01 (1943) (codified in scattered sections of 8 U.S.C.).

85. ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 286 n. 3 (1998) ("Every prominent politician in California belonged to the Anti-Chinese Union, whose stated goal was to ban Chinese immigration and 'compel the Chinese living in the United States to withdraw from the country.'" (quoting the CONST. OF THE ANTI-CHINESE UNION OF SAN FRANCISCO art. II, *reprinted in* REPORT OF THE JOINT SPECIAL COMMITTEE TO INVESTIGATE CHINESE IMMIGRATION 1170 (1877))).

86. *See id.* at 29 (discussing a Chicago-based union newspaper, Workingman's Advocate, which voiced concerns about White laborers having to compete with Chinese laborers who tended to be paid lower wages than their White counterparts).

87. *See id.* at 256.

88. *See* Naturalization Statute of 1790, Pub. L. No. 1-3, 1 Stat. 103, 103 (restricting naturalization to "free white person[s]"); HANEY LÓPEZ, *supra* note 20, at 177 (citing Ozawa v. United States, 260 U.S. 178 (1922) (explaining that, in 1922, the appellant, a Japanese national seeking to naturalize argued that the Naturalization Statute of 1790 was implemented "to exclude[] the black or African race and the Indians then inhabiting this country")).

89. *See* Naturalization Statute of 1790.

90. Naturalization Act of 1870, Pub. L. No. 41-254, 16 Stat. 254, 256.

91. *See, e.g.*, *In re* Najour, 174 F. 735, 735–36 (C.C.N.D. Ga. 1909) (where a person from the Middle East was allowed to naturalize as "white" because he was found to be a member of "the Caucasian race"); *In re* Camille, 6 F. 256, 258–59 (C.C.D. Or. 1880) (where a man with one White parent and one American Indian parent was denied the ability to naturalize because he was not "white"); *In re* Ah Yup, 1 F. Cas. 223, 223–24 (C.C.D. Cal. 1878) (No. 104) (where a national of China was found to be neither "white" nor "Caucasian").

States Supreme Court cases holding that individuals of Japanese and Asian Indian origin were not eligible for citizenship under the strict criteria of U.S. naturalization laws.[92] Additionally, because American Indians are not White or African, Indians who were born in Canada were not eligible to naturalize.[93] It was not until 1924 that the U.S. government extended citizenship to all American Indians.[94]

Based on the Constitution[95] and Supreme Court precedent,[96] Congress possesses plenary power over Indian tribes. The Court also based this power on the Doctrine of Discovery.[97] This is a religious doctrine set forth by the Catholic Church during the era of European colonization of the Western hemisphere.[98] The Doctrine holds that the nation that makes the discovery of a new territory acquires all title by virtue of the simple fact that they made the discovery.[99] Additionally, Indian tribes cannot sell real

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92. *See Ozawa*, 260 U.S. at 198 (holding that a light-skinned Japanese man was not "white" for purposes of naturalization because "white" was intended to mean a member of the Caucasian race); United States v. Thind, 261 U.S. 204, 213 (1923) (holding that a Punjabi man could not naturalize, even though he presented evidence that he was "Aryan," because his skin was not light enough to be "white").

93. *See* Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 31 IMMIGR. & NAT'Y L. REV. 825, 830 n.37 (2009) (noting that the same year the United States started enforcing the naturalization bar against Indians born in Canada, Congress also proclaimed all American Indians living within the boundaries of the United States to be U.S. citizens).

94. *Id.* at 834 n.58; *see also* Elizabeth Ellis, *The Border(s) Crossed Us Too: The Intersections of Native American and Immigrant Fights for Justice*, HEMISPHERIC INST., https://hemisphericinstitute.org/en/emisferica-14-1-expulsion/14-1-essays/the-border-s-crossed-us-too-the-intersections-of-native-american-and-immigrant-fights-for-justice-2.html [https://perma.cc/64GS-72KV]. In this article, Ellis also mentions that, while the extension of U.S. citizenship to individuals is usually seen as a positive thing because it provides many protections and rights to individuals, many American Indians see this act as a threat to tribal sovereignty and part of the ongoing forces of colonization. *Id.*

95. U.S. CONST. art. I, § 8, cl. 3.

96. *See* United States v. Lara, 541 U.S. 193, 202 (2004); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

97. *See* Johnson v. M'Intosh, 21 U.S. 543, 570 (1823) ("According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity. . . . All the proprietary rights of civilized nations on this continent [Spain, Portugal, France, the Netherlands, and England] are founded on this principle. The right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery.").

98. *See id.* at 573–74 ("This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."); Mary Ann McGivern, *Indian Nations Ask Pope Francis to Rescind Doctrine of Discovery*, NAT'L CATH. REP. (Dec. 28, 2018), https://www.ncronline.org/news/opinion/ncr-today/indian-nations-ask-pope-francis-rescind-doctrine-discovery [https://perma.cc/YG54-7HTK] ("The Doctrine of Discovery, Pope Alexander VI's papal bull, permits any Christian coming upon land inhabited by non-Christians to claim it all. It was published on May 4, 1493 . . . .").

99. *See M'Intosh*, 21 U.S. at 574.

property except to the government of the country that "discovered" them—the U.S. government in this context, which inherited this right from Great Britain.[100] Further, this doctrine holds that the occupants of the land at the time of discovery hold nothing more than a right to occupancy that is subject to divestment either by surrender of the right to the nation that "discovered" them or by action of that nation to terminate the right to occupancy.[101] This concept has been used to justify the violent exploitation of the Indigenous Peoples of the Americas for centuries, simply because they were not Christian.[102] The Doctrine of Discovery was adopted by the United States Supreme Court in 1823.[103]

Like Indian law, Congress also has plenary power over immigration law, based on colonial constructs of the inherent powers of national governments.[104] Due to the level of control Congress has over immigration, including border entry and national security, courts have upheld racially restrictive policies in this area of law.[105] Perhaps the most well-known of these cases is *Korematsu v. United States*,[106] in which the Supreme Court showed extreme deference to purported national security interests.[107] The Court upheld an explicitly racial classification that required Japanese nationals and American-born individuals of Japanese descent to be forcibly displaced from their homes and confined in

100. *See id.* at 573. ("The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."); *see also* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 631 (2006) ("*Johnson* held that Indians and Indian tribes did not have the authority to alienate land to any entity other than the American government.").

101. *See M'Intosh*, 21 U.S. at 574.

102. *See* Robert J. Miller, *Christianity, American Indians, and the Doctrine of Discovery*, *in* REMEMBERING JAMESTOWN: HARD QUESTIONS ABOUT CHRISTIAN MISSION 51, 65–66 (Amos Yong & Barbara Brown Zikmund eds., 2010).

103. *See M'Intosh*, 21 U.S. at 576 (discussing how discovery gave title to Christian monarchs of all lands which were "then unknown to all Christian people").

104. *See* United States v. Minker, 350 U.S. 179, 193 (1956); Fong v. United States, 149 U.S. 698, 707 (1893); The Chinese Exclusion Case, 130 U.S. 581, 585 (1889).

105. *See The Chinese Exclusion Case*, 130 U.S. at 585 (affirming the power of Congress to broadly forbid immigrants from entering the United States, including based on national origin); *see, e.g.*, United States v. Thind, 261 U.S. 204, 215 (1923) ("It is not without significance in this connection that Congress . . . has now excluded from admission into this country all natives of Asia . . . including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well . . . ."); Korematsu v. United States, 323 U.S. 214 (1944) (upholding a policy that forcibly imprisoned Japanese nationals and U.S. citizens of Japanese descent in government detention camps without due process).

106. 323 U.S. 214 (1944).

107. *See id.* at 223.

government detention camps without due process.[108] While *Korematsu* is now seen as part of the shameful "anti-canon" of Supreme Court jurisprudence,[109] it provides a window into the mindset that led to the use of racial classifications in connection with purported national security concerns.

In 2017, the United States Supreme Court overruled *Korematsu* in dicta in its *Trump v. Hawaii*[110] decision. In this case, President Donald Trump issued two executive orders, popularly known as "Travel Bans" or "Muslim Bans," one after the other, which barred nationals of certain countries from entering the United States for ninety days.[111] On September 24, 2017, President Trump issued a third and final modified Travel Ban.[112] The State of Hawaii, joined by families directly impacted by the ban as well as the Muslim Association of Hawaii, challenged its constitutionality.[113] The United States Supreme Court held that this last Travel Ban did not violate the INA or the Establishment Clause of the Constitution.[114] The *Hawaii* decision illustrates how national security interests can be seen as a valid basis for immigration policies that implicate racial classifications.[115] Specifically, when a policy has a disparate impact on specific racial groups, but is not explicitly racial, national security interests can provide a valid basis for upholding that policy under the Constitution.[116]

Unlike other racial categories, racial classifications that include Indian blood quantum are subject to the much less searching rational basis review.[117] Under rational basis review, the challenged classification will be found constitutional as long as the classification is "rationally related" to a legitimate government interest.[118] For example, the BIA's hiring

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108. *Id.* at 223–24.

109. *See* Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75, 84 (2011).

110. Trump v. Hawaii, 585 U.S. __, 138 S. Ct. 2392, 2423 (2018) ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.").

111. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter Travel Ban] (targeting only countries with predominantly Muslim populations).

112. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

113. *See Hawaii*, 138 S. Ct. at 2406.

114. *Id.* at 2423.

115. *See* Travel Ban, *supra* note 111.

116. *See Hawaii*, 138 S. Ct. at 2423 (describing the Travel Ban as "a facially neutral policy denying certain foreign nationals the privilege of admission").

117. Morton v. Mancari, 417 U.S. 535, 552 (1974).

118. *See generally* Washington v. Davis, 426 U.S. 229 (1976) (finding that a qualification test

preference at issue in the landmark case of *Morton v. Mancari*[119] required the BIA to give preference for appointments, promotions, and training to individuals who were "one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe."[120] The Supreme Court concluded that the preference accorded to Indian applicants was not subject to the strict scrutiny requirements under the Equal Protection Clause because the preference was not based on race.[121] Rather, it was based on the unique political relationship between the tribes and the federal government.[122]

Due to the *Mancari* precedent, even with INA section 289's explicit mention of race, it is likely that the provision would only be subject to rational basis review if legally challenged. A comprehensive 2010 law review article about the Indian free passage right by Paul Spruhan, an Assistant Attorney General for the Navajo Nation, provides a rational basis analysis of INA section 289.[123] He posits that the U.S. government may argue a basis in national security to rationalize the blood quantum requirement in INA section 289;[124] however, there is no evidence that national security concerns were at issue with the adoption of the provision nor in its continuation.[125]

II. INDIAN BORDER PASSAGE: A COMPARISON OF CANADA AND MEXICO

Presently, the Indian free passage right is only recognized for American Indians born in Canada.[126] American Indians born in Mexico only have this right if they are citizens of the Kickapoo Tribe of Texas.[127] This section provides the history of the disparate treatment given to Indigenous communities along the southern and northern borders of the United States. By explaining this history, this Comment illustrates why INA section 289 should be expanded to apply to American Indians born in Mexico.

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administered to police officer applicants had a discriminatory effect, demonstrated by reduced hiring of Black police officers, violated the Fourteenth Amendment because the test was "neutral on its face" and therefore only subject to rational basis review); *see also Mancari*, 417 U.S. at 555 ("[T]he preference is reasonable and rationally designed to further Indian self-government.").

119. 417 U.S. 535 (1974).

120. *Id.* at 553 n.24.

121. *Id.* at 553–54.

122. *Id.*

123. *See* Spruhan, *supra* note 93, at 848–49.

124. *See id.* at 849.

125. *See id.* at 838–39.

126. Immigration and Nationality Act § 289, 8 U.S.C. § 1359.

127. *See infra* notes 163–164 and accompanying text.

A. The Indian Free Passage Right and Canadian-born Indians

After negotiators from the United States and Great Britain settled on the U.S.-Canada border, the two countries signed the Jay Treaty in 1794.[128] This Treaty defined the general relationship between the United States and Great Britain, and specifically preserved the free passage right of Indigenous people on both sides of the border.[129] In article III of the Treaty, the United States and Great Britain agreed that "it shall at all times be free . . . to the Indians dwelling on either side of the . . . boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties."[130] The Jay Treaty contained no blood quantum criteria that Indians had to meet to exercise their free passage right.[131] None of the Indian tribes affected by this new border were consulted as to the provisions of this Treaty, nor were they signatories to it.[132]

In 1924, Congress enacted an immigration law that allowed only those individuals who were racially White or Black to immigrate to the United States—because only those individuals were eligible to naturalize under the citizenship laws of the day.[133] This law was aimed at blocking Japanese immigrants from entering the United States.[134] Canadian-born Indians were also caught up in the implementation of this anti-Asian policy and were deported and excluded from the United States in an unprecedented manner.[135]

After the effects of the 1924 immigration law became clear, Congress

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128. Jay Treaty, *supra* note 16.

129. *Id.* art. III.

130. *Id.* There is disagreement over whether the Jay Treaty, or at least portions of it, are still in force in the United States. *See* Spruhan, *supra* note 93, at 828. The Treaty was never enacted in Canada because Canada requires enabling legislation for a treaty to have the "force of law" and such legislation was never enacted. Greg Boos, Greg McLawsen & Heather Fathali, *Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States*, 4 SEATTLE J. ENV'T L. 343, 348 (2014). The United States Supreme Court in 1929 held that the War of 1812 had generally abrogated all of the guarantees laid out in the Jay Treaty. *See generally* Karnuth v. United States, 279 U.S. 231 (1929). Regardless, the free passage right that originated in the Treaty has been codified at 8 U.S.C. § 1359. *Id.*

131. Jay Treaty, *supra* note 16, art. III.

132. Eileen M. Luna-Firebaugh, *The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas*, 17 WÍČAZO ŠA REV. 159, 160 (2002).

133. *See* Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162 (current version at 8 U.S.C. §§ 1101–1537).

134. *See The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP'T OF STATE: OFF. OF THE HIST., https://history.state.gov/milestones/1921-1936/immigration-act [https://perma.cc/UW4Q-RVYJ].

135. Spruhan, *supra* note 93, at 830–31.

decided to make Canadian-born Indians immune from those anti-Asian immigration restrictions.[136] This meant that free passage for American Indians was finally codified in 1928.[137] However, Congress did not expand the 1928 Indian free passage right to individuals who had been adopted into an Indian family or Indian tribe.[138] The refusal to include individuals adopted into Indian families in this exemption was the first indication that Congress would limit the free passage right based on race, rather than by community self-identification or deference to Indigenous laws.[139]

The blood quantum requirement in today's free passage right was not codified in the United States until 1952 with the adoption of the INA, and this language is still in use today.[140] The INA's legislative history contains no rationale for the blood quantum requirement.[141] The blood quantum requirement may have been an attempt to reconcile the American racial concept of Indians with Canada's political definition, which did not recognize Canadian Indian women who married non-Indian men, or their children, as "Indian" from 1876 until 1985.[142] After the Jay Treaty was signed, the British government and subsequently the Canadian government did not use blood quantum,[143] but instead emphasized a gendered understanding of Indian identity.[144] Alternatively, the blood

136. *Id.* at 831–32.

137. *See* Act of April 2, 1928, ch. 308, 45 Stat. 401, 401 (current version at 8 U.S.C. § 1359) (providing that "the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States"); *see also* Spruhan, *supra* note 93, at 829 n.28 (discussing how the statutory right codified in 1928 flowed from the previously established Jay Treaty free passage right).

138. Act of April 2, 1928.

139. *See* Spruhan, *supra* note 93, at 831–32.

140. Immigration and Nationality Act, 8 U.S.C. § 1359.

141. Spruhan, *supra* note 93, at 838–39. In fact, the general counsel for the Immigration and Nationality Service (the precursor to today's U.S. Citizenship and Immigration Services) said that he had no idea why the blood quantum requirement was included in INA section 289. *Id.* at 839.

142. *See id.* at 833 n.53 (discussing how the Indian Act codified gendered definitions of Indian status in 1876 which were reprinted in 1924); Indian Act, R.S.C. 1927, c 98, § 2(d) (Can.).

143. *See* Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, 18 HYPATIA 3, 9–15 (2003) (noting that, while Canada did have a blood quantum requirement in the Gradual Enfranchisement Act of 1869, the main emphasis of its regulation of "Indianness" over time, from 1876 to 1985, centered around gender).

144. *See* Indian Act § 2(d). The concept of a woman losing her identity upon marriage to an outsider of the community was not wholly missing from jurisdictions in the United States. For example, from 1907 to 1922, a U.S. citizen woman who married a non-U.S. citizen man lost her citizenship status. *See* Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228–29 (repealed 1922). Additionally, some tribes have used similar restrictions that make children ineligible for tribal citizenship if their mother was a tribal citizen, but their father was not. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

quantum requirement may have been a reflexive use of the racial terms of the time period, as evidenced by the one-half Indian blood criteria used in one section of the Indian Reorganization Act of 1934.[145]

While the free passage right for American Indians born in Canada has existed in some fashion for over 220 years, it is not without complications. In fact, many American Indians born in Canada who try to exercise their free passage right are searched by CBP.[146] Even though the INA does not utilize other racial criteria formerly used in U.S. immigration law,[147] the blood quantum requirement of section 289 affecting American Indians born in Canada remains as the only explicitly racial provision in the INA.

B. U.S.-Mexico Border Policy and American Indians

In contrast to the situation along the U.S.-Canada border, there is no treaty or subsequent statute protecting the free passage right for American Indians born in Mexico.[148] The modern-day southern U.S. border dates back to the territory Mexico ceded to the United States with the signing of the Treaty of Guadalupe-Hidalgo in 1848[149] and the subsequent Gadsden Purchase Treaty in 1854.[150] However, neither of these treaties included provisions for the rights of American Indians to cross the U.S.-Mexico border similar to those in the Jay Treaty for the U.S.-Canada border.[151] None of the Indian tribes affected by the newly delineated border were consulted about the Treaty of Guadalupe-Hidalgo or the Gadsden Purchase Treaty, nor were any of these tribes signatories to either treaty.[152] These treaties between the U.S. and Mexican governments

145. *See* Spruhan, *supra* note 93, at 839 (citing Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 328 (1984)).

146. *See* William R. Di Iorio, Comment, *Mending Fences: The Fractured Relationship Between Native American Tribes and the Federal Government and Its Negative Impact on Border Security*, 57 SYRACUSE L. REV. 407, 418–19 (2007). The imposition of duties is specifically in violation of the original terms of the Jay Treaty, but the U.S. Court of Customs and Patent Appeals in 1937 found that the clause had been abrogated by the War of 1812 and that decision has not since been revisited. *See id.* at 413, 419 (first citing Karnuth v. United States, 279 U.S. 231 (1929); then citing United States v. Garrow, 88 F.2d 318 (C.C.P.A. 1937); and then citing Akins v. United States, 551 F.2d 1222 (C.C.P.A. 1977)).

147. *See* Spruhan, *supra* note 93, at 838; Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1943); Naturalization Statute of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

148. *See generally* Treaty of Peace, Friendship, Limits, and Settlement, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe-Hidalgo].

149. *Id.*

150. *See* Luna-Firebaugh, *supra* note 132, at 166; Boundaries (Gadsden Treaty), Mex.-U.S., Dec. 30, 1853, 10 Stat. 1031 [hereinafter Gadsden Purchase].

151. *See* Treaty of Guadalupe-Hidalgo, *supra* note 148; *see also* Gadsden Purchase, *supra* note 150.

152. *See* Luna-Firebaugh, *supra* note 132, at 160.

complicated the relationships between citizens of the same tribe who happen to be born on different sides of this "imaginary line."[153]

To this day, Mexico does not recognize American Indian communities within its borders as nations or distinct political entities, unlike the United States.[154] This lack of recognition is partly due to the long and brutal subjugation of American Indians in Mexico since Spanish colonization began in the early 1500s.[155] However, after independence in 1821, the Mexican government provided land grants to some Indigenous peoples—but only those Pueblo people who were sedentary and settled in towns in a way that paralleled European ideas of community organization.[156] Most Indigenous Mexicans did not apply for these land grants due to lack of notice or access to the system, likely due to "geographic remoteness, inability to speak Spanish, and migratory nature."[157] This is different from the experience of American Indians in the continental United States where many tribes—but definitely not all—have reservation lands of some size.[158]

The Mexican government also refused to recognize the pluricultural nature of the Mexican population until 1992, insisting that Mexico was ethnically and culturally homogenous.[159] Regardless of the exact causes for the lack of recognition of tribal sovereignty in Mexico, Mexicans who are citizens of U.S. federally-recognized tribes are reliant on their U.S. tribal citizenship to protect their rights as Indigenous peoples. They have a right to access their sacred sites and a right to maintain ties with their traditional communities.

Thirty-six Indian tribes that are federally-recognized by the United States government were affected by the Treaty of Guadalupe Hidalgo and the Gadsden Purchase Treaty, which split these tribes between Mexico

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153. Christina Leza, *For Native Americans, US-Mexico Border Is an 'Imaginary Line'*, THE CONVERSATION (Mar. 19, 2019, 6:44 AM), https://theconversation.com/for-native-americans-us-mexico-border-is-an-imaginary-line-111043 [https://perma.cc/MX4S-TG7W].

154. *See id.*

155. Rebecca Horn, *Indigenous Identities in Mesoamerica After the Spanish Conquest*, *in* NATIVE DIASPORAS: INDIGENOUS IDENTITIES AND SETTLER COLONIALISM IN THE AMERICAS 31, 32–34 (Gregory D. Smithers & Brooke N. Newman eds., 2014).

156. *See* Luna-Firebaugh, note 132, at 164 ("The long-settled Pueblos of New Mexico had received land grant homelands. However, no land grants were created for the Yuman, Apache, O'odham, Kumeyaay, or other indigenous peoples of the region who did not live in villages.").

157. *Id.* Due to the Mexican land grant system, "[m]ost of the homelands in Sonora and Chihuahua were then lost." *Id.*

158. There are 326 federal Indian reservations and 574 federally-recognized tribes in the United States. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: BUREAU OF INDIAN AFFS., https://www.bia.gov/frequently-asked-questions [https://perma.cc/22WH-ZL7S].

159. *Mexico*, INT'L WORK GRP. FOR INDIGENOUS AFFS., https://www.iwgia.org/en/mexico.html [https://perma.cc/D6ZC-BSXB].

and modern-day California, Arizona, New Mexico, and Texas.[160] Indian tribes along the U.S.-Mexico border were not given the consideration of being consulted about U.S. border enforcement planning until 2000, and then only by executive order.[161] However, such consultation between tribal governments and the U.S. federal government ceased during the Trump Administration's effort to construct a continuous wall along the southern border of the United States.[162]

The O'odham and Kickapoo peoples are among the over thirty tribes that were divided by the U.S.-Mexico border.[163] Of these tribes, only the Kickapoo have an agreement in place that directly addresses the right of their citizens to cross the U.S.-Mexico border.[164] As of 2017, the Tohono O'odham Nation had a total of 34,000 enrolled citizens, and more than 2,000 of those citizens lived in the Mexican state of Sonora.[165] This division significantly impacts individual Indians and tribal communities by making it difficult for Indians to gather traditional foods and medicine, interact with other members of their families and the greater community, and engage in spiritual practices that require access to different sacred sites.[166] This division even affects the ability of tribal citizens to access food and water within their tribal lands.[167]

Citizens of the Tohono O'odham Nation who live in the United States routinely cross the international border to make a pilgrimage to a sacred

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160. *See* Leza, *supra* note 153.

161. *See* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

162. *See* Erik Ortiz, *Native American Tribe Says Pentagon Failed to Consult on Border Wall Construction*, NBC NEWS (Feb. 17, 2020, 1:41 PM), https://www.nbcnews.com/news/us-news/native-american-tribe-says-pentagon-failed-consult-border-wall-construction-n1137771 [https://perma.cc/MPR4-4L8R]; *see also* Manzanita Band of Kumeyaay Nation v. Wolf, No. 1:20-cv-02712 (TNM), 2020 WL 6118182 (D.D.C. Oct. 16, 2020) (denying Kumeyaay Nation's request for injunction against Department of Homeland Security and CBP based on alleged violations of First Amendment and Religious Freedom Restoration Act due to construction of border wall on federal land along California-Mexico border).

163. *See* Leza, *supra* note 153.

164. *See* Luna-Firebaugh, *supra* note 132, at 168. This special status of the Kickapoo arguably only exists because the Kickapoo agreed to allow the federal government to have greater involvement in their tribal affairs, which infringes upon their inherent sovereignty. *See* Brian Kolva, Note, *Lacrosse Players, Not Terrorists: The Effects of the Western Hemisphere Travel Initiative on Native American International Travel and Sovereignty*, 40 WASH. U. J.L. & POL'Y 307, 329 (2012).

165. Anya Montiel, *The Tohono O'odham and the Border Wall*, AM. INDIAN MAG. (2017), https://www.americanindianmagazine.org/story/tohono-oodham-and-border-wall [https://perma.cc/SU7T-3MWA].

166. *See History & Culture*, TOHONO O'ODHAM NATION, http://www.tonation-nsn.gov/history-culture/ [https://perma.cc/PM5B-J9CU].

167. Leza, *supra* note 153 ("One Tohono O'odham rancher told The New York Times in 2017 that he must travel several miles to draw water from a well 100 yards away from his home – but in Mexico. And Pacific Standard magazine reported in February 2019 that three Tohono O'odham villages in Sonora, Mexico, had been cut off from their nearest food supply, which was in the U.S.").

site in Sonora.[168] Additionally, the Tribe provides medical services to all tribal citizens, including non-U.S. citizens, and transports Mexican Tohono O'odham citizens across the U.S.-Mexico border so they can utilize those services.[169] For years, citizens of the Tohono O'odham Nation were able to cross the border at the San Miguel gate located within the Tribe's reservation lands.[170] In 2017, the San Miguel gate was welded shut and is now only open to a small amount of foot traffic.[171] Consequently, Tohono O'odham tribal citizens must cross at designated federal ports of entry, just like non-Indians.[172] American Indians crossing at these ports of entry have been subject to harassment, discriminatory treatment, detention, and deportation by U.S. border officers.[173]

Indigenous people across North America now face mounting difficulties when entering the United States due to the combined factors of the Western Hemisphere Travel Initiative (WHTI)[174] and the large amount of discretionary power that CBP officers have at ports of entry.[175] Under the WHTI, people crossing into the United States through a port of entry on land must present an approved form of identification, such as a U.S. passport, Canadian passport, Mexican passport,[176] a border crossing

168. Montiel, *supra* note 165.

169. Luna-Firebaugh, *supra* note 132, at 159.

170. *See* Tay Wiles, *A Closed Border Gate Has Cut off Three Tohono O'odham Villages from Their Closest Food Supply*, PAC. STANDARD (Feb. 7, 2019), https://psmag.com/social-justice/a-closed-border-gate-has-cut-off-three-tohono-oodham-villages [https://perma.cc/7XTU-CJFB].

171. *Id.*

172. *See History & Culture*, *supra* note 166.

173. *See id.*; s*ee also* Leza, *supra* note 153 ("Since border patrol agents have expansive discretionary power to refuse or delay entries in the interest of national security, its officers sometimes make arbitrary requests to verify Native identity in these cases. Such tests, my research shows, have included asking people to speak their [I]ndigenous language or – if the person is crossing to participate in a Native ceremony – to perform a traditional song or dance. Those who refuse these requests may be denied entry.").

174. The WHTI was phased in as a response to the 9/11 terrorist attacks and fully implemented in 2009. *Western Hemisphere Travel Initiative*, U.S. DEP'T OF HOMELAND SEC.: U.S. CUSTOMS & BORDER PROT. (Dec. 17, 2018), https://www.cbp.gov/travel/us-citizens/western-hemisphere-travel-initiative [https://perma.cc/M7KG-996P]. It requires enhanced forms of identification at border crossings, among other requirements. *See generally* Western Hemisphere Travel Initiative, 8 C.F.R. § 212 (2020) [hereinafter WHTI].

175. *See* Leza, *supra* note 153.

176. Mexican citizens must have a valid visa in their passport or a border crossing card issued by the U.S. Department of State to even be a casual visitor to the United States. *The Border Crossing Card (BCC)*, U.S. DEP'T OF HOMELAND SEC.: U.S. CUSTOMS & BORDER PROT. (Dec. 12, 2020), https://help.cbp.gov/s/article/Article-1670?language=en_US [https://perma.cc/78E2-NNMM]. Whereas Canadian citizens are only required to present a passport or other WHTI-compliant document, unless limited circumstances require them to have a visa. *Canadians Requiring Visas*, U.S. EMBASSY & CONSULATES IN CAN., https://ca.usembassy.gov/visas/do-i-need-a-visa/

card, a Form I-872 American Indian Card, or an Enhanced Tribal Card, if available.[177]

There are many issues with the WHTI criteria. Only Kickapoo Indians can obtain Form I-872 American Indian Cards, which are issued by U.S. Citizenship and Immigration Services.[178] So far, only a handful of the 574 federally-recognized tribes and Native Alaskan villages[179] are able to issue enhanced tribal identification cards that meet CBP's requirements.[180] Many citizens of the Tohono O'odham Nation always used their citizenship cards when crossing via the San Miguel gate and that was sufficient.[181] While CBP officers are supposed to accept tribal identification cards as a valid form of WHTI identification, there are instances of officers rejecting tribal cards and requiring further proof of identity for crossing.[182] In such situations, CBP officers will deny entry to those who cannot produce any of the documents mentioned in the official list, such as a U.S. passport, a Canadian passport, a Mexican passport with

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[https://perma.cc/S72E-TW72]. This disparity in the treatment of individuals on the southern and northern borders is also evident in a work authorized immigration status created for Canadians and Mexicans via the North American Free Trade Agreement (NAFTA) which imposes greater restrictions on Mexicans than on Canadians. North American Free Trade Agreement app. 1603.D.1, Dec. 17, 1992, 32 I.L.M. 289 (implemented by 8 C.F.R. § 214.6(d) (2008)) (indicating that Canadian citizens may apply for admission in work-authorized TN status directly at a U.S. port of entry with only proof of Canadian citizenship and evidence of their professional qualifications, whereas Mexican citizens must first obtain a TN visa in their passport at a U.S. consulate and then present their passport and valid visa at a U.S. port of entry to request admission in TN status).

177. *Western Hemisphere Travel Initiative*, *supra* note 174.

178. *See* Kolva, *supra* note 164, at 328 n.99.

179. *About Us*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/about-us [https://perma.cc/N78T-RRA2].

180. There is no centralized resource to find which tribes issue these identification cards. However, it seems only six tribes currently offer such cards to their citizens. *See Enrollment*, SWINOMISH INDIAN TRIBAL CMTY., http://www.swinomish-nsn.gov/resources/enrollment.aspx [https://perma.cc/97XB-DDWK]; Justus Caudell, *Colville Tribes Launches Enhanced ID Program, Monday*, TRIBAL TRIB. (Sept. 19, 2018), http://www.tribaltribune.com/news/article_4621591a-bc1a-11e8-963c-bf9358d669f4.html [https://perma.cc/743R-LXNE]; *Through Agreement with CBP, Puyallup Tribe Begins Issuing Tribal Card*, U.S. DEP'T OF HOMELAND SEC.: U.S. CUSTOMS & BORDER PROT. (Sept. 5, 2018), https://www.cbp.gov/newsroom/national-media-release/through-agreement-cbp-puyallup-tribe-begins-issuing-tribal-card [https://perma.cc/4TE3-SFKC]; James Fink, *Senecas Sign on for Border ID Plan*, BUFFALO BUS. FIRST (Sept. 10, 2009, 2:46 PM), https://www.bizjournals.com/buffalo/stories/2009/09/07/daily33.html [https://perma.cc/8SPJ-F9MD]; *Enhanced Tribal Identification Card Program*, PASCUA YAQUI TRIBE, https://www.pascuayaqui-nsn.gov/index.php/etc [https://perma.cc/3U5Y-9BQ3]; *CBP Designates Kootenai Tribe's Enhanced Tribal Card as Acceptable Travel Document*, U.S. DEP'T OF HOMELAND SEC.: U.S. CUSTOMS & BORDER PROT. (Jan. 31, 2012), https://www.cbp.gov/newsroom/national-media-release/cbp-designates-kootenai-tribes-enhanced-tribal-card-acceptable [https://perma.cc/XF7Y-AGJ2].

181. *See* Wiles, *supra* note 170.

182. *Id.*

a visa, or a Mexican Border Crossing Card, among others.[183] These on-the-ground discretionary decisions by border officials are unreviewable by courts.[184] This means that the rights of individuals must be clearly stated in the law in order to avoid any denials of entry.

The current situation as it pertains to American Indians along the U.S.-Mexico border infringes on the rights of tribes like the Tohono O'odham by inserting the federal government (CBP officers) into tribal affairs that affect everything from community health to religious practices to family ties.[185] The involvement of CBP officers in Tohono O'odham's internal affairs also imposes restrictions on some citizens of this federally-recognized tribe that treat them as second-class citizens due to their place of birth. This is only one example of one tribe that is being adversely impacted by these policies—these effects are deeply felt across all twenty-four tribes with communities spanning the international border with Mexico.[186]

III. THE ARGUMENTS FOR AND AGAINST THE BLOOD QUANTUM REQUIREMENT IN SECTION 289.

As detailed above, blood quantum has a long history in the United States as it relates to American Indians and tribes.[187] It is also a highly emotional topic in American Indian communities.[188] Due to this history and the emotional investment of American Indians in the subject matter, there are strong factual and policy arguments on both sides. Those who are in favor of abolishing the blood quantum requirement argue that the federal government should leave the classification of who is "Indian" to Indian tribes. That way, tribes that wish to keep blood quantum may do

183. *See id.*

184. 8 U.S.C. § 1252(a)(2)(B)(ii); *see also* Ekiu v. United States, 142 U.S. 651, 663–64 (1892) (holding that a foreign national's right to be admitted to the United States, "once decided adversely by an inspector, acting within the jurisdiction conferred upon him" cannot be "impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors").

185. *See History & Culture*, *supra* note 166.

186. These tribes include the Cocopah, the Pascua Yaqui, the Quechan, the Tohono O'Odham, the Kickapoo Traditional Tribe of Texas, the Ysleta Del Sur Pueblo, the Barona Band of Mission Indians, the Campo Kumeyaay Nation, the Ewiaapaayp Band of Kumeyaay Indians, the Inaja-Cosmit Band of Mission Indians, the Jamul Indian Village, the La Jolla Band of Luiseno, the La Posta Band of Mission Indians, the Los Coyotes Band of Cahuilla and Cupeno Indians, the Manzanita Band of Kumeyaay Nation, the Mesa Grande Band Of Indians, the Pala Band of Mission Indians, the Pauma Band of Mission Indians, the Pechanga Band of Luiseno Indians, the Rincon Band of Luiseno Indians, the San Pasqual Band of Mission Indians, the Iipay Nation of Santa Ysabel, the Sycuan Band of the Kumeyaay Nation, and the Viejas Band of the Kumeyaay Indians. *Border Tribes*, NATIVE AM. ENV'T PROT. COAL., https://naepc.com/border-tribes/ [https://perma.cc/NZ4M-VLBC].

187. *See supra* section I.B.

188. *See supra* notes 61–65 and accompanying text.

so, but blood quantum will no longer be forced upon tribes that prefer to use traditional means to determine tribal membership. Indeed, this power is inherent to tribes as sovereigns.[189]

Another argument in support of removing the reference to blood quantum in INA section 289 is that there is no rational basis for the criteria, including national security concerns.[190] In this view, the policy has simply continued to exist due to legislative inertia and a possible aim to maintain outdated Indian policies on the part of the federal government.

Conversely, there are a few arguments in favor of keeping the 50% blood quantum classification. Some may argue that it benefits those American Indians who are not and cannot be eligible for tribal citizenship based on other restrictive policies.[191] Another argument in favor of keeping the classification is that the blood quantum restriction may bolster legitimate national security interests or other goals of the federal government. These arguments are each addressed below.

A. Individuals Who Lost Indian Status Due to Canada's Indian Act of 1927

As discussed above, until 1985, Canadian policy revoked tribal citizenship from Indian women who married non-Indian men and from the children of such unions.[192] This restriction of Indian status was not applied to Indian men who married non-Indian women nor to the children born from those unions.[193] In fact, non-Indian women who married Indian men became Indians by law in Canada.[194] This clearly presents a problem for individuals who lost their Indian status. That policy, like the blood quantum policy in the United States, also contributed to the genocide, on paper, of American Indians. However, the free passage right should not be restricted simply because of historical discrimination against American Indian women in Canada. Continuing to force this colonizer concept onto communities that do not want to use blood quantum as a measure of identity infringes on tribal sovereignty. In effect, they would be required to keep operating under this racial classification system in order to exercise their free passage right under INA section 289.

Instead, a better approach could include requiring a letter from a

189. *See supra* notes 73–74 and accompanying text.

190. *See* Spruhan, *supra* note 93, at 838–39, 849.

191. *See infra* section III.A.

192. *See supra* note 142 and accompanying text.

193. Indian Act, R.S.C. 1927, c 98, § 2(d)(i)–(ii) (Can.) (defining an "Indian" as any "male person of Indian blood" belonging to a band or any child of a male Indian).

194. *Id.* § 2(d)(iii).

recognized authorized tribal entity (council, chairman, elders, etc.) indicating the citizenship status of the individual. This process would apply equally to all tribes, regardless of their use of blood quantum internally, and would avoid forcing colonial ideas of race onto tribes that are in the process of decolonizing citizenship criteria. Alternatively, people who lost status due to the gender discrimination in the Canadian Indian Act could provide evidence of their female ancestor's status prior to her marriage to a non-Indian man to prove their Indian identity. Such individuals could also supplement their case with a letter from an authorized tribal entity. This solution would allow individuals to continue utilizing their free passage right while still striking the racist blood quantum requirement from the INA.

B. Blood Quantum and National Security Concerns

Some might argue that restricting movement of American Indians across borders based on their degree of Indian blood may further a national security interest of the United States. National security tends to be the primary concern when regulating immigration and border passage.[195] But, it is unclear how or if applying the free passage right to Indians with less than 50% blood quantum would create a greater risk to the country's national security. The U.S. government has not provided any explanation for the use of the blood quantum requirement since the time it was implemented and there is no evidence that it serves any rational national security purpose. There may be an argument that, by removing the blood quantum restriction, many more people would be eligible for unrestricted entry to the United States; this could, by extension, be a national security risk. However, based on the Supreme Court's dicta in *Hawaii*, a national security interest would likely not be enough to support a restriction explicitly based on race, like INA section 289. In *Hawaii*, the Court found that a "facially neutral policy" such as the Travel Ban was valid, but that a policy put forth "solely and explicitly on the basis of race" would not be valid.[196]

Even though Indian law has shown a trend of moving beyond racial categorization, blood quantum is still present, especially in tribal citizenship criteria. Similarly, aside from INA section 289, immigration law has also seemed to move beyond racial categories as a way of

195. *See, e.g.*, Trump v. Hawaii, 585 U.S. __, 138 S. Ct. 2392, 2408–09 (2018) (citing national security concerns as a basis given by the Trump Administration for the Travel Ban); WHTI, *supra* note 174 (implementing enhanced forms of identification at border crossings in response to national security concerns after the 9/11 terrorist attacks).

196. *See Hawaii*, 138 S. Ct. at 2423.

regulating who enters the United States.[197] Given the absence of any evidence to demonstrate how the requirement is rationally related to the goal of promoting greater national security, such an argument would be unlikely to hold up under judicial review.

IV. PROPOSED SOLUTION

Since 2018, over a dozen federally-recognized tribes have been advocating for changes to INA section 289 that would remove the blood quantum requirement. As will be discussed, tribes have also advocated for changes to immigration law that would protect the rights of Indigenous people at border crossings and ensure greater involvement of tribes in U.S. border affairs. Some of these changes have been advanced within the U.S. Congress as well. The solution proposed by this Comment is provided at the end of this section.

A. Recent Actions by Indian Tribes and Proposed Federal Legislation Support the Removal of Blood Quantum from INA Section 289

In 2018, the Tribal Border Alliance was formed by eight federally-recognized Indian tribes that reside on land near international borders with Canada, Mexico, and Russia in order to "protect Native Nations' sovereignty" as well as tribal cultures and traditions.[198] The Alliance recommends that nations institute a standardized approach in dealing with tribal land along international borders as well as for the treatment of American Indians crossing international borders.[199] Their proposal also specifically requests the removal of any reference to blood quantum in INA section 289.[200]

In addition, the Tribal Border Alliance's proposal calls for many other changes including the creation of a special visa for American Indians.[201] The Alliance also calls for increased funding and resources for tribes that are situated on the border as well as direct coordination between the federal government and tribal governments as it relates to international

197. *See supra* section I.C.

198. *Welcome*, TRIBAL BORDER ALL., https://www.tribalborderalliance.org/ [https://perma.cc/NAH4-5M99]; *see also Our Members*, TRIBAL BORDER ALL., https://www.tribalborderalliance.org/charter-members/ [https://perma.cc/7RJH-Y3ER] (listing the member tribes of the Alliance).

199. *See Tribal Border Alliance Proposal*, TRIBAL BORDER ALL., https://www.tribalborder alliance.org/proposal/ [https://perma.cc/P5PD-H95E].

200. *Id.*

201. *Id.*

borders.[202] Another requested change would require national and local training on tribal sovereignty, border crossing rights of American Indians, and tribal culture for all immigration and border officers employed by DHS.[203] The tribes also request the creation of a tribal liaison position at every port of entry "that tribal members and their relatives cross regularly."[204]

In 2018, Representatives Derek Kilmer (D-WA) and Elise Stefanik (R-NY) proposed a bill aimed at expanding the application of INA section 289.[205] The representatives brought forth the bill after advocacy by a group known as the Northern Tribal Border Alliance, which includes the Saint Regis Mohawk Tribe, the Kootenai Tribe of Idaho, and Six Nations of the Grand River.[206] The bill would have applied the free passage right to individuals who are citizens of, or who are eligible to be citizens of, federally-recognized tribes in the United States.[207] However, the proposed bill did not remove the blood quantum requirement; it simply added a tribal affiliation criteria to expand the free passage right to more people.[208] The House referred the bill to the Committee on the Judiciary, which then referred it to the Subcommittee on Immigration and Border Security for review,[209] but the bill died in the Subcommittee without being considered.[210]

B. Tribes, Not the Federal Government, Should Define Who Is "Indian"

Inherent in the retained sovereign powers of the tribes is the power to determine tribal citizenship.[211] Several federal statutes that apply to

202. *Id.*

203. *Id.*

204. *Id.*

205. H.R. 6598, 115th Cong. (2018).

206. *Northern Tribal Border Alliance Wraps Up Washington, D.C. Fly-In*, INDIAN TIME (July 26, 2018), https://www.indiantime.net/story/2018/07/26/news/northern-tribal-border-alliance-wraps-up-washington-dc-fly-in/28577.html [https://perma.cc/K9F7-LWTV].

207. H.R. 6598.

208. *See id.*

209. *H.R. 6598—115th Congress (2017-2018): All Actions*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/6598/all-actions [https://perma.cc/M8Y3-933U].

210. *See H.R. 6598 (115th)*, GOVTRACK, https://www.govtrack.us/congress/bills/115/hr6598 [https://perma.cc/MXU3-96HY].

211. *See* COHEN, *supra* note 33, at 122; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (stating that Indian tribes "remain a 'separate people, with the power of regulating their internal and social relations.'" (citing United States v. Kagama, 118 U.S. 375, 381–82 (1886))); United States

Indians indicate that tribes themselves are to determine who is Indian for purposes of those statutes.[212] These statutes were enacted as early as the 1970s.[213] In reviewing existing federal definitions of "Indian," many statutes define an "Indian" as a "person who is a member of an Indian tribe."[214] The federal government correctly defers to tribes regarding Indian identity in many other areas of law, so why not for purposes of the free passage right? Accordingly, INA section 289 should be modified to replace the blood quantum requirement. Rather than racializing American Indians by imposing colonial ideas of race, the federal government should leave the decision of who is an "Indian" to tribal governments. Doing so would be consistent with the federal policy of self-determination.

INA section 289 should be amended to remove the blood quantum language so that the statute reads, "such [free passage] right shall extend to persons who are members of or are eligible for membership in a Canadian First Nation or a federally recognized tribe in the United States." The term "Indian tribe" in this case should be defined as "any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaskan Native village or regional or native corporation within the meaning of Alaska Native Claims and Settlement Act." This definition would encompass federally-recognized tribes as well as any group that (1) is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians, or (2) is recognized as such by the State in which such tribe, band, nation, group, or community resides. This kind of broad definition of "Indian tribe" is included in several statutes;[215] this definition should be extended to the INA as well.

A parallel to Canadian First Nations and U.S. federally-recognized

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v. Wheeler, 435 U.S. 313, 322 n.18, 323 (1978) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . .").

212. *See infra* note 214 for examples of federal statutory definitions of "Indian."

213. *See, e.g.*, Tribally-Controlled Community College Assistance Act of 1978, Pub. L. No. 95-471, § 1, 92 Stat. 1325, 1325 (codified as amended at 25 U.S.C. § 1801(a)(1)) (defining "Indian" without any reference to blood quantum).

214. *See, e.g.*, 25 U.S.C. § 450b(d) (defining "Indian" in the Indian Self-Determination and Education Assistance Act); 20 U.S.C. § 4402(4) (defining "Indian" for purposes of culture and art development); 25 U.S.C. § 1801(a)(1) (defining "Indian" in the Tribally-Controlled Community College Assistance Act); 25 U.S.C. § 1452(b) (defining "Indian" in the Indian Financing Act).

215. *See, e.g.*, 25 U.S.C. § 2703(5) (Indian Gaming Regulatory Act); 25 U.S.C. § 3001(7) (Native American Graves Protection and Repatriation Act); 25 U.S.C. § 1452(c) (Indian Financing Act); 25 U.S.C. § 1801(a)(2) (Tribally-Controlled Community College Assistance Act); 25 U.S.C. § 305e(a)(3) (Indian Arts and Crafts Act); 25 U.S.C. § 5304(e) (Indian Self-Determination and Education Assistance Act); 15 U.S.C. § 637(a)(13) (aid to small businesses); 20 U.S.C. § 4402(5) (Native culture and art development); 25 U.S.C. § 2403(3) (Indian Alcohol and Substance Abuse Prevention and Treatment Act).

tribes does not exist in Mexico,[216] so many communities would unfortunately be left out of this plan. Under the present system, citizens of Mexico who are members of U.S. federally-recognized tribes do not have any free passage right. This Comment's proposal would at least allow those individuals to exercise that right.

In 2018, Congress removed a blood quantum restriction in the Stigler Act,[217] which previously restricted members of the Cherokee, Chickasaw, Choctaw, Muskogee, and Seminole Nations from transferring land allotments to heirs with less than "one-half or more Indian blood."[218] Congress should do the same in INA section 289. Doing so would further the trend of decolonizing American Indian identity and allow for tribes and other Indigenous groups to fully exercise their inherent rights to determine citizenship in their own communities.

CONCLUSION

The 50% blood quantum requirement in INA section 289 violates principles of tribal sovereignty and is unnecessarily racialized and restrictive. Congress should replace it with a race-neutral political criterion that defers to Indian tribes to decide who is "Indian." Further, to ensure equal rights of American Indians regardless of where they are born, INA section 289 should be expanded to include American Indians born in Mexico. The blood quantum requirement should be removed to keep in line with America's espoused ideals around equality of treatment for individuals regardless of race and identity. Currently, INA section 289 is the exact type of explicitly racist immigration policy the Supreme Court warned about in *Trump v. Hawaii*. As the Court has stated, our immigration laws must be race-neutral.

If INA section 289 did not have a blood quantum requirement, Peter Roberts could have kept his green card and continued visiting his property uninterrupted, while still being able to live with his community on the Tsawwassen Indian Reserve in Canada. If INA section 289 was expanded to American Indians born in Mexico, Tohono O'odham tribal citizens who are citizens of Mexico would no longer have to worry about being denied entry while trying to visit their families or access health services on the U.S. side of their reservation lands.

Although the blood quantum requirement may help some Canadian Indians who no longer have Indian status due to Canada's Indian Act or

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216. *See* Leza, *supra* note 153.

217. Halter, *supra* note 78; *see also* Stigler Act Amendments of 2018, Pub. L. No. 115-399, § 3, 132 Stat. 5331, 5332.

218. Stigler Act, ch. 458, Pub. L. No. 80-336, 61 Stat. 731, 731 (1947) (amended 2018).

those who are not citizens of an Indigenous nation, deferring to tribal determinations of citizenship would be more in-line with Congress's policy of self-determination. Additionally, removing the requirement would help decolonize the movement of people between borders by giving more power to Indian communities in Canada and the United States. Removing the blood quantum requirement would also help heal Indian communities that have been forced to use the colonizer's blood quantum model when their own constitutions and citizenship criteria do not consider blood quantum—all while allowing tribes that still use blood quantum the flexibility to continue doing so.

To better protect the rights of all American Indians, regardless of where they happen to be born, the blood quantum provision must be removed from INA section 289, as advocated for by the Tribal Border Alliance. The statute must be amended and broadened to include American Indians born in Mexico to protect the sovereignty of Indian tribes, bolster Indian communities rather than separate them, and allow tribes to define who is "Indian." By removing this racist law, Indigenous peoples in North America could more freely pass throughout Turtle Island once again.