So Close, Yet So Far Away: A Comparative Analysis of Indian Status in Canada and the United States.

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Introduction.

Who is politically an Indian in Canada and the United States? The answer to this question impacts both Indians and non-Indians for varying reasons. For Indians, the United States federal acknowledgement's acknowledgment of a tribe—which is the predicate for tribal and individual Indian political status—determines eligibility for many federal programs including health care, housing and education. While Indian political status has similar implications in Canada, there—the Canadian federal government's acknowledgement may even determine whether an individual is excluded from his or her relatives. In both countries, federal government acknowledgement of Indian status can also shape a community or individuals' self-identities.

For non-Indians, the federal governments of Canada and the United States have an ongoing political relationship with Indian nations, as well as judicially recognized fiduciary relationships. The population of political status Indians in both countries impacts the cost of government-to-government relationships and fiduciary responsibilities.

Historically, in Canada, the Indian Acts determined individuals' Indian status. The Canadian federal government constitutionalized Indian status, which largely determined both tribal and individual political status. However, band recognition of an individual did play a role in individual Indian political status—just not what it is in the United States. Today, in Canada, while the bands may determine who is a member, it is the federal government that acknowledges both band and individual Indian status. Historically and contemporarily, in the United States, the federal

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government acknowledges tribes' Indian status. However, it is tribal governments that have always exclusively determined their membership and acknowledged an individual's Indian status.

This piece explores the laws of Canada and the United States that define Indian political status, both group and individual. Part I of this piece discusses the historical legal perspectives of the Indian Acts in Canada. Part II examines the statutory definitions of Indian—both tribal and individual—in the United States and the case law related to the acknowledgement of Indian tribes' political status. Part III discusses the contrasting results of sexual discrimination challenges in both countries related to individual Indian political status..

I. Historical & Legal Perspectives of Indian Status in Canada.

A. Canadian Constitution and Acts Regarding Indian Status.

Indian status in Canada was constitutionalized pursuant to the *Royal Proclamation of 1763*,[1] which is "the first major written constitutional document for Canada."[2] *The Royal Proclamation* was issued at the close of the French and Indian War to integrate the territories that were formerly held by France into the British Colonial system. Much of *the Proclamation* also concerned relations between the British Crown and the Indian bands. *The Proclamation* set the stage for future treaties between the British Crown and the bands and land cessions.[3]

After *the Royal Proclamation*, the Canadian Parliament enacted a series of statutes regarding the indigenous people of Canada, who have been called Indians since the early colonial period. Treaties between the British Crown, federal government, territorial and provincial governments determine Canadian government acknowledgement of bands.[4] Individual Indian status is determined by the federal government's *Indian Acts*. The first of these Acts, enacted in 1850, was

[1] Royal Proclamation of 1763, R.S.C. 1970, App. II, No. 1, *available at* http://www.canadiana.org/view/42695/0030.
[2] *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 1510 (4th ed. 2005).
[3] Canada in the Making: Aboriginals: Treaties & Relations, http://www.canadiana.org/citm/themes/aboriginals/aboriginals3_e.html
[4] *See* CLINTON, *supra* note 2, at 1507-44 (4th ed. 2005) (discussing the nature of aboriginal groups' rights in Canada and citing Guerin v. The Queen [1984] S.C.R. 335; R. v. Sparrow [1990] 1 S.C.R. 1075; and Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010).

An Act for the protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed by them from trespass and injury.[5] This 1850 Act referred to "Indians and persons married to Indians" to delineate who could and could not occupy certain lands in Canada.[6] However, Indian status and the scope of its implications were not yet clearly defined.

The next statute enacted by the Canadian parliament concerning Indians was *An Act to Encourage the Gradual Civilization of Indian Tribes in This Province and to Amend the Laws Relating to Indians.*[7] *The 1857 Act* was the first time "the government assumed control over the determination of who was an Indian."[8] Importantly, section one of *the 1857 Act* slightly explicated the definition of Indian status, and made clear that *the 1850 Act* applied to

> Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon land which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any Tribe or Band of Indians in common) and who shall themselves reside upon such lands, and shall not have been exempted from the operation of the said section, under the provisions of this Act; and such persons and such persons only shall be deemed Indians within the meaning of any provision of the said Act or of any other Act or Law in force in any part of this Province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian Subjects.[9]

The use of the words "Indian blood" illustrates that Indian status had a racial component. Moreover, it had an official governmental acknowledgment component that was tied to where a person resided. Lastly, this act "provided for the enfranchisement of Indian men" who could meet certain criteria.[10] As well, Indian status was tied to familial relationships. Once Indian men ceased to have Indian status, their wives and children also automatically ceased to have Indian status.[11]

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[5] S. Prov. C. 1850, 13 & 14 Victoria, c. 74.
[6] S. Prov. C. 1850, 13 & 14 Victoria, c. 74.
[7] S. Prov. C. 1857, 20 Victoria, c.26.
[8] *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153 at ¶ 14.
[9] *See* S.Prov. C. 1857.
[10] *McIvor* at ¶ 14.
[11] *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203 at ¶ 86.

Upon confederation, Canada assumed exclusive legislative authority over Indians pursuant to the *Constitution Act of 1867*, which is also known as *the 1867 Indian Act*.[12] The next year, the Canadian Parliament defined Indian in Section 15 of *An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands*. The Canadian Parliament defined Indians as

> *Firstly.* All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants.
> *Secondly.* All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And
> *Thirdly.* All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants."[13]

Indian status was and—with the next two Acts discussed below—would continue to be about race, ancestry, reputation (or recognition by an Indian community) and marriage. In 1869, this definition was adhered to—but slightly modified for women—by the government in *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*.[14] *The 1869 Act* amended Section 15 of *the 1868 Act* for Indian women in two ways: 1) Indian women that married non-Indian men lost their Indian status and 2) Indian women that married Indian men from other tribes or bands lost their affiliation with their own tribe and became of a member of the Indian man's tribe. Moreover, an Indian woman's children also lost their Indian status or their mother's tribal affiliation.[15]

Canada's next alteration of the definition of Indian status came with *the Indian Act of 1876*.[16] Section 3 of *the 1876 Act* modified the *1868* and *1869 Acts*' definition with the language

[12] *Constitution Act, 1867 (U.K.)*, 30 & 31 Victoria, c. 3, § 91(24) (granting legislative authority over "Indians and land reserved for Indians").
[13] S. Prov. C. 1868, 31 Victoria, c. 42, § 15.
[14] S. Prov. C. 1869, 32 & 33 Victoria, c. 6.
[15] S. Prov. C. 1869, 32 & 33 Victoria, c. 6.
[16] S. Prov. C. 1876, 39 Victoria, c. 18.

"(a) any male person of Indian blood reputed to belong to particular band; (b) the child of such person; and (c) any woman who is or was lawfully married to such a person [is an Indian]."[17]

With the comprehensive definition resulting from these three acts, Indian men who had not voluntarily relinquished their Indian status maintained it regardless of whom they married. Indian women, however, either lost their Indian status or had their tribal affiliation involuntarily changed through marriage, while non-Indian women inherited and maintained Indian status if they were ever married to an Indian man. This would continue to be the standard for Indian status for more than 75 years in Canada.

Then in 1951, the Canadian Parliament enacted a new Indian Act.[18] Pursuant to *the 1951 Act*, an Indian register was created, which recorded the names of individuals who wished to be registered as possessing Indian status. *The 1951 Act* also created the Registrar, who was an officer of the Crown charged with compiling band lists—those Indians affiliated with the bands of Canada—and a general list of individuals with Indian status not affiliated with a band of Canada.[19] Section 2(1)(g) of *the 1951 Act* defined Indian status by entitlement to be registered as an Indian. Pursuant to *the 1951 Act*, a person was or was not entitled to be registered pursuant to sections 11 and 12 of that *Act*. These sections list who is and who is not entitled to register for Indian status.[20]

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[17] S. Prov. C. 1876, 39 Victoria, c. 18.
[18] The Indian Act ("An Act Respecting Indians"), R.S.C. 1951, c. 29.
[19] *McIvor* at ¶¶ 27-28.
[20] *See* The Indian Act, *supra* note 18 (stating "11. Subject to section twelve, a person is entitled to be registered if that person (a) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, chapter forty-two of the statues of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of the chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada; (b) is a member of a band (i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act; (c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b); (d) is the legitimate child of (i) a male person described in paragraph (a) or (b), or (ii) a persons described in paragraph (c); (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered; or (f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).
12(1) The following persons are not entitled to be registered, namely, (a) a person who (i) has received or has

B. Much Later, Indian Status and Discrimination Against Indian Women Changed In Canada.

In 1974, a status Indian woman who had married a non-status Indian man challenged the Canadian Indian Acts under the Canadian Bill of Rights.[21] In *Attorney General of Canada v. Lavell,*[22] the Canadian Supreme Court dismissed the woman's challenge and held that the Bill of Rights did not repeal section 91(24) of *the 1867 Act.* Moreover, the Court held that the Bill of Rights only required the Canadian Parliament to apply the existing laws—as they were—equally. In this case, the Court held that the law had been enforced and applied equally to all who were under it *as enacted*, despite the law's discriminatory impact.

However, two years later, in 1976, Canada became a signatory to the International Covenant on Civil and Political Rights ("ICCPR").[23] Article 27 of the ICCPR states "[i]n those States in which, ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their culture, to process and practice their own religion, or to use their own language." After the Canadian Supreme Court dismissed the *Lavell* case, an Indian woman who had lost her status through marriage challenged the Indian Acts pursuant to Article 27 of the ICCPR in *Lovelace v. Canada*.[24] The United Nations Committee on Human Rights held that Canada had violated Article 27 of the ICCPR

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been allotted half-breed lands or money scrip, (ii) is a descendant of a person described in sub-paragraph (i), (iii) is enfranchised, or (iv) is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), (d), or entitled to be registered by virtue of paragraph (e) of section eleven, unless being a woman, that person is the wife or widow of a person described in section eleven, and (b) a woman who is married to a person who is not an Indian").

[21] Canadian Bill of Rights, S.C. 1960, c. 44.

[22] *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349 (1973).

[23] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.S. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; 6 ILM 368 (1967).

[24] *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. No. 40 (A/36/40) at 166 (1981).

when it denied Ms. Lovelace the right to access her culture, religion and language pursuant to the Indian Acts.[25]

With the *Lovelace* case and enactment of *the Canadian Charter of Rights and Freedoms,*[26] in 1985, the Canadian government decided to amend *the Indian Acts* to do away with sexual discrimination and allow bands to determine their own membership. The Charter's explicit purpose is to "remove discrimination from the [Indian] act" and recognize "band control of membership . . . [and restore] rights to those who lost them."[27]

Then with *the 1985 Act*[28] and *Bill C-31,* the Canadian Parliament amended *the Indian Acts* to be more equitable in their impact on individuals. *The 1985 Act* requires one parent to be registered, with both grandparents registered or eligible to be registered under *the 1951 Act.*[29] This seemingly requires a one-half blood quantum for Indian status. However, under *Bill C-31,* children on the paternal bloodline side who had lost their Indian status pursuant to section 12(1)(a)(iv) of *the 1951 Act*, or what is referred to as the "double mother rule," had their status restored—effectively requiring only a one-quarter-blood quantum for Indian political status.[30]

However, even after these legal changes were enacted, the British Columbia Supreme Court found *the Indian Acts* to still have substantial problems.. In *McIvor v. Canada,*[31] which is discussed more below, the court held that *the Indian Acts* continue to be the primary means of determining Indian status, and that the law continues to discriminate based on sex due to the restoration of Indian political status extending further on the paternal bloodline than on the maternal bloodline for

[25] *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. No. 40 (A/36/40) at 166 (1981).
[26] Canada Act 1982 (U.K.), 1982, c. 11.
[27] Bill C-31: An Act to Amend the Indian Act, S.C. 1985, c. 27.
[28] The Indian Act, R.S.C. 1985, c. 1-5.
[29] The Indian Act, R.S.C. 1985, c. 1-5 at § 6.
[30] The Indian Act, R.S.C. 1985, c. 1-5 at § 6; *see* Bill C-31, *supra* note 27; *see also* McIvor v. Canada (Registrar, Indian and Northern Affairs), 2009 BCCA 153 at ¶¶ 43-72 (discussing requirements for Indian status after the enactment of the 1985 Act and Bill C-31).
[31] *McIvor* at ¶ 20.

those descendants born prior to April 17, 1985.[32] Moreover, although bands may determine their membership lists, Individual Indian political status is still acknowledged by the Canadian federal government pursuant to *the Indian Acts*. This is a continuing problem that still creates inequalities in the application of the law, which—as discussed below—differs from the United States' legal regime.

II. United States Federal Government Acknowledgement of Indian Status is Governed by the Constitution, Statutes and Case law, But Ultimately Depends on Tribal Governments' Determinations.

The United States and Canada have historically had different approaches to dealing with their Indigenous peoples, including defining Indian political status. The United States has defined Indian political status through its Congress in several statutes and through its courts in several cases.[33] Over time, in the United States' federal law, Indian political status has become a legal fiction with substantive impacts on cultural identity.[34] However, unlike Canada, Indian groups' status is not static, and new groups continue to be acknowledged by the United States federal government. And also unlike Canada, individual Indian political status is—and historically has been—exclusively determined by tribes, even when a tribe's determination is sexually discriminatory.

A. United States Constitutional and Statutory Definitions of Indian Status.

"In the jurisdictional context, individual status follows tribal status, and there can be no Indian without a tribe. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 9 (4th ed. 2004)(citing *Epps v. Andrus*, 611 F.2d 915 (1st Cir.1979). The Indian Commerce Clause of the United States Constitution, discussed below, refers to Indians. Several federal statutes and federal common law

[32] *McIvor* at ¶¶ 225-229.
[33] *See generally Worcester v. Georgia*, 31 U.S. 515 (1832); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. White Mt. Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983).
[34] *McIvor* at ¶¶ 94-95.

then define who is an Indian for purposes of receiving federal services. Currently, Indian status is considered to be a political status and not a racial classification.

i. The United States Constitution.

1. Some Have Argued that Indian Status is a Constitutionally Countenanced Racial Classification.[35]

The Commerce Clause—Article I, Section 8, Clause 3 of the United States Constitution—empowers Congress to "regulate Commerce *with* foreign Nations, and among the several States, and *with* the Indian tribes; . . ."[36] The Commerce Clause establishes a special relationship between the federal government and tribes.[37] This Constitutional provision lays the foundation for the United States' relationships with the Indian Nations it shares territory with.

The word 'with' is used pertaining to both foreign nations and Indian tribes. The use of the word 'with' in relation to these two subjects—but not States—suggests that Indians have had a special relationship with the federal government since shortly after the United States' founding.[38] Interestingly—and importantly—this relationship has been one that excludes Indian status from the imposition of absolute equality.[39]

The absolute—or strict—equality principle in contemporary United States jurisprudence has evolved from the Equal Protection Clause in Section One of the Fourteenth Amendment to the United State Constitution.[40] However, the Fourteenth Amendment's Apportionment Clause in Section Two states "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians*

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[35] To the best of the author's knowledge, this Constitutionally-countenanced racial classification" argument was first articulated by Robert N. Clinton and Carole Goldberg. *See generally* ROBERT N. CLINTON, CAROL E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 94–97 (5th ed. 2007).
[36] U.S. CONST. art. I, § 8, cl.3.
[37] *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).
[38] *Williams v. Gover*, 490 F.3d 785, 791 (9th Cir. 2007) (holding that tribes have right to determine membership and that federal bodies may not define tribal membership); *Cf. Bailey v. United States*, 516 U.S. 137, 145 (1995) (applying Indian canon of construction to consider statutory context).
[39] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-72 (1978).
[40] U.S. CONST. amend. XIV. § 1.

not taxed."[41] There is an equality principle in Section One, and yet Section Two—which excludes Indians—would seem to be in conflict with this equality principle. It is extremely unlikely that the drafters of the Fourteenth Amendment carelessly drafted such a blatant conflict into the Constitution—into the same Amendment no less.[42]

Instead, the paradox between Sections One and Two of the Fourteenth Amendment illustrates that the absolute equality principle does not apply to those with Indian political status. Rather, such a contradiction illustrates that Section Two of the Fourteenth Amendment protects a class of persons with a particular political status and have a special relationship with the United States federal government. A relationship that is free from the uniform imposition of strict equality.[43] Therefore, from the legal formalist perspective,[44] Indian status as a racial classification set apart from others does not (or at least according to formalist perspective, should not) violate the Equal Protection Clause of the Fourteenth Amendment. Nor does such a classification violate the Due Process Clause of the Fourteenth Amendment. Indian status as a racial classification would not then violate the Due Process Clause of the Fifth Amendment through the "doctrine of incorporation."[45]

The ability to classify Indians as a separate people in the law primarily by their race is a unifying facet of the Constitution, federal statutory law, and federal common law. The Constitution sets up a unique class of persons. Federal statutory language, such as within the Major Crimes

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[41] U.S. CONST. amend. XIV, § 2 .

[42] There are also several federal statutes located at Title 25 of the United States Code that acknowledge 'Indian' as a special Constitutionally countenanced racial classification. *See* 25 U.S.C. § 482 (denying certain loans to persons "of less than one quarter Indian blood"); *See* 25 U.S.C. § 677aa (dividing Ute Indians into classes based on blood quantum and providing separate and distinct rights to those classes); *See* 25 U.S.C. §§ 261-4 (limiting non-Indians permitted to trade with 'Indians'); *See* 25 U.S.C. § 302 (Placing Indian pupils in Reform School).

[43] *See* Carole Goldberg, *Members Only: Designing Citizenship Requirements for Indian Nations,* 50 KANSAS LAW REVIEW 437-71 (2002); *see also* Carole Goldberg, *American Indians and Preferential Treatment*, 49 UCLA LAW REVIEW 943-89 (2002).

[44] *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 491-99 (2003) (discussing the development and contemporary expression of legal formalism in the United States' federal courts); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[45] U.S. CONST. amend. V.; U.S. CONST. art. VI, cl. 2.

Act,[46] parses out and addresses Indians on racial grounds. Federal case law historically determined Indian political status based on racial identity.[47] The test for Indian status has become more nuanced in response to changes in American-Indian society and demographics, and the United States' general political sensibilities. Realistically, Indian status must be discussed without reference to its racial component and only through the prism of its political component to be palatable to federal government institutions—namely, the federal judiciary. Keeping this legal discussion within the parameters of the political status paradigm is facile, because the "separate sovereign principle"—which is discussed below—in federal courts' jurisprudence relegates the discussion of Indian status to its political dimension.[48]

ii. The United States Federal Government's Acknowledgement of Tribes in the United States Occurs in Two Ways.[49]

Unlike Indian groups' acknowledgement in Canada, which is statically determined by past treaties, in the United States, tribes can obtain federal acknowledgment in one of two ways.[50] A tribe can be recognized pursuant to the Bureau of Indian Affairs ("BIA") acknowledgment process or legislation.

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[46] 18 U.S.C. § 1153.

[47] *See, e.g., U.S. v. Rogers*, 45 U.S. 567 (1846) and *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[48] *E.g. Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974) (holding that Indian status "is political rather than racial in nature" and that Indian status is limited "only to members of 'federally recognized' tribes"); *see also United States v. Wheeler*, 435 U.S. 313, 329-30 (1978).

[49] The Department of the Interior periodically publishes a list of federally acknowledged tribes. For instance, *see* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 153, 40218 (Aug. 11, 2009).

[50] Because it is not a standard method, this piece does not discuss judicial acknowledgement, which is a hypothetical third manner to obtain federal acknowledgment. To use this option, presumably, a tribe would be judicially restored through a judicial finding that the tribe had been illegally administratively terminated by the Secretary of the Interior's previous removal of the tribe from a list of acknowledged tribes. If a tribe challenges this and wins, it could presumably be considered restored federal acknowledgment. *Cf.* 25 C.F.R. §§ 292.7-292.12 (governing off-reservation gaming for restored tribes, and implying potential for judicial acknowledgment). For a discussion of this proposition, *see A Day Late and a Dollar Short: Section 2719 of the Indian Gaming Regulatory Act, The Interpretation of Its Exceptions and the Part 292 Regulations*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 147, 162-72 (2010).

1.Bureau of Indian Affairs Code of Federal Regulations Acknowledgment.

The BIA may acknowledge a tribe pursuant to 25 CFR Part 83. The purpose of Part 83 is to establish a process for acknowledging Indian tribes, which is a prerequisite for federal protection, services, and benefits.[51] There are at least 27 steps in the acknowledgment process[52] and it may include a series of reconsiderations by the Secretary if the petition for acknowledgment is initially denied.[53] Further, a tribe must satisfy seven mandatory criteria for federal acknowledgement.[54] If a tribe—through its membership—has the resources and patience, this is a viable option to (re)acquire political status.[55]

The process for acknowledgement can be tedious and time consuming. There have been approximately 314 groups to petition since 1978 with only 41 (12%) having had their situation resolved. Of these 314, there are approximately 232 groups that have had their petitions put on hold as incomplete and not ready for evaluation due to missing or incomplete documentation.

2. Legislative Acknowledgement.

A tribe may also be acknowledged legislatively. Under this option, the United States Congress enacts a Public Law granting federal acknowledgment to a tribe.[56] To begin the process

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[51] 25 CFR § 83.2 (2011).

[52] The process includes: filing a letter of intent to petition, petitioning, active consideration, a public comment period and petitioner response, and a final determination.

[53] 25 CFR §§ 83.9 - 83.12.

[54] 25 CFR § 83.7 (stating the following criteria: The petitioning group must show that it has been identified as an American Indian entity on a substantially continuous basis since 1900; A predominant portion of the petitioning group must show that it comprises a distinct community that has existed as a community from historical times until the present; The petitioning group must show that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present; The petitioning group must provide a copy of the group's present governing document including its criteria for membership. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures; The petitioning group must show that its membership consists of individuals who descend from a historical Indian tribe or historical Indian tribes[,] which combined and functioned as a single autonomous political entity; The petitioning group must show that its membership is composed principally of persons who are not members of any acknowledged North American Indian tribe; and The petitioning group must show that neither it nor its members are the subject of congressional legislation that has expressly terminated or forbidden a Federal relationship).

[55] There are no "new" tribes; just those that have always existed, but now seek the U.S. federal government's acknowledgment of their existence for status reasons. *See Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193 (D. Kan. 2006); *Grand Traverse v. U.S. Att'y*, 198 F. Supp. 2d 920 (W.D. Mich. 2002).

[56] 25 U.S.C. §§ 731-737 (2011).

of obtaining congressional acknowledgment, a tribe must lobby either the President for a Presidential Message to Congress or a member of Congress to initiate preliminary Congressional hearings regarding the matter.

Although a potentially much faster option, legislative acknowledgment can be very costly and unpredictable. Lobbyists are expensive, and because the Senate usually works by a rule of unanimous consent, just one United States Senator can hold a tribe's bill up or destroy it. Moreover, as evidenced by the Alabama-Coushatta Tribe's example below, a tribe may have to compromise and accept some provisions in the legislation that are anathema to its optimal goals—or even its inherent sovereignty—to get the legislation passed. Among other things, to exercise this option, a tribe must establish that a majority of its members are citizens, that the tribe possesses a tribal membership roll, and that the tribe is a subgroup of a larger historical Indian group.[57]

The Alabama-Coushatta Tribe of Texas ("Tribe") and Ysleta del Sur Pueblo ("Pueblo") (collectively the "tribes") provides an example of legislative acknowledgement, and the problems that can come with it. The Tribe is now a federally acknowledged Indian Tribe. In 1928, the federal government began providing many services to the Tribe in accordance with its fiduciary duties. However, in 1954, the federal government terminated its acknowledgement of the Tribe.[58] Subsequently, the State of Texas began providing services to the Tribe. The Tribe maintained its state acknowledgement, without federal acknowledgment, for the next 33 years.

Then, on August 18, 1987, the federal government restored its acknowledgment of the Tribe with legislation.[59] The federal government's Restoration Act has two titles. The first title, 25 U.S.C. § 1300g (2011), restores acknowledgment to the Ysleta del Sur Pueblo ("Pueblo"). The

[57] 25 U.S.C. §§ 731-737 (2011).
[58] *See* ALABAMA-COUSHATTA , http://www.alabama-coushatta.com (last visited Dec. 17, 2010).
[59] 25 U.S.C. §§ 731-737 (2011).

second title, §§ 731-737, restores acknowledgment to the Tribe. The two titles are nearly identical,[60] and consequently, each tribe's litigation impacts the other's rights.

The Restoration Act has been the subject of several disputes between the Tribe and the State of Texas[61] that concerned both of the tribes' gaming rights. Section 736(f) of the Restoration Act gives Texas the authority to exercise criminal and civil adjudicatory jurisdiction within the Tribe's reservation, which Indian Nations generally consider to be undesirable. Subsection 737(a) of the Restoration Act, which is within the section titled "Gaming activities," states

> [a]ll *gaming activities which are prohibited by the laws of the State of Texas* are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986. (Emphasis added)[62]

During the first dispute, *Tigua I*, in 1994, the federal court held that the Restoration Act prohibited all gaming being conducted on the Pueblo's land (and therefore, both tribes' lands).[63] The *Tigua I* court concentrated on the Restoration Act's reference to a tribal council resolution that had been enacted as a condition for restoration of acknowledgement prior to changes in Texas' law. This council resolution provided that all gaming that was illegal in Texas would be illegal on the Pueblo's—or tribes'—land.

However, the Restoration Act was enacted at a time when all gaming was illegal in Texas. Thus, at that time, Texas' laws concerning gaming were criminally prohibitive of gaming. But as

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[60] *Alabama-Coushatta Tribes of Texas v. Texas ("Alabama"),* 208 F.Supp.2d 670, 674 n.2 (E.D. Tex.2002).

[61] *Texas v. Ysleta del Sur Pueblo* (*"Tigua III"*), 2005 WL 2367782 (W.D. Tex. Sept. 27, 2005); *Texas v. Ysleta del Sur Pueblo* (*"Tigua II"*), 220 F.Supp.2d 668 (W.D. Tex. 2002); *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F.Supp.2d 670, 674 n.2 (E.D. Tex. 2002) ("*Alabama*"); *Ysleta del Sur Pueblo v. Texas* (*"Tigua I"*), 36 F.3d 1325 (5th Cir. 1994).

[62] The tragic saga of the *Tigua* cases was precipitated by a missing comma before "which." For a discussion of the potential deleterious impacts of poor drafting as illustrated by this debacle, *see* Kevin Gover, *For Want of a Comma, a Casino is Lost,* INDIAN COUNTRY TODAY, March 20, 2002. Reading this article and these cases will remind the reader to use "that" without a comma, but not to use "which" without a preceding comma (or other punctuation such as an emdash) or a preposition.

[63] *Tigua I*, 36 F.3d at 1333-35.

discussed below, the reality has subsequently changes. The court also held that the Restoration Act, and not the Indian Gaming Regulatory Act ("IGRA),[64] was appropriate for determining whether the Pueblo could conduct gaming.

Based on the same reasoning, in the subsequent disputes between the tribes and the State of Texas, federal courts have found that

- The Restoration Act, and not the IGRA,[65] controls whether the tribes may conduct gaming;[66]
- The plain language of the Restoration Act referring to the tribes' resolution, and not its legislative history, is to be used when interpreting the Restoration Act;[67]
- A *Cabazon* prohibitory/regulatory (dichotomy) analysis does not apply;[68] and
- The tribes are subject to Texas' law on all gaming matters, however—curiously—the tribes are not subject to Texas' regulatory scheme.[69]

All of these findings have prohibited the tribes from exercising their economic rights and improving their members' standards of living.

However, the *Tigua I* court—followed by subsequent courts—have applied the Restoration Act in a manner that is now obsolete in light of Texas' contemporary laws regarding gaming. These courts' overly strict — perhaps pedantic— interpretations of the Restoration Act (and punctuation error) have controlled the outcomes of the *Tigua* cases. The federal courts' strict applications of the language of the Restoration Act (and the referenced tribal council resolution) in these disputes are not consistent with the contemporary reality on the ground in Texas.

At the time of the Act's enactment, Texas prohibited all gambling. However, in the interim between the Restoration Act's enactment in 1987 and today, Texas has legalized pari-mutuel

[64] 25 U.S.C. §§ 2701-2721 (2011).
[65] 25 U.S.C. §§ 2701-2721 (2011).
[66] *Tigua I*, 36 F.3d at 1335.
[67] *Tigua I*, 36 F.3d at 1333-34; *Alabama*, 208 F.Supp.2d at 677-78.
[68] *Tigua I*, 36 F.3d at 1333-35; *see also Tigua I*, 36 F.3d at n.17-18.
[69] *Tigua II*, 220 F.Supp.2d at 707.

betting, lotteries[70] and bingos.[71] Today, lottery is a major form of entertainment in Texas. Bingo halls now allow people to engage in a regulated gaming activity for entertainment all across Texas.[72] Treasure cruises—or boat casinos—are also permitted. Dog and horse race tracks can similarly be found throughout Texas.[73] Accordingly, while the federal courts' statutory interpretations arguably reflected Texas' reality at the time the Restoration Act was passed, these interpretations—like unicorns—are not grounded in reality today. Nor have they been for some time.

A conventional analysis of the Restoration Act that reflects the contemporary realities of Texas' laws should be applied by a court to permit the Tribe (and Pueblo) to game. The Act states that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."[74] Beginning with *Tigua I*, federal courts have found that, with this language, Congress intended to make Texas' law a surrogate of federal law.[75] However, a plain language reading shows that the language of the Restoration Act (and the resolution) simply means what it says—that any gaming *that* is legal or illegal in Texas is legal or illegal on the tribes' lands. Several forms of gaming entertainment are now legal in Texas. This change in Texas' law should be accurately reflected in a modern court's interpretation of the Restoration Act. If this were the case, the tribes could engage in gaming because it is a legal, regulated activity in Texas. Accordingly, such a strict and narrow application of the Restoration Act's language is not consistent with the reality of Texas' contemporary society or law. And this strict and narrow application should not continue to be applied.[76]

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[70] Tex. Gov. Code § 466.001 *et seq*. (2011) ("the State Lottery Act").
[71] Tex. Occ. Code § 2001 (2011) ("the Bingo Enabling Act").
[72] TEXAS BINGO, http://www.texas-bingo.com (last visited Dec. 17, 2010).
[73] TEXAS-CASINOS, http://www.texas-casinos.net/ (last visited Dec. 17, 2010).
[74] 25 U.S.C. § 737(a).
[75] *Tigua II*, 220 F.Supp.2d at 688.
[76] A court may depart from precedent, or even stare decisis if a compelling and urgent reason exists. American Jurisprudence, Second Edition, provides the two formulations that justify departure or substantial deviation from established and developed precedent. 20 Am. Jur. 2d Courts § 132. The first formulation for deviation contains seven

The court's interpretation of the Restoration Act in *Tigua I* is obsolete,[77] and a more modern interpretation should be adopted. Adhering to precedent will result in adverse effects to the tribes by unnecessarily constraining their economic development and growth. Importantly, the courts' artificially and unnecessarily prohibiting such economic development and improvement of the tribes' standards of living—with unnecessarily prohibiting Indian gaming—subverts the policy that the IGRA was intended to further.[78] These are the compelling and urgent reasons necessary to justify abandoning the antiquated and obsolete rules of the *Tigua* cases.[79] Unfortunately, despite these reasons, the courts have not changed their position in response to changes in Texas' laws.

This is only one example of the problems that can be created by federal legislative acknowledgement of a tribe. While tribal acknowledgment is dynamic in the United States and—unlike Canada's static system—allows for Indigenous Peoples to be rightfully acknowledged by the federal government, the system can create serious problems for those tribes that are later acknowledged or restored.

To recap, in the United States, a tribe may begin the process of obtaining Congressional acknowledgment through lobbying the President to initiate a Presidential Message or a

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different grounds: "obvious or manifest error in the precedent, the unreasonableness or the principle of law established by the precedent, a significant change in circumstances since the adoption of the legal rule, changes in conditions resulting in the disappearance of the rule the precedent established, the likelihood that adherence to precedent would cause greater harm to the community than could possibly result from disregarding stare decisis in a particular case, serious detriment is likely to arise that is detrimental to public interests, inconsistency between the precedent and a constitutional provision. The second formulation "for deviation from [a] precedent" contains four questions a court may answer to determine whether to apply *stare decisis*: "whether the precedent is so unworkable as to be intolerable, whether the parties to the case justifiably relied on the precedent so that reversing it would create an undue hardship, whether the principles of law have developed to such an extent as to leave the old rule no more than remnant of an abandoned doctrine, whether the facts have changed in the interval from the old rule to consideration so as to have robbed the old rule of justification. *Id*.

[77] *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Brown v. Board of Education*, 347 U.S. 483 (1954); *but see Marbury v. Madison*, 5 U.S. 137 (1803).

[78] 25 U.S.C. § 2702(1) (providing that the IGRA's purpose is to provide a federal statutory basis for Indian tribes "as a means of promoting tribal economic development . . . ."); *see also Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y W. Dist. of Mich*., 369 F.3d 960, 971 (6th Cir. 2004) (discussing the IGRA's purpose, which is to encourage gaming).

[79] An appellate court may deviate from a rule when a compelling and urgent reason exists when adhering to precedent would result in serious adverse or harmful effects to the parties, subvert the policy that the rule was intended to further, or when the times and conditions of society have changed so much as to make the rule obsolete. *See* 20 Am. Jur. 2d Courts § 132; *see also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985).

Congressperson to initiate preliminary Congressional hearings. This can be very costly and unpredictable. Lobbyists are expensive, and because the Senate usually works by a rule of unanimous consent, it can take only one United States Senator to hold a tribe's bill up or destroy it. Moreover, as evidenced by the Alabama-Coushatta and Ysleta Del Sur debacle, a tribe may have to compromise and accept some provisions in the legislation that are anathema to its optimal goals—or even its inherent sovereignty[80]—to get the legislation passed. A tribe's exercise of this option may gain the group and its members Indian political status, but can engender deleterious results for the tribe's later exercises of its economic rights and improvement of its members' standards of living.

While this process in the United States system is more dynamic than that of Canada, it is far from perfect and can lead to subsequent problems. While the Restoration Act equitably impacted the tribes and their members' Indian status, it also created myriad problems. Problems that are avoided in Canada, where status is fixed based on historical treaties. And while a tribe can also be acknowledged via the Part 83 process, this is only a viable option if the tribe has substantial patience and resources. The federal government's bureaucracies can be extremely inefficient—if not inept—and a tribe will have to be prepared to endure and confront this. Beyond being tedious, time consuming and costly, this process can lead to its own difficulties when tribes attempt to exercise economic liberties (such as gaming). Accordingly, the United States' more dynamic and equitable—because it doesn't necessarily lock tribes out like Canada's system, it is replete with its own problems.[81]

B. Federal Statutory Law Defining Individuals' Indian Status.

i. The Indian Reorganization Act.

The Indian Reorganization Act ("IRA") defines "Indian in the following manner:

[80] Essentially, tribal sovereignty can be understood to be an Indian Nation's legal right to promulgate rules of the game and then enforce them.

[81] As examples, *see Citizens Exposing Truth About Casinos v. Kempthorne*, 494 F.3d 460 (D.C. Cir. 2007), *Michigan Gambling Opposition v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193 (D. Kan. 2006), and *Grand Traverse v. U.S. Att'y*, 198 F. Supp. 2d 920 (W.D. Mich. 2002),

> 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 reservation, and shall further include all other persons of one-half or more Indian blood. . . . The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.[82]

While the plain language of the IRA was clear in its meaning at the time of enactment, the continued acknowledgement of tribes over time has made it less clear who is politically an Indian under the act, and what the relationship between later acknowledged tribes (and presumably their members) and the federal government is.[83]

ii. The Indian Health Care Improvement Act.

The Indian Health Care Improvement Act ("IHCIA") defines "Indian" in the following manner:

> 'Indians' or 'Indian', unless otherwise designated, means any person who is a member of an Indian tribe . . . [or] any individual who (A), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or (B) is an Eskimo or Aleut or other Alaska Native, or (C) is considered by the Secretary of the Interior to be an Indian for any purpose, or (D) is determined to be an Indian under regulations promulgated by the Secretary.[84]

The IHCIA is relatively clear in its meaning. Any person who is a member of a tribe, or who is a descendant in the first of second degree, or any member or who is considered by the Secretary of the Interior to be an Indian for any purpose, is an Indian under the language of the IHCIA. This definition is fairly liberal and leaves the inherent sovereign right of tribes to determine their membership undisturbed.

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[82] 25 U.S.C. § 479 (2011); *see infra* 25 C.F.R. § 151 (2011) (using fundamentally same definition of 'Indian' for purposes of putting land into federal trust).

[83] As an example of this new precarious environment for members of later acknowledged tribes that may be developing within the United States federal courts' jurisprudence, *see generally Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), and *Carcieri v. Kempthorne*, 128 S. Ct. 1443 (2008). These cases may signal "coming attractions" for Indian political status related to these tribes.

[84] 25 U.S.C. § 1603(13) (2011).

In each of the foregoing definitions, tribes and individuals have various manners in which to be acknowledged politically as Indians for purposes of federal law. Interestingly, in each definition, enrollment or membership in a tribe is sufficient to satisfy the definition. Alternatively, some combination of descent or blood quantum and residency may also suffice. United States statutory law more prominently takes into account both race and recognition as an Indian by an Indian community in the determination of Indian political status. However, the United States' federal courts make the racial component an afterthought and consider enrollment (membership or citizenship) in a tribe the primary factor for Indian status.

C. Within Federal Case Law, Indian Status is (at least ostensibly) Considered to be a Political, and not a Racial, Classification.

The Court in *Morton v. Mancari* ("*Morton*") held that Indian preference in employment and advancement does not constitute invidious racial discrimination, because Indians comprise a distinct political class.[85] However, the Court's ruling was limited "only to members of 'federally recognized' tribes."[86] Moreover, the Court made clear that such a preference is valid so long as it is "rationally designed to further Indian self-government."[87] However, beyond enrollment being a necessary criterion, the Court did not elaborate much regarding what else is required to be a member of this "political class."[88]

Then in *United States v. Antelope* ("*Antelope*"),[89] the Court again encountered the issue of whether federal law regarding Indians is in fact based on an impermissible racial classification. In *Antelope*, the defendants—who were enrolled members of the Coeur d'Alene tribe—challenged their federal criminal prosecutions pursuant to 18 U.S.C. § 1153. The defendants contended that

[85] *Morton v. Mancari*, 417 U.S. 535, 554 n. 24 (1974).
[86] *Morton*, 417 U.S. at 554 n. 24.
[87] *Morton.* 417 U.S. at 554.
[88] *Morton*, 417 at 554 n.24.
[89] 430 U.S. 641 (1977).

had they otherwise been non-Indians, they would have been charged under a less punitive state criminal law.

The Court held that the defendants were appropriately charged and convicted under 18 U.S.C. § 1153 not because of their race, but because they were enrolled members of an Indian tribe.[90] The Court reasoned that "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."[91] The Court did not delve into the nuances of what—beyond enrollment in a federally acknowledged tribe—satisfies the requirements for Indian status for federal criminal jurisdiction. However, the Court noted that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction . . . ."[92]

With *Morton*, the Court changed Indian status in the federal case law from the racial classification it had always been to a political classification.[93] In *Antelope*, the Court applied this rule in the criminal context to make clear that enrollment in a federally acknowledged tribe is sufficient for federal criminal jurisdiction. However, the Court did not go beyond this. *Morton* and *Antelope* created a legal fiction that Indian status is not based on race or ancestry. The Court created the fiction despite the fact that Indian ancestry is universally required for tribal membership, which derivatively incorporates the 'some Indian blood' racial (or ancestral) requirement into federal jurisprudence.

Morton and its progeny created a legal fiction that Indian status is not based on race or ancestry, and simultaneously recognized that the power to determine Indian status is exclusively in

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[90] *Antelope*, 430 U.S. at 647.
[91] *United States v. Antelope*, 430 U.S. 641, 646 (1977) (citing *Morton v. Mancari*, 417 U.S. 535 (1974) and *Fisher v. District Court*, 424 U.S. 382 (1976)).
[92] *Antelope*, 430 U.S. at 647 n.7.
[93] *See Simmons v. Eagle-Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965) ("[I]t seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood . . . . Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race,' Indians can only be defined by their race."), *aff'd* 384 U.S. 209 (1966). *Eagle-Seelatsee*, which was summarily affirmed by the Supreme Court, illustrates that it was the common understanding that Indians were determined primarily by race. *See also Antelope*, 430 U.S. at 643-44.

the hands of tribes.[94] While some federal statutes may still have a racial component with their blood quantum requirement, the standard for Indian status is predominately membership or eligibility for membership in a tribe.[95] From *Morton* on, United States federal courts have been reticent to interfere in tribal matters concerning Indian status decided by membership.

D. Ultimately, Unlike in Canada, In the United States, Indian Tribes—And Not the Federal Government—Determine Their Membership.

It has always been the position of the federal government and the courts of the United States that tribes have the exclusive authority to determine their membership.[96] Although, the United States' deference classically acceded to the fact that membership had racial and political components.[97] In *Santa Clara v. Martinez,*[98] the Court found that a tribe does not violate a person's

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[94] Moreover, federal courts of appeal also have standards for Indian status, which may differ. The split in the Eighth and Ninth Circuit Courts of Appeals tests for determining Indian political status is a poignant example best illustrated within *U.S. v. Stymiest*, 581 F.3d 759 (8th Cir. 2009) and *U.S. v. Cruz*, 554 F.3d 840 (9th Cir. 2009).

[95] *See United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005); *United States v. Keys*, 103 F.3d 758 (9th Cir. 1996); *United States v. Broncheau*, 597 F.2d 1260 (9th Cir. 1979), *cert denied*, 444 U.S. 859 (1979).

[96] For example, *see U.S. v. Rogers*, 45 U.S. 567 (1846) and *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Moreover, as stated, the courts of the United States acknowledge and defer to tribes' exclusive authority to determine their membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (providing historical analysis of tribe's right to determine membership and standing for proposition that tribes have absolute authority to define membership criteria); *Williams v. Gover*, 490 F.3d 785 (9th Cir. 2007) (holding that tribes have absolute and exclusive right to determine membership and that *federal bodies may not define tribal membership*) (emphasis added); *Martinez v. Southern Ute Tribe of the Southern Ute Reservation*, 249 F.2d 915, 920 (10th Cir. 1957) ("[A] tribe has the complete authority to determine *all* questions of membership") (emphasis added).

[97] There are also several federal civil statutes located at Title 25 of the United States Code that acknowledge "Indian" in a manner indicating that it is a special constitutionally-countenanced racial classification as discussed above, which became embodied in federal statutory law. *E.g.*, 25 U.S.C. § 482 (2011) (denying certain loans to persons "of less than one quarter Indian blood"); 25 U.S.C. §§ 261–4 (2011) (limiting non-Indians permitted to trade with Indians, but not limiting Indians trading with other Indians); 25 U.S.C. § 302 (2011) (placing Indian pupils in Reform School); Ute Partition and Termination Act ("UPA"), 25 U.S.C. §§ 677–677aa (2011) (dividing Ute Indians into classes based on blood quantum and providing separate and distinct rights to those classes). Interestingly, the UPA is a 1954 Act that required the Tribe's divisible assets—land, property, monies, and other assets—be distributed between "full-bloods" and "mixed-bloods," with other indivisible assets—such as gas, oil and mineral rights and unadjudicated or unliquidated claims—to be jointly managed. Under the UPA,

> the 'full-blood' group was comprised of those individuals with at least 'one half degree of Ute Indian blood and a total Indian blood in excess of one-half.' 25 U.S.C. § 677a(b) (2011). The 'mixed-blood' group was comprised of those individuals who either did not possess sufficient Ute Indian blood or other Indian blood to qualify as 'full-bloods' or who became a mixed-blood member by choice under section 677c after having been initially classified as a full-blood member. 25 U.S.C. §§ 677a(c), 677c.

Hackford v. Babbitt, 14 F.3d 1457, 1462 (10th Cir. 1994). The UPA also terminated federal supervision of the mixed-bloods, who had been disenrolled from the tribe. Under the UPA, the Secretary of the Interior then divided and distributed the Tribe's assets in 1961. Congress' act and the Secretary's actions explicitly distinguish Indians from non-Indians on the basis of race, endorse the tribe's actions, and illustrate the federal government's historical acceptance of race-based tests for Indian status.

[98] 436 U.S. 49 (1978).

Constitutional rights to Due Process and Equal Protection when the tribe classifies and discriminates against her (or him) based on her (or his) race as an Indian or her (or his) gender.[99] Moreover, the Court held that no federal cause of action is created nor federal remedy is available when a tribe classifies and discriminates against a person based on their race as an Indian or their gender.[100] As a practical effect of *Martinez,* tribes have exclusive jurisdiction to determine their membership. Moreover, after *Martinez*, a person's recourse for racial classification and discrimination based on this or gender is found with the tribe and not the federal courts.[101]

Historically, in the United States, Indian status was never constitutionalized. Indian tribes are mentioned similar to foreign nations in the Commerce Clause.[102] So, unlike in Canada, because Indians remained outside of the United States Constitutional framework, tribes retained their inherent sovereign authority to determine their membership, which largely determined Indian political status in the United States. Consequently, in the United States, Indian status was historically based on race. However, with *Morton v. Mancari*, the status changed in United States' law from a racial basis to a political status basis.[103] But this did not change tribes' exclusive and absolute authority to control political status as an Indian, because tribes decide who is or is not a member or citizen of their tribe; nor did this make federal courts more willing to interfere in disputes arising from these decisions (even if they were discriminatory). While the United States' law better reflects the inherent sovereignty of tribes, it has its externalities.

III. *Martinez* and *McIvor*—Sexual Discrimination Challenges With Contrasting Outcomes.

In *Santa Clara Pueblo v. Martinez,* the United States Supreme Court held that a female member of the Santa Clara Pueblo was unable to sue the tribe or its officers to enforce Title I of the

[99] *Martinez,* 436 U.S. at 55-62.
[100] *Martinez,* 436 U.S. at 59 n.9.
[101] *Martinez,* 436 U.S. at 71-72.
[102] U.S. CONST. art. I, § 8, cl.3
[103] *Morton*, 417 U.S. at 535, 553-54.

Indian Civil Rights Act ("ICRA") and its substantive provisions.[104] In *Martinez,* the issue surrounded the tribe's membership criteria that discriminated based on sex. The Supreme Court found that absent "unequivocal expression of contrary legislative intent…suits against the tribe under ICRA are barred by sovereign immunity from suit.[105] In a footnote, the court noted that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[106]

The United States Supreme Court also noted the lower court's reasoning that the people of the Santa Clara Pueblo should determine what "traditional values will promote cultural survival and should therefore be preserved."[107] Moreover, the Court noted that abrogating tribal decisions regarding membership would tend to destroy cultural Identity.[108] Accordingly, while the tribe's authority was acknowledged and acceded to, this offered no comfort to similarly situated Indian women in the United States.

In *McIvor v. Canada,* the Canadian federal government's criteria for Indian political status were challenged based on similar—but less direct—sexual discrimination grounds to those of *Martinez*. In *McIvor,* an Indian woman lost her Indian status and was determined to be ineligible for registration as an Indian under *the Indian Acts* after she married a non-Indian man.[109] Then, in 1985, *the 1985 Act* and *Bill C-31* entitled her to regain her Indian status—along with her children's Indian political status.[110] However, her grandchildren were not eligible for Indian status.[111] So she sued the Registrar and Attorney General of Canada to remedy this.

[104] *Martinez,* 436 U.S. at 69-71.
[105] *Martinez,* 436 U.S. at 59.
[106] *Martinez,* 436 U.S. at 72 n. 32.
[107] *Martinez,* 436 U.S. at 54.
[108] *Martinez,* 436 U.S. at 54.
[109] *McIvor* at ¶¶ 72-76.
[110] *McIvor* at ¶¶ 72-76.
[111] *McIvor* at ¶¶ 72-76.

The British Columbia Supreme Court held that the provisions of *the 1985 Act* continued to discriminate on the same basis they were intended to rectify.[112] The Supreme Court of British Columbia held that—because they result in discriminatory results in Indian status—the provisions of the *1985 Act* violate *the Charter*.. *The 1985 Act* extends the restoration of Indian status further on the paternal bloodline than on the maternal bloodline for those descendants born prior to April 17, 1985.[113] Unlike the Canadian Supreme Court's decision in the *Lavell* case 36 years earlier, the British Columbia Supreme Court held that this discriminatory impact was unacceptable.

In determining whether the discrimination was justifiable, the Supreme Court of British Columbia considered four contextual factors set out in other cases by the Supreme Court of Canada. Under Canadian common law, discriminatory provisions "must 1) pursue an objective that is sufficiently important to justify limiting a *Charter right,* 2) be rationally connected to the objective, 3) impair the right no more than is reasonably necessary to accomplish the objective, and 4) not have a disproportionately severe effect on the persons to whom it applies."[114]

The British Columbia Supreme Court held that pursuant to the fourth—disproportionality—factor, the discrimination in this case was arbitrary and based on irrational considerations. Moreover, the British Columbia Supreme Court held that the discrimination was unfair and not reasonably necessary.[115] Lastly, the British Columbia Supreme Court found that the harm was "not proportional to the salutary measure."[116]

However, unlike *Martinez*, the *McIvor* court did not challenge the band's enrollment criteria. Thus, the issue of inherent tribal sovereignty (and as well sovereign immunity) regarding the right of the band to determine membership and individual Indian political status was not directly at issue.

[112] *McIvor* at ¶192.
[113] *McIvor* at ¶225.
[114] *McIvor,* at ¶193, *citing R. v. Oakes, [1986] 1 S.C.R. 103.*
[115] *McIvor* at ¶223.
[116] *McIvor* at ¶225.

Instead, it was only the Canadian federal government's ability to discriminate when determining Indian political status that was held to be in violation of the *Charter*.

As discussed above, until 1985, the Canadian federal government controlled all band lists and the general list, which determined individuals' Indian political status. Canada's extensive history of determining Indian political status, and the historical relationship of band membership with this status, has rendered the two criteria indistinguishable in many instances—or at least indelibly linked. Therefore, Indian political status and band membership have historically been, are and will remain intertwined. This is logically true, even though the bands have assumed control of their membership. The *McIvor* case illustrates that Canadian federal law—unlike United States law—continues to determine Indian political status, yet allows for federal court remedies to counter invidious discrimination. Accordingly, the United States' law is more deferential to this component of tribal self-determination, but precludes federal courts from affording relief to persons who are (seemingly) unfairly or invidiously discriminated against.

Tribal enrollment and Indian status have been challenged on the basis of sexual discrimination in both Canada and the United States courts. In the late 1970s and 1980s, Canadian and United States federal courts came to similar outcomes—but by different legal means—in the *Lavell* and *Martinez* cases. However, Canada became a signatory to the ICCPR, and over time, the Canadian courts experienced a jurisprudential shift, which changed the country's legal outlook to protect individual rights against sexual discrimination. This shift is evidenced in the differing outcomes in the earlier *Lavell* case and the later *McIvor* case.

This latter result is considered by many to be more in-line with international standards than the legal outlook of the United States' federal courts and the outcomes in similar cases across the border. In Canada, the federal government's denial of Indian political status based on sex violates *the Charter* and is impermissible. Conversely, in the United States, a tribe's denial of membership based on sex does not create a federal cause of action nor federal remedy. While there is a clear

difference concerning who the defendant was—the federal government versus a tribe—in the cases this piece discusses, the relevant variable is the outcome for the plaintiffs—who were being invidiously discriminated against. In the later Canadian case, the sexual discrimination was resolved in a manner that protected the individual's rights; yet in the other United States case, the plaintiff remained subject to sexual discrimination. And in the latter case the plaintiff remained locked out of Indian political status pursuant to this discrimination. Substantive outcomes matter for the people whose lives they impact (and determine political status for). Accordingly, United States courts will not interfere with tribal determinations of political status,[117] and this is less in line with international notions of the proper protections of individuals' rights as expressed in the ICCPR. In Canada, Indian status is constitutionalized, which explains the Canadian courts' lack of reticence to involve themselves in Indian status matters, and the contrasting outcomes of the cases discussed. In the United States, the legacy of tribal self-determination regarding tribal membership pervades the federal courts' jurisprudence—even when this deference produces an outcome that is less than equitable by international standards.

[117] *Martinez*, 436 U.S. at 72; *see also Williams v. Gover*, 490 F.3d at 791.