# THE CANADIAN INDIAN FREE PASSAGE RIGHT: THE LAST STRONGHOLD OF EXPLICIT RACE RESTRICTION IN UNITED STATES IMMIGRATION LAW

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## I. INTRODUCTION

Peter Roberts had a problem. A Canadian citizen and a member of the Campbell River Band of Canadian Indians,[1] Roberts regularly crossed the United States-Canada border to visit his property in Point Roberts, Washington.[2] He had a "green card," and had been crossing the border since he was a young boy with his family to visit relatives on the Lummi Indian Reservation.[3] In 2007, however, immigration officials confiscated his green card and required him to appear in an immigration court.[4] The issue was whether he had enough Indian "blood" to cross the border as a Canadian Indian entitled to free passage into the United States.[5] Roberts has fair skin and curly hair inherited from his Ukrainian mother, but the facial features of his Indian father.[6] Roberts asserted that his physical appearance caused immigration officials to question his right to free passage.[7] Both American and Canadian press reports emphasized the curious racial aspect

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1. The author uses the term "Indian" as that is the term used in Canadian Law. Indians are one of three groups identified as aboriginal peoples in the Canadian Constitution. Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

2. Lornet Turnbull, *Canadian Indian Wonders Why U.S. Yanking Back Welcome Mat*, SEATTLE TIMES, Jan. 15, 2008, at A1.

3. *Id.*

4. Lornet Turnbull, *Immigration Case Hinges on Degree of Indian Blood*, SEATTLE TIMES, Jan. 19, 2008, at B3.

5. *Id.*; Terri Theodore, *Aboriginal Canadian Regains U.S. Green Card in Fight Over Native Status*, CNEWS, Mar. 26, 2008, *available at* http://cnews.canoe.ca/CNEWS/Canada/2008/03/26/5112206-cp html.

6. Turnbull, *supra* note 2, at A1.

7. Turnbull, *supra* note 4, at B3; Theodore, *supra* note 5.

of Roberts' situation.[8] How could it be that a person had to prove his racial ancestry in 2008?

Peter Roberts's situation is not unique, or academic. Canadian Indians have significant privileges under American immigration law.[9] They do not need an immigration visa to enter the United States.[10] They are lawful permanent residents simply by residing in the United States.[11] They cannot be deported for any reason.[12] They can work in the United States and can also receive public benefits under certain circumstances.[13] But there's a catch: these privileges apply only to "persons who possess at least 50 per centum of blood of the American Indian race."[14] Not all Canadian Indians are eligible; the privileges are restricted by the amount of a person's Indian ancestry.[15] That was Roberts' problem. According to attorneys for the United States, though he claimed one-half, that is 50%, Indian blood, his paternal grandmother identified her father as Irish in immigration documents, meaning his father was not a "full-blood" Indian, and Roberts therefore could not have 50% Indian blood.[16] Though ultimately the United States Citizenship and Immigration Services issued a green card under another category of eligibility,[17] Roberts's situation broadcasted the

8. Theodore, *supra* note 5; Turnbull, *supra* note 2, at A1.

9. *See generally* American Indian Law Alliance, Border Crossing Rights, *available at* http://www.ailanyc.org/bordercrossing%20memo.pdf (discussing the privileges of Canadian Indians). This publication is a guide issued by the American Indian Law Alliance, an organization located in New York City that advises Canadian Indians on border crossing issues. *Id.*

10. 22 C.F.R. § 42.1(f) (2006).

11. 8 C.F.R. § 289.2 (2006).

12. Matter of Yellowquill, 16 I. & N. Dec. 576, 578 (B.I.A. 1978).

13. *See* U.S. Dep't of Health & Human Servs., Admin. for Children and Families, Office of Family Assistance, Policy Announcement No. TANF-ACF-PA-2005-01 (Nov. 15, 2005) *available at* http://www.acf.hhs.gov/programs/ofa/policy/pa-ofa/2005/pa2005-1 htm (discussing the right of Canadian Indians to public benefits).

14. 8 U.S.C. § 1359 (2006).

15. Blood quantum is a metaphor to describe a person's ancestry. *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 1 (2006) [hereinafter Spruhan, *Legal History*]. The amount of Indian "blood" depends on the status of a person's ancestors. *Id.* Someone with an Indian father and a non-Indian mother has one-half Indian blood, while a person with one Indian grandmother, and three non-Indian grandparents has one-quarter Indian blood. *Id*. As discussed below, Canada does not require a threshold blood quantum to be recognized as Indian under Canadian law. *See infra* text accompanying notes 118-20.

16. Turnbull, *supra* note 4. Assuming Roberts's paternal grandmother had one-half Indian blood, and his paternal grandfather was a full-blood Indian, Roberts would have three-eighths Indian blood. *See* BUREAU OF INDIAN AFFAIRS, PHOENIX AREA OFFICE, TRIBAL ENROLLMENT 67 (1984) (chart to calculate Indian blood quantum). This assumes his mother has no Indian blood.

17. Theodore, *supra* note 5. The press article does not identify the other category federal immigration officials used to issue Roberts's green card. *Id.*

Canadian Indian issue to a wide audience,[18] and exposed the last explicit racial restriction in American immigration law.

Using Roberts' case as a starting point, this article reviews the tangled legal history of the Canadian Indian free passage right to answer the question why such a racial restriction continues to exist today.[19] Part II-A discusses the origins of Indians' free passage right in treaties between the United States and Great Britain, and a congressional statute passed in 1928. Part II-B, through an analysis of cases and administrative policies,[20] shows how officials struggled to define "Canadian Indian" under the 1928 act, conceptualizing Indian status at first as a "political" status defined by Canadian law and then as a "racial" status defined by American law. Part II-C then discusses the adoption of the blood quantum restriction as part of a comprehensive overhaul of American immigration law in 1952, and the apparent reasons for why Congress adopted a half-blood rule.

In section III, the article discusses problems arising after 1952 for Canadian Indians, like Peter Roberts, who must prove their amount of Indian blood to invoke their passage right. Section IV discusses the implications of the explicit racial restriction for federal Indian law and immigration law. It notes that both are premised on congressional "plenary power," historically outside constitutional review by the United States Supreme Court. It discusses how the Supreme Court, since the 1970s, has reviewed the constitutionality of Indian legislation under equal protection principles, but has not done so for immigration legislation premised on race.[21] Contrasting the current state of racial legislation under Congress's powers to legislate in Indian affairs with its power to legislate concerning immigration, the article suggests that the blood quantum restriction for Canadian Indian free passage may present an opportunity to distinguish definitions in federal Indian law that use blood quantum and to challenge prior precedent exempting immigration legislation from judicial scrutiny.[22]

18. Press reports of Roberts' case were posted on both immigration and Indian law blogs. *See* The Jay Treaty in U.S. Immigration Court, Turtle Talk Blog, Jan. 20, 2008, http://turtletalk.wordpress.com/2008/01/20/the-jay-treaty-in-us-immigration-court; Immigration Case Hinges on Indian (Native American) Blood, ImmigrationProf Blog, Jan. 19, 2008, http://lawprofessors.typepad.com/immigration/2008/01/immigration-cas html (describing Roberts' situation as "a fascinating immigration case").

19. *See* 8 U.S.C. § 1359 (2006).

20. The article discusses documents found in Immigration and Naturalization Service file no. 55873/734, held in the National Archives in Washington, D.C., Record Group 85, Entry 9, as well as Board of Review, Board of Immigration Appeals, and federal court decisions.

21. *See infra* notes 151-60 and 164-47 and accompanying text.

22. *See infra* notes 161-63 and 170-87 and accompanying text.

## II. BACKGROUND

### A. ORIGINS OF THE FREE PASSAGE RIGHT

The Canadian Indian free passage right is recognized in both treaties and statutory law. The Jay Treaty of 1794 between the United States and Great Britain recognizes the right of Indians to cross the border freely.[23] The specific language is:

> It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, *and also 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 on the Continent of America.[24]

After the War of 1812, the Treaty of Ghent between the two nations affirmed free passage by recognizing Indian rights existing prior to the war.[25] There is much debate whether the War of 1812 abrogated the Jay Treaty, and whether the Treaty of Ghent, absent implementing legislation, by itself reinstated the free passage right.[26] Indians today still invoke the Jay Treaty

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23. Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of their Senate (Jay Treaty), art. III, Nov. 19, 1794, 8 Stat. 116, *available at* http://avalon.law.yale.edu/18th_century/jay.asp#art3.

24. *Id.* (emphasis added). Interestingly, the free passage right is not restricted to Indians in the treaty. However, the United States Supreme Court held that the free passage right of non-Indian British citizens was abrogated by the War of 1812. *See* Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 240 (1929). The Court has never decided whether the Indian right was also abrogated.

25. Treaty of Peace and Amity between His Britannic Majesty and the United States of America (Treaty of Ghent), art. 9, December 24, 1814, 8 Stat. 218, 22-23, *available at* http://avalon.law.yale.edu/19th_century/ghent.asp. The specific language is:

> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith *to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities*.

*Id.* (emphasis added).

26. *See, e.g.,* Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 207-12 (2000) (arguing that the Jay Treaty and Treaty of Ghent obligate the United States to recognize the free passage right); William Di Iorio, *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, 413 (2007) (discussing recognition in the Jay Treaty and Treaty of Ghent and alleged infringement of such treaty rights in American and Canadian law); J. Tonra, Note, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L L. & COM. 221, 223-26 (2006) (discussing the Jay Treaty and Treaty of Ghent and their relationship to free passage rights); Bryan Nickels, Note, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313, 315 n.18,

as the source of their free passage right, and they assert exemptions from any limitations under American law, including the recent imposition of passport requirements under the Western Hemisphere Travel Initiative.[27] However, regardless of whether the treaty right remains viable or not, since 1928, American statutory law has allowed Indians to pass freely over the border.[28]

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338 (2001) (stating that the treaty right was abrogated and not reinstated, but arguing for recognition and preservation of free passage right "guaranteed" in Jay Treaty); Richard Osburn, Note, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 475-80 (2000) (discussing divergent holdings on survival of Jay Treaty and arguing Treaty of Ghent revived free passage right); Marcia Yablon-Zug, *Gone but not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*, 33 QUEEN'S L.J. 565, 573-76 (2007-2008) (arguing that the Jay Treaty was abrogated by the War of 1812, and that the Treaty of Ghent did not revive the right absent implementing legislation).

The United States Supreme Court ruled in a case not concerning the Indian free passage right that the War of 1812 abrogated the Jay Treaty. Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 240 (1929). Further, the Court of Customs and Patent Appeals ruled in a case concerning an alleged Canadian Indian exemption from duty for importing goods that the War of 1812 abrogated the Jay Treaty, and that the Treaty of Ghent did not revive the right, as it required implementing congressional legislation. United States v. Garrow, 88 F.2d 318, 322-23 (C.C.P.A. 1937).

27. *See* Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from within the Western Hemisphere, Final Rule and Notice, 73 Fed. Reg. 18,384 (April 3, 2008) (codified at 8 C.F.R. pt. 212, 235); Documents Required for Travelers Departing from or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, Final Rule, 71 Fed. Reg. 68,412 (Nov. 24, 2006) (codified at 8 C.F.R. pt. 22, 235). These new rules require a passport for all travelers to enter the United States from other Western Hemisphere countries, and the federal agencies in charge of promulgating the rules rejected Canadian Indian arguments that their free passage right exempted them from the requirement. Final Rule, Sea and Land Phase, 73 Fed. Reg. at 18,397 (Apr. 3, 2008) ("The Jay Treaty of 1794 and other treaties do not prevent the Department [ ] [of Homeland Security] from requiring documentary evidence of identity . . . from Native Americans and Canadian Indians."); Final Rule, Air Phase, 71 Fed. Reg. at 68,418 (Nov. 27, 2006) ("[A]ny right or privilege to 'pass the border' does not necessarily encompass a right to 'pass the border' without sufficient proof of identity and citizenship.").

For land and sea entries, the Department of Homeland Security might in the future accept Canadian federal government Indian identity cards (called "INAC" cards in the Final Rule) if they meet international document security standards, but currently requires passports for Canadian Indians to enter the United States. *See* 73 Fed. Reg. at 18,397, 18,397-98 (Apr. 3, 2008). Canadian Indian band documents, however, will not be accepted. *See id.*

28. *See* Act of April 2, 1928, ch. 308, 45 Stat. 401, 401 (codified as amended at 8 U.S.C. § 1359 (2006)). Interestingly, the report of the House Committee on Immigration and Naturalization on the 1928 act references both the Jay Treaty and the Treaty of Ghent, and states that Canadian Indians "are not asking to be admitted to citizenship, but that the rights secured to them by these treaties and taken away by the immigration act of 1924 be restored to them." H.R. REP. 70-1017, at 2 (1928). Representative MacGregor also mentioned the Jay Treaty when discussing the 1928 bill on the House floor. *See* 69 CONG. REC. 5582 (Mar. 29, 1928). A federal district court later concluded that the language in the 1928 act "to pass the borders of the United States," see 8 U.S.C. § 1359, was intended to track the language of the Jay Treaty. *See* Akins v. Saxbe, 380 F. Supp. 1210, 1220-21 (D. Maine 1974). One scholar argues that the statutory right is actually broader than the treaty right, in that it allows all Indians in Canada, not just those with historical connections to the border, to pass freely into the United States. *See* Yablon-Zug, *supra* note 26, at 604.

Why did Congress feel it necessary to pass a statute? Prior to 1924, Canadian Indians passed back and forth over the border with no trouble.[29] American officials sought to block non-Canadian aliens' entry into the United States through inspections at ports-of-entry and agreements with shipping companies, but Canadians had little trouble entering the United States.[30] Canadian Indians visited relatives in American tribes, worked as construction workers and seasonal agricultural workers, and otherwise crossed back and forth without incident.[31]

All this changed in 1924, as an act of Congress threatened Canadian Indians' traditional ability to cross freely into the United States. The act tied the right to enter the United States to the right to naturalize as a citizen, declaring that a person ineligible for naturalization could not immigrate.[32] This rule had a transparently racial intent, as only whites and "persons of African descent," i.e. blacks, could be naturalized.[33] The purpose of the restriction was to bar Japanese immigration.[34] Prior laws barred other Asians from immigrating to the United States, and the 1924 provision intended to extend this prohibition to Japanese immigrants as well.[35] Though targeting Asian immigration, immigration officials applied the restriction to Canadian Indians.[36] As neither white nor black, they were ineligible for naturalization and therefore ineligible for immigration under the 1924 act.[37] Based on the act, immigration officials attempted to exclude or deport Canadian Indians.[38]

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29. *See* Marian Smith, *The INS and the Singular Status of North American Indians*, 21 AM. IND. CULT. AND RES. J. 131, 136 (1997).

30. *See* Marian Smith, *The Immigration and Naturalization Service (INS) at the U.S.-Canadian Border, 1893-1993: An Overview of Issues and Topics*, 26 MICH. HIST. REV. 127, 129-132 (2000) (discussing American attempts to enforce immigration restrictions at Canadian border).

31. Smith, *supra* note 29, at 136.

32. Act of May 26, 1924, ch. 190, sec. 13(c), 43 Stat. 153, 162 (repealed 1952).

33. *See* Act of July 14, 1870, ch. CCLIV, sec. 7, 16 Stat. 254, 256 (codified as amended at 8 U.S.C. § 1422) (extending naturalization to "aliens of African nativity and to persons of African descent"); Act of March 26, 1790, chap. III, sec. 1, Stat. 103 (repealed 1795) (limiting naturalization to "any alien, being a free white person").

34. MAE NGAI, IMPOSSIBLE SUBJECTS 37, 38-49 (2004) (discussing the forces behind Japanese exclusion).

35. *Id.* at 37.

36. Smith, *supra* note 29, at 136.

37. *Id.*; H.R. REP. NO. 70-1017, at 1 (1928) (stating that Canadian Indians were ineligible for naturalization and that the Department of Labor "deemed it its duty in the enforcement of the law to exclude them"). Curiously, Congress in the same year declared American Indians citizens of the United States. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253, 253 (codified at 8 U.S.C. § 1401(b) (2006)).

38. Smith, *supra* note 29, at 136; United States *ex rel.* Diabo v. McCandless, 18 F.2d 282, 282 (E.D. Pa. 1927) (concerning habeas corpus petition of Mohawk Canadian Indian challenging deportation).

There were two separate responses to the attempted exclusion of Canadian Indians: (1) a successful court challenge by a Canadian Mohawk Indian, and (2) congressional legislation to exempt Canadian Indians from the 1924 act. Paul Diabo, an iron worker in Philadelphia, and a Mohawk Indian from Quebec, challenged the exclusion policy, arguing for his right to remain in the United States.[39] The district court concluded that Diabo could not be deported, ruling that the aboriginal right, whether or not the Jay Treaty survived the War of 1812, allowed his free passage.[40] The Third Circuit affirmed the district court's judgment, but relied on the Jay Treaty and the Treaty of Ghent to justify Diabo's free passage.[41] Concurrently, Congress exempted Canadian Indians from the bar on immigration, passing a law that stated: "[T]he 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: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption."[42] Legislative history of the act shows that members of Congress were aware of Diabo's litigation, and believed that they had never intended the racial bar on immigration to apply to the traditional crossing of Canadian Indians.[43] They therefore believed it necessary to clarify that Indians remained able to pass freely into the United States to visit relatives or for other purposes.[44]

### B. IMPLEMENTATION OF THE 1928 ACT

In its haste to protect Canadian Indians from deportation and exclusion, Congress neglected to include one important element in its legislation: a definition of "Indian." The Act did exclude persons "whose membership in

39. *See generally Diabo*, 18 F.2d at 282; Gerald Reid, *Illegal Alien?: The Immigration Case of Mohawk Ironworker Paul K. Diabo*, 151 PROC. OF THE AM. PHIL. SOC'Y 61 (2007) (discussing Diabo and the circumstances surrounding his case).

40. *Diabo*, 18 F.2d at 283.

41. McCandless v. United States *ex rel.* Diabo, 25 F.2d 71, 72-73 (3d Cir. 1928). The Solicitor General declined to seek review of the Diabo decision by the United States Supreme Court, stating his view in a memorandum that there was "substantial ground" for believing the Jay Treaty and the Treaty of Ghent protected Indians' free passage right. Memorandum by the Solicitor Gen., In re John McCandless, Comm'r of Immigration at Phila. v. Paul Diabo, at 1-2, June 1, 1928 (on file with author). Further, the passage of the free passage statute bolstered his conclusion that Canadian Indians had a right to free passage and were a "special case" distinguishable from non-Indian immigration. *Id.* at 4-5. The Solicitor General drafted the memorandum before the United States Supreme Court ruled that the non-Indian right in the Jay Treaty was abrogated by the War of 1812. *See* Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 241 (1929).

42. Act of April 2, 1928, ch. 308, 45 Stat. 401, 401 (codified as amended at 8 U.S.C. § 1359 (2006)).

43. *See* 69 CONG. REC. 5581-82 (Mar. 29, 1928) (statement of Representative MacGregor); H.R. REP. NO. 70-1017 (1928); S. REP. NO. 70-568 (1928).

44. *See* 69 CONG. REC. 5581-82 (Mar. 29, 1928) (statement of Representative MacGregor).

Indian tribes or families [was] created by adoption," but otherwise did not define who was included.[45] In the case of Canadian Indian free passage, Congress left the question to the Immigration and Naturalization Service and the Board of Immigration Appeals within the Department of Justice to determine administratively when presented with alleged Indians seeking to cross the border or to remain in the United States.[46]

Officials in both entities faced a dilemma: should they follow Canadian law when defining "Indian," or should they apply an American standard within federal Indian law or naturalization law?[47] As the act referred to Canadian Indians, perhaps federal officials should have deferred to Canada's definition as a matter of respect to that sovereign's laws. On the other hand, federal law provided several ways to define American Indian,[48] and it might have made sense to follow one of these pre-existing and familiar definitions. Importantly, in a distinction familiar to modern observers of federal Indian law, federal officials and judges articulated the question as whether the term Indian was considered "political" or "ethnological" (i.e. "racial").[49]

Initially, the Board of Immigration Appeals and the INS concluded that Indian was a political status defined by Canada's Indian Act. The cases

45. Act of April 2, 1928, ch. 308, 45 Stat. at 401. This was not the first time Congress legislated concerning Indians but failed to define the intended group. Several important statutes dealing with criminal jurisdiction on American Indian lands established federal authority over crimes committed by "Indians," but the definition of the term was left to courts to figure out. *See* Act of March 3, 1885, ch. 341, sec. 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2006)) (extending federal criminal jurisdiction over "major crimes" committed by "Indians"); Act of June 30, 1834, ch. 161, sec. 25, 4 Stat. 729, 733 (codified as amended at 18 U.S.C. § 1152 (2006)) (extending criminal jurisdiction over crimes committed in Indian Country, but exempting crimes committed by an "Indian" against another "Indian"); United States v. Rogers, 45 U.S. (4 How.) 567, 567-68, 571 (1846) (discussing how a white man who was a naturalized citizen of the Cherokee Nation was not an "Indian"). The ambiguity in the meaning of "Indian" in these criminal statutes remains more than a century later, as Congress has not clarified the definition. *See generally* Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 230 (2006).

46. *See In re* B-----, 3 I. & N. Dec. 191, 192 (B.I.A. 1948); *In re* S-----, 1 I. & N. Dec. 309, 310-11 (B.I.A. 1942); *In re* Mueller, Board of Review Memorandum Decision, June 21, 1939 (on file with author).

47. *See In re B*-----, 3 I. & N. Dec. at 192; *In re S*-----, 1 I. & N. Dec. at 310-11.

48. *See, e.g.*, Act of June 18, 1934, ch. 576, sec. 19, 48 Stat. 984, 988 (codified at 25 U.S.C. § 479 (2000)) (defining Indian as, among other definitions, a person of one-half or more Indian blood). For a discussion of the half-blood definition in the IRA, see Paul Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27, 27-49 (2006) [hereinafter Spruhan, *Indian as Race*]. For a general description of various definitions of Indian during this time period, see generally Spruhan, *Legal History*, *supra* note 15.

49. *See* United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660, 663 (W.D.N.Y. 1947); *In re B*-----, 3 I. & N. Dec. at 192; *In re S*-----, 1 I. & N. Dec. at 310-11; *see infra* notes 150-60 and accompanying text (discussing the current debate in federal Indian law regarding the classification).

presented to the Board concerned white women who had married Indian men, Indian women who had married white men, and Indians of mixed blood.[50] Unlike American law, which defined "Indian" in different ways in specific legislation,[51] Canada defined "Indian" in one general statute, the Indian Act.[52] Interestingly, "Indian" was defined at the time by race and gender, as Indian women who married non-Indian men lost their Indian status.[53] A child born from such marriage also was not an Indian under the act.[54] However, a non-Indian woman gained Indian status upon her marriage to an Indian man.[55] A child born from such marriage also was an Indian.[56] Further, the Indian Act included the concept of "enfranchisement," in which certain Indians voluntarily or involuntarily became Canadian citizens, and ceased to be recognized as Indian under Canadian law.[57] American law had no analogous definition[58] and federal officials struggled with accepting Canada's construction of Indian status.

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50. *E.g. In re* B-----, 3 I. & N. Dec. 191, 191; *In re* S-----, 1 I. & N. Dec. 309, 310; *In re* Mueller, Board of Review Memorandum Decision, June 21, 1939 (on file with author) (concerning an Indian woman of one-half Indian blood). The Board of Review became the Board of Immigration Appeals after its transfer to the Department of Justice in the 1940s. U.S. Immigration and Naturalization Service—Populating a Nation: A History of Immigration and Naturalization, http://www.cbp.gov/xp/cgov/about/history/ins_history xml (last visited Oct. 20, 2009).

51. *See supra* note 48.

52. Indian Act, R.S.C. 1927, Ch. 98, *reprinted in* SHARON HELEN VENNE, *Indian Acts and Amendments* 1868-1975 *in* AN INDEXED COLLECTION 244 (1981) [hereinafter Indian Act]. The 1927 Act in effect at the time of the 1928 free passage statute is an amended version of the original Indian Act. *See generally* Indian Act, *supra* note 52 (collecting and indexing the Indian Act and amendments).

53. Indian Act § 14. The gender rule became part of the Indian Act in 1876. *See* Indian Act, April 12, 1876, S.C. 1876, ch. 18, § 3(3)(c), *reprinted in* Indian Act, *supra* note 52, at 24-25. There are several explanations for the rule. An official Canadian government publication states that Canadian officials sought to prevent white men from acquiring Indian property through their marriage to Indian women. 4 Report of the Royal Commission on Aboriginal Peoples, Chapter 2, Part 3.1 (1996), *available at* www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e html. This does not explain, however, why non-Indian women acquired Indian status under the Indian Act. *See infra,* text accompanying note 55. A recent opinion of the British Columbia Supreme Court suggests that the rule was consistent with western legal thought at the time that a woman lost her separate legal identity upon marriage and took on the status of her husband. McIvor v. The Registrar, Indian and Northern Affairs Canada, [2007] B.C.S.C. 827, slip op. at 9.

54. Indian Act § 2(d) (defining "Indian" as the child of an Indian man).

55. *Id*.

56. *Id.*

57. *Id.* §§ 111-14; *see* BRIAN A. CRANE ET AL., FIRST NATIONS GOVERNANCE LAW 131-33 (2006) (discussing enfranchisement under Canadian law). Indians involuntarily enfranchised included for a time those who graduated from a university, became a lawyer, entered holy orders, or became ministers. *Id.* at 133. Importantly, the 1927 Indian Act stated that an Indian woman and her minor children would be enfranchised automatically upon enfranchisement of her Indian husband, unless the wife was "living apart" from her husband. Indian Act §§ 110(5), 110(13), 114.

58. Congress did pass a statute in the late nineteenth century addressing the status of non-Indian men married to Indian women, and Indian women married to those men. One provision of the statute barred a non-Indian husband, not otherwise a member of an Indian tribe, from any right to tribal property. Act of August 9, 1888, ch. 818, sec. 1, 25 Stat. 392, 392 (codified at 25 U.S.C.

After several inconsistent policy decisions by federal officials,[59] the Board of Immigration Appeals adopted the Indian Act's definition in 1942.[60] *In re S----*[61] concerned several white women married to Canadian Indian men who claimed the right to cross the border as "Indians" under the 1928 free passage law.[62] The Board ruled that the INS should follow the Canadian definition, and therefore white wives of Indian men were Indians entitled to free passage.[63] It distinguished between Indian status by marriage and by adoption, and concluded that the 1928 act's exclusion of adopted Indians did not apply to non-Indian wives.[64] The Board noted the Indian Act's "comprehensiveness," and assumed "that is acceptable to the Indians as a recognition of their tribal customs and way of life," as, "[a]pparently its only change from traditionally [sic] Indian life is its assimilation of tribal life to a patriarchal basis."[65] The Board further concluded that an Indian woman who lost her Indian status through marriage to a non-Indian lost her right to free passage, rejecting a prior decision by another tribunal that such outcome was "absurd and ridiculous and inconsistent with the legislative intent [of the 1928 act]."[66] Though INS officials at first balked at the decision and sought reversal by the Attorney General,[67] they later accepted it and applied it, allowing only people who

§ 181 (2000)). Another declared that an Indian woman who married an American citizen became a citizen of the United States upon her marriage. *Id.* § 2. However, unlike Canadian law, her marriage and resulting citizenship did not preclude her Indian status. *See id.* (stating that marriage and citizenship did not impair an Indian woman's right to tribal property); United States v. Nice, 241 U.S. 591, 598 (1915) (stating that citizenship and Indian status are not incompatible, and that a person may be an American citizen and remain under federal jurisdiction as an Indian). Though Congress granted citizenship to various Indians in piecemeal legislation and then to all Indians in 1924, see Act of June 2, 1924, ch. 233, 43 Stat. 253, 253, citizenship was not inconsistent with Indian status. *See Nice*, 241 U.S. at 598. Further, Congress never recognized non-Indian wives as entitled to Indian status. Federal immigration and naturalization law for a time revoked United States citizenship from women who married non-citizen men. *See generally* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship through Marriage*, 53 UCLA L. REV. 405 (2005). However, Congress repealed that law in various acts between 1922 and 1936. *Id.* at 430-448.

59. *See In re* S----, 1 I. & N. Dec. 309, 310-12 (B.I.A. 1942) (discussing various positions taken by different officials up to 1942).

60. *Id.* at 312-13.

61. 1 I. & N. 309 (B.I.A. 1942).

62. *In re S----*, 1 I. & N. at 309.

63. *Id.* at 312-13.

64. *Id.* at 311.

65. *Id.* at 312.

66. *Id.*

67. Draft Memorandum of Commissioner Earl G. Harrison to Attorney General, October 14, 1942 (on file with author). Commissioner Harrison planned to send this memorandum to the attorney general, which laid out his objections to the *S-----* decision, including that the ruling denied Indian women who married non-Indian men. *Id.* at 3. The memorandum stated that the Board failed to appreciate that, under its decision, a child of an Indian mother and a non-Indian father could not cross the border, an outcome "not consonant with the spirit of the 1928 Act." *Id.* Albert

fulfilled the political definition in the Indian Act the special privileges of free passage.[68] Consistent with the Indian Act, enfranchised Indians were also barred from exercising the free passage right.[69]

The administrative definition changed after the federal district court for the Western District of New York ruled in *United States ex rel. Goodwin v. Karnuth*[70] that the term "Indian" in the 1928 act had a "racial connotation."[71] Not coincidentally, the case concerned a full-blooded Indian woman who had lost her Indian status by marriage to a white man.[72] The reasoning for the conclusion that the term "Indian" was racial is vague, but the court claimed it was applying "the common understanding" and "the popular or received import" of the term "Indian."[73] It appears the court was disturbed by the potential outcome that a full-blooded Indian woman would be denied passage based on the peculiarities of Canadian law.[74] The court specifically rejected the application of the Indian Act, noting only that Goodwin had not been enfranchised by her marriage.[75] After that case, the Board

Reitzel, Acting General Counsel for INS, apparently convinced the commissioner not to submit the memorandum, based on Reitzel's analysis that non-Indian wives had the right to enter the United States with their Canadian Indian husbands whether or not they were "Indians" under the 1928 act. Memorandum for the Commissioner from Albert E. Reitzel, Acting General Counsel, INS, 1-2, Dec. 16, 1942 (on file with author). Reitzel analogized non-Indian wives to wives of Chinese merchants, who the United States Supreme Court ruled were able to immigrate with their husbands under a treaty between China and the United States. *Id.* (citing Cheung Sum She v. United States, 268 U.S. 336, 345-46 (1925) and United States v. Gue Lim, 176 U.S. 459, 468 (1900)).

68. Interpretation No. 20 to the INS: Classes of American Indians Born in Canada Entitled to Admission to the United States Without Inspection under the Immigration Laws, March 1, 1943 (on file with author) (stating that the INS would follow the Canadian Indian Act definition of Indian for free passage purposes); Letter of T.B. Shoemaker to District Director, Seattle, Mar. 19, 1943 (on file with author) (discussing the situation of Canadian Indian women married to Filipinos and living in United States and concluding they lost Indian status under Canadian law); Memorandum of Commissioner Earl G. Harrison, Commissioner, to A.C. Devaney, Dec. 24, 1942 (stating that INS would follow the *S*---- decision and the Canadian Indian Act). The INS did allow Indian women who lost their status through marriage and lived in the United States to acquire alien border crossing cards by classifying them as lawful permanent residents. *See* Smith, *supra* note 29, at 146-47.

69. Instruction No. 20, *supra* note 68. Even before the *S*---- case, INS had taken the position that enfranchised Indians were ineligible under the 1928 act. Letter of Edward J. Shaughnessy to Secretary of State, July 17, 1939 (on file with author); Letter of A. R. Archibald to District Director of Immigration and Naturalization, Detroit, Nov. 28, 1933 (on file with author). In a letter to the Secretary of State in 1934, an INS official took the position that no threshold blood quantum was necessary for Canadian Indians to invoke the free passage right under the 1928 act, but an enfranchised Indian was ineligible, and had to have less than one-half Indian blood for entry into the United States due to the racial exclusion of Canadian Indians under the 1924 immigration act. Letter of Edward J. Shaughnessy to Secretary of State, Nov. 9, 1934 (on file with author).

70. 74 F. Supp. 660 (W.D.N.Y. 1947).

71. *Karnuth*, 74 F. Supp. at 663.

72. *Id.* at 660.

73. *Id.* at 662-63.

74. *See Id.*

75. *Id.*

of Immigration Appeals changed its view, concluding that Indian was a racial status under the 1928 act, and therefore anyone who was racially Indian was allowed free passage regardless of Indian status under Canadian law.[76] However, the INS's internal policies still allowed white wives free passage with their Indian husbands, despite not being racially Indian.[77]

But who was a "racial" Indian? In the case of a person of mixed ancestry, was a certain quantum of Indian blood necessary to be recognized as an Indian to pass freely over the border? Both federal Indian law and naturalization law previously applied blood quantum, that is, fractional amounts of ancestry, to define the status of "mixed-bloods" as Indian, black, Asian, or white for various purposes.[78] Blood quantum was especially common in Indian law, as the federal government adopted the preexisting colonial concept of setting a threshold amount of Indian blood to define Indian status.[79] Importantly, federal cases defining naturalization rights applied one-half blood to define whether a person was a "free white person" or a "person of African descent," and therefore eligible to become a naturalized citizen.[80] As previously discussed, Canadian Indians were ineligible for naturalization because they were racially not white or black.[81] Two cases concerned the effect of Indian blood. *In re Camille*[82] concerned a Canadian man of one-half Indian blood.[83] The court concluded he was not white due to his amount of Indian blood and therefore could not naturalize.[84] *In re Cruz*[85] concerned a woman who was three-quarters Indian and one quarter black.[86] The court stated that a person had to have an "affirmative quantity" of "African descent," to be eligible for natur-

76. *See In re* B-----, 3 I. & N. Dec. 191, 192 (B.I.A. 1948).

77. *See* Letter of Argyle Mackey, Commissioner, to L.H. LaVigne, Aug. 9, 1951 (on file with author) (stating that the INS still allowed non-Indian wives to enter with their Indian husbands despite racial definition of "Indian").

78. *See generally* Spruhan, *Legal History*, *supra* note 15; *see also* IAN HANEY LÓPEZ, WHITE BY LAW 46, 59, 160-61 (1996).

79. *See* Spruhan, *Legal History*, *supra* note 15, at 8.

80. *See, e.g., In re* Cruz, 23 F. Supp. 774, 775 (E.D.N.Y. 1938) (holding that a person three-quarters Indian and one-quarter black was not eligible for naturalization); *In re* Rallos, 241 F. 686, 686 (E.D.N.Y. 1917) (holding a half-Filipino, half-Spaniard person not eligible); *In re* Young, 198 F. 715, 716 (W.D. Wash. 1912) (holding a half-Japanese, half-German person not eligible); *In re* Knight, 171 F. 299, 300-01 (E.D.N.Y. 1909) (holding a half-English, quarter-Chinese, and quarter-Japanese person not eligible); *In re* Camille, 6 F. 256, 258-59 (D. Or. 1880) (holding a half-white, half-Canadian Indian person not eligible).

81. *See supra* note 37 and accompanying text.

82. 6 F. 256 (D. Or. 1880).

83. *Camille*, 6 F. at 257.

84. *Id.* at 258-59.

85. 23 F. Supp. 774 (E.D.N.Y. 1938).

86. *Cruz*, 23 F. Supp. at 775.

alization; a person of one-half Indian ancestry was ineligible.[87] In 1934, an immigration official similarly opined to the secretary of state that a Canadian mixed-blood who was enfranchised under Canadian law had to have less than one-half "ineligible blood" (Indian blood) to immigrate, based on the racial exclusion.[88]

Congress lifted the racial exclusion for Canadian Indian naturalization in 1940.[89] Once Indians became racially eligible for naturalization, an interesting result occurred. In 1946, Congress mandated that a person had to have a "preponderance" of blood from the Indian, white, black, or Filipino race, or a preponderance of blood from a combination of such bloods to be naturalized.[90] In a confusing construct, Congress defined naturalization eligibility by requiring more than one-half eligible blood, either from a single eligible race or through a combination of several eligible races.[91] This meant a person who was half-Indian and half-Japanese, for instance, was ineligible, but a person three-quarters Indian and one-quarter Japanese was eligible. It was essentially the same rule as the one applied in the case law discussed above; one-half eligible and one-half ineligible blood meant a person was ineligible. However, Indians were now part of the eligible club, and only those with more than one-half Indian blood could naturalize if the other blood came from an "ineligible" race.

The Board of Immigration Appeals considered the question of mixed-blood in *In re M----*[92], holding that a person of one-half Indian blood was not an "Indian" under the free passage statute.[93] The reasoning was again vague, but the Board rejected federal Indian law definitions of Indian that included half-bloods, and the naturalization cases like *Camille* that applied a half-blood rule; instead a person was required to have a preponderance of

87. *Id.*

88. Letter of Edward J. Shaughnessy, *supra* note 69, at 2. In this letter, Deputy Commissioner Shaughnessy answered a request from the Secretary of State for an opinion on "the percentage of Indian blood necessary to bring an alien within the terms of the [1928 act]." *Id.* at 1. Shaughnessy replied that no threshold quantum was necessary for Indians who had not been enfranchised. *Id.* at 2. However, citing *Camille*, he opined that an enfranchised Indian must have less than one-half Indian blood to be eligible for immigration. *Id.*

89. Act of October 14, 1940, ch. 876, sec. 303, 54 Stat. 1137, 1140. The act granted the right to naturalize to "descendants of races indigenous to the Western Hemisphere." *Id.* This included Indians from Canada and throughout the Americas.

90. Act of July 2, 1946, ch. 534, sec. 1, 60 Stat. 416, 416. Also included were "descendants of races indigenous" to islands adjacent to North and South America. *Id.* The act separately allowed Chinese and "persons of races indigenous to India" to naturalize. *Id.* Curiously, the act included in such eligible groups persons possessing a preponderance of Chinese blood or blood of the races of India, but also separately included persons with one-half such blood and "some additional" white, black, Indian (that is, Native American), "adjacent islander," or Filipino blood. *Id.*

91. *Id.*

92. 4 I. & N. Dec. 458 (B.I.A. 1951).

93. *Id.* at 460.

Indian blood.[94] Though similar to the definition in the 1946 statute discussed above, the Board did not cite the statute for the preponderance rule.[95] Regardless, in a reversal of its prior approach, the Board found that a child of a full-blood Canadian Indian and a non-Indian was not an "Indian," regardless of whether he or she had Indian status under Canadian law.[96]

### C. PASSAGE OF THE 1952 REVISION

The 1952 revision to the free passage statute completed the shift from a political definition of Indian to a racial one, by requiring fifty percent or more blood of the "American Indian race."[97] The revision was part of a comprehensive overhaul of immigration and naturalization law through the McCarran-Walter Act, also known as the Immigration and Naturalization Act of 1952.[98] The most important changes for our purposes were the elimination of racial barriers to naturalization, and the lifting of the bar on Asian immigration.[99] Instead of a racial bar, citizens of Asian countries shared in a national quota system, by which the number of immigrants from each nation was capped at a certain limit.[100] Though the act was touted as an elimination of racial distinctions in immigration and naturalization,[101] the addition of a blood quantum requirement for Canadian Indians actually enshrined a racial conception of the free passage right.[102]

Why did Congress define the free passage right by blood quantum? The legislative history of the act sheds no light on the issue. Committee reports do not discuss Canadian Indian free passage rights in any detail.[103]

94. *Id.* Though unstated, it might be that the Board felt that a person who is one-half Indian and one-half white technically belonged to neither race, and therefore could not be considered Indian. *See In re* Knight, 171 F. 299, 301 (E.D.N.Y. 1909).

95. *In re* M----, 4 I. & N. Dec. 458, 458-59 (B.I.A. 1951). The subject of the *M*----- case was half-Indian and half-white. *Id.* With that ancestry, he would have been eligible for naturalization, and therefore immigration, as the combination of Indian and white blood would fulfill the "preponderance" test set out in the naturalization provision. *See supra* notes 89-91 and accompanying text. *M*---- was already in the United States, and invoked the free passage right to avoid deportation for the lack of an immigration visa. *In re M*----, 4 I & N. Dec. at 458.

96. *In re M*----, 4 I & N. Dec. at 458.

97. Act of June 27, 1952, ch. 477, sec. 289, 66 Stat. 234 (codified at 8 U.S.C. § 1359 (2006)).

98. *Id.*; *see also* H.R. REP. NO. 1365, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1653.

99. Act of June 27, 1952, ch. 1, sec. 201-202, 66 Stat. at 175-78.

100. *Id.* However, the act attributed persons of one-half Asian descent to the quota of the Asian country, regardless of whether they we born or lived in that country or not. *Id.* § 202(b), 66 Stat. at 177. *See infra* text accompany notes 110-11.

101. H.R. REP. 1365, *reprinted in* 1952 U.S.C.C.A.N at 1679-80.

102. Act of June 27, 1952, ch. 9, § 289.

103. *See* H.R. Rep. 1365, *reprinted in* 1952 U.S.C.C.A.N at 1725 (skipping over the Canadian Indian provision in a section-by-section discussion of the bill); General Counsel Opinion No. 3-54, Admissibility to the United States under Section 289 of the Immigration and Nationality Act

Indeed, two years after the act, the INS's general counsel stated that he had no idea why the blood quantum requirement was added.[104] Later administrative officials and scholars have asserted different theories. An INS official suggested in a 1993 opinion that "there probably was a perception in 1952 . . . that a blood quantum needed to be set at some amount or degree to exclude those whose Indian ancestry was diluted by generations of intermarriage."[105] Sharon O'Brien suggests that the definition was adapted from the 1934 Indian Reorganization Act, which includes one-half Indian blood as one of three alternative categories of Indians subject to the act.[106]

It is likely that the definition came from the pre-existing half-blood definition in immigration and naturalization law. As discussed above, courts defining "white" and "black" for naturalization applied a half-blood standard, barring mixed-bloods with one-half Indian blood.[107] Technically, the courts did not conclude that such persons were Indian, as they were only concerned with whether persons were white or black, and therefore eligible for naturalization.[108] However, as discussed above, Congress also set the line for naturalization eligibility at one-half.[109] Further, the half-blood rule appears in another section of the 1952 act, concerning quotas for persons of Asian descent.[110] Though national immigration quotas generally applied to a nation, and not to a race, the act stated that all those of one-half Asian ancestry, wherever they were born or may reside, would be counted towards Asian nations' overall quota.[111]

The half-blood rule was also consistent with the racial conception of Indian status applied by the INS and the Board of Immigration Appeals

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of Certain Non-Indian Wives of Canadian-Born American Indians, at 7-8 (1954) (on file with author) (noting lack of discussion in legislative history of the act).

104. General Counsel Opinion No. 3-54, *supra*, note 103. INS's general counsel suggested that the congressional committees that drafted the act were aware of *Goodwin*, see *supra* notes 64-68 and accompanying text, and therefore considered Indian to be a racial group, adding only that a person had to have 50% or more Indian blood. *Id.* at 8. The direct question the general counsel answered was whether non-Indian wives could still cross the border freely due to their marriage to Canadian Indian men. *Id.* at 1. In another significant shift from prior policy, see *supra* text accompanying note 77, the general counsel opined that they were not eligible for free passage, as Congress clearly restricted the right in the 1952 revision to those possessing one-half or more Indian blood. *Id.* at 8.

105. INS General Counsel Opinion No. 93-65 n.3 (Aug. 27, 1993).

106. *See* Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 328 (1984); Act of June 18, 1934, ch. 576, sec. 19, 48 Stat. 984, 988 (codified at 25 U.S.C. § 479 (2000)); Spruhan, *Indian as Race*, *supra* note 48, at 29 (discussing half-blood component of IRA definition).

107. *See supra* notes 80-88 and accompanying text.

108. *See id.*

109. *See supra* notes 90-91 and accompanying text.

110. Act of June 27, 1952, sec. 202(b), 66 Stat. 175, 177 (repealed 1965).

111. *Id.*

discussed above. The only difference was the amount of Indian blood considered necessary to be racially Indian.[112] Interestingly, in 1945, an immigration official in charge of the St. Albans, Vermont, INS office proposed the very definition Congress adopted in 1952: 50% or more Indian blood regardless of whether the person was considered Indian under Canadian law.[113] Whether directly adopted or not, Congress applied the same conception; Indian was a racial status, and the Indian race was defined as having one-half or more Indian blood.[114]

The racial definition of Indian status for free passage remains to this day.[115] All other overtly racial definitions in immigration law have been eliminated, including the inclusion of persons of one-half or more Asian blood in Asian national quotas.[116] As the United States generally has moved beyond direct invocations of race in its immigration law, the free passage provision is truly anomalous.[117]

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112. INS's general counsel suggested in 1954 that Congress rejected the Board of Immigration Appeals' view in the *M----* opinion that a person had to have more than one-half Indian blood, but agreed with the underlying premise that Indian was a racial status. *See* General Counsel Opinion No. 3-54, *supra* note 103, at 8.

113. Memorandum from H.R. Landis, Dist. Dir., St. Albans, Vt., to the Comm'r of Phila., Pa. (May 19, 1945) (on file with author). Landis suggested that definition after consulting with Canadian officials. Letter from H.R. Landis Dist. Dir., St. Albans, Vt., to A.L. Jolliffe, Dir. of Immigration, Dep't of Mines and Resources, Ottawa, Ontario, Canada (May 8, 1945) (on file with author). Landis asked, among other things, what percentage of Indian blood was required under the Indian Act. *Id.* The acting director of the Indian Affairs Branch of the Canadian Department of Mines and Resources replied that there was no specific percentage required, and stated that "[t]he Act includes a half-breed and quarter-breed, or even lesser breed, providing there is Indian blood in the male line." Letter from Acting Dir., Indian Affairs Branch, Dept. of Mines and Resources, Canada to H.R. Landis, Dist. Dir., St. Albans, Vt. (May 15, 1945) (on file with author). Landis's proposal then was a conscious deviation from Canadian law on the role of blood quantum in defining Indian.

114. Act of June 27, 1952 § 289.

115. *See* 8 U.S.C. § 1359 (2006).

116. *See generally* Marian Smith, *Race, Nationality, and Reality: INS Administration of Racial Provisions in U.S. Immigration and Nationality Law Since 1898*, *Parts 1-3*, 34 Prologue 91 (2002) (describing history of racial distinctions and elimination of overt race-based immigration and naturalization criteria). The Immigration and Nationality Act of 1965 eliminated restrictive quotas based on national origin, and the provision attributing persons of one-half or more Asian ancestry to Asian nations. Act of Oct. 3, 1965, Pub. L. No. 89-236, 1965 U.S.C.C.A.N. (79 Stat. 911) 883; *see generally* Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (discussing the history of the 1965 act and arguing that Congress intended to eliminate race as a factor in immigration). This does not mean that immigration laws or their implementation do not continue to have disparate impact on different groups. *See infra* note 168. Indeed, the 1965 act added a quota for immigrants from the Western Hemisphere where none had existed before, restricting the number of Mexican immigrants able to legally enter the United States. *See* NGAI, *supra* note 34, at 254-58, 260-61. The same quota restricted the number of legal Canadian immigrants for the first time. *See id.*

117. *See supra* note 116.

## III. PROBLEMS IN IMPLEMENTATION OF THE BLOOD QUANTUM REQUIREMENT

Though the 1952 provision solved the problem of how to define Indian, the implementation of that definition has revealed new problems, as shown by Peter Roberts' situation. By defining Indian by blood quantum, the United States injected a requirement that did not and does not exist in Canadian law. As discussed above, Canadian law defined Indian by gender and enfranchisement, not blood quantum.[118] Canada eliminated, for the most part, gender-based definitions in 1985,[119] and Indian status is still not defined by blood quantum.[120] Consequently, Canada, unlike the United States, did not and does not record the blood quantum of those recognized as Indian.[121] Therefore, the question presented is: how do American immigration officials know that a Canadian Indian invoking the free passage right indeed has one-half or more Indian blood?

Both courts and the United States Citizenship and Immigration Services (USCIS), formerly known as the INS, struggle with

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118. *See supra* notes 51-57 and accompanying text.

119. The gender discrimination in Canadian Indian law lasted in full force until 1985, when Canada finally repealed that part of the Indian Act. *See* An Act to Amend the Indian Act, S.C. 1985, c. 27 (Bill C-31). Bill C-31 set up a process through which Indian women, their children, and enfranchised Indians who lost their Indian status could have their status restored. *Id.* However, issues still remain, as the bill did not restore the Indian status of all persons of Indian descent cut off by prior versions of the Indian Act, and the bill continues to exclude certain Indians under the so-called "two generation cut-off," also called the "second generation cut-off," whereby certain descendants of Indians will lose status after two generations of intermarriage. *See* John Giokas & Robert Groves, *Collective and Individual Recognition in Canada: The Indian Act Regime*, in WHO ARE CANADA'S ABORIGINAL PEOPLES 41, 67-69 (Paul Chartrand ed., 2002). The British Columbia Supreme Court recently ruled that Bill C-31 violated the right to equality in the Canadian Charter of Rights and Freedoms because of the two generation cut-off rule. *See* McIvor v. The Registrar, Indian and Northern Affairs Canada, [2007] B.C.S.C. 827; *see* Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, 18 HYPATIA 3 (2003) (reviewing the gender issue in Canadian Indian law).

120. *See* CRANE, *supra* note 57, at 135-49 (discussing the 1985 reform of Indian Act and the current categories of people within definition of Indian). Some Indian bands have defined their membership by blood quantum, but the Indian Act itself does not define Indian status by any threshold amount of Indian blood. *See* CRANE, *supra* note 57, at 138-49 (discussing the definition of Indian in the Indian Act); Megan Furi & Jill Wherrett, *Indian Status and Band Membership Issues*, Parliamentary Information and Research Service (2003), *available at* http://www.parl.gc.ca/information/library/PRBpubs/bp410-e htm#bcontinuingtx (discussing Band membership criteria); Sébastien Grammond, *Disentangling "Race" and Indigenous Status: The Role of Ethnicity*, 33 QUEEN'S L.J. 487, 514 (2008) (noting that many Indian Bands require 50% or more Indian blood for membership). One scholar has suggested that the Indian Act in effect applies a blood quantum threshold in the so-called "second-generation cut-off rule," which strips certain persons of Indian status after two generations of marriages between Indians and non-Indians. *See* Grammond, *supra* note 120, at 514; *supra* note 119.

121. *See* INS General Counsel's Opinion No. 93-65, *supra* note 105 (Canadian Certificate of Indian Status not a valid entry document under Section 289 because it does not show blood quantum). The United States government issues a "certificate of degree of Indian blood," which indicates the blood quantum of the Indian named on the certificate.

accommodating Canadian Indians while enforcing the half-blood restriction.[122] Administrative guidance rejects the use of Indian status documents issued by the Canadian government.[123] Aware that Indian status does not require Indian blood in Canada, USCIS advises officials processing Canadian Indians for entry that such documents are not evidence of a person's blood quantum and cannot allow entry into the United States under the free passage right.[124] Instead, USCIS accepts "blood quantum letters" from Indian band officials that state the amount of Indian blood.[125] However, under current Canadian law, Indian status and band membership are separate concepts, and people recognized as Indian under the Indian Act might not be members of an Indian band.[126] Further, some people may be of Indian descent, but not be recognized by either the Canadian government or an Indian band.[127] Such individuals have to produce other documents that show that they have at least one-half Indian blood.[128]

A case from the Eighth Circuit demonstrates the evidentiary difficulties resulting from the blood quantum requirement. In *United States v. Curnew*,[129] the defendant appealed a conviction for illegally re-entering the United States after his prior deportation.[130] He claimed to be a Canadian Indian and invoked the free passage right, but could not produce documents showing his quantum of Indian blood.[131] He argued that under the 1952 provision he only needed to show he had some Indian blood and cultural or social recognition as an Indian.[132] The Eighth Circuit applied a strict reading of the free passage statute, stating that Curnew had to establish at least 50% Indian blood and that some Indian ancestry was not sufficient.[133] The Court also upheld the district court's denial of Curnew's offer of expert testimony by an anthropologist to prove his blood quantum, as the expert

122. *See infra* notes 123-28 and accompanying text.

123. *See* INS General Counsel's Opinion No. 93-65, *supra* note 105.

124. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ADJUDICATOR'S FIELD MANUAL 23.8(a).

125. *Id.*; American Indian Law Alliance, *supra* note 9, at 6.

126. Furi & Wherrett, *supra* note 120.

127. *See supra* note 119.

128. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE, *supra* note 124, at 23.8(a). It is unclear what documents might fulfill the requirement. The Adjudicator's Field Manual only lists "a tribal certification that is based on reliable tribal records, birth certificates, and other documents establishing the requisite percentage of Indian blood." *Id.*

129. 788 F.2d 1335 (8th Cir. 1986).

130. *Curnew*, 788 F.2d at 1338.

131. *Id.* at 1337.

132. *Id.* at 1338.

133. *Id.*

admitted she could not identify Curnew's specific amount of Indian blood.[134]

Peter Roberts apparently had some type of blood quantum letter from his Indian band.[135] Immigration officials nonetheless sought to block his entry through other records purportedly showing he has a smaller quantum of Indian blood.[136] It is then unclear whether such letters, by themselves, will be accepted in the future to establish 50% or more Indian blood, if other documents suggest a different conclusion.

One other issue, though not yet litigated in a published case, is whether other aboriginal people in Canada, though not technically "Indian," can invoke the free passage right.[137] Canada recognizes three categories of aboriginal people in its 1982 constitution: (1) Indians, (2) Inuit, and (3) Métis.[138] Up to 1939, Canadian authorities did not consider Inuit to be "Indians" within the Canadian government's responsibility.[139] A ruling of the Canadian Supreme Court in 1939 changed that position, holding that they were Indians under the jurisdiction of the Canadian federal government.[140] However, since 1951, Inuits are specifically excluded from the Indian Act, and Canada has administered Inuit affairs under a separate legal scheme.[141] Métis are persons of mixed Indian and non-Indian ancestry who were explicitly excluded from the Indian Act.[142] Though not "Indians" they are nonetheless recognized as aboriginal people for certain purposes.[143] Ambiguities continue to exist in Canadian law concerning the rights of the different aboriginal groups.[144] The relevant question here is whether these two other groups are able to cross the border and invoke the privileges available to "Indians" under American immigration law.[145] Nothing in the sparse legislative history suggests Congress was even aware of the distinctions made in

134. *Id.* at 1339. Interestingly, a dissenting judge objected to the majority's approach, stating that the majority opinion imposed a "prohibitively onerous" responsibility on the defendant to prove through a family tree one-half or more Indian blood. *Id.* at 1340 (Lay, C.J., dissenting).

135. Turnbull, *supra*, note 4, at B3.

136. *Id.*

137. *See* American Indian Law Alliance, *supra* note 9, at 14.

138. Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, e. w. 35(2).

139. *See* Giokas & Groves, *supra* note 119, at 45.

140. *See Re Eskimos*, [1939] D.L.R. 417; *see* CONSTANCE BACKHOUSE, COLOUR-CODED: A LEGAL HISTORY OF RACISM IN CANADA 1900-1950 18-55 (1999) (discussing the history of this case).

141. *See* Giokas & Groves, *supra* note 119, at 45 (noting that Inuits are provided federal services but excluded from the Indian Act).

142. DAVID ELLIOTT, LAW AND ABORIGINAL PEOPLES IN CANADA 20 (5th ed. 2005).

143. *Id.* at 20-21.

144. *See id.*; *see* Giokas & Groves, *supra* note 119, at 44-45.

145. *See* American Indian Law Alliance, *supra* note 9, at 14.

Canadian law.[146] As a practical matter it appears that immigration officials currently do not deny free passage claims by these other groups, and in effect interpret "Indian" to mean "aboriginal," though it is unclear what documents members of these groups display to cross the border.[147] However, the issue whether such groups are racially "Indian" for purpose of the free passage right remains.[148]

## IV. IMPLICATIONS FOR FEDERAL INDIAN LAW AND IMMIGRATION LAW

Though by itself, the Canadian Indian free passage right issue is interesting as yet another chapter in the strange career of blood quantum in American law,[149] there are larger implications for both federal Indian law and immigration law. For Indian law scholars, the blood quantum restriction on the right is a rare example of an explicitly racial conception of Indian status by the federal government that might affect other Indian legislation.[150] Before the 1970s, the Court exempted congressional legislation concerning Indians from any sort of constitutional judicial review, recognizing an alleged necessity for congressional plenary authority.[151] The Court has identified the Constitution's Indian Commerce Clause as the primary textual source of Congress' plenary power over Indian affairs.[152] However, the Court now will review the constitutionality of Indian

146. *See infra* notes 103-106 and accompanying text.

147. *See* American Indian Law Alliance, *supra* note 9, at 14 (stating that immigration officials have not denied entry to Métis or Inuit).

148. *See id.*

149. Recent scholarship describes other chapters in that strange career. *See, e.g.*, CIRCE STURM, BLOOD POLITICS: RACE, CULTURE AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA 78 (2002); Spruhan, *Legal History*, *supra* note 15 (stating in the United States, for tribal membership, one must meet a certain blood quantum); Spruhan, *Indian as Race*, *supra* note 48, at 27 (explaining the United States' use of a threshold requirement of blood quantum to be considered "Indian"); Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance,* 33 AM. INDIAN L. REV. 243, 251 (2008) (noting that in the United States, blood quantum is a large feature of tribal membership); Rose Cuison Villazor, *Blood Quantum Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008) (discussing use in property laws concerning pacific islanders). The term "strange career" is adapted from the classic history of segregation by C. Vann Woodward, the Strange Career of Jim Crow.

150. *See infra* notes 154-160 and accompanying text.

151. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); United States v. Kagama, 118 U.S. 375, 384 (1886) (stating that federal authority over Indians "is necessary to their protection" and that "[i]t must exist in [the federal] government, because it never has existed anywhere else").

152. *See* U.S. CONST. art. I, § 8, cl. 3; Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

legislation, including whether such legislation violates equal protection principles.[153]

Importantly, the Court, beginning in the seminal case of *Morton v. Mancari*,[154] conceptualized Indian status as "political" and not "racial" for purposes of equal protection, despite Congress or the Bureau of Indian Affairs's use of blood quantum as one element in defining "Indian."[155] In an approach similar to, but independent of the one applied by the INS and the Board of Immigration Appeals discussed in this article, the Court has said that legislation benefiting members of Indian tribes does not concern a racial group, as the United States has unique responsibilities to Indian tribes as political entities deriving from treaties and other agreements.[156] Instead of strict scrutiny, the Court will uphold the legislation under a modified rational-basis review, asking whether it is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[157] However, the use of blood quantum to define Indian in such legislation has led to questions whether *Mancari* will continue to shield Indian legislation from strict scrutiny review.[158] The Iowa Supreme Court recently reviewed legislation that defines Indians solely by ancestry, with no requirement of tribal membership, under strict scrutiny, and struck a provision in the state's version of the Indian Child Welfare Act as an impermissible racial classification.[159]

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153. *See, e.g.,* Babbitt v. Youpee, 519 U.S. 234, 236-37 (1997) (striking down a provision concerning Indian probate as violating the Fifth Amendment's takings clause); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 76 (1996) (striking down a waiver of state sovereign immunity in the Indian Gaming Regulatory Act as violating the Eleventh Amendment); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 90 (1977) (upholding the distribution of tribal property under equal protection); United States v. Antelope, 430 U.S. 641, 648-49 (1977) (upholding the Major Crimes Act under equal protection); Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont., 424 U.S. 382, 389 (1976) (upholding exclusive tribal jurisdiction over an adoption proceeding under equal protection); *Mancari*, 417 U.S. at 354-55 (upholding Indian employment preference regulation under equal protection).

154. 417 U.S. 535 (1974).

155. *Mancari*, 417 U.S. at 554. The definition of Indian at issue in *Mancari* required tribal membership and one-quarter Indian blood. *Id.* at 553 n.24. It was applied to provide Indians with employment preference within the Bureau of Indian Affairs, the entity within the Department of the Interior with primary authority over Indian programs. *See id.* at 537. The Court has followed *Mancari* in several other cases to uphold Indian legislation against equal protection attacks. *See, e.g.*, *Weeks*, 430 U.S. at 73-74; *Antelope*, 430 U.S. at 645-47; *Fisher*, 424 U.S. at 390-91.

156. *Mancari*, 417 U.S. at 553 n.24.

157. *Id.* at 555.

158. *See, e.g.,* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 731-48 (2001); Frank Shockey, *Invidious American Indian Tribal Sovereignty:* Morton v. Mancari *contra* Adarand Constructors, Inc. v. Pena, Rice v. Cayetano *and Other Recent Cases*, 25 AM. INDIAN L. REV. 275, 294-313 (2000-2001); *see* Matthew Fletcher, *Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 181 (2008) (arguing for the continued application of *Mancari* and its conceptualization of Indian status as political).

159. *In re* A.W., 741 N.W.2d 793, 810-11 (Iowa 2007).

So far, *Mancari* has survived when the definition of Indian, though incorporating blood quantum, is tied to membership in an Indian tribe recognized by the United States.[160]

The unequivocal invocation of race in the free passage statute may shed light on how to distinguish a racial use of Indian from a political one. It is difficult to argue that Congress intended to benefit a political group of Canadian Indians incidentally defined by blood quantum. The term "American Indian race" is directly in the statute, and there is no similar additional requirement of membership in a Canadian band. Further, the United States possesses no political relationship with Indian citizens of Canada through treaties or other agreements similar to its relationship with American Indians.[161] Indeed, the Bureau of Indian Affairs, the federal department primarily responsible for implementing the federal government's trust responsibility to Indian tribes, appears to not have participated in the development of the free passage legislation, and deferred to INS when questions arose in its implementation.[162] There is no evidence that Congress believed it was invoking its plenary power over Indian affairs when it legislatively recognized the free passage right. The existence of this separate legislation for Canadian Indians might be used to distinguish American Indian legislation, which, though it might utilize blood quantum, is grounded in the political relationship between the federal government and American Indian tribes.[163]

For immigration law scholars, the explicit racial restriction on the free passage right may present an opportunity to challenge the exemption of immigration legislation from judicial review. The Supreme Court similarly has conceptualized Congress' authority over immigration as plenary and has concluded that Congress may restrict immigration in any way it deems

160. *See, e.g.*, *Antelope*, 430 U.S. at 645-47.

161. The United States does have a relationship with some tribes that also have members in Canada, including tribes of the Iroquois Confederacy, which have reservations in the United States and reserves in Canada. However, nothing in American law suggests that the political relationship extends to tribal members in Canada. Were the statute reviewed under *Mancari's* standard, then, it might not survive anyway, as the statute arguably is not "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

162. *See* Letter from Fred Daiker, Assistant to the Commissioner of Indian Affairs, to Immigration and Naturalization Service (Apr. 9, 1941) (on file with author) (referring to an INS question by a Canadian Indian woman on eligibility for free passage); Letter from Fred Daiker, Assistant to the Commissioner of Indian Affairs, to Immigration and Naturalization Service (Mar. 25, 1941) (on file with author) (referring to an inquiry by the superintendent of the Fort Peck Indian Reservation on the status of Canadian Indians living on a reservation). It appears that neither the 1928 free passage statute nor its 1952 revision were referred to by the Indian affairs committees or subcommittees of the House or Senate, and the Canadian Indian problem appears to have been considered strictly an immigration issue. *See* H.R. REP. NO. 70-1017 (1928); S. REP. NO. 70-568 (1928).

163. *See Mancari*, 417 U.S. at 553 n.24, 555.

appropriate, including through racial restrictions, free of judicial review.[164] The Court has upheld explicit racial bars on Asian immigrants under such theory.[165] As noted by scholars such as Gabriel Chin, these cases have never been overruled.[166] Unlike the application of constitutional limitations to Indian legislation, the Court has not, as of yet, applied such limitations to racial restrictions in immigration, though it has applied a type of rational basis review in non-racial challenges to immigration legislation.[167] Chin and others have alleged a lack of any racial restrictions in current immigration law, and that this absence of restrictions precludes challenges to overturn prior precedents.[168]

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164. *See* Fong Yue Ting v. United States, 149 U.S. 698, 713-14, 731 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889); *see generally* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (discussing the connections between plenary authority over Indian affairs and immigration); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002).

165. *See Fong Yue Ting*, 149 U.S. at 731; *Chae Chan Ping*, 130 U.S. at 606.

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

*Id.*

166. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3-5 (1998); Saito, *supra* note 164, at 447. The title of this article is adapted from Chin's article.

167. *See* Fiallo v. Bell, 430 U.S. 787, 798-800 (1977); Chin, *supra* note 166, at 65 (arguing that the "prevailing judicial and scholarly view . . . is that rational basis review applies" to immigration legislation).

168. *See* Kif Augustine-Adams, *The Plenary Power Doctrine after September 11*, 38 UC-DAVIS L. REV. 701, 702-03 (2005); Gabriel Chin, *Is there a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law,* 14 GEO. IMMIGR. L.J. 257, 285 (2000). Chin argues that:

> [t]he best test of the plenary power doctrine would involve a statute discriminating on a basis which domestic law clearly forbids. If persons of African ancestry or Jewish religion or Democratic Party membership were made ineligible for immigration or naturalization, or if Congress offered food stamps to Anglo-Saxon aliens only, or provided that Latino aliens would receive only eighty percent of the welfare benefits given to other aliens, the Court would overwhelmingly vote to strike it down. Yet, it is not likely that we will see such a case.

*Id.* Kevin Johnson has said that "[e]xpress racial and national origin exclusions, which would squarely contradict such icons of the law as *Brown v. Board of Education*, rarely arise in modern immigration law and policy." KEVIN R. JOHNSON, THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS 47 (2004). However, he has also noted that though there are allegedly no existing overt racial restrictions for admission of immigrants, the enforcement of immigration law has impacted racial groups differently. *See* Kevin R. Johnson, *Race and Immigration Law Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 290 (2000). Johnson distinguishes between Chin's discussion of "de jure racial discrimination," that is, "blatant racial classifications" in admission criteria, and racially discriminatory enforcement of facially neutral immigration laws. *Id.* at 290-292.

However, could persons recognized as Indian in Canada, but who do not have at least one-half Indian blood, challenge the free passage restriction as an impermissible racial distinction? Could non-Indians challenge the free passage of Indians under the same theory?[169] The statute might offer the opportunity for either group to argue that allowing free passage only to persons of 50% or more Indian blood, impermissibly defines immigration rights by race. Of course, merely asserting that it is racial does not mean the Supreme Court would apply strict scrutiny; it might still excuse such racial definitions under Congress' plenary authority over immigration, and apply no judicial review, or apply a rational basis test, perhaps similar to *Mancari*, that in effect would immunize the legislation from equal protection review.[170]

Assuming strict scrutiny applies, the free passage statute would have to promote a compelling government interest and be narrowly tailored to that interest.[171] Assuming the Supreme Court accepts a governmental interest as "compelling" and narrowly tailored, "the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose."[172] The narrowly tailored requirement "ensures that the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the motive for the classification was an illegitimate racial prejudice or stereotype."[173] Put another way, the use of the racial classification must be "necessary to achieve [the] stated goals."[174]

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169. A white resident of Hawaii recently successfully challenged election rules for the Office of Hawaiian Affairs, which had limited voter eligibility to persons of Native Hawaiian descent. *See* Rice v. Cayetano, 528 U.S. 495, 523-24 (2000). The United States Supreme Court ruled that the definition of Native Hawaiian was racial because Hawaiian was defined by ancestry, and that the rules violated the Fifteenth Amendment. *Id.* at 514-17, 523-24. Significantly, the Jay Treaty recognized free passage for all British citizens, not just Canadian Indians. *See supra* text accompanying note 24. However, the 1928 statute only protected the right of Indians to pass freely. In 1929, the United States Supreme Court ruled that the non-Indian free passage right was abrogated by the War of 1812. *See supra* note 24. Some argue that the Indian right in the treaty would face the same result but for the 1928 statute. *See, e.g.*, Yablon-Zug, *supra* note 26, at 569. Given that history, could non-Indians argue that the statutory protection of Indian free passage rights but not non-Indian Canadian free passage rights impermissibly creates racial benefits for one group recognized in the Jay Treaty to the detriment of others? The author makes no comment on the appropriateness of such a challenge, but only suggests that given the racial nature of the definition, such a challenge might be made.

170. *See supra* note 167 (arguing that the rational basis test from *Fiallo* would not automatically uphold a racially discriminatory immigration law, as it may be that racial distinctions are per se "irrational" and therefore invalid); Chin, *supra* note 166, at 66-72; *infra* text accompanying notes 184-87 (arguing that the Indian free passage right might nonetheless be upheld as "rational").

171. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

172. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

173. *Id.*

174. *See Parents Involved in Cmty. Schs.*, 551 U.S. at 732.

What is the compelling governmental interest? Controlling entry from Canada? Even assuming border security was the interest, which would seem to be "compelling," is the half-blood cut-off narrowly tailored to promote that interest? Surely other ways to control entry exist than allowing only Canadian Indians of one-half or more Indian blood free passage.[175] Or was Congress' interest to affirm the historical, arguably treaty-based free passage right of Indians?[176] If so, why use a specific blood quantum threshold to do so? To avoid the gender discrimination in Canadian law? Even assuming Congress defined Indian by descent to avoid the negative effect of the Canadian Indian Act's exclusion of Indian women married to non-Indian men and their children, it still might have defined Indian without relying on a specific quantum of Indian blood.[177] If the compelling interest is the ongoing recognition of the free passage right, it then might not be "necessary" to define Indians as a racial group to continue that right.[178] However, could the federal government argue that its definition is actually more inclusive by using blood quantum instead of the Indian Act, and therefore serving the interest of recognizing the free passage right better than following Canada's Indian Act definition, which still excludes some Indians, and all Inuit and Métis?[179] It is hard to prove. Comparative population numbers are difficult to come by given that the Canadian government does not record the blood quantum of its Indian, Inuit, and Métis citizens, whether recognized under the Indian Act or not.[180]

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175. *See infra* text accompanying notes 188-91.

176. *See supra* text accompanying notes 23-26.

177. Of course, with the revisions to the Indian Act in 1985, which eliminated the gender-based definition in effect in 1952, *see supra* note 119, there is no current reason to define Canadian Indian as a racial status if avoidance of gender discrimination were the motive.

178. *See Parents Involved in Cmty Schs.*, 551 U.S. at 733.

179. *See* Yablon-Zug, *supra* note 26, at 604 (arguing that the statutory right is broader than the right recognized by the Jay Treaty). Others have argued the opposite, asserting that the blood quantum requirement actually limits the number of Indians who can exercise the treaty's free passage right, which only refers to "Indians." *See* O'Brien, *supra* note 106, at 328-29.

180. For example, the Census Operations Division of Statistics Canada produced a statistical report on Canada's aboriginal population based on the 2001 Canadian census. *See generally* 2001 CENSUS: ANALYSIS SERIES, ABORIGINAL PEOPLES OF CANADA: A DEMOGRAPHIC PROFILE (2003). According to the report, there were 1,319,890 people of "aboriginal origin," that is, people who reported having an aboriginal ancestor. *Id.* at 18. 976,305 people identified themselves as being Indian, Métis, or Inuit. *Id.* 558,175 identified themselves as "registered Indians" that is, Indians under the Indian Act. *Id.* 554,860 identified themselves as being members of a band. *Id.* The data is not broken down by blood quantum, and the report notes that the registered Indian population was underreported due to problems in enumerating some Indian reserves. *Id.* at 6. The report also notes that the Department of Indian Affairs and Northern Development counted 681,000 registered Indians during the same time period, and that differences in methodology precluded comparison between the two numbers. *Id.* In 2007 the Department of Indian Affairs and Northern Development reported 763,555 Indians registered under the Indian Act. FIRST NATIONS AND NORTHERN STATISTICS SECTION, REGISTERED INDIAN POPULATION BY SEX AND RESI-

In the end, these alleged compelling interests are purely speculative. The legislative history lacks any discussion of the purpose for applying a racial definition, and the federal government might be hard-pressed to assert a plausible compelling interest in the absence of any congressional guidance.[181] It might be that members of Congress simply considered Canadian Indians to be a race, as it considered other immigrant groups, such as Asians, to be races, and therefore restricted the pre-existing free passage right to those it believed to be truly racially Indian.[182] Though the outcome of a challenge under a strict scrutiny review is ultimately unclear, it appears the federal government would have difficulty justifying its use of blood quantum in this context.[183]

Even under a limited rational basis review, it might be difficult for the federal government to argue that limiting Canadian Indian free passage by race is "rational."[184] There appears to be no rational justification to define Canadian Indians by race, other than the avoidance of the effect of the now-eliminated gender distinctions in the Canadian Indian Act, or an unproven assertion that a half-blood definition is more inclusive than a political definition.[185] However, if an immigration rational basis test were as deferential as the Indian law test, it might be that any justification for using blood quantum the federal government offered would be sufficient.[186] Indeed, blood quantum is pervasive in federal Indian law, and when used to define Canadian Indians, as opposed to other racial groups in immigration law, it might appear "rational" within the context of this larger phenomenon.[187]

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DENCE 2006, ix (2007), *available at* http://www.ainc-inac.gc.ca/pr/sts/rip/rip06_e.pdf. Again, however, the Department did not break down the numbers by blood quantum. *See id.*

181. *See supra* text accompanying notes 103-06.

182. *See supra* text accompanying notes 33-35.

183. *Cf.* Rice v. Cayetano, 528 U.S. 495, 514-17, 523-24 (2000) (holding that the rule defining Native Hawaiian by descent was impermissible racial classification under the Fifteenth Amendment).

184. *See supra* note 167.

185. *See supra* notes 150, 153.

186. The outcome may depend on whether the blood quantum definition or the recognition of the free passage right itself is reviewed. The Supreme Court in *Mancari* upheld the use of blood quantum in the employment preference regulation because it believed that the preference itself was "rationally tied to the fulfillment of Congress' unique relationships towards the Indians," not because the blood quantum definition was so "rationally tied." Morton v. Mancari, 417 U.S. 535, 555 (1974). Put another way, the Court did not analyze whether the definition of "Indian" used in the preference regulation was rational; it held that providing employment preference was "reasonable and rationally designed to further Indian self-government." *Id.* It then might be that the use of blood quantum is justified as long as the program that implements the blood quantum definition is rationally related to an important governmental interest. In this situation, asserting that the free passage statute is rationally related to the protection of an historically-recognized right might then be enough.

187. *See supra* text accompanying note 79.

For those who support the free passage rights of Canadian Indians, how might the potential constitutional problems be avoided? One possibility might be for Congress to revise the free passage statute again and eliminate the blood quantum requirement. Congress might replace blood quantum with a different definition, perhaps tied to Canada's 1982 Constitution, which uses the term "aboriginal peoples of Canada," a classification arguably not racial in nature, at least from an American perspective.[188] Using the term "aboriginal peoples" or some similar term is more inclusive than applying the Indian Act's definition and avoids the controversial history and current status of that act. This might create even more complicated problems in identification, however, because the Canadian Constitution does not define "aboriginal peoples," except to include "Indians," "Inuit," and "Métis."[189] Though such a statutory revision might avoid the potential constitutional problem, in practice it might be impractical to apply without a clear definition. In the end, there appears to be no perfect fix; any decision has negative consequences by cutting off some part of the Canadian aboriginal population, or by including so large and ill-defined a group that enforcement becomes impossible.[190] However, the racial problem might be avoided by shifting the definition from a straight blood quantum threshold to some politically-based criteria, if such criteria could be found.[191]

188. *See supra* text accompanying note 155; *but see* Giokas & Groves, *supra* note 119, at 43 (suggesting that Canadian law views Indians as a racial classification, and that Canadian authority to legislate for Indians is tied to Indian ancestry or descent); Grammond, *supra* note 120, at 488-490 (discussing the views of some Canadian judges that indigenous rights in Canadian law are fundamentally racial in nature). Unlike American law, Canadian law currently does not recognize inherent aboriginal sovereignty, and it therefore might be difficult to import a "political" concept of Indian status as articulated in *Mancari* into the Canadian situation. As discussed above, however, American officials viewed the Indian Act as a "political" definition of Indian, though it is unclear exactly why. *See supra* text accompanying notes 60-69. It appears that the inclusion of wives with no Indian ancestry as "Indians" in the act rendered the definition "political" in the minds of such officials. As Indian status under Canadian law still does not require Indian ancestry, American law might still classify Indians as a political group, even if there is no analogous concept of sovereignty.

189. *See supra* note 138.

190. *See supra* text accompanying notes 179 and 185 (discussing the issue of more or less inclusiveness under various definitions).

191. If Canadian law views Indian status as racial, but appropriate under its constitution, see *supra* note 158, there may not be a "political" definition that can apply to the free passage right if Congress again applies a definition tracking Canadian law. *See supra* note 158. The "racial" nature of the Canadian law's conception of Indian status still might not be dispositive, however, as American law might view Indian status as political under *Mancari's* racial and political dichotomy regardless of Canada's position. *Id.* At the very least, Congress could still avoid the problems associated with applying blood quantum, and potentially provide greater protection from constitutional attack.

## V. CONCLUSION

The Canadian Indian free passage statute is anomalous, whether considered from an Indian law or immigration law perspective.[192] Time will tell whether other Indians like Peter Roberts will face problems crossing the border, and whether they will challenge the blood quantum restriction, or whether others, including non-aboriginal people, will challenge the free passage right or its blood quantum restriction. Long relegated to the occasional footnote in legal scholarship,[193] the definition of "Indian" in the statute has much to say about how both Indians and race are conceptualized in American law.[194]

192. *See supra* notes 61-63, 168 and accompanying text.

193. *See, e.g.*, Cohen's Handbook of Federal Indian Law, § 5.07[2][f] nn. 554 & 555 (2005) (noting the free passage statute in a footnote). The treaty, tribal sovereignty, and border security issues arising out of the free passage statute have received attention. *See supra* note 23. However, the implications of the racial restriction itself have not been discussed in any detail. *See* Castella, *supra* note 26, at 198 n.59 (mentioning the racial issue, but stating that implications are not within scope of the article).

194. *See supra* notes 149 and 158.