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WHO IS AN INDIAN? SEARCHING FOR AN ANSWER TO THE QUESTION AT THE CORE OF FEDERAL INDIAN LAW

Margo S. Brownell*

The definition of Indian is the measure of eligibility for a variety of benefits and programs provided to Indians under federal law. There is confusion, however, at the core of efforts to define "Indian." This confusion raises many concerns about the role that government plays in defining "Indian." This Note surveys the most common definitions of "Indian" found in federal statutes, BIA regulations, and state laws. The author argues that the racial basis of many of these laws and regulations are unconstitutional and tread on the sovereignty of Indian tribes. She evaluates efforts of the federal government to avoid these problematic definitions. Finally, she proposes the adoption of a uniform federal definition of "Indian" based on the definition of "Indian" found in the Arts and Crafts Act of 1990. Such a definition would defer to tribal sovereignty and address the financial and administrative concerns of the federal government while remaining within constitutional guidelines.

INTRODUCTION

"I feel as if I'm not a real Indian until I've got that BIA stamp of approval You're told all your life that you're Indian, but sometimes you want to be that kind of Indian that everybody else accepts as Indian."—Cynthia Hunt, Lumbee Indian¹

On January 21, 2000, newspapers across the country featured a picture of a wizened eighty-two-year-old Inupiaq Eskimo elder named Stanton Katchatag who lives in the remote village of Unalakleet, Alaska.² Mr. Katchatag was famous that day because he was in the distinguished position of being the first American to be

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1. FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN* 63 (1996).

2. E.g., Kim Murphy, *Census Seeking to Leave No One Out in the Cold*, L.A. TIMES, Jan. 21, 2000, at A1.

counted in the 2000 Census.³ The article that accompanies Mr. Katchatag's picture cites Census Director Kenneth Prewitt as holding Unalakleet up as a symbol for the Census's effort to count every American.⁴ Prewitt hoped that the small, remote Alaskan village could set a standard for the rest of the country.⁵

At stake in the Census count is \$180 billion dollars a year in federal funds that are apportioned on the basis of census population.⁶ According to JoAnn K. Chase, Executive Director of the National Congress of American Indians, "[t]he stability and the quality of the data for our population is of concern since it is a relatively small population (about 2 million in 1990) and this data is used to disburse federal program funds to American Indian Tribal and Alaska Native Village governments."⁷ In Alaska, with its 104,750 Native Alaskans, getting an accurate count is especially crucial. "It will affect the funding we receive from the Indian Health Service," said Larry Ivanoff, president of the local tribal organization in Unalakleet.⁸

There is a subtle irony behind the celebration of Mr. Katchatag as the first enumerated American of the 2000 Census: the racial, ethnic, and legal classification of Mr. Katchatag and his fellow Eskimos for purposes of the Census, as well as for a myriad of federal Indian programs, is not as easy as riding a snowmobile around Unalakleet to get an accurate head count. Rather, it requires unraveling more than a century of federal Indian law and policy on the question of who an Indian is and what, if any, federal benefits Indians are entitled to receive by virtue of their blood and tribal affiliation.

The definition of "Indian" is the measure of eligibility that the government uses for benefits and preferences provided to Indians under a variety of federal programs. Yet, there is confusion at the core of efforts to define "Indian." The Census, for example, takes one approach; it allows individuals to self-identify as Indian by

3. Maureen Clark, *Coldly Calculating in Alaska: U.S. Head Count Begins Here, Under Winter's Grip*, BOSTON GLOBE, Jan. 21, 2000, at A3; D'Vera Cohn, *Census Gets Warm Welcome; Director Starts U.S. Tally With Knock on Door in Alaskan Village*, WASH. POST, Jan. 20, 2000, at A3; Stephen A. Holmes, *In Remote Alaska, Counting Begins for the Census*, N.Y. TIMES, Jan. 21, 2000, at A1; Murphy, *supra* note 2, at A1.

4. E.g., Murphy, *supra* note 2, at A1.

5. Clark, *supra* note 3, at A3.

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

7. *Federal Measures on Race and Ethnicity: Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 4-5 (1997) [hereinafter *Gov't Mgmt. Hearings*] (statement of JoAnn K. Chase, Executive Director, National Congress of American Indians), available at 1997 WL 277011.

8. Clark, *supra* note 3, at A3.

checking the racial category “Native American/Alaska Native.”⁹ Other laws are more restrictive, requiring membership in a federally recognized Indian tribe, “Indian descent,” one-half or one-quarter Indian blood, and/or residence on a reservation.¹⁰ This definitional landscape is further complicated by the fact that these criteria often conflict with tribal membership provisions. The untenable result of this situation is that an individual may be an “Indian” for the purpose of receiving educational grants but not health benefits.¹¹ Or, he may be eligible to be chief of his tribe but yet not an “Indian” for the purposes of obtaining a Bureau of Indian Affairs (BIA) loan or an Indian scholarship to a state university.¹² Felix Cohen sums it up this way:

Some people . . . can be an Indian for one purpose but not for another. A Caucasian or person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for purposes of federal criminal jurisdiction. An Indian whose tribe has been terminated will not be considered an Indian for most federal purposes. Nevertheless, such a person remains an Indian ethnologically and continues to be a tribal member for internal tribal purposes.¹³

This confusion raises many concerns not only about the coherence of federal Indian policy but also about the role that the government plays in defining “Indian.” From the government’s point of view, the greatest concern is the extent to which statutes and regulations providing benefits to Indians are based on potentially unconstitutional racial criteria: blood quantum and Indian descent. These racial criteria were deemed permissible, and even necessary, throughout much of nineteenth- and twentieth-century Indian policy. Increasing concerns over equal protection and tribal sovereignty, however, suggest that the federal government may no longer be an acceptable arbiter of race-based eligibility standards.¹⁴

Thus, the current challenge facing both the federal government and Indians is to forge a policy regarding the definition of

9. BORDEWICH, *supra* note 1, at 66.

10. *Id.* at 67.

11. *Id.*

12. See Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship*, 66 NOTRE DAME L. REV. 1461, 1483–86 (1991) (describing current government methods of determining Indian status for allotment of benefits).

13. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 26 (1982).

14. See discussion *infra* Part II.A on the Indian Reorganization Act of 1934 and the Self Determination and Education Assistance Act of 1975.

“Indian” that reconciles (1) the government’s concern for upholding the U.S. Constitution and limiting its financial responsibility towards Indians; (2) the tribes’ demands for sovereignty and self-determination; and (3) the needs and rights of non-tribal Indians who have been increasingly orphaned by federal Indian law. Part I of this Note describes the legal landscape in which Indians find themselves struggling to reconcile the manifold versions of Indian identity promulgated by both the federal and state governments. This section describes the most common definitions of Indian found in federal statutes, BIA regulations, and state laws. Part II argues that the racial underpinnings of many of the laws and BIA regulations that define “Indian” are unconstitutional and tread on the sovereignty of the Indian tribes. Part III outlines recent efforts of the federal government to steer clear of those definitions. Part IV discusses possible solutions to this incoherence and proposes a definition that is constitutional, deferential to tribal sovereignty, and inclusive of Indians who have fallen between the cracks of previous provisions, at the same time that it addresses the government’s need to watch its bottom line.

I. THE DEFINITIONAL LANDSCAPE

There is no one definition of “Indian” that serves all federal purposes. According to one congressional survey, federal legislation contains over thirty-three different definitions of the term “Indian.”¹⁵ Both the federal government and the courts have defined the term “Indian” for many purposes, including eligibility for social programs, jurisdiction in criminal matters, preference in government hiring, and administration and distribution of tribal property.¹⁶ While there are numerous combinations of criteria used to define the term “Indian,” legislation and regulations dealing with “Indians” generally fall into one of three categories: (1) those that use definitions based on blood quantum; (2) those that use definitions based on tribal status; and (3) those lacking any definition at all.

15. O’Brien, *supra* note 12, at 1481. This number is actually much higher if one includes the hundreds of tribal enrollment statutes. *E.g.*, Shoshone Tribal Rolls of 1971, 25 U.S.C. § 585 (1994); Yakima Tribal Rolls of 1946, 25 U.S.C. § 601 (1994); Lac Vieux Desert Band of Lake Superior Chippewa Tribal Rolls of 1988, 25 U.S.C. § 1300h-3 (1994).

16. COHEN, *supra* note 13, at 23.

A. Definitions Based on Blood

The earliest attempts by the courts and the federal government to pinpoint Indian identity relied on racial traits and biased cultural stereotypes. In 1869, for example, the Supreme Court of New Mexico Territory decided that the Pueblos were not Indians because they were “honest, industrious, and law-abiding citizens”¹⁷ and “a people living for three centuries in fenced abodes and cultivating the soil for the maintenance of themselves and families.”¹⁸ Eight years later, the United States Supreme Court agreed with this conclusion, stating that, although the Pueblos were Indians “in feature, complexion, and a few of their habits,”¹⁹ they were not Indians because they were “a peaceable, industrious, intelligent, honest, and virtuous people.”²⁰ The United States Supreme Court changed its mind in 1913, however, after receiving BIA agents’ reports that the Pueblos engaged in drunkenness, debauchery, dancing, and communal life.²¹

With the Dawes Severalty Act of 1887,²² the blood quantum first became important as a determinant of when an Indian would be allowed to alienate an allotment of land.²³ The BIA thought that the less Indian blood an individual possessed, or the “whiter” he was, the more sophisticated he would be in his dealings with land speculators and the less he would need federal protection.²⁴ In addition, at that time, many whites and blacks were claiming to be Indian in order to acquire allotments of land.²⁵ The federal policy was to bar whites adopted by tribes from gaining an interest in tribal property distribution.²⁶ While the Dawes Rolls listed blood

17. *United States v. Lucero*, 1 N.M. 422, 438 (1869), *quoted in* COHEN, *supra* note 13, at 22 n.25.

18. *Id.* at 442.

19. *United States v. Joseph*, 94 U.S. 614, 616 (1877), *quoted in* COHEN, *supra* note 13, at 22 n.25.

20. *Id.*

21. *United States v. Sandoval*, 231 U.S. 28, 39–47 (1913) (holding that Pueblo land in New Mexico was “Indian country” for purposes of prohibiting the introduction of liquor into “Indian country” as a constitutional power within Congress’s purview to regulate commerce with “Indian tribes”); *see also* BORDEWICH, *supra* note 1, at 66.

22. Dawes Severalty Act, ch. 119, 24 Stat. 388 (1887).

23. Steve Russell, *A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 GEO. PUB. POL’Y REV. 129, 132 (1999).

24. *Id.*

25. GAIL K. SHEFFIELD, *THE ARBITRARY INDIAN* 82 (1997).

26. *See* The Protection of Indians Act of 1988, 25 U.S.C. § 181 (1994). This Act provides that:

quantum of individual Indians, Indians themselves were aware that blood quantum determinations were carelessly performed and routinely inaccurate.²⁷ The degree of racial intermingling that occurred within the Five Civilized Tribes²⁸ alone was reflected in the fact that African American freedmen made up twenty-three percent of the members listed on the final rolls and adopted whites made up another three percent.²⁹

Congress began incorporating blood quantum requirements into Indian legislation in the early twentieth-century; as a result, many statutes and BIA regulations have provided services to Indians on the basis of a one-half or one-quarter blood quantum.³⁰ The most prominent of these early statutes, and the touchstone for many subsequent definitions of "Indian" under federal law, is the Indian Reorganization Act of 1934 (IRA).³¹

Many BIA regulations governing the administration of federal Indian benefit programs also rely on a one-half or one-quarter blood quantum requirement. Examples of such regulations include the Indian Hiring Preference,³² Employment Assistance for Adult Indians,³³ Vocational Training for Adult Indians,³⁴ Educational Loans and Grants,³⁵ and Land Acquisition.³⁶ In addition, the BIA's Indian Education policies define an eligible Indian or Alaska Native student as one who is "recognized by the Secretary of the

no white man, not otherwise a member of any tribe of Indians, who may . . . marry an Indian woman, member of any Indian tribe in the United States . . . shall by such marriage . . . acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

Id.

27. Russell, *supra* note 23, at 132.

28. The "Five Civilized Tribes" include the (i) Cherokee, (ii) Choctaw, (iii) Chickasaw, (iv) Creek, and (v) Seminole nations. These five tribes were forcibly removed from their ancestral homelands in the southeastern United States and relocated to the "Indian Territory" in the early nineteenth-century. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 3-5 (1984).

29. *Id.* at 47.

30. One of the earliest laws to use the one-quarter blood quantum was the Indian Appropriations Act of 1918. It states "[n]o appropriation, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood whose parents are citizens of the United States." Indian Appropriation Act, 65 Pub. L. No. 159, 40 Stat. 561, 564 (1918) (codified as amended at 25 U.S.C. § 297 (1918)) (repealed 1985).

31. 25 U.S.C. § 479 (1994). See discussion of the IRA, *infra* Part II.A.

32. 25 C.F.R. § 5.1 (2000).

33. 25 C.F.R. § 26.1(g) (2000).

34. 25 C.F.R. § 27.1(i) (2000).

35. 25 C.F.R. § 40.1 (2000).

36. 25 C.F.R. § 151.2(c)(3) (2000).

Interior as eligible for Federal services, because of their status as Indians or Alaska Natives, whose Indian blood quantum is 1/4 degree or more."³⁷

Other statutes require proof of both tribal enrollment *and* a one-quarter blood quantum.³⁸ In order to administer this blood quantum requirement, the BIA issues to Indians an identity card, referred to universally as the "CDIB," or Certificates of Degree of Indian Blood, which states an individual's blood quantum and serves as a ticket to eligibility for BIA services.³⁹

The majority of state laws affecting Indian entitlements also rely heavily on the blood quantum criterion to limit eligibility. A Minnesota economic development law defines an "Indian economic enterprise" as "any commercial, industrial, or business activity established or organized for the purpose of profit, at least 51 percent of which is owned by persons of 25 percent or more Indian blood."⁴⁰ Michigan and Alaska rely on the one-quarter blood quantum as the basis for eligibility for their Indian college tuition waiver programs. The Michigan tuition waiver law defines American Indian as "a person who is not less than 1/4 quantum blood Indian as certified by the person's tribal association and verified by the Michigan commission on Indian Affairs,"⁴¹ whereas the Alaska tuition waiver requires an American Indian receiving the benefit to be either a descendant of a member of the aboriginal races inhabiting the state at annexation or a descendant of at least one-quarter blood from an Indian or Eskimo who migrated to the state from Canada between 1867 and 1952.⁴²

B. Definitions Based on Tribal Status

While the blood quantum is prominent in legislation from the first half of the twentieth century, laws enacted since the 1970s have increasingly relied on definitions based on membership in a federally recognized tribe. The prototypical provision is a two-part definition: (1) "Indian" is defined as "a person who is a member of

37. 25 C.F.R. § 32.4(z) (2000); *see also* 25 C.F.R. § 31.1 (2000) (discussing qualifying enrollment in federal schools); 25 C.F.R. § 36.3 (2000) (defining an "Indian student").

38. *E.g.*, 25 C.F.R. § 20.1 (2000) (setting eligibility for federal financial assistance and social services).

39. *Underwood v. Deputy Ass't Sec'y—Indian Affairs*, 93 Interior Dec. 13, 20 (1986), available at 1986 WL 222929.

40. MINN. STAT. ANN. § 469.110 (West 1998).

41. MICH. COMP. LAWS ANN. § 390.1252 (West 1997).

42. ALASKA STAT. § 14.43.075 (Michie 1998).

an Indian tribe” and (2) “Indian tribe” is defined as “any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”⁴³

The most prominent example of legislation incorporating this type of definition is the Indian Self-Determination and Education Assistance Act of 1975.⁴⁴ This Act authorizes the government to contract with tribes and tribal organizations for the planning and administration of federal Indian service programs.⁴⁵

Many laws require membership in a federally recognized tribe as a condition to the conferral of federal benefits. One of the few laws that extends its reach beyond federally recognized tribes, however, is the Indian Health Care Improvement Act of 1976.⁴⁶ This Act covers members of terminated and state-recognized tribes and descendants of members of such tribes, in addition to members of federally recognized tribes. The provision offers eligibility to any individual who is “a member of a tribe, band, or other organized group of Indians, including those . . . terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendant, in the first or second degree, of any such member.”⁴⁷

Probably the most deferential definition used by Congress to date is the one incorporated into the Arts and Crafts Act of 1990.⁴⁸ This Act defines as an Indian “any individual who is a member of an Indian tribe; or for the purposes of this section is certified as an Indian artisan by an Indian tribe.”⁴⁹ Like the Indian Health Care Improvement Act, this law includes state-recognized tribes in the definition of “Indian tribes.”⁵⁰

43. 25 U.S.C. § 450b(e) (1994).

44. 25 U.S.C. §§ 450–458(e) (1994).

45. *Id.*; see also Karl A. Funke, *Education Assistance and Employment Preference: Who Is an Indian?*, 4 AM. INDIAN L. REV. 1, 36 (1976).

46. 25 U.S.C. §§ 1601–1683 (1994).

47. 25 U.S.C. § 1603(c) (1994).

48. 25 U.S.C. § 305(e)(d)(1) (1994).

49. *Id.*

50. *Id.* Membership-based definitions appear in numerous BIA regulations, particularly those dealing with economic development programs. *E.g.*, Loans to Indians Involving Revolving Loan Fund, 25 C.F.R. § 101.1 (2000); Loans for Financing Reservation Economic Enterprises and Housing, 25 C.F.R. § 103.1 (2000); Housing Improvement Program, 25 C.F.R. § 256.2 (2000); Indian Business Development Program, 25 C.F.R. § 286.1 (2000).

C. No Definition at All

There are some laws that use the word “Indian” but provide no definition at all, giving the BIA and the courts an opportunity to craft their own interpretation. An example is the Snyder Act of 1921,⁵¹ which provides the underlying congressional authority for most BIA activities.⁵² Another is the Johnson-O’Malley Act of 1934,⁵³ which authorizes the Secretary of the Interior to contract with a state or territory to fund educational, medical, agricultural, and social welfare programs for Indians through state agencies.⁵⁴

The Major Crimes Act,⁵⁵ which establishes federal court jurisdiction for certain crimes committed in Indian Country when the defendant is Indian, is also silent regarding the definition of “Indian.”⁵⁶ Federal courts have interpreted the term as referring to an individual who is identified by his tribal community as an Indian and have not required formal tribal enrollment as part of the definition of Indian.⁵⁷ The Department of Justice (DOJ), however, does require that a defendant be an enrolled member of a tribe in order to fall under the Act.⁵⁸

51. 25 U.S.C. § 13 (1994).

52. *Id.*; see also *Morton v. Ruiz*, 415 U.S. 199, 205–06 (1974).

53. 25 U.S.C. §§ 452–457 (1994).

54. *Id.*

55. 18 U.S.C. § 1153 (1994).

56. *Id.*

57. *United States v. Antelope*, 430 U.S. 641, 646–47 n.7 (1977) (stating that enrollment in a recognized tribe was not an absolute requirement for federal jurisdiction where the Indian defendant lived on the reservation and “maintained tribal relations with the Indians thereon”); *Alberty v. United States*, 162 U.S. 499, 500–01 (1896) (holding that neither the defendant, a former black slave who had been granted membership in the Cherokee Nation, nor the victim, who was the illegitimate son of a Choctaw and a black woman and who had married a Choctaw Indian, were Indians); *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (interpreting the meaning of “Indian” under the Trade and Intercourse Act of 1834, the precursor of the Major Crimes Act, not to apply to a white man who had been adopted into the Cherokee tribe); see also Allison Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court’s Changing Vision*, 55 U. PITT. L. REV. 1, 81–82 (1993).

58. 137 CONG. REC. 23,673 (1991) (statement of Senator Daniel K. Inouye). In the wake of *Duro v. Reina*, 495 U.S. 676 (1990), the Senate debated a bill to reinstate the power of Indian tribes to exercise criminal jurisdiction over Indians. Senator Inouye pointed out that although title 18 does not provide a statutory definition of “Indian,” both federal and state case law have provided specific guidelines on how it is defined for the purposes of the Major Crimes Act. 137 CONG. REC. 23,673 (1991). He stated that the Department of Justice policy requires that a person charged as an “Indian” be enrolled in a tribe. *Id.* While Indian status is stipulated in most cases, proof is based on several factors when it is contested, none of which is determinative: (i) degree of Indian blood (though this alone is not enough); (ii) whether the person is recognized as an Indian by his tribe of origin, or his host tribe if he is living on another tribe’s reservation (though this by itself will not suffice); (iii) that a person has established his status as an Indian by enrolling or seeking to enroll in a tribe; and (iv) by

To make matters more confusing, the Indian Civil Rights Act (ICRA) relies on the Major Crimes Act in defining an Indian as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, [United States Code] if that person were to commit an offense listed in that section in Indian country to which that section applies.”⁵⁹

During a Senate debate concerning criminal jurisdiction of Indians, Senator Daniel K. Inouye explained the rationale behind the ICRA definition.⁶⁰ He stated that the Major Crimes Act was incorporated by reference into the definition of “Indian” under the Indian Civil Rights Act so that there would be a consistent definition in the exercise of jurisdiction by the federal government and the tribal government.⁶¹ In other words, the definitions were coordinated so that an individual cannot claim to be an Indian for the purposes of federal jurisdiction and then try to use another definition for the purposes of avoiding tribal jurisdiction. Conversely, the Major Crimes Act prohibits a person from seeking to be an Indian for the purposes of tribal jurisdiction and then denying his status as an Indian for the purposes of federal jurisdiction.

II. PLAYING THE RACE CARD

A. *The Racial Underpinnings of the IRA*

The Indian Reorganization Act of 1934 (IRA) was one of the first statutes to provide a legislative definition of “Indian.”⁶² Although it was not the first law to use the blood quantum to restrict the definition of Indian, it was certainly the most influential. Section 19 of the IRA defines “Indian” as:

[A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any

seeking and being provided services by a Federal agency because of his status as an Indian. *Id.* at 23,674. Even if a defendant is eligible for enrollment in a federally recognized tribe, however, it does not mean he will be considered an Indian for the purposes of 18 U.S.C. § 1153. *Id.*

59. 25 U.S.C. § 1301 (1994).

60. 137 CONG. REC. 23,673 (1991).

61. *Id.*

62. Indian Appropriations Act of 1918, 25 U.S.C. § 297 (repealed 1985). *See* discussion *supra* Part I.A.

Indian reservation, and shall further include all other persons of *one-half or more Indian blood*.⁶³

Individuals meeting any one of these three criteria can obtain from the government a range of benefits, including tuition loans, loans for economic development, Indian preference in BIA employment, the right to petition the Secretary of Indian Affairs to take land in trust, and the right to organize as an Indian group or community.⁶⁴

Passage of the IRA marked a major turning point in federal Indian policy; the Act halted the destructive allotment policy, which had reduced tribal lands by two-thirds in 50 years, and reversed the federal policy of assimilation.⁶⁵ The IRA provides three alternative criteria for eligibility: (1) tribal membership, (2) ancestral descent, and (3) blood quantum.⁶⁶ Taken together, these criteria reflect a statutory attempt to define the term "Indian" inclusively, in a way that addresses legal, political, racial, and cultural categories.

In drafting section 19 of the IRA, Congress created three classes of Indians.⁶⁷ The first class, described as the "Membership Class,"⁶⁸ includes "all persons of Indian descent who are members of any recognized Indian tribe"⁶⁹ and is defined without regard to blood quantum. The second class, described as the "Descendant Class,"⁷⁰ includes "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"⁷¹ and is defined without regard to either blood quantum or tribal membership. The third class, described as the "Unaffiliated One-Half Blood Class,"⁷² includes "all other persons of one-half or more Indian blood"⁷³ and thus offers eligibility

63. *Id.* (emphasis added).

64. Memorandum from Scott Keep, Assistant Solicitor, U.S. Dep't of the Interior, Deputy Assistant Secretary of Indian Affairs 2 (July 12, 1981) [hereinafter Keep Memo of 1981] (on file with author) (citing 25 U.S.C. § 461 et seq. (1994)).

65. BORDEWICH, *supra* note 1, at 71–72.

66. 25 U.S.C. § 479 (1994).

67. *Id.*; see also Funke, *supra* note 45, at 10–32; John Collier, Commissioner of Indian Affairs, Enrollment Under the Indian Reorganization Act, Circular No. 3134 (Mar. 7, 1936) [hereinafter Circular 3134] (on file with author).

68. AMERICAN INDIAN POLICY REVIEW COMM'N, TASK FORCE ON LAW CONSOLIDATION, REVISION AND CODIFICATION, FINAL REPORT OF TASK FORCE 9 TO THE UNITED STATES CONGRESS 110 (1970) [hereinafter AIPRC TASK FORCE REPORT].

69. 25 U.S.C. § 479 (1994).

70. AIPRC TASK FORCE REPORT, *supra* note 68, at 110.

71. 25 U.S.C. § 479 (1994).

72. AIPRC TASK FORCE REPORT, *supra* note 68, at 110; Circular 3134, *supra* note 67, at 1.

73. 25 U.S.C. § 479 (1994).

for benefits to those who are not tribal members or residents on a reservation.

The Senate hearings on the bill show that Congress was aware that no minimum blood quantum was to be placed on either the membership or descendant class.⁷⁴ Karl A. Funke, in his influential 1976 article *Educational Assistance and Employment Preference: Who is an Indian?*, states that “a person of as little as ‘one sixty-fourth’ Indian blood could be included in the membership class and a person of as little as a ‘five-hundredth’ Indian blood could be included in the descendant class.”⁷⁵

Finally, the unaffiliated half-blood class was intended to extend the provisions of the IRA to Indians who are either unaffiliated with a tribe or who are members of tribes not recognized by the federal government.⁷⁶ The Senate Committee debating this bill was fully aware that this language included within the Act Indians who formerly had no rights at all.⁷⁷ A 1935 Memorandum to John Collier, Commissioner of Indian Affairs, from the Assistant Solicitor, Felix S. Cohen, specified the rights of non-tribal Indians under the Act:

Clearly, this group [Siouan Indians of North Carolina] is not a “recognized Indian tribe now under federal jurisdiction” within the language of section 19. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler/Howard Act only in so far as individual members may be one-half or more Indian blood. Such members may not only participate in the educational benefits under section 11 . . . and in the Indian preference rights for Indian Service employ-

74. See Funke, *supra* note 45, at 20.

75. Funke, *supra* note 45, at 20. The scope of the descendant class has been open to varying interpretations. Under one interpretation, it is *the descendant himself* who must have lived on a reservation on June 1, 1934. See AIPRC TASK FORCE REPORT, *supra* note 68, at 196; Funke, *supra* note 45, at 27. Because this interpretation would require that the descendant was alive in 1934 and residing on the reservation, it would thereby create a finite class of members—few of whom would be alive today. The other interpretation suggests that it is *the member from whom the Indian descends* who must have been alive and living on the reservation in 1934. This interpretation would give rise to an open-ended descendant class that would expand exponentially without regard to residency, tribal affiliation, or blood quantum. In the 1970s, the AIPRC adopted the first interpretation of this provision, stating “[i]t was readily apparent that [an open-ended descendant class] would immediately and drastically water down the preference and virtually destroy the purposes behind the preference laws.” AIPRC TASK FORCE REPORT, *supra* note 68, at 196.

76. AIPRC TASK FORCE REPORT, *supra* note 68, at 197.

77. *Id.*

ment granted by section 12 . . . but may also organize under sections 16 and 17.⁷⁸

This class is the hallmark of the inclusiveness of the IRA. As Collier, the architect of the IRA, testified to both the Senate and the House, “[t]he object of this definition is to include all Indian persons who, by reason of residence, are definitely members of Indian groups, as well as persons who are Indians by reason of degree of Indian blood.”⁷⁹

Collier strongly supported the special legal status of Indians as crucial to their survival.⁸⁰ In testimony before the Senate Committee on Indian Affairs, Collier indicated that a major objective of the IRA was continuing federal support for both persons who were Indian by virtue of degree of Indian blood and persons who were Indian by virtue of residence on a reservation and participation in a unique Indian culture.⁸¹

At the same time, however, the “all other persons” provision restricted the number of recipients in this category by requiring a high degree of Indian blood. In Circular No. 3123, dated November 18, 1935, Collier explained the definition of “Indian” set forth in section 19 of the IRA: “The above language shows on the part of Congress a definite policy to limit the application of Indian benefits, under the Indian Reorganization Act, to those who are Indians by virtue of actual tribal affiliation or by virtue of possessing one-half degree or more Indian blood.”⁸²

Although, as discussed above, many statutes use other definitions of “Indian,” the IRA criteria remain the underpinning of many BIA rules governing eligibility.⁸³ This is the case because section 19 of the IRA applies wherever an “Indian” is defined as any person who is “considered by the Secretary of the Interior to be an

78. Funke, *supra* note 45, at 26 (quoting an unpublished memorandum from Felix S. Cohen, Assistant Solicitor, Dep’t of the Interior, to John Collier, Commissioner of Indian Affairs (Apr. 8, 1935)).

79. *Id.*

80. See BORDEWICH, *supra* note 1, at 71–72; DEBO, *supra* note 28, at 353–54 (describing Collier’s passionate commitment to the preservation of Indian culture).

81. See generally Funke, *supra* note 45, at 19–32 (discussing Senate hearings regarding section 19 of the IRA).

82. John Collier, Commissioner of Indian Affairs, Membership in Indian Tribes, Circular 3123 (Nov. 13, 1935) [hereinafter Circular No. 3123], quoted in AIPRC TASK FORCE REPORT, *supra* note 68, at 200.

83. See AIPRC TASK FORCE REPORT, *supra* note 68, at 110.

Indian for any purpose,"⁸⁴ a phrase that frequently appears in BIA regulations.

B. BIA: Keepers of the Blood Quantum

Shortly after the IRA was passed in 1934, the BIA was charged with devising a method to certify individuals who claimed to be half-blood Indian. The Bureau based its determination on five factors: 1) tribal rolls; 2) testimony of the applicant; 3) affidavits from people familiar with the applicant; 4) findings of an anthropologist; and 5) testimony of the applicant that he has retained "a considerable measure of Indian culture and habits of living."⁸⁵ As explained in a 1936 memo written by Collier, "Determination of the degree of Indian blood is entirely dependent on circumstantial evidence; there is no known sure or scientific proof. Nor has any legal standard of universal applicability been set up by statute for the determination of who is, and who is not, an Indian."⁸⁶

According to BIA internal documents, persons either capable of establishing their Indian ancestry or "exhibiting sufficient 'Indian' physical characteristics to be equated with possession of one-half or more degree Indian blood"⁸⁷ were told they were entitled to benefits established by the IRA.⁸⁸

In fact, physical characteristics were such an important part of this determination that, in 1936, the BIA sent Harvard anthropologist Carl Selzer to Robeson County, North Carolina, to settle the mystery of whether a group named the Lumbee was in fact Indian.⁸⁹ He measured their features and put a pencil in each Indian's hair, noting "Indian" blood if the pencil slipped through and "Negroid" if it did not.⁹⁰ The "diagnoses" were based solely on physical characteristics. The absurd results of his study listed children as Indian while omitting their parents and placed brothers and sisters on opposite sides of the half-blood line. Of

84. Letter from Thomas M. Boyd, Assistant Attorney General, to Senator Daniel K. Inouye, Chairman of the Select Committee on Indian Affairs 2 (Jan. 30, 1989) [hereinafter Boyd Letter] (on file with author).

85. Memorandum from John Collier, Commissioner of Indian Affairs, U.S. Dep't of the Interior 2 (Sept. 22, 1936) (on file with author) (regarding registration as an "Indian" in accordance with section 19 of the Indian Reorganization Act).

86. *Id.* at 1.

87. Keep Memo of 1981, *supra* note 64, at 3.

88. *Id.*

89. BORDEWICH, *supra* note 1, at 64.

90. *Id.*

the 209 Indians Selzer “diagnosed,” he concluded that only twenty-two were Indians.⁹¹

Five decades after the passage of the IRA, however, the BIA was still stumbling over how to determine blood quantum. In a 1981 memorandum from Scott Keep, Assistant Solicitor of the Department of the Interior (DOI), to the Deputy Assistant Secretary of Indian Affairs, Keep acknowledged that the Bureau had no administrative procedure for determining blood quantum and was handling such decisions on a case-by-case basis.⁹² The memo stated, “[w]e strongly recommend that the Bureau establish, or more accurately re-establish, an administrative decision procedure to determine whether individuals claiming eligibility for IRA benefits actually possess one-half degree Indian blood.”⁹³

Despite this recommendation, the BIA’s efforts lagged. In 1986, the Department of the Interior’s own Board of Indian Appeals reprimanded the BIA for its “hidden regulations” regarding how blood quantum is determined.⁹⁴ Seventy-nine-year-old Morgan Underwood challenged a BIA decision lowering his blood quantum from full-blood Chickasaw Indian to half-blood.⁹⁵ In 1975, Underwood had received a BIA certificate of degree of Indian blood (CDIB) showing that he was full-blood Chickasaw Indian.⁹⁶ In 1983, when he applied to the BIA to get a card-sized CDIB to replace his larger certificate, the BIA reviewed his blood quantum and determined that it should be decreased.⁹⁷ The BIA made this change based on the fact that Underwood was illegitimate and there had been no judicial determination of paternity.⁹⁸ The Agency was not persuaded by the fact that decades before he had applied for and been granted a birth certificate from the state of Oklahoma attesting to the identity of his father, a full-blood Chickasaw.⁹⁹ Instead, the BIA suggested that the birth certificate was a forgery.¹⁰⁰

The court sharply criticized the BIA for the covert way in which it made its blood quantum determinations, never publishing the procedures in the Federal Register nor giving notice to Indians of

91. *Id.* at 64–65.

92. Keep Memo of 1981, *supra* note 64, at 3.

93. *Id.* at 1.

94. Underwood v. Deputy Ass’t Sec’y—Indian Affairs, 93 Interior Dec. 13, 23 (1986).

95. *Id.*

96. *Id.* at 15.

97. *Id.*

98. *Id.* at 16.

99. *Id.* at 15.

100. *Id.*

the methods by which it made CDIB determinations.¹⁰¹ The court reversed the BIA's determination and ordered it to issue Underwood a CDIB card stating he was full-blood Chickasaw.¹⁰²

In its eagerness to apply the blood quantum, the BIA has time and again proceeded without formally publishing its certification procedures as is required under the Administrative Procedures Act.¹⁰³ Even more seriously, it has repeatedly exceeded its administrative authority by imposing a blood quantum where the authorizing statute provided for a different, and often more generous, definition of "Indian."¹⁰⁴ As far back as 1938, Nathan Margold, Solicitor General of the DOI, had to prevent the "Indian Office" from imposing a blood quantum in issuing loans to individual Indians under the Oklahoma Welfare Act (OWA).¹⁰⁵ The OWA made credit available to all Indians regardless of their blood quantum.¹⁰⁶ At the time, the Agency staff was concerned that applications for loans were being made by people "with a very small degree of Indian blood."¹⁰⁷ The staff complained that it was unable to provide enough supervision and assistance to handle applications from "unrestricted Indians"¹⁰⁸ and that "credit funds [were] entirely inadequate to provide credit for all the Indian applicants."¹⁰⁹

Margold issued an opinion stating that the OWA made no distinction among Indian applicants on the basis of blood quantum. Rather, he pointed out that the Agency staff had discretion to require full security for the loans based only on the past performance of the borrower, not on the degree of Indian blood.¹¹⁰

More recently, the BIA attempted to make a similar argument in *Zarr v. Barlow*,¹¹¹ when it stated that, even if it could not use a blood quantum for educational loans, it was "reasonable to base eligibility for outright grants, which have no payback requirements, on the more restrictive standard."¹¹² *Zarr* is a singular example of the

101. *Id.* at 25.

102. *Id.*

103. *Cf.* 5 U.S.C. §§ 552-553 (1994) (requiring agencies to publish requirements and other materials on which they rely).

104. *See* Funke, *supra* note 45, at 3.

105. 25 U.S.C. §§ 501-509 (1994); Loans—Preference—Degree of Indian Blood, 1 Op. Solicitor Gen., Dep't of the Interior 828, 828 (1938), *available at* 1938 WL 6884.

106. 25 U.S.C. § 506 (1994).

107. 1 Op. Solicitor Gen., Dep't of the Interior at 828.

108. *Id.*

109. *Id.*

110. *Id.* at 829.

111. 800 F.2d 1484 (9th Cir. 1986).

112. *Id.* at 1490.

BIA's overzealous use of the blood quantum. The *Zarr* court held that the BIA's one-quarter blood requirement for Indian higher education grants did not conform with the Indian Financing Act of 1974.¹¹³ The plaintiff, a student named Barbara Zarr, was certified by the BIA as having 7/32 Pomo Indian blood.¹¹⁴ The Indian Financing Act defines "Indian" as "any person who is a member of any Indian tribe . . . which is recognized by the Federal Government as eligible for services from the [BIA]."¹¹⁵ The BIA's regulation, on the other hand, provides that "[f]unds appropriated by Congress for the education of Indians may be used for making educational loans and grants to aid students of one-fourth or more degree of Indian blood."¹¹⁶ The BIA denied Zarr's application for higher education grants because she did not meet the eligibility criteria outlined in 25 C.F.R. § 40.1.¹¹⁷

The court in *Zarr* held that blood quantum could not be the sole eligibility criterion and that the BIA's regulation "ignores the plain language and intent of the Indian Financing Act, and the agency is not free to ignore the statute and continue to administer the various loan programs under whatever standard it believes is correct or expedient."¹¹⁸ The court pointed out that where Congress has made blood quantum a criterion of eligibility, it has expressly indicated that blood quantum is the determining criteria.¹¹⁹ According to the court:

In the absence of express language . . . demonstrating that Congress intended to make distinctions among Indians who are tribal members but who have different degrees of Indian blood, it would thwart every indication of congressional intent to permit the BIA to rely on its power to "fill any gap left" . . . to support its use of the discredited restrictive standard.¹²⁰

113. *Id.* at 1493.

114. *Id.* at 1485.

115. *Id.* at 1490 n.5 (alteration in original).

116. *Id.* at 1487 (citing 25 C.F.R. § 40.1).

117. *Id.* at 1485.

118. *Id.* at 1490. After *Zarr* was handed down, the BIA amended 25 C.F.R. § 40.1 in an internal BIA memorandum. The regulation was again invalidated, however, based on the fact that the BIA did not follow notice and comment rulemaking. *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 440 (9th Cir. 1994). The current regulations define an Indian as a person "of one-fourth or more degree of Indian blood. . . who reside[s] within the exterior boundaries of Indian reservations under the jurisdiction of the Bureau of Indian Affairs or on trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs." 25 C.F.R. § 40.1 (2000).

119. *Zarr*, 800 F.2d at 1492.

120. *Id.* (citation omitted).

The *Zarr* court based its position on a similar holding issued by the United States Supreme Court in *Morton v. Ruiz*,¹²¹ a case which did not concern the blood quantum, but rather a regulation that restricted welfare benefits to Indians living on a reservation when the Congressional appropriation used the language “on or near” a reservation.¹²² In *Ruiz*, the Court explicitly recognized the Bureau’s authority to craft regulations to address its funding resources:

[I]f there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits.¹²³

Nonetheless, the Supreme Court went on to invalidate the BIA’s regulation concerning blood quantum because, as in *Zarr*, it imposed restrictions that Congress did not intend.¹²⁴

C. The Indian Hiring Preference: An Equal Protection Nightmare?

Perhaps the greatest example of how the blood quantum has come to dominate the eligibility debate is its role in the federal government’s Indian hiring preference. The hiring preference is set forth in section 12 of the IRA, which provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.¹²⁵

This was not the first time that Congress enacted a hiring preference statute. Numerous statutes provided for employment

121. 415 U.S. 199 (1974).

122. *Id.* at 207.

123. *Id.* at 231.

124. *Id.* at 237.

125. 25 U.S.C. § 472 (1994).

preferences for Indians prior to 1934, and the general policy of giving Indians preference in employment dates back as far as 1834.¹²⁶ None of those early statutes defined the term “Indian,” however, but spoke only of “Indians” or “persons of Indian descent.”¹²⁷ In 1929, the Civil Service Commission approved the first limitation on Indian hiring preferences by requiring that any candidate be at least one-quarter Indian blood and registered at an Indian agency.¹²⁸ In 1934, two months prior to the passage of the IRA, President Roosevelt signed an Executive Order amending the Civil Service rules to include positions that could be filled by Indians of one-quarter blood with a non-competitive examination.¹²⁹ That Order contained the first formal declaration of the quarter-blood requirement.¹³⁰

Still unhappy with the notion that the Indians would be subject to the discretion of officials acting under the Civil Service laws, Congress designed section 12 to exempt Indians from Civil Service laws and “put an end to the absolute discretion vested in the executive and administrative officials and reconstitute the Indian tribes with the sovereign powers which the federal government had usurped from them.”¹³¹ The goal was to create a system of self-government and self-determination, and the hiring preference was seen as critical to achieving that goal.¹³²

Although the preference itself contains no definition of “Indian,” section 19 of the IRA clearly defines the term for the purposes of all the provisions of the Act, including the hiring preference.¹³³ Nevertheless, for many years the BIA operated with its own set of procedures. The BIA never published these procedures, which were contained only in the internal BIA Manual. The BIA procedures required that “[t]o be eligible for preference, an individual must be one-fourth or more degree Indian blood *and* be a member of a Federally recognized tribe.”¹³⁴ The Indian Health Service (IHS) also had a hiring preference that imposed a one-fourth blood requirement.¹³⁵ This requirement was also never formally published but was set forth only in an IHS circular, which

126. 25 U.S.C. § 45 (1994); AIPRC TASK FORCE REPORT, *supra* note 68, at 106; Funke, *supra* note 45, at 8.

127. *E.g.*, 25 U.S.C. §§ 44, 46–47 (1994).

128. Funke, *supra* note 45, at 8–9.

129. *Id.* at 9 (citing Exec. Order No. 6676 (Apr. 14, 1934)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* at 18.

134. *Id.* (emphasis added) (citation omitted).

135. *Id.* at 6.

cited as authority all the general preference statutes and a 1939 Executive Order issued by President Roosevelt.¹³⁶

The BIA Manual and the IHS Circular thus clearly imposed restrictions on the definition of "Indian" which section 19 of the IRA does not. As discussed above, section 19 provides that the IRA benefits apply to members of tribes under federal jurisdiction (i.e. members of federally recognized tribes, irrespective of their blood quantum), to members' descendants who were living on reservations on June 1, 1934 (irrespective of the descendant's own tribal membership or blood quantum), and to unaffiliated Indians of one-half degree Indian blood (Indians who need not be a member of any tribe).¹³⁷ Under the BIA procedures, full-fledged tribal members of less than one-fourth Indian blood were ineligible, as were the half bloods and descendants who were not enrolled in any tribe.¹³⁸

The BIA's use of the one-quarter blood quantum for the hiring preference was condemned in 1977 by the Task Force on Law Revision, Consolidation, and Codification of the American Indian Policy Review Commission (AIPRC).¹³⁹ In its view, the Bureau had gone beyond its authority by "assum[ing] the discretion to alter the definition of 'Indian.'"¹⁴⁰ Furthermore, the Task Force criticized the BIA and IHS for not publishing the eligibility criteria in violation of the Administrative Procedures Act.¹⁴¹

In reaching its conclusion, the Task Force drew on a 1975 case, *Whiting v. United States*,¹⁴² in which a member of the Rosebud Sioux Tribe who was less than one-fourth blood quantum successfully challenged the BIA hiring criteria.¹⁴³ The BIA had turned to the Department of Justice (DOJ) to help it defend the case, but the Department said the case was indefensible.¹⁴⁴ With no options left,

136. *Id.* at 18 (citing Exec. Order No. 8043 (Jan. 30, 1939)); see also AIPRC TASK FORCE REPORT, *supra* note 68, at 108.

137. 25 U.S.C. § 479 (1994).

138. Funke, *supra* note 45, at 18-19.

139. AIPRC TASK FORCE REPORT, *supra* note 68, at 189-92. The mission of the AIPRC was a comprehensive investigation and study of Indian affairs with the goal of strengthening tribal governments so that tribes would fully represent their members and guarantee the rights of individual Indians at the same time. See AIPRC TASK FORCE REPORT, *supra* note 68, at 3-9 (detailing the mission and goals of the AIPRC).

140. Funke, *supra* note 45, at 36. Karl A. Funke was a member of the AIPRC Task Force and many of the conclusions set forth in his 1976 article, cited *supra* note 45, were adopted by the Task Force in its final report. See generally AIPRC TASK FORCE REPORT, *supra* note 68, at 49-153 (detailing the recommendations of the AIPRC regarding the revision of title 25).

141. AIPRC TASK FORCE REPORT, *supra* note 68, at 194-95.

142. *Whiting v. United States*, Civ. No. 75-3007 (D.S.D. 1975), cited in AIPRC TASK FORCE REPORT, *supra* note 68, at 195.

143. *Id.*

144. *Id.*

the BIA entered into a consent decree and changed its procedures to conform to section 19.¹⁴⁵

The result of the court ruling and the AIPRC findings was the enactment of 25 C.F.R. § 5.1, the rule that still governs the Indian employment preference today.¹⁴⁶ The irony of 25 C.F.R. § 5.1 is that, according to the Supreme Court in *Morton v. Mancari*,¹⁴⁷ decided the year before *Whiting*, the hiring preference that passed constitutional muster is the one the BIA had been using. The Court held that the requirement of membership in a federally recognized tribe *and* one-quarter blood quantum (the regulation contained in the BIA Manual) was a political rather than racial preference granted to Indians “as members of quasi-sovereign tribal entities.”¹⁴⁸ The Court stated that, “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”¹⁴⁹

The implication is that a race-based criterion such as a blood quantum is acceptable only as long as it is linked to the requirement of membership in a federally recognized tribe. In other words, the inclusion of the political criterion operates to save the racial criterion and thus the preference.¹⁵⁰

Not long after the BIA promulgated 25 C.F.R. § 5.1, however, the potential equal protection concerns of the race-based criteria became obvious to other governmental agencies to which the hiring preference regulation also applied. In 1988, the Office of Legal Counsel (OLC) issued an opinion advising the Acting General Counsel of the Department of Education (DOE) that 25 C.F.R. § 5.1 was unconstitutional.¹⁵¹ A year later, the DOJ sent a letter to Senator Daniel K. Inouye, Chairman of the Select Committee on Indian Affairs, reaching the same conclusion.¹⁵²

145. AIPRC TASK FORCE REPORT, *supra* note 68, at 195.

146. Funke, *supra* note 45, at 37. The language of 25 C.F.R. § 5.1 is almost identical to that of section 19 of the IRA.

147. 417 U.S. 535, 555 (1974).

148. *Id.* at 554.

149. *Id.* at 553 n.24.

150. See Boyd Letter, *supra* note 84, at 4 n.4.

151. Letter from Manuel Lujan, Jr., Secretary of the U.S. Dep’t of the Interior, to Richard Thornburgh, Attorney General 1 (Mar. 16, 1990) [hereinafter Lujan Letter] (on file with author).

152. *Id.*

At issue was the Indian hiring preference governing personnel actions within the DOE. The DOE's hiring preference defined Indian as:

- A) a member of an Indian tribe, band or other organized group of Indians . . . including those . . . terminated since 1940 and those recognized by the state in which they reside,
- B) a descendant, in the first or second degree, of an individual described in subparagraph (A),
- C) considered by the Secretary of the Interior to be an Indian for any purpose,
- D) an Eskimo, Aleut, or other Alaska Native, or
- E) is determined to be an Indian under regulations promulgated by the Secretary [of Education] after consultation with the National Advisory Council on Indian Education.¹⁵³

The DOJ concluded that the Act contained three provisions that were completely race-based: "a descendant, in the first or second degree," the provision regarding "Eskimo, Aleut, or other Alaska Native," and, where subsection C incorporated by reference 25 C.F.R. § 5.1, the criteria of persons "of one-half or more Indian blood."¹⁵⁴ The position of the DOE on the preference was clearly stated in the letter:

We believe that the preference granted by the Act to those who are *actual members of an Indian tribe* is constitutional under *Morton v. Mancari* Those preferences for Indians, however, that do not depend, even in part, upon membership in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under that decision¹⁵⁵

After an in-depth analysis of Supreme Court precedent regarding the unconstitutionality of racial classifications, the DOJ found that the race-based criteria were not narrowly tailored. In addition, the race-based criteria did not, in the case of the Eskimo and Aleut racial groups, remedy past discrimination, and the classifications "trammel[ed] the rights of innocent third parties."¹⁵⁶ The letter

153. 25 U.S.C. § 2651 (1988) (repealed 1994).

154. 25 C.F.R. 5.1(d).

155. Boyd Letter, *supra* note 84, at 2 (emphasis added).

156. *Id.* at 8.

concluded, “[a]ccordingly, we believe that the racial classifications contained in [25 C.F.R. § 5.1] are unconstitutional under Supreme Court precedent, even assuming a history of discrimination against Indians.”¹⁵⁷ The Department suggested that the Secretary of Education apply only the constitutional part of the preference and that it adopt additional regulations defining Indian for purposes of the preference.¹⁵⁸

A dispute between the DOI and the DOE regarding the constitutionality of the hiring preference emerged as a result of this letter.¹⁵⁹ Outraged that the DOE was consulting the DOJ on the constitutionality of 25 C.F.R. § 5.1 behind its back, Secretary of the Interior Manuel Lujan wrote to Attorney General Richard Thornburgh in March of 1990, emphatically defending the blood quantum requirement.¹⁶⁰ Secretary Lujan stated:

If, as OLC contends, a blood quantum requirement is unconstitutional per se, those tribes with blood quantum requirements in their constitutions will be exposed to significant legal challenges since the Indian Civil Rights Act (ICRA) incorporates a guarantee of equal protection similar to the Equal Protection provisions of the Fourteenth Amendment Additionally, since nearly 40% of the Indian tribal entities we deal with do not have any formally approved governing document or, indeed, any written governing document at all which would define tribal membership, we have no clear, objective standard for determining who is entitled to services.¹⁶¹

A note of near panic can be detected in Secretary Lujan’s language:

The OLC has informed us that it intends to send recommendations concerning this issue to the White House soon. I

157. *Id.*

158. *Id.* at 8–9.

159. See Lujan Letter, *supra* note 151, at 1–2.

160. *Id.*

161. *Id.* Secretary Lujan argues that if the blood quantum is held to be unconstitutional tribes will be open to equal protection challenges. This argument is dubious at best, based on the Supreme Court’s holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Court not only affirmed a tribe’s right to define its own membership, but it also held that the only federal court remedy explicitly provided for in the Indian Civil Rights Act is a writ of *habeas corpus* to test the legality of detention by a tribe. 436 U.S. at 72 n.32. Thus, a successful equal protection challenge in federal court, by an Indian against a tribe, seems unlikely.

believe the White House would not be well served if it were asked to take action without the advice of the federal agency that has the greatest experience and responsibility concerning the issue.¹⁶²

The DOJ's opinion clearly put the BIA in a bind. If it was to follow the advice of the OLC and come up with non-race-based criteria for the preference, the BIA might find itself once again facing a court challenge or congressional reprimand for ignoring the language and intent of the IRA. Yet, if the BIA was to continue implementing the IRA definition, it would be knowingly violating the equal protection guarantees of the Constitution. In the intervening decade since the DOJ called the regulations unconstitutional, the BIA has taken the path of least resistance, continuing to rely on 25 C.F.R. § 5.1. The only way out of the regulation at this point is for the Supreme Court to squarely confront 25 C.F.R. § 5.1, and its section 19 blueprint, and invalidate the race-based provisions of both based on the equal protection guarantees of the Fifth Amendment.

III. STAYING AWAY FROM RACE: RELYING ON THE POLITICAL RELATIONSHIP

Due to the constitutional implications of race-based eligibility criteria,¹⁶³ as well as concerns for tribal sovereignty, Congress has

162. Lujan Letter, *supra* note 151, at 2.

163. The question remains whether the race-based provisions of section 19 of the IRA could withstand a constitutional challenge. Under the rationale set forth in *Morton v. Mancari*, 417 U.S. 535 (1974), and recent equal protection cases, such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the IRA probably would not survive. Given the Supreme Court's recent opinion in *Rice v. Cayetano*, 528 U.S. 495 (2000), it seems possible that the Court may go out of its way to avoid subjecting the racial classifications of the IRA to the rigors of strict scrutiny.

The federal government's sovereign-to-sovereign relationship with Indian tribes is grounded in the "Indian Commerce Clause" which has been construed to authorize the United States to enter into treaties with tribes and enact legislation concerning them. U.S. CONST. art I, § 8. *Mancari* stands for the proposition that programs that benefit a *politically*-defined indigenous group need only meet the rational basis test. See *Delaware Tribal Bus. Comm'n v. Weeks*, 430 U.S. 73, 83-85 (1977). As long as the classification invokes the sovereign-to-sovereign relationship government has with the tribes, then federal programs giving benefits to Indians are constitutional. If, however, *racial* classifications are invoked, they are considered to be outside the holding of *Mancari* and are subject to the strict scrutiny given to racial classifications in non-Indian contexts. See *Boyd Letter*, *supra* note 84, at 6.

The vulnerability of race-based Indian preferences becomes especially evident in light of the Supreme Court's recent decision in *Rice*, 528 U.S. at 495. By a 7-2 vote, the Court struck down a Hawaiian voting scheme that allowed only native Hawaiians to vote for nine trustees

moved away from blood quantum and descent requirements and moved to a “political” definition. Legislation increasingly identifies an Indian according to his or her political status, as a member of a federally recognized tribe. As discussed above, “Indian” has become a two-part definition which first identifies an “Indian” as someone who is a member of an Indian tribe and then identifies an “Indian tribe” as any tribe, band, nation, or organized Indian community recognized by the United States.¹⁶⁴ By the mid-1990s, just over one million men and women met this criterion.¹⁶⁵

The government, along with some tribes, prefers this definition because, ostensibly, it avoids the pitfalls of racial classifications and puts the determination of “Indianness” in the hands of the tribes who decide who qualifies for membership. But this definition is no panacea. The old concerns about racial criteria and BIA domination are still lurking in the background due to the federal government’s role in telling tribes which ones it will recognize and what their membership requirements must be. Furthermore, the definition leaves out as many as half a million Indians who receive no benefits because they are unenrolled members of a federally recognized tribe, or full-fledged members of tribes that have never been recognized, or whose recognition was terminated by the government in the 1950s.¹⁶⁶ So to the extent that this definition satisfies the *Mancari* test, it also sacrifices the inclusiveness that was a basic tenet of the IRA.

The shift to this “political” definition began in the 1970s, when President Nixon stated that the goal of any new Indian policy must

who administer trust programs for the benefits of both native and non-native Hawaiians. *Id.* at 524. The statute defined “Hawaiian” as “any descendent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778” and “the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.” *Id.* at 516 (quoting HAW. REV. STAT. § 10-2 (1993)). According to the Court, “[a]ncestry can be a proxy for race. The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name.” *Id.* at 514–17.

It is significant, however, that *Rice* was decided on voting rights grounds and *not* on equal protection grounds. This suggests that a majority of justices was not prepared to sustain Rice’s claim that the racial classification violated his Fourteenth Amendment rights. See George Will, *Island of Equal Protection*, WASH. POST, Mar. 2, 2000, at A19. Perhaps, the Justices were thinking of the words of Justice Blackmun in *Mancari*: “If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . .” *Mancari*, 417 U.S. at 552. Whether the Court had in mind the eligibility implications for millions of Indians had they ruled on equal protection grounds, at least for now, 25 C.F.R. § 5.1 and section 19 of the IRA seem safe from challenge.

164. See *supra* Part II.C.

165. BORDEWICH, *supra* note 1, at 67.

166. See *id.*

be “to strengthen the Indian’s sense of autonomy without threatening his sense of community. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.”¹⁶⁷ The Indian Self-Determination and Education Assistance Act of 1975¹⁶⁸ was the most pivotal legislation of that era and set the stage for a transfer of authority to the tribes for administering federal grants and programs that benefit Indians.¹⁶⁹ It was during this period that the AIPRC produced its thorough and scathing study of federal Indian policy.¹⁷⁰ Since that time, according to Senator Daniel K. Inouye, Chairman of the Senate Select Committee on Indian Affairs, “[s]overeignty, the inherent right of self-government and self-determination, is the focal point in all Indian issues.”¹⁷¹

Congress’s new consciousness became evident as early as 1974, with the Indian Financing Act (IFA).¹⁷² With the IFA, Congress attempted to consolidate under one uniform standard numerous IRA loan and grant programs, which by the 1970s incorporated conflicting eligibility provisions. For example, revolving loan fund provisions set up under the IRA in 1939 and 1948 required a one-quarter blood quantum requirement, which obviously conflicted with section 19 of the IRA.¹⁷³ The intent of Congress was to redefine eligible Indians under a more inclusive standard.¹⁷⁴ In doing so, Congress, in enacting the IRA, rejected a definition based on a one-quarter blood quantum in favor of the standard of membership in a recognized tribe.¹⁷⁵

This definitional shift has also made its way into some regulations governing Indian eligibility. For example, in 1987, when creating rules governing eligibility for IHS services, the Department of Health and Human Services (HHS) promulgated 42 C.F.R. § 36.12¹⁷⁶ The rule states that an eligible person must be (1) a member of a federally recognized Indian tribe and (2) reside within a designated Health Service Delivery Area.¹⁷⁷ Between the draft rule and the final rule HHS deleted the one-quarter blood

167. *Id.* at 83.

168. 25 U.S.C. §§ 450 et seq. (1994).

169. *See id.* at 84.

170. *Id.*

171. *Id.* at 85.

172. 25 U.S.C. §§ 1452 et seq. (1994).

173. *See Zarr v. Barlow*, 800 F.2d 1484, 1488 (9th Cir. 1986) (discussing the legislative history of the Indian Financing Act).

174. *See id.*

175. *See id.* at 1491–92.

176. 42 C.F.R. § 36.12 (1999).

177. *Id.*

quantum.¹⁷⁸ In the Federal Register, the HHS stated, “[m]any commentators expressed concern that inclusion of a specific blood quantum requirement would interfere with a tribe’s sovereignty by eliminating some tribal members from eligibility based upon racial identity rather than on the political relationship which exists between tribes and the Federal government.”¹⁷⁹ It was careful to reserve the right to use such limiting factors in the future, however, saying “[t]he Department does not believe that any of these arguments necessarily preclude use of a specific blood quantum as a criteria for receipt of Federal health benefits.”¹⁸⁰

A. Federal Recognition: Who’s In and Who’s Out

Originally, tribes became legally recognized through treaties with the United States government or through executive orders or presidential proclamations.¹⁸¹ In 1934, the IRA provided unequivocal federal recognition to those tribes with whom the government already had a relationship and allowed some non-federally recognized tribes to organize under its provisions and become federally recognized.¹⁸² In 1978, the government adopted 25 C.F.R. § 83 to govern the process of federal acknowledgment for non-IRA tribes.¹⁸³ Until that time, those non-federally-recognized tribes had been “tribes” for limited purposes such as takings claims, but not for other purposes such as eligibility for services and benefits (e.g., health care).¹⁸⁴ With the enactment of 25 C.F.R. § 83, however, acknowledged tribes were acknowledged for all purposes.¹⁸⁵ In other words, this regulation enabled tribes to receive all services and benefits provided to other historically recognized tribes.¹⁸⁶ As of 1999, there were 558 federally recognized tribes.¹⁸⁷

The federal acknowledgment criteria are purely administrative, not statutory, and are promulgated by the DOI through the Bureau of Indian Affairs Branch of Acknowledgment and Research.¹⁸⁸ To

178. 52 Fed. Reg. 35,044 (Sept. 16, 1987).

179. *Id.*

180. *Id.*

181. BORDEWICH, *supra* note 1, at 68.

182. SHEFFIELD, *supra* note 25, at 59.

183. 25 C.F.R. § 83 (2000).

184. Cindy D. Padget, *The Lost Indians of the Lost Colony: A Critical Legal Study of the Lumbee Indians of North Carolina*, 21 AM. INDIAN L. REV. 391, 406 (1997).

185. 25 C.F.R. § 83 (2000).

186. *Id.*

187. Russell, *supra* note 23, at 130.

188. SHEFFIELD, *supra* note 25, at 14.

qualify for federal acknowledgment under the rule: (1) a tribe must have been identified as an American Indian entity since 1900; (2) it must comprise a distinct community and have existed as a community from historical times; (3) it must have political influence over its members; (4) it must have membership criteria; and (5) it must have a membership that consists of individuals who descend from a historical Indian tribe and who are not enrolled in any other tribe.¹⁸⁹

The DOI's position is that the process of federal acknowledgment is first and foremost a political one.¹⁹⁰ The preamble to the final rules in the Federal Register states: "[a]lthough petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations—a political relationship—is indispensable."¹⁹¹

Political or not, using federal recognition as a measure of "Indianness" signals to many Indians continued government control over Indians, not deference. According to one view, the enactment of 25 C.F.R. § 83 has made "Indianness" not an expression of tradition and history, but rather a rigid legal term that depends on how the BIA interprets the facts a tribe presents.¹⁹² In fact, many tribes that predate European contact are still not federally recognized.¹⁹³ According to Rennard Strickland, an Indian Law scholar, the quest to become a federally recognized tribe is a game played by the federal government to divide and conquer: "[t]he question of who is 'more' or 'most' Indian may draw people away from common concerns."¹⁹⁴ He points out that in the federal bureaucracy, being considered an Indian "may have nothing to do with who you are, how you live, what you do, what your beliefs are; it has to do with the marriage and tribal enrollment patterns of your parents or grandparents as interpreted by federal bureaucrats."¹⁹⁵ This process leaves out many Indian tribes, including terminated tribes whose federal recognition has not been restored and state recognized tribes which have not been granted federal recognition.¹⁹⁶

189. Mandatory Criteria for Federal Acknowledgment, 25 C.F.R. § 83.7 (a)–(f) (1999).

190. Memorandum from Scott Keep, Ass't Solicitor, U.S. Dep't of the Interior, to the Chief of the Division of Tribal Government Services 6 (Mar. 2, 1988) [hereinafter Keep Memo of 1988] (on file with the author).

191. 43 Fed. Reg. 39,361 (Aug. 24, 1978) (codified as amended at 25 C.F.R. pt. 54).

192. Padget, *supra* note 184, at 406.

193. Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 330 (1998).

194. *Id.*

195. *Id.*

196. SHEFFIELD, *supra* note 25, at 44.

In the 1950s and 1960s, the federal government terminated its relationships with numerous tribes which it deemed sufficiently capable of self-government and thus no longer in need of federal supervision or benefits.¹⁹⁷ The policy devastated the tribes, however, resulting in the alienation of trust lands and increased authority of states over tribes, and encouraged the relocation of Indians to urban centers.¹⁹⁸ Two major tribes that were terminated were the Menominees of Wisconsin and the Klamath of Oregon.¹⁹⁹ As well, more than seventy smaller tribes and some thirty-eight California *rancherias* (rural Indian settlements of the southwestern U.S.) were terminated.²⁰⁰ Although federal recognition has been restored to some of these tribes, many remain unrecognized and thus their members are excluded from the political definition of "Indian."²⁰¹

Another group of outsiders is state-recognized Indians. Ten states, all of them in the East, have a recognition process that is entirely independent of the federal recognition process.²⁰² A prime example of a state-recognized tribe that has been repeatedly denied federal recognition is the Lumbee Tribe of North Carolina.²⁰³ The Lumbee contradict every stereotype of "Indian." Some have blond hair and blue eyes; others have African American features. Early visitors to their region described them as "light-skinned Indians" who farmed and dressed like Englishmen.²⁰⁴ The DOI's early studies of the Lumbee concluded that they were not Indian because they did not look "like Indians."²⁰⁵ Yet, this group is so sure of its Indian heritage that it has petitioned nine times for federal recognition.²⁰⁶

Unlike many Southern tribes, such as the Cherokee, the Lumbee never possessed tribal rolls.²⁰⁷ Rather, their community identification depends on verification by Indian records, birth certificates, and other documents acceptable to the Indian

197. *Id.*

198. *Id.* at 44–45.

199. *Id.* at 44

200. *Id.* at 62.

201. *Id.*

202. *Id.* at 63–73. The ten states are: Alabama, Connecticut, Delaware, Georgia, Louisiana, Massachusetts, North Carolina, New York, Tennessee, and Virginia.

203. *Id.* at 69.

204. BORDEWICH, *supra* note 1, at 63.

205. Padget, *supra* note 184, at 403. Indian scholars say they are a mix of early Hatteras and Cheraw tribes, along with blacks and whites, including blue-eyed descendants of Sir Walter Raleigh's "lost colony." *Id.* at 404. See also the Selzer study discussed *supra* Part II.B.

206. BORDEWICH, *supra* note 1, at 63–64.

207. RUTH DIAL WOODS, TESTIMONY: INDIAN DEFINITION STUDY 10 (1974).

community.²⁰⁸ For the purposes of the federal government, this type of documentation is not sufficient. As Ruth Dial Woods, a Lumbee, wrote of her people in 1974 during their petition for federal recognition, “[t]he fact that they cannot historically document their lineage to one particular tribe does not negate their claim to Indian descent.”²⁰⁹ Throughout their recognition struggle, the Lumbee have come to think of themselves as the Indians that America forgot, and they resent that they have been forced to engage in “the paper chase of genealogy.”²¹⁰

To insiders, those tribes that do have recognition, what is at stake in federal acknowledgment is eligibility for scarce government resources. Thus, these tribes have a strong interest in thwarting groups like the Lumbee from succeeding under 25 C.F.R. § 83. When the Lumbee petitioned for recognition in 1974, many federally recognized tribes adamantly opposed them.²¹¹ These tribes made no secret of their fear that passage of the legislation would dilute services to historically recognized tribes.²¹² In a telegram to Congressman Lloyd Meeds, John A. Crow, Principal Chief of the Eastern Band of Cherokees, stated, “[T]hey simply have no historical relationship with the Federal Government. To the contrary, they have no treaties, no Federal trust land base, no historical tribal organization, and literally thousands of persons [are] claiming to be Lumbee Indians—who are in fact of no Indian lineage whatsoever.”²¹³

The United Southeastern Tribes, Inc. pointed out that DOI’s records in the 1930s showed there were only twenty-two people of half or more Indian blood among the Lumbee; by the 1970s, the tribe was claiming 55,000 members.²¹⁴ It stated: “As Indian people we are in great sympathy with the many groups of non-Indian people regardless of their origin who during these troubled times, find a need to form some type of identity. However, our sympathy and

208. *Id.*

209. *Id.* The bill granting the Lumbee federal recognition, H.R. 12216, 93d Cong. (1974), was passed by the House on October 7, 1974 and then forwarded to the Senate as S. 4045 where it was defeated. *Id.* at app. A at 5.

210. *Id.* at 20.

211. *Id.* at app. C.

212. *See id.*

213. Telegram from John A. Crow, Principal Chief of the Eastern Band of Cherokees, to Congressman Lloyd Meeds (undated), in WOODS, *supra* note 207, at app. C.

214. Letter from United Southeastern Tribes to Dep’t of Labor 1 (Oct. 17, 1974) (discussing the position of United Southwestern Tribes regarding the recognition of the Lumbee as Indians) in WOODS, *supra* note 207, at app. C.

concern cannot extend to the point of sacrificing the heritage, tradition and culture of our people."²¹⁵

At the 31st Annual Convention of the National Congress of American Indians held at that time, the delegates voted to oppose the Lumbee effort to gain federal tribal recognition status.²¹⁶ Eugene Begay, of the United Southeastern Tribes, Inc. stated, "[t]he long Indian struggle has been to maintain culture and identity and to develop our resources. The basic issue is this: Who is an Indian and who is not an Indian? It's time for us to decide, and then to tell Congress and federal agencies our conclusions."²¹⁷

The chairman of the Rosebud Sioux Tribe agreed. He stated, "[t]his issue is greater than you think. We may have from 40,000 to 79,000 persons waiting to make an onslaught on Congress—people suddenly coming out of the woodwork. How many do we allow to 'become' Indians, while we diminish our resources every day?"²¹⁸

The irony of this struggle is that it is precisely the Lumbee, known early in the century as the "Siouan Indians of North Carolina," that Felix Cohen referred to in his 1935 memorandum as Indians who would be considered unaffiliated half-bloods and would definitely fall within the reach of the IRA.²¹⁹

B. Whose Definition of Membership?

Whatever political meaning federal recognition gives to this definition of "Indian," the race-based requirements of tribal membership, and the government's role in dictating them, threaten to take away. Furthermore, the membership requirements vary between tribes resulting in tribes that have the least restrictive membership requirements receiving the most federal benefits. Most tribes define tribal membership requirements in a tribal constitution and implement the definition through a tribal roll.²²⁰ Title 25 of the U.S. Code contains scores of tribal enrollment statutes

215. United Southwestern Tribes Position Regarding The Lumbee People's Recognition as Indians 14, in Woods, *supra* note 207, at app. C.

216. Press Release, American Indian Press Association News Service 29 (undated), in Woods, *supra* note 207, at app. C.

217. *Id.* (quoting Eugene Begay, Navajo-Chippewa representative to the National Congress of American Indians).

218. *Id.* at 30 (quoting Robert Burnett, Chairman of the Rosebud Sioux Tribe).

219. Funke, *supra* note 45, at 26.

220. Dussias, *supra* note 57, at 86.

spelling out the membership criteria of various tribes. A typical example of this type of statute is the Yakima Tribe's enrollment statute, 25 U.S.C. § 601, which provides:

The Secretary of the Interior is authorized and directed, with the advice and consent of the Yakima Tribal Council, to prepare a roll showing the members of the Yakima Tribes . . . [which roll] shall constitute the official membership roll of the Yakima Tribes for all purposes The following shall be placed on the roll:

- (a) All living persons who received allotments on the Yakima Reservation . . .
- (b) All living persons who are of the blood of the fourteen original Yakima Tribes . . .
- (c) All living persons who have maintained a domicile . . . on the Yakima Reservation
- (d) All children of one-fourth or more blood of the Yakima Tribes born . . . to a parent who is an enrolled member and maintains a domicile on the Yakima Reservation.²²¹

Since the days of John Collier, it has been the policy of the government to tell tribes to whom they should offer membership. Collier stated:

[I]t is our opinion, and will be our policy, in connection with the approval of constitutions and by-laws of tribes, to urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should limit such membership to persons who reasonably can be expected to participate in tribal relations and affairs. . . . Where automatic membership is conferred upon children born of mixed marriages wherein the parents reside permanently away from the reservation, there should be included a minimum requirement that such children be of at least one-half degree of Indian blood.²²²

Justification for this policy was based on a paternalistic concern for protecting the tribes. According to Collier, "[i]t is important that the Indians not only shall understand this policy

221. 25 U.S.C. § 601 (1994).

222. Circular No. 3123, *supra* note 82.

but shall appreciate its importance as it applies to their own welfare through preventing the admission to tribal membership of a large number of applicants of small degree of Indian blood.”²²³

The DOI has maintained this insistence that tribes offer membership only to those who can be expected to maintain tribal relations. Such a view was summed up in a 1988 memorandum from Scott Keep, Assistant Solicitor of the DOI, concerning the authority of the Secretary to disapprove amendments to membership provisions of tribal constitutions. The memorandum stated:

[W]hile it is true that membership in an Indian tribe is for the tribe to decide, that principle is dependent on and subordinate to the more basic principle that membership in an Indian tribe is a bilateral, political relationship. A tribe does not have authority under the guise of determining its own membership to include as members persons who are not maintaining some meaningful sort of political relationship with the tribal government.²²⁴

The DOI has concluded that it has “broad and possibly nonreviewable authority” to disapprove or withhold approval of a tribal constitutional amendment regarding membership criteria.²²⁵ The DOI stated that it would exert this authority if a tribe amended its constitution to grant memberships to descendants, who were not maintaining any sort of tribal relation because that would constitute a racial criterion.²²⁶ It was this policy that the AIPRC strongly criticized when it stated, “The BIA has acted to undermine tribal governments by . . . usurping one of the most basic powers of self-government—the right to determine membership, by conditioning BIA funding on BIA-determined membership requirements.”²²⁷

The Supreme Court, on the other hand, has affirmed the power of tribal governments to set their own criteria for membership due to the political and sovereign nature of the tribe.²²⁸ In *Santa Clara Pueblo v. Martinez*, the Court stated, “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”²²⁹

223. *Id.*

224. Keep Memo of 1988, *supra* note 190, at 6.

225. *Id.* at 7.

226. *Id.*

227. AIPRC TASK FORCE REPORT, *supra* note 68, at 189.

228. *Roff v. Burney*, 168 U.S. 218, 223 (1897); *Patterson v. Council of Seneca Nation*, 157 N.E. 734, 735 (1927); *see also Waldron v. United States*, 143 F. 413 (C.C.D.S.D. 1905); COHEN, *supra* note 13, at 26.

229. 436 U.S. 49, 72 n.32 (1978) (emphasis added).

This language still leaves room, however, for the government to assert authority to determine a tribe's membership when it concerns "federal purposes," such as eligibility for governmental benefits.

Definitions vary among the tribes, but most require blood quantum or descent from a tribal member.²³⁰ Beyond that, tribes require varying degrees of blood quantum for membership eligibility, anywhere from one-half degree of tribal blood to no blood requirement at all.²³¹ As a result, enrolled members of a tribe today may include individuals who are racially non-Indian, those with very little Indian blood, and those who are racially Indian but live off the reservation and do not consider themselves part of the Indian community.

The White Mountain Apache tribe, for example, requires at least one-half blood quantum.²³² Membership in North Carolina's Eastern Band of Cherokee is based on as little as 1/32 degree Indian blood, while membership in the Tunica-Biloxi tribe requires only 1/64 Indian blood.²³³ The Cherokee Nation of Oklahoma accepts anyone descended from an individual listed on the early tribal rolls.²³⁴ The Onondaga and Seneca tribes require that members be born to an enrolled mother.²³⁵ The Tohono O'Odham, or Papago, Tribe of Arizona allows all children born to members of the tribe who reside on the reservation to automatically become members.²³⁶ The Lac Vieux Desert Band of the Lake Superior Chippewa Indians base eligibility on one-quarter blood and descent from a person who was listed on the census prior to 1928 or prior to 1940.²³⁷

Despite the BIA's threats to invalidate membership criteria based solely on descent, as of July 1991, the BIA reported that twenty-six tribes, containing 78,530 enrolled members, did not require blood quantum for membership, but only descent from a tribal member.²³⁸ Other tribes are willing to grant membership through adoption. For example, the San Carlos Apache tribe

230. COHEN, *supra* note 13, at 22-23.

231. *Id.*

232. BORDEWICH, *supra* note 1, at 73.

233. *Id.* at 72.

234. *Id.*

235. *Id.*

236. *Id.*

237. 25 U.S.C. § 1300h-3 (1994).

238. Bureau of Indian Affairs, U.S. Dep't of Interior, unpublished report of Tribal Enrollment Division (July 1991) (on file with author).

grants membership to the spouses of tribal members as long as they have one-quarter degree Indian blood from any tribe.²³⁹

No tribe, however, requires full-bloodedness for membership;²⁴⁰ none could. In 1910, just more than half of the nation's 265,638 Indians were full-blooded, but, today, many tribes contain no full-bloods at all.²⁴¹ Indians have the highest rate of interracial marriage of any minority in America.²⁴² In 1970, more than thirty-three percent of all Indians were married to non-Indians (compared to one percent of all Americans who married outside their race).²⁴³ A decade later that number was fifty percent.²⁴⁴ A congressional study suggested that the percentage of Indians with half or more Indian blood would decline from about eighty-seven percent in 1980 to just eight percent by 2080.²⁴⁵

As a result of this trend, many Indians believe that it is time that tribes dispense with the blood quantum as a criterion of membership.²⁴⁶ In fact, Indians marched in protest over the use of the blood quantum in Denver in March, 1999, stating that use of a blood quantum to determine membership disenfranchises increasing numbers of mixed-blood urban youths.²⁴⁷ Those Indians objected to the fact that they are the only group in the country that has to prove who they are with a piece of paper—the CDIB—and that urban Indians, often the products of mixed marriages, are subject to discrimination.²⁴⁸ Yet, many of these urban Indians want to be enrolled in a tribe because there are benefits to enrollment, such as scholarships and the right to claim Indian land and receive housing and business loans.²⁴⁹

A tribe's decision to rely on a blood quantum (and its decision regarding which blood quantum to use) is frequently linked to the struggle for tribal survival, the desire to maximize wealth or political advantage, or other outside forces affecting the tribe. For example, the Salish-Kootenai Tribe of Montana is composed mainly of mixed bloods and was almost terminated in the 1950s.²⁵⁰

239. *Id.*

240. BORDEWICH, *supra* note 1, at 73.

241. *Id.*

242. *Gov't Mgmt. Hearings, supra* note 7, at 5.

243. BORDEWICH, *supra* note 1, at 78.

244. *Id.*

245. *Id.*

246. Sheba R. Wheeler, *Indian Lineage Rules Decried Tribal-Blood Limits Called Exclusionary*, DENV. POST, Mar. 22, 1999, at B1.

247. *Id.*

248. *Id.*

249. *Id.*

250. SHEFFIELD, *supra* note 25, at 123.

The tribe's response was to tighten its blood quantum requirement to one-quarter.²⁵¹ At that time, the tribe saw promoting the blood quantum over inclusiveness as an "entrenchment" strategy necessary for survival.²⁵² The Cherokees, on the other hand, have remained inclusive, requiring only proof of descent from an individual listed on the Dawes Commission Rolls.²⁵³ They believe that a large, dispersed mixed-blood population is crucial to achieving political power as a tribe, and thereby protecting the full blood, traditional Cherokees.²⁵⁴ The result, however, is that each generation of the tribe becomes increasingly less Indian.²⁵⁵ Like the Cherokee, the Sault Ste. Marie Tribe of Chippewa requires only descent from a member, having discarded its blood quantum requirement in 1975.²⁵⁶ Since that time the tribe has gone from 1,300 to 21,000 members.²⁵⁷

In addition, gaming has been responsible for encouraging a relaxed membership standard in some tribes and a strict one in others. For example, the Mashantucket Pequots of Connecticut, who only require one-sixteenth Pequot blood for membership, have been revitalized as a tribe through an influx of new members brought on by gaming.²⁵⁸ At one point, the tribe had only twelve reservation residents.²⁵⁹ Now that the tribe has become wealthy as a result of running the most successful tribal casino in the country, many distant relations are requesting membership.²⁶⁰ According to one report, some eight to ten people a week apply for membership claiming they have Indian blood.²⁶¹

The Saginaw Chippewa of Mount Pleasant, Michigan, have been plagued by conflicts over tribal membership as a result of new gaming income.²⁶² In 1993, the tribe opened a casino which now brings in profits of more than \$200 million a year, enabling the

251. *Id.*

252. *Id.*

253. *Id.* at 105. Interestingly, Chief John Ross, who led the tribe into the confrontation with the colonists that resulted in the Trail of Tears, was the one-eighth Cherokee grandson of a Scots trader. Russell, *supra* note 23, at 131.

254. SHEFFIELD, *supra* note 25, at 123.

255. *See id.*

256. BORDEWICH, *supra* note 1, at 73.

257. *Id.* The reputation of the Sault Ste. Marie Tribe for selling membership and fishing rights to fishermen with no Indian blood, however, suggests that profit may have been a motive. *See id.*

258. Kathryn R. L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 423 (1997).

259. *Id.*

260. *Id.* at 422.

261. *Id.* at 423.

262. Elizabeth Amon, *Case: What's U.S. Tribal Role? Feds Replace Tribal Council with Rival but Face Court Challenge*, NAT'L L.J., Nov. 8, 1999, at A1.

tribe to pay each of its 2,800 members \$30,000 a year.²⁶³ The tribal council controls not only the award of casino contracts, but also membership policies.²⁶⁴ The situation has led to allegations of voter fraud based on claims that individuals who are not valid members through blood or adoption have voted in tribal elections.²⁶⁵ Recently, the BIA has taken the controversial step of intervening in the election dispute.²⁶⁶

The Shakopee Mdewakanton Sioux Tribe has only one hundred members, but it is constantly getting applications for membership.²⁶⁷ Presumably, this increase in interest in membership derives from their operation of the Mystic Lake Casino in Minnesota, the second most profitable tribal casino.²⁶⁸ Consequently, some tribal members have lobbied to implement a one-fourth blood quantum.²⁶⁹ The irony of this situation is that gaming has spurred many Indians living off the reservation to return, yet for tribes to maintain economic growth through gaming, they must limit their population growth.²⁷⁰

Conflicting membership requirements have caused acrimony between tribes, notably between the Michigan tribes. This acrimony was demonstrated by a recent dispute over the distribution of tribal judgment funds.²⁷¹ On one side was the Grand Traverse Band, the Little River Band, the Bay Mills Indian Community, and the Northern Michigan Ottawa Association, all of which require that their members be one-quarter blood, based on the Durant Roll of 1910. On the other side was the Sault Ste. Marie Tribe of Chippewa Indians with its lineal descent requirement.²⁷²

According to George Bennett, Chairman of the Grand Traverse Band of Ottawa and Chippewa, in his congressional testimony in support of H.R. 1604, a political compromise to settle the dispute,

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. Rand & Light, *supra* note 258, at 423.

268. *See id.*

269. *Id.*; *see also* Shakopee Mdewakanton Sioux v. Babbitt, 107 F.3d 667 (8th Cir. 1997).

270. Rand & Light, *supra* note 258, at 423.

271. *Hearings on H.R. 1604 Before the House Comm. on Resources*, 105 Cong. 2 (1997) (statement of George Bennett, Chairman of the Grand Traverse Band of Ottawa and Chippewa).

272. *Id.* At the time the judgement was awarded in 1968, there was one federally recognized Michigan tribe, the Bay Mills Indian Community, which would have been the sole recipient. The Sault Ste. Marie Tribe of Michigan Indians was recognized in 1972 under 25 U.S.C. §§ 2 and 13. In 1979, the Grand Traverse Band petitioned for recognition and later was recognized. In 1993, the Little Traverse Band of Ottawa Indians and the Little River Band of Ottawa Indians were federally recognized. Also, the Northern Michigan Ottawa Association is an organization with a membership of non-recognized Indians. *See id.* at 1-2.

“[t]his liberal definition [the Sault Ste. Marie definition] has had the net effect of swelling their tribal population to some 25,000-plus members.”²⁷³ As a result of the competing definitions, according to Bennett, there has been a thirty-year deadlock on the distribution of tribal funds.²⁷⁴

One former board member of the Sault Ste. Marie Tribe of Chippewa, Beverly S. Louis, a full-blooded Chippewa who has seen the effect of lax membership, takes a hard line against diluting the rolls.²⁷⁵ She advocates that her tribe adopt a half-blood membership requirement, even if it means her own granddaughter will not be eligible for membership. “There should be no more membership unless an Indian is one-half blood quantum—as determined by the BIA, not the tribe.”²⁷⁶ She believes that membership in her tribe, with the federal benefits that attend it, has become a prize offered up to the highest bidder.²⁷⁷ As a result, she has seen the membership rolls swell up with members who are one-thirty-second or less Chippewa blood.²⁷⁸ According to Louis, if the result of a strict blood quantum is that the tribe shrinks, so be it—perhaps Indians will be prompted to start marrying within the tribe.²⁷⁹

IV. SOLUTIONS

The history of the definition of “Indian” reflects a century-long quest to establish the boundary criteria of federal Indian law—“the place at which diminished Indian blood, culture, political affinity . . . indicate the transition from an Indian to an American identity.”²⁸⁰ With so many divergent interests at stake, one thing that does seem clear is that no single set of criteria is going to completely satisfy the government, the tribes, and “all other” Indians for all purposes.

273. *Id.* at 2.

274. *Id.*

275. Interview with Beverly S. Louis, former board member of the Sault Ste. Marie Chippewa Indians, in Ann Arbor, Mich. (Fall 1999).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. Frances Svensson, *Imposed Law and the Manipulation of Identity: The American Indian Case*, in *THE IMPOSITION OF LAW* 69, 73 (Sandra B. Burman & Barbara Harrell-Bond eds., 1979), quoted in SHEFFIELD, *supra* note 25, at 85.

Perhaps the closest to a workable solution that the government and the tribes, working in tandem, have achieved is the definition of "Indian artist" in the Indian Arts and Crafts Act of 1990.²⁸¹ This Act has addressed the sovereignty and inclusiveness problems of a definition based on federal recognition by adding another step, a tribal certification procedure that ensures that tribes will have final say regarding who is considered an Indian artist.²⁸²

A. *The Arts and Crafts Act of 1990:
A Case Study*

The Arts and Crafts Act of 1990 is unique among recent federal Indian legislation because, at all stages of its enactment, it was supported and advanced by Indians.²⁸³ President Bush signed it into law in 1990, and it amended previous legislation that had never been enforced.²⁸⁴ The main objective of the law was to stem the economic loss to the Indians caused by unmarked handicrafts—losses that were running between \$400 and \$800 million a year.²⁸⁵

The Arts and Craft Act has several unique features. It defines "Indian" as "any individual who is a member of an Indian tribe; or for the purposes of this section is certified as an Indian artisan by an Indian tribe. . . ."²⁸⁶ The definition of "Indian tribe" extends not only to tribes with federal recognition, but also to "any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority."²⁸⁷

The original version of the definition included no provisions for Indians who were not members of federally recognized tribes. At a hearing on the bill held in Santa Fe, New Mexico in 1989, however, several unenrolled Indians spoke about their situation and

281. 18 U.S.C. § 1159 (1994); 25 U.S.C. § 305 (1994).

282. 25 U.S.C. § 305 (e)(d) (1994).

283. SHEFFIELD, *supra* note 25, at 6.

284. *Id.* at 11.

285. *Id.* at 23. The law increased criminal penalties from the previous version and created civil penalties for its violation. The Act further directs the Arts and Crafts Board (an agency of the Department of the Interior, but not part of the BIA) to "promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market of the products of Indian art and craftsmanship." 25 U.S.C. § 305a (1994).

286. 18 U.S.C. § 1159(c)(1) (1994) (emphasis added); 25 U.S.C. § 305e(d)(2) (1994) (emphasis added).

287. 18 U.S.C. § 1159(c)(3)(B) (1994); 25 U.S.C. § 305e(d)(3)(B) (1994).

tribal leaders were sympathetic to their situation.²⁸⁸ One Indian artist, whose father is a Seneca and mother is a non-Indian and who was raised on the Seneca reservation, testified as follows:

Among my father's people, enrollment numbers are assigned through blood descent in the mother's line I do not question the rights of the tribes to set whatever criteria they want for enrollment eligibility; but in my view, that is the extent of their rights, to say who is an enrolled Seneca or Mohawk or Navajo or Cheyenne or any other tribe. Since there are mixed bloods with enrollment numbers and some of those with very small percentages of genetic Indian ancestry, I don't feel they have the right to say to those of us without enrollment numbers that we are not of Indian heritage, only that we are not enrolled.

. . . . To say that I am not [Indian] and to prosecute me for telling people of my Indian heritage is to deny me some of my civil liberties . . . and constitutes racial discrimination.²⁸⁹

Responding to this testimony, the legislators searched for a more inclusive definition and consulted with the DOJ to ensure its constitutionality. According to Gail K. Sheffield in her book *The Arbitrary Indian*, "[m]aking the tribes, through the certification provision, the arbiters of who is a (nonenrolled) Indian was done in accordance with *Santa Clara Pueblo v. Martinez*, in which the United States Supreme Court upheld the right of a tribe to determine its own membership."²⁹⁰ Also, congressmen from the eastern states that recognized tribes lobbied for the inclusion of state-recognized tribes.²⁹¹

One issue that arose before the 1996 regulations went into effect was whether a tribe could certify a non-Indian as a tribal artist. The Yankton Sioux tribe of South Dakota had certified a man who was adopted by a traditional family on the reservation, spoke the native language, and had spent much of his youth as an apprentice to his uncle, an internationally known Dakota bead artist.²⁹² The regulations resolved this issue by requiring that, in order to be certified,

288. SHEFFIELD, *supra* note 25, at 25, 28–29.

289. *Id.* at 26–27.

290. *Id.* at 29.

291. *Id.*

292. *Id.* at 103–04.

an individual must be of the tribe's lineage, and the tribe may not charge a fee for certification.²⁹³

In the final analysis, some Indians saw the Act as a step forward for sovereignty and others disagreed. An Indian Arts and Crafts Board commissioner stated that the statute expanded the sovereign power of the tribes because it provides them with another form of membership for non-member Indians.²⁹⁴ To him, the Act went beyond the blood quantum and encompassed "community recognition" within the "official" definition of "Indian."²⁹⁵ Other Indians saw the law as eroding the principle that Indian tribes have sole discretionary authority over their citizenry.²⁹⁶

The certification concept, while inclusive, raises some unanswered questions. For example, what authority will tribes have over non-members they certify? Can artists who are denied certification challenge the tribes? Should state-recognized tribes be put on the same footing as federally recognized tribes?²⁹⁷ Furthermore, although the tribes are now the arbiters of "Indianness," as the regulations explicitly state, certification is still based on one of the criteria called unconstitutional by the DOJ a decade ago: Indian descent.²⁹⁸

B. Other Solutions: From a Uniform Blood Quantum to Self-Identification

Many solutions to the inconsistent standards of Indian identity have been offered up throughout the years. In 1976, a Health, Education and Welfare Department Task Force Report suggested that "revision of some statutes to redefine the term 'Indian' to eliminate the connotation of race might eliminate the qualms felt by some courts in passing upon the constitutional basis for assistance to Indians."²⁹⁹

A year later the AIPRC Task Force issued its final recommendations based on suggestions it received from chiefs and spokesmen

293. *Id.* at 103.

294. *Id.* at 122.

295. *Id.* at 122-23.

296. *Id.* at 122.

297. *Id.* at 130.

298. *Id.*

299. THE CHANGING LEGAL STATUS OF THE TRIBAL INDIAN, REG'L TASK FORCE ON INDIAN AFFAIRS, REP. TO THE DEP'T OF HEALTH, EDUC. AND WELFARE REGION VIII, DENV., COLO. 12 (1976).

of the Five Civilized Tribes in Oklahoma.³⁰⁰ The tribes advocated a uniform one-quarter blood quantum, applicable to all the provisions of section 19 of the IRA, to alleviate the unfairness that results from the tribes' varying standards of membership.³⁰¹ The AIPRC's recommendation included the lowering of the one-half blood quantum requirement of the unaffiliated Indians to one-quarter blood quantum.³⁰² Obviously, this solution does little to cure the constitutional problems of the IRA, and an across-the-board blood quantum would no doubt exacerbate the sovereignty and self-determination concerns of many tribes.

A slightly more inclusive standard favored by some is membership in an Indian tribe—including non-recognized, terminated, and state-recognized tribes—along with a one-quarter blood quantum.³⁰³ While this definition meets the *Mancari* test³⁰⁴ and expands the definition to include tribes that don't have federal recognition, it still leaves unenrolled Indians, like the mixed-blood urban youths³⁰⁵ who protested in Denver, without benefits, and it certainly overrides tribal definitions of membership.

An option at the other end of the spectrum is self-identification—the Census model. Self-identification, unlike the blood-quantum, is free from government assumptions about what race is because no one is telling the individual what it means to be an “Indian” when he or she selects that category.³⁰⁶ In Russell Thornton's view:

[W]hat seems important . . . is that American Indians be allowed to do their own defining, either as individuals or as tribes. This may occur on the individual level through self-identification; it may occur on the tribal level through formal membership. One may object that self-identification allows considerable variation among individuals defined as American Indian, but American Indians have always had tremendous variation among themselves, and the variations in many ways have been increased, not reduced, by the events of history [and] demographic[s]. . . . Allowing self-identification and the differences it encompasses is simply to

300. AIPRC TASK FORCE REPORT, *supra* note 68, at 111.

301. *Id.*

302. *Id.* at 112.

303. Charles Wilkinson, Moses Lasky Professor of Law, University of Colorado, Remarks at American Indian Law Day 2000 at Univ. of Mich. Law School (Mar. 24, 2000).

304. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

305. *Supra* notes 246–49 and accompanying text.

306. See SHEFFIELD, *supra* note 25, at 87 (quoting RUSSELL THORNTON, AMERICAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492, at 224 (1987)).

allow American Indians to be American Indians, something done all too infrequently in the short history of the United States.³⁰⁷

The appeal of self-identification is that it both offers uniformity and embraces the different notions of “Indianness” which are at the heart of the confusion. Yet, it is obviously unworkable on many levels. First and foremost, it is a purely racial category and eliminates any political grounding for the government’s special treatment of Indians. Also, it would be politically unpopular, resulting in unlimited federal responsibility for “Indians” and drastically eroded tribal sovereignty. Furthermore, it is inevitable that the Indian population would explode based on the thirty-eight percent increase in the Census count of the Indian/Alaska Native population between 1980 and 1990, which far outpaced what can be explained by birth rates.³⁰⁸ This increase has led Indians to joke that the largest tribe in the United States will soon be the “Wanabi.”³⁰⁹ Clearly, then, a law providing higher education grants to individuals who self-identify as Indian, for example, would not win many supporters in Congress.

*C. A Definition that Defers to Tribes, Includes
‘All Other Persons,’ and Watches the Government’s Bottom Line*

As long as race is the basis of the government’s definition of Indian, self-determination will not be. As discussed *supra* Part II, the history and language of the IRA show that it is fundamentally a race-based policy. According to Fergus Bordewich, “Collier believed that Native American culture—‘this Red Atlantis’—was morally and aesthetically superior to modern industrialized society and to its ethos of individualism and competition.”³¹⁰ Collier saw the IRA as a means of “awakening the racial spirit.”³¹¹

Consequently, the first step Congress should take is to repeal section 19 of the IRA. Politically and pragmatically, the provision has outlived its time. The provision providing benefits to “all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian

307. *Id.*

308. *Gov’t Mgmt. Hearings, supra* note 7.

309. Russell, *supra* note 23, at 131.

310. BORDEWICH, *supra* note 1, at 71.

311. *Id.* at 72.

reservation"³¹² is a finite class because it applies to *descendants* who were living on the reservation in 1934.³¹³ Thus, in the near future, the provision will be obsolete because the class will have no living members. The "all other persons of one-half or more of Indian blood" is clearly unconstitutional under the *Mancari* rationale,³¹⁴ and thus should be repealed. The remaining provision, which refers to members of tribes under federal jurisdiction,³¹⁵ is by itself too restrictive and leaves out unenrolled Indians and terminated and state-recognized tribes.

In creating a definition that would become the prototype for future statutory and regulatory provisions, Congress should follow its own example and retrace the steps it took when it created the definition of Indian under the Arts and Crafts Act: it should involve Indians in all stages of development of the Act; it should look for a definition that defers to the sovereignty of federally recognized tribes and yet includes unenrolled Indians and terminated and state-recognized tribes where possible; it should make the tribes the arbiters of membership and certification; and it should consult with the DOJ to ensure that the Act conforms to Supreme Court precedent.

It is true that there is a crucial difference between the Arts and Crafts Act and the numerous other laws which populate title 25: the Act does not entitle Indians to any *federally funded* benefits.³¹⁶ If the past is prologue, any Indian preference or benefits law that lets the tribes decide whom to certify and includes terminated and state-recognized tribes would surely encounter resistance from both the government *and* federally recognized tribes. Surely, the BIA would try to insert a blood quantum requirement.

Thus, a definition that attempts to reconcile these competing interests and could be inserted uniformly in federal Indian benefit laws follows.

312. 25 U.S.C. § 479 (1994).

313. See AIPRC TASK FORCE REPORT, *supra* note 68, for a discussion of the AIPRC interpretation of this provision.

314. See *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

315. 25 U.S.C. § 479 (1994).

316. 25 U.S.C. § 305 (1994).

D. An "Indian" Is

An Indian is:

- a) any individual who is a member of any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States because of their status as Indians; or for the purpose of this section is certified as an Indian by a federally recognized Indian tribe. The Secretary of the Interior shall not impose a blood quantum requirement on any certification procedure, but shall defer all authority to the tribes to decide the basis for certification.
- b) any individual who is a member of any non-federally recognized Indian tribe, including those tribes, bands, or groups terminated since 1940, and any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority *and* who is a one-quarter blood quantum as certified by his or her Indian tribe.

Such a definition operates on many levels. This definition satisfies the *Mancari* test³¹⁷ because it puts the tribes in charge of certification and links the blood quantum requirement with tribal membership. The tribes retain their sovereignty through being in charge of certification of both the unenrolled members included in subsection (a) and the blood quantum required in subsection (b). The government is thereby out of the race business as far as certification is concerned, yet the blood quantum still can be used to reasonably limit a portion of the eligible population. Finally, the provision is true to the inclusive spirit of the IRA. It would cover the Lumbee, the mixed-blood youths in Denver, and the unenrolled Seneca artist. It would satisfy the DOJ, and, most important, it may find supporters in Congress.

It is true that a definition which gives the tribes total control over certification would involve a true leap of faith on the part of the federal government, but it is one that the Arts and Crafts Act

317. See *Mancari*, 417 U.S. at 555.

suggests that the government is ready to make. According to Steve Russell, President of the Texas Indian Bar Association:

Whether tribes follow economic incentives in the matter of blood quantum is, in the final analysis, up to tribal governments At the root, it is tribal sovereignty that defines an Indian as certainly as it is tribal sovereignty that legitimizes the treaties that ceded the land upon which the United States rests.³¹⁸

When Glenda Ahhaitty, a member of the U.S. Census Bureau Advisory Committee on American Indian and Alaska Native Populations, was testifying before Congress in 1999 regarding census implementation in Indian Country, she said that a basic determination must be made at the outset when drawing up a definition of American Indian: Does the definition support sovereignty and self-determination for Indian people?³¹⁹

Congress and the BIA may someday attempt to clear up the confusion in the law by adopting a uniform provision such as the one suggested above. Or, they may simply continue to define "Indian" on an ad hoc basis, responding to the political and legal attitudes of the time. But what is certain is that the benchmark of the success of any definition they adopt will be whether Congress, the BIA, and Indians can answer Ahhaitty's question with a resounding "Yes."

318. Russell, *supra* note 23, at 132.

319. *Census Implementation in Indian Country: Hearing Before the Senate Comm. on Indian Affairs*, 145 CONG. 476 (1999) (statement of Glenda Ahhaitty, member of the U.S. Census Bureau Advisory Committee on American Indian and Alaska Native Populations), available at 1999 WL 16947158.