

AN INDIAN BY ANY OTHER NAME: CROSS-BORDER AFFIRMATIVE ACTION

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While Indian tribes bordering the United States and Canada may share the same culture, the same ancestry, and even the same name, a descendant of common heritage may not be recognized as “Indian” in the United States, and thus not eligible to receive federal benefits. The federal government has the power to recognize an Indian tribe’s sovereignty and determine who is an “Indian” for tribal services, but limits such recognition to those tribes falling within the geographic limits of the United States. With respect to members of “border tribes” that historically traversed the U.S.-Canada border, “Indian” recognition can be denied to an individual because each federally recognized tribe is subsequently required to limit its membership to those whose lineage can be traced directly to that particular tribe’s location within the United States, regardless of tribal heritage predating the border. The result is a gap in recognition: Many descendants of border tribes are born and raised on one side of the border but only recognized as “Indian” on the other. In the United States, ineligibility for affirmative action—both public and private—is one symptom of this gap in recognition. This Note argues that non-recognition of American Indians for affirmative action purposes illustrates how the federal government’s failure to account for descendants of border tribes prevents the United States from wholly meeting its trust obligation, and proposes ways the government can permanently repair its trust relationship with Indian tribes in this narrow context. It discusses three methods for establishing cross-border affirmative action for American Indians: ratification of a bilateral agreement or enactment of domestic statutory reform within the United States, intertribal recognition of membership between U.S. and Canadian tribes, and a potential short-term solution calling upon private initiatives to embrace a broad cross-border definition of “Indian.” This Note concludes that intertribal recognition is impractical due to existing hostility—both on the part of tribes and their respective federal trustees—to the concept of dual tribal enrollment. Further, while private-sector mechanisms may provide a stopgap solution to the problem, they cannot adequately address the federal standards that perpetuate the gap in recognition. In order to fully cure this defect and fulfill the government’s enduring trust responsibility, Congress must take legislative action to close the gap in recognition and provide equal opportunity for affirmative action to all American Indians in the United States.

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INTRODUCTION

In 2007, my father—the last of my immediate family—died. My guardians subsequently helped me apply for enrollment in the tribe that my mother belonged to—something that had been discussed in the past but never came to fruition while my mother was alive. I was born and raised a U.S. citizen in Niagara Falls, New York, and had visited Iroquois reservations in the state. When my tribal status card arrived, I was surprised to see that it bore the Canadian flag, but did not think much of it at the time. After all, the Iroquois Confederacy’s tribes had spanned across the border both before and after the United States’s and Canada’s founding.

A year before my father died, my high school had graduated a Gates Millennium Scholar. The program—funded by the Bill and Melinda Gates Foundation—is a prestigious college scholarship that provides a full ride for minority students who have excelled in secondary education.¹ I applied, and, many months later, I was told that I was a finalist for the scholarship. As a finalist, the program informed me that I needed to provide proof of tribal enrollment or certificate of

¹ See *Gates Millennium Scholars Program*, GATES MILLENNIUM SCHOLARS, <http://www.gmsp.org/gates-millennium-scholars-program/> (last visited Sep. 18, 2017).

descent from a state or federally recognized tribe.² I immediately faxed a scanned image of my newly minted status card and gave the program the enrollment office's phone number. My hopes were dashed when the Gates program notified me that I would be disqualified because my tribe was not recognized at the federal or state level within the United States. Despite my insistence that all Iroquois tribes are from within what is now the United States, the program stood by its decision. The potential for a \$200,000 scholarship was gone over this legal technicality.

My experience highlights one of the many problems that arise as a result of the dissonance between U.S. and Canadian Indian status recognition. The United States and Canada have the power to recognize a tribe's sovereignty and determine who is an "Indian" for tribal services.³ Both countries, however, limit such recognition and services to only those Indians who are members of tribes within their respective jurisdictions.⁴ Further compounding the problem, both governments require each federally recognized tribe to limit its membership to those whose lineage can be traced directly to that particular tribe located within their respective countries, regardless of tribal heritage predating the U.S.-Canada border.⁵ While tribes that historically traversed the border region may still share the same culture and even the same name in both the United States and Canada, the division of territory following the American Revolution bisected these tribes into separate legal entities with mutually exclusive memberships.⁶ More than thirty border tribes⁷ and tens of thousands of Indians⁸ are split

² See *Gates Millennium Scholars Program 2016*, GATES MILLENNIUM SCHOLARS, <https://scholarships.gmsp.org/Program/Details/7123dfc6-da55-44b7-a900-0c08ba1ac35c> (last visited Sep. 18, 2017).

³ See *infra* Part I.

⁴ See *infra* Section I.A.

⁵ See *infra* Section I.A.

⁶ See Nicole Terese Capton Marques, Comment, *Divided We Stand: The Haudenosaunee, Their Passport and Legal Implications of Their Recognition in Canada and the United States*, 13 SAN DIEGO L.J. 383, 385 (2011). Lake Ontario serves as an analogy. Geographically, it is a singular body of water with the same name no matter on which side of the border it sits. Legally, however, Lake Ontario is artificially split into two entities between the United States and Canada whose jurisdictions do not overlap. Lake Ontario-St. Lawrence River regulation plan (Plan 2014), CANADA, <https://www.canada.ca/en/global-affairs/news/2016/12/lake-ontario-lawrence-river-regulation-plan-plan-2014.html?=&wbid> (last updated Dec. 9, 2016).

⁷ Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 315-16 (1984).

⁸ See D.K. Daeg de Mott, *Iroquois* (stating that the 2009 Iroquois population between the United States and Canada, alone, was over 125,000), in 2 WORLD MARK ENCYCLOPEDIA OF CULTURES AND DAILY LIFE 304 (Timothy L. Gall & Jeneen Hobby eds., 2d ed. 2009).

this way. The result is a gap in recognition: Many descendants of border tribes are born and raised on one side of the border but only recognized as “Indian” on the other.⁹

In the United States, the federal government’s failure to recognize Indians who fall into this gap as “Indian” not only subverts their right to cultural survival and identity, but also serves to cut them off from federal benefits that the government is obligated to provide.¹⁰ The United States is indebted to Indian tribes, having made certain promises in exchange for the tribes’ relinquishment of vast amounts of territory and their guarantee of peaceful relations with the U.S. government. This exchange created the U.S. government’s enduring trust responsibility, which compels it to provide federal protection and assistance to the indigenous populations within the United States.¹¹ Despite this obligation “to enhance the social and economic wellbeing of Indian people,” American Indians remain “the most disadvantaged and impoverished group in our society.”¹²

While ineligibility for affirmative action—both public and private—is just one symptom of the gap in recognition, it illustrates how the federal government’s failure to account for descendants of border tribes prevents the government from wholly meeting its trust obligation. This Note proposes ways the U.S. government can permanently repair the trust relationship in the narrow context of affirmative action and anticipates a private sector interim solution to close the gap in recognition. It argues that, for the trust responsibility to be met, an Indian born a U.S. citizen but recognized as “Indian” only in Canada should be eligible for affirmative action for Indians in the United States. To provide context, Part I briefly describes the geographical and cultural reality of Indian tribes predating the U.S.-Canada border, the trust relationship created between the U.S. government and the newly partitioned border tribes within its territory, and the subsequent criteria for defining “Indian” and tribal membership in the United States. Part II then examines how the tension between the political and racial classifications of “Indian” plays a role in defining “Indian” for the purposes of federal programs, and how this definition

⁹ Marques, *supra* note 6, at 385, 403.

¹⁰ See G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP] (“Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”); Marques, *supra* note 6, at 387–88 (noting that eligibility for federal services hinges on enrollment as a member of a federally recognized tribe in the jurisdiction of the United States).

¹¹ See *infra* Section I.A.

¹² STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 43 (4th ed. 2012).

informs the availability of private and public affirmative action programs. Finally, Part III explores three potential solutions that would provide for a form of mutual recognition of descendants of border tribes as “Indian” in both the United States and Canada, including their respective benefits and limitations.¹³

I

INDIAN POLICY AND DEFINING “INDIAN”

“Conquest gives a title which the Courts of the conqueror cannot deny”

—*Johnson v. M’Intosh*, 1823¹⁴

A. *The Trust Relationship*

What are known as “border tribes” first existed as unified sovereign entities that traversed the territories of the United States and Canada long before these countries existed. For example, before Columbus landed in the so-called New World, the Haudenosaunee¹⁵ Confederacy was founded upon mutual acceptance of the *Gayanashagowa*—the Great Law of Peace—by the Mohawk, the

¹³ With regards to terminology, the author will use “Indian” throughout this Note. The author has many concerns regarding the term “Indian,” and has oscillated on what his preferred terminology is for people to refer to his race. Nonetheless, the term “Indian” will be used throughout this paper, as that is the term of art used in all relevant statutes and materials. *Cf.* *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1282 n.1 (11th Cir. 2015) (“[W]e use the term ‘Indian’ throughout this opinion because it is the term used in the statutes at issue”); *Stand Up for California! v. U.S. Dep’t of Interior*, 919 F. Supp. 2d 51, 67 (D.D.C. 2013) (“[T]he word ‘Indian’ is a term of art”); Dan Lewerenz, Note, *Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug*, 27 *ARIZ. J. INT’L & COMP. L.* 193, 194 n.6 (2010) (“Although the terms ‘Native American’ and ‘Native’ are commonly used in the United States, and the preferred term in Canada is ‘First Nations,’ most of the treaty, statutory, and regulatory law concerning this particular issue uses ‘American Indian’ or ‘Indian.’”).

¹⁴ 21 U.S. (8 Wheat.) 543, 588 (1823).

¹⁵ Pronounced “Ho-dee-no-so-nee.” Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 *BUFF. L. REV.* 1041, 1042 n.7 (1998). The word means “people of the longhouse,” after the structures that housed and defined the constituent family clans of the Confederacy’s component nations. *See* Marques, *supra* note 6, at 387 (describing the model of the longhouse as one of both kin and territory). European colonists referred to the Confederacy as the “Iroquois.” *See also* FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* 25 (1984) (noting the origin of the word “Iroquois” is unclear and did not originate from the Indians); WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* 3 (1998) (noting the French name for the country was “Iroquoia” which may be the root for the word “Iroquois”). The British and later the Americans referred to the Confederacy as the “Six Nations” or “Six Nation Confederacy.” *See, e.g.*, Treaty with the Six Nations, Tribes of Indians called the Six Nations-U.S., Nov. 11, 1794, 7 Stat. 44 [hereinafter Treaty of Canandaigua] (referring to the Haudenosaunee as “the Six Nations”).

Oneida, the Onondaga, the Cayuga, the Seneca, and, subsequently, the Tuscarora Nations.¹⁶ This alliance of tribes—referred to interchangeably as “Haudenosaunee,” “Iroquois,” and “Six Nations”—are the indigenous inhabitants of the lands bordering Lake Huron, Lake Erie, Lake Ontario, and the St. Lawrence River, in what are now parts of Ontario, Quebec, upstate New York, and Pennsylvania.¹⁷ While the Confederacy’s political power extended over this whole area, the constituent nations’ respective homes were centered in upstate New York.¹⁸

The establishment of the U.S.-Canada border¹⁹ divided the Iroquois tribes²⁰ and more than thirty other tribes²¹ by what remains to

¹⁶ E.g., Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 807–09 (1998). The Tuscarora Nation originally inhabited North Carolina and moved to New York, eventually joining the Confederacy in 1712. The Confederacy functioned more like the U.S. Articles of Confederation or the modern European Union—akin to a very strong alliance, rather than a unified body as the U.S. federal system. Iroquois history has a centuries-long scholarship that is beyond the scope of this paper. See generally FENTON, *supra* note 15 (detailing Iroquoian history and cultural practices from the mid-sixteenth century to 1794).

¹⁷ FENTON, *supra* note 15, at 3.

¹⁸ See *id.* at 4 (providing map of Iroquoia in 1600). Hence, the author’s matrilineal ancestors ultimately descend from within the present United States jurisdiction.

¹⁹ See Definitive Treaty of Peace, Gr. Brit.-U.S., art. II, Sept. 3, 1783, 8 Stat. 80, 81 [hereinafter Treaty of Paris] (creating the international boundary).

²⁰ See Marques, *supra* note 6, at 390 (noting that the “International Boundary” created following the American Revolutionary War failed to consider status and rights of Indian tribes). The United States punished those who allied with the British by taking away most of their land in New York State, while the British offered little better than small reservations in Canada. See McSloy, *supra* note 15, at 1048, 1054–55; see also ENCYCLOPEDIA OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY) vi (Bruce E. Johansen & Barbara A. Man, eds., 2000) (comparing map of aboriginal Iroquois lands and modern reservations split between the United States and Canada). The author’s distant matrilineal ancestors left upstate New York and settled on the Six Nations Reserve in Southern Ontario.

²¹ See O’Brien, *supra* note 7, at 315–16 (“More than thirty tribes on the northern border are affected, including members of the Wabanaki and Iroquois Confederacies, the Ojibwe, Ottawa, Lakota, Salish, Colville, several tribes of western Washington, and the Haida, Tlingit, and Tsimshian of Alaska and Canada.”). Several scholars have examined the border’s effects on non-Iroquois border tribes in contemporary times. See Gregg Boos et al., *Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States*, 4 SEATTLE J. ENVTL. L. 343, 365–75, 379 (2014) (discussing the indigenous peoples’ concerns along the Alaska-Canada border and the U.S.-Mexico border); Leah Castella, Note, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 192–201 (2000) (analyzing the cultural and economic problems faced by native tribes who live in lands divided by the northern and southern U.S. border); Denise Evans, Note, *Superimposed Nations: The Jay Treaty and Aboriginal Rights*, 4 DALHOUSIE J. LEGAL STUD. 215 (1995) (analyzing how the U.S.-Canada border presents numerous problems for the Blood and Blackfeet tribes); Richard Osburn, Note, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471 (2000)

them an alien boundary. Both the United States and Canada recognize the sovereignty of tribes within their respective jurisdictions in accordance with the trust relationship between their governments and tribes.²² Each country limits “Indian” recognition and federal Indian services to only those Indians within their territorial boundaries.²³ Accordingly, their respective trust obligations have historically been exercised only for tribes within their jurisdictions.²⁴ As Nicole Marques puts it, “[r]egulations as they stand prevent individual members, born and raised in one country but recognized as an ‘Indian’ in the other, from receiving benefits reserved for the ‘Indians’ of the country in which they reside—even though their tribe exists and is recognized in both countries.”²⁵

The existing trust relationship between the United States and Indian tribes originally arose from the hundreds of treaties that the federal government signed with Indian tribes between 1787 and 1871.²⁶ The United States obtained most of its land mass and secured ongoing peaceful relations with these tribes in exchange for the promise of reserved land parcels, respect for tribal sovereign independence, and ensuring tribal social and economic wellbeing.²⁷ This trust relationship imparted on the federal government both a legal duty and a moral obligation to keep its end of the bargain—a cornerstone of federal Indian law since the Republic’s origins.²⁸ Maintenance of the

(analyzing the legal and cultural problems indigenous peoples face along the U.S.-Canada border, the U.S.-Mexico border, and the Alaska-Russia border).

²² For a broad overview of the development of the trust relationship in both the United States and Canada, see Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643 (1991).

²³ See, e.g., 25 C.F.R. §§ 83.1–2 (2017) (limiting federal services to “indigenous” Indian tribes within the continental United States that are recognized by the Secretary of the Interior); Indian Act, R.S.C. 1985, c I-5, s.2 (Can.) (mandating that an Indian entitled to federal services be enrolled pursuant to provisions of the Act, which governs all matters relating to registered Indians, Indian bands, and reserves in Canada); Marques, *supra* note 6, at 387–88, 403 (analyzing the limitations of both governments’ definitions). Not to mention that many Indian tribes, themselves, prohibit dual enrollment in another tribe. See *infra* Section III.B.

²⁴ Cf. O’Brien, *supra* note 7, at 325 (discussing how Indian land claims in the United States Claims Court are limited to claims by Indians residing within the United States’s territory, therefore “‘Canadian’ Indians belonging to tribes . . . whose aboriginal lands extend into the United States, are cheated out of their lands” (citing 28 U.S.C. § 1505 (1982))).

²⁵ Marques, *supra* note 6, at 425 (emphasis added).

²⁶ PEVAR, *supra* note 12, at 30.

²⁷ *Id.* at 30.

²⁸ See *id.* at 30–31 (arguing that the federal government has a duty to fulfill its promises to the tribes).

trust responsibility is conferred on Congress, which has further defined its obligation by enacting legislation regarding Indian affairs.²⁹

The Supreme Court first articulated what this responsibility entails in the so-called Marshall Trilogy—a series of cases written by Chief Justice John Marshall in which the Court had to define both Congress’s power over Indian affairs and the relationship between Indian tribes and the federal and state governments, respectively. First, the Court held that all tribes were incorporated into the United States through the “doctrine of discovery,” through which “civilized” Western colonizers had rights that trumped those of the “savage” tribes of North America.³⁰ The Court subsequently clarified that Indian tribes were “domestic dependent nations,” independent of state jurisdiction but not equivalent to foreign nations and possessing only limited sovereignty subject to Congress’s plenary power over Indian affairs.³¹ Congress’s full and complete authority to regulate Indian affairs has been continually reaffirmed by the Supreme Court as the central function of the Indian Commerce Clause.³² From this exceptional power comes the broad trust duty requiring “the federal government to support and encourage tribal self-government, self-determination, and economic prosperity.”³³ Therefore, “[t]he tribes

²⁹ See *id.* at 33 (discussing the trust relationship created by statutes following the end of treaty-making with tribes). As the Supreme Court explained in 2011, the federal government “assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.” *United States v. Jicarilla Apache Tribe*, 564 U.S. 162, 177 (2011).

³⁰ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 567–68 (1823) (“Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.”).

³¹ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593–94 (1832) (holding that tribes are excluded from state jurisdiction and that Congress has plenary power over tribes); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding Indian sovereign status to be that of “domestic dependent nations,” distinct from other foreign states, and characterizing the trust relation of Indian nations and the United States as “a ward to his guardian”).

³² See, e.g., U.S. CONST. art. I, § 8, cl. 3 (empowering Congress “[t]o regulate Commerce . . . with the Indian tribes”); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding that Congress has plenary power over Indian affairs); see also PEVAR, *supra* note 12, at 56–61 (providing an overview of the source and scope of federal power over Indians). Since Congress has plenary power, “courts may not order Congress to undertake any particular action on behalf of Indians or tribes. With respect to Congress, then, the trust responsibility is a moral and ethical, rather than a legally enforceable, duty.” PEVAR, *supra* note 12, at 34.

³³ See PEVAR, *supra* note 12, at 32–33; see also *id.* (arguing the trust doctrine creates both broad and specific duties for the federal government toward Indian tribes). Congress has plenary power over Indian affairs in a way that the Commerce Clause has not been interpreted to provide over other sovereigns. The most notable distinction is that Congress

retain whatever inherent sovereignty they had as the original inhabitants of this continent to the extent that sovereignty has not been removed by Congress . . . or is inconsistent with the overriding interest of the federal government.”³⁴ Only Congress—or its delegated official—may interfere with tribal sovereignty, including membership determinations. In contrast, Section 35 of Canada’s Constitution Act of 1982 constitutionalized then-existing aboriginal and treaty rights.³⁵ The Canadian government’s trust relationship with Indians consists of a fiduciary obligation,³⁶ the exercise of which is judicially reviewable.³⁷ The modern form of Canada’s Indian Act continues to dictate all aspects of tribal membership and governance and, indeed, all aspects of tribal life.³⁸ Canadian law “historically treated Indian gov-

may legislate over Indian affairs that do not involve interstate commerce. *Compare* United States v. Antelope, 430 U.S. 641, 645 (1976) (noting that the Commerce Clause gives Congress the power to single out Indians for federal criminal prosecution, without regard to whether the crime involved interstate commerce), *with* United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that Congress could not use its Commerce Clause power with regard to states to regulate guns that had not traversed interstate boundaries).

³⁴ *City of Lincoln City v. U.S. Dep’t of Interior*, 229 F. Supp. 2d 1109, 1114 (D. Or. 2002) (citing *Worcester*, 31 U.S. (6 Pet.) at 519 (other citations omitted)).

³⁵ See Canadian Charter of Rights and Freedoms, Part II of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 35 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 44 (Can.); John T. Cross & Kristin M. Lomond, *The Civil Rights of the Aboriginal Peoples of the United States and Canada*, 10 ARIZ. J. INT’L & COMP. L. 253, 283–84 (1993) (analyzing Section 35); Marques, *supra* note 6, at 398 (same).

³⁶ See *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 375–76 (Can.) (holding that the Crown owes enforceable fiduciary obligations to Indians); JAMES I. REYNOLDS, *A BREACH OF DUTY: FIDUCIARY OBLIGATIONS AND ABORIGINAL PEOPLES* 17–22 (2005) (providing a detailed overview of the Canadian government’s fiduciary obligation to aboriginal peoples in the context of the *Guerin* decision); Marques, *supra* note 6, at 397–98 (analyzing *Guerin*).

³⁷ See *The Queen v. Sparrow*, [1990] 1 S.C.R. 1075, 1110 (Can.) (holding that the government bears the burden of justifying the negative effects of legislation on any constitutionally-protected aboriginal rights); ROBERT MAINVILLE, *AN OVERVIEW OF ABORIGINAL AND TREATY RIGHTS AND COMPENSATION FOR THEIR BREACH* 60 (2001) (“When the Crown exercises discretionary powers over Aboriginal Peoples or in the management of Aboriginal . . . rights . . . or interests, it assumes duties or obligations to discharge these powers in accordance with fiduciary standards that are subject to review and enforcement by the courts.”); Marques, *supra* note 6, at 398 (analyzing *Sparrow*).

³⁸ See Indian Act, R.S.C. 1985, c I-5 (Can.) (setting out the parameters of regulation over Indian affairs); Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context*, 58 MCGILL L.J. 607, 611 (2013) (“Since 1876, Canada has dealt with Aboriginal peoples by way of the *Indian Act*, a single, comprehensive statute that defines and controls nearly all aspects of Aboriginal peoples’ dealings with the government.”).

ernment as delegated legislative and political authority”³⁹ and tribal members as simply subjects of the Crown.⁴⁰

To illustrate the current system of recognition in the United States, consider a hypothetical Indian tribe, “Tribe A,” which was split into two separate legal entities as a result of the U.S.-Canada border: If a U.S. citizen is a member of Tribe A in Canada, that does not mean that he or she is recognized as a member of Tribe A in the United States as well. Even though Tribe A in the United States and Tribe A in Canada share the same name, culture, and history, there is currently no legal mechanism by which the person can become a member of Tribe A in the United States for purposes of either federal law (through federal action) or tribal law (through applying to a tribe for “dual enrollment”⁴¹). And without membership in a federally recognized tribe such as the part of Tribe A located in the United States, he or she will not be recognized as “Indian.” Due to this gap in recognition, a U.S. citizen who only receives tribal membership with his or her tribe located on the Canadian side of the border is ineligible for federal benefits available to Indians recognized in the United States, and, as a result, is ineligible for private scholarships or affirmative action programs that depend upon federal recognition of Indian status.

In the United States, it is Congress’s capacity to define the contours of tribal membership, and thus who is “Indian” in the eyes of the federal government, that gave rise to the current gap in recognition. “Indian” has a legal, cultural, ethnological (racial), or political meaning depending on who defined it and for what purpose. Tribal governments, the federal government, and state governments can determine who is an “Indian” for purposes of each respective government’s laws, creating a situation where an individual can be an “Indian” under some laws but not others.⁴² Indian tribes have the authority to determine who is an Indian for tribal governance purposes, but only Congress—or its delegated official—determines who is recognized as Indian for federal purposes.⁴³ An Indian tribe may come to be recognized by the federal government as a sovereign entity either through an act of Congress, an application to the Department

³⁹ Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1316–17 (1993).

⁴⁰ See Vicaire, *supra* note 38, at 612, 658 (concluding indigenous peoples in Canada enjoy fewer indigenous-specific rights than their United States counterparts).

⁴¹ See *infra* Section III.B.

⁴² See PEVAR, *supra* note 12, at 17.

⁴³ See *id.* at 18 (discussing criteria used by agencies to determine who is an Indian for federal purposes).

of the Interior, or by a federal court.⁴⁴ Although official recognition⁴⁵ by way of tribal membership is the clearest means by which an Indian can participate in federal Indian programs, Congress has the power to create programs for Indians who are not members of federally recognized tribes and may develop a different standard for defining “Indian” for such programs than those used by Indian tribes to determine their membership lists.⁴⁶

Since private actors are informed by the federal government’s definition of “Indian,” this gap in recognition has the impact of exempting U.S.-born members of border tribes from both U.S. federal and private affirmative action.⁴⁷ This failure goes to the heart of the trust responsibility. Recognizing affirmative action as a component of the trust relationship, the Supreme Court held in *Morton v. Mancari* that classifications favoring Indians based on their political enrollment in a tribe are subject to rational basis review, and not strict scrutiny, when those classifications “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians”⁴⁸ American Indians rank at the statistical bottom of the achievement gap⁴⁹ and suffer from tokenism at elite universities.⁵⁰ Affirmative action is one

⁴⁴ See *id.* at 271–72 (listing ways groups may be recognized by the government as Indian tribes).

⁴⁵ See *id.* at 271–74 (providing an overview of the process of obtaining federal recognition as an Indian tribe); Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgement*, 37 NEW ENG. L. REV. 491 (2003) (same).

⁴⁶ See PEVAR, *supra* note 12, at 19 (noting tribes “not officially recognized . . . may participate in federal programs that Congress has not limited to federally recognized tribes”).

⁴⁷ See *infra* Section II.B.

⁴⁸ *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

⁴⁹ See Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 27 CHICANA/O-LATINA/O L. REV. 29, 29, 31–32 (2008) (noting that in 2005, American Indians/Alaskan Natives enrolled in college education at a lower rate than whites, Latinos, or blacks (citing CATHERINE FREEMAN & MARY ANN FOX, NAT’L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKA NATIVES tbl.7.1b (Aug. 2005), <http://nces.ed.gov/pubs2005/2005108.pdf>)).

⁵⁰ See Cruz & Reynoso, *supra* note 49, at 57 (“[S]tudies specifically addressing the experiences of American Indians at highly selective universities report . . . problems with tokenism and undue visibility.”); *cf.* DRESSING IN FEATHERS: THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE (S. Elizabeth Bird ed., 1996) (collecting short works discussing the numerous and damaging ways that American Indians have been stereotyped and misunderstood in historical and modern American society); Lawrence R. Baca, *When the Native American Invitation to the Diversity Table Gets Lost in the Mail: Who’s Got Our Six?—A Cautionary Tale*, in IILP REVIEW 2014: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 176, 176 (Elizabeth Chambliss et al. eds., 2014) (“More often than not, [Native Americans] are forgotten—even by [their] fellow racial and ethnic minorities.”); Charles Kopel, *Memorializing the Undeparted: Two Case Studies in the American Movement to Prematurely Memorialize the Native Race* (July 2014)

way of addressing these ills in ways that are similar to, but different from, programs that enhance multiculturalism. Among other things, tribes benefit from affirmative action and special federal programs to bolster their sovereign status, maintain the separateness of their cultures, and safeguard their right to self-governance as a means of addressing their economic and social ills in a way that would be ineffective or inappropriate for other groups.⁵¹ Border tribes, however, are left behind. Members of these tribes, split between the United States and Canada by an arbitrarily drawn border, are equally entitled to the benefits of the trust relationship created between the federal government and their tribal ancestors.⁵² While the Court has yet to rule on the extent to which the trust doctrine applies to nonrecognized tribes,⁵³ or the problem of non-recognition with respect to descendants of border tribes, the federal government cannot fully meet its trust obligation without accounting for those American Indians who have fallen through the gap.

(unpublished B.A. thesis, Yeshiva University) (on file with the New York University Law Review) (analyzing the persistent historical trend of American popular belief in the imminent extinction of American Indians and the American Indian way of life).

⁵¹ There is a large amount of literature discussing this issue that is beyond the scope of this Note. Representative scholarship includes the following. *See, e.g.*, Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589 (2004) (analyzing how the multiculturalism movement and Indian tribes are fundamentally different and that tribes should only selectively and strategically associate with multiculturalism based on the long-term furtherance of sovereignty); Yousef T. Jabareen, *Redefining Minority Rights: Successes and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples*, 18 U.C. DAVIS J. INT'L L. & POL'Y 119, 121–31 (2011) (distinguishing tribes on the basis that they are governments, not simply ethnic minorities); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1045–46 (2012) (noting scholarship that posits that the racialization of American Indians has taken different forms, and sometimes requires different remedies, than the racialization of other subordinated groups); Macklem, *supra* note 39, at 1356–66 (analyzing the difference between tribal oppression, which involved unequal distributions of sovereignty, and immigrant minorities whose denial of equality was based on other factors); Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 291 (2015) (“[T]he political project of civil rights, which is fundamentally about equality under the law, and which is confined within the nation-state, is insufficient for indigenous . . . peoples in addressing ongoing questions of sovereignty.”); *see also* Krakoff, *supra* note 51, at 1051–52 (“The way to counter the logic of elimination is to support laws and policies that perpetuate the separate sovereign political status of tribes as peoples”); Macklem, *supra* note 39, at 1350 (“[E]quality of peoples, not equality of individuals, is the appropriate source of principles to assess the justice of Indian government.”).

⁵² This Note focuses on affirmative action in the United States because it is more contentious, given that Canada allows affirmative action in its Constitution. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), *reprinted in* R.S.C. 1985, app II, no 44 § 15(2) (Can.); Macklem, *supra* note 39, at 1327 n.85 (analyzing the Canadian Constitution). Canada will be discussed when necessary to differentiate U.S. Indian policy.

⁵³ PEVAR, *supra* note 12, at 41.

B. *The Political Versus Racial Classification of “Indian”*

If mutual recognition of descendants of border tribes for the purpose of affirmative action is to be made possible, the U.S. government must necessarily reconsider its prevailing standard for classifying individual citizens as “Indian.” Of course, the critical question becomes: How should “Indian” be defined for cross-border affirmative action? Defining who is “Indian,” in any context, is part of a long and bitter history and jurisprudence that continues to the present day. It is essential to understand this historical framework in order to fully appreciate the importance that any definition for cross-border affirmative action account for the political and racial context of the term “Indian.” This section analyzes the political classification of “Indian,” followed by its racial distinction, and the inherent conflict between the two.

1. *Political Distinction*

There is no single definition of “Indian”; the term’s definition varies depending on its purpose and context.⁵⁴ When defined by one’s membership in a federally recognized tribe, the Supreme Court has determined the classification to be “political rather than racial in nature.”⁵⁵ In *Mancari*—the first such case in the context of affirmative action—the Court upheld a policy favoring qualified American Indians for positions within the Bureau of Indian Affairs, holding that the federal government can establish employment preferences for members of Indian tribes.⁵⁶ As a result of this holding, classifications favoring Indians based on tribal political status are not subject to the heightened judicial review for race-based disparate treatment when such laws are in the interest of fulfilling Congress’s trust responsibility.⁵⁷ A tribe’s recognition by the federal government and an individual’s subsequent enrollment in that tribe are thus indispensable prerequisites for an American Indian to benefit from this lowered scrutiny.

Political recognition of a tribe by the federal government establishes a unique government-to-government relationship between the

⁵⁴ See Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 *BYU J. PUB. L.* 1, 40 (2004) (“‘Indian’ is a term that has different meanings for different purposes.”); see also Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 *U. MICH. J.L. REFORM* 275, 278 (2001) (stating that “[a]ccording to one congressional survey, federal legislation contains over thirty-three different definitions of the term ‘Indian’”).

⁵⁵ *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

⁵⁶ *Id.* at 555.

⁵⁷ *Id.* at 554–55.

tribal government and the United States and acknowledges the tribe's inherent sovereign authority over its affairs.⁵⁸ Beyond securing a more permissive standard of judicial review of affirmative action policies, membership in a federally recognized tribe "is the key indicator of whether or not an American Indian qualifies for federal, tribal, and . . . state services such as educational scholarships, preference in employment and housing, and healthcare."⁵⁹ Without federal recognition, not only are both tribes and Indians barred from special federal benefits, they also lose their "Indian" identity in the eyes of the law.⁶⁰ Even when a tribe has been granted official status through federal recognition, Congress has the power to unilaterally terminate the legal existence of the tribe and has done so, for instance, during the infamous Termination Era.⁶¹

Congress similarly retains plenary power over tribal membership criteria and, although the federal government has mostly deferred to tribes regarding individual membership determinations,⁶² the United States has intervened in defining tribal membership throughout his-

⁵⁸ See Coen, *supra* note 45, at 491–92 (summarizing the benefits of sovereignty and applicable statutes, including sovereign immunity).

⁵⁹ Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 302 (2011). Fletcher notes that tribal membership is used in a variety of federal regulations, including "42 C.F.R. § 136a.16 (2010) (outlining the procedure to verify tribal citizenship by the Indian Health Service); 7 C.F.R. § 253.6(b)(1) (same for food stamps eligibility); 25 C.F.R. § 23.71(b) (implying the importance of tribal citizenship for government service eligibility)." *Id.* at n.49.

⁶⁰ During the Termination Era, Congress sought to eliminate the federal-tribal relationship altogether by terminating tribal governments' legal existence. This "meant that tribal members suddenly became non-Indian, legally speaking, and thus immediately lost their ability to access federal services and programs for tribes and tribal members." Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 403–04 (2015).

⁶¹ Over 100 tribes lost their legal status during the Eisenhower and Kennedy Administrations. See, e.g., FELIX S. COHEN, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW § 1.06 (Neil Jessup Newton ed., 2012) (describing federal policy during the Termination Era as "focused primarily on ending the trust relationship between the United States and Indian tribes, with the ultimate goal being to subject Indians to state and federal laws on exactly the same terms as other citizens"); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977) (providing an overview of the historical development of Congress's Termination Era and its implementation, and assessing what Congress can do for the terminated tribes).

⁶² See, e.g., Fletcher, *supra* note 59, at 314 ("In general, federal Indian law reserves the exclusive and plenary authority of determining tribal membership to tribal governments." (first citing *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); and then citing *Roff v. Burney*, 168 U.S. 218 (1897))). *But see* Bradford W. Morse, *Common Roots but Modern Divergences: Aboriginal Policies in Canada and the United States*, 10 ST. THOMAS L. REV. 115, 132 (1997) ("[W]hile Indian governments in the United States hold inherent powers of self-government, these powers are vulnerable in that they are subordinated to the overriding or plenary power of Congress.").

tory.⁶³ Today, the government influences membership decisions through regulations governing the federal recognition process.⁶⁴ In order for a tribe to maintain official recognition, federal regulations require, among other things, a showing of descent from a historical Indian tribe or group of tribes,⁶⁵ evidence that most of a tribe's members come from a "distinct community,"⁶⁶ and that the tribe has detailed membership criteria.⁶⁷ Unlike citizenship status in the United States, which is protected by broad safeguards against arbitrary or involuntary revocation, tribal membership and the rights accompanying "Indian" recognition can be wholly and permanently withdrawn.⁶⁸ Therefore, tribes do not retain unfettered discretion to determine their membership, but instead have to work in tandem with federal law to secure and maintain their tribal status as defined by the government.

There is stark disagreement over the benefits and drawbacks of the political classification of Indians.⁶⁹ Fueling much of the criticism of

⁶³ See Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487 (2006) (reviewing RENEE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT* (2005) and MARK EDWIN MILLER, *FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS* (2004)) (cataloguing repeated federal government interventions into tribal membership decisions); see also Galanda & Dreveskracht, *supra* note 60, at 407 ("[T]he Department of the Interior . . . continued to acknowledge that, while tribes do possess the authority to set tribal membership standards, their authority has always been subservient to the Secretary of the Interior . . .").

⁶⁴ The federal recognition process is a relatively new concept in federal Indian law, first codified in 25 C.F.R. § 83 by the Department of the Interior in 1978. See 25 C.F.R. § 83 (2017) (current version of recognition process). Prior to then, the Indian Reorganization Act of 1934 defined "Indian tribe" for the most part, while giving the Interior Secretary wide discretion. See 25 U.S.C. § 479(a)(2) (2012) (stating that an "Indian tribe" is any group "that the Secretary of the Interior acknowledges to exist as an Indian tribe"); Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 7 (2012) (describing the discretion granted to the Secretary under the Indian Reorganization Act).

⁶⁵ 25 C.F.R. § 83.11(e) (2017).

⁶⁶ *Id.* § 83.11(7)(b).

⁶⁷ *Id.* § 83.11(d).

⁶⁸ See Galanda & Dreveskracht, *supra* note 60, at 414 (providing an overview of how tribal "membership" originated and developed throughout U.S. history).

⁶⁹ Some defend the political classification of tribal membership as a means of delineating the federal trust obligation and preventing ethnic fraud. See, e.g., J. Anthony Paredes, *In Defense of the BIA and the NPS: Federal Acknowledgement, Native American Consultation, and Some Issues in the Implementation of the Native American Graves Protection and Repatriation Act in the Southeastern United States*, 10 ST. THOMAS L. REV. 35 (1997) (defending the Bureau of Indian Affairs' recognition procedures, among other things, as a way to prevent ethnic fraud). Reformers call for the federal recognition process to be objectified and simplified. See, e.g., Christine Metteer, *The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian*, 5 RUTGERS RACE & L. REV.

the “Indian” as political classification is the threat of arbitrary disenrollment. There are two main criticisms of arbitrary disenrollment. The first is that tribal disenrollment perpetuates the federal assimilationist policies of the past.⁷⁰ The second is that arbitrary disenrollment discredits tribal government in the eyes of Indians and non-Indians alike.⁷¹ For members of a tribe, disenrollment from the tribe has the equivalent effect as termination of the tribe by the federal government. The individual loses membership’s entitlements, including federal benefits and the ability to identify as “Indian” in affirmative action programs that are linked to membership. The substantial financial benefits afforded by tribal membership⁷² provide tribal leaders with a perverse incentive to disenroll their own members. For some small tribes that issue per capita payments to tribal members from casino revenue, the disenrollment of a single member can mean thousands of additional dollars per month for remaining members.⁷³ Rather than focusing on maintaining tribal identity, tribes might become obsessed with narrowing membership to split the revenue pie and to eliminate political dissidents.⁷⁴ Those who are unilaterally disenrolled have no means of legal recourse.⁷⁵

53, 91 (2003) (“The requirement that a tribe show itself to have been a ‘distinct community . . . from historical times until the present’ must be eliminated.”) (quoting 25 C.F.R. § 83.7(b) (2001)); Mark D. Myers, Note, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL’Y REV. 271 (2000) (criticizing the flawed application of the federal recognition process, its effects on tribes—particularly those that continue to be wrongly unrecognized—and proposing how to reform the process).

⁷⁰ See Galanda & Dreveskracht, *supra* note 60, at 388, 410, 474 (summarizing how disenrollment erodes tribal existence and succeeds in Indian termination where the federal government failed).

⁷¹ See *id.* at 443 (“[T]he sovereign that allows the destruction of citizenship rights also permits the diminution of its own power. And where the sovereign itself causes the abuses, seeking to hush dissidents . . . , it triggers a vicious cycle [that] will ultimately discredit the polity.”); cf. Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at The Bingo Palace*, 29 ARIZ. ST. L.J. 97, 105–06 (1997) (analyzing instances where disenrollment over Indian gaming has spawned armed intra-tribal violence).

⁷² See, e.g., Austin Badger, Comment, *Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples*, 26 AM. U. INT’L L. REV. 485, 493–94 (2011) (summarizing the potentially substantial financial benefits of tribal memberships and collecting citations); cf. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 136 (2007) (noting the correlation between tribal economic success and desirability of tribal membership).

⁷³ See Galanda & Dreveskracht, *supra* note 60, at 409–10 (stating that each member’s membership “can literally be reduced to cash in hand”).

⁷⁴ See Badger, *supra* note 72, at 502 (noting that a tribe may be motivated by financial or political incentives rather than cultural ones when making membership decisions).

⁷⁵ See Galanda & Dreveskracht, *supra* note 60, at 445–50 (discussing the lack of remedies for arbitrary disenrollment in federal, state, tribal, and international forums); Badger, *supra* note 72, at 512–13 (“*Santa Clara* . . . leaves individuals without a remedy under the courts of the government which granted the rights.”). In *Santa Clara*, the Court held that the Indian Civil Rights Act cannot be interpreted to provide for declaratory or

2. *Racial Distinction*

Despite the government's focus on "Indian" as a political classification, "Indian" as a racial classification remains a deeply contentious issue for both federal Indian law and affirmative action. The racialization of American Indians has a long and bitter history whose embers continue to fume in contemporary understandings of who is "Indian."

Indians were not always distinguished by race. From the Founding until the mid to late nineteenth century, neither the federal government⁷⁶ nor the tribes⁷⁷ themselves distinguished Indians on the basis of race. In 1846, the Supreme Court, under the infamous Chief Justice Taney, began the racialization of Indians when it held that a white man who was adopted into the Cherokee Nation was not an "Indian" in the eyes of the law.⁷⁸ As federal Indian policy developed into the removal of Indians and expansion of non-Indian settlement, the federal government realized that strictly limiting tribal membership status by blood quantum would freeze tribes in space and time, such that their population growth would be limited and even shrink to nothingness.⁷⁹ Indian bloodlines became the "principal tool of genocidal extermination."⁸⁰ Nowhere was this more apparent than the late nineteenth and early twentieth century Allotment Era,⁸¹ in which Congress used high blood quantum requirements to ensure that the

injunctive relief, thus granting a great deal of discretion to tribes regarding membership decisions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51–52 (1978).

⁷⁶ See Fletcher, *supra* note 59, at 298 ("[T]hroughout the first 150 years or so of federal and state Indian law and policy, the racial character of American Indians played a secondary role to legal and political determinations of whether an individual Indian was 'civilized' or not" (citing Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006))).

⁷⁷ Historically, "outsiders could become members of an Indian polity over time, regardless of their race or ethnicity." Fletcher, *supra* note 64, at 13.

⁷⁸ *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846) (holding that only those who belong to the Indian "race" are considered Indians).

⁷⁹ See Fletcher, *supra* note 64, at 2 ("[T]he federal government . . . develop[ed] the membership criteria for many hundreds of tribes Tribes with stringent membership rules limit their own population growth and . . . could shrink their membership down to nothingness" (footnote omitted)); Krakoff, *supra* note 51, at 1050 ("[T]ribes were constructed and racialized consistent with the agenda of clearing the territory for non-Indians."); Spruhan, *supra* note 76, at 2–3 (2006) ("Some allege that the federal government applies blood quantum to eliminate its responsibilities to Indian people by legally defining Indians out of existence." (footnote omitted)).

⁸⁰ Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 715 (1986). See generally Spruhan, *supra* note 76 (providing an in-depth analysis of the historical background of using blood quantum to classify and categorize Indians in the United States).

⁸¹ See, e.g., Galanda & Dreveskracht, *supra* note 60, at 399–402 (providing an overview of the Allotment Era).

majority of Indian descendants would lack sufficient blood quantum to inherit their ancestors' land.⁸²

Today, the United States continues to issue Certificates of Degree of Indian Blood to Indian individuals seeking tribal enrollment and access to federal benefits.⁸³ Defining "Indian" as a race measured by blood quantum and ancestral lineage has inspired bitter debate for well over a century. Critics see racial metrics for tribal membership as inherently over- and under-inclusive.⁸⁴ Defenders feel that blood quantum serves as a valid proxy for connection to the tribal community.⁸⁵ This debate is driven in part by a fear that tribes may be flooded by what Professor Carole Goldberg and other academics and tribal leaders call "wannabes": frauds who profess a distant (and often

⁸² See, e.g., Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 *HAMLIN L. REV.* 97, 106 n.53 (2007) ("Because there were not enough qualified Indians to take over the allotments the Indian land base was severely depleted.").

⁸³ See *Genealogy*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/FOIA/Genealogy/> (last visited June 27, 2017) (describing the process by which the Bureau of Indian Affairs issues Certificates of Degree of Indian Blood); see also Laughlin, *supra* note 80, at 117 (citing *Davis v. United States*, 192 F.3d 951, 956 (10th Cir. 1999)) (describing the influence of the Bureau of Indian Affairs over tribal membership through the issuance of Certificates of Degree of Indian Blood). Canadian tribes issue similar certificates. Cf. Val Napoleon, *Extinction by Number: Colonialism Made Easy*, 16 *CAN. J.L. & SOC'Y* 113 (2001) (discussing the history of Indian racialization in Canada).

⁸⁴ See, e.g., Fletcher, *supra* note 64, at 5 (criticizing blood quantum requirements as excluding people who are deeply committed to tribal culture, while including people with higher blood quantum but no connection with the tribal community); see also Laughlin, *supra* note 82, at 112 ("[Blood quantum requirements] preclude[] individuals with legitimate cultural ties from membership simply because they cannot meet the blood quantum threshold."); Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 *SETON HALL L. REV.* 1241, 1255–56 (2005) (suggesting that limiting membership to those people who are lineal descendants prevents people who may have a cultural connection to a tribe from becoming members).

⁸⁵ See, e.g., Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 *FLA. INT'L U. L. REV.* 295, 322 (2014) ("[A]s the [Seminole] Tribe makes clear, the blood quantum requirement is not a proxy for race; it is a proxy for connection and belonging."). The field of epigenetics provides some credence to this claim. See generally Brian G. Dias & Kerry J. Ressler, *Parental Olfactory Experience Influences Behavior and Neural Structure in Subsequent Generations*, 17 *NATURE NEUROSCIENCE* 89, 89 (2014) (examining the inheritance of parental traumatic exposure through experiments on mice, thereby "provid[ing] a framework for addressing how environmental information may be inherited transgenerationally at behavioral, neuroanatomical, and epigenetic levels"); Richard Gray, *Phobias May Be Memories Passed Down in Genes from Ancestors*, *TELEGRAPH* (Dec. 1, 2013), <http://www.telegraph.co.uk/news/science/science-news/10486479/Phobias-may-be-memories-passed-down-in-genes-from-ancestors.html> (discussing a recent epigenetics study that shows that traumatic or stressful experiences can be passed on through genetics); Dan Hurley, *Grandma's Experiences Leave a Mark on Your Genes*, *DISCOVER MAG.* (June 25, 2015), <http://discovermagazine.com/2013/may/13-grandmas-experiences-leave-epigenetic-mark-on-your-genes> (providing an overview of behavioral epigenetics research and its efforts to determine the extent to which psychological and behavioral tendencies are inherited).

bogus) Indian heritage to siphon off tribal benefits.⁸⁶ Regardless of blood quantum, Indians are frequent victims of racially charged attacks and suffer from the highest rates of over-policing and incarceration for nonviolent offenses in the country.⁸⁷ Racial subordination is a critical component of an Indian's identity that is intertwined with formal legal determinations of his or her race.⁸⁸

3. *Conflict Between Political and Racial Classifications*

As discussed above, the political and racial classifications of "Indian" are contentious when taken separately on their own terms. These classifications do not exist independently, however, but share a precarious union in defining who is an "Indian." Although the federal government can and does separate the racial from the political classification of Indians,⁸⁹ Indians are *both* members of a race and of political bodies—their tribes.⁹⁰ Viewing Indian status as purely political fails to account for the deep racism and racialization Indians face and

⁸⁶ Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 465 (2002) ("As a wholesale means for including people who lack clan and kinship ties, culturally based criteria could overwhelm Indian nations with wannabes."); *see also* Metteer, *supra* note 69, at 91–92 ("[B]ecause many tribal leaders are worried about fakes flooding the tribal rolls and siphoning off precious tribal benefits . . . many tribes hesitate to abandon the blood quantum rules they detest." (internal quotation marks omitted) (citing Suzan Shown Harjo, *Vampire Policy Is Bleeding Us Dry—Blood Quanta Be Gone!*, INDIAN COUNTRY TODAY (Feb. 14, 2001), <https://indiancountrymedianetwork.com/news/vampire-policy-is-bleeding-us-dry-blood-quantums-be-gone/>)).

⁸⁷ *See, e.g.*, Lawrence R. Baca, *Apples, Bananas, Coconuts, and Oreos—The Fruit Salad and Dessert of Race: American Indians in the Diversity Discourse*, in IILP REVIEW 2012: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 110, 114 (Elizabeth Chambliss et al. eds., 2012) ("The six men who jumped [an Indian] didn't ask if he was an enrolled member of a federally recognized tribe. They made a facial, racial judgment that he was an Indian . . ."); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 959–62 (2011) (recounting modern manifestations of racially charged attacks against Indians and their rates of over-policing and incarceration for nonviolent offenses); Lydia Millet, *Native Lives Matter, Too*, N.Y. TIMES (Oct. 13, 2015), <https://www.nytimes.com/2015/10/13/opinion/native-lives-matter-too.html> ("American Indians are more likely than any other racial group to be killed by the police.").

⁸⁸ *See* Rolnick, *supra* note 87, at 964–68, 1044 (analyzing the tension between the political classification and the lived experience of Indians as a racial minority).

⁸⁹ *See, e.g.*, Metteer, *supra* note 69, at 55 ("When the government defines 'Indians' racially, as in the census, it deals with individuals. . . . [M]ost legislation defines 'Indians' legally, and the government deals with tribes as separate sovereigns, rather than with individuals." (internal citations omitted)).

⁹⁰ *See, e.g.*, Baca, *supra* note 87, at 113 (noting that Indians are both a race and political citizens of tribes); Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 299 (2008–2009) ("[T]ribes [are] neither racial communities, nor classically liberal polities.").

share with other discriminated groups.⁹¹ Yet too much of a focus on “Indian” as racial classification can risk subjecting laws targeting Indians to strict scrutiny.⁹² This insecure coupling both threatens and enhances Indian entitlement to federal benefits, including affirmative action.

Tribes are faced with a dilemma: If their membership rules are too inclusive and lack a sufficient racial component, the federal government will no longer see the community as sufficiently “tribe-like” to exercise tribal sovereignty, and may discontinue the trust relationship.⁹³ Contemporary Indians face two kinds of stereotypes relative to “tribe-like” behavior: Either they are “full bloods” who wear traditional dress, are one with nature, and live an exclusively subsistence lifestyle, or—if engaged in mainstream economic activity—their tribes are seen as only groups of racially-related opportunists who use the system to get an unfair edge over non-Indian competition.⁹⁴ The courts have done much to legitimize these stereotypes by measuring a tribe’s political status against its racial components.⁹⁵ If a tribe desires to maintain its separate political status, it must entertain to some degree the racialization of Indians.

Going from a rock to a hard place, if a tribe defines its membership too much by race, it risks losing its political status. For instance, the Supreme Court’s colorblind jurisprudence has grown increasingly suspicious of tribal membership’s dependence on race.⁹⁶ If Indians’

⁹¹ See, e.g., Rolnick, *supra* note 87, at 964–68, 1044 (discussing the ways that the racialization of Indians establishes a condition of racial subordination); see also Baca, *supra* note 87, at 114 (discussing race-based prejudice and physical attacks against Indians).

⁹² See, e.g., Rolnick, *supra* note 87, at 969 (“In light of the Supreme Court’s modern race jurisprudence, it has become a necessary legal strategy for Indians to defend their benefits as stemming from the unique political status of tribes, rather than their race.”).

⁹³ See, e.g., Fletcher, *supra* note 59, at 324 (noting that the federal government may not be ready for radical changes to a tribe’s adopting procedures for non-Indians); Gover, *supra* note 90, at 264 (describing how federal policy incentivizes the racialization of tribes); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1764 (1993) (“The fact that the Mashpee had intermingled with Europeans, runaway slaves, and other Indian tribes signified to the jury and to the court that they had lost their tribal identity.”).

⁹⁴ See Krakoff, *supra* note 85, at 328 (discussing some of the stereotypes surrounding Indian identity).

⁹⁵ See, e.g., *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997) (“[T]he Reindeer Act provides a preference in an industry that is not uniquely native”); Krakoff, *supra* note 85, at 328 (describing how a variety of Supreme Court cases “indicate that the effort to equate, in the public mind, classifications that further the political independence of tribes with invidious racial classifications has been succeeding”) (collecting citations).

⁹⁶ See, e.g., Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court’s Changing Vision*, 55 U. PITT. L. REV. 1 (1993) (arguing that the Supreme Court’s increasing reliance on tribal membership as the sole basis for tribal governmental authority and rejection of a geographically-based view of tribal sovereignty have substantially curtailed tribal governments’ ability to ensure the

racial nature is emphasized too much, this could encourage an already hostile Court to revisit the political classification doctrine and overturn *Mancari*, “which could then in turn eliminate Title 25 to the United States Code as being racially motivated and unconstitutional.”⁹⁷ This fear is particularly pronounced in the affirmative action context. Many opponents of affirmative action conflate the entirety of federal Indian law with this progressive policy, inspiring them to target their litigation to confine or to overturn *Mancari*.⁹⁸ These opponents have a receptive audience in the recent Court, which, in past cases, including *Adoptive Couple v. Baby Girl*⁹⁹ and *Rice v. Cayetano*,¹⁰⁰ has tended to conflate race and tribal membership without appreciation of their historical and legal contexts.¹⁰¹

Despite colorblind jurisprudence’s assault on affirmative action, border tribes should be able to benefit from “Indian” as a political classification. Scholars assert that membership in a federally recognized tribe remains a political categorization, even while it also includes the racialized history of the federal government’s treatment of Indians.¹⁰² For one, the federal government coerced all tribes into having descent requirements, while also compelling some tribes to join together as a single federally recognized entity, and forcing others to scatter, regardless of their historical bonds (such as border

safety of Indians and non-Indians, regulate land use, and effect civil jurisdiction on reservations); Fletcher, *supra* note 59, at 296 (“[S]ince non-Indians might never be allowed to become tribal members on account of their race, the Court appears concerned that such person could *never* be in a position to consent [to tribal jurisdiction] . . . [a]nd, since this limitation is largely based on race, the Court’s skepticism is further heightened.”). *But see* Krakoff, *supra* note 85, at 296–97 (concluding that a “better reading of *Mancari* is that classifications that recognize the unique status and rights of tribes, even if they necessarily include aspect of lineage and descent, should generally be upheld” if the law is justifiable as fulfilling Congress’s trust responsibilities to Indians).

⁹⁷ Baca, *supra* note 87, at 114; *see also* Paul Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement Under the Indian Reorganization Act, 1934–1945*, 8 RUTGERS RACE & L. REV. 27 (2006) (discussing how the Indian Reorganization Act’s half-blood provision is vulnerable to strict scrutiny and that the provision should be considered in light of its implementation, which incorporated both biological and non-biological elements, thus making it more analogous to the political definition in *Mancari*). Some already argue that Title 25 is unconstitutional. *See* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991) (arguing that separate treatment of Indians and non-Indians under federal Indian law constitutes racial discrimination).

⁹⁸ *See, e.g.*, Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 951 (2002) (describing efforts to confine or overturn *Mancari*).

⁹⁹ 133 S. Ct. 2552 (2013).

¹⁰⁰ 528 U.S. 495 (2000).

¹⁰¹ *See* Krakoff, *supra* note 85, at 296–98 (analyzing developing Supreme Court case law).

¹⁰² *See, e.g.*, Krakoff, *supra* note 51, at 1132 (arguing that membership is both political and embeds a racialized history).

tribes).¹⁰³ Additionally, tribes often have diverse linguistic, ethnic, and cultural memberships that defy biological or socially constructed definitions of race.¹⁰⁴ Finally, the political classification, even with its racial components, continues to serve as Indians' greatest shield against equal protection challenges to affirmative action, because the political classification recognizes the unique status and rights of tribes as part of Congress's trust responsibilities to Indians.¹⁰⁵

II

AFFIRMATIVE ACTION TWILIGHT ZONE

"[O]ur treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."

—Felix S. Cohen, 1953¹⁰⁶

The longstanding tension between the political and racial classifications of "Indian" continues in the context of modern affirmative action for tribes divided by the U.S.-Canada border. Defining what an "Indian" is for cross-border affirmative action purposes is another chapter in the long and bitter history of categorizing tribes and tribal membership. The inherent tension in defining "Indian" for affirmative action purposes is that either some legitimate parts of the Indian population are cut off from membership, or that the criterion is so large and ill-defined that enforcement is impossible.¹⁰⁷ Any cross-border definition must deal with both "Indian" as political classification and as racial classification, while also accounting for frauds who feign an Indian identity for personal gain. However the federal government decides to redefine "Indian," it should adopt a definition that allows border tribes to have singular identities in the eyes of affirmative action.

¹⁰³ See Krakoff, *supra* note 85, at 296 (noting that the legal category "federally recognized tribe" is political due to interference in tribal affairs); see also Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1132 (1994) ("The Sioux . . . were pulled apart onto many different reservations as a means of weakening them militarily.").

¹⁰⁴ See Krakoff, *supra* note 85, at 325 ("Tribal histories regarding their paths to federal recognition . . . make clear . . . that by the time a tribe achieves that status, its members already reflect a mix of identities . . .").

¹⁰⁵ See *id.* at 296–97 (acknowledging the role that the political classification plays in vindicating Congress's obligations to Indians).

¹⁰⁶ Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

¹⁰⁷ Cf. Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301, 327 (2009) (describing the difficulty of drafting a definition of "Indian" for affirmative action purposes).

A. *What Is an “Indian” for Affirmative Action Purposes?*

While this Note is the first to address the need for a cross-border Indian definition for affirmative action purposes, the discussion of what defines an “Indian” for affirmative action is not unique. Twenty-five years ago, P.S. Deloria, then-Director of the American Indian Law Center, and Professor Robert Laurence of the University of Arkansas debated how to define an “Indian” for law school admissions and the implications of any definition on tribal sovereignty and affirmative action.¹⁰⁸ They concluded that the definition of “Indian” depended on an institution’s goals for affirmative action.¹⁰⁹ If the goal is cultural pluralism—diversity benefiting the education of white students and the institution itself—then the institution’s definition of “Indian” should control, which need not be confined to tribal membership but instead involve demonstration of some past identification with the American Indian community.¹¹⁰ In this sense, an Indian’s racial classification can qualify them for affirmative action when they lack the political status of tribal enrollment.¹¹¹ If, on the other hand, the goal is reparations for past wrongs (such as those implicating the trust relationship),¹¹² then Indians have an important role in saying whom affirmative action serves.¹¹³ In that sense, an Indian’s tribal enrollment is far more determinative of his or her qualification for affirmative action than the degree of his or her racial heritage. Favoring either a political or racial basis for affirmative action presents numerous advantages and risks.

Confining “Indian” to its political categorization as membership in a federally recognized tribe in either Canada or the United States presents numerous virtues. Since the *Mancari* standard is not based on race, affirmative action for this class of Indians would avoid strict scrutiny by the courts.¹¹⁴ Thus, affirmative action for federally recog-

¹⁰⁸ See P.S. Deloria & Robert Laurence, *What’s an Indian?: A Conversation About Law School Admissions, Indian Tribal Sovereignty and Affirmative Action*, 44 ARK. L. REV. 1107 (1991).

¹⁰⁹ See *id.* at 1111.

¹¹⁰ See *id.* at 1111, 1133.

¹¹¹ See *id.* at 1111–12 (“[I]f the school’s interest is in cultural pluralism, it would be crazy to exclude [a full-blood Indian] because she isn’t enrolled [as an official member].”).

¹¹² See *supra* Section I.A.

¹¹³ See *id.* at 1111, 1133.

¹¹⁴ See, e.g., Baca, *supra* note 87, at 117 (discussing how “Indian” as a political distinction can still be used for affirmative action purposes, even when “Indian” as race could not); Reynoso & Kidder, *supra* note 49 (analyzing the University of California School system and concluding that, since membership in a federally recognized tribe is a political classification, the U.C. system could make such membership a plus factor in admissions despite California’s ban on affirmative action).

nized Indians need only satisfy rational basis review.¹¹⁵ Further, courts have recognized the importance of leadership training to the federal government's purpose, under the trust obligation, of helping to strengthen tribal self-sufficiency and sovereignty.¹¹⁶ A political classification, however, can be resented as much as a racial one.¹¹⁷ More disturbing is the fact that a political classification is no guarantee of an individual's connection to the tribal community and is often under-inclusive of many deserving constituents—due to federal termination, government failure to recognize a tribe, or arbitrary disenrollment by a tribe.¹¹⁸ Recognition is merely a certification process—it does not transform an individual's identity.¹¹⁹ Avoiding strict scrutiny comes at the price of excluding many deserving Indians from both sides of the border.

Broadening “Indian” to its racial categorization and relying more on self-identification rather than tribal enrollment presents its own

¹¹⁵ See, e.g., Idleman, *supra* note 51, at 628 (“[B]ecause they are political rather than racial or ethnic in their . . . character, tribes and tribal members may be singled out and treated differently [by federal legislation] without having to confront strict scrutiny under the equal protection guarantee.”); Reynoso & Kidder, *supra* note 49, at 32 (“Whereas federal courts reserve strict scrutiny for classifications based on race, ethnicity and national origin (including affirmative action programs), classifications based on membership in a federal recognized tribe are subject to the rational basis test”); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1355, 1358–59 (1997) (providing insight from a prominent opponent of affirmative action arguing that, in the context of Indian tribes, preferences are properly given to political groups specifically recognized by federal law and the U.S. Constitution, “not merely to an ethnic group that has no independent legal standing”).

¹¹⁶ See, e.g., Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1170 (9th Cir. 1982) (upholding a Housing and Urban Development regulation implementing a preference to Indian-owned economic enterprises for contracts to build housing for Indians under *Mancari*, in part because, “[o]ne of the purposes of the Indian Self-Determination Act is to develop leadership skills in Indians” (citing 25 U.S.C. § 450(a))); Reynoso & Kidder, *supra* note 49, at 41–42 (analyzing the leadership training rationale). Indeed, the current seminal case on affirmative action recognized the importance of leadership training in general for affirmative action purposes. Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (holding that opportunities for leadership development must be made available to a diverse group of students).

¹¹⁷ See Macklem, *supra* note 39, at 1326–27 (“Political or cultural discrimination may well be as odious as racial discrimination if legislatures do not offer relevant reasons in its defense.”).

¹¹⁸ See, e.g., Deloria & Laurence, *supra* note 108, at 1108 (“There is no reason to expect that those persons identified as ‘Indians’ by a government—federal or tribal—will be more ‘Indian’ than those who only identify themselves as ‘Indians.’”); Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11, 15 (2000) (recounting how a Seminole woman could not qualify for an Indian scholarship because her grandmother hid from enrollment parties to protest allotment's destruction of the tribal land base, thus denying her granddaughter documentation of her Indian ancestry on federally-compiled rolls); *supra* Section I.B.1.

¹¹⁹ See Myers, *supra* note 69, at 271, 286 (discussing the limitations of federal recognition).

opportunities and challenges. The Indian Commerce Clause has always been understood to enable Congress to enact federal legislation directed at individual Indians, not just tribes and their members, particularly since there was no formal enrollment process in the eighteenth century.¹²⁰ Moreover, the federal government has continually resisted limiting its trust responsibility to enrolled tribal members given the government's role in imposing ancestry-based membership criteria in the Allotment Era.¹²¹ Accounting for race also avoids the pitfalls of recognition's limitations, such as wrongly excluding legitimate Indians due to arbitrary disenrollment or termination.¹²² With more flexibility, however, comes greater scrutiny. Defining "Indian" purely as race, without regard for the political trust relationship, subjects affirmative action for such individuals to strict scrutiny.¹²³ Although race-based affirmative action programs are currently permissible under *Fisher*¹²⁴ and *Grutter*,¹²⁵ this can change depending on the balance of the Court. One way to avoid race-based judicial scrutiny of the federal government's targeting of racial Indians is to show how targeting such individuals advances *group* interests in self-determination, rather than simply aiding isolated individuals without any perceptible group impact.¹²⁶

Defining "Indian" is not only critical to resolving the current juridical failure, but also essential to combating widespread ethnic fraud perpetrated against Indians in affirmative action. Although the act of posing as a member of a disadvantaged group to benefit from affirmative action is not a phenomenon exclusive to Indians,¹²⁷ its

¹²⁰ See Goldberg, *supra* note 98, at 969 (describing interpretations of the Indian Commerce Clause).

¹²¹ See *id.* at 964.

¹²² Cf. *supra* Sections I.B.1, I.B.2.

¹²³ See, e.g., Idleman, *supra* note 51, at 623 ("It is only when Indians are treated differently apart from their tribal status, or when 'Indian' or 'Native American' is used for classification without regard to tribal membership, that governmental classifications appear fundamentally racial . . . in character and . . . vulnerable to . . . strict scrutiny."); see also Reynoso & Kidder, *supra* note 49, at 33–34 (analyzing Proposition 209 cases that challenged programs targeting Native Americans as a racial/ethnic classification rather than as members of federally recognized tribes).

¹²⁴ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214–15 (2016).

¹²⁵ *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

¹²⁶ See, e.g., Goldberg, *supra* note 98, at 989 (analyzing the necessity of such a condition to survive an equality-based challenge); Reynoso & Kidder, *supra* note 49, at 42 ("Such a self-determination purpose could be concretely expressed, for example by giving American Indian tribal members who already demonstrate community leadership potential (by virtue of their involvement in tribal . . . cultural activities) more of a plus factor than those who do not.").

¹²⁷ See, e.g., *Malone v. Civil Serv. Comm'n*, 646 N.E.2d 150 (Mass. App. Ct. 1995) (affirming dismissal of two white firefighters who falsely claimed on their applications that their race was "black" to secure an appointment to the department); Baca, *supra* note 87,

scope makes it an epidemic that is unique to the indigenous community.¹²⁸ The National Native American Bar Association (NNABA) maintains that half or more of all law school students who claim to be Indians are not, but checked the box to benefit from affirmative action.¹²⁹ Confining the affirmative action definition of “Indian” to members of either Canadian or U.S. tribes has a greater chance of excluding such frauds,¹³⁰ but is likely under-inclusive of many deserving Indians.¹³¹ By the same token, measuring “Indianness” by race or blood quantum is also no guarantee of tribal connection and risks strict scrutiny review.¹³² A racial metric also creates a much greater opportunity for “wannabes” to feign (or grossly exaggerate) an Indian heritage.¹³³ The key to addressing such ethnic fraud is to determine, regardless of whether Canadian or U.S. institutions use a political or racial classification for Indians, if an applicant can demonstrate her previous connection to an Indian community.¹³⁴

at 111 (discussing how a colleague got his grandson into graduate school by discovering that one of his maternal grandparents was from Spain, even though the grandson had never identified himself as Hispanic, had no knowledge of Hispanic culture, and had never suffered discrimination for being Hispanic).

¹²⁸ Cf. Samantha Allen, *Native Americans Blast Dartmouth for New Hire*, DAILY BEAST (Sept. 19, 2015), <http://www.thedailybeast.com/articles/2015/09/19/native-americans-blast-dartmouth-for-new-hire.html> [hereinafter Allen, *New Hire*] (discussing the controversy over Dartmouth hiring Susan Taffe Reed as the director of the college’s Native American Program when it was discovered that she was duplicitous about her dubious Native ancestry); Samantha Allen, *Tribes Blast ‘Wannabe’ Native American Professor*, DAILY BEAST (July 11, 2015), <http://www.thedailybeast.com/tribes-blast-wannabe-native-american-professor> [hereinafter Allen, *Wannabe*] (discussing the controversy over the Cherokee Nation denouncing scholar-activist Andrea Smith for falsely claiming to be a member of the tribe and how this is another painful reminder of cultural appropriation). See generally Marques, *supra* note 6, at 402 n.115 (“An implication of the enrollment process is that the government does not want to be responsible to every individual who ‘claims’ to be an Indian.”).

¹²⁹ See Baca, *supra* note 87, at 117. Baca is a former president of NNABA. *Id.* at 260.

¹³⁰ *Id.* at 117 (“If law schools keep their diversity commitment and start asking for enrollment numbers . . . non-Indians will not be able to lie about being Indian, and so only actual Indians will be counted as Indians by law schools.”). But see Deloria & Laurence, *supra* note 108, at 1121–22 (“Such a definition almost always misses the boat. Tribal membership is a political definition by the tribe that serves a fixed tribal purpose and it is not usually fit for other purposes.”).

¹³¹ Many criticize tribal enrollment as an under-inclusive metric for defining “Indians,” because admitting a card-carrying Cherokee member with 1/256th blood quantum residing in Orange County is unlikely to more effectively advance the goals of affirmative action than admitting a full-blooded Indian who has been arbitrarily disenrolled. See Deloria & Laurence, *supra* note 108, at 1119; cf. Paredes, *supra* note 69, at 40 (discussing outright con-artists who sell “Indian tribal membership” as chiefs of phony tribes).

¹³² See *supra* Section I.B.2.

¹³³ See *supra* note 86 and accompanying text.

¹³⁴ An applicant could demonstrate knowledge of her family connection to a tribe. See Allen, *Wannabe*, *supra* note 128 (quoting Steve Russell, a Cherokee writer and professor at Indiana University Bloomington). Alternatively, an applicant can prove that she served

As one can see, this debate over how to define an “Indian” for affirmative action purposes is an extension of the larger debate on defining an “Indian” in federal law on both sides of the border. This Note does not advocate for either side of the debate on whether the federal government should favor “Indian” as political classification or “Indian” as racial classification for defining cross-border affirmative action. Any definition, however, will have to contend with both, while allowing border tribes to have access to affirmative action free of frauds who may hijack it from them.

B. The Interaction Between the Federal Definition of “Indian” and Private Affirmative Action

How the federal government defines “Indian” for recognition purposes has a substantial impact on private affirmative action programs. First, Title VI of the Civil Rights Act of 1964 prohibits any program that receives federal funding from discriminating on the basis of race.¹³⁵ The Supreme Court has consistently interpreted Title VI to be coterminous with both the Equal Protection Clause and the Fifth Amendment.¹³⁶ Thus, private institutions that receive federal funds are bound by the Equal Protection Clause and so may not discriminate on the basis of race or national origin¹³⁷ outside of the carefully delineated boundaries the Court has defined for affirmative action.¹³⁸ Therefore, a private institution’s decision to have affirmative action for non-recognized Indians is subject to heightened scrutiny, rather than the rational basis of *Mancari*’s political classification. Second, private programs that limit their “Indian” criterion to federally recognized Indians, such as the Gates Millennium Scholarship, are necessarily bound by whom the federal government includes as “Indian.” Private programs that neither receive federal funding nor cabin them-

or participated with a tribal community in the past. *See* Deloria & Laurence, *supra* note 108, at 1116; *supra* note 126 and accompanying text. Of course, none of this is to say that an individual must “be” Indian, such as wearing her hair in braids or joining the Native American Law Student Association (NALSA), as a condition to her eligibility for affirmative action—certainly the author has not worn his hair in braids or dressed in traditional garments. *Id.* at 1117.

¹³⁵ 42 U.S.C. § 2000d-1 (2012).

¹³⁶ *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (“Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”); *see also* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (citing *Bakke* for the same). Holdings under the Equal Protection Clause of the Fourteenth Amendment are binding on the federal government per reverse incorporation through the Fifth Amendment as articulated in *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹³⁷ *See* 20 U.S.C. § 1011(a) (2012).

¹³⁸ *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); *Grutter*, 539 U.S. 306.

selves to Indians that are federally recognized are free to do as they please for affirmative action. Given the number of institutions that receive federal funding and the administrative ease available to private organizations that confine their programs to federally recognized Indians,¹³⁹ any long-term solution will require changing the definition of “Indian” at the federal level to include Indians on the other side of the border.

The United States does not recognize Indians who have been split by its jurisdiction, but a family court decision inadvertently defined what the new federal recognition scheme should accomplish. *In re Adoption of Linda J.W.*¹⁴⁰ involved whether a cross-border Iroquois Indian, who was entitled to tribal enrollment in Canada, was entitled to relief under the Indian Child Welfare Act (ICWA).¹⁴¹ The court concluded that she was an “Indian” person for the purposes of ICWA and granted relief.¹⁴² The reasoning encapsulates this Note’s vision for honoring tribal identity and touches on the author’s belief in one Iroquois people so well that it is quoted in full:

It is not difficult to recall that all the land of Western New York and southern Ontario was once under the control of the Six Nations, of which the Onondagas are one member nation. . . . The existence of [the U.S.-Canada] border has no effect on the community of the Six Nations which lived across this land long before the imposition of this border, and who continue to maintain a posture of sovereignty even while they are surrounded on all sides by the governments of the United States and Canada. This continuity of the Six Nations community is recognized by the United States and Canada in the right of free and uninhibited passage of people and goods across the United States/Canada border which is granted to the Six Nations under the Jay Treaty. The Six Nations continues to assert claims to land across this area, and considers itself a single and continuous community.¹⁴³

This is not Supreme Court precedent, but this is the vision that the United States must adopt—that a tribe divided by the border is one people no matter where they reside. Even though this case was decided in the context of ICWA, it is important for affirmative action

¹³⁹ Cf. Mark Neath, Comment, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 589, 706 (1995) (“Just as American colleges and universities prefer ‘objective,’ ‘standardized’ admissions tests over seemingly subjective and difficult-to-score essay tests, tribes prefer blood quantum over other measures of cultural identity.”).

¹⁴⁰ See 682 N.Y.S. 2d 565 (N.Y. Fam. Ct. 1998).

¹⁴¹ See 25 U.S.C. §§ 1901–1963 (2012).

¹⁴² See *In re Adoption of Linda J.W.*, 682 N.Y.S. 2d at 567–68.

¹⁴³ *Id.* at 567.

because it asserts that a Cayuga recognized in Ontario is as much Cayuga as one recognized in New York. The histories of both Canada and the United States are responsible for dividing the Iroquois and subjecting them to differing, and at times devastating, requirements for federal recognition.¹⁴⁴ The problem of cross-border recognition comes from a long train of abusive definitions of what an “Indian” was.¹⁴⁵ It is the trust responsibility of both countries to restore the singular identity of Iroquois and other tribes that they have never relinquished.¹⁴⁶ Ensuring universal access to affirmative action is a start, but there are formidable obstacles to any potential solution.

III

BRIDGING THE GAP

“It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”

—*McClanahan v. Arizona State Tax Commission*, 1973¹⁴⁷

There are at least three methods to establish cross-border affirmative action in the United States for American Indians who are members of border tribes but only recognized as “Indian” in Canada. Since the underlying problem is a failure in the trust relationship, the ultimate solution lies with the federal government. For this reason, either the ratification of a bilateral agreement between the U.S. and Canadian governments or enactment of domestic statutory reform within the United States would promise the most comprehensive and long lasting resolution. But these measures are also the most difficult to achieve. While some form of intertribal agreement between U.S. and Canadian tribes for the mutual recognition of members could strengthen tribal sovereignty by empowering self-determination and independent resolution of this cross-border issue, it would be an

¹⁴⁴ See *supra* Section I.A.

¹⁴⁵ Cf. DAVID R. ROEDIGER, *THE WAGES OF WHITENESS* 93 (1991) (“Before the white man can relate to others he must forego the pleasure of defining them.” (quoting leading Lakota scholar Vine Deloria, Jr.)); Macklem, *supra* note 39, at 1312 (“The Indian message is simple: For too long, their identities have been defined by others.”). One reason why many Indians resent political correctness *as applied to themselves* (such as “Native American”) is that it represents the most recent episode of a centuries-long effort to define and categorize them for the convenience of the majority.

¹⁴⁶ See Macklem, *supra* note 39, at 1315 (“Aboriginal allegiances of race, culture and community crisscross the 49th parallel in ways that the nonindigenous North American legal imagination does not currently comprehend.”); Marques, *supra* note 6, at 404 (“This legal side effect of divergent systems of political Indian status recognition is one that exemplifies the governments’ shortcomings in fulfilling their obligations with regard to American Indian tribes . . .”).

¹⁴⁷ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973).

impractical solution due to existing hostility—both on the part of tribes and their respective federal trustees—to the concept of dual tribal enrollment. Finally, a temporary solution calling upon private initiatives to embrace a broad cross-border definition of “Indian” (combined with a requirement for “tribal community connection”) could be implemented immediately, but is the least comprehensive option. Critically, such private-sector mechanisms cannot address the underlying failure by the federal government to meet its trust obligation. In order to fully cure this defect, Congress must take action to close the gap in recognition and provide equal opportunity for affirmative action to all *American* Indians in the United States.¹⁴⁸

A. *Treaty or Other International Agreement Between Canada and the United States and Unilateral Statutory Reform*

The only legal construct by which the United States recognizes an “Indian” outside of its territories is the Jay Treaty’s free passage right.¹⁴⁹ The Jay Treaty exhibited both countries’ intent to maintain the Iroquois and other border tribes’ right to travel across the border without obstruction.¹⁵⁰ In 1952, the American Immigration and Naturalization Act (INA) was amended to include a blood quantum requirement,¹⁵¹ which mandated that an individual possess “at least 50 per centum blood of the American Indian race” to qualify for free

¹⁴⁸ The term “American Indians” is used here to emphasize that all Indians descendant from within the United States but divided by the discussed legal dichotomy should be recognized as what they are: *American* Indians.

¹⁴⁹ Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. III, Nov. 19, 1794, 8 Stat. 116, 130 [hereinafter Jay Treaty] (“[T]he Indians dwelling on either side of the . . . boundary line[] [are] free[] to pass and repass . . . into the respective territories and countries of the two contracting parties, . . . and to navigate all the lakes, rivers and waters thereof, and to freely carry on trade and commerce with each other . . .”).

¹⁵⁰ This recognition was later abrogated temporarily by the War of 1812. *See, e.g.*, *Karnuth v. United States*, 279 U.S. 231, 241 (1929) (holding that the War of 1812 abrogated the free passage right of Article III of the Jay Treaty); *Francis v. R.*, [1956] S.C.R. 618 (Can.) (holding that the Jay Treaty was abrogated); Lewerenz, *supra* note 13, at 202 & n.68 (observing that “[m]ost courts and scholars agree that the War of 1812 abrogated all or parts of the Jay Treaty,” and collecting citations). Scholars debate whether the Treaty of Ghent, *see* Treaty of Peace and Amity, Gr. Brit.-U.S., art. IX, Dec. 24, 1814, 8 Stat. 218, unambiguously restored the Jay Treaty’s Indian free passage right or if it remained permanently abrogated. *Compare* Lewerenz, *supra* note 13, at 196 (arguing that the Jay Treaty’s free passage right was restored after the War of 1812 by the Treaty of Ghent and that the Jay Treaty is the basis of the right that was codified in the Immigration and Naturalization Act and, thus, is the basis for the right of Canadian Indians to pass freely into the United States), *with* Marcia Yablon-Zug, *Gone but Not Forgotten: The Strange Afterlife of the Jay Treaty’s Indian Free Passage Right*, 33 QUEENS L.J. 565, 569 (2008) (concluding that a free passage right does exist, but that “the right is no longer based on the Jay Treaty” and exists now only as a matter of statutory law).

¹⁵¹ *See* Fletcher, *supra* note 59, at 299 n.21 (describing the term of art).

passage.¹⁵² This made eligibility for Jay Treaty rights dependent on racial/ethnic lineage rather than political affiliation with a tribe.¹⁵³ Without this blood quantum, tribal membership,¹⁵⁴ an individual's self-identification as Indian, and recognition in the community as an Indian¹⁵⁵ are insufficient to claim the right to freely cross the border. Conversely, an individual could lack all those qualities but still qualify for free passage in light of her blood lineage.¹⁵⁶ This heavily criticized provision¹⁵⁷ demonstrates the United States's recognition of non-federally recognized "Indians" outside of its jurisdiction for entry into the country. Canada, in contrast, restricts free passage to individuals registered with Canadian authorities to be an "Indian" within the Indian Act,¹⁵⁸ regardless of their citizenship.¹⁵⁹

¹⁵² Immigration and Nationality Act of 1952: Application to American Indians Born in Canada, ch. 477, § 289, 66 Stat. 234 (codified at 8 U.S.C. § 1359 (2012)); see American Indians Born in Canada, 8 C.F.R. § 289 (2017) (regulations implementing Section 289 of the INA); *Frequently Asked Questions – Secure Certificate of Indian Status*, INDIGENOUS & N. AFFAIRS CAN., <https://www.aadnc-aandc.gc.ca/eng/1100100032383/1100100032385> (last updated Sept. 14, 2017) (explaining border crossing requirements).

¹⁵³ See Boos et al., *supra* note 21, at 359 ("Eligibility for Jay Treaty rights is a matter of ethnic lineage rather than political affiliation with a tribe.").

¹⁵⁴ See United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660, 663 (W.D.N.Y. 1947) (holding that a Canadian-born American Indian woman who lost her status as an "Indian" under Canada's Indian Act was still entitled to free passage pursuant to America's INA); Boos et al., *supra* note 21, at 359–60 ("Tribal membership alone is inadequate to demonstrate an individual's qualification . . . because membership does not require a 50% blood quantum." (citing U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP & IMMIGRATION SERVS., *Adjudicator's Field Manual*, 393 § 23.8(a) (2013))).

¹⁵⁵ See United States v. Curnew, 788 F.2d 1335, 1336 (8th Cir. 1986) ("[W]hether Canadian-born alien . . . identifies himself as or is viewed by others as 'Indian' is not determinative of whether he possesses at least 50 per centum American Indian blood . . .").

¹⁵⁶ See Boos et al., *supra* note 21, at 360.

¹⁵⁷ See, e.g., O'Brien, *supra* note 7, at 347–48 (arguing that the U.S. blood quantum requirement is wrong and that an "individual's right to travel across the boundaries of his or her aboriginal homeland is a right possessed by virtue of his or her tribal membership, not because of his or her identity as an Indian"); Spruhan, *supra* note 107, at 303 (analyzing the Jay Treaty free passage right for Canadian Indians and arguing that the definition of Canadian Indian should be shifted from a straight blood quantum threshold to some politically-based criteria to avoid constitutional challenges).

¹⁵⁸ See Indian Act, R.S.C. 1985, c I-5 (Can.) (delineating all aspects of tribal registration and governance).

¹⁵⁹ See Immigration Act, R.S.C. 1985, c I-2, § 4(3) (Can.); Evans, *supra* note 21, at 216 (analyzing the Immigration Act); Marques, *supra* note 6, at 394 & n.53–54 (same). Indians not registered under the Indian Act must show that they have a sufficient nexus or "relationship to Canada in some sort of historical or contemporary cultural fashion." Bryan Nickels, Note, *Native American Free Passage Rights Under the 1794 Jay Treaty: Survival Under United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313, 331 (2001); see Marques, *supra* note 6, at 394–95 (analyzing Watt v. Liebelt, [1999] 2 F.C. 455 (Can.), and the Canadian common law nexus test for free passage).

Both the United States and Canada have trust obligations to their respective indigenous populations within their respective territories. The Jay Treaty and subsequent federal legislation demonstrates both governments' historic recognition of Indians as not bound by the border.¹⁶⁰ In addition, each government has recognized members of the tribes that make up the Iroquois.¹⁶¹ In fulfilling their duties to maintain an open border to tribes and to satisfy their trust obligations to said tribes, both governments are responsible for resolving this lack of reciprocal recognition. This is not to say that there is a total lack of coordination: The United States allows Canadian citizens who have 50% blood quantum to enter, live, and work in the United States.¹⁶² Canada allows U.S. citizens who are enrolled by a band (tribe) in Canada to do the same.¹⁶³ If both countries recognize Indians for the purposes of border travel—and recognize members of the tribes that compose the Iroquois within their borders—it is not a herculean effort to have Canada and the United States agree to mutual recognition of enrolled tribal members for the limited purpose of affirmative action. After all, Congress has plenary power to determine who is an “Indian.”

There are a number of avenues that the United States and Canada could pursue to adopt a process for mutual recognition of enrolled tribal members.¹⁶⁴ One would be to adopt an international agreement akin to a “super Jay Treaty.” Such an agreement would not only need to reaffirm the free passage right for Indians, but also provide for the reciprocal recognition of each country's determinations of Indian status. Thus, an individual granted the political classification of “Indian” in one country would retain that status in the other. This would fulfill both countries' trust obligations by continuing to secure an open border for tribes and allowing members of border tribes to retain their identities and entitlement to affirmative action in their country of residence.

¹⁶⁰ See, e.g., Marques, *supra* note 6, at 418.

¹⁶¹ E.g., *id.*

¹⁶² *First Nations and Native Americans*, U.S. EMBASSY & CONSULATES CAN., <https://ca.usembassy.gov/visas/first-nations-and-native-americans/> (last visited June 28, 2017).

¹⁶³ See, e.g., Marques, *supra* note 6, at 418; cf. O'Brien, *supra* note 7, at 348 (arguing that the 50% blood quantum requirement is an illegal alteration of the Jay Treaty by the United States and that the requirement also conflicts with the *Mancari* holding that tribal property rights are politically and not racially based (citing *Morton v. Mancari*, 417 U.S. 535, 551–55 (1974))).

¹⁶⁴ The United States and Canada do not need to agree on a uniform regulatory framework by which tribes and their members are recognized by *both* governments (resolving the conflicts discussed in Section II.A), but can confine such an agreement to those enrolled in both countries under their respective laws. See Marques, *supra* note 6, at 418.

A similar option that does not require engaging the treaty ratification process is a memorandum of understanding between Canada and the United States to support transborder cooperation in maintaining and supporting their shared Indian populations.¹⁶⁵ Canada has a similar MOU with Russia regarding aboriginal well-being in the Arctic.¹⁶⁶ Another non-treaty option includes using the International Joint Commission—which is responsible for examining issues regarding the U.S.-Canada border—to solve recognition and other issues encountered by border tribes.¹⁶⁷ Marques proposed that both countries recognize the Haudenosaunee passport as a means of empowering Haudenosaunee self-determination and ability to define themselves as one people in the eyes of the world.¹⁶⁸ Finally, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) notes the importance of indigenous groups maintaining cross-border relations with people from their own tribes,¹⁶⁹ and the United States and Canada can fulfill this recognition by passing comprehensive legislation providing for mutual recognition.

Both countries also have the option to act unilaterally by passing domestic statutes that would include cross-border Indians for Indian affirmative action purposes. Congress has plenary power over Indian affairs, including the power to define “Indian” independent of membership in a federally recognized tribe for programs that target Indians.¹⁷⁰ Congress has used this power before, such as permitting Indians who are not enrolled in any recognized tribe to qualify for

¹⁶⁵ See Marques, *supra* note 6, at 419 (proposing such an option).

¹⁶⁶ See Memorandum of Understanding Between the Department of Indian Affairs and Northern Development (Canada) and the State Committee on Northern Affairs of the Russian Federation Concerning Cooperation on Aboriginal and Northern Development, Can.-Russ., (Nov. 29, 2007) [hereinafter Can.-Russ. MOU], <https://www.aadnc-aandc.gc.ca/eng/1100100014645/1100100014647> (last updated Sept. 15, 2010) (“Affirming the commitment of both countries to the well-being of its northern population . . .”).

¹⁶⁷ See O’Brien, *supra* note 7, at 348–50 (describing the International Joint Commission).

¹⁶⁸ See Marques, *supra* note 6, at 389, 408, 420, 421, 423 (arguing for recognition of the Haudenosaunee passport).

¹⁶⁹ See UNDRIP, *supra* note 10, at art. 36(1) (“Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”). UNDRIP is a non-budget resolution of the General Assembly and is not legally binding on any country. See generally Benedict Kingsbury, *Indigenous Peoples*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 9 (Wolfrum ed., 2012), <http://www.iilj.org/wp-content/uploads/2016/08/Kingsbury-Indigenous-Peoples-1.pdf> (providing an overview of UNDRIP); Marques, *supra* note 6, at 409–14 (same).

¹⁷⁰ See *supra* Section I.A.

Indian health care benefits.¹⁷¹ Congress could do the same here and pass a statute that permitted cross-border Indians to qualify for affirmative action programs even though they are not enrolled in a federally recognized tribe. Parliament could use its plenary power to similarly amend the Indian Act to do the same.¹⁷²

A major bilateral agreement or unilateral reform could provide a comprehensive and enduring solution that would not only settle the issue of cross-border recognition for affirmative action, but also begin the process of addressing deep and pressing underlying concerns regarding tribal sovereignty and recognition. The problem will continue until this solution is implemented in some form. There are a number of obstacles, however, that could stymie a federal solution for the foreseeable future. Indian tribes lack significant resources and lobbyist support to change the legal implications of the current system in their favor.¹⁷³ Pushing a treaty or a statute through the U.S. Senate is a tall order for anyone, but it is particularly so now with a Senate that is increasingly deadlocked. Moreover, some may argue that neither the United States nor Canada has a trust obligation to the other country's tribes and that legislation on their behalf is not "tied rationally to the fulfillment of Congress' unique [trust] obligation toward the Indians."¹⁷⁴ Additionally, Canada and the United States differ substantially when it comes to recognition of tribes within their borders. Tribes in the United States are empowered to use tribal law to determine membership,¹⁷⁵ whereas only federal law defines tribal membership in Canada.¹⁷⁶ Most tribes in the United States use tribal blood quantum, which only considers blood from the "accepting"

¹⁷¹ See 25 U.S.C. § 1603(13) (2012) (providing a definition of "Indian" that is broader than enrollment).

¹⁷² See *supra* Section I.A.

¹⁷³ See Marques, *supra* note 6, at 405.

¹⁷⁴ Morton v. Mancari, 417 U.S. 535, 555 (1974); see PEVAR, *supra* note 12, at 41–42 (analyzing the trust doctrine's potentially limited scope); Spruhan, *supra* note 107, at 322 & n.161 (analyzing the difficulty regarding the trust obligation). *But see supra* notes 120–21 and accompanying text (noting that the United States trust obligation has never been confined to tribes and their members).

¹⁷⁵ See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978).

¹⁷⁶ See Indian Act, R.S.C. 1985, c I-5 (Can.) (delineating all aspects of tribal registration and governance); see also Brian L. Lewis, *So Close, Yet So Far Away: A Comparative Analysis of Indian Status in Canada and the United States*, 18 WILLIAMETTE J. INT'L L. & DIS. RESOL. 38, 39 (2010) (arguing that the United States has been more deferential to tribal government definitions of their membership while Canada monopolized (and constitutionalized) acknowledgement of band and individual Indian status, regardless of the tribe's determination of who is a member); Castella, *supra* note 21, at 197 (analyzing differences).

tribe.¹⁷⁷ In Canada, tribes favor pan-Indian blood rules, which aggregates quantum from *all* tribes.¹⁷⁸ These distinctions can lead to the conclusion that Canadian Indians do not satisfy American requirements for recognition even disregarding the territoriality requirement, and vice-versa. This is not how individual Indians become recognized on one side of the border as opposed to the other, but this is an example of how both countries have developed their own traditions for defining “Indian” and how an attempt to simply accept the other country’s Indians as their own can encounter resistance.

An international agreement or domestic statutory reform is ultimately what needs to happen to repair this wound to the trust relationship, but it is practically unavailable for immediate relief.

B. *Intertribal Recognition*

If the two federal governments cannot resolve this problem, why not leave it to the tribes to figure it out themselves? Legally partitioned tribes would take it upon themselves to recognize each other’s members on both sides of the border, thus giving them equivalent “Indian” status in both countries. Dual enrollment in tribes appears tempting as a plausible solution—it bypasses the mutually exclusive federal recognition scheme by allowing those enrolled to be viewed by each government as one people, and it evinces tribal sovereignty through self-determination and resolution of this cross-border issue that plagues them.¹⁷⁹

Unfortunately, dual enrollment is effectively a non-starter. Recognition of Indian status affects Indians and non-Indians alike, and allowing dual enrollment would substantially increase the costs associated with each government’s obligations toward the border tribes.¹⁸⁰ Although beyond the scope of this Note, securing recognition as “Indian” in another country would entitle an individual to that country’s Indian benefits, raising cost concerns that could kill any such proposal before it has a chance to be made. This is because an “Indian” would be recognized for *all* purposes, not simply affirmative

¹⁷⁷ See Kirsty Gover, *Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand, and the United States*, 35 LAW & SOC. INQUIRY 689, 701–03 (2010) (describing and analyzing blood quantum rules).

¹⁷⁸ See *id.* This is important because pan-Indian blood rules permit admitting persons of high aggregate multi-tribal blood quantum who otherwise lack sufficient tribe-specific ancestry. *Id.* at 702.

¹⁷⁹ See Marques, *supra* note 6, at 403–04.

¹⁸⁰ See, e.g., Lewis, *supra* note 176, at 39 (“The population of political status Indians in both countries impacts the cost of government-to-government relationships and fiduciary responsibilities.”); Marques, *supra* note 6, at 404 (analyzing how tribal dual enrollment is a non-starter).

action. The same problem of differing U.S. and Canadian requirements arises here, as the United States could see a tribe engaged in cross-border recognition as admitting hordes of non-Indians, dismantling the tribe's trust relationship with the federal government.

Aside from each governments's likely doubts regarding tribes opening their memberships to dual enrollment, the tribes themselves are overwhelmingly against dual enrollment (even with tribes that are culturally identical). Approximately half of Canadian First Nations and 60% of U.S. tribes prohibit multiple memberships at the time of admission, and a few Canadian First Nations extend the prohibition to persons enrolled in *any* tribe in North America—with only a handful of tribes expressly permitting multiple enrollment.¹⁸¹ Most Iroquois tribal constitutions prohibit dual enrollment.¹⁸² Although the Iroquois prevent dual enrollment because their membership is based on familial ties,¹⁸³ the bulk of Indian tribes are primarily interested in conserving tribal resources by preventing “tribe shopping”—the possible unjust enrichment of individuals who have already benefited from another tribe's asset distribution—and limiting the tribe's social welfare responsibilities by excluding persons who are able to have their needs met elsewhere.¹⁸⁴

As a solution disfavored by all sides that promises more harm than benefit,¹⁸⁵ intertribal recognition does not offer a practical means of immediate relief.

C. *Private Initiative*

Private actors provide the most immediate solution, but also the one most disconnected from the problem because it inherently cannot repair the underlying trust relationship between the federal government and tribes. Private initiative can do much good for Indians

¹⁸¹ See Gover, *supra* note 177, at 714, 716 n.47; see also O'Brien, *supra* note 7, at 323 & n.49 (noting that most American tribes forbid dual enrollment).

¹⁸² See Marques, *supra* note 6, at 403. The author experienced this directly when he tried to register with the Cayuga Nation of New York. The resulting conversation was probably the bitterest racial argument in the author's life, as the person on the other end of the line dismissed the author as not being Cayuga, and chastised his ancestors for going to Canada “thinking they would get milk and honey.”

¹⁸³ See FENTON, *supra* note 15, at 24, 31 (describing the role of familial ties in Iroquois communities); Marques, *supra* note 6, at 403 (“[T]he Haudenosaunee traditionally determine whether or not an individual is a member of one of the tribes culturally, based on familial ties.”).

¹⁸⁴ See Gover, *supra* note 177, at 714–15.

¹⁸⁵ Not to mention that it passes off a problem the Canadian and U.S. governments created to tribes that they have already imposed upon by creating mutually exclusive recognition laws. See Marques, *supra* note 6, at 403–04.

without threatening tribal sovereignty,¹⁸⁶ but it cannot get at the heart of the problem. While private endeavors do not offer a permanent legal solution, they do offer an immediate course of action to address the lack of cross-border recognition in affirmative action.

Private actors can adopt a political classification of “Indian” that does not require a treaty, comprehensive legislation, or imposing upon tribal membership criterion. Institutions can simply accept *both* U.S. and Canadian recognition in a federally recognized tribe as its definition of “Indian.” The Oxford-Agnese Nelms Haury Scholarship does exactly that—cabining eligibility to those who are officially recognized in either an American tribe or a Canadian First Nation.¹⁸⁷ While this does not account for the inherently under-inclusive aspects of tribal enrollment, it does remove the indignity of a member of a recognized tribe losing their recognition by crossing the border—as with the Gates Millennium Scholarship. Plus, since federal recognition in either country is a political classification, it is not subject to strict scrutiny.

Private institutions also have the flexibility to use “Indian” as racial classification to include those whom tribal enrollment leaves out. The Office of Management and Budget (OMB) provides a ready-to-use definition for “American Indian or Alaskan Native” that many private companies already use: “A person having origins in *any* of the original peoples of North and South America (including Central America), and who *maintains tribal affiliation or community attachment.*”¹⁸⁸ OMB mandated the use of this definition for use in all federal program data collections,¹⁸⁹ so practically all institutions of higher education use this definition to comport with the Department of Education’s own compliance with OMB.¹⁹⁰ The OMB definition allows a

¹⁸⁶ Cf. Deloria & Laurence, *supra* note 108, at 1129 (“A federal judge . . . might too-quickly dismantle a tribal membership practice and dismiss the tribe’s defense as an improper thinking . . .”).

¹⁸⁷ See *Oxford-Agnese Nelms Haury Scholarship*, LINACRE COLL., UNIV. OF OXFORD, <http://www.linacre.ox.ac.uk/prospective-students/scholarships/oxford-agnese-nelms-haury-scholarship> (last visited June 28, 2017).

¹⁸⁸ Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,789 (Oct. 30, 1997) (emphasis added); see also *Race Definitions*, GEN. ELEC., <http://www.ge.com/careers/race-definitions> (last visited June 28, 2017) (adopting OMB’s definition).

¹⁸⁹ See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. at 58,782 (“This classification provides a minimum standard for maintaining, collecting, and presenting data on race and ethnicity for all Federal reporting purposes.”). Thus this is the definition used in the Census. See TINA NORRIS ET AL., U.S. CENSUS BUREAU, *THE AMERICAN INDIAN AND ALASKA POPULATION: 2010 CENSUS BRIEF 2* (2012).

¹⁹⁰ See Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,274 (Oct. 19, 2007)

private institution to use a category that is sufficiently broad enough to include individuals whose tribes are indigenous anywhere in the Western Hemisphere without regard for U.S. borders, thereby eliminating the cross-border issue that plagues tribes today. The requirement to maintain tribal affiliation or community attachment gives institutions a prism to weed out frauds. Further, if an individual is not enrolled because they come from an unrecognized or terminated tribe, private actors have the latitude to accept some form of certification or letter from an unrecognized tribe's council that this applicant is a member of their community. So long as private institutions use "Indian" as race as one factor in a holistic assessment in the pursuit of membership diversity—while accounting for race-neutral alternatives—such programs should survive strict scrutiny.¹⁹¹

Private initiative is limited and cannot provide a comprehensive solution for all affected tribes that would resolve all relevant legal issues regarding the trust relationship and defining "Indian." As discussed in Section III.A, until the federal government changes its definition, in the long-term there is little incentive for the Gates Millennium Scholarship and similar programs to change their commitment to staying within the current federal definition. Given the influence of the federal definition on private institutions that accept federal funds or limit their affirmative action to federally recognized Indians, private actors who act outside of this influence will do little to dramatically alter the affirmative action landscape for cross-border tribes. It is a readily available option, however, for any and all organizations that are willing to implement it, that would end the current shapeshifting quality of the U.S.-Canada border for those individuals they accept.

(implementing OMB's definition and requiring educational institutions and other recipients to collect racial and ethnic data using OMB definitions); see also Office of Human Res., *Race & Ethnicity Reporting*, GA. INST. TECH., <https://ohr.gatech.edu/resources/employeerelations/race> (last visited June 28, 2017) (adopting DOE required guidelines); *New Demographic Data Collection Format FAQ*, HARVARD UNIV., https://hr.harvard.edu/files/humanresources/files/demographicdatacollection_faqs.pdf (last visited Sept. 8, 2017) (showing Harvard's policy to comply with OMB standards while collecting demographic data); Andrew Hamilton, *Affirmative Action and Equal Employment Opportunity Policy Statement*, N.Y. UNIV., <https://www.nyu.edu/content/dam/nyu/hr/documents/policies/AffirmativeActionEqualEmploymentOpportunityPolicyStatement.pdf> (last visited Sept. 8, 2017) (showing NYU's policy to comply with applicable law when gathering demographic data); Sayer Devlin, *NYU Guesses Racial, Ethnic Identity of Some Employees*, WASHINGTON SQUARE NEWS, Apr. 17, 2017, <https://www.nyunews.com/2017/04/17/nyu-guesses-racial-ethnic-identity-of-some-employees/> (indicating that NYU is required by federal law to collect racial data on its employees).

¹⁹¹ See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

CONCLUSION

The best solution to this problem lies not just with a greater understanding between the United States and Canada, but a fundamental reimagining of both countries' relationships with their Indian tribes. In the United States, the trust responsibility can only be fully met if the federal government takes legislative action, either through ratification of a bilateral agreement with Canada or enacting domestic statutory reform. Such a broad reform has difficult obstacles, but it is what is necessary to both repair the trust relationship with tribes and provide a long-term solution for affirmative action. Congressional action is the most substantive and lasting approach, but is unlikely to provide relief at present. Leaving it to tribes themselves to find a solution would be unworkable and could put them in jeopardy of losing their federal recognition by the U.S. government. Private actors promise the most readily available means of reform, but they are also farthest from the problem and cannot provide a long-term solution. Given the powerful influence of the federal government's recognition scheme on private actors who receive federal funds or cabin their affirmative action programs to Indians who are federally recognized, the institutions that are willing to operate outside of these constraints are unlikely to make a large-scale impact, nor are institutions that operate within these constraints likely to change their behavior. Private efforts can provide a lifeline, however, until the federal government can implement the solution that members of border tribes both need and deserve.