Taymoor M. Pilehvar & Lory D. Rosenberg, *How Much Blood to Cross the Northern Border? Reconsidering the Blood Quantum Requirement of INA §289.* 1 AILA L. J. 31 (2019).

Although a 1795 treaty allows for the free passage of indigenous Americans across the northern border with Canada (as if they were inherently LPRs), later INS language adds the requirement of 50% native blood for this privilege. Thus tribal membership would be determined by racial factors, rather than political affiliation. This article argues that the INS statute is racially discriminatory and interferes with the sovereignty of tribes to determine their own membership.

Historical Context

- **1795 – Jay Treaty**
  - After American Revolution: agreement with Britain that subjects of the king, American citizens, and Indians should have free passage back and forth across the border.

- **1928 – 8 U.S.C. §226a**
  - Codified Jay Treaty; added that adopted tribal members could not enjoy this privilege.

- **1942 – *Matter of S*- (BIA 1942)**
  - Marriage between non-native Canadian woman and native man gave non-native woman tribal membership status; deemed okay by BIA for purposes of immigration because the treaty dealt with *political* affiliation.

- **1947 – *U.S. ex rel. Goodwin v. Karnuth* (W.D.N.Y. 1947)**
  - Marriage between native woman and non-native Canadian man meant woman lost her tribal status (per Canadian law). When she was in US, she was placed in deportation proceedings, but court decided that she could still benefit from §226a because of her native blood—thus switching from political to racial factors.

- **1940s-50s – Termination Era**
  - "This period was marked by federal actions intended to dissipate its trust relationship with the natives, curtail tribal sovereignty, and disencumber tribal land for federal government use, often by integrating natives into the American lifestyle and minimizing the importance of tribal membership and decreasing the number of tribal members." (34)

  - In keeping with a shift away from political affiliation to race-based criteria for membership, "which would also result in a more narrow class of indigenous persons who could enjoy free passage." (34)

- **1952 (to today) – INA §289**
    - "Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race." (q.34)

<u>On Treaties</u>

- *Medellin v. Texas*, 552 U.S. 491 (2008): "self-executing" (automatically domestic law) v. "non-self-executing" (i.e., requiring an action by Congress).
    - "The Court looked at numerous factors to determine whether a treaty is self-executing, or whether only an implementing statute can provide a right of action." (35)

- Jay Treaty: does not appear to be self-executing.
    - "As such, a Canadian-born tribal member cannot seek judicial relief in U.S. courts for suspected immigration violations based solely on the treaty." (35)

- *J. Ribas y Hijo v. United States*, 194 U.S. 315, 324 (1904): "Established precedent holds that when statutes and treaties conflict one another, each being 'the supreme law of the land,' that which is 'last in date must prevail in the courts.'" (q.36)

- "Congress has plenary power over immigration laws." (36)

- "Congress can enact statutes that contradict international treaties." (36)
    - E.g., *Chae Chan Ping*, 130 U.S. 581 (1889): Court affirmed Chinese immigrant's exclusion "despite the fact that it violated the treaty with China" bcz of Congress's plenary power over immigration.

<u>Antidiscrimination Legislation</u>

- "This article proposes that current legal trends in federal Indian law and international human rights law would be in line with a congressional reconsideration of the blood quantum requirements in INA §289. Doing so would bolster that statute's compliance with antidiscrimination provisions in the INA and reaffirm modern U.S. commitments to tribal sovereignty as well as the related concept of self-determination." (37)

- "This requirement [of 50% native blood], absent in the treaty itself, is tantamount to discrimination based on racial impurity, depriving tribal members of their treaty-protected right of free passage, and in effect, punishing tribal members because of the miscegenation of their ancestors." (37)

- **8 U.S.C. §1152(a)(1)(A):** "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." (q.37)

- "A return to the political interpretation of 'Indian' would insulate INA §289 against any claim of race-based discrimination." (37f.)

- *LAVAS* case (D.C. Circuit, 1995): Vietnamese refugees refused admission because U.S. wanted to curb number of Vietnamese immigrants. Court decided that this kind of limitation would require an emergency situation in order for such an exemption from §1152 to be legitimate.

- "The dicta in the *LAVAS* case indicates that discriminatory immigration laws are held to a strict scrutiny standard: i.e., the discriminatory action must be in furtherance of a compelling government interest and must be narrowly tailored to achieve that interest—the highest level of judicial scrutiny." (39)

- As in that case, "the government has not espoused any exigent reasons to discriminate against those Canadian-born indigenous persons whose racial composition is below 50 percent blood quantum." (39)

- "INA §289 is a violation of—or at least offends the thrust of—the INA's antidiscrimination provision in 8 U.S.C. §1152(a) because it treats Canadian-born indigenous persons differently on the basis of their racial composition." (39)

Tribal Sovereignty & Self-Determination

- "The United States' relationship with its 'domestic dependent' tribes is a unique one in which federally recognized tribes are considered sovereign entities, but are nonetheless under the protection and plenary power of Congress. Of utmost importance in this ward-guardian relationship is the preservation of tribal sovereignty to the fullest extent permissible under the U.S. Constitution. Although this government responsibility does not extend to tribes or tribal members in Canada, the principle of indigenous sovereignty compels the United States to treat indigenous populations on both sides of the border in an ideologically and practically consistent manner." (39-40)

- Tribal sovereignty means the tribe gets to make decisions about membership.

- *Cherokee Nation v. Nash* (D.C.C. 2017): tribe wanted to disenroll lineal members who were descendants of former black slaves of Cherokees. 2007 Cherokee Nation modified their constitution so they could reject freedmen. But district court said that because historically the Nation had allowed this membership, it should do so now. (40-41)
    - Applied to border question: what if Cherokee Nation's territory was on both sides of Canadian border? Could descendants of freedmen (political members) pass freely across the border? "In *Nash*, the U.S. government enforced a treaty that was clearly based on political status, and not on race." (41)

- United Nations Declaration on the Rights of Indigenous Peoples (2007): “Self-determination, closely related to tribal sovereignty, is the idea that a group of affiliated peoples can ‘freely determine their political status and freely pursue their economic, social, and cultural development.’” (q.41)

- “The concept that tribes should choose and apply their own membership rules is one that touches on both sovereignty and self-determination. This is the foundation of the ‘political’ approach to defining ‘American Indian.’” (42)