The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution

By Quintin Cushner and Jon M. Sands

Blood should no longer play a leading role in determining whether a person is an Indian for purposes of federal criminal jurisdiction. The blood test evokes racial language in our jurisprudence that is outdated and unnecessary in 2012. A better test would discard blood and focus entirely on whether the person is enrolled or eligible for enrollment in a federally recognized Indian tribe.

Perhaps it is because of the way that blood can serve both as a symbol of our shared humanity ("If you prick us, do we not bleed?"[1]) and our differences ("Just one drop of black blood makes a man colored."[2]) that we find it troubling that, for over a century and a half, federal courts have employed a blood test to assess whether a person is an Indian or a non-Indian for the purpose of federal criminal jurisdiction. Currently, in determining whether an individual is an Indian for this purpose, federal courts examine that person's degree of Indian blood relating to a federally recognized tribe and his or her tribal or governmental recognition as an Indian.[3]

In this article, we trace the use of the blood test in determining Indian status from its origins to its current applications.[4] Ultimately, we conclude that, as applied by federal courts, the use of a blood test as a factor that determines Indian status both harks back to antiquated views and risks violating the Equal Protection Clause of the U.S. Constitution. Given these concerns, we believe that the use of the blood test for purposes of federal law should be relegated to the dustbin of history. Instead, tribal or governmental recognition of an individual as an Indian—only one prong of the two-pronged test that is currently used to determine a person's status as an Indian—is sufficient.

Tainted "Blood": The Visceral Objection to the Blood Test

When looking for indications of past views on race in American law, rulings handed down by the U.S. Supreme Court are a good place to start. And any short list of Supreme Court cases dealing with race should include *Plessy v. Ferguson*, *Korematsu v. United States*, and *Loving v. Virginia*. Each of these three cases, which were decided at different stages of the American experiment and mentioned blood in very different contexts, illustrates the pitfalls that can occur when statutory law and case law speak in terms of blood.

Plessy v. Ferguson (1896)

In *Plessy v. Ferguson*, the Supreme Court famously affirmed the constitutionality of "separate but equal" facilities by upholding the Separate Car Act, a Louisiana law that required African-Americans and whites to have separate accommodations on railroad cars. Homer Plessy, who was arrested for violating the law, was one-eighth African-American, which made him "colored" under Louisiana State law.[5] But these are questions to be determined under the laws of each state and are not properly put in issue in this case. Under the allegations of Plessy's petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white race or to the black race.[6]

The Supreme Court's deference to determining a person's status by the proportion of blood in his or her veins (the "one-drop rule") is as repulsive as it is outdated. This is so not simply because the Supreme Court later overturned *Plessy* in *Brown v. Board of Education*, but also because phrases like "the proportion of colored blood necessary to constitute a colored person" have long since been removed from the realms of polite conversation—unless that polite conversation happens to be about federal Indian law, in which case such terminology is not only appropriate but also necessary for making a determination as to criminal jurisdiction.

Korematsu v. United States (1944)

In this case, the Supreme Court affirmed the U.S. government's decision to place U.S. citizens of Japanese origin in internment camps for reasons of national security during World War II. Although the majority opinion made no reference to blood, Justice Frank Murphy stated in his dissent that the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins had no such reasonable relation to him and referred to the majority's opinion as "legalization of racism," evoking blood as an example of a reductive categorization of people that should not survive constitutional scrutiny. Justice Murphy logically pointed out that the fact that a person has "Japanese blood" running through his or her veins cannot lead to the inference that the person is about to commit "sabotage and espionage." Determinations of whether or not a person's liberty should be taken away should not be based on a measuring stick as crude as blood. Logic should also dictate that blood should not be a determinative factor in deciding whether the federal courts are empowered to take away a defendant's liberty by asserting criminal jurisdiction over that defendant. Despite this, the blood test remains good law in determining whether a defendant is an Indian for purposes of federal criminal jurisdiction.

Loving v. Virginia (1967)

In this case, the Supreme Court struck down a Virginia law forbidding interracial marriage because the law violated equal protection under the law. Virginia's statutory scheme, as quoted in *Loving*, defined race solely in terms of blood:

> Intermarriage prohibited; meaning of term "white persons"—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.[7]

The Court stated:

> The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas. …" (citation omitted.) Section 1-14 of the Virginia Code provides: "Colored persons and Indians defined—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians."[8]

The Virginia appellate court had upheld the statutory scheme after finding it a reasonable aim of the legislature "'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,'" which the Supreme Court correctly noted was "obviously an endorsement of the doctrine of [w]hite [s]upremacy."[9] It is in no way comforting that Virginia law treated Indians slightly more charitably than it treats African-Americans. The message was similar: different blood, different sort of person.

These three Supreme Court rulings allude to the folly that can occur when legal distinctions among people are made based on the blood flowing through their veins. For this rea-

son, we believe that federal courts should cease using blood as part of their determination of who is and who is not an Indian for the purposes of federal criminal jurisdiction. Such language is not only antiquated, it harks back to a time when federal and state governments had a far more strained relationship with ethnic minorities. To further distance the United States from those times, the application of the blood test in federal Indian law should cease.

Origins of the Blood Quantum in Federal Indian Law

The U.S. Supreme Court established the test for determining Indian status for purposes of federal criminal jurisdiction in its ruling in *United States v. Rogers*.[10] This decision was handed down following the 1817 passage of what was later to become known as the General Crimes Act, which placed crimes committed by both Indians and non-Indians in Indian country under federal jurisdiction, but left to the tribes those crimes committed by Indians against other Indians.[11] This case involved William Rogers, a white man indicted for the murder of another white man, Jacob Nicholson, on land in present-day Oklahoma that belonged to the Cherokee Nation. As a defense, Rogers claimed that he had been adopted by the Cherokee Tribe, having married a Cherokee woman, and that the man he was accused of killing had been adopted by the tribe for the same reason, placing the killing outside the jurisdiction of the United States.

The Supreme Court reasoned that Congress had reserved for the tribes jurisdiction for crimes committed by an Indian against another Indian to provide them with some measure of self-governance and autonomy, not to help a white man evade federal responsibility for the killing of another white man simply because the crime occurred in Indian country.[12] To prevent this perceived distortion of congressional intent, the Court stated that whether or not a person is an Indian relies upon the degree of Indian blood in the person's veins relating to a federally recognized tribe and recognition as an Indian by the tribe or the government.[13] Under this test, the Supreme Court asserted federal jurisdiction over Rogers and others who "might at pleasure settle among [the tribes], and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indian born."[14]

Federal courts continue to use this two-pronged test to determine who is an Indian for purposes of criminal jurisdiction.[15] According to current Indian law, a person with Indian blood must have ancestors who resided in North America prior to the arrival of Europeans.[16] Given how difficult this could be to prove, courts within the U.S. Court of Appeals for the Ninth Circuit have generally required evidence of "some" blood—that is, that the person at issue has a parent, grandparent, or great-grandparent who is indisputably an Indian.[17] Under this requirement, courts have recognized defendants with as little as one-eighth Indian blood as Indians.[18]

Criminal Jurisdiction in Indian Country Since *Rogers*

Because federal criminal jurisdiction in Indian country has expanded since *Rogers*, it is helpful to have a brief overview of criminal jurisdiction in Indian country. The U.S. Constitution grants Congress the authority to regulate commerce with the Indian tribes.[19] The U.S. Supreme Court later expanded this authority, calling Indian tribes "domestic dependant nations"[20] and holding that Congress has plenary authority over Indian reservations.[21] Congress has passed the following acts related to criminal jurisdiction in Indian country:

- the Federal Enclaves Act, also known as the General Crimes Act;
- the Major Crimes Act;
- Public Law 280;
- the Indian Civil Rights Act of 1968; and
- the Tribal Law and Order Act of 2010.

General Crimes Act (18 U.S.C. § 1152) (1817)

This act provides for federal court jurisdiction over offenses committed in Indian country that violate the general laws of the United States that apply to offenses on federal enclaves—that is, places within the sole and exclusive jurisdiction of the United States. The General Crimes Act does not apply to offenses committed by one Indian against another Indian, to Indian defendants who have been previously punished by the local laws of the tribe, or to areas reserved to the exclusive jurisdiction of the tribe by treaty stipulation.

Major Crimes Act (18 U.S.C. § 1153) (1885)

After the unpopular U.S. Supreme Court decision that overturned the murder conviction of Brule Lakota Subchief Crow Dog for the killing of Brule Lakota Chief Spotted Dog because Indian-on-Indian crime was not covered by the General Crimes Act,[22] Congress passed the Major Crimes Act in 1885. This act eventually granted jurisdiction to the federal government, in conjunction with the tribes, over 15 specified major crimes committed in Indian country by an Indian, regardless of the status of the complaining witness or victim.[23]

Public Law 280 (18 U.S.C. § 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–26) (1953)

This law conferred extensive jurisdiction over criminal offenses and civil causes of action arising in Indian country to six states. Public Law 280 initially also permitted other states to acquire jurisdiction at their option but was amended in 1968 to require tribal consent to do so.

Indian Civil Rights Act of 1968 (ICRA) (25 U.S.C. §§ 1301–03)

This law imposed most of the Bill of Rights on the tribes for the first time—albeit in a form that is not co-extensive with the U.S. Constitution. The ICRA also empowered tribes to sentence convicted defendants to one year in prison and/or a maximum fine of $5,000 for a single criminal offense.

Tribal Law and Order Act of 2010 (124 Stat. 2258)

Perhaps the most sweeping reform in the criminal jus-

tice system as it relates to Indian country in more than 40 years, this act strengthens law enforcement, alters tribal criminal justice, increases the tribe's sentencing authority, and extends federal authority over Indian country and Indians. Among other measures, this law empowers Indian tribes to impose a maximum sentence of three years and a maximum fine of $15,000 for a single offense provided that certain due process requirements are met.

None of these laws that affect criminal jurisdiction in Indian country defines who is an Indian.[24] This lack of a definition has led to a series of cases in which defendants who had been charged as Indians have challenged their convictions based on the premise that they were not Indians.

Judicial Determinations of Who Is an Indian

Much of the debate over who is an Indian has taken place within the Ninth Circuit, where the majority of Indian country lies. As explained fully below, two of these cases gave rise to the question of whether or not the blood test has any place in contemporary federal law. The first case, *United States v. Maggi*,[25] included a cursory defense of the continuing utility of the blood test by the Ninth Circuit that seems unconvincing. The second Ninth Circuit case, *United States v. Bruce*,[26] included a dissenting opinion that offered a sensible alternative to the two-pronged *Rogers* test. The test suggested by the dissent in *Bruce* would enable the federal courts to abandon the blood test as used in *Rogers* and the potential equal protection problems that accompany it and should be adopted as law.

United States. v. Maggi

United States v. Maggi[27] involved a dispute over whether the defendants were Indian by blood under the Major Crimes Act, which requires that a defendant be an Indian. In this case, a federal district court convicted Gordon Mann, an enrolled member of the Little Shell Tribe of the Chippewa Cree, which is not a federally recognized tribe,[28] of aggravated sexual abuse of a minor on the Blackfeet Reservation in Montana. Shane Maggi was convicted in federal district court of four counts related to assault with a dangerous weapon and firearms charges for an attack on a married couple in their home on the Blackfeet Reservation. The court vacated Mann's conviction because his 10/64 Chippewa Cree blood and 11/64 of "other" Indian blood did not provide any evidence that he had blood from a federally recognized Indian tribe. Maggi argued that his 1/64 blood relation to the federally recognized Blackfeet Tribe—his sole claim to Indian blood being one great-great-great-great-great grandparent who was a full-blooded member of the Blackfeet Tribe—was insufficient for criminal jurisdiction under the Major Crimes Act. In its discussion of whether Maggi was an Indian under the blood test, the Ninth Circuit acknowledged that the use of "'blood' terminology may sound anachronistic" before defending the continuing purpose of the test: "to exclude[] individuals, like the defendant in *Rogers* whom may have developed social and practical connections to an Indian tribe, but cannot claim any ancestral connection to a formerly sovereign community."[29]

However, the court opted not to resolve the blood issue or set a lower baseline for blood quantum. Instead, the court held that Maggi had failed to meet the second prong of the "Who is an Indian?" test, which requires tribal or federal government recognition of Maggi as an Indian. When analyzing this second prong, federal courts have looked to evidence of "(1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005) (quoting *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995)). Because Maggi was not an enrolled member of the Blackfeet Tribe (though he apparently did participate in some tribal ceremonies), availed himself of tribal benefits only once for a trip to Indian Health Services, and never resided on the Blackfeet Reservation, much less voted in a tribal election or held a tribal identification card, the Ninth Circuit held that the government failed to establish that Maggi had tribal or governmental recognition as an Indian.

The Ninth Circuit's summary defense of the blood test against perceptions of it as outdated is not convincing. The test is not just anachronistic; it is evocative of a time when racial views were codified in statutes and perpetuated in case law. As society moves further away from those unfortunate times in America's past when the government had a more problematic relationship with Indians and other racial minorities, removing the blood language from American federal law would seem to be a step in the right direction.

Rymer Reason: United States v. Bruce *and the Blood Test Alternative*

Violet Bruce, while living on the Fort Peck Indian Reservation in northeastern Montana, was convicted under the General Crimes Act of simple assault for choking her five-year-old son, Cylus. Bruce challenged her conviction, and the Ninth Circuit affirmed. First, the Ninth Circuit held that Bruce's one-eighth Chippewa blood was sufficient to satisfy the blood test prong, making it only the second time a court had recognized a person with so little Indian blood as an Indian. Second, the Ninth Circuit concluded that Bruce also met her burden of proof on the second prong such that the issue of whether or not Bruce was an Indian should have been submitted to the jury. The Ninth Circuit made this finding regarding the second prong even though Bruce was not a tribe member, was not eligible for tribal membership, and was not entitled to tribal or governmental benefits to which Indians are entitled.

Judge Pamela Ann Rymer dissented in *Bruce*, noting that no court had ever held that an adult was an Indian when that person was not eligible for enrollment in a federally recognized tribe or entitled to government benefits due to Indians. After noting this, Judge Rymer identified an interesting problem with the majority's holding: If a person is not an enrolled Indian, is ineligible for enrollment, and is ineligible for tribal or government benefits due to Indians, then categorization of that person as an Indian must rely

on an otherwise impermissible racial classification that violates equal protection.[30] This problem, and Judge Rymer's proposed solution, may show the federal courts a way to eliminate the blood test as a way of determining who is an Indian for purposes of criminal jurisdiction.

In her dissent, Judge Rymer cited to *United States v. Antelope*,[31] the most important case involving Indian law pertaining to equal protection. In *Antelope*, two Indians who were members of the Coeur d'Alene Tribe in Idaho were charged with first-degree felony murder for allegedly robbing and killing an 81-year-old woman who was not an Indian. The Indian defendants alleged racial discrimination and violation of the Equal Protection Clause, arguing that a non-Indian who had committed the exact same crime would not have been charged under federal law under the Major Crimes Act, but rather under Idaho law, which did not have a felony murder provision and thus would require the state to prove premeditation and deliberation. The Ninth Circuit ruled that this disparity placed defendants "at a serious racially-based disadvantage,"[32] but the U.S. Supreme Court reversed the decision, holding that the Constitution provided for classifications based upon tribal status.[33] The Court reasoned that the two defendants charged with first-degree murder "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe."

Other courts confronting the intersection of Indian law and the Equal Protection Clause have used this distinction between the political classification of a tribal member and the racial classification of an individual Indian since the Supreme Court's ruling in *United States v. Antelope*.[34] The U.S. Constitution does not apply in Indian country, although a more limited form of equal protection is applied there based on the Indian Civil Rights Act of 1968, and tribal courts consider federal law persuasive when interpreting the ICRA.[35] However, when an Indian defendant is charged in federal court, that defendant is entitled to "the same procedural benefits and privileges as all other persons within federal jurisdiction."[36] Therefore, although the scope of the Equal Protection Clause in Indian country is not co-extensive with that of the U.S. Constitution, an Indian defendant charged in federal court would be subject to the same body of law as is any other individual charged with a federal crime.[37]

Given this framework, the ruling handed down in *Antelope* works only to the extent that the defendant fits easily under the political classification of an enrolled tribal member. But what happens when there is some dispute as to whether an Indian is actually an enrolled member of a tribe? Judge Rymer recognized this problem in her dissent in *Bruce* when she noted that "enrollment—or at a minimum, eligibility for enrollment—may be constitutionally required to avoid equal protection problems because otherwise enforcement of federal criminal laws would arguably be based on an impermissible racial classification."[38] Judge Rymer suggests that any determination of who is an Indian must rely on whether a defendant is a member of a federally recognized tribe or, minimally, eligible for tribal membership.

We believe that the two-pronged *Rogers* test for determining who is an Indian for purposes of federal criminal jurisdiction should be replaced by the simple requirement that a defendant be eligible for enrollment with the relevant federally recognized tribe. Such a requirement would eliminate the equal protection concerns raised in cases like *Bruce*, where a defendant was found to be an Indian despite not being eligible as a tribe member. If all defendants were required to be eligible for tribal membership, then it could be fairly stated that the categorization of a defendant as an Indian is a political distinction based on tribal membership as stated in *Antelope*, rather than a racial distinction unrelated to whether or not the defendant was recognized as a member of a federally recognized tribe.

Of course, many Indian tribes have a blood quantum requirement for membership. Therefore, the federal courts would still have to make a blood quantum determination in cases in which an unenrolled individual may be eligible to enroll in an Indian tribe that has such a requirement. However, the decision made by the tribe—a sovereign entity—to use a blood quantum to define its own membership is distinguishable from the *Rogers* test and its progeny, which involve the federal judiciary's determination of who is an Indian and who is not. Principles of tribal sovereignty should allow a tribe to define its members as it sees fit, including through the use of a blood quantum. However, the authors of this article believe that the federal judiciary should distance itself as much as is practicable from perpetuating the blood requirement.

Such a change would reduce the use of problematic "blood" language in federal jurisprudence and would not impede law enforcement efforts in Indian country. For example, if a defendant identical to the defendant in *Rogers* was enrolled or eligible for enrollment in a federally recognized tribe because the tribe did not have a blood quantum requirement, then the test proposed in this article would provide the federal courts with jurisdiction under the Major Crimes Act.[39] If the defendant was not eligible for enrollment in the tribe because the tribe had a blood quantum requirement, then the defendant could still be prosecuted under state law.[40] In either case, the defendant in a case heard in the 21st century would not be able to avoid prosecution in the manner that William Rogers attempted in the 19th century.

Conclusion

The blood test established by the U.S. Supreme Court in *Rogers* has worn out its welcome. The test has been done in by its association with other objectionable racially charged language related to blood and continuing questions over whether using the blood test violates the Equal Protection Clause. In 2012, federal courts should not be ruling in terms of blood, because blood is a crude and often nefarious way of distinguishing among people. Moreover, as Judge Rymer pointed out in *Bruce*, reliance on the blood prong without the accompanying evidence of eligibility for tribal enrollment triggers concerns over the defendant's right to equal protection under the law.[41] The way to slow down the flow of language referring to blood in federal courts is to adopt

a new test that can be summarized in two sentences: If a person is enrolled or eligible for enrollment in a federally recognized tribe, then the person is an Indian. If not, then the person is not an Indian. **TFL**

Quintin Cushner is an associate at Gallagher & Kennedy P.A. in Phoenix, Ariz. Jon M. Sands is the federal public defender for the District of Arizona.

Endnotes

[1]William Shakespeare, *The Merchant of Venice*, Act III, Scene 1, line 64.

[2]Langston Hughes, SIMPLE TAKES A WIFE 85 (1953)

[3]45 U.S. (4 How.) 567 (1845).

[4]The question of "Who is an Indian" is the topic of much debate. For further reading, see Addie C. Rolnick, *The Promise of* Mancari: *Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011); Katherine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177 (2010–2011); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 12 (2006); Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Coctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 186 (2006).

[5]The Court continued: "[T]he question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood and still others, that the predominance of white blood must only be in the proportion of three-fourths." 136 U.S. 537, 552 (1896).

[6]*Id.*

[7]388 U.S. 1, 5 n.4 (quoting Va. Code Ann. §§ 20–54 (1960 Repl.Vol.)).

[8]*Id.* (quoting Va. Code Ann. §§ 1–14 (1960 Repl.Vol.)).

[9]*Id.* at 7 (1967) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

[10]45 U.S. (4 How.) 567 (1845).

[11]3 Stat. 383, now codified at 18 U.S.C. § 1152.

[12]Indian country is defined as—"(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

[13]45 U.S. (4 How.) 567 (1845).

[14]*Id.* at 573.

[15]For three of the most recent examples, see *U.S. v. Juvenile Male*, No.11-30065 (9th Cir. Jan. 20, 2012) (a juvenile who was one-fourth Indian had sufficient quantum of Indian blood); *United States v. LaBuff*, 658 F.3d 873 (9th Cir. 2011) (finding that the defendant, who was 5/32 Blackfeet Indian, had a sufficient quantum of Indian blood); *United States v. Smith*, 2011 WL 2670096, *1 (9th Cir. July 8, 2011) (finding that the defendant, who was 25/128 Assiniboine and Sioux, had a sufficient quantum of Indian blood).

[16]William C. Canby, AMERICAN INDIAN LAW IN A NUTSHELL 9 (5th ed., 2009).

[17]*Id.*

[18]*Sully v. United States*, 195 F. 113 (8th Cir. 1912); *United States v. Bruce*, 394 F.3d 1215, 1224 (2005).

[19]Article I, sec. 8 of the U.S. Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

[20]*Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

[21]*United States v. Kagama*, 118 U.S. 375 (1886).

[22]*Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[23]23 Stat. 362, 385 (1885).

[24]*See* Canby, *supra* note 16, at 9.

[25]598 F.3d 1073 (9th Cir. 2010).

[26]394 F.3d 1215 (9th Cir. 2005).

[27]598 F.3d 1073 (9th Cir. 2010).

[28]The Little Shell Tribe is recognized by the State of Montana, however. *See* Montana Office of Indian Affairs, Tribal Nations, tribalnations.mt.gov/tribalnations.asp (last visited Nov. 20, 2011).

[29]98 F.3d at 1080.

[30]The Equal Protection Clause states the following: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. 14, § 1.

[31]430 U.S. 641 (1977).

[32]523 F.2d 400, 406 (1975).

[33]Article I, sec. 8 of the Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

[34]*United States v. Antelope*, 430 U.S. 641 (1977).

[35]25 U.S.C. §§ 1301–03; *Howlett v. Salish* and *Kootenai Tribes of Flathead Reservation*, Mont., 529 F.3d 233, 237 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir. 1975) ("[T]he equal protection clause of the ICRA is not co-extensive with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.").

[36]*Keeble v. United States*, 412 U.S. 205, 212 (1973)).

[37]*Antelope*, 430 U.S. at 647–48; *Keeble*, 412 U.S. at 212.

[38]394 F.3d at 1233–34.

[39]18 U.S.C. § 1153.

[40]*United States v. McBratney*, 104 U.S. 621, 869 (1882); *see also Antelope*, 430 U.S. at 643 n.2.

[41]Judge Rymer passed away on Sept. 21, 2011. *See* Dennis McLellan, *Pamela Ann Rymer Dies at 70; Judge on U.S. 9th Circuit Court of Appeals*, L.A. TIMES, Sept. 24, 2011 (available at articles.latimes.com/2011/sep/24/local/la-me-pamela-rymer-20110924) (last visited Nov. 25, 2011).