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## Are We Atoning for Our Past or Creating More Problems: How COVID-19 Legislative Relief Laws Are Shaping the Identities of Indigenous Populations in North America

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# Are We Atoning for Our Past or Creating More Problems: How COVID-19 Legislative Relief Laws Are Shaping the Identities of Indigenous Populations in North America

Samuel Kramer\*

*This student's note will attempt to answer three questions: 1) How Canadian and American legal precedent affects the modern identity of Indigenous Populations? 2) How COVID-19 legislative relief continues to shape indigenous identities? and 3) Can a comparative study teach legislators about enacting legislation that withstands shifts in political climates?*

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*“He who fights with monsters might take care lest he thereby become a monster. And if you gaze for long into an abyss, the abyss gazes also into you.”*

*-Friedrich Nietzsche*

## I. INTRODUCTION: PAINTING THE BACKGROUND

Amid struggle and catastrophe, a society can reflect.<sup>1</sup> The COVID-19 pandemic is no exception.<sup>2</sup> Across the world, people placed under lockdown orders and locked into media driven echo chambers have reflected on the state of the world and our collective

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<sup>1</sup> SHANE SORENSON, *RENAISSANCE WISDOM: HOW TO FLOURISH IN THE MODERN DAY 2* (2022).

<sup>2</sup> *Id.*; see also S. Dixon, *Social Media Use During COVID-19 Worldwide—Statistics & Facts*, STATISTA (Oct. 18, 2022), <https://www.statista.com/topics/7863/social-media-use-during-coronavirus-covid-19-worldwide/#topicOverview>.

past.<sup>3</sup> This reflection recognized historic oppression and its modern continuity.<sup>4</sup> Statues, remnants of outdated and racist perspectives, continued to stand in our world.<sup>5</sup> In some cases, reflection fueled action and action sought change.<sup>6</sup> For example, in England, a statue of a slave trader was thrown into Bristol Harbor.<sup>7</sup> In Belgium, a statue of a Belgian King was removed.<sup>8</sup> In the United States 168 confederate statues were removed in 2020 alone.<sup>9</sup> Physical statues are not the only antiquities remaining in the modern world.<sup>10</sup>

In law, historic legislation, regulation, and litigation are like statues erected long ago that still stand to remind us of our past.<sup>11</sup> In essence, statutes—and other areas of law—are statues. There is no such thing as a law created in a vacuum.<sup>12</sup> Every law has a history.<sup>13</sup>

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<sup>3</sup> Dixon, *supra* note 2.

<sup>4</sup> Connie L. McNeely & Laurie A. Schintler, *The Pandemic Challenge: Reflections on the Social Justice Dynamic*, NAT'L LIBR. OF MED., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7753789/>.

<sup>5</sup> Paula A. Braveman et al., *Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to dismantling*, HEALTH AFFAIRS (Feb 2022), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2021.01394>; *see also* Danyelle Solomon, Connor Maxwell, & Abril Castro, *Systemic Inequality: Displacement, Exclusion and Segregation*, CAP (Aug. 7, 2019), <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/>; Danyelle Solomon, Connor Maxwell, & Abril Castro, *Systemic Inequality and American Democracy*, CAP (Aug. 7, 2019), <https://www.americanprogress.org/article/systemic-inequality-american-democracy/>.

<sup>6</sup> Mark Landler, 'Get Rid of Them': A Statute Falls as Britain Confronts Its Racist History, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/world/europe/edward-colston-statue-britain-racism.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Monika Pronczuk & Mihir Zaveri, *Statue of Leopold II, Belgian King Who Brutalized Congo, Is Removed in Antwerp*, N.Y. TIMES, <https://www.nytimes.com/2020/06/09/world/europe/king-leopold-statue-antwerp.html> (last updated Nov. 3, 2021).

<sup>9</sup> *2020 Confederate Symbol Removals*, SPLC, <https://www.splcenter.org/data-projects/2020-confederate-symbol-removals> (last visited Mar. 16, 2023).

<sup>10</sup> Braveman, *supra* note 5; *see also* Solomon, Maxwell & Castro, *supra* note 5.

<sup>11</sup> Braveman, *supra* note 5; *see also* Sally Haslanger, *Systemic and Structural Injustice: is there a difference?*, CAMBRIDGE UNIV. PRESS, <https://www.cambridge.org/core/journals/philosophy/article/systemic-and-structural-injustice-is-there-a-difference/15422EA9F2A48BD0E30825D8D24DA285>

<sup>12</sup> Haslanger, *supra* note 11.

<sup>13</sup> *Id.*

Modern law is built on precedent.<sup>14</sup> Old legislation provides foundational principles that modern legislation builds upon.<sup>15</sup> In other words, precedent serves as the platform for modern legislation.<sup>16</sup> Furthermore, laws do not necessarily vanish but are amended or repealed.<sup>17</sup> Even repealed laws, were once “good law” that affected the material plane.<sup>18</sup>

Systemic issues can commemorate racist perspectives and highlight inequality as these issues become ingrained in the legal structure.<sup>19</sup> To some, the answer to righting systemic issues is to demolish the current structure and build anew.<sup>20</sup> The allure is sensible as a broken system of favoritism and injustice rightfully causes outrage. However cathartic, a full-scale demolition is risky, time consuming, and incredibly unlikely as it pits current paradigm supporters against opponents.<sup>21</sup> Still in a time of political gridlock and ideological gaps, political compromise of such scale is farfetched. The current legal landscape, despite its many flaws, separates our world from chaos and the imperfect structure provides shelter from the rain.<sup>22</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Haslanger, *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> Kiana Cox & Khadijah Edwards, *Black Americans Have a clear Vision for Reducing Racism but Little hope it will happen*, PEW RSCH. CTR., <https://www.pewresearch.org/race-ethnicity/2022/08/30/black-americans-have-a-clear-vision-for-reducing-racism-but-little-hope-it-will-happen/> (indicating proposed solutions to inequality being “significant reforms to or complete overhauls of several U.S. institutions.”).

<sup>21</sup> Rob Garver, *Experts See Gridlock, Dysfunction Likely in Incoming Congress*, VOA NEWS (Nov. 16, 2022, 8:27 PM), <https://www.voanews.com/a/experts-see-gridlock-dysfunction-likely-in-incoming-congress/6838134.html>.

<sup>22</sup> See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS*, 66–68 (Victor Gourevitch eds., trans., Cambridge University Press 1997) (1762); see also Braveman, *supra* note 5; Solomon, Maxwell, & Castro, *supra* note 5; Haslanger, *supra* note 11.

Systemic cracks rob people of justice and equality.<sup>23</sup> The inequality allows some to drown while others remain dry.<sup>24</sup> Seeking to change a systemic issue is often an uphill battle—riddled with peril—and nothing short of a hero’s tale.<sup>25</sup> There is no clear solution to instituting equality and this paper does not, nor in my hubris do I, attempt to state such. Rather, this paper takes the first and most important step towards solving a problem.

Systemic flaws are cracks in a country’s way of governing.<sup>26</sup> These cracks occur when the legal system continues to evolve, compounding the distance between those who benefit and those who are left behind.<sup>27</sup> The law glosses over legal gaps and failures, attempting to transform historic mistakes into modern problems.<sup>28</sup> One such flaw, crack, or failure in United States’ law is the Alaska Native Claims Settlement Act (“ANCSA”).<sup>29</sup> ANCSA started as a congressional experiment in 1971, which created regional and village corporations for indigenous populations in Alaska instead of reservations.<sup>30</sup> The shortcomings of ANCSA are evident in the subsequent litigation which revolve around the legal rights of Alaskan native

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<sup>23</sup> Braveman, *supra* note 5; *see also* Solomon, Maxwell, & Castro, *supra* note 5; Haslanger, *supra* note 11.

<sup>24</sup> Braveman, *supra* note 5; *see also* Solomon, Maxwell, & Castro *supra* note 5; Haslanger, *supra* note 11.

<sup>25</sup> *See generally* Justice System Partners, *Ten Steps to System Change*, MACARTHUR FOUND. SAFETY AND JUST. CHALLENGE (2015), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0021/52446/10-Steps-To-System-Change\\_JSP-Brief.pdf](https://www.ncsc.org/_data/assets/pdf_file/0021/52446/10-Steps-To-System-Change_JSP-Brief.pdf) (indicating an extensive outline for systemic change consisting of ongoing collaboration, leadership, analysis, engagement, planning, implementation, innovation, alignment, reflection, and improvements).

<sup>26</sup> *See generally* Braveman, *supra* note 5 (indicating systemic flaws are embedded in systems that perpetuate injustice); *see also* Solomon, Maxwell, & Castro *supra* note 5 (defining systemic flaws as entrenched inequality).

<sup>27</sup> *See generally* Braveman, *supra* note 5 (noting the role of historic policy in modern legal structure); *see also* Solomon, Maxwell, & Castro *supra* note 5 (noting how systemic issues perpetuate problems of the past).

<sup>28</sup> FRANCISCO VALDES, ET AL., *CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY* 272 (1st ed. 2021).

<sup>29</sup> Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601–1629.

<sup>30</sup> *About the Alaska Native Claims Settlement Act*, ANCSA REG’L ASS’N, <https://ancsaregional.com/about-ancsa/> (last visited January 29, 2023).

populations.<sup>31</sup> In addition, the Supreme Court has had to clarify the unique circumstances of Alaska and its indigenous populations many times.<sup>32</sup> These issues are modern consequences of settled law.<sup>33</sup> On March 19, 2020, the United States passed the Coronavirus Aid, Relief, and Economic Security Act (“The CARES Act”), which allocated indigenous populations in the United States funding to support their autonomy.<sup>34</sup> However, Alaskan tribes were denied their funding due to technical language.<sup>35</sup> This prompted *Yellen v. Confederated Tribes of the Chehalis Reservation*. In *Yellen*, the Supreme Court relies on precedent and the plain meaning of statutory provisions to hold that Alaskan Native Corporations (“ANCs”) are Native Indigenous tribes and thus entitled to COVID-19 relief funding.<sup>36</sup>

The controversy in *Yellen*, highlights a continual systemic issue—even when the government acts in earnest.<sup>37</sup> The modern government’s relationship with indigenous populations seeks to provide much needed support to make up for atrocities of the past.<sup>38</sup>

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<sup>31</sup> See, e.g., *Sturgeon v. Frost*, 587 U. S. \_\_\_\_ (2019); *Sturgeon v. Frost*, 577 U. S. 424 (2016); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); *Metlakatla Indian Community v. Egan*, 369 U. S. 45 (1962).

<sup>32</sup> *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2435 (2021) (“This is not the first time the Court has addressed the unique circumstances of Alaska and its indigenous populations” (citations omitted)).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2440 (“Title V of the [CARES Act] allocates 150 billion to States, Tribal Governments, and units of local government to compensate for unbudgeted expenditures made in response to COVID–19” (internal quotations and citations omitted)).

<sup>35</sup> *Id.* (“[A] number of federally recognized tribes (respondents) sued, arguing that only federally recognized tribes are Indian tribes under ISDA, and thus under the CARES Act. Some Tribes further argued that ANCs do not have a recognized governing body for purposes of the CARES Act and are ineligible to receive its funding for that reason as well.”(internal quotations omitted)).

<sup>36</sup> *Yellen v. Confederated Tribes of The Chehalis Reservation Et Al.*, at 2434 (“The question presented is whether ANCs are Indian tribe[s] under ISDA, and are therefore eligible to receive the CARES Act relief set aside by the Treasury Department. The Court holds that they are.” (internal quotations omitted)).

<sup>37</sup> See generally *id.* (where embedded historic policy continues to cause modern issues).

<sup>38</sup> *Id.* at 2438 (noting that modern tribes enter into “a contract, [where] the tribal organization delivers federally funded economic, infrastructure, health or education benefits to the tribe’s membership.”)

However, before a group can benefit from legislation, the government first must identify who among the group should benefit.<sup>39</sup> Because Congress needs named beneficiaries, racial classifications are thoroughly defined and cast a large legal shadow.<sup>40</sup> Racial identities and their legal significance are “a social construct without biological meaning” built slowly over generations.<sup>41</sup> The concept of race became solidified in society as legal institutions began utilizing racial identities and intertwined them with legislation and litigation.<sup>42</sup> The current racial classifications are the result of the Office of Management and Budget’s (“OMB”) “response to the anti-discriminatory and equal opportunity laws of the 1960s.”<sup>43</sup> The OMB, in 1977, provided the definition for the terms “American Indian” and “Alaskan Native:”

American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.<sup>44</sup>

As a result, in the case of persons indigenous to North America, racial identity became tangled with the concept of legal identity, which is “understood to be the combination of factors that enable a person to access rights, benefits, and responsibilities.”<sup>45</sup> Although the identity of “American Indian” and “Alaskan Native” was thereafter defined, Congress has since struggled with untying the two

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<sup>39</sup> *Enactment of a Law*, CONGRESS.GOV, <https://www.congress.gov/help/learn-about-the-legislative-process/enactment-of-a-law> (last visited Mar. 16, 2023).

<sup>40</sup> Megan Gannon, *Race is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016) <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/>.

<sup>41</sup> *Id.*

<sup>42</sup> Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15(1) MINN. J. OF L. & INEQ. 7, 7-9 (1997).

<sup>43</sup> *Id.*

<sup>44</sup> Kenneth Prewitt, *Racial Classification in America*, DAEDALUS J. OF THE AM. ACAD. OF ARTS & SCI. 5, 63 n.6 (Winter 2005).

<sup>45</sup> Mia Harbitz & Maria del Carmen Tamargo, *The Significance of Legal Identity in Situations of Poverty and Social Exclusion*, INTER-AM. DEV. BANK (Nov. 2009), <https://publications.iadb.org/publications/english/viewer/The-Significance-of-Legal-Identity-in-Situations-of-Poverty-and-Social-Exclusion-The-Link-between-Gender-Ethnicity-and-Legal-Identity.pdf>.



groups—fueling identity issues for Alaskan native populations.<sup>46</sup> Time and time again, the Supreme Court has had to clarify the rights of Alaskan indigenous populations as affected by Federal laws.<sup>47</sup>

Alaskan native populations have long had to dispute their legal rights in federal court.<sup>48</sup> Although we cannot change the way the world has worked, we can work to change the world. Meaningful change requires that the manner in which actions are taken and the resulting effects of said actions to be treated attentively, no matter how subtle.<sup>49</sup> This note will analyze the indigenous identity issue inherent in the United States Supreme Court’s decision in *Confederated Tribes of the Chehalis Reservation*. Part II of this article will outline the historic relationship between the United States and Canada with their respective indigenous populations, specifically the legislation identifying what constitutes a native population. Part III will complement the analysis of prior legislation with an examination of American and Canadian response to the COVID-19 Pandemic and how the roll out of that legislation relied on the historic precedent to identify the recipients of COVID-19 Relief Funding. Part IV will compare the different structures of indigenous identification in the United States—showcasing important lessons for future policy.

## II. THE HISTORICAL LEGAL IDENTITY OF NATIVE POPULATIONS

When western Europe discovered “unclaimed” land in the Americas, they viewed the land with hope for riches.<sup>50</sup> As both colonizers and countries, both England—later the United States—and Canada held little regard for the perspective, rights, and culture of

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<sup>46</sup> *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434, 2452 (2021).

<sup>47</sup> *See Sturgeon v. Frost*, 857, US \_\_\_\_ (2019); *Sturgeon v. Frost*, 577 US 424 (2016); *Alaska v. Native Village of Venetie Tribal Government*, 522 US 520 (1998); *Metlakatla Indian Community v. Egan*, 369 US 45 (1962).

<sup>48</sup> *See Sturgeon v. Frost*, 857, US \_\_\_\_ (2019); *Sturgeon v. Frost*, 577 US 424 (2016); *Alaska v. Native Village of Venetie Tribal Government*, 522 US 520 (1998); *Metlakatla Indian Community v. Egan*, 369 US 45 (1962).

<sup>49</sup> Braveman, *supra* note 5; *see also* Solomon, Maxwell, and Castro, *supra* note 5; Haslanger, *supra* note 11.

<sup>50</sup> *Motivations for Colonization*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/motivations-colonization/> (last visited Mar. 16, 2023).

indigenous populations living on lands they had taken and continuously sought to take.<sup>51</sup> Both countries employed forced assimilation as a tactic of their westward expansion.<sup>52</sup>

From the year of the discovery of the Americas to the 20th century, the relationship between the policy makers and the countries substantially changed.<sup>53</sup> Eras and ages have come and gone by many names: the era of colonialism, the era of mercantilism, and the era of imperialism.<sup>54</sup> A constant throughout these eras is the little regard paid to indigenous populations, and the marginalization that pushed these Natives to the outskirts of society.<sup>55</sup>

Canada and the United States followed a similar political evolution.<sup>56</sup> Both the United States and Canada created reservations to isolate the Natives.<sup>57</sup> As both countries expanded, their borders and policies eventually reached the reservations and their policies shifted to forced assimilation.<sup>58</sup> When that failed, both countries attempted to compromise with the indigenous populations and began to support their cultural differences.<sup>59</sup>

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<sup>51</sup> *Native Americans in Colonial America*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/native-americans-colonial-america/> (last visited Mar. 16, 2023).

<sup>52</sup> *Id.*

<sup>53</sup> U.S. History Primary Source Timeline, *Colonial Settlement, 1600s-1763*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/colonial-settlement-1600-1763/overview/> (last visited January 30, 2022).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; see also Alys Landry, *Presidents and Native Peoples*, COWBOYS & INDIANS (June 18, 2020), <https://www.cowboysindians.com/2020/06/presidents-and-native-peoples/>.

<sup>56</sup> *Native Americans in Colonial America*, *supra* note 51; *U.S. History Primary Source Timeline, Colonial Settlement, 1600s-1763*, *supra* note 58.

<sup>57</sup> *Historical Background: The Indian Act and the Indian Residential Schools*, FACING HISTORY & OURSELVES, <https://www.facinghistory.org/stolen-lives-indigenous-peoples-canada-and-indian-residential-schools/historical-background/dispossession-destruction-and-reserves> (last updated Sept. 5, 2019).

<sup>58</sup> *Id.*; *The Reservation System*, KHAN ACAD., <https://www.khanacademy.org/humanities/us-history/the-gilded-age/american-west/a/the-reservation-system> (last visited Mar. 16, 2023).

<sup>59</sup> *Introduction of Bill C-38*, GOV'T OF CAN., <https://www.sac-isc.gc.ca/eng/1662142490384/1662142638971> (last visited Mar. 16, 2023).

### A. *Pre-Founding Interactions*

Interactions with indigenous populations in North America pre-date the founding of the United States and Canada.<sup>60</sup> European powers—France, Spain, and England—created colonies across the North American continent, hoping to exploit the newly discovered land.<sup>61</sup> The United States Library of Congress teaches the colonization of North America as “an invasion of territory controlled and settled for centuries by Native Americans . . . Native American Groups perceive the Europeans’ arrival as an encroachment.”<sup>62</sup> Responding to the invasion, “Native Americans thus began attacking settlers, killing their livestock and burning such crops.”<sup>63</sup> The Colonists responded in kind, and both sides committed atrocities against the other.<sup>64</sup> Conflict between Native Americans and the North American settlements occurred up until, and well after, the creation of the United States and Canada.<sup>65</sup> By resisting colonial settlement and expansion onto their lands, “from the 17th to the 19th centuries, non-Indian observers portrayed Indians intent on ‘savage war’ more violent than ‘civilized’ combat of European and American governments.”<sup>66</sup>

### B. *Policy in the United States*

Colonial America’s tumultuous relationship with indigenous populations foreshadowed harsh treatments. Since its founding, the United States antagonized indigenous populations to prioritize the interests of American citizens and expand westward.<sup>67</sup> Military

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<sup>60</sup> U.S. History Primary Source Timeline, *supra* note 53.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *The New England Colonies and the Native Americans*, NAT’L GEOGRAPHIC (June 30, 2022), <https://www.nationalgeographic.org/article/new-england-colonies-and-native-americans/>.

<sup>66</sup> Arlene Hirschfelder & Paulette F. Molin, *I is for Ignoble: Stereotyping Native Americans*, FERRIS STATE UNIV. (Feb. 22, 2018), <https://www.ferris.edu/HTMLS/news/jimcrow/native/homepage.htm>.

<sup>67</sup> See generally Gillian Brockell, *George Washington owned slaves and ordered Indians killed. Will a mural of that history be hidden?*, WASH. POST (Aug. 25, 2019), <https://www.washingtonpost.com/history/2019/08/25/george-washington-owned-slaves-ordered-indians-killed-will-mural-that-history-be-hidden/>.

focus under Washington perceived Native Americans “as recalcitrant savages who need to be ‘extirpated.’”<sup>68</sup> Even before the United States was founded, the Continental Army, predecessor to the United States Army, focused on the destruction of indigenous communities.<sup>69</sup> Manifest destiny, which is the belief that it was the God ordained right of the United States to expand westward directly conflicted with the rights of indigenous tribes.<sup>70</sup>

In 1803, when Jefferson expanded westward through the Louisiana Purchase, he held the belief that “Indian country belonged in white hands.”<sup>71</sup> In 1830, President Jackson signed the “Indian Removal Act” (“Act”) allowing the federal government to “rezone” Native American settlements east of the Mississippi to west of it.<sup>72</sup> The Act called for peaceful and voluntary rezoning.<sup>73</sup> However, Jackson resorted to violent and forceful removal of Native Americans from their lands.<sup>74</sup> The United States “forcibly relocated the *Five Civilized Tribes* (Cherokee, Chickasaw, Choctaw, Creek, and Seminole) . . . in a death march that became known as the Trail of Tears [sic].”<sup>75</sup> By the 1840s, tens of thousands of Native Americans were driven from their lands, with thousands dying along the trip.<sup>76</sup>

In 1851, the United States created the reservation system through the Indian Appropriations Act.<sup>77</sup> The United States “envisioned the reservations as a useful means of keeping Native

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<sup>68</sup> *Id.* (“Washington believed the government should offer a fair price to Native Americans for their land, and the “opportunity” to embrace “American-style civilization,” . . . “[B]ut if they say no, then he describes them as recalcitrant savages who need to be ‘extirpated’ “ — which is an old-fashioned word for genocide.”).

<sup>69</sup> *Id.*

<sup>70</sup> Landry, *supra* note 55.

<sup>71</sup> *Id.*

<sup>72</sup> *Trail of Tears*, HISTORY, <https://www.history.com/topics/native-american-history/trail-of-tears> (last updated July 28, 2022).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *The Reservation System*, *supra* note 60; Indian Self-Determination and Assistance Act, 25 U.S.C. § 5304(d).

<sup>76</sup> *Trail of Tears*, *supra* note 74.

<sup>77</sup> *1851: Congress Creates Reservations to Manage Native Peoples*, NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/317.html> (last visited January 30, 2023).

Americans off of lands that white Americans wished to settle.”<sup>78</sup> Many Native Americans resisted the reservation system but were forced in through bloody massacres committed by the United States Army.<sup>79</sup> On reservations, “indigenous people were allowed to form their own tribal councils and courts, and thus retain their traditional governing structures . . . the reservations suffered from poverty, malnutrition, and low standards of living and rates of economic development.”<sup>80</sup>

United States policy towards Native Americans changed under Grant where “Indians [became] ‘wards of the nation’ . . . [and policy sought] assimilation into white culture.”<sup>81</sup> The policy was designed to encourage Indians to abandon their tribal reservation in exchange for individually owned land.<sup>82</sup> However this policy changed as it “led to violent resistance on the part of many Native Americans and was ultimately abandoned under President Rutherford B. Hayes.”<sup>83</sup> In 1887, under President Cleveland, the Dawes Act again allowed the federal government to break up tribal lands and reservations.<sup>84</sup> The Dawes Act “allowed for the President to break up reservation land, which was held in common by the members of a tribe” and parcel it out to individual owners.<sup>85</sup> The Dawes Act gave citizenship to those who took individual land plots over the tribal land.<sup>86</sup> The Dawes Act was proposed to encourage Native Americans to assimilate into American culture.<sup>87</sup> Then, the Coolidge administration

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<sup>78</sup> *The Reservation System*, *supra* note 60 (citing Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton & Company, 1988)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Landry, *supra* note 55.

<sup>82</sup> *Id.*

<sup>83</sup> *The Reservation System*, *supra* note 58.

<sup>84</sup> *History & Culture in the Badlands, The Dawes Act*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/dawes-act.htm> (last updated July 9, 2021).

<sup>85</sup> *The Dawes Act (1887)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> (last updated Feb. 8, 2022).

<sup>86</sup> *History and Culture, Citizenship Act—1924*, N. PLAINS RSRV. AID, [http://www.nativepartnership.org/site/PageServer?pagename=airc\\_hist\\_citizenshipact](http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_citizenshipact) (last visited January 30, 2023).

<sup>87</sup> Sarah K. Elliot, *How American Indian Reservations Came to be*, ANTIQUES ROADSHOW, <https://www.pbs.org/wgbh/roadshow/stories/articles/2015/5/25/how-american-indian-reservations-came-be> (last updated Oct. 18, 2016).

passed the Indian Citizen Act of 1924, which gave citizenship to every Native American born in the United States.<sup>88</sup> However, state governments still denied native Americans some of the rights that accompanied citizenship.<sup>89</sup>

The reservation system was resurrected under President Franklin D. Roosevelt through the passage of the U.S. Indian Reorganization Act (“Indian Reorganization Act”).<sup>90</sup> The Indian Reorganization Act “is said to be the promotion of the exercise of tribal self-governing powers.”<sup>91</sup> The act “promoted tribal self-government by encouraging tribes to adopt constitutions under Section 16 of the Act.”<sup>92</sup> In 1936, Congress amended the Indian Reorganization Act to allow “all Alaska Native villages to organize their tribal governments under it.”<sup>93</sup> Section 16 identifies that “[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto.”<sup>94</sup> Furthermore, under Section 19, the term Indian was defined as “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . For the purposes of this act, *Eskimos and other aboriginal peoples of Alaska shall be considered Indians.*”<sup>95</sup>

Under the Nixon Administration, the relationship between the United States and Indigenous populations was reformed.<sup>96</sup> Nixon called for special relationships between Native tribes and the United States.<sup>97</sup> Nixon’s policy was for Indians to be “independent of federal control without being cut off from federal concern and support.”<sup>98</sup> Moreover, Nixon sought “to create the conditions for a new

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<sup>88</sup> *Indian Citizenship Act*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/june-02/> (last visited Oct. 17, 2021).

<sup>89</sup> *Id.*

<sup>90</sup> *The Reservation System*, *supra* note 58.

<sup>91</sup> *The Indian Reorganization Act (1934)*, UNIV. OF ALASKA FAIRBANKS, <https://uaf.edu/tribal/academics/112/unit-2/indianreorganizationact1934.php> (last visited Jan. 30, 2023).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Indian Reorganization Act, 25 U.S.C. § 5123(a).

<sup>95</sup> 25 U.S.C. § 5129 (emphasis added).

<sup>96</sup> Landry, *supra* note 55.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

era in which the Indian future is determined by Indian acts and Indian decisions.”<sup>99</sup> As a result of Nixon’s contributions, President Ford passed the Indian Self Determination and Education Assistance Act (“ISDEAA”) (25 USC 5301 et seq.). which significantly enabled Indian tribes.<sup>100</sup> The act allowed tribes to “assume administrative responsibility for federally funded programs designed for their benefit . . . [to] negotiate contracts and compacts directly with the federal government to run their own programs.”<sup>101</sup> ISDEAA defined an Indian as “a person who is a member of an Indian tribe.”<sup>102</sup> ISDEAA defined an Indian tribe as “any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional corporation as defined or established pursuant to [ANCSA] (85 Stat. 688) [43 USC 1601 et seq.].”<sup>103</sup> Lastly, ANCSA defined a tribal organization as “the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization”<sup>104</sup>

i. Unique ~~New York~~ Alaska

Despite legal continuity regarding indigenous populations throughout the contiguous 48 states, legislators sought a new approach for incorporating indigenous populations in Alaska.<sup>105</sup> Alaska was purchased from Russia in 1867, but “[t]here was never an attempt in Alaska to isolate Indians on reservations.”<sup>106</sup> When Alaska joined the Union in 1959, the claims of

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Indian Self Determination and Education Assistance Act (ISDEAS) 1975*, UNIV. OF ALASKA FAIRBANKS, <https://uaf.edu/tribal/academics/112/unit-3/indian-selfdeterminationandeducationassistanceactisdeaa1975.php> (last visited Oct. 17, 2021).

<sup>102</sup> Indian Self-Determination and Assistance Act, 25 U.S.C. § 5304(d).

<sup>103</sup> 25 U.S.C. § 5304(f).

<sup>104</sup> Alaska Native Claims Settlement Act, 88 Stat. 2203 <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88Pg2203.pdf#page=1>.

<sup>105</sup> *About the Alaska Native Claims Settlement Act*, ANCSA REGIONAL ASS., <https://ancsaregional.com/about-ancsa/> (last visited Oct. 17, 2021)[hereinafter *About the ANCSA*].

<sup>106</sup> *Metlakatla Indian Community v. Egan*, 369 U. S. 45, 51 (1962).

Alaskan natives were uncertain.<sup>107</sup> Public policy regarding the rights of Alaskan Native Groups was created in 1971 under ANCSA.<sup>108</sup> ANCSA effectively terminated all indigenous land titles and created twelve regional corporations and over 200 village corporations where shareholders were indigenous shareholders.<sup>109</sup> ANCSA defined a Native as “a citizen of the United States who is a person of one-fourth degree or more Alaska Indian . . . Eskimo, or Aleut blood.”<sup>110</sup>

ANCSA divided the state of Alaska, for indigenous populations, into twelve regions, creating twelve private, for profit Alaska Native Corporations.<sup>111</sup> Although Alaskan native tribes could opt out of the agreement and thus opt out of becoming a corporation instead of a reservation, only one community chose to do so.<sup>112</sup> The twelve corporations created include the Ahtna, Inc. (Ahtna Athabascan), the Aleut Corporation (Aleut [Unangax]), the Arctic Slope Regional Corporation (Iupiat), the Bering Straits Native Corporation (Inupiaq, Central Yupik, Siberian Yupik), the Bristol Bay Native Corporation (Yupik, Denaina, Alutiiq), the Calista Corporation (Yupik, Cupik, Athabascan), the Chugach Alaska Corporation (Alutiiq [Sugpiaq], Eyak [Athabascan], Tlingit), the Cook Inlet Region, Incorporated (Athabascan, Southeast Indian, Inupiat, Yupik, Alutiiq [Sugpiaq] and Aleut [Unangax]), Doyon, Limited (Athabascan), Koniag (Sugpiaq [Alutiiq]), the NANA Regional Corporation (Iupiaq), and the Sealaska Corporation (Tlingit, Haida, Tsimshian, Aleut).<sup>113</sup> Each region “was instructed to ‘incorporate under the laws of Alaska a Regional Corporation to conduct business for profit.’”<sup>114</sup> To accomplish this, the regions created nonprofit organizations and village corporations for its federally recognized tribes. Currently, throughout the twelve regions, there are over 160 communities, 174

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<sup>107</sup> *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2438–39 (2021).

<sup>108</sup> *Id.* at 2439.

<sup>109</sup> *About the ANCSA*, *supra* note 105.

<sup>110</sup> Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(b).

<sup>111</sup> *About the ANCSA*, *supra* note 105.

<sup>112</sup> *Id.*

<sup>113</sup> The Twelve Regions, ANCSA REG'L ASS'N, <https://ancsaregional.com/the-twelve-regions/> (last visited Oct. 17, 2021).

<sup>114</sup> *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S.Ct. 2434, 2439 (2021) (quoting 43 U.S.C. § 1606(d)).



operating village corporations, and 229 federally recognized tribes.<sup>115</sup>

This deviation from the usual handling of indigenous-owned land, resulted in confusion over the legal rights of Alaskan tribes, which the Supreme Court has addressed on several occasions.<sup>116</sup> In *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court held that Alaskan Indigenous populations are not under Federal superintendence.<sup>117</sup> Most recently, in *Yellen*, the Supreme Court had to once again work through the precedent and confusion regarding Alaskan indigenous populations.<sup>118</sup>

ii. The Current Identification Structure in the United States

The current structure establishing the legal identity of indigenous populations in the United States exists under the Federally Recognized List Act of 1994 (“List Act”);<sup>119</sup> orders the Secretary of the Interior to publish a list annually of federally recognized Indian tribes.<sup>120</sup> Under the List Act, an “Indian tribes presently may be recognized by an Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘procedures for establishing that an American Indian Group exists as an Indian tribe;’ or by a decision of a United States court.”<sup>121</sup>

Recognition or acknowledgement by regulation requires acknowledgement by the Department of the Interior,<sup>122</sup> which is a slow process commanding extensive research.<sup>123</sup> The criteria for acknowledgement requires:

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<sup>115</sup> *Overview of Entities Operating in the Twelve Regions*, ANCSA REG’L ASS’N <https://ancsaregional.com/overview-of-entities/#> (last visited Oct. 17, 2021).

<sup>116</sup> *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2458 (2021); *See also Sturgeon v. Frost*, 587 U. S. \_\_\_ (2019); *Sturgeon v. Frost*, 577 U. S. 424 (2016); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); *Metlakatla Indian Community v. Egan*, 369 U. S. 45 (1962).

<sup>117</sup> Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §5131.

<sup>118</sup> *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434 (2021).

<sup>119</sup> Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §5131.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Presentation from Joel A. Davis, Esq., Federal Tribal Recognition, July 16, 2013.

<sup>123</sup> *Id.*

- a. A continuous identification as an Indian entity since 1900;
- b. A distinct community;
- c. Political influence over members;
- d. Governing documents or internal membership criteria;
- e. Membership based on historic ancestry;
- f. Distinct members not a part of another Indian group; and
- g. Not barred by legislation which terminated the federal relationship.<sup>124</sup>

Not including being barred by legislation, no one criteria is outcome determinative, and the application is considered holistically.<sup>125</sup> The Department of the Interior will not acknowledge:

- a. An association, organization, or corporation formed in recent times unless the entity has only changed form by incorporating or formalizing its political autonomy;
- b. A splinter group separating from the main body of an already recognized tribe unless it is able to demonstrate historical autonomy meeting recognition criteria;
- c. An entity barred from recognition by congressional legislation; or
- d. An entity previously denied acknowledgement.<sup>126</sup>

Although 25 U.S.C.A. §5131 enables courts of the United States to federally recognize tribes, courts have been reluctant to exercise this power.<sup>127</sup> In particular, courts have held that groups seeking federal recognition must first exhaust administrative remedies—seeking acknowledgement from the Department of Interior.<sup>128</sup>

Legal commentators have been quick to allege that Alaskan Indigenous corporations are barred from seeking federal recognition

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<sup>124</sup> Jennifer P. Hughes, *Primer on Federal Recognition And Current Issues Affecting The Process*, PREPARED FOR NCAI WINTER SESSION (Feb. 6, 2021), <https://19310896-ece0-4ed5-8f54-58cdd61226f9.filesusr.com/ugd/aad22c32b9a43cc3834b84bbdea0275cf2e229.pdf?index=true> (emphasis added).

<sup>125</sup> See also 25 C.F.R. §§ 83.10–11 (2015).

<sup>126</sup> 25 C.F.R. § 83.4 (emphasis added).

<sup>127</sup> *Mdewakanton Band of Sioux in Minn. v. Bernhardt*, 464 F.Supp.3d 316, 321–23 (D.D.C. 2020), *aff'd sub nom.* *Mdewakanton Band of Sioux in Minn. v. Haaland*, 848 F.App'x 439 (D.C. Cir. 2021); see also *Agua Caliente Tribe of Cupeno Indians of Pala Rsr. v. Sweeney*, 932 F.3d 1207, 1213–15 (9th Cir. 2019).

<sup>128</sup> See *Mdewakanton Band of Sioux in Minn.* 464 F.Supp.3d 316; see also *Agua Caliente Tribe of Cupeno Indians of Pala Rsr.* 932 F.3d 1207.

by the federal recognition process.<sup>129</sup> However, 25 CFR § 83.4 does not bar Alaskan Indigenous corporations from recognition just because they exist as a corporation.<sup>130</sup> Rather, if the corporation formed through incorporation of existing political autonomy, it may apply for recognition.<sup>131</sup> Only Alaskan subsidiaries and villages are barred from applying, unless they separate from its respective parent corporation.<sup>132</sup>

### C. *Tribal Policy in Canada*

Canada also has a long history of racism that taints its governmental history.<sup>133</sup> Since its foundation, Canada assumed its indigenous populations as federal responsibility and sought to “develop them into ‘productive citizens.’”<sup>134</sup> In the 1830s, colonization in Canada ramped up and the pre-founding policy was to displace indigenous populations.<sup>135</sup> Indigenous settlements were forced to relocate and assimilate into European culture.<sup>136</sup>

In 1867, the Canadian government was formally established and “Canada inherited the British colonial legacy--the practices and ideas regarding the colonized indigenous populations.”<sup>137</sup> The newly founded Canadian government also assumed control over its indigenous populations.<sup>138</sup> The 1868 Statute defined Indians as follows:

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<sup>129</sup> See Hughes, *supra* note 126; see Davis, *supra* note 124.

<sup>130</sup> 25 CFR § 83.4(a) (2015) (stating the Department will not recognize “An association, organization, corporation, or entity of any character formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community”).

<sup>131</sup> *Id.*

<sup>132</sup> 25 CFR § 83.4(b) (2015).

<sup>133</sup> Azra Rashid, *Racism & the Americanization of Canadian history: Why we shouldn't look at ourselves through a U. S. lens*, CONVERSATION (May 26, 2021, 2:11 PM), <https://theconversation.com/racism-and-the-americanization-of-canadian-history-why-we-shouldnt-look-at-ourselves-through-a-u-s-lens-159974>.

<sup>134</sup> Dan Eshet, *STOLEN LIVES: THE INDIGENOUS PEOPLES OF CANADA AND THE INDIAN RESIDUAL SCHOOLS* (Facing History & Ourselves ed., 2015).

<sup>135</sup> *Id.* at 30.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 114.

<sup>138</sup> Act of May 22, 1868, S.C. 1868, c 42 (Can.) (providing organization for the management of Indian and Ordnance lands).

*Firstly.* All persons of Indian blood, reputed to belong to the particular tribe, band, or body of Indians interested in such lands or immovable property, and their descendants ;

*Secondly.* All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and the descendants of all such persons; And

*Thirdly.* All women lawfully married to any of the persons included in the several classes hereinafter designated; the children issue of such marriages and their descendants.<sup>139</sup>

Canadian public policy in the 19<sup>th</sup> century sought to encourage native populations to assimilate through legislation such as the Gradual Enfranchisement Act of 1869.<sup>140</sup> The Gradual Enfranchisement Act, was “for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act.”<sup>141</sup> The Gradual Enfranchisement Act also amended the 1868 definition of an Indian to require “Indian women marrying other than Indians, not to be Indians within this Act.”<sup>142</sup> In 1874, Canada passed an Act to Amend Certain Laws Respecting Indians which defined an Indian as “a person within the definition contained in the . . . of any tribe, band or body of Indians”<sup>143</sup>

Canada then passed the Indian Act of 1876 which was “[a]n Act to amend and consolidate the laws respecting Indians.”<sup>144</sup> The 1876 act defined band as “any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common of which the legal title is vested in the Crown.”<sup>145</sup> The act also defines Indian as follows:

*First.* Any male person of Indian blood reputed to belong to a particular band;

*Secondly.* Any child of such person;

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> 1869, S.C. 1869, c 6 (Can.) (providing gradual enfranchisement of Indians and management of Indian affairs).

<sup>142</sup> *Id.*

<sup>143</sup> S.C. 1874, c 21 (Can.).

<sup>144</sup> 1876, S.C. 1876, c. 18 (Can.) (amending and consolidating the laws respecting Indians).

<sup>145</sup> *Id.*

*Thirdly.* Any woman who is or was lawfully married to such person.<sup>146</sup>

The 1876 Act also established a reserve system for its indigenous populations.<sup>147</sup> The reserve was defined as “any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered[.]”<sup>148</sup>

In 1880 and 1886, Canada further amended the Indian Act under S.C. 1880 c. 28 (43. Vict.) and R.S.C. 1886, c. 43, respectively.<sup>149</sup> Neither the 1880 nor the 1886 amending acts changed the general identification of Indians and bands.<sup>150</sup> Canada changed these definitions in 1906 by passing R.S.C. 1906., c. 81.<sup>151</sup> Under the Indian Act of 1920, residential school systems became mandatory for indigenous children.<sup>152</sup> With these systems, the Government “forcibly separated children from their families for extended periods of time and forbade them to acknowledge their Indigenous heritage and culture or to speak their own languages.<sup>153</sup> Children were severely punished . . . [and subjected to] physical, sexual, emotional, and psychological abuse.<sup>154</sup>

In 1951, under S.C. 1951, c. 29, the Canada again redefined essential identity related terms for indigenous populations.<sup>155</sup> First, the term for “band” expanded to include bands declared by the Governor in Council.<sup>156</sup> Under these changes, the term “Indian” became

<sup>146</sup> *Id.* (five qualifying remarks for a woman or child to remain of Indian identity omitted).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Act of May 7, 1880, S.C. 1880, c 28 (amending and consolidating the laws respecting Indians); Indian Act and Amendment, R.S.C., 1886, c. 43.

<sup>150</sup> Act of May 7, 1880, S.C. 1880, c 28 (amending and consolidating the laws respecting Indians); Indian Act and Amendment, R.S.C., 1886, c. 43.

<sup>151</sup> Indian Act, R.S.C. 1906., c. 81.

<sup>152</sup> FIRST NATIONS EDUCATION STEERING COMMITTEE, *1920–1927 Indian Act Becomes More Restrictive*, <https://www.fnesc.ca/wp/wp-content/uploads/2015/07/IRSR11-12-DE-1920-1927.pdf> (last accessed Apr. 8, 2023).

<sup>153</sup> Erin Hanson, *The Residential School System*, INDIGENOUS FOUND. UNIV. OF BRITISH COLUMBIA, [https://indigenousfoundations.arts.ubc.ca/the\\_residential\\_school\\_system/](https://indigenousfoundations.arts.ubc.ca/the_residential_school_system/) (last updated Sept. 2020).

<sup>154</sup> *Id.*

<sup>155</sup> Indian Act of 1951, S.C. 1951, c 29 (Can.).

<sup>156</sup> *Id.*

to mean “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.”<sup>157</sup> Additionally, in 1951, Canada passed an act enabling provinces to provide services to aboriginal people where none existed federally,” causing Aboriginal children separated from their homes to dramatically increase.<sup>158</sup> In 1951, the Indian Act was amended.<sup>159</sup> Changes to the Indian Act included allowing cultural practices, legal representation, and free movement without agency approval.<sup>160</sup> The government’s goal was “to move away from casting Indians as wards of the state and instead facilitate their becoming contributing citizens of Canada.”<sup>161</sup> Indigenous populations opposed the idea of assimilation into Canadian citizenship and “wanted to maintain a legal distinction as Indian people.”<sup>162</sup> In the 1950s, the Canadian government continued the residential school system but transformed its purpose into a pseudo-foster care.<sup>163</sup>

These definitions remained through the Consolidated Acts of 1970.<sup>164</sup> With variances by tribe, modern native rights “include rights to the land, right to subsistence resources and activities, the right to self-determination and self-government, and the right to practice one’s own culture and customs including language and religion.”<sup>165</sup> In Section 35 of the Constitution Act, the Canadian government reaffirmed the rights of Aboriginals.<sup>166</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Eric Hanson, *The Indian Act*, INDIGENOUS FOUND. UNIV. OF BRITISH COLUMBIA, [https://indigenousfoundations.arts.ubc.ca/the\\_indian\\_act/](https://indigenousfoundations.arts.ubc.ca/the_indian_act/) (last visited Oct. 17, 2021).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Erin Hanson, *The Sixties Scoop*, INDIGENOUS FOUND. UNIV. OF BRITISH COLUMBIA, [https://indigenousfoundations.arts.ubc.ca/sixties\\_scoop/](https://indigenousfoundations.arts.ubc.ca/sixties_scoop/) (last visited Oct. 17, 2021).

<sup>164</sup> R.S.C. 1970, c. I-6.

<sup>165</sup> Erin Hanson, *Aboriginal Rights*, INDIGENOUS FOUND. UNIV. OF BRITISH COLUMBIA, [https://indigenousfoundations.arts.ubc.ca/aboriginal\\_rights/](https://indigenousfoundations.arts.ubc.ca/aboriginal_rights/) (last visited Oct. 17, 2021).

<sup>166</sup> *INAN – Section 35 of the Constitution Act 1982– Background– Jan 28, 2021*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/inan-jan-28-2021/inan-section-35->

Bill C-31 in 1985 allowed many people to claim Indian status and live on the reserve.<sup>167</sup> Reservations are governed by the federal government, which also maintains legal title to the land.<sup>168</sup> On the reservations, “federal and provincial social policies in the areas of health, economic development, and education resulted in new and expansive services on many reserves. Increased services led to new employment and economic opportunities, which stimulated interest by reserve residents in training and postsecondary education options.”<sup>169</sup>

Prior to Bill C-31, enfranchisement resulted in individuals losing federal recognition for being Indian.<sup>170</sup> Without Indian status the individual, and that person’s descendants, would no longer be entitled to any associated benefits.<sup>171</sup>

i. The Current Identification Standards in Canada

Currently, individuals—not tribes—apply for indigenous status.<sup>172</sup> Application requires proof of ancestry.<sup>173</sup> Recently, Canada introduced Bill C-38 to amend the Indian Act.<sup>174</sup> The goals of C-38 seeks to: (1) address the inequality of enfranchisement; (2) enable deregistration by application; (3) eliminate sex-based inequities in the membership provisions; and (4) remove some outdated and offensive language.<sup>175</sup>

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constitution-act-1982-background-jan-28-2021.html (last updated May 13, 2021).

<sup>167</sup> *Canadian Aboriginal Reserves, Land Claims*, BRITANNICA, <https://www.britannica.com/place/Canadian-aboriginal-reserves/Land-claims> (last visited Oct. 17, 2021).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Remaining Inequities Related to Registration and Membership, Enfranchisement*, GOV’T OF CAN., [https://www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889#\\_Enfranchisement](https://www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889#_Enfranchisement) (last visited Oct. 17, 2021).

<sup>171</sup> *Id.*

<sup>172</sup> *How to Apply for Indian Status*, GOV’T OF CAN., <https://www.sac-isc.gc.ca/eng/1462808207464/1572460627149> (last visited Oct. 17, 2021).

<sup>173</sup> *Id.*

<sup>174</sup> *Introduction of Bill C-38*, GOV’T OF CAN., <https://www.sac-isc.gc.ca/eng/1662142490384/1662142638971> (last visited Oct. 17, 2021).

<sup>175</sup> *Id.* (“removing dated references to mentally incompetent Indians.”)

### III. ENTER, THE COVID-19 PANDEMIC

In 2020, the COVID-19 pandemic effectively stopped the world.<sup>176</sup> The healthcare crisis presented unprecedented economic, health, and social challenges to the global community.<sup>177</sup> These challenges were even more drastic for indigenous populations.<sup>178</sup> The United Nations stated:

Indigenous peoples experience a high degree of socio-economic marginalization and are at disproportionate risk in public health emergencies, becoming even more vulnerable during this global pandemic, owing to factors such as their lack of access to effective monitoring and early-warning systems, and adequate health and social services.<sup>179</sup>

For instance, the Nunavut Premier Joe Savikataaq acknowledged that “Nunavut is chronically underfunded, and [they] cannot be expected to deal with this new global reality from behind the starting line.”<sup>180</sup>

Both the United States and Canada passed COVID-19 related legislative relief and attempted to provide support to Indigenous populations.<sup>181</sup> The United States enacted the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”), the Consolidated Appropriations Act (“CAA”) and the American Rescue Plan Act (“ARPA”).<sup>182</sup> These acts incorporated different identifications of

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<sup>176</sup> *The Virus That Shut Down the World: 2020, A Year Like No Other*, UNITED NATIONS NEWS (Dec. 24, 2020), <https://news.un.org/en/story/2020/12/1080702>.

<sup>177</sup> *Id.*

<sup>178</sup> *COVID-19 and Indigenous Peoples*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/covid-19.html> (last visited Oct. 17, 2021).

<sup>179</sup> *Id.*

<sup>180</sup> Jack Graham, *Canada Earmarks Aid for Indigenous Communities to Prepare for Coronavirus*, REUTERS (Apr. 15, 2020, 11:19 AM), <https://www.reuters.com/article/us-health-coronavirus-canada-aid-trfn/canada-earmarks-aid-for-indigenous-communities-to-prepare-for-coronavirus-idUSKCN21X2CI>.

<sup>181</sup> See generally CARES Act § 341; see also *Indigenous Community Support Fund*, GOV'T OF CAN., <https://www.sac-isc.gc.ca/eng/1585189335380/1585189357198#sec1> (last updated July 26, 2022).

<sup>182</sup> See generally CARES Act (passed by Congress on March 25, 2020 and signed into law on March 27, 2020); CAA (passed by Congress on December 21, 2020)



indigenous populations.<sup>183</sup> COVID-19 relief funding as it applies to indigenous populations, has been viewed optimistically—as providing ways to fix systemic inequalities.<sup>184</sup>

A. *COVID-19 Relief in the United States*

The United States responded to the COVID-19 pandemic, inter alia, by passing three acts: (1) the CARES;<sup>185</sup> (2) the CAA;<sup>186</sup> and the ARPA.<sup>187</sup> These acts provided funding to enable states, territories, and programs to combat the catastrophic effect of the COVID-19 pandemic.<sup>188</sup> Despite some similarities between these acts, they

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and signed into law on December 27, 2020); and ARPA (passed by Congress on March 10, 2021 and signed into law on March 11, 2021)..

<sup>183</sup> See generally CARES Act (defining Indian tribes by the definition provided in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 USC 5304(e)); CAA (defining Indian tribes as federally recognized tribes pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994); and ARPA (which returns defining Indian Tribes according to the Indian Self-Determination and Education Assistance Act).

<sup>184</sup> See Jeff Denis, *COVID-19: How the Crisis Can Call Us Toward Reconciliation with Indigenous Communities*, EVERYTHING ZOOMER (June 10, 2020), <https://www.everythingzoomer.com/general/2020/06/10/indigenous-issues-and-covid-19-how-the-crisis-can-call-us-toward-reconciliation/>; see also Eric C. Henson et al., *Recommendations for the Allocation and Administration of American Rescue Plan Act Funding for American Indian Tribal Governments*, NATIVE NATIONS INST. & HARV. PROJECT ON AM. INDIAN ECON. DEV. (Apr. 9, 2021), [https://ash.harvard.edu/files/ash/files/policy\\_brief\\_6\\_-\\_arpa\\_04-09-21\\_vfin\\_dist.pdf?m=1618001727](https://ash.harvard.edu/files/ash/files/policy_brief_6_-_arpa_04-09-21_vfin_dist.pdf?m=1618001727) [hereinafter *Recommendations for ARPA Funding for Tribal Governments*]; see also Eric C. Henson et al., *Emerging Stronger than Before: Guidelines for the Federal Role in American Indian and Alaska Natives Tribes Recovery from the COVID-19 Pandemic*, NATIVE NATIONS INST. (July 24, 2020), [https://ash.harvard.edu/files/ash/files/policy\\_brief\\_4-federal\\_policy\\_24july2020\\_final\\_for\\_dist.pdf?m=1595612546](https://ash.harvard.edu/files/ash/files/policy_brief_4-federal_policy_24july2020_final_for_dist.pdf?m=1595612546).

<sup>185</sup> Coronavirus Aid, Relief, and Economic Stability (“CARES”) Act, Pub. L. No. 116–136, 134 Stat. 281.

<sup>186</sup> Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, 134 Stat. 1182, 2127.

<sup>187</sup> American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4, 228.

<sup>188</sup> See generally CARES Act § 341 (providing funding for direct payments, unemployment, small businesses, community development, transportation, vaccine development and distribution, schools, rent assistance, nutrition and agriculture, the United States Postal Service, childcare, broadband, coronavirus relief fund (not included in ARPA), and employee retention credit.).

each sought different approaches to provide for indigenous populations differently.<sup>189</sup>

i. The CARES Act

Congress passed the CARES Act on March 25, 2020, and President Trump signed it into law two days later, on March 27, 2020.<sup>190</sup> The CARES Act provided 2 trillion dollars to the economy, becoming one of “the largest financial rescue package in U.S. History.”<sup>191</sup> In general, the CARES Act provided 610 billion dollars to households, 525 billion dollars to large businesses, 75 billion dollars to the airline industry, 600 billion dollars to small businesses, 175 billion dollars to states and municipalities, 45 billion dollars to FEMA, 185 billion dollars to health care providers, and 65 billion dollars to other groups.<sup>192</sup> Of the billions allocated to smaller governments, the recipients include “States . . . eligible units of local government; the District of Columbia and U.S. Territories . . . and Tribal governments (collectively “governments”).”<sup>193</sup>

According to the CARES Act “[t]he term ‘Tribal government’ means the recognized governing body of an Indian Tribe.”<sup>194</sup> The Act defines an Indian Tribe by the definition “given . . . term in section 4(e) of the Indian Self-Determination and Education Assistance

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<sup>189</sup> See generally CARES Act (defining Indian tribes by the definition provided in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 USC 5304(e)); CAA (defining Indian tribes as federally recognized tribes pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994); and ARPA (which returns defining Indian Tribes according to the Indian Self-Determination and Education Assistance Act).

<sup>190</sup> *About the Cares Act and the Consolidated Appropriations Act*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/about-the-cares-act> (last visited Feb. 5, 2023) [hereinafter About CARES and CAA].

<sup>191</sup> *What is the CARES Act?*, INVESTOPEDIA, <https://www.investopedia.com/coronavirus-aid-relief-and-economic-security-cares-act-4800707> (last updated Sept. 3, 2022).

<sup>192</sup> *A Visualization of the CARES Act*, COMM. FOR A RESPONSIBLE FED. BUDGET (Mar. 27, 2020), <https://www.crfb.org/blogs/visualization-cares-act> (table).

<sup>193</sup> *Coronavirus Relief Fund*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/coronavirus-relief-fund> (last visited Feb. 5, 2023).

<sup>194</sup> 42 U.S.C. § 5122(6).

Act (25 USC 5304(e)).”<sup>195</sup> Under the Indian Self-Determination and Education Assistance act, an “Indian tribe” means

any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;<sup>196</sup>

Within the 335 page Act, there are only two references to the specific populations in Alaska and its legal idiosyncrasies.<sup>197</sup> The first indicates “additional payment” to the Institute of American Indian and Alaska Native Culture and Arts Development (“Institute”).<sup>198</sup> Secondly, Alaskan tribes are referenced a specification for the “ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND.”<sup>199</sup> In this instance, the Act allocates funds for: “[a]ny activity authorized by the ESEA of 1965, including the Native Hawaiian Education Act and the Alaska Native Educational Equity, Support, and Assistance Act (20 USC 6301 et seq.)”.<sup>200</sup>

The CARES Act provided federal funding to governing bodies of any Indian tribe as defined by the Indian Self Determination and Education Assistance Act.<sup>201</sup> The United States Department of the Treasury refused to provide Alaskan indigenous populations with the funding afforded by the CARES Act as they did not recognize the Indian Corporations as Indian tribes.<sup>202</sup>

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<sup>195</sup> CARES Act, Pub. L. No. 116–136, 134 Stat. 281, 504 (2020).

<sup>196</sup> Indian Self-Determination and Assistance Act, 25 U.S.C. § 5304(d).

<sup>197</sup> CARES Act, Pub. L. No. 116–136, 134 Stat. 281, 504 (2020).

<sup>198</sup> *Id.* at 551.

<sup>199</sup> *Id.* at 565.

<sup>200</sup> *Id.* at 566.

<sup>201</sup> *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2440 (2021).

<sup>202</sup> *Id.*

ii. The CAA

The CAA was passed on December 21, 2020, and signed into law by President Trump on December 27, 2020.<sup>203</sup> The 2,126-page bill provided further economic relief for those impacted by the COVID-19 pandemic.<sup>204</sup> In terms of impact on Indian tribes, the CAA provided indigenous populations with roughly \$3.7 billion in funding.<sup>205</sup> The funding was intended to be a broadband grant and emergency benefit programs.<sup>206</sup>

The CAA indicated that the indigenous populations intended to receive funding are tribal governments and defines tribal governments.<sup>207</sup> CAA defines tribal governments as:

the governing body of any Indian or Alaska Native Tribe, band, nation, pueblo, village, community, component band, or component reservation, individually recognized (including parenthetically) in the list published most recently as of the date of enactment of this Act pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994[.]<sup>208</sup>

The Federally Recognized Indian Tribe List Act of 1994 (“FR Tribe List Act”) identifies an Indian tribe as “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.”<sup>209</sup> In 2019, the Bureau of Indian Affairs published “the current list of 573 Tribal entities recognized . . . by virtue of their status as Indian

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<sup>203</sup> About CARES and CAA, *supra* note 192.

<sup>204</sup> *Consolidated Appropriations Act (CAA) of 2021: Resources for Administrators*, ALEGEUS (Mar. 8, 2021), <https://www.alegeus.com/insights/consolidated-appropriations-act-cao-of-2021-resources-for-administrators/>.

<sup>205</sup> *COVID-19 Response: Broadband Funding for Tribes, Tribal Colleges and Universities, the Bureau of Indian Affairs, the Bureau of Indian Education, and the Indian Health Service*, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/IF/IF11795> (last updated Mar. 30, 2021).

<sup>206</sup> *Id.*

<sup>207</sup> Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, 2137 (2020).

<sup>208</sup> *Id.*

<sup>209</sup> Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 5101-5144, 5130 (1994).

Tribes.”<sup>210</sup> The Bureau of Indian Affairs acknowledges “the practice of listing the Alaska Native entities separately for the purpose of facilitating identification of them.”<sup>211</sup>

iii. The ARPA

Congress passed the ARPA on March 6, 2021, and President Biden signed it into law on March 11, 2021.<sup>212</sup> The ARPA consists of 1.9 trillion dollars in economic relief to help the United States recover from the devastation of COVID-19.<sup>213</sup> Despite not establishing a COVID-19 relief fund, ARPA did provide funding, targeting specified areas and specific recipients.<sup>214</sup> For instance, ARPA allocated 350 billion dollars in funding for state, local, territorial, and tribal governments.<sup>215</sup> Specifically, it provided 195 billion dollars to state governments, with a minimum of 500 million dollars given to each state.<sup>216</sup> It also provided 130 billion to local governments.<sup>217</sup> Lastly, ARPA allocated 20 billion dollars to tribal governments and 4.5 billion dollars for territories.<sup>218</sup>

ARPA identifies “a Tribal organization (as that term is defined in Section 4 of the Indian Self-Determination and Education Assistance Act (25 USC 5304)).”<sup>219</sup> Furthermore, the Act also defines a tribal government as:

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<sup>210</sup> Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (2022).

<sup>211</sup> *Id.*

<sup>212</sup> Erik Haagensen, *American Rescue Plan (Biden’s \$1.9 Trillion Stimulus Package)*, INVESTOPEDIA, <https://www.investopedia.com/american-rescue-plan-definition-5095694> (last updated Sept. 21, 2022).

<sup>213</sup> *Id.*

<sup>214</sup> *Four Key Elements of the American Rescue Plan*, COMM. FOR A RESPONSIBLE FED. BUDGET (Feb. 24, 2021), <https://www.crfb.org/blogs/four-key-elements-american-rescue-plan>.

<sup>215</sup> *Fact Sheet: The American Rescue Plan will deliver immediate economic relief to families*, U.S. DEP’T OF THE TREASURY (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4, 226.

any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of this Act pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).<sup>220</sup>

*B. COVID-19 Relief in Canada*

Canada provides significant support for indigenous populations through the Indigenous Community Support Fund (“ICSF”).<sup>221</sup> The fund was established to provide “Indigenous leadership and organizations with the flexibility needed to design and implement community based solutions to prevent, prepare and respond to the spread of COVID-19 within their communities.”<sup>222</sup> The fund is intended to support:

- (1) First Nations communities and organizations, including self-governing and modern treaty nations
- (2) Inuit communities and organizations in Inuit Nunangat
- (3) Metis Nation communities and organizations
- (4) Urban and off-reserve Indigenous communities and organization[.]<sup>223</sup>

First Nations communities include indigenous populations on reserves and self-governing communities and landless bands.<sup>224</sup>

On March 18, 2020, the Canadian government announced funding for the Indigenous Community Support Fund (ICSF) through the COVID-19 Economic Response Plan.<sup>225</sup> Initially, funding allocations were to be: 290 million dollars to First Nations, Inuit and Metis communities and 15 million dollars to urban and off-reserve indigenous organizations through requests.<sup>226</sup> On March 26, 2020, the Canadian government provided the outline for the pledged distinction-

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<sup>220</sup> *Id.* at 228.

<sup>221</sup> Indigenous Community Support Fund, *supra* note 181.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

based Indigenous Community Support fund.<sup>227</sup> The government announced that First Nations communities would receive 215 million dollars, Inuit communities 45 million dollars, and Métis Nation communities 30 million dollars.<sup>228</sup>

On May 21, 2020, funding for urban and off-reserve organizations was increased by 75 million dollars to a total of 90 million dollars.<sup>229</sup> On August 12, 2020, the Canadian government allocated an additional 305 million dollars in the fund.<sup>230</sup> On November 30, 2020, the fund received an additional 380 million dollars.<sup>231</sup> On December 18, 2020, the fund received an additional \$30 million from money provided to the Emergency Food Security Fund.<sup>232</sup> Most recently, on April 19, 2021, the fund received an additional 760.8 million dollars.<sup>233</sup>

On April 15, 2020, the Canadian government announced that it will spend about 130 million dollars to help northern territories prepare for COVID-19.<sup>234</sup> Prime Minister Trudeau announced that the spending was a way to work with indigenous populations to address their unique needs of inadequate food supplies and health care services.<sup>235</sup> The assistance aids in the supply chain for food and medical supplies.<sup>236</sup> Reuters reports that the funding is in addition to the ICSF fund.<sup>237</sup>

On April 4, 2020, an additional 10 million dollars was announced to support emergency shelters on reserves and in the Yukon “[t]o support Indigenous women and children fleeing violence.”<sup>238</sup>

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<sup>227</sup> Indigenous Community Support Fund, *supra* note 181.

<sup>228</sup> *Addressing Urgent Needs in Indigenous Communities Related to COVID-19*, GOV'T OF CAN. (Mar. 26, 2020), <https://www.canada.ca/en/indigenous-services-canada/news/2020/03/addressing-urgent-needs-in-indigenous-communities-related-to-covid-19.html>

<sup>229</sup> *Indigenous Community Support Fund*, *supra* note 181.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Graham, *supra* note 180.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *See id.*

<sup>238</sup> EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA, Canada announces support to those experiencing homelessness and women fleeing gender-based violence during the coronavirus disease (COVID-19) pandemic, <https://www.cana>

Marc Miller, the minister of indigenous services also announced “[t]his is just the beginning. We know more support will be needed. And we will be there to make sure no Indigenous community is left behind.”<sup>239</sup> On May 29, 2020, Canada announced a plan for another 650 million for covid Aid to indigenous communities.<sup>240</sup>

Moreover, on April 15, 2020, news campaigns reported petitions calling for more assistance to indigenous populations.<sup>241</sup> The petition arose after Trudeau’s pledge to help the country’s northern communities during the COVID-19 pandemic.<sup>242</sup> Indigenous leaders suggest more needs to be done.<sup>243</sup>

Canadian COVID-19 legislation can be summarized as follows: the COVID-19 Emergency Response Act which was assented to on March 25, 2020;<sup>244</sup> A second Act respecting certain measures in response to COVID-19 (Bill C-14) was assented to on April 11, 2020;<sup>245</sup> An Act respecting Canada emergency student benefits (Bill C-15) which was assented to on May, 1, 2020;<sup>246</sup> an Act respecting further Covid-19 Measures (Bill C-20) which was assented to on July 27, 2020;<sup>247</sup> and, lastly, an Act relating to certain measures in response to COVID-19 (Bill C-4) which was assented to on October 2, 2020.<sup>248</sup>

i. COVID-19 Emergency Response Act

The COVID-19 Emergency Response Act was the first act passed by the Canadian government that responded to the COVID-

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da.ca/en/employment-social-development/news/2020/04/canada-announces-support-to-those-experiencing-homelessness-and-women-fleeing-gender-based-violence-during-the-coronavirus-disease-covid-19-pandemic.html (last accessed April 9, 2023).

<sup>239</sup> *Id.*

<sup>240</sup> The Canadian Press, *Canada Giving Another \$650M in COVID-19 Aid to Indigenous Communities*, GLOB. NEWS <https://globalnews.ca/news/7001491/coronavirus-canada-indigenous-support/> (last updated May 29, 2020, 12:50 PM).

<sup>241</sup> *Id.*

<sup>242</sup> *See id.*

<sup>243</sup> *Id.*

<sup>244</sup> COVID-19 Emergency Response Act, S.C. 2020, c. 5 (Can.).

<sup>245</sup> Medical Assistance in Dying Act, S.C. 2016, c. 3 (Can.).

<sup>246</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

<sup>247</sup> Public Complaints and Review Commission Act, S.C. 2022, c 20 (Can.).

<sup>248</sup> Act to Amend Criminal Code, S.C. 2021, c 24 (Can.).



19 pandemic.<sup>249</sup> Although this Act, makes no express reference to indigenous peoples, aboriginals, or native Canadians—Part 7 of the act affects the indigenous populations. Part 7 amended the Federal-Provincial Fiscal Arrangement Act by authorizing “additional payments to the provinces and territories [.]”<sup>250</sup> The Federal-Provincial Fiscal Arrangements Act identifies aboriginal government as “an Indian, an Inuit or a Métis government or the *council of the band*, as defined in subsection 2(1) of the Indian Act.”<sup>251</sup> An additional payment of nearly 500 million dollars was given to the 13 provinces and territories of Canada.<sup>252</sup>

Part 8 of the COVID-19 Emergency Response Act amended the Financial Administration Act authorizing the “minister of Finance, until September 30, 2020, to borrow money under that act for certain payments without the authorization of the Governor in Council.”<sup>253</sup> The Financial Administration Act excludes self-governing bodies from receipt under the Act, including “a band, as defined in subsection 2(1) of the Indian Act, any member of the council or any agency of the band or an aboriginal body that is party to a self-government agreement given effect by an Act of Parliament or any of their agencies.”<sup>254</sup>

Part 15 amended the Canada Student Financial Assistance Act to require no interest or principal payments for a period of time.<sup>255</sup> The Canada Student Financial Assistance Act defines an Indian as “a person who is a Canadian citizen, a person registered as an Indian under the Indian Act.”<sup>256</sup>

ii. Bill C-14 (April 11, 2020) (Can.)

Bill C-14 is a second in response to COVID-19 which was assented to on April 11, 2020.<sup>257</sup> The Act consists of two parts. Part 1 amended the Income Tax Act, allowing wage subsidies.<sup>258</sup> Part 2

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<sup>249</sup> COVID-19 Emergency Response Act, S.C. 2020, c. 5 (Can.).

<sup>250</sup> *Id.*

<sup>251</sup> Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8 (Can.).

<sup>252</sup> *Id.*

<sup>253</sup> COVID-19 Emergency Response Act, S.C. 2020, c. 5 (Can.).

<sup>254</sup> Financial Administration Act, R.S.C. 1985, c. F-11 (Can.).

<sup>255</sup> Canada Student Financial Assistance Act, S.C. 1994, c. 28 (Can.).

<sup>256</sup> *Id.*

<sup>257</sup> Medical Assistance in Dying Act, S.C. 2016, c. 3 (Can.).

<sup>258</sup> *Id.*

amended the Financial Administration Act.<sup>259</sup> Specifically, as in the Emergency Response Act, Bill C-14 amended the Financial Administration Act, which relied on the Indian Act for a definition of an Indian.<sup>260</sup>

iii. Bill C-15 (April 29, 2020) (Can.)

Bill C-15 relates to Canada Emergency Student benefits.<sup>261</sup> The Act entitles payment to students who lost work and income opportunities, affecting the legal rights of indigenous populations.<sup>262</sup> The Bill C-15 defines an Indian as “an Indian under the Indian Act, a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act or a protected person within the meaning of subsection 95(2) of that Act.”<sup>263</sup> In turn, the Immigration and Refugee Protection Act relies on the Indian Act by stating, “an Indian under the Indian Act has the right to enter and remain in Canada in accordance with this Act.”<sup>264</sup>

iv. Bill C-20 (July 21, 2020)

Bill C-20 is an Act respecting further COVID-19 measures and was passed on July 27, 2020.<sup>265</sup> The Act is separated into three parts.<sup>266</sup> Part 1 addresses wage subsidies.<sup>267</sup> Part 2 addresses disabilities, pensions, and veterans.<sup>268</sup> Part 3 enables flexible time limits.<sup>269</sup> There is no reference in this Act to Indians, Natives, or aboriginals.<sup>270</sup>

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Public Complaints and Review Commission Act, S.C. 2022, c 20 (Can.).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> Public Complaints and Review Commission Act, S.C. 2022, c 20 (Can.).

v. Bill C-4 (October 2, 2020) (Can.)

Bill C-4 was the last of the expansive COVID-19 relief measures.<sup>271</sup> Bill C-4 consists of three parts.<sup>272</sup> Part 1 addressed payments to support economic and sickness recovery.<sup>273</sup> Part 2 enabled employee leave for COVID-19.<sup>274</sup> Part 3 amended the Public Health Events of National Concern Payments Act.<sup>275</sup> Bill C-4 does reference Aboriginal government, however, it does not provide any definition for an aboriginal government.<sup>276</sup> The Canada Recovery Benefits Act, which accompanies the reference in Bill C-4, does not provide a definition of an aboriginal government, either.<sup>277</sup>

#### IV. COMPARATIVE STUDY

In 2016, the total indigenous population in Canada was 1.67 million.<sup>278</sup> In 2021, the indigenous population in Canada increased to 1.8 million.<sup>279</sup> It is important to note a difference in government classification.<sup>280</sup> The 2016 census is more divisive than the 2021 census.<sup>281</sup> Whereas in the United States, in 2016, there were an estimated 2.6 million persons identifying as an American Indian.<sup>282</sup>

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<sup>271</sup> Act to Amend Criminal Code, S.C. 2021, c 24 (Can.).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Act to Amend Criminal Code, S.C. 2021, c 24 (Can.).

<sup>278</sup> *Census Profile, Census 2016*, STAT. CAN., <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Geo2=&Code2=&SearchText=Canada&SearchType=Begins&SearchPR=01&B1=All&TABID=1&type=0> (last updated Oct. 27, 2021) [hereinafter *Canada Census Data 2016*].

<sup>279</sup> *Census Profile, 2021 Census of Population Profile table*, STAT. CAN., <https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&DGUIDList=2021A000011124&GENDERList=1,2,3&STATISTICList=1&HEADERList=0&SearchText=Canada> (last updated Feb. 1, 2023) [hereinafter *Canada Census Data 2021*].

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* Cf. *Canada Census Data 2016*, *supra* note 281.

<sup>282</sup> B02014, 2016 American Indian and Alaska Native Alone for Selected Tribal Grouping, United States Census Bureau, <https://data.census.gov/table?q=Indian&tid=ACSDT1Y2016.B02014>.

Meanwhile, in 2021, there were an estimated 3.158 million persons identifying as American Indian.<sup>283</sup>

#### A. *Proving Recognition*

In the United States, a tribal entity has the burden of proving federal recognition.<sup>284</sup> Conversely, Canadian recognition empowers the individual.<sup>285</sup> The requirements to establish recognition appear to be easier in Canada as the focus is on an individual's ancestry.<sup>286</sup> In the United States, the focus is on the tribes' political unity.<sup>287</sup>

#### B. *Historic Identification*

Historically, legislation in the United States is less organized than legislation in Canada.<sup>288</sup> Although public policy trends in the direction of indigenous populations followed a in both countries, the United States' definition of an indigenous population was continuously redefined and shifted as public policy changed.<sup>289</sup> Conversely, Canada anchored its definition to one act—the Indian Act.<sup>290</sup>

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<sup>283</sup> B02014, 2021 American Indian and Alaska Native Alone for Selected Tribal Grouping, United States Census, <https://data.census.gov/table?q=Indian+2021&tid=ACSDT1Y2021.B02014>

<sup>284</sup> See generally 5 C.F.R. §§ 83.10–11 (2015).

<sup>285</sup> *How to Apply for Indian Status*, *supra* note 172.

<sup>286</sup> *Id.* Cf. 25 CFR §§ 83.10–11.

<sup>287</sup> See generally 25 CFR §§ 83.10–11.

<sup>288</sup> *History & Culture in the Badlands, The Dawes Act*, *supra* note 86; *The Indian Reorganization Act (1934)*, *supra* note 93; Indian Self-Determination and Assistance Act, 25 U.S.C. § 5304(d); Alaska Native Claims Settlement Act, 88 Stat. 2203 <https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg2203.pdf#page=1>; Act of May 22, 1868, S.C. 1868, c 42 (Can.) (providing organization for the management of Indian and Ordnance lands); Act of May 22, 1868, S.C. 1868, c 42, S 15 (Can.) (providing organization for the management of Indian and Ordnance lands); Act of June 22, 1869, S.C. 1869, c. 6 (Can.) (providing gradual enfranchisement of Indians and management of Indian affairs); Act to Amend Certain Laws Respecting Indians, S.C. 1874, c. 21 (Can.); Act of Apr. 12 1876, S.C. 1876, c. 18 (Can.) (amending and consolidating the laws respecting Indians); Act of May 7, 1880, S.C. 1880, c. 28 (amending and consolidating the laws respecting Indians); Indian Act and Amendment, R.S.C., 1886, c. 43; Indian Act, R.S.C. 1906., c. 81; Indian Act of 1951, S.C. 1951, c. 29 (Can.); Consolidated Acts, R.S.C. 1970, c. 1–6.

<sup>289</sup> See sources cited *supra* note 291.

<sup>290</sup> See generally Canadian indigenous identifying legislation: Act of May 22, 1868, S.C. 1868, c 42 (Can.) (providing organization for the management of

Subsequent Canadian legislation affecting indigenous populations related back to the original Indian Act—enforcing structure and plussed reliance on indigenous identity.<sup>291</sup> While Canada has changed its definition of “indigenous,” it has done so by referring back to the original Indian Act.<sup>292</sup>

COVID-19 legislative relief in both countries continued respective trends of indigenous identities.<sup>293</sup> In the United States, indigenous identities remained confused—resulting in *Yellen v. Confederated Indian Tribes*.<sup>294</sup> While the Federally Recognized Indian Tribe List Act of 1994 may have been an attempt to anchor a definition of “indigenous,” it is unclear if it will have that effect.<sup>295</sup> Although both Canada and the United States outsource recognition to an application process and agency review, the United States’ recognition process might vary depending on a myriad of factors related to a tribe’s political unity.<sup>296</sup> Conversely, because Canada focuses on the individual, it’s the process centers upon ancestry, rather than proof of unity.<sup>297</sup>

### C. *Covid-19 Reliance on Precedent*

The United States and Canada have relied on precedent for the terminology and identifications of indigenous communities to

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Indian and Ordnance lands); Act of May 22, 1868, S.C. 1868, c. 42, S 15 (Can.) (providing organization for the management of Indian and Ordnance lands); Act of June 22, 1869, S.C. 1869, c. 6 (Can.) (providing gradual enfranchisement of Indians and management of Indian affairs); Act to Amend Certain Laws Respecting Indians, S.C. 1874, c. 21 (Can.); Act of Apr. 12 1876, S.C. 1876, c. 18 (Can.) (amending and consolidating the laws respecting Indians); Act of May 7, 1880, S.C. 1880, c. 28 (amending and consolidating the laws respecting Indians); Indian Act and Amendment, R.S.C., 1886, c. 43; Indian Act, R.S.C. 1906., c. 81; Indian Act of 1951, S.C. 1951, c 29 (Can.); Consolidated Acts, R.S.C. 1970, c. I–6.

<sup>291</sup> See generally sources cited *supra* note 293.

<sup>292</sup> See generally sources cited *supra* note 293.

<sup>293</sup> Coronavirus Aid, Relief, and Economic Stability (CARES) Act, Pub. L. No. 116–136, 134 Stat. 281; American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4, 228; see COVID–19 Emergency Response Act, S.C. 2020, c. 5 (Can.).

<sup>294</sup> See generally *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434 (2021).

<sup>295</sup> *Id.*

<sup>296</sup> See generally 25 C.F.R. §§ 83.10–11 (2015).

<sup>297</sup> *How to Apply for Indian Status*, *supra* note 172.

receive COVID-19 relief.<sup>298</sup> However, the definition of a native in the United States was less consistent than in Canada.<sup>299</sup>

First, under the CARES Act, the “term ‘Indian Tribe’ has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 USC 5304(e)),”<sup>300</sup> which identified Indians as

any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;<sup>301</sup>

Then under the CAA, United States government pivoted to define “Indian tribe” to mean “any recognized tribe included on the current list published by the Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe Act of 1994.”<sup>302</sup> This identifies Indian tribes as “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.”<sup>303</sup> In 2019, the Bureau of Indian Affairs List identified 573 tribal entities.<sup>304</sup> Then, under the ARPA, the definition of an Indian Tribe returned to “a tribal organization (as that term is defined in Section 4 of the Indian Self-

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<sup>298</sup> Coronavirus Aid, Relief, and Economic Stability (CARES) Act, Pub. L. No. 116–136, 134 Stat. 2137; American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4, 228; COVID–19 Emergency Response Act, S.C. 2020, c. 5 (Can.).

<sup>299</sup> See sources cited *supra* note 301.

<sup>300</sup> CARES Act, Pub. L. No. 116–136, 134 Stat. 281, 504 (2020).

<sup>301</sup> Indian Self–Determination and Education Assistance Act 25 U.S.C. § 5304(e).

<sup>302</sup> Consolidated Appropriations Act, Pub. L. No. 116–260, 134 Stat. 1182, 2137 (2020).

<sup>303</sup> Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, 108 Stat. 4791, 4791 (1994).

<sup>304</sup> Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (2022).

Determination and Education Assistance Act (25 USC 5304).”<sup>305</sup> However, ARPA also defined a Tribal government as:

any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of this Act pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).<sup>306</sup>

The use of different definitions and precedent creates confusion on what is an Indian tribe or government.<sup>307</sup> As identified in *Yellen*:

A federally recognized tribe is one that has entered into “a government-to-government relationship [with] the United States.” 1 F. Cohen, *Handbook of Federal Indian Law* §3.02[3] (N. Newton ed. 2012). This recognition can come in a number of ways: “from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity.” W. Canby, *American Indian Law in a Nutshell* 4 (7th ed. 2020). As private companies incorporated under state law, ANCs have never been “recognized” by the United States in this sovereign political sense.<sup>308</sup>

However, as held in *Yellen*, the reliance on the ISDA, which incorporates ANCs in the definition of Indian tribes, entitles ANCs to federal funding under the CARES Act.<sup>309</sup> ANCs are limited to receive COVID-19 Relief Funding under the CAA or ARPA because of both bill’s cross reference of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). As *Yellen* indicates:

Had Congress wished to limit . . . funding to federally recognized tribes, it could simply have cross-referenced the List Act instead, as it had in numerous statutes before. Instead, Congress invoked a definition that expressly includes ANCs (and has been

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<sup>305</sup> American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4, 228.

<sup>306</sup> *Id.*

<sup>307</sup> See generally *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434 (2021).

<sup>308</sup> *Id.* at 2437.

<sup>309</sup> *Id.* at 2452.

understood for decades to include them). Today's ruling merely gives effect to that decision.<sup>310</sup>

The use of precedent and definition differs from consistency in the Canadian COVID-19 relief legislation, as Canada used definitional precedent to support indigenous populations.<sup>311</sup> Canadian COVID-19 legislation rarely explicitly referred to native populations.<sup>312</sup> Instead, the Canadian legislation indicated and affected previous acts that had already indicated native populations.<sup>313</sup> For instance, the COVID-19 Emergency Response Act affected The Federal-Provincial Fiscal Arrangements Act, the Financial Administration Act, and the Canada Student Financial Assistance Act to provide support to indigenous populations.<sup>314</sup> All three of these acts relied on the historic definition of an Indian under the Indian Act. Subsequent legislation, Bill C-14 similarly relied on the definition of an Indian Act.<sup>315</sup> Bill C-15 affected the Immigration and Refugee Protection Act, which used the definition under the Indian Act.<sup>316</sup> The only inconsistent part of Canadian COVID-19 relief legislation is part of Bill C-4, which failed to define or identify an Aboriginal government.<sup>317</sup>

Canadian legislation, differed from United States legislation by keeping the definition of indigenous populations more consistent.<sup>318</sup> Canadian COVID-19 legislation, the COVID-19 Emergency Response Act, and Bills C-14, C-15, C-20, C-4, altered a previous bill (the Indian Act?) which affected the legal rights of indigenous populations:<sup>319</sup> although the terms “native,” “tribes,” and/or “aboriginals” were rarely used in COVID-19 legislation, the precedent that Canadian COVID-19 legislation relied on defined the indigenous

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<sup>310</sup> *Id.*

<sup>311</sup> See sources cited *supra* note 301.

<sup>312</sup> COVID-19 Emergency Response Act, S.C. 2020, c. 5 (Can.); Medical Assistance in Dying Act, S.C. 2016, c. 3 (Can.); Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.); Act to Amend Criminal Code, S.C. 2021, c 24 (Can.).

<sup>313</sup> See sources cited *supra* note 315.

<sup>314</sup> COVID-19 Emergency Response Act, S.C. 2020, c. 5 (Can.).

<sup>315</sup> *Id.*; see also Medical Assistance in Dying Act, S.C. 2016, c. 3 (Can.).

<sup>316</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

<sup>317</sup> Act to Amend Criminal Code, S.C. 2021, c 24 (Can.).

<sup>318</sup> See sources cited *supra* note 315.

<sup>319</sup> See sources cited *supra* note 315.



populations as under the Indian Act.<sup>320</sup> Although to showcase consistency by reliance on proxy definitions may be considered low hanging fruit, consistency is key to creating continued understanding.

*D. The Effectiveness of COVID-19 Relief Legislation*

With the COVID-19 pandemic still plaguing the world, it is difficult to assess the success of Canada and the United States' respective COVID-19 legislation in supporting indigenous populations. While it is clear that Canada has a more concrete definition of the native population such relief is intended to benefit, comparing the true efficacy of such rollouts is difficult.

In the United States, as of January 24, 2022, indigenous populations in America had infection rates 3.5 times higher than non-Hispanic white populations.<sup>321</sup> Native Americans were nearly four times more likely to be hospitalized because of COVID-19.<sup>322</sup> Johns Hopkins University cited the disproportionality of COVID-19 on American Indian communities as occurring due to “underfunded and under-resourced health systems, limited access to health services, poor infrastructure, and underlying health disparities.”<sup>323</sup>

The Harvard Project on American Indian Economic Development Nations Institute (“Project”) indicated the CARES Act and ARPA have the potential to revitalize Indian Nations.<sup>324</sup> The Project viewed COVID-19 legislative relief as holding “the promise of materially remedying at least some of the gross, documented, and long-

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<sup>320</sup> See sources cited *supra* note 315.

<sup>321</sup> Sarah M. Hatcher et al., *COVID-19 Among American Indian and Alaska Native Persons — 23 States, January 31–July 3, 2020*, 69 MORBIDITY & MORTALITY WKLY REP. 1166, 1169 (2020).

<sup>322</sup> *Coronavirus (COVID-19)*, INDIAN HEALTH SERV., <https://www.ihs.gov/coronavirus/> (last updated Mar. 09, 2023).

<sup>323</sup> Rose Weeks, *New Data Shows COVID-19's Disproportionate Impact on American Indian, Alaska Native Tribes*, JOHNS HOPKINS UNIV. (Oct. 11, 2021), <https://hub.jhu.edu/2021/10/11/map-covid-19-impact-american-indian-population/>.

<sup>324</sup> See Recommendations for ARPA Funding for Tribal Governments, *supra* note 186; see also Henson et al., *supra* note 186.

standing underfunding of federal obligations and responsibilities in Indian Country.”<sup>325</sup>

The CARES Act proved successful, to a certain degree:

to dampen the social and economic harm of the COVID-19 crisis in Indian Country. This is in spite of the fact that the assistance was delivered to the 574 federally recognized Indian tribes only after considerable litigation-driven delay, with counterproductive strings attached, and in a context characterized by long-standing federal government under-funding and neglect[.]<sup>326</sup>

Criticism of the CARES Act focuses on insufficient funding and litigation delays.<sup>327</sup> Litigation delays were partly due to uncertainty as to the intended recipients of funds.<sup>328</sup> Although ARPA has not experienced the same degree of litigation as the CARES act, ARPA still presents the threat of unequal distribution of funds because it favors tribes with robust pre-pandemic economies.<sup>329</sup> These shortcomings of the CARES Act are not reserved for native Alaskan populations.

Groups cite disproportional effects of the COVID-19 pandemic as evidence of the United States’ failure to support indigenous populations.<sup>330</sup> These disproportionalities include the infection rates in Indian populations as compared to state rates.<sup>331</sup> The CDC indicated

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<sup>325</sup> Recommendations for ARPA Funding for Tribal Governments, *supra* note 186.

<sup>326</sup> Eric C. Henson et al., *Federal COVID-19 Response Funding for Tribal Governments: Lessons from the CARES Act*, HARVARD PROJECT ON AM. INDIAN ECON. DEV. (Jul. 24, 2020), [https://ash.harvard.edu/files/ash/files/policy\\_brief\\_5\\_cares\\_act\\_lessons\\_24july2020\\_final\\_for\\_dist.pdf?m=1595612547](https://ash.harvard.edu/files/ash/files/policy_brief_5_cares_act_lessons_24july2020_final_for_dist.pdf?m=1595612547) [hereinafter *Federal COVID-19 Response Funding*].

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Eric C. Henson et al., *Assessing the U.S. Treasury Department’s Allocations of Funding for Tribal Governments under the American Rescue Plan Act of 2021*, HARV. PROJECT ON AM. INDIAN ECON. DEV. (Nov. 3, 2021), [https://ash.harvard.edu/files/ash/files/assessing\\_the\\_u.s.\\_treasury\\_departments\\_allocations\\_of\\_funding\\_for\\_tribal\\_governments.pdf?m=1635972521](https://ash.harvard.edu/files/ash/files/assessing_the_u.s._treasury_departments_allocations_of_funding_for_tribal_governments.pdf?m=1635972521).

<sup>330</sup> Sahir Doshi et al., *The Covid-19 Response in Indian Country*, CTR. FOR AM. PROGRESS (Jun. 18, 2020), <https://www.americanprogress.org/article/covid-19-response-indian-country/>.

<sup>331</sup> *Id.* (citing Navajo Nation Department of Health, “Dikos Ntsaaígíí-19 (COVID-19),” available <https://www.ndoh.navajo-nsn.gov/COVID-19>) (last accessed June 2020).).

that “infection rates were 3.5 times higher for American Indians/Alaska Natives (AI/ANs) compared to White Americans for the first 7 months of the pandemic.”<sup>332</sup>

Canada, on the other hand has had a more involved approach to supporting its indigenous populations throughout the COVID-19 pandemic.<sup>333</sup> The Canadian government worked to provide First Nation communities with essential preventative items such as hand sanitizer, masks, shields, gloves, and medical gowns.<sup>334</sup> The government also funded mobile structures and support for surge health infrastructure.<sup>335</sup> Despite Canadian COVID-19 legislative support, socio-economic issues persist.<sup>336</sup> Indigenous populations still face structural inequalities such as food insecurity, access to water, and healthcare services among others.<sup>337</sup>

Despite the systemic challenges facing Canadian indigenous populations, indigenous populations have remained resilient through innovation and strength.<sup>338</sup> In the initial rollout of COVID-19 vaccines, the Cherokee Nation was “a national leader in vaccine distribution and [] demonstrated its care and protection for Elders.”<sup>339</sup> Some tribes have expanded vaccine rollout to “non-Native community members, family members, and Indigenous peoples

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<sup>332</sup> Victoria M. O’Keefe & Melissa L. Walls, *Indigenous communities demonstrate innovation and strength despite unequal losses during COVID-19*, BROOKINGS (Apr. 2, 2021) <https://www.brookings.edu/blog/how-we-rise/2021/04/02/indigenous-communities-demonstrate-innovation-and-strength-despite-unequal-losses-during-COVID-19/>.

<sup>333</sup> *Coronavirus (COVID-19) and Indigenous Communities: What We are Doing*, GOV’T OF CAN., <https://www.sac-isc.gc.ca/eng/1602703831334/1602703863331> (last modified Mar. 13, 2023).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *What We Heard: Indigenous Peoples and COVID-19: Public Health Agency of Canada’s Companion Report*, GOV’T OF CAN., <https://www.canada.ca/en/public-health/corporate/publications/chief-public-health-officer-reports-state-public-health-canada/from-risk-resilience-equity-approach-covid-19/indigenous-peoples-covid-19-report.html> (last updated Mar. 16, 2021).

<sup>337</sup> *Id.*

<sup>338</sup> O’Keefe & Walls, *supra* note 332.

<sup>339</sup> *Id.*

from Canada.”<sup>340</sup> Furthermore, the sense of community in indigenous populations has driven high vaccination rates.<sup>341</sup>

## V. CONCLUSION

Legal precedent does not vanish; it lingers. As such, historic choices made by governing bodies have lasting effects on the development of future law. In the United States, legal precedent regarding indigenous populations is tangled and confusing.<sup>342</sup> The decision to create two different systems of autonomous communities for indigenous populations—although perhaps of the best intentions—has caused ongoing confusion regarding the rights of those populations. Canada, like the United States, had an ever-evolving legal landscape as it pertained to its indigenous populations. Throughout the 19th and 20th century, the Canadian Indian Act evolved through many acts and amendments.<sup>343</sup> However, despite the layers of changes that have occurred, the deployment of COVID-19 legislative relief to indigenous populations may have been tangled, but it was not confusing.<sup>344</sup>

Canada’s focus on the individual and the United States’ focus on tribes provides differing to establishing proof of identity. The United States requires an indigenous person to establish identity through reliance on their tribe.<sup>345</sup> This allows for individuals to slip through the cracks and creates the need for collective action. Furthermore, this elevates the burden of proof, forcing a population to establish a myriad of factors. Canada’s focus on the individual casts a big net and may stretch and thin resources—but it does not leave individuals

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<sup>340</sup> *Id.*; see also Iris Samuels, *US Tribe Shares Vaccine with Relatives, Neighbors in Canada*, AP NEWS (May 5, 2021), <https://apnews.com/article/montana-canada-coronavirus-pandemic-coronavirus-vaccine-government-and-politics-00e0f7a7ee6e75d7abdb67d03a067f82>.

<sup>341</sup> Caroline Radnofsky et al., *Native Americans Use Culture and Community to Gain Tribes’ Trust in Covid Vaccine*, NBC NEWS, <https://www.nbcnews.com/news/us-news/native-americans-use-culture-community-gain-tribes-trust-covid-vaccine-n1256647> (last updated Feb. 4, 2021, 2:35 PM).

<sup>342</sup> *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434 (2021).

<sup>343</sup> See generally sources cited *supra* note 293.

<sup>344</sup> See generally sources cited *supra* note 293.

<sup>345</sup> See generally 25 C.F.R. §§ 83.10–11 (2015).

behind.<sup>346</sup> Comparing population statistics between the United States and Canada reveals astonishing differences. In 2021, the total aboriginal population in Canada was 1.8 million.<sup>347</sup> The overall population in Canada in 2021 was 36.99 million.<sup>348</sup> In the United States, in 2021, there was an estimated 3.158 million identifying as an American Indian.<sup>349</sup> The overall population in the United States was 331.89 million.<sup>350</sup> When accounting for overall populations of both Canada and the United States, indigenous populations in Canada made up about 4.8 percent of its 2021 population whereas indigenous populations in the United States made up less than one percent of its 2021 population.<sup>351</sup>

It does not take a person in MENSA to understand that the present world exists as a furtherance of our past. Just as a well written book establishes continuity based on preceding chapters, so too does our present rely on our past. Discrimination, inequities, and injustice reverberate today—compounding harm. The only way to address this harm is to redress the issues with knowledge and purpose of who we intend to benefit. The United States has been inconsistent in defining indigenous persons. Rather than define a population intended to receive benefits by recognizing the population’s individual persons, the United States focuses on the group. This requirement establishes a collective action problem which forces a person to be dependent on their group. The United States should open the door to individuals in addition to groups—enabling persons to prove ancestry to receive federal assistance and benefits. There are ways to prevent double-dipping without short-handing the individual. Furthermore, the United States’ definition has changed substantially throughout legislative agendas. While it is unclear if the Federally Recognized List Act of 1994 will stand as an anchoring body—establishing a foundation is one step towards providing consistency.

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<sup>346</sup> *How to Apply for Indian Status*, *supra* note 172.

<sup>347</sup> Canada Census Data 2021, *supra* note 279.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*