REJECTING THE RACIALIZATION OF INDIANNESS†

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INTRODUCTION

In her exemplary article, *Indianness as Property*, Professor Pratt contributes to the long-standing and contentious debate about whether the descendants of Freedmen—formerly enslaved individuals of African descent held by the "Five Civilized Tribes"—should be granted tribal citizenship. As background, the Cherokee, Choctaw, Chickasaw, Muscogee (Creek), and Seminole tribes were labeled "civilized" because they adopted aspects of White culture, including speaking English, converting to Christianity, and embracing an agrarian lifestyle—practices that also included the use of enslaved labor.[1] The enslaved individuals, owned by these tribes and brought to Oklahoma along the Trail of Tears, were classified as "Freedmen" after the Civil War.[2] Most of the Five Tribes deny citizenship to the Freedmen descendants,[3] rousing debates about the inclusiveness of Indian tribal membership.

At the heart of this debate lies a complex interplay between Native identity, sovereign rights, and racial justice. Proponents of extending tribal citizenship to Freedmen descendants highlight their vital role in the history and development of tribal nations and their legal rights based on 1866 treaties with the federal government that required the Five Tribes to grant citizenship to freed slaves and their descendants.[4] They assert that their exclusion perpetuates discrimination

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[1] Carla D. Pratt, *Indianness as Property*, 105 B.U. L. REV. 311, 318-20; *see also* Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 301 (2011) (observing that whether American Indian was deemed "civilized" under law might also depend on whether American Indian had relinquished all or some aspects of tribal national citizenship or was no longer loyal to Indian tribe, but to state or federal government instead).

[2] Ted Shepherd, *Not "Indian" Enough: Freedmen, Jurisdiction, and Equal Protection*, 2024 PEPP. L. REV. 43, 51, 53.

[3] Pratt, *supra* note 1, at 362.

[4] *Id.* at 337; *see also* Treaty with the Seminole Indians, Seminole Nation-U.S., art. II, Mar. 21, 1866, 14 Stat. 755; Treaty with the Choctaws and Chickasaws, Choctaw & Chickasaw Nations-U.S., art. II, Apr. 28, 1866, 14 Stat. 769; Treaty with the Creek Indians, Creek Nation-U.S., art. II, June 14, 1866, 14 Stat. 785; Treaty with the Cherokee Indians, Cherokee Nation-U.S., art. IV, July 19, 1866, 14 Stat. 799.

against African Americans and people of mixed Black and Native heritage. Conversely, critics of Freedmen descendants' inclusion emphasize tribes' sovereign rights to establish citizenship criteria without external influence and the importance of prioritizing ancestral connections as a means of cultural preservation.

Indianness as Property offers valuable historical and legal context to illuminate this ongoing conflict. It builds on Professor Cheryl Harris's groundbreaking scholarship, which proffered that whiteness evolved from a racial identity into a form of "status property," that conferred specific legal rights and social privileges to White individuals.[5] Expanding on this framework, Pratt analyzes how Indianness, like whiteness, has been constructed as a form of property that necessitated the rejection of blackness to enable American Indians to secure and protect legal rights and social benefits.[6] While fully acknowledging and respecting Indian Nations' sovereignty, she implores the Five Tribes to critically examine the historical roots of their resistance to accepting Freedmen descendants, which is grounded in colonial constructions of race and property, and reject the incessant anti-Black ideology that emanates from this construction.

Pratt's exploration of the origins of race-based definitions for "Indian" and tribal citizenship criteria holds significant implications for tribes beyond the Five Tribes. Her critique of the reliance on Indian "blood" to classify individuals for placement on the Dawes "Blood" Rolls or Freedmen Rolls—grounded in unscientific, inaccurate methodologies and discriminatory practices—comes at a pivotal moment. The practice of quantifying Indian "blood" has led to the troubling exclusion of American Indians deemed not "Indian enough," contributing to the decline and potential decimation of tribal populations. Ongoing efforts to combat the exclusionary impacts of the use of blood quantum for tribal membership expose the inherent flaws of "measuring" blood to ascertain tribal eligibility. *Indianness as Property* provides tribes with an opportunity to more critically examine the efficacy of relying on race-based Indian "blood"-related tribal citizenship requirements and consider more inclusive criteria. Her work inspires essential conversations about how citizenship criteria can strengthen tribal sovereignty, honor and preserve tribal cultures and traditions, and safeguard the legacy of Indian tribes.

I. VIEWING THE FREEDMEN CONTROVERSY THROUGH THE LENS OF RACE AND PROPERTY

Pratt provides a powerful and interesting perspective on the deliberate separation of African Americans and American Indians throughout their shared history. In examining fluctuating perceptions of Indianness throughout the past 150-plus years, she exposes the development and reliance on an anti-Black

[5] Pratt, *supra* note 1, at 313; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993).

[6] Pratt, *supra* note 1, at 313.

ideology to obtain certain rights and benefits for American Indians. For example, during the Removal and Reservation Era, when slavery was entrenched in the United States, differentiating Indianness from Blackness enabled individuals to avoid bondage in the form of slavery.[7] Pratt explains the natural tendency for Native Americans to strive to be "free from blackness" during this time period, as federal and state governments employed the "one-drop rule,"[8] which classified any individual with African ancestry as Black, regardless of their Indigenous heritage.[9]

Similarly, during Reconstruction—also known as the "Allotment and Assimilation Era" of federal Indian policy—Indianness conveyed status and entitlement interests that were unavailable to individuals of African American descent.[10] Under the Dawes Act, the federal government formalized a racial hierarchy during the allotment process by creating two separate rolls: the Freedmen Roll, listing formerly enslaved people, and the Blood Roll, listing those deemed racially Indian "by blood," who had never been enslaved.[11] Individuals deemed "racially Indian," often based merely on physical characteristics such as skin tone and hair texture, obtained an elevated status over individuals considered "politically Indian, but racially black" due to their African ancestry.[12]

Pratt asserts that Indianness also became an entitlement property during this period because the federal government distributed land allotments inequitably based on these racial classifications.[13] Some Freedmen received significantly smaller plots,[14] were relegated "land deemed to be the least desirable, usually

[7] *Id.* at 111; William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 21-22 (2002) (citing Mathew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 389 (1998)) ("Although Indian slavery had largely discontinued in favor of African American slavery by the early nineteenth century, Californian Indians, as late as the midnineteenth century, were regularly raided by slave-hunters looking for men to work in mines and women to work in brothels, and extermination befell many who resisted.").

[8] Miller v. Allen, 229 P. 152, 154 (Okla. 1924) ("One drop of slave blood taints the stream, and makes it African in its descent."); *see also* Alberty v. United States, 162 U.S. 499, 501 (1896).

[9] Pratt, *supra* note 1, at 333-34.

[10] *Id.* at 340-41.

[11] *Id.* at 348.

[12] *See id.* at 334.

[13] *Id.* at 342.

[14] The Cherokee, Creek, and Seminole Freedmen received the same size allotments as "blood" members, but the Choctaw and Chickasaw Freedmen received smaller plots. Shepherd, *supra* note 2, at 55-56, 55 n.67 (citing *Select Provisions of the 1866 Reconstruction Treaties Between the United States and Oklahoma Tribes: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 2d Sess. 3 (2022)).

because it was not suited to farming."[15] As a result, "racial Indianness" conferred both social privilege and property interests. These interests continued during the Jim Crow Segregation era because Indianness, as compared to blackness, generally served as legal protection against segregation.[16]

Through this chronicle, Pratt effectively demonstrates that slavery, federal policies, and discriminatory laws made it necessary or advantageous for Native Americans to distinguish themselves from mixed Black-Indigenous peoples and Black Americans. As part of this historical pattern of separating Indianness from blackness, former slaveholding tribes amended their constitutions in the 1970s and 1980s to revoke Freedmen descendants' membership[17] or severely restrict "their rights and access to services."[18] As a result, Black descendants of individuals listed on the Dawes "Freedmen Roll" were excluded from citizenship unless they could provide certified birth and marriage records proving they had a direct tribal ancestor on the Dawes "Blood Roll."[19]

Professor Pratt argues that a property interest in Indianness persists today, as evidenced by the continued marginalization and exclusion of Freedmen's descendants from tribal citizenship.[20] Due to continued marginalization, prejudice, and discrimination of Blacks in America, she acknowledges the natural tendency to want to avoid the societal "taint" of blackness."[21] However, she emphasizes the importance of rejecting essentialist racist ideologies that promulgate the false notions that race is an inherent biological trait instead of a social construct, and that group identity is static, rather than shaped by changing social, political, and historical contexts.[22]

Her examination of the evolving concept of Indianness lays the groundwork for a persuasive argument that Indian tribes should use their sovereign power to reject the indoctrination of anti-blackness ideology and race-based definitions of "Indian."

II. A CALL TO TRIBAL NATIONS TO REINFORCE THEIR SOVEREIGN POWER BY RECLAIMING A NON-RACIALIZED DEFINITION OF INDIAN

Indianness as Property highlights the critical role of tribal sovereignty in reclaiming how "Indian" is defined and establishing tribal citizenship criteria

[15] Pratt, *supra* note 1, at 342.

[16] *Id.* at 353.

[17] Shepherd, *supra* note 2, at 56-57, 56 n. 76 (citing MUSCOGEE NATION CONST. art. III, § 2 (1979)); CHOCTAW NATION CONST. art. II, § 1 (1983); 11 C.N.C.A. § 12 (1983).

[18] *Id.* at 56-57 (citing *Select Provisions of the 1866 Reconstruction Treaties Between the United States and Oklahoma Tribes: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 2d Sess. 3 (2022) (joint prepared statement of Hon. Lewis J. Johnson, Chief, Seminole Nation, and Hon. Brian Thomas Palmer, Assistant Chief, Seminole Nation)).

[19] Pratt, *supra* note 1, at 347-48.

[20] *See id.* at 362-63.

[21] *Id.* at 366.

[22] *See id.* at 158-61.

free from racialized constructs. Pre-contact, Native Nations valued "kinship and community"[23] and "sociocultural inclusiveness."[24] Post-contact, "membership" in Native communities continued to be based on "social and cultural togetherness," and was "not rooted in blood alone."[25] Native concepts of tribal belonging included a combination of factors, including "ancestry, residence, and . . . advocacy on behalf of the tribal nation."[26] The United States honored Indigenous people's view of tribal belonging, recognizing "Indian" as a political designation based on citizenship in Sovereign Tribal Nations.[27] Federal government treaties with Native Americans affirmed the authority of tribes to define who qualified as Indian, which often included mixed-blood individuals and, in some cases, those with little to no Indian blood.[28]

However, after more than a century of recognizing the inherent right of Tribal Nations to accept tribal associations regardless of race or color, the federal government began to force Indian Nations to incorporate and adopt race-based tribal nation membership requirements.[29] As Pratt explains, it was during the allotment and assimilation era—when the federal government sought access to additional Indian lands for White settlers—that the government began scrutinizing individuals' "Indianness."[30] First, under the General Allotment Act of 1887, it divided reservation lands collectively held by Indian tribes, so they could be allocated to individual Indians.[31] It then limited who was designated as Indian and therefore eligible for an allotment under the Curtis Act of 1898,[32] which empowered the Dawes Commission to create membership rolls. This

[23] Ashleigh Lussenden, *Blood Quantum and the Ever-Tightening Chokehold on Tribal Citizenship: The Reproductive Justice Implications of Blood Quantum Requirements*, 111 CALIF. L. REV. 287, 293 (2023).

[24] *Id.* (quoting Ward Churchill, *The Crucible of American Indian Identity: Native Tradition Versus Colonial Imposition in Postconquest North America*, 39 AM. INDIAN CULTURE & RES. J. 41, 41 (1999)).

[25] *Id.* at 294.

[26] Fletcher, *supra* note 1, at 296.

[27] Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-*Adoptive Couple *Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 810 (2017); *see also* Fletcher, *supra* note 1, at 299.

[28] Lussenden, *supra* note 23, at 296.

[29] *Id.* at 297; *see also* Fletcher, *supra* note 1, at 296.

[30] *See* Pratt, *supra* note 1, at 346 ("Because any land left over after the allotment process would be opened up as "surplus lands" for white settlers to take, the federal government, which sought to maintain the existing hierarchy of race and property, had an interest in denying as many Freedmen claims to allotments as possible."); *see also* Lussenden, *supra* note 23, at 297; Rebekah Ross, *Let Indians Decide: How Restricting Border Passage by Blood Quantum Infringes on Tribal Sovereignty*, 96 WASH. L. REV. 311, 316 (2021).

[31] General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358).

[32] *See* The Curtis Act of 1898, ch. 517, 30 Stat. 495.

effectively granted the government authority to determine which members of the Five Tribes were "sufficiently Indian" by using race as the defining measure of Indian identity.[33]

As a result, "the Cherokee, Chickasaw, Choctaw, Seminole, and Muscogee 'identit[ies] [were] socially and politically constructed around hegemonic notions of blood, color, race, and culture.'"[34] These racial classifications were then used to "categorize and quantify" individuals based on physical characteristics grounded in eugenics, a pseudoscience used by Nazis to assess racial superiority.[35] This discounted individuals who asserted that they were half-Indian but displayed phenotypical Black features because their degree of Indian blood was determined based on physical features, with "no exact scientific proof."[36]

In subsequent years, Congress passed additional legislation that eroded the long-standing principle that "Indian" should be defined by Tribes themselves and continued to qualify Indians usiing "Indian blood" as the benchmark. For example, in 1904, land restrictions on the Five Tribes' allotted land were removed for Indians who were "not of Indian blood,"[37] so White settlers could access those lands. And in 1906, Congress redefined "Indian,"[38] thereby "formally introduc[ing] the concept of a minimum amount of 'blood quantum' to maintain one's status as an 'Indian' under federal law."[39] The use of blood quantum rules racialized American Indians, undermined their sovereign rights,[40]

[33] *See* Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241, 1254 (2005) ("Through the creation of the Dawes Roll, the federal government and the [Seminole] tribe collaboratively defined Native American identity utilizing race, rather than culture, as the hallmark of Indian identity.").

[34] Trevion Freeman, *For Freedmen's Sake: The Story of the Native Blacks of the Muscogee Nation and Their Fight for Citizenship Post*-McGirt, 57 TULSA L. REV. 513, 516 (2022) (alterations in original) (quoting Circe Sturm, *Blood Politics, Racial Classification, and Cherokee National Identity*, *in* CONFOUNDING THE COLOR LINE 223, 224 (James F. Brooks ed., 2002)).

[35] Ross, *supra* note 30, at 318.

[36] Freeman, *supra* note 34, at 520; Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 288 (2000) (describing 1936 memo written by the Commissioner of Indian Affairs that emphasized lack of scientific proof in determining degree of Indian blood).

[37] Fain & Nagle, *supra* note 27, at 835 (quoting Act of April 21, 1904, ch. 1402, 33 Stat. 180).

[38] *Id.* at 838 (discussing impacts of Burke Actm ch. 2348, 34 Stat. 182 (1906)).

[39] *Id.* at 836 (citing Act of May 27, 1908, ch. 199, 35 Stat. 312).

[40] Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 808 (2008).

and limited the number of individuals who could be identified as Indian, a "significant step in the federal attempt to eliminate Tribal Nations altogether."[41]

When Congress ended allotment, it instituted a definition of American Indian that maintained blood quantum by requiring half-Indian blood.[42] However, it also reverted to its position of deference to tribes on membership criteria under the Indian Reorganization Act of 1934 ("IRA").[43] Since then, Congress has generally recognized the inherent right of Tribal Nations "to define their own rules and regulations regarding who qualifies for citizenship in a Nation—regardless of blood quantum."[44] The U.S. Supreme Court has affirmed this right, emphasizing that a tribe's ability "to define its own membership for tribal purposes . . . [is] central to its existence as an independent political community."[45]

Thus, no uniform requirement for tribal enrollment exists across Tribes,[46] as a critical feature of sovereignty is that each of the 574 federally recognized Tribal Nations establishes its own criteria for determining who qualifies as Indian for citizenship.[47]

III. TRIBAL NATIONS CAN REJECT THE USE OF INDIAN "BLOOD" AS THE PRIMARY CRITERION FOR TRIBAL CITIZENSHIP

Tribal governments utilize a variety of ways to determine citizenship for their nations but generally base eligibility on lineal descent from an ancestor on the base roll of the Tribe or blood quantum,[48] a percentage of Indian "blood."[49] The

[41] Fain & Nagle, *supra* note 27, at 824 (citing Ryan W. Schmidt, *American Identity and Blood Quantum in the 21st Century: A Critical Review*, J. ANTHROPOLOGY, 2011, at 6-7, https://onlinelibrary.wiley.com/doi/pdf/10.1155/2011/549521).

[42] 25 U.S.C. § 479; Fletcher, *supra* note 1, at 302.

[43] Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2012)); Lussenden, *supra* note 23, at 298.

[44] Fain & Nagle, *supra* note 27, at 805 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978)).

[45] Freeman, *supra* note 34, at 521 (alteration in original) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 36 (1978)).

[46] Avery Locklear, *Are You Native American?*, 100 N.C. L. REV. F. 118, 142 (2022) (citing *Tribal Enrollment Process*, U.S. DEP'T INTERIOR, https://www.doi.gov/tribes/enrollment [https://perma.cc/X286-XJ5F] (last visited Mar. 2, 2025) ("Tribal enrollment requirements preserve the unique character and traditions of each tribe. The tribes establish membership criteria based on shared customs, traditions, language and tribal blood. . . . The criterion varies from tribe to tribe, so uniform membership requirements do not exist.")).

[47] *See* Freeman, *supra* note 34, at 519.

[48] *Tribal Enrollment Process*, U.S. DEP'T INTERIOR, https://www.doi.gov/tribes/enrollment [https://perma.cc/X286-XJ5F] (last visited Mar. 2, 2025).

[49] William O. Carson, Felina M. Cordova-Marks & SR Carroll, *Exploring the Historical Complexities of Native Identity Formation, Blood Quantum, and Modern Tribal Enrolment Criteria*, 8 J. GLOB. INDIGENEITY 3 (Apr. 23, 2024), https://www.journalofglobalindigeneity.com/article/116431-exploring-the-historical-complexities-of-native-identity-

percentage of Indian or Alaskan Native blood possessed by a person is identified through a Certificate of Degree of Indian or Alaskan Native Blood ("CDIB"). It may include different tribal "blood" percentages or "only state the amount of blood of a specific tribe," and is certified by the Bureau of Indian Affairs ("BIA") or an authorized tribal official.[50]

The Five Tribes use lineal descent, but some also require a CDIB that shows a percentage of tribal blood as part of their tribal membership qualifications. For example, the Choctaw and Chickasaw Nations require lineage to an original enrollee listed on the Dawes Rolls, but a CDIB is a prerequisite to applying for citizenship within these tribes.[51] Neither tribe enrolls nor formally recognizes Freedmen descendants.[52]

Similarly, the Seminole Nation of Oklahoma uses lineal descent,[53] but also requires a CDIB for "Tribal Membership"[54] that verifies the blood quantum of applicants.[55] It offers a separate application for "Freedmen Citizenship," which does not require a CDIB with a blood quantum, but Freedmen descendants must produce "An Unbroken chain of Original Certified Birth or Death certificates

formation-blood-quantum-and-modern-tribal-enrolment-criteria. Other criteria exist as well, including residency, which often requires a member to both live on Tribal land and be of lineal descent. *Id.* at 5 ("The most utilized methods for enrolment are BQ based, lineal descent from an ancestor on the base roll of the Tribe, and residency, which means a Native Nation requires a member to live on Tribal land as well as be of lineal descent.").

[50] Paul Strahan, *CDIB: The Role of the Certificate of Degree of Indian Blood in Defining Native American Legal Identity*, 6 AM. INDIAN L.J. 169, 170 n.4 (2018) (citing *CDIB & Tribal Membership, Frequently Requested Information*, CHOCTAW NATION, https://www.choctawnation.com/sites/default/files/Frequently%20Requested%20Information%20CDIB%20%26%20Tribal%20Membership.pdf. [https://perma.cc/TJ4N-KBH6]) ("[T]he Choctaw Nation of Oklahoma will issue a CDIB with tribal blood from other "Five Civilized Tribes" in addition to Choctaw blood . . . .").

[51] *See Tribal Membership and CDIB*, CHOCTAW NATION OF OKLA., https://www.choctawnation.com/services/tribal-membership/ [https://perma.cc/2NS7-9F6J] (last visited Mar. 2, 2025); *Chickasaw Citizenship*, CHICKASAW NATION, https://chickasaw.net/Our-Nation/Government/Tribal-Government-Services/Chickasaw-Citizenship.aspx [https://perma.cc/J3FQ-LACZ] (last visited Mar. 2, 2025).

[52] B. 'Toastie' Oaster, *7 Questions About Freedmen Answered*, HIGH COUNTRY NEWS (Oct. 11, 2021), https://www.hcn.org/articles/indigenous-affairs-communities-7-questions-about-freedmen-answered/ [https://perma.cc/MLE7-8X9T].

[53] SEMINOLE NATION OF OKLA. CONST. art. II ("The membership of this body shall consist of all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 137) and their descendants.").

[54] *Tribal Enrollment*, GREAT SEMINOLE NATION OF OKLA., https://www.sno-nsn.org/getpage.php?name=Tribal_Enrollment (last visited Mar. 2, 2025).

[55] Mary Pierpoint, *Seminole Nation Changes Tribal Enrollment*, INDIAN COUNTRY TODAY, https://ictnews.org/archive/seminole-nation-changes-tribal-enrollment (last updated Sep. 12, 2018) ("[T]ribal members voted to require a one-eighth quantum of Seminole blood as a part of enrollment requirements.").

from the applicant to the Enrollee of the Final Roll of 1906."[56] Based on this tribal membership and Freedmen citizenship distinction, it considers Freedmen descendants "enrolled tribal *citizens*," but not members entitled to full rights.[57]

The Muscogee (Creek) Nation requires citizenship applicants to be "Creek by Blood" and trace back to a direct ancestor listed on the 1906 Dawes Roll,[58] so it does not enroll or formally recognize Freedmen descendants.[59] Only the Cherokee Nation of Oklahoma enrolls and fully recognizes the rights of Freedmen descendants.[60]

Therefore, almost all of the Five Tribes require proof of a Native ancestor listed on the "Blood Roll" (as opposed to Freedmen's Roll) for full citizenship rights and a CDIB identifying a specific blood quantum.[61] This combination of requirements forecloses citizenship to the vast majority of Freedmen descendants. Although blood quantum criteria "does not detail the full story of the Creek Freedmen,"[62] it has "the most impact" on their exclusion from membership in the Five Tribes.[63]

Certainly, eliminating or reducing reliance on "blood" in either form—lineal descent to an individual listed on a "Blood Roll" or blood quantum as shown on a CDIB—would pave the way for inclusion of Freedmen descendants. For instance, once the Cherokee Nation struck the term "by blood" from its legal

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[56] *Re: Freedman Citizenship Requirements*, GREAT SEMINOLE NATION OF OKLA., https://www.sno-nsn.org/docs/FreedmanCitizenshipApp.pdf (last visited Mar. 2, 2025.)

[57] Oaster, *supra* note 52 (emphasis added).

[58] *MCN Citizenship Office*, MUSCOGEE NATION, https://www.muscogeenation.com/citizenship/ [https://perma.cc/9DLR-C2XG] (last visited Mar. 2, 2025) ("The criteria for Citizenship is that you must be Creek by Blood and trace back to a direct ancestor listed on the 1906 Dawes Roll by issuance of birth and/or death certificates.").

[59] *See id. But see* Sean Murphy, *Muscogee Nation Judge Rules in Favor of Citizenship for Slave Descendants Known as Freedman*, AP, https://apnews.com/article/muscogee-creek-tribe-freedmen-slaves-citizenship-c8b461db1b5d792654cf5620777fed7b (last updated Sept. 28, 2023, 4:02 PM) ("A judge for the Muscogee (Creek) Nation in Oklahoma ruled in favor of citizenship for two descendants of Black slaves once owned by tribal members, potentially paving the way for hundreds of other descendants known as freedmen.").

[60] *Tribal Registration*, CHEROKEE NATION, https://www.cherokee.org/all-services/tribal-registration/ [https://perma.cc/Z397-GG3K] (last visited Mar. 2, 2025) ("The basic criteria for CDIB/Cherokee Nation tribal citizenship is that an application must be submitted along with documents that directly connect a person to an enrolled lineal ancestor who is listed on the 'Dawes Roll' Final Rolls of Citizens and Freedman of the Five Civilized Tribes.").

[61] The only exception is the Cherokee Nation, which removed its "blood" requirement in 2021 after significant legal battles, enabling about 8,500 Freedmen descendants to enroll. Harmeet Kaur, *The Cherokee Nation Acknowledges that Descendants of People Once Enslaved by the Tribe Should Also Qualify as Cherokee*, CNN, https://www.cnn.com/2021/02/25/us/cherokee-nation-ruling-freedmen-citizenship-trnd/index.html (last updated Feb. 25, 2021, 8:53 PM).

[62] Freeman, *supra* note 34, at 520.

[63] *Id.* at 519.

documents in 2021, about 8,500 Freedmen descendants were able to enroll as citizens.[64] The Cherokee Nation Supreme Court Justice Shawna S. Baker described the words "by blood" as "a relic of a painful and ugly, racial past,"[65] and stated that the term itself and "laws which flow from that language" are "illegal, obsolete, and repugnant to the ideal of liberty."[66] Deb Haaland, the former Secretary of the Interior and first Native American to serve in that role, commented that by granting equal status to the Freedmen, the Cherokee Nation fulfilled "their obligations to the Cherokee Freedmen" and encouraged "other Tribes to take similar steps to meet their moral and legal obligations to the Freedmen."[67]

Pratt's argument that the remaining four of the Five Tribes should reject the notion that Freedmen's descendants are ineligible for citizenship due to a lack of "racially Indian" status[68] has implications for other tribes who are reevaluating the relevance, utility, and effectiveness of blood quantum as the primary criterion for tribal membership. Her analysis underscores the importance of adopting alternate tribal citizenship criteria to blood quantum, as the concept of "measuring" Indian "blood" is fraught with duplicity, inaccuracies, and inconsistencies. Tribal Nations beyond the Five Tribes can significantly benefit from rejecting race-based "blood" measures and adopting more inclusive criteria that strengthen tribal sovereignty, increase membership, and preserve tribal culture and traditions to help Indian Nations remain resilient.

IV. PAVING THE WAY FOR TRIBAL PERSEVERANCE BY CONFRONTING CHALLENGES POSED BY BLOOD QUANTUM CRITERIA

Even though blood quantum was used as a mechanism to eviscerate Indigenous populations, most Tribal Nations adopted its use to determine eligibility for tribal citizenship and require some percentage of blood quantum.[69]

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[64] Kaur, *supra* note 61.

[65] Mary Louise Kelley & Farah Eltohamy, *Cherokee Nation Strikes Down Language that Limits Citizenship Rights 'By Blood,'* NPR (Feb. 25, 2021, 2:06 PM), https://www.npr.org/2021/02/25/971084455/cherokee-nation-strikes-down-language-that-limits-citizenship-rights-by-blood [https://perma.cc/LN6U-JZQZ].

[66] Effect of Cherokee Nation v. Nash, No. SC-17-07, 2021 WL 2011566, at *4 (Cherokee Sup. Ct. Feb. 22, 2021).

[67] Chris Cameron & Mark Walker, *Tribes to Confront Bias Against Descendants of Enslaved People*, N.Y. TIMES (May 28, 2021), https://www.nytimes.com/2021/05/28/us/politics/freedmen-citizenship.html.

[68] *See* Pratt, *supra* note 1, at 362.

[69] Lussenden, *supra* note 23, at 289 (citing DAVID WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 58 (2017)); *Blood Quantum and Sovereignty: A Guide*, NATIVE GOVERNANCE CTR., https://nativegov.org/resources/blood-quantum-and-sovereignty-a-guide/ [https://perma.cc/9JZ9-TU7B] (last visited Mar. 2, 2025).

Approximately 70% of Tribes use some level of blood quantum,[70] with most requiring a minimum of one-quarter Native ancestry and others mandating thresholds of one-half or one-eighth.[71]

The use of blood quantum as a requirement for tribal citizenship has been described as a "polarizing issue" for tribal citizens,[72] and one that is "complicated, controversial, and personal."[73] Proponents argue that blood quantum is essential for preserving cultural identity, maintaining tribal norms, safeguarding traditions, and honoring ancestral connections.[74] Others voice concern about resource allocation. Because Indian tribes offer government services to tribal members, such as health and public safety, housing and utilities, and justice systems, some tribal members worry that relaxing or eliminating blood quantum rules could further strain these resources.[75] In addition, due to the fact that tribal membership is often a condition for federal, tribal, and some state services, expanding membership could intensify competition for limited educational scholarships, employment and housing programs, healthcare, and per capita payments.[76]

Additionally, tribes may fear losing control. Some feel apprehensive about broader inclusion, believing that "outsiders" would assume influential roles in tribal governance or sell tribal lands, jeopardizing tribal autonomy and cultural integrity.[77] Finally, for some, blood quantum criteria simply provide consistency and continuity, and the bureaucracy involved in overhauling citizenship criteria does not seem worthwhile.

On the other hand, opponents of blood quantum believe reducing reliance or eliminating blood quantum criteria is a critical step toward restoring Indian cultural identity and sovereignty. They contend that its use "conflicts with traditional Indigenous ideas about kinship, citizenship, and belonging" and maintains criteria used by the federal government "as a tool for genocide, removal, and erasure."[78] Indeed, historically, Indigenous people emphasized kinship, shared culture, language, and communal responsibilities rather than blood. The federal government began utilizing blood quantum requirements to

[70] NATIVE GOVERNANCE CTR., *supra* note 69.

[71] Lussenden, *supra* note 23, at 293 n.18 (citing DAVID WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 58 (2017)).

[72] Cameron & Walker, *supra* note 67.

[73] NATIVE GOVERNANCE CTR., *supra* note 69.

[74] *See id.*

[75] *See id.*

[76] *See id.*; *see also* Fletcher, *supra* note 1, at 302 ("In recent decades, tribal membership is the key indicator of whether or not an American Indian qualifies for federal, tribal, and, to a lesser extent, state services such as educational scholarships, preference in employment and housing, and health care.").

[77] NATIVE GOVERNANCE CTR., *supra* note 69.

[78] *Id.*

justify "forced assimilation" and land expropriation.[79] It enforced the use of minimum blood quantum from 1887 through the 1950s to: (1) reduce the number of people to whom it owned a trust responsibility; (2) transfer millions of acres of Tribal land to non-Indian owners; and (3) promote the "wholesale termination of federal recognition of entire Tribes."[80] Sadly, if blood quantum is "part of an insidious plan to eradicate the Native American, it is slowly having the desired effect."[81]

While less relevant for larger tribes like the Cherokee[82] or Muscogee,[83] small tribes face rapidly declining populations due to their reliance on blood quantum for citizenship. Opponents of blood quantum requirements believe tribes must adopt less restrictive criteria to increase membership and resilience because blood quantum acts as "a tool for genocide" by gradually reducing the number of individuals who qualify for citizenship[84] until Indigenous people "cease to exist."[85] For example, an assessment of Red Lake Nation's population trajectory found that without a significant change to its one-quarter blood quantum criteria, Red Lake, like many tribes across the nation, faces a catastrophic population loss in the near future.[86]

To avoid the calamitous potential of tribal extinction, some tribes "are eliminating blood quantum requirements entirely and using lineal descent."[87]

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[79] Locklear, *supra* note 46, at 146 (quoting Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, WASH. L. REV. 1041, 1043 (2012)).

[80] Fain & Nagle, *supra* note 27, at 803-04.

[81] Andrea Appleton, *Blood Quantum*, HIGH COUNTRY NEWS (Jan. 13, 2009), https://www.hcn.org/issues/41-1/blood-quantum/ [https://perma.cc/7BLK-2B4J] ("Based on current requirements, most tribes will have no new eligible members in 50 years, and many will cease to exist within a century.").

[82] The Cherokee have 450,000 enrolled citizens. CHEROKEE NATION, https://www.cherokee.org/ [https://perma.cc/J3AM-GYS3] (last visited Mar. 2, 2025) ("Today, the Cherokee Nation is the largest tribe in the United States with more than 450,000 tribal citizens worldwide.").

[83] The Muscogee Tribe has over 100,000 members. MUSCOGEE NATION https://www.muscogeenation.com/ [https://perma.cc/5HG6-NBXA] (last visited Mar. 2, 2025) ("MCN is . . . the fourth largest tribe in the U.S. with 100,766 citizens.").

[84] NATIVE GOVERNANCE CTR., *supra* note 69.

[85] Jerri L. Cook, *The Space Between Birthright and Blood Quantum*, 97 WIS. LAW. 20, 22 (2024).

[86] NICOLE MARTINROGERS, ANNA GRANIAS & CAROLYN LIEBLER, RED LAKE NATION: POPULATION PROJECTIONS, CORRECTED, AMHERST H. WILDER FOUND. 3 (2024), https://www.wilder.org/sites/default/files/imports/RedLake_PopulationProjections_5-24.pdf [https://perma.cc/NW8G-J2F9] ("Leaving the tribal enrollment criteria as is, the projected enrolled population declines from just over 16,000 in 2022 to around 2,600 people in 2122."); Mathew Holding Eagle III, *Red Lake Nation Considers a Future Without Tribal Blood Requirement*, SAHAN J. (Jan. 4, 2023), https://sahanjournal.com/news-partners/red-lake-nation-considers-future-without-tribal-blood-requirement/ [https://perma.cc/XFC5-VKZ4].

[87] NATIVE GOVERNANCE CTR., *supra* note 69.

For example, the St. Croix Tribe of Chippewa, one of the few remaining Tribal nations that required one-half blood quantum, "risked extinction" because more than half of its membership was over age fifty-five.[88] Therefore, in 2023, it voted to remove its blood quantum requirement in favor of lineal descendancy to an enrolled St. Croix parent.[89]

Other tribes have increased the number of individuals who are eligible for tribal citizenship[90] by "lowering blood quantum requirements and/or allowing prospective citizens to count blood from other Native nations in their calculations."[91] These adjustments are necessary because thousands of Native Americans are not considered "Indian" enough to enroll in tribes due to "dilution" of their bloodlines.[92] This has partly been caused by migration and relocation away from tribal land, resulting in increased Native and non-Native marriages so that many Indians "identify as multiple races or multiple tribes."[93] Furthermore, because they likely possess one-half or less blood quantum, it is unlikely that their children will qualify for membership.[94] The relocation to urban areas also results in fewer tribal members of reproductive age remaining on tribal land, so finding partners to have children with and preserve the necessary blood quantum is proving increasingly difficult.[95]

The reality is that the "modern-day Indian" is "the result of historical changes such as 'geographic movement,' adoption of outside culture, and racial mixing."[96] Some tribal members voice frustration that tribes have not adapted to changing times by altering or eliminating stringent blood quantum requirements that limit their marriage prospects, potentially excluding their future children from citizenship. For example, Leah Myers' Jamestown S'Klallam Tribe

[88] St. Croix Chippewa Indians of Wisconsin, *St. Croix Tribe of Chippewa Votes to Remove 'Blood Quantum' Requirement, Update Constitution*, ST. CROIX 360 (Nov. 27, 2023), https://www.stcroix360.com/2023/11/st-croix-tribe-of-chippewa-votes-to-remove-blood-quantum-requirement-updates-constitution/ [https://perma.cc/3GTS-SVKL].

[89] *Id.*

[90] NATIVE GOVERNANCE CTR., *supra* note 69 ("[S]ome nations are lowering blood quantum requirements and/or allowing prospective citizens to count blood from other Native nations in their calculations. Others are eliminating blood quantum requirements entirely and using lineal descent (or sometimes, more specifically, patrilineal or matrilineal descent) to define membership.").

[91] *Id.*

[92] Appleton, *supra* note 81 ("Thousands of Native Americans are not enrolled in their tribes because their bloodlines have become diluted over the years.").

[93] Lussenden, *supra* note 23, at 306.

[94] *Id.*

[95] *Id.* at 304, 306.

[96] Locklear, *supra* note 46, at 144 (quoting MALINDA MAYNOR LOWERY, LUMBEE INDIANS IN THE JIM CROW SOUTH: RACE, IDENTITY, AND THE MAKING OF A NATION, at xii (2010)).

requires one-eighth blood.[97] She explained that her tribe, which has fewer than 600 members, is facing imminent cultural extinction if blood quantum laws stay in place, and unless she has children with another citizen of her tribe, her children will be ineligible for membership.[98] Without children with the requisite blood quantum, generational membership in Tribal Nations will be discontinued.[99]

This is the unfortunate experience of Michael Irvine, a member of the Confederated Salish and Kootenai Tribes.[100] Although he has fond memories of hunting on tribal land with his father and would like to pass this tradition on to his daughter, she will not be permitted to hunt on the Flathead Indian Reservation once she turns eighteen because she is one-sixteenth short in blood quantum to qualify for citizenship in his tribe. He sadly commented that "she can't put into practice what she learns in our own home . . . . That is how traditions die."[101]

When young American Indians lack eligibility for tribal citizenship based on what they view as an arbitrary "blood" percentage, they feel devalued and dejected, causing them to disengage from participation in tribal events and programs.[102] Therefore, although blood quantum is maintained by tribes as a means of cultural preservation, tribes actually "lose out" on creating new memories and stories that could be passed down to future generations.[103]

Accordingly, blood quantum has been described as "a knife that cuts both ways": it may preserve strict ancestral lineage, but it also jeopardizes the long-term survival of tribes.[104] It threatens their very existence due to decreases in the number of people who can qualify by having a sufficient percentage of Indian blood. As sovereign nations, tribes must confront this troubling and existential issue and determine how tribal citizenship requirements can be altered to ensure their continued survival.

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[97] Leah Myers, *Blood-Quantum Laws Are Splintering My Tribe*, ATLANTIC, (June 21, 2023), https://www.theatlantic.com/family/archive/2023/06/blood-quantum-laws-native-american-tribal-communities/674461/ [https://perma.cc/V3YX-2TFF].

[98] *Id.*

[99] *See* Lussenden, *supra* note 23, at 304-05.

[100] Tailyr Irvine, *Reservation Mathematics: Navigating Love in Native America*, NAT'L MUSEUM OF THE AM. INDIAN, https://americanindian.si.edu/developingstories/irvine.html [https://perma.cc/A64M-49B3] (last visited Mar. 2, 2025) (describing how child of Indian couple will not qualify for membership in certain tribes).

[101] *Id.*

[102] Myers, *supra* note 97.

[103] *Id.*

[104] Stanford Graduate Sch. of Bus., *Blood Quantum: A Knife that Cuts Both Ways*, YOUTUBE (Apr. 8, 2023), https://www.youtube.com/watch?v=-iqZOqHSzM4 [https://perma.cc/RQR4-U6MJ].

V. DEVELOPING CRITERIA THAT REINFORCE TRIBAL CONNECTIONS AND PROTECT TRIBALISM

As sovereign entities with the inherent right to self-governance,[105] Tribal Nations have the authority to decide whether—and to what extent—blood quantum should factor into citizenship requirements. This political autonomy is "consistent with the federal policy of self-determination,"[106] empowering tribes to weigh the benefits and drawbacks of blood quantum criteria, assess whether these standards align with their cultural and political priorities, and amend or eliminate blood quantum requirements to advance tribal sovereignty. Doing so will enable them to better reflect tribes' historical, traditional, and communal values and respond to their evolving needs.

Other nations, including the United States and Canada, use varied citizenship criteria, including age, residency, character fitness, knowledge of language, government, and history, and allegiance to the nation, without "blood" requirements. As Professor Matthew Fletcher noted, Indian Nations can also develop tribal citizenship criteria that exclude "blood" as the sole or primary qualification for membership.[107] In fact, he has noted that to evolve from tribes "into Indian nations," membership criteria should be broadened beyond "purely race and ancestral-based rules."[108]

In *Indianness as Property*, Pratt calls on tribes to rid themselves of the notion that Freedmen's descendants are ineligible for citizenship due to a lack of "racially Indian" status or the inability prove "blood" connections.[109] She proposes broadening the citizenship qualifications for the Five Tribes to include Freedmen descendants based on their historical and sovereign connections to the tribes.[110]

Focusing on tribal connections is essential when establishing criteria to replace race-based requirements because, although it might seem obvious, tribes must remain tribes. Throughout history, numerous assimilation strategies have been designed and employed to solve the "Indian problem" by systematically

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[105] *Id.*; *see also* Lussenden, *supra* note 23, at 292; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978) (granting tribes power to determine citizenship requirements). *But see* Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 140 (D.D.C. 2017), *enforced sub nom*. In re Effect of Cherokee Nation v. Nash, No. SC-17-07, 2017 WL 10057514 (Cherokee Sup. Ct. Sept. 1, 2017), *judgment entered sub nom.* Effect of Cherokee Nation v. Nash, No. SC-17-07, 2021 WL 2011566 (Cherokee Sup. Ct. Feb. 22, 2021) (holding Cherokee Nation must extend citizenship to the Freedmen).

[106] Ross, *supra* note 30, at 339-40.

[107] Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 12 (2012).

[108] *Id.*

[109] Pratt, *supra* note 1, at 161-62.

[110] *Id.*

and deliberately stripping tribes of their land, children, and cultures.[111] Separatism[112] and tribalism helped thwart assimilation, preserve tribal languages, cultures, and traditions, and prevent the extinction of many Indian tribes.[113] Today, cultural identity remains relevant, as "Indian tribes are at their best when protecting and preserving tribal cultures — ceremonies and language — and concomitant treaty rights."[114]

Therefore, replacing race-based standards—"Blood" Roll lineage or blood quantum—requires instituting criteria focused on meaningful tribal connections. This could include historical or sovereign connections as recommended by Pratt for Freedmen Roll descendants, or cultural and familial ties for relatives of tribal citizens who do not meet blood percentage thresholds. Revised criteria should, foremost, be determined by each tribe and embody its shared values and beliefs, as well as its customs, culture, and traditions that can be preserved and passed down to future generations. By promoting tribal spirit and fostering a strong sense of community, these non-race-based criteria can help safeguard each tribe's unique historical and cultural heritage while ensuring its resilience and continuity.

CONCLUSION

Pratt's thorough research and insightful scholarship illuminate the historical context behind some tribes' reluctance or outright refusal to grant tribal citizenship to Freedmen descendants. By shedding light on the complexities underlying this conflict, Pratt promotes understanding, inspires meaningful change, and encourages greater acceptance of Freedmen descendants within tribal communities. Her argument to redefine Indian identity as a political identity untethered to the social construct of race to "liberate tribes from the property paradigm of Indianness and strengthen tribal sovereignty"[115] has implications beyond the Five Tribes. Eliminating requirements of lineal descent to "Blood Rolls" or blood quantum, and incorporating criteria focused on tribal connections, would pave the way for inclusion of both Freedmen descendants and family members of current citizens who fall short of blood quantum requirements. Moreover, focusing on tribal connections can strengthen tribal sovereignty, honor and preserve tribal cultures and traditions, and safeguard the enduring legacy of Indian tribes.

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[111] *See* Andrea Jane Martin, *Beyond* Brackeen*: Active Efforts Toward Antiracist Child Welfare Policy*, 42 YALE L. & POL'Y REV. 42, 48-49 (2023); H.R. REP. NO. 104-808, at 15 (1996) (demonstrating pattern of forced assimilation).

[112] *See generally* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987) (explaining desire of tribes to maintain "measured separatism" and avoid assimilation).

[113] Fletcher, *supra* note 107, at 8-9.

[114] *Id.* at 9.

[115] Pratt, *supra* note 1, at 318.