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AVOIDING EXTINCTION, PRESERVING CULTURE: SUSTAINABLE, SOVEREIGNTY-CENTERED TRIBAL CITIZENSHIP REQUIREMENTS

MICHAEL D. OESER*

ABSTRACT

Tribal populations are dwindling. These losses are primarily the result of high blood quantum requirements and high levels of inter-marriage with non-Indians. Consequently, tribes will eventually face either legal extinction—where no one can meet the tribal’s citizenship criteria—or practical extinction—where few tribal citizens have any significant connection to or knowledge of the tribe. Existing commentary compounds the problem by never basing its analysis of citizenship *within* the tribal context on the rich body of citizenship theory and history that exists *outside* the tribal context. This myopia forecloses a host of useful, sustainable options validated by centuries of use. Failing to incorporate basic citizenship theory and history into tribal approaches leaves tribes in a Wonderland where the agreed, intuitive ethics of citizenship becomes alien to Indian law. Tribes and individual Indians are left in a results-oriented carnival fun house, where ideas like citizenship are continually manipulated by non-Indian authorities in self-serving ways, unmoored from any unifying ethical principle. This article seeks to reconnect the topic of tribal citizenship with broader, fundamental citizenship principles and history and suggests some alternative approaches to tribal citizenship based on that analysis.

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I. INTRODUCTION

Who is “Indian”? Everyone—Indian and non-Indian alike—has an answer. These answers usually speak in ancestral or cultural terms. Unfortunately, these ancestral and cultural answers have been used clumsily to respond to a related, but different, question: “Who is a tribal citizen?”¹

1. People usually use the word “membership” when talking about the status of being part of a tribe. However, “membership” could refer to being *politically* part of a tribe, *genealogically* part of a tribe, or *culturally* part of a tribe. Moreover, using the term “membership” in relation to a “tribe” disrespects tribes’ status as sovereigns. Sovereigns do not have members; they have citizens. Some might feel that such distinctions are semantics, but such semantics have been part and parcel of the loss of sovereignty tribes have suffered. Tribe’s sovereign rights were seen as inherent at one point in time; now they appear largely delegated from the federal government, in substance if not in name. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 212 (1978) (Marshall, J., & Burger, C.J., dissenting); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975); *Powers of Indian Tribes*, 55 I.D. 14, 57 (1934), *overruled by 77 I.D.* 49. Similar semantics have led to tribal sovereignty now being a quaint, “platonic” anachronism, a “backdrop” to state and federal interests, which now take center stage. *McClanahan v. Arizona*, 411 U.S. 164, 172 (1973) (“Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.” (citation omitted)); *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Proponents of tribal sovereignty should stick to the term “citizen” and correct any contrary usages.

Answers to the citizenship question need to speak to a person's political identity, as opposed to ancestral or cultural identity.

In order to answer the tribal citizenship question well, one must understand the subtle differences between ancestral identity, political identity, and cultural identity. For instance, when Daniel Snyder, owner of the Washington, D.C. NFL franchise, wanted to show support for his team's name among "Native Americans," he seized on a ten-year-old survey that asked respondents if they were "Native American."² If a respondent self-identified by answering "yes," that respondent was then asked if the team's name bothered them.³ The problem is the initial question makes no distinction between people who answer "yes" because they have an Indian ancestor, "yes" because they are tribal citizens, or "yes" because they were "raised" Indian. Clearly there are far more people who have some distant Indian ancestor than there are people that have some substantial, cultural connection to a tribe. Critics of the survey point out many people likely answered the survey based on alleged ancestry, but they have no other connection to a tribe and do not identify with a tribe culturally.⁴ The fairly obvious conclusion is that Snyder used this particular survey because the vast majority of the people surveyed were not Indian in any meaningful sense and the results did not reflect the opinions of people who actually were Indian. A better survey would focus on tribal citizens, reservation residents, or both⁵ and probably would have had a far different result.

Precision is vital. A tribe's answer to the citizenship question affects everything in tribal law and federal Indian law—the authority of the tribal

2. *Letter from Washington Redskins Owner Dan Snyder to Fans*, WASH. POST (Oct. 9, 2013), http://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html. Many tribal members are critical of "self identification" as a means of determining "Indianness." Dean Chavers, *5 Fake Indians: Checking A Box Doesn't Make You Native*, INDIAN COUNTRY TODAY (Oct. 15, 2014), <http://indiancountrytodaymedianetwork.com/2014/10/15/5-fake-indians-checking-box-doesnt-make-you-native-157179>; see also Comments to *5 Fake Indians: Checking A Box Doesn't Make You Native*, INDIAN COUNTRY TODAY (Oct. 15, 2014), <http://indiancountrytodaymedia.network.com/2014/10/15/5-fake-indians-checking-box-doesnt-make-you-native-157179>.

3. Press Release, National Annenberg Election Survey, Most Indians Say Name of Washington "Redskins" Is Acceptable While 9 Percent Call It Offensive, Annenberg Data Show (Sept. 24, 2004), <http://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/200403redskins-09-24pr2.pdf>.

4. Natasha Dhillon, Justin Hemmings, Maggie Scales, & William Stanley, *11 Reasons to Ignore the 10-Year-Old Annenberg Survey About the Washington Football Team's Offensive Name*, WASH. COLLEGE OF LAW: INTEL. PROP. CLINIC (Feb. 11, 2014), <http://ipclinic.org/2014/02/11/11-reasons-to-ignore-the-10-year-old-annenberg-survey-about-the-washington-football-teams-offensive-name/>.

5. Robert McCartney, *We Need a Fresh, Reliable Opinion Poll to Show What Indians Today Think of 'Redskins' Name*, WASH. POST (Feb. 19, 2014), http://www.washingtonpost.com/local/we-need-a-fresh-reliable-opinion-poll-to-show-what-indians-today-think-of-redskins-name/2014/02/19/6afdb02c-99a0-11e3-b88d-f36c07223d88_story.html.

government to govern its citizens, the authority of the tribal government to govern its territory, the resources it has available to manifest tribal authority, the relationship of the tribe to the state, and the relationship of the tribe to the federal government. The answer to the citizenship question constitutes the foundation of sovereignty because citizens are the foundation of the sovereign.⁶ Without a good answer to this question, tribes will continue to lose authority over their homelands and quite possibly vanish in any meaningful sense.⁷

Unfortunately, the legal scholarship about tribal citizenship never grounds its analysis in the rich body of citizenship theory and history that exists outside the tribal context. Tribal issues, including citizenship, are regularly treated as if they exist in a vacuum. Scholars, practitioners, and tribal leaders often seem to assume that exclusive use of minimum blood quantum and lineal descent are the only legitimate alternatives. This myopia not only forecloses a host of useful, sustainable options, it has Indian people misconstruing their own history, or worse, disregarding it as illegitimate.

Many analyses of tribal issues buy into the idea that problems facing tribal populations are somehow unique in a way that makes reference to the common, intuitively fair answers used in non-Indian contexts inappropriate. The reality is that tribal circumstances are no more or less different than the circumstances other peoples have faced when answering these questions. This is not to say that the details of individual tribal custom, history, and tradition do not or should not factor in; they do and they should, but the broad architecture of citizenship as a concept should be evident regardless of cultural context, tribal or otherwise.

The discussion of tribal citizenship needs to make a direct connection to that broad architecture. Doing so need not change the substance of tribal approaches to citizenship and will support assertions that tribal citizenship concepts and standards are as valid as those of other sovereigns. Doing so shows that citizenship in the tribal context is a valid analog to citizenship generally and deserves the same respect. Failing to do so leaves tribes in a Wonderland, where the agreed, intuitive ethics of prior resolutions becomes alien to Indian law. Without that direct connection, tribes and individual

6. Sir Henry Jones, *The State is Nothing but Its Citizens*, in CITIZENSHIP 164, 164-67 (Paul Berry Clarke ed., 1994); John Rockwell Snowden et al., *American Indian Sovereignty And Naturalization: It's A Race Thing*, 80 NEB. L. REV. 171, 173 (2001) ("The power to determine membership is at the heart of sovereignty. What is found in this heart will most likely be spread throughout the body. . . . At the center of sovereignty is the power to define the criteria of national citizenship and its rights and obligations.").

7. Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 1-3 (2013).

Indians are left in a contrived, results-oriented carnival fun house, where ideas like citizenship are continually manipulated by non-Indian authorities in self-serving ways, unmoored from any unifying ethical principle. One goal of this article is to reconnect the topic of tribal citizenship with fundamental citizenship principles.

Part II of this article will present a brief review of citizenship theory and history. This review forms a necessary basis for a thorough, precise evaluation of citizenship practices in the tribal context. Part III will introduce the two dominant approaches used by tribes to determine citizenship—minimum blood quantum and lineal descent—and will then explain the four flaws inherent in both approaches: (1) both approaches will ultimately result in the extinction of tribes,⁸ either “legally” or “practically”; (2) exclusive use of either minimum blood quantum or lineal descent is inconsistent with the historic customs of most tribes;⁹ (3) both lack a strong correlation to the subjective qualities that citizenship criteria are ideally designed to identify;¹⁰ and (4) tribes’ use of ancestry has been used to undermine tribal authority on tribal lands.¹¹ Part III will also add to the body of evidence supporting the existence of the first three flaws, including comparison to studies by demographers and population biologists of other small tribal and non-tribal populations.¹² This evidence will suggest that

8. JILL DOERFLER, *THOSE WHO BELONG: IDENTITY, FAMILY, BLOOD, AND CITIZENSHIP AMONG THE WHITE EARTH ANISHINAABEG* xxvii-xxviii (2015); Russell Thornton, *Tribal Membership Requirements and the Demography of ‘Old’ and ‘New’ Native Americans*, 16 *POPULATION RES. AND POL’Y REV.* 33, 39, (1997); Letter to the Editor, *Tribal Citizenship in Crisis*, INDIAN COUNTRY TODAY (Sept. 18, 2009), <http://indiancountrytodaymedianetwork.com/2009/09/18/tribal-citizenship-crisis-82460> [hereinafter *Tribal Citizenship*].

9. DOERFLER, *supra* note 8, at 27-29; Raymond D. Fogelson, *Perspectives on Native American Identity*, in *STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS* 40, 44-45 (Russell Thornton ed., 1998); *see also* Raymond J. DeMallie, *Kinship: The Foundation for Native American Society*, in *id.* at 306, 331; Kimberly TallBear, *DNA, Blood, and Racializing the Tribe*, 18 *WICAZO SA REV.* 81, 93 (2003); Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 *U. CHI. L. SCH. ROUNDTABLE* 689, 703-04 (1995); Stephen Cornell, *The Transformations of Tribe: Organization and Self-Concept in Native American Ethnicities*, 11 *ETHNIC & RACIAL STUD.* 27, 29-30 (1988); *United States v. Rogers*, 45 U.S. 567, 572-73 (1846) (intermarried white person considered a citizen of the Cherokee Nation under Cherokee law); *Nofire v. United States*, 164 U.S. 657, 658 (1896) (testimony offered that a white man had been “adopted” into the Cherokee Nation); Fletcher, *supra* note 7, at 1, 12-13 (2013).

10. Fletcher, *supra* note 7, at 5-6.

11. *Id.* at 8-11; T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 117-18 (2002); *see generally*, Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 *FED. LAW.* 38, 40 (2006).

12. DOERFLER, *supra* note 8, at xxiii; *Wilder Research: MCT Population Projections*, WHITE EARTH NATION, http://www.whiteearth.com/programs/?page_id=539&program_id=26; Traill et al., *Minimum Viable Population Size: A Meta-Analysis of 30 Years of Published Estimates*, 139 *BIOLOGICAL CONSERVATION* 159, 159-60 (2007) [hereinafter Traill et al., *Minimum Viable Population Size*]; Traill et al., *Pragmatic Population Viability Targets in a Rapidly Changing World*, 143 *BIOLOGICAL CONSERVATION* 28, 28-29 (2010) [hereinafter Traill et al., *Pragmatic*

more tribe-specific study is urgently needed, contrary to the common tribal practice of tightly guarding citizenship and blood quantum data. Part IV will then survey modern citizenship criteria.

In the end, Part V will urge several changes to tribal citizenship practices: (1) the end of minimum blood quantum or lineal descent as a singular criterion for determining tribal citizenship; (2) the extension of citizenship to include “non-member” Indians who live on the reservation and spouses of members who live on the reservation; (3) the creation of a new category of citizenship based solely on reservation residence that includes non-Indians;¹³ (4) the limitation of “reservation citizens” political participation to matters related to living on the reservation, i.e., those issues affecting reservation residents as residents;¹⁴ and (5) the creation of enclaves within reservations with significant non-Indian populations where

Population Viability Targets]; Steven R. Beissinger, *Population Viability Analysis: Past, Present and Future*, in *POPULATION VIABILITY ANALYSIS* 5, 5-17 (Steven R. Beissinger & Dale R. McCullough eds., 2002); Cameron M. Smith, *Estimation of a Genetically Viable Population for Multigenerational Interstellar Voyaging: Review and Data for Project Hyperion*, 97 *ACTA ASTRONAUTICA* 16, 16-17 (2014); Damian Carrington, “*Magic Number*” for Space Pioneers Calculated, *NEW SCIENTIST* (Feb. 15, 2002), <https://www.newscientist.com/article/dn1936-magic-number-for-space-pioneers-calculated/>.

13. ALENIKOFF, *supra* note 11, at 115; Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 *AM. INDIAN L. REV.* 243, 250 (2009) (“The centerpiece challenge of tribal self-governance, which has most animated political theorists and legal scholars, is the possibility that tribal autonomy could create illiberal enclaves within liberal democracies. Persons subject to tribal jurisdiction would thereby be denied protections and freedoms owed to them as citizens. Tribal membership rules are at the core of this problematic.”); Fletcher, *supra* note 11, at 40 (“The so-called democratic deficit problem is an illusion. To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though he or she is not a citizen of that state. The Court focuses on the possibility that the Colorado resident has legal status sufficient to someday acquire citizenship in Utah, in contrast to a non-Indian, who might not have that status. But at the time the Colorado citizen’s loan is adjudicated, the person is not a citizen of Utah. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, the change in status could not alter the result of the Utah courts’ adjudication of the loan at issue.”); Fletcher, *supra* note 7, at 11.

14. Professor Matthew Fletcher has also called for the incorporation of non-Indians into reservation polities. Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 *WYO. L. REV.* 295, 324-25 (2011); Fletcher, *supra* note 7, at 13-16. Tommy Miller has addressed the authority of tribes to include non-Indians as tribal citizens and how that inclusion would impact federal criminal jurisdiction, tribal criminal jurisdiction, and tribal regulatory jurisdiction. Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 *AM. INDIAN L. J.* 323 (2014). This article supports those conclusions, and others, from a different perspective by connecting them to the fundamental theory and history of citizenship, a necessary starting place often left out of tribal citizenship analyses. This article also provides a more detailed, and slightly different, discussion of how inclusion of non-Indians could be shaped to preserve the tribal character of a reservation, as much as possible.

access and control is limited to tribal citizens¹⁵ and those agreeing to submit to full tribal jurisdiction.¹⁶

A few tribes have adopted some of the measures suggested in this article, but the majority of tribes still cling to outdated policies.¹⁷ This must stop. For tribes to survive, tribal citizenship policies must evolve. The issue is truly one of extinction, legal or practical.

II. BASIC CITIZENSHIP THEORY AND HISTORY

No more than a cursory discussion of the theory and history of citizenship is possible within this article, but any evaluation of the effectiveness and sustainability of a set of citizenship criteria must start with an understanding of citizenship itself—theoretically and historically as a general matter, not specific to the tribal context.¹⁸ As intuitive as most consider an understanding of citizenship to be, a thorough analysis requires an explicit discussion of its foundation. This foundational review will reveal aspects of sound citizenship practices that tribal citizenship fails to embrace.

15. *See* *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 414-21 (1989).

16. The Supreme Court has held that tribes may exercise jurisdiction over non-Indians who enter such consensual relationships. *See* *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

17. *See generally* KIRSTY GOVER, *TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP* (2010).

18. This review will limit itself to more baseline citizenship theory, leaving comparisons to more modern theory to other articles and authors—with the exception of one comment. Much of the contemporary scholarship on citizenship advocates for a more open concept of citizenship where citizenship is easily established and changed. *See generally* YASEMIN NUHOĞLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994); *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) [hereinafter *CITIZENSHIP TODAY*]; PETER KIVISTO & THOMAS FAIST, *CITIZENSHIP: DISCOURSE, THEORY, AND TRANSNATIONAL PROSPECTS* 102-40 (2007); DEREK HEATER, *WHAT IS CITIZENSHIP?* 160-64 (2d ed. 2005) (1999); Sarah V. Wayland, *Citizenship and Incorporation: How Nation-States Respond to the Challenges of Migration*, 20 *FLETCHER F. WORLD AFF.* 35 (1996); Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 *BERKELEY J. INT'L L.* 330 (2006); John D. Snethen, *The Evolution of Sovereignty and Citizenship in Western Europe: Implications for Migration and Globalization*, 8 *IND. J. GLOBAL LEGAL STUD.* 223 (2000). This position is largely based on the more peripatetic nature and super-national worldview of many modern individuals and populations. While this more open concept might work for far larger, more established, less culturally based sovereigns, it would be out of place in the tribal context. Tribes are comparatively small populations that would be easily overwhelmed by the number of new citizens other sovereigns accept in a single day. *Naturalization Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Oct. 24, 2012), <http://www.uscis.gov/news/naturalization-fact-sheet>. More importantly, most tribes see themselves in a defensive legal, political, and cultural position, urgently trying to preserve their history, language, population, and identity. That effort would become far more difficult, if not impossible, if tribes adopted the more open approaches advocated by many modern citizenship scholars.

In its most basic sense, citizenship is the relationship between an individual and a state, characterized by allegiance, where the individual has duties to the state, and in return the state provides protection and support to the citizen, including the protection of “rights.”¹⁹ Although each sovereign’s concept of citizenship has been unique, citizens have generally shared certain characteristics throughout history.²⁰ Each citizen of a particular sovereign has generally had the same rights and obligations as other citizens in the same position;²¹ that said, some sovereigns have had more than one category of citizens with different rights and obligations associated with each category.²² Examples exist of classes of citizens that did not have the right to vote or to political participation, but had other rights and obligations.²³

Citizens have generally had rights to societal benefits.²⁴ These benefits commonly include protection by the police, use of the roads, access to public utilities, access to the courts, and protection by the military. These social benefits might also include education, protection of the food supply, regulation of the economy, welfare, and protection of the environment if the citizens chose to authorize, staff, and fund those programs.

Citizens generally also have had civil rights, although these have varied from sovereign to sovereign.²⁵ These rights typically protect the freedom of citizens from government action. They commonly include the right to due

19. THOMAS JANOSKI, CITIZENSHIP AND CIVIL SOCIETY 9-10, 12 (1998); DEREK HEATER, A BRIEF HISTORY OF CITIZENSHIP 1-5 (2004); HEATER, *supra* note 18, at 10 (“We must not forget that the citizenship model presents a state composed of citizens of equal status, equally enjoying their rights and relating to the state by virtue of those rights and concomitant duties.”); DAWN OLIVER & DEREK HEATER, THE FOUNDATIONS OF CITIZENSHIP 1-31 (1994); THE CITIZENSHIP DEBATES: A READER 1-27 (Gershon Shafir ed., 1998); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 226-27 (2008); HEATER, *supra* note 18, at 14 (The development of citizenship introduced the concepts of “equal social worth . . . [and] ‘a direct sense of community membership based on loyalty to a civilisation which is a common possession’, including national patriotism; . . .” (citations omitted)).

20. HEATER, *supra* note 19, at 1-5.

21. *Id.*, at 1-5; HEATER, *supra* note 18, at 13.

22. HEATER, *supra* note 19, at 1-5; HEATER, *supra* note 18, at 160-64; J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, in THE CITIZENSHIP DEBATES: A READER 31-41 (Gershon Shafir ed., 1998); Max Weber, *Citizenship in Ancient and Medieval Cities*, in *id.* at 43-49.

23. HEATER, *supra* note 19, at 33-34; HEATER, *supra* note 18, at 39-40, 85-86 (“In the ancient world, as Rome extended her sway in Italy, but reluctant to concede full citizenship to the incorporated peoples, she invented *civitas sine suffragio*. By this device individuals had citizenship without the franchise, legal but not political citizenship.”); Paul Barry Clarke, *Privilege and Exclusivity and Two Types of Citizen*, in CITIZENSHIP 6-11 (Paul Barry Clarke ed., 1994).

24. T. H. Marshall, *Citizenship and Social Class*, in THE CITIZENSHIP DEBATES: A READER 93-111 (Gershon Shafir ed., 1998); HEATER, *supra* note 18, at 12-17.

25. JANOSKI, *supra* note 19, at 33-38; HEATER, *supra* note 18, at 5, 13-14.

process, a criminal jury of peers, free speech, freedom of religion, and habeas corpus.

Citizens also have generally had political rights,²⁶ although some states have had citizens who did not have political rights but did have other rights.²⁷ Political rights focus on access to and participation in government, i.e., voting, serving in public office, serving on a jury, and freedom of speech to support political candidates and issues. Voting is considered the most important of these rights as it is the means by which a group of individuals implement collective self-determination. In democratic sovereigns, voting generally determines who is subject to the sovereign's authority.²⁸ Anyone who votes must be subject to the laws that result from the voting process; at the same time, everyone subject to a democratically created law has the right to vote in its creation. Otherwise, the system breaks down from collective self-government into subjugation of one group by another.

Obligations to the sovereign form the other side of the civic equation.²⁹ These obligations commonly include obeying the law, serving on juries, and paying taxes.³⁰ They might also involve public or military service.³¹

The symbiotic relationship between rights and obligations is crucial and cannot be overstated.³² The rights of citizens to freedom and other more concrete societal benefits remain abstract aspirations without the resources to actualize and enforce those rights.³³ The rights and the resources that support and effectuate them must generally exist in balance

26. JANOSKI, *supra* note 19, at 29-32; HEATER, *supra* note 18, at 5, 13-14.

27. HEATER, *supra* note 19, at 33; HEATER, *supra* note 18, at 39-40, 85-86.

28. Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 806-07 (2010).

29. Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World*, in THE CITIZENSHIP DEBATES: A READER 75-91 (Gershon Shafir ed., 1998); JANOSKI, *supra* note 19, at 53; RICHARD DAGGER, CIVIC VIRTUES: RIGHTS, CITIZENSHIP, AND REPUBLICAN LIBERALISM 61-80 (1997); HEATER, *supra* note 18, at 21 (“[C]itizenship consequently involves expenditure and hence taxation on a considerable scale.”).

30. KIVISTO & FAIST, *supra* note 18, at 1-4, 50, 55-56, 75, 100; JANOSKI, *supra* note 19, at 2-6, 54-56, 58; DAGGER, *supra* note 29, at 61-80.

31. JANOSKI, *supra* note 19, at 2-6, 54-56, 58; HEATER, *supra* note 18, at 75-79.

32. JANOSKI, *supra* note 19, at 2-6, 52-53 (“This chronic avoidance of obligations is puzzling because not only do rights require obligations for their fulfillment, since no right may exist without an obligation to help make the right exist, but obligations must also constrain each person’s bundle of citizenship rights to make any system of rights workable.”); T. H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT 123 (University of Chicago Press 1964) (“If citizenship is invoked in the defense of rights, the corresponding duties of citizenship cannot be ignored.”); HEATER, *supra* note 19, at 26 (“Finally, there is the moral issue This is the immorality of accepting rights . . . without honouring reciprocal obligations.”); *id.* at 29 (“[R]ights should have the expected complement of duties.”).

33. JANOSKI, *supra* note 19, at 2-6, 52-53 (“[W]hat students of citizenship must realize is that obligations enforce rights, and without enforcement, rights will not exist.”).

or the structure for which they exist, the government, fails, as do the benefits that flow from that structure.³⁴

Citizens provide these resources. The resources citizens provide usually take the form of money and compliance, but also include service.³⁵ It takes time, money, and effort to build roads and public utilities, and to train and equip an army. It takes time, money, and effort to enforce the law; police must be hired, paid, trained, and equipped. Courts must be constructed and staffed. Citizens must serve on juries and decide cases.

Note that voting is a special case. It operates as both a right and an obligation.³⁶ Citizens have a right to vote; they also have an obligation to do so only after educating themselves on the issues being collectively decided. A citizenry that fails to do both consistently will make bad decisions that weaken their collective sovereignty, or even extinguish it.

Lastly, all citizens have had some feeling of allegiance to the community, *qua* sovereign.³⁷ Although intangible, it is nonetheless crucial. It can be understood as the motivation citizens must have to fulfill their roles within a government in good faith so that the sovereign can fulfill its objective: protection, maintenance, and development of the community.³⁸

34. RICHARD BELLAMY, *CITIZENSHIP: A VERY SHORT INTRODUCTION* 4-6 (Oxford University Press 2008); William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 *FORDHAM L. REV.* 1721, 1721-28 (2001).

35. JANOSKI, *supra* note 19, at 2-6 (“The silences about obligations appear to be irresponsible. Nearly all citizens rigorously claim the right to a trial by jury, but many avoid serving on juries for other citizens. In terms of political and social obligations, many citizens demand government money from entitlement programs, yet loathe paying taxes to support entitlements for others. . . . Citizens want public defense in their communities and around the world, but are shy or afraid of serving on community watches in neighborhoods, and in the military or its more peaceful alternatives.” (citations omitted)).

36. BELLAMY, *supra* note 34, at 7 (“In particular, the [people] will want [the political framework’s] provisions to provide a just basis for all to enjoy the freedom to pursue their lives as they choose on equal terms with everyone else, and in so far as is compatible with their having a reasonable amount of personal security through the maintenance of an appropriate degree of social and political stability. And a necessary, if not always sufficient, condition for ensuring the laws and policies of a political community possess these characteristics is that the country is a *working electoral democracy and that citizens participate in making it so.*” (emphasis added)); LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 242 (1986).

37. BELLAMY, *supra* note 34, at 6; Mayton, *supra* note 19, at 221, 226-27; HEATER, *supra* note 18, at 55-63 (“Self-interest, however tempting, must give way to the higher, indeed supreme, requirements of selfless civic duty. That is the mark of the model citizen.”); Eskridge, Jr., *supra* note 34, at 1721-28.

38. HEATER, *supra* note 18, at 32, 64 (“[F]reedom involves a readiness to uphold and preserve it, and implies an acceptance of the freedom of others. Expressed negatively, apathy and intolerance are the vices abhorred by liberal civic virtue. Apathy is unacceptable because the very basis of modern representative government is the critically necessary vigilance of the citizenry (often by the news media on their behalf) to ensure the proper, that is, efficient, just and uncorrupt, running of the system.”; “The whole republican tradition is based upon the premise that citizens recognize and understand what their duties are and have a sense of moral obligation instilled into them to discharge these responsibilities. Indeed, individuals were considered barely worthy of the title of citizen if they avoided performing their appointed duties.”).

The requirement has been justified on the most basic of grounds: no duties, no republic. If citizens are unwilling to fight for the republic, it will be overwhelmed by its external enemies; and if the citizens are unwilling to contribute to the civil affairs of the republic, it will collapse into corruption and dissension, ultimately into an authoritarian, even tyrannical form of state. Direct involvement is essential.³⁹

Essentially, citizens must value the purpose of their sovereign enough to participate effectively in its preservation and development. Some examples will further illuminate the importance of allegiance.

Having the infrastructure to implement a court system, a police force, or an election is not enough; to survive, a sovereign must have people properly fulfilling their roles within those institutions in a way that supports the sovereign. Having judges and police does not matter if the people in those roles have no desire to fulfill that role as intended, i.e., making sound decisions based on the rule of law, the facts in evidence, and not self-interest. There is no point in having courts if no one will serve on a jury. Voting serves no purpose if voters do not vote or make no effort to make good choices.

Having laid out the basic aspects of citizenship, the next question is how to determine which individuals have these characteristics by establishing appropriate citizenship requirements.⁴⁰ Citizenship requirements seek to identify objective criteria that have a high degree of correlation to individuals with a particular subjective state of mind. That state of mind is the willingness to function within a government as intended.⁴¹ Anyone meeting these criteria would consequently be fitting beneficiaries of the rights and other benefits associated with being a citizen.

History contains numerous examples of abhorrent criteria used to include and exclude people from citizenship or the individual rights associated with citizenship, particularly voting. That said, three time-honored ways of determining citizenship have been used for centuries and

39. *Id.* at 64-65, 69-75 (“A society of selfish individuals is, at its extreme, no society at all, nor does it have citizens, properly speaking—it is nothing more than an agglomeration of competitive units.”).

40. Statelessness is a serious and legitimate concern when discussing citizenship or naturalization. P. WIES, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (Stevens & Sons, Ltd. 1956); Veronica Aragón, *Statelessness and the Right to Nationality*, 19 SW. J. INT’L L. 341, 342 (2013); Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L L. 1141, 1145-47 (1998). Fortunately, it is not one that need concern tribal peoples, at least not in the United States. Any individual not included in a tribe’s citizenry will still be a citizen of the United States and the state within which the reservation falls.

41. *See supra* notes 28-34 and accompanying text.

are still in use today: (1) birth to citizen parents (“*jus sanguinis*”),⁴² (2) birth within the sovereign’s territory (“*jus soli*”),⁴³ and (3) naturalization.⁴⁴ These have been thought to provide strong circumstantial proof of willingness to fulfill the civic responsibilities and allegiance since the time of the Greeks and are still widely accepted in some form today.

Jus sanguinis (latin for “right of the blood”) appears founded on the idea that a person has a strong connection to where their family lives or came from.⁴⁵ *Jus soli* (latin for “right of the soil”)⁴⁶ and naturalization appear founded on the idea that a person has a strong connection to where they have chosen to reside and have resided for a substantial period of time. Naturalization is commonly based on marriage to a citizen or residence.⁴⁷ Marriage to a citizen is intuitively equated with allegiance to the spouses’ sovereign in a transitive sense. All of these ways of determining citizenship have been used to assume that a person who has any one of these characteristics is significantly invested in the well-being of the place in question and the individuals who reside there.

III. CURRENT TRIBAL CITIZENSHIP PRACTICES AND THEIR FLAWS

A survey of citizenship theory and history is only a beginning. An explanation of current citizenship practices and their inherent flaws reveals why reconnecting tribal citizenship to broader, more sustainable citizenship concepts is needed. Through this discussion one can see how disconnected citizenship in the tribal context has become.

A. SUMMARY OF MODERN TRIBAL CITIZENSHIP PRACTICES

Today tribes generally determine citizenship in two ways, commonly referred to as “lineal descent” and “minimum blood quantum.” In general, the minimum blood quantum approach requires citizens to possess a minimum amount of tribal ancestry.⁴⁸ That means that the individual in question has an ancestor who was a tribal citizen, and the person applying for tribal citizenship has a minimum of amount of “blood” based on that

42. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case*, 9 YALE J.L. & HUMAN. 73, 77 (1997).

43. *Id.*

44. CITIZENSHIP TODAY, *supra* note 18, at 29-35; HEATER, *supra* note 18, at 85.

45. See CITIZENSHIP TODAY, *supra* note 18, at 17-18.

46. *Id.* at 17; HEATER, *supra* note 18, at 80.

47. CITIZENSHIP TODAY, *supra* note 18, at 17, 24, 28, 64, 71, 116-17.

48. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 1-2 (2006); Fletcher, *supra* note 7, at 1, 4; Thornton, *supra* note 8, at 36-37.

relation. The most common minimum standards are 1/16, 1/8, and 1/4, but some tribes require as much as half. In contrast, the lineal descent approach requires citizens to have some amount of tribal ancestry, but sets no minimum threshold, i.e., they have at least one ancestor that was a tribal citizen, regardless of how long ago that relative lived.⁴⁹

Some tribes use a hybrid approach.⁵⁰ Typically, that means the individual in question has to have some shared tribal ancestry with the tribe in which the individual is seeking citizenship, i.e., lineal descent, but must also have a minimum blood quantum from any combination of tribes. Another hybrid approach is to combine either minimum blood quantum or lineal descent with other non-genealogical criteria, usually residence, historical knowledge, cultural knowledge, or language competency.⁵¹ This second type of hybrid is not common, sadly.

B. THE MAJOR FLAWS IN MODERN TRIBAL CITIZENSHIP PRACTICES

Exclusive reliance on either minimum blood quantum or lineal descent has four known major flaws: (1) either approach will ultimately result in the extinction of tribes, either legally or practically;⁵² (2) use of either approach is inconsistent with the historic customs of most tribes;⁵³ (3) both approaches lack a strong correlation to the subjective qualities that citizenship criteria are ideally designed to identify;⁵⁴ and (4) both approaches have been used to justify the extension of state jurisdiction into Indian country by the United States Supreme Court.⁵⁵

1. *Exclusive Use of Either Approach Will Result in Either “Legal Extinction” or “Practical Extinction.”*

Many believe that current tribal citizenship practices were intentionally imposed on tribes in an effort to “breed them out,” and with good reason.⁵⁶

49. Fletcher, *supra* note 7, at 6.

50. GOVER, *supra* note 177, at 114.

51. *Id.* at 79-80.

52. RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492, at 236 (1987); Thornton, *supra* note 8, at 33-42 (“If these trends continue, both the genetic and tribal distinctiveness of the total Native American population will be greatly lessened. A Native American population comprising primarily ‘old’ Native Americans strongly attached to their tribes will change to a population dominated by ‘new’ Native American individuals who may or may not have tribal attachments or even tribal identities.”); Neath, *supra* note 9, at 698-99; *Tribal Citizenship*, *supra* note 8.

53. *Tribal Citizenship*, *supra* note 8.

54. *Id.*

55. Oeser, *supra* note 28, at 836; *see also* Fletcher, *supra* note 7, at 10-11.

56. Much scholarship concludes that these approaches to citizenship were forced on tribes with the idea that tribes would eventually die out as a result. M. Annette Jaimes, *Federal Indian*

Regardless of the original intent, available evidence suggests that current tribal citizenship practices will result in the extinction of tribes, either legally or practically, although further tribe-specific study is needed. Minimum blood quantum requirements provide the clearest example of this, but the lineal descent approach suffers from a similar flaw.

Minimum blood quantum requirements will eventually lead to a situation where no one can meet the minimum threshold for tribal citizenship established by tribal law,⁵⁷ i.e., minimum blood quantum tribes eventually will become “legally extinct.”⁵⁸ At least one tribe has reached this specific conclusion after having a demographer do projections based on studies of the tribal population in question.⁵⁹ There is no reason to think that, if done, studies of other tribes using minimum blood quantum will reach a different conclusion. That said, all tribes should pursue such studies as part of any effort to revise their citizenship policies.

The steady decrease in full-bloods and half-bloods⁶⁰ and the high rate of marriage to non-tribal individuals⁶¹ support the same conclusion on a

Identification Policy, in THE STATE OF NATIVE AMERICA 123, 133-34 (M. Annette Jaimes ed., 1992); Neath, *supra* note 9, at 696-97. However, evidence exists that some tribes sought or approved of these approaches. Spruhan, *supra* note 48, at 45; TallBear, *supra* note 9, at 88-91. There is always inherent difficulty in ascribing a particular motive to any action taken by a group of people; usually there are as many motivations as there are members of the group. Any argument that Indians have been “duped” into something so important appears somewhat patronizing.

57. The size of the American Indian population in the United State has grown, but that trend is deceiving; it is the result of “changing definitions” used by the U.S. census. THORNTON, *supra* note 52, at 190, 192-200.

58. Neath, *supra* note 9, at 698; Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 461 (2001); Thornton, *supra* note 8, at 33, 39; PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 338 (1987) (“Set the blood quantum at one-quarter, hold to it as a rigid definition of Indianness, let intermarriage proceed as it had for centuries, and eventually Indians will be defined out of existence. When that happens, the federal government will be freed of its persistent ‘Indian problem.’”).

59. DOERFLER, *supra* note 8, at xxiii.

60. Thornton, *supra* note 8, at 39 (“Taking into account the high rates of intermarriage, it has been projected that within the next century, the proportion of those with a one-half or more blood quantum will decline to only 8 percent of the American Indian population, whereas the proportion with less than a one-fourth blood quantum will increase to around 60 percent. Moreover, these individuals will be increasingly unlikely to be enrolled as tribal members. Even if they are tribal members, a traditional cultural distinctiveness may be replaced by mere social membership if language and other important cultural features of American Indian tribes are lost.”); FERGUS M. BORDEWICH, KILLING THE WHITE MAN’S INDIAN 78 (1996); Federal Measures on Race and Ethnicity: Hearing Before the Subcomm. on Gov’t Mgmt., Info., and Tech. of the House Comm. on Gov’t Reform and Oversight, 105th Cong. 4-5 (1997) (statement of JoAnn K. Chase, Executive Director, National Congress of American Indians), available at 1997 WL 277011; *Tribal Citizenship*, *supra* note 8.

61. Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America*, in THE STATE OF NATIVE AMERICA, 23, 40 (M. Annette Jaimes ed., 1992); THORNTON, *supra* note 52, at 236-37.

broader scale. Several tribes have reduced the minimum blood quantum required for citizenship in direct response to declining numbers.⁶² More tribes have at least considered it.⁶³ Despite these fairly obvious concerns, many tribes continue to use minimum blood quantum.⁶⁴

Even if all the factors causing blood quanta to fall could be controlled for a particular tribe (an extremely unlikely event), the long term outlook would likely not improve for the majority of tribes. Assuming that all a tribe's members stopped reproducing with non-members in a way that stopped the decline in blood quantum, two problems would still exist. First, a tribe's long term survival goes down as a tribe's population gets smaller. Second, the smaller a tribe's population, the higher the chances offspring will have congenital health problems and genetic abnormalities.

Population biology shows us that as a species' population gets smaller, so do the chances of long-term survival for that species.⁶⁵ A hypothetical tribe, where all members only had children with other members, could be analogized to a separate species, for sake of argument. What this shows us is that, *even in the best case scenario*, minimum blood quantum is a dead end, more so for smaller tribes.

Only one peer-reviewed article has ever applied population biology to human populations,⁶⁶ and none have looked at tribal populations. Still, the guidance population biology provides is useful, as long as we recognize the limitations of that guidance. Some limited comparisons of the available animal and human literature to the tribal situation can be made.

A meta-analysis of thirty years of minimum viable population studies looking at animals has suggested that the minimum number of adult

62. *Otoe Missourias Vote for Lower Quantum*, NATIVE AM. TIMES, (June 28, 2009) <http://www.nativetimes.com/archives/29/2064-otoe-missourias-vote-for-lower-quantum> (last visited July 19, 2015); Pam Louwagie, *White Earth Members Approve New Constitution*, STAR TRIBUNE, Nov. 21, 2013, at B1.

63. *Bid To Lower Navajo Blood Quantum Rejected*, INDIANZ.COM (Apr. 23, 2004) <http://www.indianz.com/News/archive/001892.asp>; Christopher Abeita, *Tribal Members Want to Vote on Lowering Blood Quantum*, ISLETA PUEBLO POLITICS (June 11, 2015), <http://isletapueblopolitics.com/2015/06/11/tribal-members-want-to-vote-on-lowering-the-blood-quantum>; Carol Berry, *Northern Ute Tribal Enrollment May Rise, Pending Election Could Lower Blood Quantum*, INDIAN COUNTRY (Apr. 9, 2013) <http://indiancountrytodaymedianetwork.com/2013/04/09/northern-ute-tribal-enrollment-may-rise-pending-election-could-lower-blood-quantum-148682>; Jeri Thomas, *Determining Blood Quantum*, GILA RIVER, <http://gilariver.org/GRIN/julygrin.pdf>. White Earth Nation went so far as to drop its one-fourth requirement in favor of lineal descent. David Thorstad, *White Earth Nation Adopts New Constitution*, MR ZINE (Nov. 21, 2013) <http://mrzine.monthlyreview.org/2013/thorstad211113.html>.

64. Gover, *supra* note 13, at 251; Rosemary Stephens, *Blood Quantum Resolution Defeated*, CHEYENNE & ARAPAHOE TRIBAL TRIB., Sept. 15, 2009, at 1.

65. Traill et al., *Minimum Viable Population Size*, *supra* note 12, at 159-166; Traill et al., *Pragmatic Population Viability Targets*, *supra* note 12, at 30; Beissinger, *supra* note 12, at 5-17. There is debate about the usefulness of such analyses. *Id.*

66. Smith, *supra* note 12, at 16-29.

individuals needed for the long-term survival and evolution of a species is somewhere between 3577 and 5129, depending on the species.⁶⁷ A more recent study looking at animals found that at least 5000 individuals are needed for long-term survival and evolution of a species.⁶⁸ Population biologists looking at the optimum size of a crew traveling to a new solar system to settle a planet have made estimates from as low as 80 individuals⁶⁹ and as high as 23,400,⁷⁰ depending on how many negative genes exist in the initial group of individuals, how much planning and control go into group reproduction, and how long the projections assume a population must survive to count as a positive result.

Comparing these findings with tribal populations is both troubling and treacherous. It is troubling because, of the 615 tribal communities surveyed by the Bureau of Indian Affairs (“BIA”) in 2005, 111 had 160 individuals or less, only 96 had 3577 individuals or more, only 66 had 5000 individuals or more, and only 16 had more than 23,400 individuals.⁷¹ The danger suggested by these numbers is not unrealistic. Many tribes have disappeared, and many are close to disappearing as we speak.⁷²

The treacherous part of comparing population biology findings to tribal populations comes from the fact that only a very blunt comparison can be made. These studies are not of native populations; with one exception, they are not even about human populations.

The use of minimum blood quantum has another frightening possibility: an increased rate of health problems and genetic abnormalities. Studies have shown that isolated populations of as many as 1000 human individuals show increased rates of congenital health problems and genetic abnormalities.⁷³ For minimum blood quantum tribes of roughly 1000

67. Traill et al., *Minimum Viable Population Size*, *supra* note 12, at 159-66.

68. Traill et al., *Pragmatic Population Viability Targets*, *supra* note 12, at 30; Catherine Clabby, *A Magic Number? An Australian Team Says It Has Figured out the Minimum Viable Population for Mammals, Reptiles, Birds, Plants and the Rest*, 98 AM. SCI. 24 (Jan.-Feb. 2010).

69. Carrington, *supra* note 12.

70. Smith, *supra* note 12, at 16-29.

71. U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 3-26 (2005) [hereinafter LABOR FORCE REPORT]. The 2005 survey includes all individuals. Only adults count toward meeting a minimum viable population threshold.

72. Of the 583 Indian communities surveyed by the Bureau of Indian Affairs in 2005, a dozen had less than a dozen residents. *Id.*

73. I. Rudan et al., *Effects of Inbreeding, Endogamy, Genetic Admixture, and Outbreeding on Human Health: A (1001 Dalmatians) Study*, 47 CROAT MED. J. 601 (2006) (<http://www.ncbi.nlm.nih.gov/pubmed/16909458>) (study of historically isolated and intermarried communities on the Adriatic Islands of Croatia showed increased rates of increased blood pressure, body mass index, cholesterol, triglycerides, uric acid, creatinine, and blood glucose); Mark Mackinnon, *Samaritans Bring in New Blood to Save their Sect*, THE GLOBE AND MAIL, Oct. 15, 2007, <http://www.theglobeandmail.com/news/world/samaritans-bring-in-new-blood-to-save-their->

citizens, this finding means that even if all the remaining members only married and had children with other citizens (the previously mentioned “best case scenario”), the rate of health problems and genetic abnormalities among those children would increase. As the average blood quantum of a tribe approaches the minimum blood quantum required for citizenship, the only way for the tribe to avoid a steep population decline is for members to do just that and risk having a child with health problems or birth defects.

A 2005 BIA report shows that at least 383 of the 615 tribal communities surveyed had 1000 enrolled members or less.⁷⁴ Interestingly, a 2014 study of the relationship between birth defects and race concluded that American Indians and Alaska Natives “had a significantly higher” prevalence of seven types of birth defects.⁷⁵ As previously stated, the 2014 study at best shows that more tribe-specific study is needed and must control for causes unrelated to population size.

Lineal descent requirements suffer a similar extinction flaw in the long term. Lineal descent, taken to its logical conclusion, will reach a point over time where the vast majority of a tribe’s citizens will have almost no connection to the tribe, i.e., the tribe will suffer “practical extinction.”⁷⁶ When no minimum threshold is placed on the tribal ancestry of a person seeking citizenship, inevitably people with an extremely thin ancestral connection to the tribe will gain full citizenship. This problem is exacerbated by the fact that Indians marry outside their tribes at higher rates

sect/article963915/?page=all; Gonzalo Alvarez, Celsa Quinteiro & Francisco C. Ceballos, *Inbreeding and Genetic Disorder*, ADVANCES IN THE STUDY OF GENETIC DISORDERS (Kenji Ikehara ed., 2011), <http://www.intechopen.com/books/advances-in-the-study-of-genetic-disorders/inbreeding-and-genetic-disorder>.

74. LABOR FORCE REPORT, *supra* note 71, at 27-39.

75. Mark A. Canfield, et al., *The Association Between Race/Ethnicity and Major Birth Defects in the United States, 1999-2007*, 104 AM. J. OF PUB. HEALTH, e14, e14-e23 (September 2014).

76. For instance, where an individual has a single Indian ancestor, the chances the individual shares genetic material with that ancestor go down with each generation. *gcbias. How Much of Your Genome Do You Inherit from a Particular Ancestor?* (Nov. 4, 2013), <http://gcbias.org/2013/11/04/how-much-of-your-genome-do-you-inherit-from-a-particular-ancestor/>. There is only a 50% chance an individual will share any genetic material with a particular ancestor ten generations removed. *Id.* The probability of not sharing genetic material with a particular ancestor approaches 100% at fourteen generations. *Id.*; see also Thornton, *supra* note 8, at 39; Neath, *supra* note 9, at 705; *Tribal Citizenship*, *supra* note 8 (“A major difficulty with lineal descent is many individuals – many very Americanized and with little knowledge of their tribal culture – tend to dominate and form the majority of the community. This is a trend toward development of ‘ethnic’ Indian nations, where most members don’t know their culture or traditions, and don’t participate in the tribal society. If the lineal descent route is taken, there must be strong efforts to recover and maintain Indian identity and community.”).

than any other racial group.⁷⁷ Some citizens of lineal descent tribes have had blood quanta of less 1/1000.⁷⁸

Thin ancestral connection has been thought to strongly correspond to individuals having little knowledge of, connection to, or allegiance to a sovereign, in this case a tribe.⁷⁹ Clearly this is not always the case; the correspondence is not one-to-one. While ancestral connection is only circumstantial proof that a person will make a good citizen—as are all other citizenship criteria—it has been used without question for centuries outside the Indian context.⁸⁰

2. *Exclusive Use of Minimum Blood Quantum or Lineal Descent Is Inconsistent with the Historic Customs of Most Tribes.*

An amazing amount of evidence has developed in the last thirty years supporting the idea that tribes were complex societies prior to European contact, with sophisticated governments, politics, astronomy, architecture, concepts of private property, and citizenship.⁸¹ Ample evidence exists that while ancestry was one basis by which individuals were granted social and political rights within a particular Indian community,⁸² tribes also granted

77. Thornton, *supra* note 8, at 39-40.

78. Andrea Appleton, *Blood Quantum: A Complicated System that Determines Tribal Membership Threatens the Future of American Indians*, HIGH COUNTRY NEWS (Jan. 12, 2009), <https://www.hcn.org/issues/41.1/blood-quantum>.

79. Thornton, *supra* note 8, at 33, 39 (“If these trends continue, both the genetic and tribal distinctiveness of the total Native American population will be greatly lessened. A Native American population comprising primarily ‘old’ Native Americans strongly attached to their tribes will change to a population dominated by ‘new’ Native American individuals who may or may not have tribal attachments or even tribal identities.”); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. J. 107, 141 (1999); Robert B. Porter, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor Lavelle*, 11 KAN. J. L. & PUB. POL’Y 629, 640 (2002); TallBear, *supra* note 9, at 92-93; Fletcher, *supra* note 7, at 11; *Tribal Citizenship*, *supra* note 8 (“A major difficulty with lineal descent is many individuals – many very Americanized and with little knowledge of their tribal culture – tend to dominate and form the majority of the community. This is a trend toward development of ‘ethnic’ Indian nations, where most members don’t know their culture or traditions, and don’t participate in the tribal society. If the lineal descent route is taken, there must be strong efforts to recover and maintain Indian identity and community.”).

80. See DEREK HEATER, *CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION* 53 (2004); HEATER, *supra* note 19, at 1-5; OLIVER & HEATER, *supra* note 19, at 1-31; BELLAMY, *supra* note 34, at 4-6.

81. See generally CHARLES C. MANN, 1491: NEW REVELATIONS ABOUT THE AMERICAS BEFORE COLUMBUS (2006).

82. Fogelson, *supra* note 9, at 44-45; see also DeMallie, *supra* note 9, at 331; TallBear, *supra* note 9, at 93 (“While racial requirements are unofficial factors in the citizenship policies of some nations (i.e., as in discrimination in favor of certain types of immigrants and against others based on perceived racial characteristics), nonracial requirements are more often held to officially determine citizenship. Tribes also had nonracial requirements before European and Euro-American colonization. Some of these persisted officially into the twentieth century, and many

such rights to individuals with no ancestral connection to *any* tribe under certain circumstances,⁸³ such as marriage and residency. What mattered to tribal peoples prior to European contact was whether the individual in question “lived like an Indian.”⁸⁴ Professor Jill Doerfler’s wonderful history of the Anishinaabeg points this out forcefully:

George Morrison argued that there was no designation of who was “full-blood” and who was “mixed-blood” among the Anishinaabeg until the question of land titles became tied to these identities. He asserted that those who lived with the Anishinaabeg were considered “full-bloods” due to their way of living, not because of their actual biological ancestry. He stated:

In old times all who wore the breech cloth and blanket and also affiliated with the Indians, lived in wigwams and didn’t live in houses, they were called “Indians”; they were considered the same as the full-bloods on account of their way of living; not on account of their blood, but on account of their—it was their way of living that regulated that.⁸⁵

These practices represent a form of naturalization, a quite common modern process.⁸⁶

persist unofficially. They include being born within the tribal community, marrying or being adopted into the community, long-term residence within the tribal community, and the assumption of cultural norms such as language, religion, and other practices.”); Neath, *supra* note 9, at 703-04; Cornell, *supra* note 9, at 29-30.

83. Snowden et al., *supra* note 6, at 194-99; L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 718-19 (2001); *In re Mayfield*, 141 U.S. 107, 116 (1891) (holding a non-Indian was a member of the Cherokee Nation “by adoption, if not by nativity”); Scott L. Malcomson, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 119 (2000) (prisoners taken in battle often incorporated into tribe over time); *United States v. Rogers*, 45 U.S. 567, 573 (1846) (intermarried white person considered a citizen of the Cherokee Nation under Cherokee law); *Nofire v. United States*, 164 U.S. 657, 658 (1896) (testimony offered white man had been “adopted” into the Cherokee Nation); *Alberty v. U. S.*, 162 U. S. 499, 500-01 (1896) (former black slave made a citizen of the Cherokee Nation by treaty with United States); *Means v. The Dist. Court of the Chinle Judicial Dist.*, 26 Indian L. Rep. 6083 (Navaho May 11, 1999); *Russell Means v. Navaho Nation*, CIV.99-1057-PCT-EHC (SLV) (D. Ariz. Sept., 20 2001) (Navaho court found jurisdiction based on tribal common law that in-laws that lived in the territory were tribal citizens, i.e., Means was not a non-member Indian; he was Navaho).

84. DOERFLER, *supra* note 8, at 15.

85. *Id.* (footnotes omitted).

86. Snowden et al., *supra* note 6; Fogelson, *supra* note 9, at 4-5; Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. OF ANTHROPOLOGY 1-2 (2011).

3. *Minimum Blood Quantum and Lineal Descent Lack a Strong Correlation to the Subjective Qualities that Citizenship Criteria Are Ideally Designed to Identify.*

Lineal descent almost certainly leads to the grant of citizenship to individuals that do not possess the subjective qualities of good tribal citizens, i.e., a false positive result. Similarly, minimum blood quantum almost certainly results in the denial of citizenship to individuals that do possess the subjective qualities of good tribal citizens, i.e., a false negative result. This is because ancestry has no causal relationship to the state of mind sought, i.e., a willingness to fulfill the duties of citizenship, and only a limited coincidental relationship. While no system of citizenship achieves perfect results, the results produced by tribal approaches seem particularly troubled. The most obvious example happens with lineal descent, but minimum blood quantum suffers a similar flaw in a different way.

For example, the Cherokee Nation is a lineal descent tribe.⁸⁷ It is the largest tribe in the United States.⁸⁸ The Cherokee Nation has roughly 350,000 citizens.⁸⁹ About 206,000 live in Oklahoma,⁹⁰ and about 126,000 live within the fourteen counties that once comprised the tribe's reservation.⁹¹ Some Cherokee Nation tribal citizens have a blood quantum of less than 1/1000.⁹²

As a general matter, the lower the blood quantum of a citizen and the farther that citizen lives from the Oklahoma homeland, the less likely it is the citizen knows much about the tribe or feels some allegiance to it. At some point along the continuum, many, but not all, know little more than that they are genealogically Cherokee. Yet, they still have the right to control the tribe's affairs by voting. As blood lines in lineal descent tribes spread thinner and farther out, the number of people with little connection to the tribe will grow to the point where they outnumber citizens with a significant and filial connection to the tribe. At some point, an observer might legitimately question whether the tribe still exists as a practical matter, i.e., again, as questioned above, if the tribe has suffered "practical extinction."

87. See *Citizenship*, CHEROKEE NATION, <http://www.cherokee.org/Services/TribalCitizensip/Citizenship.aspx> (last visited July 19, 2015).

88. Curtis Killman, *Cherokees Say They Have the Biggest Tribe*, TULSA WORLD, Sept. 25, 2011.

89. See *Frequently Asked Questions*, CHEROKEE NATION, <http://www.cherokee.org/about/theNation/FrequentlyAskedQuestions.aspx> (last visited July 19, 2015).

90. Killman, *supra* note 88.

91. See *Frequently Asked Questions*, CHEROKEE NATION, <http://www.cherokee.org/about/theNation/FrequentlyAskedQuestions.aspx> (last visited July 19, 2015).

92. See Appleton, *supra* note 78.

Turning to the minimum blood quantum scenario, consider the case of Robert Upham.⁹³ Upham spent his childhood on the Fort Belknap Reservation in Montana, home of the Gros Ventre Tribe.⁹⁴ Four generations of his mother's family are buried there.⁹⁵ Despite having Gros Ventre ancestors and blood from four other tribes, Upham does not have enough ancestry of any particular tribe to enroll anywhere.⁹⁶ Despite being raised on the reservation and burying his family there, he has no political rights in the community he and his ancestors have called home.⁹⁷ A citizenship structure that excludes individuals like Upham is inherently flawed.⁹⁸

4. *The United States Supreme Court Has Used Current Tribal Citizenship Criteria to Justify the Extension of State Jurisdiction on Reservation Lands*

The United States Supreme Court has undermined tribes' sovereignty within their own reservations based on current tribal citizenship practices. The Court essentially reasons in several cases, explicitly and implicitly, that allowing tribes to have criminal or regulatory authority over non-Indians on the reservation is unthinkable because it flies in the face of the United States' democratic principles.⁹⁹ In other words, because non-Indians can never have political rights in tribal government under the present laws, it is unfair to subject them to any laws created by tribal government. Prof. T. Alexander Aleinikoff describes this as the "Democratic Deficit," borrowing a term from European Union political theory.¹⁰⁰ The most explicit use of this reasoning appears in *Duro v. Reina*,¹⁰¹ but *Duro's* reasoning has its

93. Sheba R. Wheeler, *Indian Lineage Rules Decried Tribal-Blood Limits Called Exclusionary*, DENVER POST, March 22, 1999, at B1.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Professor Kimberly TallBear shared a personal example in her article *DNA, Blood, and Racializing the Tribe*. TallBear has 7/16 Indian blood (1/4 Cheyenne and Arapaho and 3/16 Dakota). TallBear, *supra* note 9, at 104 n.44. She has never been referred to as a "mixed blood." *Id.* She spent most of her childhood on the Flandreau Santee Sioux Reservation. *Id.* While TallBear had a non-Indian father, "[b]ecause [of her] cultural identification, sense of history, and home place were so strongly Dakota, it did not occur to anyone to call [her] mixed blood." *Id.* TallBear also shares a converse example. *Id.* Her mother had a white colleague who was the spouse of a tribal member. *Id.* TallBear's mother referred to this colleague as "really an Indian" because he spoke the tribal language, held tribal spiritual beliefs, and had been accepted as a member of the community for a long time. *Id.*

99. Fletcher, *supra* note 7, at 11; ALEINIKOFF, *supra* note 11, at 115; *see generally* Fletcher, *supra* note 11, at 38-40.

100. ALEINIKOFF, *supra* note 11, at 115.

101. 495 U.S. 676 (1990).

roots in *Oliphant v. Suquamish Indian Tribe*.¹⁰² The same reasoning is used in *Brendale v. Confederated Tribes*.¹⁰³

Duro involved whether a tribe had criminal jurisdiction over an individual who lived on a tribe's reservation and committed a crime there, but was a citizen of a different tribe.¹⁰⁴ The Court described such individuals as "nonmember Indians."¹⁰⁵ In the course of its decision, the Court specifically held that Albert Duro, the nonmember Indian in question, was "not a member of the Pima–Maricopa Tribe, and [was] not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima–Maricopa authority."¹⁰⁶

Duro relied heavily on *Oliphant v. Suquamish*.¹⁰⁷ *Oliphant* extinguished tribal criminal jurisdiction over non-Indians that commit offenses on a tribe's reservation.¹⁰⁸ In doing so, the Court found the inability of non-Indians to serve on tribal juries—a basic civic duty incident to citizenship—persuasive.¹⁰⁹ The inability to serve on juries denied non-Indians the ability to be tried by a jury of their peers. The idea that non-Indians would be subjected to unfamiliar laws they had no ability to participate in forming also swayed the Court.¹¹⁰

The same reasoning appears in *Brendale v. Confederated Tribes*, although it is couched in terms of the whether the "essential character" of particular areas of the reservation in question were Indian or non-Indian.¹¹¹ The *Brendale* Court held that the Yakima Indian Nation could zone some non-Indian fee lands on the reservation, but not others.¹¹² The geography and demographics of the reservation played key roles in the controlling opinion and highlight the role of citizenship in his decision.¹¹³

At the time the controversy in *Brendale* arose, the Yakima reservation was divided into two parts: the "closed area" and the "open area."¹¹⁴ Non-

102. See *id.* at 684; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

103. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425-27 (1989) (plurality opinion).

104. *Duro*, 495 U.S. at 679.

105. *Id.* at 676.

106. *Id.* at 688. The Court also cited *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 161 (1980), approvingly when it noted that nonmembers had no say in tribal affairs. *Duro*, 495 U.S. at 687, 691, 706-07.

107. See *Duro*, 495 U.S. at 688.

108. *Oliphant*, 435 U.S. at 195, 204.

109. See *id.* at 194.

110. *Id.* at 210-12.

111. See *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 432-33, 441-42 (1989).

112. *Id.* at 428.

113. *Id.* at 414-22, 433-41.

114. *Id.* at 415.

Indians were not allowed into the closed area with two exceptions: (1) they owned fee land in the closed area, or (2) they obtained a permit from the tribe.¹¹⁵ Visitors with permits were allowed to sightsee, hike, and camp, but were explicitly “prohibited from hunting, fishing, boating, drinking, operating vehicles off established roads, camping at other than designated campsites and removing flora, fauna, petrified wood, other valuable rocks or minerals or artifacts.”¹¹⁶ The permit system was enforced by “monitoring ingress and egress at four guard stations and by patrolling the interior of the closed area.”¹¹⁷ The tribe made no effort to control access to the open area.¹¹⁸

The deciding opinion was written by Justice Stevens, joined by Justice O’Connor.¹¹⁹ The important issue for them was who lived in these areas and how many of them had, or could have, a say in the tribe’s zoning law, i.e., how many of the people living in a particular area were tribal citizens and could therefore participate in tribal government.¹²⁰ The reservation encompassed about 1.3 million acres.¹²¹ The closed area was 807,000 acres, with less than one percent owned in fee by individuals.¹²² None of the non-Indian individuals who owned land in the closed area were permanent residents.¹²³ In contrast, non-Indians made up more than 80 percent of the open area’s population.¹²⁴

The Court ultimately held that the tribe could zone the closed area, but not the open area.¹²⁵ The Court reasoned, in essence, that tribal authority could be exerted where few people would be subject to tribal laws they could never participate in making.¹²⁶ The Court did away with the tribes’ ability to zone reservation lands with large non-Indian populations because that would have subjected a large number of non-Indians to tribal law.¹²⁷

115. *Id.*

116. *Id.* at 439.

117. *Id.*

118. *Id.* at 445.

119. *Id.* at 433 (Stevens, J., announcing the judgment in part and concurring in part).

120. *Id.* at 441-47.

121. *Id.* at 415.

122. *Id.* at 438.

123. *Id.*

124. *Id.* at 412.

125. *Id.* at 444, 447.

126. *Id.* at 441-44.

127. *Id.* at 432-33, 444-47.

IV. SUMMARY OF MODERN CITIZENSHIP PRACTICES AND CIVIC OBLIGATIONS

A survey of citizenship and naturalization requirements of other nations provides fertile ground to brainstorm tribal citizenship criteria. That said, one cannot simply import the laws and policies of any nation into the tribal context; equating the tribal context with any modern independent nation without qualification would be a mistake. Still, such laws can be a starting point for new thinking if done critically.

As stated above, the two most common, modern ways of obtaining citizenship are birth to a citizen parent and birth within the territory of the country in question.¹²⁸ Sometimes children must also reside in the country for a minimum amount of time before becoming citizens.¹²⁹

Adults seeking citizenship must generally apply to become naturalized citizens.¹³⁰ Historically, naturalization often required a specific legislative or royal decree,¹³¹ but today naturalization processes are largely administrative.¹³²

Naturalization processes vary, but most require an understanding of the nation's language, history, government, and culture, in addition to some period of residency, a citizen oath, and proof of good character.¹³³ Residency requirements can include proof of professional and familial ties to the country in question.¹³⁴ Some countries require proof of employability or sufficient income to avoid public assistance.¹³⁵ Some

128. See Mayton, *supra* note 19, at 225-26. See also CITIZENSHIP TODAY, *supra* note 18, at 20, 22-24; See generally U.S. OFFICE OF PERSONNEL MGMT. INVESTIGATIONS SERVICE, CITIZENSHIP LAWS OF THE WORLD (2001), [hereinafter CITIZENSHIP LAWS OF THE WORLD], <http://www.multiplecitizenship.com/documents/IS-01.pdf>.

129. See, e.g., CITIZENSHIP LAWS OF THE WORLD *supra* note 128, at 13, 31, 35, 43, 50, 53 (stating Afghanistan, Belgium, Bhutan, Burundi, Chile, and Columbia, among others, require children to reside in the country for a number of years before citizenship is granted by birth).

130. See Mayton, *supra* note 19, at 225-26 (“As noted, membership in a political community, as by citizenship, is gained either by naturalization or by right. Naturalization ordinarily entails some sort of showing of competency as a citizen. Usually, this showing entails an application, a period of residency to show commitment, some further showing of civic competency as by a written exam, and then an oath of allegiance. A byproduct of this process is a feeling of citizenship earned and thus better valued for it. The day one is sworn as a citizen is felt as a day of honor and achievement.”).

131. See 12 THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 160-74 (George Ripley & Charles A. Dana eds., 1875), <http://babel.hathitrust.org/cgi/pt?id=njp.32101042848026;view=1up;seq=168> (explaining the historical context of naturalization).

132. See generally 8 U.S.C. §§1421-1574 (2016); 8 C.F.R. §§301.1-392.4.

133. See CITIZENSHIP TODAY, *supra* note 18, at 22-24 tbls.1-2 & 1-3; CITIZENSHIP LAWS OF THE WORLD, *supra* note 128.

134. See, e.g., CITIZENSHIP LAWS OF THE WORLD, *supra* note 128, at 101 (stating Italy law grants citizenship to persons with “specific familial ties to Italy”).

135. See, e.g., *id.* at 156 (stating Papua New Guinea requires “a reliable source of income or support” for the naturalization process).

countries lessen residency requirements for spouses of current citizens.¹³⁶ Some countries lessen or waive residency requirements for individuals who have performed some exceptional service for the country in question.¹³⁷ Many countries also allow individuals who have successfully completed a term of service in the country's armed forces to become naturalized citizens without a minimum residency requirement.¹³⁸

The "proof of good character" requirement can mean more than not having criminal convictions. It can also encompass whether someone has fulfilled civic responsibilities as well, such as paying taxes and serving on juries.¹³⁹ Some states require, or have required, military service as a civic obligation.¹⁴⁰ A smaller group of countries also allow citizens to perform civilian, unarmed, or non-combatant service as an alternative.¹⁴¹

Israel's Law of Return merits specific mention. The Law of Return gives individuals "born Jewish," or that convert to Judaism, the right to enter, establish residency in, and immediately become citizens of Israel.¹⁴²

136. See, e.g., *id.* at 161 (noting Portugal allows "[f]oreign spouses who have been married to a Portuguese citizen for over 3 years" to register for citizenship, as compared to the normal six or ten year naturalization process).

137. See, e.g., *id.* at 78 (allowing any French citizen "who has rendered exceptional service to France" to bypass the naturalization requirement).

138. See, e.g., *id.* at 233 (stating the United States extends citizenship to "persons who have performed specific military service").

139. See SERVICE-PUBLIC.FR, <http://vosdroits.service-public.fr/particuliers/F2213.xhtml#N10158> (last visited July 19, 2015) (stating that the condition of "good character" can be shown by the payment of taxes).

140. T. Jeremy Gun, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 204 (2003) (describing how many countries require military service that may run contrary to the strong religious beliefs of their citizens). See, e.g., Tomer Benito, *The Unfortunate Advantage of the Holyland People*, 37 WM. MITCHELL L. REV. 5241, 5243-4 (2011) (explaining mandatory military service for both men and women in Israel); Alvin Lee, *Assessing the Korean Military's Gay Sex Ban in the International Context*, 19 LAW & SEXUALITY 67, 70-72 (2010) (describing how criminal penalties may be levied against men not participating in mandatory active military service in Korea); Eric H. Anderson, "Render to Caesar the Things that Are Caesar's, and to God the Things that Are God's": *Conscientious Objection in the Russian Federation*, 1996 BYU L. REV. 989, 1000 (1996); Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 SAN DIEGO L. REV. 849, 882 (1989) (describing the two types of mandatory service in Guatemala).

141. See *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959) (allowing a conscientious objector to work in a civilian job in lieu of serving in a military capacity); Andrew M. Pauwels, Note, *Mandatory National Service: Creating Generations of Civic Minded Citizens*, 88 NOTRE DAME L. REV. 2597 (2013).

142. Being "born Jewish" under The Law of Return originally meant being born to a Jewish mother or having a Jewish grandmother. The law has been expanded to include individuals with Jewish ancestry, i.e., born to a Jewish father or having a Jewish Grandfather. The Law of Return 5710 (1950), THE KNESSET (2003), <http://www.knesset.gov.il/laws/special/eng/return.htm> (last visited July 3, 2015).

The law gives the same rights to spouses, children, or spouses of children of Jews.¹⁴³

V. SUGGESTIONS FOR SUSTAINABLE, SOVEREIGNTY-CENTERED TRIBAL CITIZENSHIP REQUIREMENTS

Outlining the problems with the current approaches gives an outline of what a solution must do. Tribal citizenship requirements must: (1) not result in “practical” or “legal” extinction, (2) be consistent with tribal customs and values to have legitimacy within tribal communities, (3) identify individuals willing to assume the burdens of citizenship necessary to sustain and preserve the sovereign, and (4) support tribal authority on reservation lands by minimizing “democratic deficits.” This broad sketch leads to two specific, necessary changes to tribal citizenship policy and at least four useful additions.

A. TRIBES MUST ABANDON THE EXCLUSIVE USE OF MINIMUM BLOOD QUANTUM

The clearest conclusion suggested by the foregoing analysis is that reliance on minimum blood quantum as a sole standard for citizenship must be abandoned. When used alone, minimum blood quantum requires two conditions to be sustainable: (1) a population base large enough to allow reproduction within that population without the risks of increased health problems or birth defects, and (2) limiting the number of tribal citizens that have children with non-tribal citizens. Neither condition is realistically obtainable by any tribe. Unless both those conditions are met, the exclusive use of a minimum blood quantum standard will ultimately doom a tribe. At best, a tribe could postpone legal extinction by entering a repetitive cycle of adopting lower and lower blood quantum standards. Some tribes have already begun this ultimately futile effort.¹⁴⁴ At some point, repeatedly lowering the minimum threshold resembles lineal descent, which when used in isolation is itself fatally flawed.

That is not to say that minimum blood quantum must be abandoned altogether. It can be retained as one alternative means of obtaining citizenship. For instance, a tribe could grant citizenship to all individuals

143. The Law of Return 5730 (1970) § 4A. (a), LSI 114 (1950) (Isr.), THE KNESSET (2003), <http://www.knesset.gov.il/laws/special/eng/return.htm> (last visited July 3, 2015); The Citizenship Law, 1952, S.H. 95.; Mark J. Altschul, *Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining Its Present Language*, 2002 U. ILL. L. REV. 1345, 1350-55 (2002).

144. See *supra* notes 62-63.

with a certain minimum blood quantum and to all individuals with some degree of lineal descent who also fulfill additional non-genetic criteria.

B. TRIBES SHOULD USE LINEAL DESCENT BUT ONLY IN CONJUNCTION WITH ADDITIONAL NON-GENETIC CRITERIA.

Retaining some form of lineal descent, on the other hand, makes sense given its time-honored track record. It is consistent with human history, both tribal and non-tribal. Birth to parents is used by many countries in some form or another. The one distinction in its use in the tribal context is that tribes do not require the parents of the individual seeking citizenship to be citizens. Instead, lineal descent allows an individual to base citizenship on any ancestor who is or was a citizen, no matter how distant. Tribes could require those seeking citizenship to prove that the individual's parents are citizens. This would increase the likelihood that the individual in question would have had some connection to the tribe as a child.

Requiring generational continuity would eliminate the issue of people who rediscover their Indian heritage, but a tribe adopting such a requirement would need to consider how much such a requirement would limit tribal size going forward. In addition, they would need to consider whether such a limitation would be ethical given that it bars individuals from citizenship based on criteria beyond their control, i.e., their parents' decision not to enroll would exclude them from membership. Using lineal descent in conjunction with other indicia of allegiance would lessen the need for the additional assurance generational continuity could provide, as will be discussed *infra*.

Starting with lineal descent as a basis for citizenship has the additional advantage of being over-inclusive. Using lineal descent grants citizenship to all individuals with tribal ancestry—those who would be good citizens and those who would not. But relying on lineal descent alone results in all the problems described in Part III, not the least of which is extinction. As Professor Matthew Fletcher puts it, “An Indian tribe composed of a large percentage of non-Indian members is no tribe at all.”¹⁴⁵ The large and sudden increase in tribal citizens would also result in a large and sudden increase in federal spending related to the tribe, which could draw unwanted federal scrutiny. In a perfect world, tribes would not need to consider how the federal government would respond to their internal choices related to citizenship. Unfortunately, the political ramifications of any change in citizenship standards are likely to be closely watched.

145. Fletcher, *supra* note 7, at 1-2.

The question then becomes twofold: (1) How do you differentiate individuals who meet the lineal descent requirement and would be good citizens from those who would not? And (2) If a precise, easily applicable line cannot be drawn, which side should the tribe err on—overinclusion or underinclusion? Further differentiation necessarily implies creation of additional standards to use in conjunction with a lineal descent requirement. In other words, tribes should combine a lineal descent requirement with other criteria. A minority of tribes already do this, but not enough. These additional criteria would ideally identify individuals with ancestry who would fulfill the duties required of citizens in good faith. Other nations seek the same goal when they decide whether to grant citizenship to a particular individual via naturalization. Consequently, the naturalization requirements of other nations provide fertile ground for how tribes can do the same thing.

Additional standards used by other nations include, but are not limited to, birth within the nation, birth to citizen parents, residency, cultural integration, historical knowledge, governmental knowledge, civil service, citizenship oaths, or other non-genetic criteria. These additional criteria could be adopted alone, in combination, or as a set of alternatives. Each also has a historic tribal analog, meaning that adoption of any of these criteria is a validation of recognized tribal custom, not the adoption of non-Indian standards. Each of these criteria will be discussed in turn.

1. *Birth on the Reservation and Reservation Residency*

Birth and residency within sovereign territory have wide spread historical acceptance, similar to that enjoyed by birth to citizen parents. As a result, tribes could use reservation birth and residency in conjunction with lineal descent as a basis for tribal citizenship. Birth on the reservation is fairly easy to verify, as is reservation residency.

Birth on the reservation and reservation residency have historically been seen as strong indications that an individual identifies with the community where the individual was born or lives. Nations have historically seen this as strong circumstantial evidence of a readiness to be a good citizen with regard to the duties owed as a member of that community.

The problem in the tribal context is that many tribes have large off-reservation populations, thanks to federal policies specifically designed to encourage Indians to relocate off reservation.¹⁴⁶ The lack of reservation jobs and greater educational opportunities off reservation are all too common and add to this phenomenon. Consequently, making reservation

146. Indian Relocation Act of 1956, Pub. L No. 959, 70 Stat. 986 (1956).

residency or reservation birth a requirement for tribal citizenship would disenfranchise many who are otherwise worthy of citizenship. However, using birth or residency on the reservation as one option to gain citizenship, among others, would avoid such disenfranchisement.

2. *Cultural and Governmental Knowledge*

Modern nations commonly test individuals seeking naturalization for cultural knowledge, language ability, historical knowledge, financial stability, and governmental knowledge. While these are common standards outside the Indian context, care must be taken when importing them into the Indian context.

Most nations test linguistic, historical, and governmental knowledge as part of the naturalization process. The conventional thinking is that anyone seeking to become a citizen of a nation should have some baseline understanding of its language, history, government, laws, and civic duties. It also seems reasonable that anyone genuinely interested in becoming a citizen would have an independent desire to know these things.

Questions testing knowledge of tribal governmental and law would probably have verifiable answers that could be agreed on and easily taught, but the same is not true of language and history. Sadly, the majority of tribal citizens today have at best a limited knowledge of their tribal language.¹⁴⁷ Requiring an understanding of the tribe's language would essentially end up denying citizenship to the vast majority of otherwise eligible individuals. Language ability is best used as an alternative criteria, rather than a mandatory one. That said, giving some form of incentive to use language ability as an individual's supporting criteria would support tribal efforts to preserve the tribe's language.

Testing historical knowledge would be easier, but has the problem of "Who decides what the right answer is?" Many in Indian Country would consider it a serious taboo for any individual or body to declare the "correct" answer on certain topics, particularly in light of many tribes' commitment to preserving oral traditions. Mitigating against this worry is the fact that such naturalization tests do not test for mastery, but rather threshold competency.

147. Allison M. Dussias, *Indigenous Languages Under Siege: The Native American Experience*, 3 INTERCULTURAL HUM. RTS. L. REV. 5 (2008).

3. *Citizenship Oaths*

Many nations require individuals seeking naturalization to take an oath as a last step to attaining citizenship.¹⁴⁸ Such oaths usually include promises to uphold the law and fulfill duties common of all citizens. They serve a largely ceremonial purpose outside the tribal context. In the tribal context, however, such oaths could serve to put individuals on notice of expectations. Refusals to take a particular oath would prevent individuals who fundamentally reject tribal authority from becoming tribal citizens, an important function.¹⁴⁹ For non-member and non-Indian potential citizens, discussed *infra*, such oaths if properly documented, could form the basis for asserting a consensual relationship on which tribal jurisdiction could be based.

4. *Civil Service*

While not a modern prerequisite for naturalization in the non-Indian context, several nations require individuals already possessing citizenship to perform military or civil service.¹⁵⁰ While tribes cannot have military forces, creation of a tribal service requirement would likely have at least two significant benefits: (1) a large reservoir of man-hours to help build and maintain the tribal nation, and (2) increased political participation. Fulfillment of a civil service requirement would be strong evidence of a willingness, indeed probability, to fulfill other civic duties down the road. As the saying goes, “What’s past is prologue.”¹⁵¹ A tribal citizen is more likely to be invested in making good decisions on behalf of the tribe if the citizen has already invested time and effort in the tribe’s well-being.

Conversely, an arrangement where tribal citizens make demands on tribal government with no appreciation for what it takes to fulfill those demands ignores the balance in which these two aspects must exist. While the federal government provides many resources to tribes to meet the needs of tribal communities, the more tribes can meet those needs themselves, the less they will be dependent on federal resources, and by extension, federal approval. Numerous possibilities exist for how such a civil service program could be put to use by tribes: construction and maintenance of

148. CITIZENSHIP TODAY, *supra* note 18, at 22-23.

149. In other contexts, individuals have refused to swear citizenship oaths. *INS v. Elias-Zacarias*, 502 U.S. 478, 486 (1992) (Stevens, J., dissenting) (refusing oath of allegiance can express a political opinion).

150. *See supra* notes 132-33.

151. WILLIAM SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1.

infrastructure, elder care, staffing tribal schools, staffing cultural preservation programs, natural resource management, and more.

The challenge with using civil service as a criterion is tribal citizens might not have the capacity or time to dedicate to such service, particularly populations living away from the reservation. Travel to the reservation to perform such service would likely be impossible for many otherwise eligible individuals. To overcome this hurdle, tribes could do two things. First, any civil service criteria would need to be an alternative, not mandatory, criteria. Second, tribes could tailor the ways an individual could fulfill their civil service criterion to the circumstances of the individual seeking citizenship. While supervision and verification would present administrative hurdles, these would not be insurmountable if a tribe saw civil service as important.

C. FOUR USEFUL ADDITIONS: NATURALIZATION FOR RESIDENT SPOUSES, NATURALIZATION FOR RESIDENT NON-MEMBER INDIANS, CREATION OF “RESERVATION CITIZENSHIP,” AND THE CREATION OF CLOSED ENCLAVES.

The foregoing suggestions address the first three flaws inherent in current tribal citizenship practices. The “democratic deficit” issue and its effect on tribal authority on the reservation remain. Four possibilities for handling this last flaw are: (1) granting tribal citizenship to non-member Indians who live on the reservation, (2) granting tribal citizenship to spouses of tribal citizens who live on the reservation, (3) creating a new category of citizenship based solely on residence, and (4) creating portions of the reservation open only to tribal citizens and non-Indians who explicitly accept tribal jurisdiction.

1. *Granting Tribal Citizenship to Spouses of Tribal Citizens and “Non-Member” Indians who Live on the Reservation*

The advantage behind extending tribal citizenship to reservation-resident spouses of tribal citizens and “non-member” Indians is simple: doing so moves two groups of people on the reservation from the non-citizen side of the “democratic deficit” equation to the citizen side. That might seem self-serving, but history, theory, and practicality all support such an extension.

The practice of making citizenship accessible to spouses, although not automatic, has few exceptions among nations, Indian or non-Indian.¹⁵²

152. CITIZENSHIP TODAY, *supra* note 18, at 17, 24, 28, 64, 71, 116-17.

Spousal citizenship is often contingent on residency.¹⁵³ Widespread use reflects the acceptance of the underlying theory—the decision to marry a citizen of another nation and live in that nation reflects a willingness to become part of that community. The residency requirement sets a verifiable, meaningful boundary that also has broad historical and contemporary acceptance, and tribes can require a minimum length of residency before granting citizenship. Tribes can also withdraw citizenship for spouses that move off reservation with no clear plan to return. These rules would resemble non-Indian standards for determining state residency.

Three facts support the ability of tribes to make this change. First, the custom has a solid historical and cultural basis; it predates European contact.¹⁵⁴ Second, tribes have broad discretion in matters of their own citizenship,¹⁵⁵ as does any nation. Third, the custom has wide acceptance outside the tribal context; it would be the embodiment of hypocrisy to deny tribes the same authority.

Granting full tribal citizenship to “non-member” Indians who live on the reservation would move more individuals from one side of the “democratic deficit” equation to the other. Tribal citizenship could be granted to “non-member” Indians in a similar way: requiring minimum residency and conditioning membership on continued residence.

But granting tribal citizenship to reservation-resident spouses and non-member Indians only addresses a portion of the non-citizen population on most reservations, and consequently, only a portion of the “democratic deficit” problem. A more comprehensive answer requires addressing all reservation-resident non-member Indians.

2. *Granting “Reservation Citizenship” to Reservation-Resident Non-Indians*

To address the “democratic deficit” that exists for the remaining reservation-resident non-Indians, tribes should create a new class of citizenship available to all reservation residents, Indian and non-Indian alike. “Reservation citizens” would be allowed to participate in governmental matters relevant to being a reservation resident, such as law enforcement, zoning, infrastructure, taxation, wildlife regulation, etc. In contrast, only “tribal citizens” would be allowed to participate in deciding matters related to tribal services, tribal businesses, federal benefits based on

153. *Id.* at 24.

154. *See supra* notes 76-79.

155. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n.8 (1978); *Smith v. Babbitt*, 875 F. Supp. 1353, 1360 (D. Minn. 1995).

tribal citizenship, sacred sites, and tribal benefits like per capita payments. This would be a significant departure from current practices, but it has sound historical and theoretical bases.

It might take time to develop a better understanding of which issues would belong to the “reservation government” and which to the “tribal government,” but divisions of jurisdiction by subject matter are not new. The Tenth Amendment performs a similar job between states and the federal government,¹⁵⁶ and has been subject to refinement and interpretation by the courts.¹⁵⁷ Multiple categories of citizenship are not without precedent, either. Athens, Sparta, Rome, and Great Britain all had them.¹⁵⁸

The key would be maintaining the fit between which issues primarily impact each group, and by extension, which group should have a say in making laws regarding a particular issue. Two things could help tribes determine which issues should belong to the “reservation government” and which to the “tribal government”: (1) the use of a “reserved rights” concept, and (2) the analysis of present and future caselaw for decisions that extinguish tribal jurisdiction over resident non-Indians due to a lack of political participation.

Tribes could structure their constitutions so that any rights of participation granted to reservation-resident non-Indians would be expressly stated, while the tribe and its citizens would reserve all other rights and authority. This would resemble how the states are granted the powers not expressly given to the federal government of the United States by the Constitution¹⁵⁹

Another guidepost would be federal case law. Tribes could regain a measure of authority over reservation-resident non-Indians by granting them participation rights on any issue in which federal courts extinguished tribal authority on the basis of a “democratic deficit.” This would enable tribes to contour their authority as caselaw changes, as it always does. Tribes could even create a process by which they could reclaim previously

156. U.S. Const. amend. X.

157. Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?* 36 WM. MITCHELL L. REV. 793, 830-31 (2010); Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 851-77 (2006); David N. Mayer, *Justice Clarence Thomas and the Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 339-410 (1996).

158. HEATER, *supra* note 80, at 81; MERRILL JENSEN, *THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION 1763-1776*, at 240-41 (1968).

159. U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

conceded authority, should federal law later change to support tribal authority over non-Indians on a particular issue.¹⁶⁰

These new approaches would address the “democratic deficit” problem, but would create another problem. Today almost as many, and sometimes more, non-Indians live on reservations than Indians.¹⁶¹ Consequently, on those reservations, tribal citizens would likely lose a large amount of control with regard to their own reservation. The laws passed by a body politic primarily composed of non-Indians would likely no longer reflect a distinctly tribal character. To avoid this, tribes could select areas of the reservation with few non-Indian residents and close them to the general public.

3. *Closing Portions of the Reservation to Non-Tribal Citizens*

Tribes, which grant non-Indian residents the right to participate in reservation issues and have significant non-Indian populations on their reservations, could create enclaves on the reservation where tribal character and authority would be more complete. These areas would be closed to the general public and governed exclusively by the tribe. This arrangement would resemble the closed portions of the Yakima Nation reservation prior to 1988.¹⁶²

These portions should have as few non-Indian residents as possible. Tribes could grant non-Indians permission to enter these areas conditioned on an explicit acceptance of tribal authority jurisdiction via permitting. This would create a consensual relationship between the Tribe and the non-Indian visitor on which full tribal jurisdiction could be based.¹⁶³

V. CONCLUSION

Sovereignty represents a people’s efforts to preserve their way of life, i.e., culture. Citizenship is the foundation of sovereignty. Consequently, citizenship criteria need to be tailored to the purpose of preserving culture.

160. A court considering this structure could decide that this arrangement leaves the voting rights of reservation resident non-Indians too vulnerable to divestment by tribal citizens. To avoid this possibility, tribes should consider requiring a super-majority vote of the tribal citizens to reclaim participation rights previously granted. Measures should also be taken to prevent tribal citizens from reclaiming authority shortly before specific elections for the same reasons.

161. Matthew L.M. Fletcher, *NCAI Press Release on VAWA Reauthorization Passage*, TURTLE TALK (Feb. 28, 2013, 1:26 PM), <http://turtletalk.wordpress.com/2013/02/28/ncai-press-release-on-vawa-reauthorization-passage/> (citing U.S. Census Bureau, Census 2010).

162. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 414-21 (1989).

163. The Supreme Court has held that Tribes may exercise jurisdiction over non-Indians who enter such consensual relationships. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981).

Current tribal citizenship practices confuse political identity (i.e., citizenship), cultural identity, and ancestry. They are related, but distinct, concepts. Understanding that distinction and how it relates to the tribal treatment of citizenship are necessary first steps to crafting culturally relevant, sustainable, and sovereignty-centered tribal citizenship criteria. Developing such criteria is imperative. Answering the citizenship question incorrectly, or even *partially* correct, undermines tribes' sovereignty.

Tribes need to decide what they really want to preserve: genetics or culture. Genetic code can produce a body that looks Indian, but that is all it can do. It will never pass on what it *means* to be Anishanaabeg, Ho-Chunk, Hunkpapa, Crow, Blackfoot, Apache, Commanche, Cheyenne, Cherokee, Dine, or any of the other myriad tribes. Only culture can do that. Culture—the rich stock of meaning that embodies a people, their history, religion, art, ethics, customs, food, and science—cannot be captured or preserved genetically.

Tying citizenship too closely to genetics through the use of minimum blood quantum or lineal descent will doom a culture because neither is sustainable. Exclusive reliance on genetic criteria to the exclusion of naturalization also ignores the reality that “peoples” have always been organic in nature, changing over time. “Full blood” is a completely contrived concept. Traced far enough back, all “full bloods” came from something that came before.

Tribes have broad authority to choose whatever citizenship structure they want.¹⁶⁴ What they cannot do is separate the consequences of the structure they adopt from the structure itself; the two go hand-in-hand. Tribes can choose to use minimum blood quantum; they cannot choose whether using minimum blood quantum is sustainable. Alternatively, tribes can combine lineal descent with the other non-genetic criteria outlined above. History contains a veritable library of examples of how to do this. Citizenship is not an exclusively Indian idea and should not be treated as such. Citizenship has come down through history with many, many variations that all have something to teach. While wholesale adoption of the choices of another culture would rarely, if ever, be appropriate, tribes can adapt the citizenship practices of others to their own purposes. Adaptation is crucial to the long term survival of any species. Tribes are no different. They must adapt, and do so strategically, or they will simply disappear.

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164. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 246-47 (Rennard Strickland et al. eds., 1982).