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Race, Descent, and Tribal Citizenship

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What is the relationship between descent-based tribal citizenship[1] requirements and race or racism? This essay argues that tribal citizenship laws that require Indian or tribal descent are generally neither the product nor the source of racism in federal Indian law and policy. And while descent does affect multiple areas of federal Indian law and policy, citizenship requirements do not drive many of them. Descent as used in tribal citizenship criteria, moreover, only has a tenuous connection to race as it is commonly understood. More importantly, recognizing governmental authority in tribes that use descent-based citizenship criteria does not violate either federal law or federal norms.

This is a big topic, one this essay cannot fully explore. In part this is because questions of race and descent do not just influence tribal citizenship criteria, but also many areas of federal Indian law and policy. To illustrate this point, I begin this essay in a somewhat counterintuitive place, with the reauthorization of the Violence Against Women Act.

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1. Political belonging to a tribe was formerly commonly called citizenship, but was designated membership in the constitutions drafted by tribes at federal urging under the Indian Reorganization Act; many now are beginning to return to the term citizenship, but "member" remains the most common term in statutes and case law. This essay therefore uses both terms.

Three out of five Native women will experience domestic violence in their lifetimes.[2] One third of all Native women will be raped,[3] more than twice the national average.[4] Sixty-three percent of these assaults and sixty-seven percent of these rapes are at the hands of non-Native perpetrators.[5] This is a reversal of the pattern for most other races, where the race of the survivor and perpetrator is typically the same.[6]

But in 1978, the Supreme Court decreed that tribes had no criminal jurisdiction over non-Indians committing crimes in their territory.[7] Later decisions deprived tribes of much civil jurisdiction as well.[8] The results were that tribes could not impose criminal penalties on non-Indian abusers, and some tribal governments would not even enter civil orders because of the uncertainty of tribal civil jurisdiction; when civil orders were entered, some state and federal courts refused to enforce them.[9] Amnesty International found that the lack of jurisdiction over non-Indians helped create a culture of impunity for perpetrators of violence against women in Indian country.[10]

When the authors of the bill to reauthorize the Violence Against Women Act proposed affirming tribal criminal and civil jurisdiction over anyone, Indian or non-Indian, who commits domestic violence against an Indian in Indian country,[11] both women's advocates and tribes celebrated. A group of congressional Republicans, however, argued that it was unconstitutional for tribes to exercise jurisdiction over "any American"[12]—*i.e.*, non-Indian Americans. Their objections were made in the name of racial equality. Senator Jon Kyl, for example, declared that "by subjecting individuals to the criminal

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2. NCAI POLICY RESEARCH CTR., POLICY INSIGHTS BRIEF: STATISTICS ON VIOLENCE AGAINST NATIVE WOMEN 2 (2013), *available at* http://files.ncai.org/broadcasts/2013/February/Policy%20Insights%20Brief_VAWA_020613.pdf.

3. S. REP. NO. 112-153, at 7–8 (2012).

4. *See* Bethany R. Berger, *Justice and the Outsider Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1108 (2005); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 123 (2004).

5. NCAI POLICY RESEARCH CTR., *supra* note 2, at 4.

6. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL SURVEY PROFILE, 1992-2002 9 tbls.12 & 13 (2004), available at http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

7. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–12 (1978).

8. *See* Berger, *supra* note 4, at 1054–64 (summarizing cases).

9. *See* Martinez v. Martinez, No. C08-5503 FDB, 2008 WL 5262793, at *1, 7 (W D. Wash. Dec. 16, 2008) (holding that tribal court had no authority to issue order of protection on behalf of Alaska Native woman against her non-Indian husband); Stacy Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments A Tribal Court Perspective*, 76 N.D. L. REV. 311, 349–51 (2000) (reporting widespread lack of enforcement of tribal court domestic violence orders).

10. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT NATIVE WOMEN FROM SEXUAL VIOLENCE IN THE USA 26–28 (2007), available at http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf.

11. Violence Against Women Act Reauthorization of 2012, S. 1925, 112th Cong. (2012).

12. Rob Capriccioso, *U.S. Senator Worries Tribal Courts will Imprison Any American,'* INDIAN COUNTRY TODAY (April 16, 2012), http://indiancountrytodaymedianetwork.com/article/u.s.-senator-worries-tribal-courts-will-imprison-%E2%80%98any-american%E2%80%99-108508 (quoting Sen. Kay Bailey Hutchinson).

jurisdiction of a government from which they are excluded on account of race," the bill violated the Due Process and the Equal Protection provisions of the U.S. Constitution.[13]

At the same time, a situation in which only tribes cannot exercise local jurisdiction over all domestic violence problems in their territory, and only Indian women abused by non-Indians are excluded by this lack of jurisdiction, also appears to be one of racial disparity. Responding to congressional opponents of the bill, Representative Darrell Issa of California called the "current law a clear discrimination between two residents of the reservation simply based on race."[14]

Objections to tribal courts trying non-Indian men for beating Indian women led to a nine-month delay in reauthorizing VAWA. Efforts to strip the provision from the bill, along with provisions seeking to ensure protection for LGBT and immigrant victims, failed in the Senate but succeeded in the House last May.[15] After more coalition building, advocacy, removal of additional visas for undocumented immigrants, and the November 2012 elections, the bill passed the Senate by 78-to-22 on February 12, 2013.[16] Finally, on February 28, the bill passed the House, with 87 Republicans joining all but one Democrat to vote in favor.[17]

This story reveals some of the multiple and contested roles that race, descent, and tribal citizenship play in Indian country. As examined in recent important work by Sarah Krakoff and Addie Rolnick, Indian status is "inextricably political"[18] but that political status is "hopelessly intertwined" with race,[19] because modern Indian status is forged by the often racist efforts to

13. Caroline P. Mayhew, *VAWA Tribal Provisions and Race Discrimination Arguments*, INDIAN COUNTRY TODAY (May 29, 2012), http://indiancountrytodaymedianetwork.com/opinion/vawa-tribal-provisions-and-race-discrimination-arguments-114790 (quoting former Sen. Jon Kyl).

14. STAFF OF H.R. COMM. ON THE JUDICIARY, 112TH CONG., REP. ON VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2012, at 246 (2012), *available at* http://www.rules.house.gov/Media/file/PDF_112_2/JurisdictionCommRpts/HRPT-112-HR4970cj.pdf.

15. The House Bill also removes protections to ensure that LGBT and immigrant victims of domestic violence were fully protected by VAWA. William Douglas, *GOP-Backed Domestic Violence Bill Ok'd; Critics Claim it Excludes too Many Groups*, CHARLESTON GAZETTE (W. Va.), May 17, 2012; *see also* Kristen Broughton & Joanna Anderson, *S1925-Violence Against Women Reauthorization Act of 2011*, CQ BILLANALYSIS (May 30, 2012), 2012 WLNR 11704699 (describing provisions in more detail).

16. Jonathan Weisman, *Senate Votes Overwhelmingly to Expand Domestic Violence Act*, N.Y. TIMES, Feb. 13, 2013, at A21, *available at* http://www.nytimes.com/2013/02/13/us/politics/senate-votes-to-expand-domestic-violence-act.html?ref=domesticviolence; Editorial, *Renew the Violence Against Women Act*, N.Y. TIMES, Feb. 16, 2013, at A18, *available at* http://www.nytimes.com/2013/02/16/opinion/renew-the-violence-against-women-act.html?_r=0.

17. *Final Vote Results for Roll Call 55, S. 47, Violence Against Women Reauthorization Act of 2013*, CLERK.HOUSE.GOV (Feb. 28, 2013, 11:56 AM), http://clerk.house.gov/evs/2013/roll055.xml.

18. Sarah Krakoff, *Inextricably Political Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1048 (2012).

19. Addie C. Rolnick, *The Promise of* Mancari *Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 968 (2011).

deal with and contain the political sovereignty of indigenous peoples.[20] The continued reliance by tribes on descent to define their political boundaries, however, is not the source of this racialization. While specific citizenship choices may be motivated by ignoble goals, the reliance on descent in general comes from efforts to maintain political continuity and cohesion in the face of persistent and racist efforts to destroy tribes. Neither federal constitutional law nor international norms prevent descent-based citizenship criteria or recognition of territorial sovereignty in tribes that employ them.

This essay proceeds in three parts. First, it highlights the common misunderstandings associated with the relationship between race, descent, and Indian status. Second, it outlines the many contrasting relationships between race, descent, membership, and Indian law, showing that tribal citizenship criteria frequently do not drive these relationships, and are not the source of racism against Indians or tribes. Finally, this essay addresses and rejects challenges that federal Indian law and tribal citizenship criteria are racist, illegal, or immoral because of the role of descent.

I.
MISUNDERSTANDINGS OF THE ROLE OF DESCENT AND RACE IN INDIAN STATUS

Although there is a relationship between Indian heritage and Indian status, the relationship is frequently misunderstood. Two stories are illustrative.

The first is the story of comedian Wanda Sykes, whose family tree was traced back to free blacks in 1683 on the PBS show "Finding Your Roots with Henry Louis Gates, Jr."[21] In later interviews about the show, Sykes quipped, "I was so disappointed he didn't get me any casino money out of this . . . . Come on Skip, tell me I'm a relative of Pocahontas. I would have retired."[22] Sykes was joking—at time of revelation, she teared up thinking of the difficulty of remaining free and black in Virginia for so many generations of slavery.[23] But the joke reveals a false yet common syllogism: Indian blood equals Indian status and Indian status equals casino riches. This is wrong at a number of levels. First, the United States must officially recognize tribal status and powers of self-government in a tribe before it can engage in legal gambling in a state that would not otherwise allow it.[24] Pocahontas' Pamunkey Tribe has a storied

20. *See* Bethany R. Berger, *Red Racism and the American Indian*, 56 UCLA L. REV. 591 (2009) (discussing the role of racism in federal Indian law and policy).

21. Felicia R. Lee, *Family Tree's Startling Roots*, N.Y. TIMES, March 20, 2012, at C1, *available at* http://www.nytimes.com/2012/03/20/arts/television/wanda-sykes-finds-ancestors-thanks-to-henry-louis-gates-jr.html?_r=0.

22. *Id.*

23. *Finding Your Roots with Henry Louis Gates, Jr. John Legend and Wanda Sykes* (PBS television broadcast May 14, 2012), *available at* http://www.pbs.org/wnet/finding-your-roots/video/john-legend-and-wanda-sykes/.

24. *See* 25 U.S.C. § 2703(5) (2012) (defining an "Indian tribe" as one recognized by the Secretary of the Interior and possessing powers of self-government); *id.* § 2710 (describing circumstances in which "Indian tribes" may engage in gaming).

history, but although it continues to exist and fight to defend its land and community, it does not have federal recognition.[25] In other words, Sykes is likely doing much better than most of the current day Pamunkey. Even if the Pamunkey were recognized, and its casino were one of the few to produce more profits than necessary to pay for government services, Sykes probably would not get any casino money. Virtually all tribes require members to trace descent from an individual who was recorded as a tribal citizen on historic census rolls; these rolls were generally created long after 1683, usually somewhere around 1900.[26] Just being descended from Pocahontas probably would not be enough.

But misunderstandings of the role of Indian descent are not confined to comedians. A more disturbing example comes from Supreme Court Justice Robert Jackson. During the 1952 arguments in *Brown v. Board of Education*, Jackson made the aside, "In some respects, in taxes, at least, I wish I could claim to have a little Indian blood."[27] As with Ms. Sykes, a little Indian blood would not do much for him. It would not make him a member of a tribe, a requirement to claim any immunity from taxes. Even tribal members pay almost all federal taxes,[28] and to be exempt from any state taxes Jackson would have to live on the territory of his tribe, not in Washington, D.C.[29]

Even those like Jackson who have tremendous power over the significance of Indian status do not always understand what it means. The shared misconception is that "a little Indian blood" gives rise to vast privileges—a share of immense gambling riches, broad exemptions from all taxes, and other rights not shared by those without it. This misconception contributes to beliefs that Indian status is a racial status, and that it is unfair and even unconstitutional. The next section shows that the relationship between Indian status and race and descent is far more complex.

II.
THE ROLE OF DESCENT AND RACE IN INDIAN STATUS

What descent and race actually do mean for Indian status varies a lot. With separate tests for criminal versus civil jurisdiction, receipt of health versus education benefits, and different tests entirely for satisfying the public's definition of "real Indians," misunderstandings like Sykes's (though perhaps

25. *See Pamunkey Indian Tribe Files for Federal Acknowledgment*, NATIVE AMERICAN RIGHTS FUND (Oct. 14, 2010), http://narfnews.blogspot.com/2010/10/pamunkey-indian-tribe-files-for-federal.html.

26. *See* Rice v. Cayetano, 528 U.S. 495, 526–27 (2000) (Breyer, J , concurring) (listing tribal membership laws and noting that none accord membership based on descent from a member as early as 1778).

27. BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 50 (Leon Friedman ed., The New Press 2004) (1969).

28. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 8.02[2], at 680 (Nell J. Newton et al. eds. 2012) [hereinafter COHEN'S HANDBOOK].

29. *See id.* § 8.03[1][b], at 697; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160–61 (1980); United States ex rel. Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552, 1559–60 (8th Cir. 1997).

not Jackson's) are understandable. This section lays out some of the many varied definitions of tribal membership and Indian status, and the role of descent and race in each.

Today, virtually all tribes require some measure of tribal descent to enroll. While tribes still do occasionally extend citizenship to those without any Indian descent, this is generally an evasion of written tribal law.[30] Nonetheless, tribal requirements vary. Some tribes require that descent be from that particular tribe; some require tribal descent generally and/or descent from a related indigenous group; and others require simply Indian descent plus residence or parental enrollment.[31] The degree of descent required also varies: some require one-quarter, one-eighth, or one-sixteenth heritage, while others require only the ability to trace an ancestor to a particular roll.[32] Although the requirements are often expressed in terms of "blood quantum"—the Bureau of Indian Affairs even issues "Certificates of Degree of Indian Blood"[33]—the quantum determined is far more historic and cultural than it is biological, as it is tied to descent from an individual listed on a particular census roll of a tribe at a

30. An example of this comes from the well-known South Dakota holding that a child of no known Native descent was an Indian child under the Indian Child Welfare Act because he had been adopted by members of the Cheyenne River Sioux Tribe and enrolled with the tribe. Matter of Dependency & Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989). The enrollment of the child was in fact in violation of Cheyenne River Sioux written law, which requires Cheyenne River Sioux blood or listing on the 1934 census of tribal members to become a tribal citizen. CONSTITUTION AND BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE art. II (1935). For a constitution that explicitly permits enrollment by adopted children, see the CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1 (1988), although even it requires adopted children to have Indian descent.

31. *See, e.g.*, CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1 (1988) (requiring descent from member plus one-fourth Indian blood of which one-eighth must be Michigan Chippewa and/or Ottawa blood); CONSTITUTION OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) art. II, § 2 (1990) (requiring descent from a person listed on the 1870 census roll); CONSTITUTION AND BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE art. II (1935) (members are those of Indian blood on the 1934 census roll and those born to Cheyenne River Sioux members who were resident on the reservation at the time of birth, plus those of Cheyenne River blood discretionarily admitted by a two-thirds vote of the tribal council); CONSTITUTION AND BY-LAWS FOR THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION OF MONTANA art. II, § 1 (1978) (members are those on the 1935 census roll, those of Indian blood born to members while in residence at time of birth, and those of one-fourth Blackfeet Indian blood born to blood Blackfeet members); CONSTITUTION OF THE SOUTHERN UTE INDIAN TRIBE, COLORADO art. II, § 1 (1975) (those on the 1970 roll and children of such members with one-quarter Southern Ute blood); CONSTITUTION OF THE CHILKAT INDIAN VILLAGE, KLUKWAN, ALASKA art. III (2006) (all residents of Indian descent married to or adopted by resident members may become members); *see also* Kirsty Gover, *Genealogy as Continuity Explaining the Growing Tribal Preference for Descent Rules in Membership Governance*, 33 AM. INDIAN L. REV. 243, 304 fig. 5 (2008) (charting different kinds of membership rules).

32. *See, e.g.*, CONSTITUTION OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1 (requiring one-quarter Indian blood with at least one-eighth being Chippewa and/or Ottawa blood); CONSTITUTION AND BY-LAWS OF THE CHITIMACHA TRIBE OF LOUISIANA art. III (1971) (requiring one-sixteenth Chitimacha Indian blood); CONSTITUTION OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) art. II, § 2 (requiring descent from a person listed on the 1870 census roll).

33. *See* Gover, *supra* note 31, at 252–53 (discussing CDIBs).

particular time. These rolls did not necessarily list the blood quantum of the individual, and if they did, did not necessarily do so accurately.[34]

Tribal citizenship is necessary to vote in a tribe, and is required for certain benefits, such as distribution of per capita payments from casino profits.[35] A number of tribes, however, have a category of "descendant members," which includes those who are not themselves eligible for membership but are descended from enrolled tribal citizens.[36] These descendant members may be eligible for tribal governmental services and treaty hunting and fishing rights that are not available to nonmembers.[37]

Although tribal enrollment is a necessary criterion for many aspects of Indian status, it is not necessary for some of the most important ones, and not sufficient for others. Similarly, although Indian heritage is necessary for many definitions of Indian status, it is not necessary for all. The tests for civil and criminal jurisdiction, for example, differ from each other with regard to both heritage and membership. Immunity from state civil jurisdiction on reservations does not require Indian heritage but does usually require membership in the tribe in whose territory one is acting.[38] In contrast, Indian status for purposes of criminal jurisdiction requires both some heritage from a federally recognized Indian tribe and that the individual be "recognized as an Indian" by the federal government or an Indian tribe.[39] Recognition does not have to include enrollment or even eligibility for enrollment, however; it can be satisfied by some combination of residence on a reservation, receipt of benefits reserved for Indians, participation in tribal affairs, and other factors.[40] Ironically, therefore,

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34. *See id.* at 261 (federal census rolls taken before 1930 generally did not record blood quantum, or tribal affiliation as opposed to residence); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 40–41 (2006) (Dawes commission rolls recorded only blood of mother's tribe if parents were from different tribes, and failed to record any Indian blood at all for many of Indian and African American ancestry).

35. COHEN'S HANDBOOK, *supra* note 28, § 4.06[1][a], at 280 ("All tribes, in almost all circumstances, limit tribal voting rights to individuals with tribal membership or citizenship."); Lynnette Curtis, *Cast Out of Paiute Tribe, Disenrolled Confront Struggles*, LAS VEGAS REV.-J. (Apr. 22, 2012), http://www.lvrj.com/news/cast-out-of-paiute-tribe-disenrolled-confront-struggles-148423355.html (discussing connection between disenrollment and per capita payments).

36. *See* United States v. Maggi, 598 F.3d 1073, 1076–75, 1082 (9th Cir. 2010) (describing descendant membership in Blackfeet Tribe).

37. *Id.* at 1076–75.

38. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160–61 (1980) (nonmember Indians had to pay state taxes on cigarettes purchased on reservation); United States ex rel. Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552, 1559–60 (8th Cir. 1997) (even Lakota Sioux from other tribes had to pay motor vehicle excise taxes on vehicles garaged on Cheyenne River Sioux Reservation).

39. COHEN'S HANDBOOK, *supra* note 28, § 9.02[1][d], at 746–47.

40. *Compare* United States v. Bruce, 394 F.3d 1215, 1226–27 (9th Cir. 2005) (holding that woman who was one-eighth Chippewa but not enrolled in tribe or recognized as Indian by the federal government should have had her affirmative defense of Indian status submitted to the jury and was Indian for purposes of criminal jurisdiction because she was born on a reservation and currently lived on one, participated in Indian religious ceremonies, had on several occasions been treated at Indian hospitals, and had previously been arrested by tribal authorities) *with Maggi*, 598 F.3d at 1083 (holding that man of 1/64 Blackfeet and 1/32 Cree descent whose mother was a member of the

although some congressional Republicans protest against subjection of perpetrators of domestic violence to the jurisdiction of tribes from which they are excluded by descent, many Indians are already subject to the criminal jurisdiction of tribes in which they can never enroll.[41]

Indian heritage is also not necessary to be defined as an Indian child under the Indian Child Welfare Act. The Act, which creates presumptive tribal jurisdiction over child welfare cases involving Indian children, defines an Indian child to be either (a) a tribal member or (b) the biological child of a member who is eligible for membership.[42] The second qualifying definition contributes to charges that the statute unconstitutionally classifies based on race.[43] The first qualifying definition, however, has been correctly interpreted to mean that a child without Indian heritage who had been adopted by a Lakota family and become a member of their tribe is an "Indian child" for purposes of the act.[44]

Access to government services for Indians involves many different tests.[45] Here are just a few. Care at facilities funded by the Indian Health Service (IHS) requires proof of descent as well as actual belonging to an Indian community, which may be shown by factors other than tribal enrollment, such as participation in tribal affairs and residence on tax-exempt property.[46] Tribes may also create additional categories of individuals eligible for services,[47] and the IHS will provide care to family members of Indians in some circumstances.[48] In contrast, Bureau of Indian Education operational support for reservation elementary and secondary schools is provided only for students who are either members or one-quarter blood quantum descendants of members.[49] Federal assistance to colleges under the Tribally Controlled Colleges and Universities Act is broader, as it is provided both to educate students who are tribal members and to biological descendants of members regardless of blood quantum.[50] Similarly, membership in a federally recognized tribe alone creates eligibility for Bureau of Indian Affairs Job Placement and

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Blackfeet Tribe, who was ineligible for enrollment and had never lived on the reservation, but who as a "descendant member" was eligible for tribal health care, educational scholarships, and hunting and fishing rights, and who had been arrested and prosecuted by tribal officials several times, was not Indian).

41. *See generally* United States v. Lara, 541 U.S. 193, 210 (2004) (upholding tribal criminal jurisdiction over nonmember Indians).

42. 25 U.S.C. § 1903(4) (2012).

43. *See* Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1382–85 (2002) (discussing and critiquing these attacks).

44. Matter of Dependency & Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989).

45. *See* COHEN'S HANDBOOK, *supra* note 28, § 22.01, at 1382–83; Krakoff, *supra* note 18, at 1084–85 (discussing various provisions).

46. 42 C.F.R. § 136 12 (2012).

47. 25 U.S.C. § 1680c(c).

48. 42 C.F.R. § 136.12.

49. 25 U.S.C. § 2007(f); 25 C.F.R. § 39.2.

50. 25 U.S.C. § 1801(7)(B).

Training[51] and Food Stamp[52] programs. Some programs include individuals not connected to federally recognized tribes. The Indian Education Act of 1972, for example, which provides limited funding to public schools for education of Indian students,[53] defines "Indian" to include members of federally recognized tribes, members of state-recognized and terminated tribes, as well as their descendants.[54] The Native American Housing Assistance and Self-Determination Act covers not only members of recognized American Indian and Alaska Native tribes, but also Native Hawaiians, who do not share the status of Indian tribes.[55]

These are just a few of the many ways that descent and tribal enrollment contribute to legal definitions of Indian status. But neither descent nor enrollment in a tribe are necessary or sufficient for self-identification as Indian, inclusion in popular definitions of Indian status, or in racism directed against Indians. For example, African Americans whose ancestors may have served in the Seminole Nation government or crossed the Trail of Tears with the tribe, and who themselves grew up in Seminole country, self-identify as Seminole and Indian, regardless of Indian blood or recognition by the Seminole Nation.[56] At the same time, enrollment plus Indian descent often does not mean that individuals will be perceived as racially Indian. The vast majority of tribal citizenship laws require only one-quarter or less Indian or tribal descent. Indian tribal citizens, therefore, often look white, black, Latino, or Asian, and would not satisfy popular ideas of who is Indian.[57]

Finally, any number of things can make one the target of anti-Indian racism: perception as Indian, regardless of reality;[58] asserting tribal benefits or rights as an Indian;[59] or even claiming Indian status when one does not look or act sufficiently Indian in the mind of the racist.[60] For example, Donald Trump testified in hearings before the Senate that the Mashantucket Pequots did not look like "real Indians," while a local townsperson complained to a reporter that "more than half [of the Mashantucket Pequots] are predominantly African American and the rest are mostly white . . . . They just want special privileges.

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51. 25 C.F.R. §§ 26.1, 26.5.

52. 7 C.F.R. § 273.4(a)(3)(ii).

53. 20 U.S.C. §§ 7421, 7422.

54. *Id.* § 7491(3).

55. 25 U.S.C. §§ 4221–4243.

56. *See* William Glaberson, *Who Is a Seminole, and Who Gets to Decide?*, N.Y. TIMES (Jan. 29, 2001), http://www.nytimes.com/2001/01/29/us/who-is-a-seminole-and-who-gets-to-decide.html?pagewanted=all&src=pm.

57. *See Cherokee Ancestors*, MEET CHEROKEE NATION CITIZENS, http://www.meetthecherokee.org/TakeAction/WatchOurVideo/tabid/1715/Default.aspx (last visited Feb. 8, 2012) (video showing pictures of Cherokee citizens of many different races).

58. *See* Perkins v. Lake Cnty. Dept. of Utils., 860 F. Supp. 1262, 1278 (N.D. Ohio 1994).

59. *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 843 F. Supp. 1284, 1288–90 (W.D. Wis. 1994).

60. *See* Renee Ann Cramer, *The Common Sense of Anti-Indian Racism Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 330 (2006).

These are guys who used to be on welfare."[61] Similarly, in conflicts over Ojibwe treaty fishing in the 1980s and 1990s, protesters derided the fishermen not only as "welfare warriors" and "timber niggers," but also as not sufficiently Indian, singing "a half-breed here a half-breed there," and damning their mixed blood leader as "nothing but a fucking jew."[62] On the flip side, at least one district court found it "unnecessary, and indeed inappropriate, to attempt to measure the Plaintiff's percentage of Indian blood or to examine his documentable connection to recognized existing tribes" in order to determine whether his employment discrimination case could go forward, so long as he could present evidence that the defendant discriminated against him because of the belief that he was Native American.[63]

Similarly, racist treatment of Indian tribes generally is tied to outsiders' beliefs about the self-governance capacities of Indian peoples, not descent requirements in citizenship criteria. For example, outsiders have denigrated tribes that have incorporated non-Indian citizens as witless pawns of scheming non-Indians, or degraded representatives of a noble if primitive breed.[64] Moreover, some of the most racist policies toward Indians were fueled by assertions of the inherent racial equality of Indian individuals.[65] Racism has always informed resistance to the idea of tribes as governments, regardless of the actual racial composition or membership criteria of the tribe at issue.[66] Racist perceptions of tribes even contributed to federal insistence that only those with Indian heritage could assert the legal rights of Indians.[67] Tribal enrollment criteria did not create or reinforce this racism.

III.
DESCENT-BASED MEMBERSHIP CRITERIA DO NOT MAKE FEDERAL INDIAN LAW OR TRIBAL CITIZENSHIP REQUIREMENTS RACIST

The relationship of indigenous descent to Indian status is complex, and the relationship of indigenous descent to race and racism is problematic.[68] Nevertheless, descent is deeply implicated in Indian law, just as it is in racist reactions to Indians. Does that mean that federal recognition of tribal status itself violates legal or moral norms against racism, or that tribes are engaged in racial discrimination when they enact citizenship laws that require descent?

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61. *Id.* at 329–30.

62. *Lac du Flambeau Band of Lake Superior Chippewa*, 843 F. Supp. at 1288–90.

63. *Perkins*, 860 F. Supp. at 1278.

64. *See, e.g.*, Bethany R. Berger, *"Power Over this Unfortunate Race" Race, Politics, and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2032–33 (2004) (discussing reactions to white and black incorporation with Cherokee, Seminole, and Winnebago tribes).

65. Berger, *supra* note 20, at 654.

66. *Cf. id.* at 620-621 (discussing removal of Georgia Cherokees despite "civilization" of Cherokee society).

67. *Id.* at 621.

68. *See generally* Goldberg, *supra* note 43 (discussing these complex and problematic relationships).

These questions are distinct yet related, and the answer to both questions is no. Evaluation of federal actions depends on laws and norms applicable to the federal government, and the historical and modern-day context of the federal relationship to Indian tribes. Evaluation of tribal membership criteria, in contrast, concerns the motivations of Indian tribes in enacting these criteria and the impact of the criteria on those excluded. In both the federal and tribal cases, evaluation also depends on the contemporary situation of Indian tribes, and the role of descent criteria in preserving cohesion and community for tribal peoples.

The role of descent in defining Indian status often leads to critiques that recognition of rights and authority in Indian tribes is itself racist. In the VAWA debates, for example, the Heritage Foundation claimed that Indian tribes cannot have jurisdiction over non-Indians who beat, rape, and abuse Indian women on tribal land because tribes are "racially exclusive."[69] Similarly, Senator Charles Grassley of Iowa drew fire for his claim that tribal jurisdiction over non-Indian abusers would violate equal protection norms because "on an Indian reservation, [the jury is] going to be made up of Indians, right? So the non-Indian doesn't get a fair trial."[70] *Oliphant v. Suquamish Indian Tribe*, the 1978 decision that ruled that tribes lacked criminal jurisdiction over non-Indians, was informed by the petitioner's arguments that tribes were "racial governments" and "racial organizations" whose jurisdiction would violate the constitutional norms—if not the law—prohibiting racial discrimination.[71] Indeed, entire presidential administrations have been characterized as asserting "all Indian legislation is unconstitutional because it is race-based."[72]

These criticisms are fundamentally misguided. The very drafters of the Fourteenth Amendment understood tribal status as a political status not undermined by the Amendment's guarantee of racial equality.[73] This understanding has been affirmed by the modern Supreme Court in *Morton v. Mancari* and its progeny.[74] Moreover, as others and I have argued, recognition of the territorial governmental authority of Indian tribes furthers the egalitarian

69. *See* David B. Muhlhausen & Christina Villejas, *Violence Against Women Act Reauthorization Fundamentally Flawed*, HERITAGE FOUNDATION (Mar. 29, 2012), http://www.heritage.org/research/reports/2012/03/the-violence-against-women-act-reauthorization-fundamentally-flawed; Mayhew, *supra* note 13 (quoting former Sen. Jon Kyl).

70. Jennifer Bendery, *Chuck Grassley on VAWA Tribal Provision Means "The Non-Indian Doesn't Get a Fair Trial,"* HUFFINGTON POST (Feb. 21, 2013), http://www.huffingtonpost.com/2013/02/21/chuck-grassley-vawa_n_2735080.html.

71. Brief for Petitioners at 77–80, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729).

72. Justice Robert Yazzie, *"Watch Your Six" An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going*, 23 AM. IND. L. REV. 497, 498 (1998) (recounting conversation with Senate Indian Affairs Committee staffer).

73. *See* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1172–80 (2010).

74. *Id.* at 1184–88.

commitments of the Fourteenth Amendment by reversing the racism of the process by which tribes were denied self-determination.[75]

Recognition of governmental rights in sovereigns defined by descent also comports with international norms. *Jus Sanguinus*, or descent-based determination of citizenship, was until recently the dominant rule outside the United States and the United Kingdom and its possessions, and remains the rule in many nations.[76] International bodies implement the rule for elections by populations in diaspora, a situation with particular resonance in the tribal context. To register to vote in the referendum on the independence of South Sudan, for example, one had to have a parent from one of the indigenous communities in Southern Sudan before January 1, 1956, or be able to trace one's ancestry to one of the ethnic communities in Southern Sudan.[77] Although using such criteria to determine who could be a citizen of the United States would clearly breach domestic norms, recognizing governments formed using such criteria does not.

In contrast, insisting on a rule of *jus soli*, the territorial determination of citizenship at play in the United States, would violate the federal commitment to tribal self-determination. In part because of the long process of colonization, many Indian people cannot live in their tribal communities and have access to educational or employment opportunities that most Americans take for granted.[78] As a result, according citizenship only to those domiciled in tribal territories would exclude more than half of those with significant connections to tribes.[79] In addition, the same process of colonization means that tribes today often cannot control who enters, lives on, or is born within their borders. Allotment, the turn-of-the-century division and sale of tribal lands to non-tribal members, has resulted in large non-Indian populations owning property and having the right to live on reservations.[80] The Supreme Court has held that both

75. *Id.* at 1172; Rolnick, *supra* note 19, at 969 ("[F]ederal Indian law (and the sovereignty rights it protects) can be understood as an important tool of anti-racism.").

76. *See* Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin*'s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 73, 77 (1997).

77. Southern Sudan Referendum Act of 2009, § 25, available at http://saycsd.org/doc/SouthernSudanReferendumActFeb10EnglishVersion.pdf; UNITED NATIONS MISSION IN SUDAN, THE SOUTH SUDAN REFERENDUM ACT: FREQUENTLY ASKED QUESTIONS (2010), http://unmis.unmissions.org/Portals/UNMIS/Referendum/The%20Southern%20Sudan%20Referendum%20Act%20FAQ.pdf.

78. The average unemployment rate on reservations, for example, was 49 percent in 2005, and as high as 89 percent on some reservations. COHEN'S HANDBOOK, *supra* note 28, § 21.01, at 1321. While more tribes administer four-year colleges on their reservations, there are no elite research universities on reservations. *See* Zoë Corbyn, *Research on the Reservation*, 471 NATURE 25, 26 (2011) (stating that eight tribes now have four year colleges, but tribal colleges in general have trouble attracting faculty with doctorates); *see also* Gover, *supra* note 31, at 294–95 (describing demographic changes that made residency rules unworkable).

79. U.S. Dept. of the Interior, Bureau of Indian Affairs, *Frequently Asked Questions*, BIA.GOV, http://www.bia.gov/FAQs/index.htm (last visited Mar. 2, 2013) (more than half of Indians do not live on their reservations).

80. *See* COHEN'S HANDBOOK, *supra* note 28, § 1.04, at 73 (discussing effect of allotment in turning reservations into checkerboards of white and Indian ownership).

allotment acts and later tribal cessions of use rights, such as rights-of-way, strip tribes of the right to exclude non-Indians from these lands.[81] As a result, many reservations have significant non-Indian populations,[82] and these populations are often the first to contest tribal authority.[83] According citizenship to all of those born or long domiciled on reservations, therefore, would result in many tribes being overwhelmed by individuals with little connection and often outright hostility toward those tribes. Given the United States' commitment to tribal self-determination,[84] requiring such inclusion would fundamentally undermine federal norms.

These demographic and territorial realities shape tribal decisions to maintain and even add descent as requirements for citizenship. Officially, tribes have substantial legal discretion over citizenship criteria. The United States Constitution does not bind Indian tribes, which are "separate sovereigns pre-existing the Constitution."[85] The Supreme Court has held that the Indian Civil Rights Act,[86] which applies most of the Bill of Rights to Indian tribes as a matter of statutory law, does not create a cause of action to challenge tribal descent-based requirements.[87] Nevertheless, federal power constrains tribal choices in many ways.[88] The federal government has explicitly or implicitly mandated restrictive descent requirements, threatening to deny approval to tribal constitutions or even to withdraw recognition from newly restored or recognized tribes if they extend membership to non-Indians or those without

81. *See* Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997); Montana v. United States, 450 U.S. 544, 554–55 (1980).

82. The 2010 Census found that 46 percent of the people living on Indian reservations were non-Indian. NCAI POLICY RESEARCH CENTER, *supra* note 2, at 6.

83. *Oliphant v. Suquamish Indian Tribe*, for example, involved challenges to tribal jurisdiction by two non-Indian residents of the Suquamish Indian reservation, Mark Oliphant and Daniel Belgarde. Brief for the United States as Amicus Curiae at 5–7, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729). Oliphant had started a drunken brawl during the tribe's annual Chief Seattle Days celebration, then attacked the tribal police officers who tried to break it up, while Belgarde had led tribal police on a two-hour chase across the reservation when they attempted to pulled him over for reckless driving. *Id.*

84. ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, AMERICAN INDIAN LAW: CASES AND COMMENTARY 155 (2d ed. 2010) (stating that the United States has supported tribal self-determination as official policy since 1970); COHEN'S HANDBOOK, *supra* note 28, § 4.01[1][c], at 212–13 (asserting federal support for self-determination since the 1960s); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (referring to the "well-established federal policy of furthering Indian self-government" (internal quotations omitted)).

85. *See Santa Clara Pueblo*, 436 U.S. at 56.

86. 25 U.S.C. §§ 1301–1303 (2012).

87. *Santa Clara Pueblo*, 436 U.S. at 61–62 (holding that there was no federal cause of action under the Indian Civil Rights Act to challenge an ordinance that extended membership to individuals descended from married male members and female non-members but not married female members with male non-members); Slattery v. Arapahoe Tribal Council, 453 F.2d 278, 282 (10th Cir. 1971) (finding that the trial court did not have jurisdiction to hear a challenge to a one-quarter Indian blood requirement for membership); Daly v. United States, 483 F.2d 700, 705–06 (8th Cir. 1973) (upholding one-quarter Indian blood requirement for membership).

88. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 447–49 (2002).

"sufficient" descent from American Indians.[89]

Others have proposed a cultural test for tribal citizenship to avoid reliance on descent.[90] As I ask my students, do you know who would become American Indians under such a test? Germans! In part because of the craze for the Native American adventure novels of turn-of-the-century German writer Karl May, Germans obsessively study elements of tribal cultures that many Native teenagers no longer practice.[91] An anthropologist friend recalled sitting in a bar in Stuttgart and hearing a group of Germans next to him having a fluent conversation in Lakota. Despite efforts to reinvigorate tribal languages, not every patron of a diner in Lakota country could carry on such a conversation.

In short, continued reliance on descent for tribal citizenship, whether in combination with residence or cultural requirements or alone, may be one of the only feasible paths given the present day situation of Indian tribes as sovereigns without territorial control or independence. While residence and cultural requirements may be used creatively to ensure that tribal communities are in fact communities and include all of the members of that community, descent will remain an important part of that community-defining process. These requirements are neither prohibited by constitutional law nor out of sync with citizenship rules in place across the globe.

* * *

Of course, there are ugly elements to some tribal debates about membership. Descent requirements may be used as justification to exclude individuals for reasons that are largely political, or as power plays to determine who should be in or out of power or get tribal benefits.[92] In such situations, although descent requirements are not driven by racism, they are excuses for exclusion that divide and ultimately weaken tribes and diminish their standing as legitimate sovereigns.[93] Racism may also play a role in some controversies. Some of the highest profile membership controversies involve attempts to require that citizens of the Seminole and Cherokee Nations trace descent from Dawes rolls for those with Indian blood, which exclude those who trace descent

89. *See id.*; Gover, *supra* note 31, at 256–58.

90. *See* Goldberg, *supra* note 43, at 1388 (discussing and criticizing these calls); Matthew L.M. Fletcher, *A Weak Sovereign*, N.Y. TIMES (Sept. 15, 2011), http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/cherokee-nation-underhanded-racial-politics (calling for cultural test for citizenship).

91. Rivka Galchen, *Wild West Germany Why Do Cowboys and Indians Captivate the Country?*, NEW YORKER, Apr. 9, 2012, at 40.

92. *See* Carmen George, *Dissension after Chukchansi Council Meeting*, SIERRA STAR (Dec. 29, 2011), http://www.sierrastar.com/2011/12/28/57081/dissension-after-chukchansi-council.html; James Dao, *In California, Tribes with Casino Money Cast off Members*, N.Y. TIMES (Dec. 12, 2011), http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?pagewanted=all.

93. *See generally* Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295 (2011) (discussing challenges that descent requirements pose to tribal sovereignty).

solely from Freedmen rolls.[94] These rolls, created in the late nineteenth and early twentieth century, ostensibly included African Americans who had been slaves of the tribes but became tribal citizens at the end of the Civil War.[95] Citizenship criteria that distinguish between "Blood" and "Freedmen" rolls cannot be separated from the racism of tribal slaveholding, or from the status of tribes as peoples within the United States, a place where anti-African American racism is often just below the surface. But even tribal attempts to exclude those who cannot show descent from the "Blood" rolls would not exclude all those with African ancestry. The general public would perceive many citizens with Cherokee and Seminole blood as African American, and even some African American-Cherokee citizens support blood requirements as a connection with Cherokee ancestors.[96]

In general, the demand for descent comes from desire for a community that has cohesion with one's ancestors. If things were different—if reservations could be economically and socially self-sustaining communities, with meaningful control over who lived and died there—descent should not be a prerequisite for membership. But we do not live in that world. In this world, descent remains an important, perhaps necessary, tool for preserving community and furthering self-determination.

94. *See* Glaberson, *supra* note 56 (discussing Seminole controversy); S.E. Ruckman, *Cherokee Freedmen Tribe Reinstates Citizenship Until Appeals Finished*, TULSA WORLD (May 15, 2007), http://www.tulsaworld.com/news/article.aspx?articleID=070515_1_A13_hFree64430 (discussing Cherokee controversy).

95. *See* ARIELA JULIE GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 153–58 (2008) (discussing history of these rolls and their inaccuracy as a reflection of who had Indian blood).

96. *See Cherokee Ancestors*, *supra* note 57.