

REPLY

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I. INTRODUCTION

What Blood Won't Tell: A History of Race on Trial in America tells the history of race and racism in the United States through the lens of trials of racial identity—cases in which courts or administrative bodies determined whether someone was black, white, or Indian.¹ The book is first and foremost a history of the shifting ways Americans have used the law to create “race,” a system of ordering people hierarchically with grave consequences for liberty, property, and rights. While many histories of race and law emphasize the rise of a “one drop of blood rule” as uniquely degrading to African Americans because of its association of “negro” blood with taint, and focus on evidence from statutes and high court pronouncements, my book instead looks at law “on the ground.”

In practice, degree-of-blood rules were not as important as other forms of racial knowledge, especially evidence of racial performances and associations, and certain kinds of racial “science” and expertise. Moreover, the discourse of racial performance rose together with the better-known discourse of science in the mid-nineteenth century, and they were not perceived as opposites or mutually exclusive. My point is not to show that race is legally “constructed”—a starting rather than an endpoint of the narrative—nor that race was contingent, performative, and fluid, but to show that making race depend on performance drew a close connection between whiteness and citizenship in U.S. law. It is this imaginary

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1. ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008).

connection between whiteness and fitness for citizenship that I believe remains a potent force today in debates over immigration, the PATRIOT Act, and innumerable other public questions.

It is a rare privilege to have four such thoughtful scholars engage with my work. Three of the four commentators are primarily focused on questions of race and citizenship in the law today and have applied concepts from my historical discussion to the present day. Neil Gotanda's review looks at broader theoretical issues about racial ideology in the law. Anthony Alfieri applies insight gained from historical racial identity trials to contemporary litigation. And Rose Cuison Villazor asks whether blood quantum citizenship requirements may, in some contexts, be beneficial for the protection of indigenous peoples' land rights. The fourth commentator, legal historian Jason Gillmer, takes the inverse approach, asking whether any broad theoretical conclusions can be drawn from the histories I have told. I will therefore begin by responding to Gillmer's historical review, and then discuss contemporary implications.

II. COMPLEXITY AND GENERALIZATION

Jason Gillmer rightly calls our attention to the importance of the local and the historically contingent. He argues that once we discover the true indeterminacy of both race and law, we can no longer make overarching claims about "general conclusions and broad theoretical frameworks" and in fact, it might be a fool's errand to write a book with the geographic and temporal sweep of *What Blood Won't Tell*. This is an important critique and a challenge to all who adopt the microhistorical techniques of cultural-legal history. As I have written elsewhere, "Cultural-legal histories will not give general maxims of prescription" or "over-arching mantras to be applied to every problem," but they can offer "generally useful heuristics" and culturally specific interpretations.² I strongly believe that certain kinds of generalizations about history *are* possible and make historical interpretation worth doing. Even to say that racial adjudication was a matter for local, community contestation is a generalization.

To me, the piece that holds the individual stories together and helps to make sense of them is the *why*. My story is not just about *how* race was determined, but about *why*, and why it matters. My argument is that racial determination was not about the discovery of some already-present identity, but about the production of that identity—and the production had

2. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 684 (2001).

a purpose. As I write in *What Blood Won't Tell*, “Determining racial identity was about raising some people up . . . to put others down; enslaving some people to free others; taking land from some people to give it to others; robbing people of their dignity to give others a sense of supremacy.”³

Another challenge for historians of ideology and culture is to demonstrate change over time. Gillmer emphasizes continuity, and there are important aspects of continuity in my story as well. I argue explicitly that all of the various bases of identity—appearance, ancestry, reputation, status, performance, science, and associations—have continued to be important throughout U.S. history to this day. At the same time, “there were key moments in American history at which the determination of racial identity became particularly fraught”—in the mid-nineteenth century, and at the turn of the twentieth century.⁴ At these moments, certain aspects of identity became particularly meaningful. In the decade leading up to the Civil War, racial identity trials became “intense contests about science and performance.”⁵ I do not mean to suggest, however, that there was a “linear” development from one form of racial knowledge to the next—science and performance before the Civil War, and associations afterward.

As I show in various case studies, witnesses talked about an individual's associations within and acceptance into society both before and after the Civil War. But these discussions took on new meanings in a world that was in the midst of establishing Jim Crow separation of the races. After the Civil War, witnesses recalled social events that had taken place before the War in new ways. Some described whites and free people of color intermingling at corn shuckings, while others insisted that if one had attended a “negro frolic,” one must not have been white.⁶ This kind of argument only made sense to people who were retelling the past to remake the present and future as a world of separation.

My interpretive choice to emphasize race as association in the post-Civil War period is my own reading of the volumes of testimony in these cases. It is not the only possible reading, but I think it is a true one. And that is what historians *do*: we sift through mountains of evidence and tell the most persuasive story we can about how and why things changed. Before the Civil War, there was more than just messy complexity

3. GROSS, *supra* note 1, at 9.

4. *Id.* at 13.

5. *Id.*

6. *See id.* at 78–90.

surrounding race in local communities. Rather, there was a burgeoning connection between whiteness and citizenship—one in which, among other things, the imagined purity of white women’s sexuality and the necessity of its protection played a vital role. After the Civil War, black men who claimed citizenship risked lynching, and the myth of the white woman’s body as the Southern body politic blossomed into full form. As historians such as Martha Hodes and Barbara Bair have shown, the meaning of race did change in the South before and after the Civil War, as politics and society were transformed by the end of slavery.⁷

Jason Gillmer’s review highlights the fascinating history of the racially ambiguous communities up and down the Eastern seaboard who became known, in the twentieth century, as “tri-racial isolates.” As discussed in his review and elsewhere, Gillmer’s own recent research is an excellent microhistorical exploration of one family’s trajectory through the borderlands of race.⁸ By focusing on a single family, Gillmer is able to uncover a great deal of information about all of the players in his story, and the methodology is extremely rewarding. He asks whether there is more I could have uncovered about several of the cases I spotlight in my chapter on the Melungeons, Croatans/Lumbee, and the Narragansett. His question draws attention to the serendipity of historical research. I came across the Perkins case only because I was lucky enough to find the detailed notes—down to the doodles in the margins—taken by Perkins’ lawyer before and during the trial, in the lawyer’s collected papers at the East Tennessee University archives.⁹ I also used local records from Carter County to reconstruct what I could about the context of the case. I was never able to find any trial records from Carter County, nor did the main protagonists in the case appear in the 1850 or the 1860 Census. Yet the records I did find revealed fascinating details about the status and the lives of such in-between people.

7. See generally MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* (1997) (discussing the pre-Civil War greater latitude for interracial sex and the associated rise of white supremacist hysteria in the post-Civil War era, both of which were connected to Reconstruction politics and the myth of the black rapist); BARBARA BAIR, *Remapping the Black/White Body: Sexuality, Nationalism, and Biracial Antimiscegenation Activism in 1920s Virginia*, in *SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY* 399 (Martha Hodes ed., 1999) (tracing the history of the 1924 Virginia Racial Integrity Act in terms of the embodiment of Southern nationalism in the “pure” white female body).

8. See Jason A. Gillmer, *Shades of Gray: The Life and Times of a Free Family of Color in Antebellum Texas* 2–4 (Aug. 13, 2009) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448739).

9. See GROSS, *supra* note 1, at 64–70 (citing T.A.R. Nelson Papers (on file with McClung Collection, East Tennessee University)).

I find nothing in the Ashworths' history inconsistent with the argument I make regarding the Melungeons. Many of these racially ambiguous families and communities lived for decades without challenge to their identities. In chapter 4, I argue that serious pressure on these communities to fall on one side of a black-white divide arose after the Civil War with the advent of Jim Crow. The three groups I discuss each chose different paths. The Melungeons claimed whiteness; the Croatan/Lumbee Indians claimed an Indian identity, winning separate schools from blacks or whites; and the Narragansett, throughout the nineteenth century, insisted on a multiracial Indian identity that included people of African descent.

Furthermore, despite continuing challenges and conflict—and the increasing rigor of “degree-of-blood” rules—some families “passed” over to the white side of the color line. Other racially ambiguous communities survived well into the twentieth century, like the “white negroes” of Jones County, Mississippi. Yet I do not think we can take this as straightforward evidence that race was not significant to those communities. As I conclude the chapter:

The persistence of racially ambiguous communities challenges the notion of the United States as a binary racial system, but it also calls into question the naïve belief that the mixing of races will eliminate racial hierarchy or injustice. Indeed the histories of these in-between peoples suggest that intermediate and hybrid statuses were precarious, bred the tendency to subordinate the next group down the line, and increased the pressure on all individuals to perform whiteness in order to maintain one's place in a community. . . . In every case, when racially ambiguous groups came before courts or legislatures, the state demanded that they exercise their claims to citizenship through the rejection of blackness.¹⁰

III. COLORBLINDNESS AND COMMON SENSE

Turning to more recent history, Neil Gotanda draws connections between the “common sense” of race and the modern ideology of “colorblindness,” as he extends the acute analysis of his seminal article on colorblind constitutionalism, *A Critique of “Our Constitution is Color-Blind”*¹¹ to my findings in *What Blood Won't Tell*. In his article, Gotanda described the “nonrecognition” of race, a “two-part process—recognition of racial affiliation followed by the deliberate suppression of racial considerations.”¹² Gotanda showed that embedded in colorblind racial

10. *Id.* at 138–39.

11. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991).

12. *Id.* at 6.

ideology is the notion that we can first see race and then not see it. He then went on to brilliantly deconstruct “nonrecognition” as an unstable and incoherent concept. In doing so, Gotanda described the pervasiveness of race in individual decisionmaking and popular culture. His review connects this understanding of contemporary colorblind ideology to the history of racial common sense in *What Blood Won't Tell*.

Gotanda explains how it is that the common sense of race, which is pervasive in our popular culture and laws, can coexist with official colorblindness. In fact, he argues that an assertion of colorblindness is itself “a moment of racial common sense.” The “unspoken technique of racial nonrecognition” includes a moment of common sense racial identification and then acts as an alibi against charges of racial bias (“How could I be discriminatory? I was blind to race.”). I find this analysis enormously suggestive, and it leads me to two observations.

Colorblind constitutionalism is a modernist racial ideology—liberal in its mid-twentieth century incarnation, but reactionary (sometimes called “conservative”) by the 1970s.¹³ In the conclusion of *What Blood Won't Tell*, I note:

Mid-twentieth-century racial liberals, . . . who wanted to eliminate the category of race, believed that when the races disappeared, so too would racial hierarchy. . . . The current advocates of colorblindness seem to harbor no such optimistic beliefs. Instead their opinions seem premised on the assumption . . . that existing racial hierarchies are inevitable results of cultural difference, not to mention wholly reasonable cultural discrimination.¹⁴

The colorblind approach, as adopted by the U.S. Supreme Court in cases such as *Shaw v. Reno*¹⁵ and *Adarand Constructors, Inc. v. Peña*,¹⁶ insists on viewing race simply as phenotype or “skin color” and thus safely seen but then unseen. However, the colorblind approach exists side by side with a cultural common sense of race, as something we know when we see it performed—we understand that in daily life there are ways of acting or looking or dressing black or white, which, if done in the wrong place at the wrong time, can get you arrested, or, if done in the right place at the right

13. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, in *SEX, LOVE, RACE*, *supra* note 8, at 464, 482.

14. GROSS, *supra* note 1, at 299–300. See also Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (examining the role of colorblindness discourse in perpetuating racial stratification).

15. See *Shaw v. Reno*, 509 U.S. 630, 641–43 (1993).

16. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24 (1995).

time, can get you hired. By denying that discrimination on the basis of these performances has anything to do with race, colorblindness perpetuates racial hierarchy.

In the mid-twentieth century, state officials actively engaging in racial discrimination learned to speak the language of race-neutrality. Chapter 7 of my book focuses on Mexican Americans in Texas and California and their legal battles over exclusion from juries and segregation in schools. In courtroom testimony, one can see local officials and prosecutors adopting the language of colorblindness as they claim to have based their exclusionary decisions not on race, but on other grounds—language, cultural habits, education, and other criteria for measuring fitness for citizenship—even as they betrayed their own racial biases in statements about “dirty” or “ignorant” Mexicans who could never attain equality with whites.¹⁷ Likewise, new research on the Red Cross during World War II shows that Red Cross officials defended their policy of segregating white and nonwhite blood, not in terms of racial difference, but by reference to the supposed public-relations problems that would arise if they did not do so.¹⁸ These narratives (“It’s not me, it’s my customers’ preference,” and “It’s not race, it’s culture”) are part of the common sense of race today—what Étienne Balibar has called “cultural racism,” or racism by other means.¹⁹ The link between common sense and colorblindness is not only that the colorblind individual must first “register” race through common sense and then “unrecognize” it, but that so-called colorblindness continues to produce race through these narratives. As I conclude in chapter 7, “For as long as we equate race with biology and racism with the crudest forms of racial pseudoscience, as American courts have done, discrimination on the basis of cultural and linguistic difference will appear neutral and respectable, and racial hierarchy will continue to flourish.”²⁰

IV. WHITENESS AND CITIZENSHIP

The civil rights lawyers who represented Mexican American defendants facing all-white juries and parents confronting all-white schools had to devise strategies to deal with the combination of legal colorblindness

17. GROSS, *supra* note 1, at 274–93.

18. See Thomas A. Guglielmo, “Red Cross, Double Cross”: Race and America’s World-War-II-Era Blood Donor Service, 97 J. AM. HIST. (forthcoming June 2010) (manuscript at 25, on file with author).

19. See Étienne Balibar, *Is There a “Neo-Racism”?*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 17, 22–23 (Étienne Balibar & Immanuel Wallerstein eds., 1991).

20. See GROSS, *supra* note 1, at 293.

and the racial common sense that governed the day-to-day actions of local officials. Unfortunately, they were not always successful in doing so without undermining their own positions.

Anthony Alfieri asks the important question of what today's lawyers advocating for poor men and women of color, many of them immigrants with poor language skills, can do to harness insights from the history of race on trial to the pursuit of justice for their clients. The *Norelus* case is a fascinating and complicated one: an immigrant woman working at a minimum-wage job brings a sexual harassment claim against her supervisor. When there are inconsistencies and falsifications in her account of the events, some of which may have been caused by the trauma she suffered, her lawyers amend her complaint and offer polygraph tests to show her truthfulness concerning the "core" of her claims. And while a magistrate finds in their favor, the district court sanctions the client and her lawyers.

Two things appear to be central to the eventual disposition of this case: the underlying issue of Norelus's veracity—the determination of which is undoubtedly influenced by the racial common sense of the various factfinders who consider the issue—and the lawyering of the Amlongs. With regard to the first issue, what is most interesting to me is that the central fact about which Norelus lied in her original deposition was her citizenship. She had not admitted to her lawyers that she was undocumented and had used her cousin's social security card to obtain employment. In fact, she denied even knowing her cousin, Lavictore Remy. However, as Karen Amlong testified, and the court of appeals acknowledged, Norelus's lie about her immigration status did not necessarily mean she had lied about the harassment and rape, and more importantly, "just because somebody came into the country illegally doesn't mean that she can be raped and exploited."²¹ Yet, despite the fact that the law offers some protections even for "illegal aliens," practical realities make it very difficult for noncitizens to claim rights in U.S. courts. A nonwhite noncitizen who lies about her status is suspect in any other claims she seeks to make.

Most of the district and appellate courts' opinions are occupied with the second issue—whether Karen Amlong violated her ethical duties in pressing Norelus's case. While it is harder to tease out, how does this question relate to the common sense of race? What are our expectations for a white lawyer representing poor clients of color? These are difficult

21. *Amlong & Amlong v. Denny's, Inc.*, 500 F.3d 1230, 1247 (11th Cir. 2007).

questions, and especially hard to answer in cases of rape and sexual assault, where it is often very difficult to verify the truthfulness of the victim's accusations. Is it "frivolous and vexatious" for a lawyer to pursue uncorroborated claims on behalf of a victim who is a very bad witness on her own behalf? If so, lawyers who represent poor, uneducated, or immigrant women take sexual assault cases at their own peril.

Still, Alfieri is not pessimistic. He calls for a return to law for the vindication of the rights of poor people of color. Here, he departs from the recent trend in legal scholarship away from faith in the legal system to solve problems of social justice. Kenji Yoshino, for example, suggests at the end of *Covering: The Hidden Assault on Our Civil Rights*, that law cannot undo the harms caused by coerced performances of race, gender and sexuality.²² The answers, Yoshino writes, lie in changing the culture and our individual psyches; the law will follow.²³ Richard Ford, too, urges us to separate cultural change from antidiscrimination law.²⁴ Alfieri, however, joins a group of scholars who have begun calling for a wider scope to Title VII to take account of broader racial meanings in our culture and to recognize that discrimination on the basis of racial *performance* is racial discrimination. Devon Carbado and Mitu Gulati, as well as Camille Gear Rich, have sketched broad outlines of this new approach in contemporary employment discrimination law.²⁵ More than just fascinating academic pieces, their analyses could be of great practical use if extended to the kinds of cases Alfieri and the student-lawyers who work with the Center for Ethics and Public Service (the innovative legal clinic Alfieri directs) face each day.

V. BLOOD QUANTUM AND SOVEREIGNTY

Rose Cuison Villazor calls our attention to a different contemporary predicament: the one faced by American Indian tribes and other indigenous peoples regarding how to define citizenship in ways that avoid triggering the increasingly strict scrutiny with which U.S. courts view programs and

22. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 192–96 (2007).

23. See *id.*

24. See generally RICHARD T. FORD, *RACIAL CULTURE: A CRITIQUE* (2005) (arguing that multiculturalist legal challenges oftentimes perpetuate rather than alleviate social stratification).

25. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (focusing on the pressure placed on employees to engage in identity performance); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (urging courts to interpret Title VII's definition of race and ethnicity to include markers of racial performance).

institutions designed to benefit native peoples. She worries that the histories in *What Blood Won't Tell* could lead one to conclude—wrongly in her opinion—that blood quantum citizenship requirements are inherently harmful to indigenous groups and that they should be rejected.

This anti-blood quantum argument has in fact been made by some legal scholars, largely, although not solely, on prudential grounds. L. Scott Gould, for example, argued in the immediate aftermath of *Rice v. Cayetano* that tribes who wish to remain on the right side of an increasingly narrow Supreme Court jurisprudence of Indian identity would be wise to abandon blood quantum-based membership rules.²⁶ I actually do not agree with this view, as I will explain below. But I do think there are very important issues at stake in these debates, and I hope that the histories I tell can provide some insight.

Chapters 5 and 6 of *What Blood Won't Tell* examine two episodes in the American tragedy of native land allotment policy in the late nineteenth and early twentieth centuries. Chapter 5 tells the story of the Cherokee and Seminole nations, both of which had enslaved African Americans before the Civil War and incorporated some African Americans into their nations as warriors, family members, and citizens—and are to this day embroiled in conflicts over the citizenship of the descendants of those African Americans who became known as “Freedmen.” I argue that in both the “Five Civilized Tribes” of what is now Oklahoma and in Hawaii (the subject of chapter 6), blood quantum first became legally and politically salient when native lands were broken up for allotment to individuals, with devastating consequences for the native peoples—especially for those caught in between, the Freedmen. This history raises deep and fraught questions about the plight of native peoples today, especially because, as I recount, the question of whether Indians and other native peoples are races or nations is at the heart of legal conflicts about their rights and sovereignty today.

Villazor urges readers that blood quantum requirements can *protect* indigenous peoples' land base. She cites a case involving a restriction on transfers of land from people of Northern Marianas Islands descent (“NMD”) out of the group. She argues that this restriction, designed to protect rather than surrender the land base of the Northern Marianas Islands

26. See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 767–70 (2001). See also Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 566–68 (1996) (concluding that all Indian tribes are in danger of having strict scrutiny apply to their identity classifications if they use blood-based criteria).

people, does not have a racial purpose, and instead furthers the political purpose of undoing the negative effects of colonialism.

As Villazor argues here and in a longer essay, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, two important Supreme Court cases, *Morton v. Mancari* and *Rice v. Cayetano*, created a dichotomy between racial and political identity that has obscured the political dimension of blood quantum laws.²⁷ Yet the conflation of Indians as at once a race and a nation under U.S. law has a much longer history. *Mancari* is part of an era of jurisprudence in which native land rights, as well as the civil rights of African Americans and others understood as racial minorities, received the most sympathetic hearings they had ever had and ever would in the U.S. Supreme Court. But the problem of producing a racialized Indian identity through law long predates *Mancari*.

What Blood Won't Tell explores that history—a somewhat different story in the Seminole and Cherokee nations than in Hawaii (or the Northern Marianas). In both Indian Territory and Hawaii, the federal government used blood quantum to implement land policies that destroyed indigenous nations. In Hawaii, as in the CNMI, institutions and regulations in place to redress some of that harm are now themselves being attacked as racially discriminatory. Like Villazor, I see these attacks as misplaced exercises of colorblind constitutionalism. By contrast, in the Cherokee and Seminole nations, over the course of a century, a majority of Indians “by blood” came to understand the “Freedmen” citizens of their nations as outsiders and intruders and to figure their own Indian identity as racially exclusionary. Like Villazor, I think we can condemn one use of race and not the other. I do think we should be skeptical about arguments like those made by the Seminole nation in federal court based on an inherent link between Indian national sovereignty and the right to exclude on the basis of race or former slave status.

Villazor, however, unlike a historian, worries about the question, What *should* Indian tribes and other indigenous groups do? If we were starting from scratch, writing ideal rules in a utopian state, we might well prefer other forms of belonging to those that depend on fractions of “blood.” Yet as Carole Goldberg points out, most Indian tribes and other native communities *do* define their citizens by some form of descent.²⁸

27. Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 814–15 (2008).

28. See Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1390–92 (2002) [hereinafter Goldberg, *Descent into Race*]; Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 459–61 (2002).

(And sovereignty is all about the right to do so!) In *Descent into Race*, Goldberg makes the very important point that *Morton v. Mancari*, properly understood, does not require Indians to forswear all ancestry-based citizenship requirements in order to be treated as sovereign nations or tribes.²⁹ Indeed, if we truly want to undo the damage done by the legal racialization of Indian nations in the early twentieth century, the best federal Indian policy we can implement is one that recognizes Indian nations' sovereignty, regardless of whether aspects of Indian identity appear to have elements in common with other "racial" or "minority" groups. As Goldberg cogently points out, "race" has never, in U.S. law or society, been based only on "blood," but at least as much on "cultural performance." Thus, the alternatives that Gould and others suggest to blood quantum requirements, all based on some form of cultural performance such as participation in community rituals or speaking the Indian language, would involve courts in precisely the sorts of judgments of "acting Indian" that were so problematic in generations of racial identity trials beginning in the early republic.³⁰

I wholeheartedly agree, therefore, that the problem with cases like *Rice v. Cayetano* is the U.S. Supreme Court's misreading of history and its continued racialization of indigenous nations. While one answer to *Rice*'s prohibition against race-based citizenship might be for native Hawaiians to seek federal recognition, tribes certainly cannot escape being pegged as "races" simply by forswearing blood quantum. In fact, the "Hawaiian" voting qualification struck down in *Rice* as a violation of the Fifteenth Amendment was based *not* on blood quantum, but rather on one having descended from someone who lived in the Hawaiian islands in 1778.³¹

On the other hand, I think all efforts to define citizenship involve exclusion and should thus be carefully examined—as the Cherokee Supreme Court did when it found the exclusion of the Freedmen from voting unconstitutional³²—to ensure that such definitions do not unduly disregard the rights of individuals. Indeed, there are some tough questions surrounding the relationship between Indian citizenship requirements and the right of the individual to be free from invidious race and gender discrimination—many of which were raised by the well-known Supreme Court case of *Santa Clara Pueblo v. Martinez*. In that case, Julia Martinez challenged a tribal ordinance denying tribal membership to the children of

29. See Goldberg, *Descent into Race*, *supra* note 28, at 1378.

30. See *id.* at 1393.

31. See GROSS, *supra* note 1, at 203–05.

32. See *id.* at 171–72.

female tribe members who married outside the tribe, but granting membership to the children of male members who married outside the tribe.³³ Moreover, in holding that “the role of [U.S.] courts in adjusting relations between and among tribes and their members [is] restrained,” the U.S. Supreme Court made clear that these are issues that Indian courts themselves must confront.³⁴

In the example Villazor presents, it is not immediately clear to me why a blood quantum rule is better suited to protect Northern Marianas Islanders’ land base than a broader descent rule like the one that defines “Hawaiian” or other more flexible citizenship rules. I am curious about the history of the one-fourth blood quantum citizenship requirement of the NMD definition. In Hawaii, a one-half blood quantum definition of “Native Hawaiian” was set forth in the 1921 Hawaiian Homes Commission Act—narrowing the pool of people eligible to receive land allotments from those with 1/32 native ancestry to those with one-half—precisely to free more lands for the sugar companies and ranches.³⁵ Someone gains and someone loses from particular “blood” fractions in a legal definition, as the label “NMD” becomes attached to some and not others.

While we do not have to go so far as Indian historian Melissa Meyer, who argues that “[m]easuring fractions of blood and excluding relatives from tribal membership reflects the combined influence of Euroamerican scientific racism and conflated ideas about ‘blood’ and peoplehood,” I do think indigenous groups who use fractions of blood ought to consider carefully the effects of the history Meyer invokes.³⁶ The correct approach is likely to lie somewhere between Meyer’s view and an unconditional acceptance of blood quantum. In an insightful essay on native North American identity, anthropologists Pauline Turner Strong and Barrik Van Winkle conclude:

Dismantling the intricate edifice of racism embodied in “Indian blood” is not simply a matter of exposing its essentialism and discarding its associated policies, but a more delicate and complicated task: that is, acknowledging “Indian blood” as a discourse of conquest with manifold and contradictory effects, but without invalidating rights and resistances that have been couched in terms of that very discourse.³⁷

33. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978).

34. *Id.* at 72.

35. See GROSS, *supra* note 1, at 186–87.

36. Melissa L. Meyer, *American Indian Blood Quantum Requirements: Blood Is Thicker Than Family*, in *OVER THE EDGE: REMAPPING THE AMERICAN WEST* 231, 244 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999).

37. Pauline Turner Strong & Barrik Van Winkle, “*Indian Blood*”: *Reflections on the Reckoning*

To do so, I believe we must not only put blood quantum in the context of our colonial history, but also recognize the ways in which our colonial history and racial history are intertwined.

VI. CONCLUSION

My book is called *What Blood Won't Tell* because it recounts the history of an ideology and a practice, race, that depended on the belief that blood *would* tell—that one's internal essence could be read in one's appearance, actions, demeanor, and character. Until we understand that history, it is very hard to undo the harm that race has done.

Each of the reviewers in this Symposium has raised important questions for historians and legal scholars, as well as lawyers and civil rights advocates, to reckon with: How can we make sense of an overarching history of racial subordination and do justice to the stories of individuals and communities who resisted? What is the relationship between official narratives of colorblind constitutionalism and a popular and legal culture of racial common sense that tells us how people of different races do and should behave? How can we break historical links between whiteness and citizenship in the day-to-day workings of our legal system? And how can indigenous nations make use of concepts like "blood quantum," once used to destroy the land base of native peoples, to protect themselves, if at all? None of these questions have easy answers, but I am thrilled to participate in the conversation.

and Refiguring of Native North American Identity, 11 CULTURAL ANTHROPOLOGY 547, 565 (1996).