TRIBES AND TRIBULATIONS: BEYOND SOVEREIGN IMMUNITY AND TOWARD REPARATION AND RECONCILIATION FOR THE ESTELUSTI

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ABSTRACT

This Article advocates a form of micro-reparations for a limited class of African Americans—the Estelusti (black Indians). The Article seeks reparations in the form of racial healing not only from the United States Government, but also from one particular participant in African American slavery—Native American Indian Tribes. The Article begins by defining the theory of micro-reparations and providing the historical foundation which serves as the factual predicate to the claim that black Indians have for reparation. This part of the article establishes how the rule of hypo-descent or the "one drop rule" has served historically and presently to exclude black Indians from tribal membership. Parts III and IV of the article outline the legal and political strategies that could be utilized in an effort to obtain justice for black Indians. Part V of the article acknowledges the problems with a purely legal approach to achieving reparations for black Indians, and seeks to proffer an interdisciplinary approach to achieving reparation that would preserve the tribal right of self-determination and sovereign immunity.

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I. INTRODUCTION

Much has been written about the need for reparations for descendants of African American slaves. Indeed, the discussion about the need for reparations for African American slaves began immediately after the Civil War. Some effort at rehabilitating the former slaves, or "freedmen," as they were called, was made through the establishment of the "Freedmen's Bureau" and the various laws and government programs that were established during the twenty-year period commonly referred to by historians as the period of Reconstruction. But efforts at rehabilitating former slaves and their descendants were frustrated by their reception—or lack thereof—into American society, since as a whole they were unwelcome there. Americans rejected the freedmen as equals and refused to allow them to assimilate into American society. The efforts of reconstruction were quickly halted by hostile racist groups and racist laws that sought to maintain the institution of white supremacy in every aspect of life, keeping...
freed blacks at the bottom of the American social and economic ladders, despite their new-found freedom. The effort at reparation was reborn with the birth of the modern civil rights movement, which spawned much needed legislation and government sponsored programs aimed at alleviating the oppression imposed upon descendants of African American slaves. The concept of affirmative action emerged as a means of attempting to remediate some of the lingering discrimination against blacks which deprived them of educational and employment opportunities.

Despite these earlier efforts at instituting some form of reparations for descendants of slaves, the vestiges of slavery can still be seen in our post-modern American society. Indeed one need only re-read Booker T. Washington's *Up From Slavery*\(^8\) to realize that the more things have changed, the more they have stayed the same.\(^9\) Many, if not all, of the problems of the black community identified by Washington in his documentation of post-slavery conditions for African Americans still persist today.\(^10\) Black Americans still lag behind whites in education. Most black

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\(^6\) In his 1963 book entitled "Why We Can't Wait," Dr. Martin Luther King, Jr. proposed a Bill of Rights for the disadvantaged (which included whites as well as African Americans). In this book, Dr. King argued for reparations for the exploitation of slave labor and present day vestiges of slavery:

> Few people consider the fact that, in addition to being enslaved for two centuries, the Negro was, during all of those years, robbed of the wages of his toil. No amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America down through the centuries. Not all the wealth of this affluent society could meet the bill. Yet a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply for American Negroes. The payment should be in the form of a massive program by the government of special, compensatory measures which could be regarded as a settlement in accordance with the accepted practice of common law . . . . The most profound alteration would not reside so much in the specific grants as in the basic psychological and motivational transformation of the Negro. The moral justification for special measures for Negroes is rooted in the robberies inherent in the institution of slavery.

\(^7\) Albert Mosley, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353 (2003) (stating that "[a]ffirmative action was presented as a way of making it possible for America to utilize the talents of high-achieving blacks who were currently being ignored, thus releasing unused energies and defusing festering resentments that could breed unnecessary conflict").

\(^8\) BOOKER T. WASHINGTON, *UP FROM SLAVERY* (1905) (1901).

\(^9\) I am uncertain of the origin of the colloquialism.

\(^10\) THE STATE OF BLACK AMERICA 2004: THE COMPLEXITY OF BLACK PROGRESS (Nat'l Urban League 2004) (examining the status of blacks in America regarding education, economics, health care, legal justice and other topics. This report, published annually, is the most extant report on the state of black America The executive summary of the report along with the full report are available at the National Urban League's website at www.nul.org (last visited April 6, 2004)).
children attend segregated schools, which lack the proper funding and delivery system to equip the students to compete with suburban white children for seats in institutions of higher education. Economic circumstances leave most black children unable to attend college, and many who are privileged to receive higher education are educated in Historically Black Colleges and Universities. These institutions, which were and still are segregated, do not command the respect and prestige of the majoritarian institutions of higher learning in the marketplace of ideas or in the corporate arena. There are as many, if not more, black men in prison as there are in college. Each year, more African Americans are infected with HIV than any other racial group.

It is from this vantage point that many legal scholars, lawyers, politicians, and even judges have seen the need to study, discuss and in

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12 See FRANKENBERG, ET AL., supra note 11; see also JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

13 See FRANKENBERG, ET AL., supra note 11.

14 I say this not to disparage Historically Black Colleges and Universities, nor to imply that they offer an inferior education. As an alumnus of Howard University Law School, I can unequivocally state that I received an excellent legal education. Nonetheless, the perception generally of (predominately white) corporate America, academia, and U.S. News and World Report, which ranks Howard Law School in the Third Tier, is probably to the contrary. See Gil Kujovich, Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal, 72 MINN. L. REV. 29, 155-56 (1987).


16 Human Immunodeficiency Virus (HIV) is the virus that is associated with and often causes Aquired Immune Deficiency Syndrome (AIDS). See www.cdc.gov/hiv/pubs/facts/afam.htm (last visited March 1, 2004). For statistics on HIV infection rates see www.cdc.gov/hiv/pubs/facts/afam.htm (last visited March 1, 2004).

some instances, pursue lawsuits,\footnote{18} all in an effort to repair the damage that the institution of slavery and the subsequent period of Jim Crow\footnote{22} has inflicted upon a group of people we call black or African American.\footnote{23} Most reparations discourse has focused on public law forms of reparations with the United States Government, which sanctioned and administered the institution of slavery through its laws, being the intended payor. Theories in corporate

\footnote{18} Johnnie Cochran and Willie Gary are two prominent African American lawyers who as members of the Reparations Coordinating Committee (RCC) filed the lawsuit on behalf of the victims of the 1921 Tulsa Race Riot. See NNPA, Landmark Suit Seeks Reparations for Deadly 1921 Okla. Riot, available at www.finalcall.com/artman/publish/article_567.shtml (last visited July 28, 2003) (explaining the history of the riot and the remedies sought by the attorneys working on the case, as well as their motivations for pursuing such a cause of action).

\footnote{19} Rep. John Conyers, Jr. (D-Mich.) has introduced a bill every year since 1989 seeking to establish a commission to study reparation proposals for African Americans. The bill was referred to the House Committee on the Judiciary in 1993 and then to the House Subcommittee on Civil and Constitutional Rights, but it has yet to make it out of committee. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 201 (2000). See H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997); H.R. 40, 106th Cong. (1999); H.R. 40, 107th Cong. (2001); H.R. 40, 108th Cong. (2003). In 1997, Rep. Tony Hall (D-Ohio) introduced a special measure to issue an apology for slavery, but no apology has been issued as of the date of printing of this article.


\footnote{22} The term Jim Crow refers to the period in history between the end of Reconstruction and the New Deal. See WOODWARD, supra note 5; see also Mack, Law Society, supra note 5.

\footnote{23} I understand that not all black people are African American, and not all African American people approve of being called black. Moreover, not all African American people in the United States today are descendants of African American slaves. Nonetheless, recognizing that the overwhelming majority of African Americans are lineal descendants of African American slaves, and further recognizing that such descendants are commonly referred to as "blacks," I have elected for purposes of this article, to use the term "black" interchangeably with the term "African American" to refer to the collective group of people who are descendants of African slaves held in captivity in the geographical boundary of what is now the United States.
social responsibility have also proffered corporate actors, which benefited from the slave trade and/or the institution of slavery, as potential defendants in actions seeking redress or reparation for African Americans. In most of this reparations discourse, all African Americans as a group, or at least all of those who are descendants of slaves, have been the intended beneficiaries.

The legal difficulties with this approach abound, however, with the most notable being those of standing, statute of limitations and political question. Because modern courts are unlikely to entertain such long-standing, widespread claims, it is necessary to reconsider the claim for reparations from the individual or micro perspective. Moreover, corrective action that may serve as reparation for one group of African Americans may not be applicable or appropriate for another group of African Americans. What I will call "micro-reparations" are efforts which seek redress for a certain group or class of people who under existing jurisprudence can assert a cause of action for a present individual injury stemming from the institution of slavery or Jim Crow. The benefit of thinking about reparations on the micro level is that the typical resistance to claims for group justice is alleviated in several ways. First, because the victims or intended plaintiffs can be identified, and not merely assumed, the victims of the wrong become an identifiable class, which solidifies their standing as plaintiffs. Second, in a claim for micro-reparations, the harm that the class has suffered can be causally connected to wrongful action of the past. Third, the party or parties deemed responsible for the subordinating action can be identified. A claim for micro-reparations is structured in a way that fits the traditional mold of American justice, which seeks to protect individual rights. This article advocates a form of micro-reparations by seeking reparation for a limited class of African Americans—those who have been denied Native American tribal membership because of slavery and its legacy.

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26 One example of a micro-reparations effort is the lawsuit filed in the U.S. District Court in Oklahoma on behalf of the surviving victims (and their descendants) of the Tulsa Race Riot. This action sought reparation (compensation) for those whose property and livelihoods were destroyed as a result of the Tulsa Race Riot. See Landmark Suit Seeks Reparations for Deadly 1921 Okla. Riot, supra note 18. The lawsuit was recently dismissed on the grounds that the statute of limitations had run. Lyle Denniston, Judge Dismisses Riots Reparations Suit: While Lamenting Tulsa Atrocity, He Cites Deadline, BOSTON GLOBE (March 23, 2004). For an interesting and thorough historical discussion of the Tulsa Race Riot, as well as a persuasive argument in favor of reparations for its victims, see ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002). To learn more about the 1921 Tulsa Race Riot and Oklahoma’s response to recent demands for reparation, visit Professor Alfred L. Brophy’s website at http://www.law.ua.edu/directory/bio/abrophy/abrophy_links.html.
of racism. The article seeks redress not only from the United States Government, but also one particular participant in African American slavery—Native American tribes. I do not use the term "tribe." I also use the term governing group of Native Americans who share a language and culture. I reject any connotation of ancestry generally cannot. It is this injustice which this article seeks to remedy.

Yet, we tend to do so for ease of reference, so that everyone will understand exactly who we are talking about—the indigenous people of North America and more particularly the United States. See WARD CHURCHILL, FANTASIES OF THE MASTER RACE (1992) for examples of this cultural reduction.

Moreover, it is important to remember that even an oppressed minority group may enjoy a position of privilege and supremacy over another minority group. The article seeks redress not only from the United States government, but also one particular participant in African American slavery—Native American tribes. I do not use the term "tribe." I also use the term governing group of Native Americans who share a language and culture. I reject any connotation of ancestry generally cannot. It is this injustice which this article seeks to remedy.

27 Before proceeding any further, it is important to acknowledge that Native Americans, as a group, have been oppressed by the majoritarian controlled (white/European American) United States government. The treacherous history of Native American oppression, genocide and removal at the hands of the United States government should be well known and condemned by all. For an excellent historical analysis of the post-colonialization cultural genocide of Native Americans, see WARD CHURCHILL, FANTASIES OF THE MASTER RACE (1992). For a historical recount of the liquidation and exploitation of the Five Civilized Tribes, see ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1972). Grouping all Native Americans into one pot as if they were all culturally the same seems ignorant in face of the many different languages, customs and traditions that separate each Native American Clan or Nation into its own cultural dimension. Yet, we tend to do so for ease of reference, so that everyone will understand exactly who we are talking about—the indigenous people of North America and more particularly the United States. See WARD CHURCHILL, FANTASIES OF THE MASTER RACE 236-41 (1992) for examples of this cultural reduction.

28 In this article, I use the term "Native American" and "Indian" interchangeably because these are the terms used in law and culture to refer to the collective aboriginal people of North America. While I recognize that Columbus' labeling of the people he met in North America as "Indians" was based on his erroneous belief that he had landed in the East Indies, many Native Americans now refer to themselves as Indian. For purposes of this article, references to Native Americans or Indians are generally limited to the five large tribes of people who were removed by the United States government from the Southeastern United States to Indian Territory (now Oklahoma). Although Oklahoma has approximately 34 tribes represented in its borders, the focus of this article is on the "Five Civilized Tribes." I am not implying that any Native American tribes were or are "uncivilized." I only use the term "Five Civilized Tribes" because this is the term that most historians have used to refer to these tribes. The tribes were named such by the majoritarian controlled U.S. government because whites deemed them to be more civilized than the nomadic Indians in the west. This view arose from the fact that the Five Civilized Tribes had existing cultural norms that more resembled European cultural norms and adopted the culture, religion and philosophy of white settlers more readily than western plains Indians. The Five Civilized Tribes were the overwhelming majority of the population of Indian Territory (now Oklahoma) and occupied a significant portion of land in Indian Territory. Because the Five Tribes were deemed "civilized," and because they were landholders, there was more acceptance of these Native Americans by whites and hence more intermarrying. These cross-cultural unions created generations of "Indians" who have tribal membership and privileges, but look white and in many instances consider themselves white. See MURIEL H. WRIGHT, A GUIDE TO THE INDIAN TRIBES OF OKLAHOMA ix-x, 3-7 (1951). Today, a majority of the members of the Five Civilized Tribes are persons who have European ancestry. I periodically use the term "white Indian" to describe these people and to distinguish this group of people from Native Americans of African descent whom I will call "black Indians." Even though Native Americans as a collective group have been subjugated and oppressed, there are some within that group who have been more privileged than others. Moreover, it is important to remember that even an oppressed minority group may enjoy a position of privilege and supremacy over another minority group. See ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 89 & ch. 5 (1999) (discussing how oppression can be perpetrated by partially subordinated groups through what he calls the "redeployment of oppressive systemic structures"). During the period of slavery in this country, many Native Americans, particularly those belonging to one of the "civilized" tribes, enjoyed a position of privilege and supremacy over African Americans, and they exploited this position by actively participating in the institution of slavery and the subsequent institution of Jim Crow. Today, persons who have both Native American and European ancestry enjoy a position of privilege and supremacy over persons who have Native American and African ancestry because generally those with European ancestry can celebrate their Native American heritage and reap the benefits and privileges associated with that heritage, while those with African ancestry generally cannot. It is this injustice which this article seeks to remedy.

29 I recognize that the term "tribe" is a European/Anglo-American term used to describe a self-governing group of Native Americans who share a language and culture. I reject any connotation of implicit savagery or inferiority of Native American people when I use the term "tribe." I also use the term
"reparations" to mean a demand for monetary payment or merely financial compensation for slave labor. To me, the term "reparations" is much broader than that. I subscribe to the theory of reparations outlined by Randall Robinson and other scholars, which conceptualizes reparations as a movement to reclaim American history and culture for all Americans. This form of reparations requires thorough investigation into what actually happened and prods us to ask how and why it happened. Consequently, this requires us to stop retelling the story from the perspective of the people who have traditionally had the voice and tell new stories from the perspective of those who have been subordinated and silenced. This form of reparations seeks to effectuate emotional, psychological, educational, spiritual, political and economic healing and restoration primarily for those who have been subordinated and scarred by race-based policies. To be effective, reparations must take the form of a multi-disciplinary and multi-cultural effort to restore the humanity of those who were de-humanized and subordinated. Reparations represent a call for racial justice and healing, and an initiative to reclaim a lost perspective for the nation’s history.

In seeking to reclaim lost history, it is important to understand that some Native American Indian tribes actively participated in the enterprise of slavery by establishing black slavery by law. Therefore, these tribes and their individual members benefited from the free labor of African
Native American ownership of slaves is no secret; it is well documented in history. As revealed in the Pioneer Papers, the institution of slavery in Native American society was modeled after the institution of slavery created by white America. Wealthy Native Americans owned large plantations, hundreds of slaves, and grew crops, primarily cotton, to generate wealth. Not surprisingly, slavery served to subordinate African women

32 It could be argued that Native American tribes should have to pay some form of reparations to African Americans as a form of restitution for the unjust enrichment which forced free labor yielded the tribe and/or its members. Some would argue that Native Americans have already paid their debt to African Americans since some slave holding tribes made land allotments to their freed slaves. Others would argue that the land allotments were not made to all former slaves and that those that were made were not sufficient to compensate for decades of forced labor. This debate, however, is for another article. Compensation for the forced labor of the slaves is not the basis for the reparation claim in this article.

33 See DEBO, AND STILL THE WATERS RUN, supra note 27, at 3-4. For a contemporaneous documentation of Native American slave ownership in Indian Territory, see WPA OKLAHOMA SLAVE NARRATIVES, supra note 31 (compiling and reprinting interviews conducted by the Work Progress Administration of former slaves in Oklahoma, many of whom recount that they were owned by Native Americans); see also WASHINGTON, supra note 8, at 46, wherein Washington acknowledges that "Indians in the Indian Territory owned a large number of slaves during the days of slavery."

34 When Oklahoma was a young state, the Works Progress Administration sponsored, jointly along with the University of Oklahoma and the Oklahoma Historical Society, a project to record the recollections of people who had lived during the Pioneer days when Oklahoma was Indian Territory. Approximately 100 field workers throughout the state of Oklahoma interviewed people having personal knowledge of pioneer life and experiences and recorded those interviews in what is commonly referred to as the Pioneer Papers. See Foreword to THE PIONEER PAPERS.

35 Some freed slaves and historians note that the institution of slavery imposed by Native Americans was not as harsh as the institution imposed by whites. I suspect that there were probably instances of the kinder gentler slave master among both groups, and I reject the implication that Native American enslavement of people of African ancestry was in any way humane. Among the people interviewed by WPA workers were former slaves who frequently told about their kind masters. It is difficult to know how to read the evidence that these narratives present. Whether these stories were accurate perceptions or crafted to conform to what the interviewee thought they should say is unknown. Nonetheless, there is anecdotal evidence that some Native American slave masters did not practice physical brutality toward slaves. One such example is offered by Chaney McNair, a freed slave whose owner was William Penn Adair, a prominent member of the Cherokee tribe. Ms. McNair recounted that she perceived that she was treated better than slaves owned by whites in Texas. She noted that the slaves on her plantation always had "plenty to eat, good horses to ride and plenty of good whiskey to drink." 106 THE PIONEER PAPERS 442 (Interviewed May 11, 1937). She also reported that her Native American master did not impose daily production quotas on the slaves, whereas her counterparts owned by white masters in Texas were reportedly beaten severely for failing to meet a daily quota. Id. at 443. Nonetheless she recounts that while many of the Cherokees were good to their slaves, there were exceptions, with one Joe Martin being a particular exception in her mind. See THE WPA OKLAHOMA SLAVE NARRATIVES, supra note 31, at 274-75 (Reminiscences of Aunt Chaney McNair: One-Time Slave of William Penn Adair). Moreover, McNair recounts that Cherokee slave master kindness did not preclude slaves from being sold away from their families. Ms. McNair recalls that Cherokee slavery when she recalls that her father, Bob Ratcliff, was sold to John Drew on a neighboring plantation before she was born, and her oldest two brothers were sold away and she "never heard of them any more."

36 GENE ALDRICH, BLACK HERITAGE OF OKLAHOMA 18, 22 (1973) (documenting the wealth and slave ownership of one Choctaw Indian named Robert M. Jones. Jones owned approximately five hundred (500) slaves and a plantation with a mansion a few miles southeast of Hugo, Oklahoma. Much
sexually, thereby enabling Indian slave masters to take sexual liberties with African women.\(^{37}\) As a result, many slaves on the Native American plantation shared Native American ancestry and African ancestry.\(^{38}\) Needless to say, like white slaveholders, Native American slaveholders typically did not legitimize their out-of-wedlock slave offspring. Fair-skinned straight-haired slaves were born without any documentation of their paternity and their multi-cultural heritage was rendered invisible\(^{39}\) by the rule of hypo-descent, also known as the "one drop rule," which simply labeled them as "black," "Negro," or "colored."\(^{40}\)

When the Civil War began, most slave owning Native American tribes fought with the South to preserve the institution of slavery and their "way of life."\(^{41}\) Upon defeat of the Confederacy, the slave holding Indian tribes entered treaties with the United States Government wherein they agreed to abolish slavery, thereby freeing the African American slaves in their possession.\(^{42}\) Some tribes agreed to make some provisions for the freed slaves, or freedmen as they were called, to aid them in starting a new and independent life. But like white American society, most slave owning Native American tribes refused to assimilate African Americans into the tribe after the dismantling of slavery. Sadly, even Freedmen who had Native American ancestry or "blood,"\(^{43}\) as it is commonly referred to in determining

\(^{37}\) See James Hugo Johnston, Documentory Evidence of the Relations of Negores and Indians, vol. 14, No. 1 JOURNAL OF NEGRO HISTORY (Jan. 1929). Sexual encounters between Native American slave masters and African slave women were documented by the Commissioner of Indian Affairs in 1866 wherein he reported, "There is a large number of young freedwomen who have from one to eight children, born while they were slaves, and who never had husbands. Many of these children are mixed bloods . . . ." Id. at 42; Brent Staples, The Black Seminole Indians Keep Fighting for Equality in the American West, N.Y. TIMES, Nov. 18, 2003.

\(^{38}\) See ROBERT ELLIOTT FLICKINGER, THE CHOCATAW FREEDMEN AND THE STORY OF OAK HILL INDUSTRIAL ACADEMY: VALIANT, MCCURTAIN COUNTY OKLAHOMA 224, 274, 388 (as reprinted by Angela Walton-Raji) (2002) (displaying photographs of several Choctaw Freedmen whose faces and/or hair reflect their Choctaw heritage).


\(^{40}\) The terms "Negro" and "colored" were polite terms used to refer to African Americans immediately after the dismantling of slavery. For a well known and controversial example of a white slavemaster fathering children with a mixed race slave, see ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997).

\(^{41}\) It is important to note that there were factions in some tribes, particularly the Cherokee and Creek, who chose to support the Union. See WRIGHT, supra note 28, at 14.

\(^{42}\) See Treaty With the Chocytaws and Chickasaws, Art. 2, 14 Stat. 769 (1866); Treaty with the Cherokee Indians, Art. 9, 14 Stat. 799 (1866).

\(^{43}\) The Constitution of the Chocytaw Nation of Oklahoma defines membership in the Chocytaw Nation as those person who are Chocytaw Indians "by blood whose names appear on the final rolls of the Chocytaw Nation approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 136) and their lineal descendants." CONST. OF THE CHOCYTAW NATION Art. II, § 1, available at
who is Indian, were rejected by the tribe and were not enrolled as members of the tribe. The rule of hypo-descent was applied by Native American tribes and the United States Government so that virtually any person with one drop of African blood (any person who had been a slave and any matrilineal descendant of a slave) was considered a Freedman. The effect of this classification was that the person was not recognized as an Indian and therefore was not entitled to all of the rights and privileges of tribal membership.

When the United States government decided to create a list of all of the Indians in Indian Territory, in order to track who was entitled to benefits from the government, primarily land allotments, the government created the Dawes Commission. The Dawes Commission was charged with creating a roll of all Indians so that tribal lands could be allotted to individual Indians in fee rather than held by the tribe as communal property. The Dawes Commission created two rolls. The first was the "Blood roll" which listed the person's name, tribe and their percentage of Indian blood. Those who were not full blood Indians on the blood roll had European ancestry or Caucasian "blood," which did not preclude them from being enrolled as Native Americans. The second roll was the "Freedman roll," which listed the name of all persons who were freed slaves of the tribe. The "Freedman roll" failed to acknowledge and record which Freedmen had Native American "blood" or ancestry. It merely listed their names and the tribal affiliation of their former slave master. Thus, non-full blood Indians with European ancestry went on the "Blood roll" whereas non-full blood Indians with African ancestry went on the segregated "Freedman roll."

The impact of the Dawes Commission's creation of segregated rolls is seen today. Presently, only those persons who can demonstrate an ancestral connection to the Native Americans listed on the "Blood roll" can claim full tribal membership and all of the rights and privileges that flow from such membership.44 Hence, the United States government and some

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Native American tribes currently apply the racist policy of the "one drop rule" to exclude from tribal membership thousands (perhaps even hundreds of thousands) of African Americans with Native American ancestry. Because their ancestors were enrolled as Freedmen whose multi-cultural ancestry was ignored and indeed denied, persons with Native-American ancestry whose race today would be constructed as African-American have been denied their Native American heritage and all of its accompanying rights and privileges.

The injury felt by those persons of dual heritage is in part psychological. It is similar to the injury that a child born out-of-wedlock feels when not recognized by his father. It is an injury that makes one feel unloved and unworthy of recognition. It is an injury which inflicts feelings of worthlessness, self doubt and the pain of rejection. It is an injury that informs the mind that blackness is evil and ugly and tarnishes or taints all that it touches.

The other injury imposed by this modern day application of the "one drop rule" is not dignitary or psychological but economic and educational.
Persons with documented Native American ancestry are entitled to certain educational, health and economic benefits that seek to repair the damage that the U.S. Government inflicted on Native Americans as a group. African Americans with Native American ancestry should be able to recoup the benefits of educational scholarships, healthcare, mortgage assistance, employment, tax relief, loans, and all of the other benefits that Caucasian Americans with Native American ancestry enjoy. The denial of such benefits is a violation of human dignity and the Equal Protection Clause of the Fourteenth Amendment. Indeed it is time for the United States government and Native American Indian tribes to accept the multi-dimensionality of African Americans and recognize their ancestral

50 Many tribes award educational scholarships to students who are members of the tribe, and some of the funding for scholarships is appropriated by Congress. See Choctaw Nation of Oklahoma, Programs and Services Brochure 2, 7 (2003) (on file with author); see also Zarr v. Barlow, 800 F.2d 1484 (9th Cir. 1986) (discussing the Bureau of Indian Affairs' administration of Indian higher education grants). Educational Scholarships for Native American students are offered through various institutions of higher education in Oklahoma and the southwest. See e.g., The Guide to Scholarships [at] Oklahoma State University, available at http://www.okstate.edu/finaid/scholarships/guide_to_schol.html (last visited February 24, 2004). See also Greg and Patty Pyle Scholarship offered to a student attending Southeastern Oklahoma State University, which gives priority to Native American students, available at http://www.sosu.edu/futurestudents/scholarships/scholarship%20guide.pdf (last visited February 24, 2004).


53 Many employment opportunities on the reservation and in Indian Territory afford hiring preferences to Native Americans. These employment opportunities exist in large part due to the growth of the Native American gaming industry. Employment opportunities at the Bureau of Indian Affairs also give preferential treatment to Native Americans. See Indian Reorganization Act of 1934, 25 U.S.C. §§ 450e(b), 472, 472a (1934); 25 C.F.R. § 5.1 (2001) (establishing the preference in favor of Native Americans); Morton v. Mancari, 417 U.S. 535 (1974) (upholding as constitutional, the preferential treatment of Native Americans in BIA hiring and promotions ostensibly to promote the Indian right of self-determination created by their quasi-sovereign status).

54 Native American Indian tribes are not among the entities made taxable under the Internal Revenue Code. Accordingly, federally recognized tribes are exempt from federal income taxation. See Rev. Rul. 67-284, 1967-2 C.B. 55. Although there is no general exemption from federal income taxation for Native American individuals, some tax exemptions in favor of Native American individuals may be found in treaties and statutes. See David H. Getches, Et Al., Federal Indian Law 718 (4th ed. 1998); see also Squire v. Capoeman, 351 U.S. 1 (1956) (holding that income derived from allotted lands held by the Federal government in trust for an individual tribe member is excluded from income and therefore not subject to taxation. Finally, a tribal member who resides within the tribe's geographical boundary is not subject to state taxation). Cf. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (holding that non-resident tribal members of an Indian reservation are subject to state income tax).

connection to Native America. It is time for Native America to welcome the children it illegitimated so long ago. It is time to repair the damage, reclaim the lost and reconcile with those who deserve recognition of their multidimensional cultural heritage. It is this form of reparation which this article advocates.  

II. HISTORY OF A RACIALLY MOTIVATED POLICY

A. Native American Participation in Slavery

The policy of Manifest Destiny and the desire for new land created by a continual influx of European settlers in the "new land" called America created a circumstance wherein the United States government needed to colonize more land. Settlers were moving beyond the thirteen colonies and were moving south into the areas of Georgia, Alabama, Mississippi and Florida, which were lands occupied by Indigenous Native American groups, including the Five Civilized Tribes—the Creek, Choctaw, Chickasaw, Cherokee, and Seminole. European settlers began trading European goods with Native Americans in exchange for Native American goods such as furs, deerskins, tobacco and indigo. European settlers upset the way of life of the Native Americans because the Native Americans believed that no one person could own the land. Contrary to European notions of individual land ownership, the Native Americans believed that they were trustees of the land and that it was for the communal use and enjoyment of the entire tribe. Although no one individual owned the land, each tribe did have a generally recognized geographic boundary, which was its primary area for purposes of fishing, hunting and erecting housing. European settlers who moved into tribal boundaries and erected fences were intruding on tribal lands. Nonetheless, the Native Americans did not seek to evict the settlers, but rather welcomed them, began to trade with them, and in some instances offered them protection from other tribes or other colonizing governments. Native Americans from the Cherokee Nation welcomed the Spanish explorer

56 Finally, others are advocating fairness for African Americans who share Native American ancestry. See Brent Staples, When Racial Discrimination Is Not Just Black and White, N.Y. TIMES, Sept. 12, 2003, at A26 (arguing for equal treatment of black Native Americans).


58 See, e.g. ARRELL M. GIBSON, THE CHICKASAWS 23 (1971).

59 In 1784, Spanish officials made treaties with several tribes in Florida wherein the tribes acknowledged the protection of Spain and agreed to trade exclusively with Spain. See WRIGHT, A GUIDE, supra note 28, at 103.
De Soto in what is now western North Carolina as early as the spring of 1540.\textsuperscript{60}

The Five Civilized Tribes were named such by the new European Americans because they were not merely hunter gatherers moving from place to place to find food. They were farmers.\textsuperscript{61} It was this agrarian way of life and the willingness to adopt white institutions\textsuperscript{62} and European culture that made the Native Americans of the Southeastern United States more akin to their European counterparts. It was also this same attribute that made African slavery an appealing concept for these Native American tribes. Like white farmers, the Five Civilized Tribes realized that they could amass more wealth by utilizing the free labor of Africans. Hence, Native Americans in the Southeastern region of what is now the United States began purchasing Africans from white slave traders and institutionalized African slavery within their tribes as a matter of law.\textsuperscript{63}

Eventually, European settlers became so numerous in the Southeastern United States that the settlers began to attack peaceful Indian populations and campaigned to the United States government to get the Indian population out of their way.\textsuperscript{64} Accordingly, the government began to debate what to do about the "Indian problem." Some suggested mass slaughter through war, while others preferred the more humane route of removing the Indians to an area west of the Mississippi river. In the end, it was the latter policy that prevailed.\textsuperscript{65} Through a series of treaties with the U.S. government during the 1830s, each of the Five Civilized Tribes agreed to accept cash payments and land west of the Mississippi in exchange for its Eastern lands.\textsuperscript{66} By the mid-1840s, each of the Five Civilized Tribes were removed from the southeastern region of the United States to a territory west of the Mississippi river, now called Oklahoma.\textsuperscript{67} Removal not only cost

\textsuperscript{60} \textit{Id.} at 58.

\textsuperscript{61} For example, the Choctaw tribe, which occupied the lower Mississippi valley, grew corn in abundance to trade with their neighbors. See \textsc{James C. Milligan, Oklahoma: A Regional History} 52 (1985).

\textsuperscript{62} As early as 1800, the Civilized Tribes, particularly the Cherokees and Choctaws, began to adopt the white man's institutions, such as Christian churches, schools and legal codes. Some of them began to operate plantations exploiting the forced labor of African slaves. See \textsc{Debo, supra} note 27, at 3-4.

\textsuperscript{63} See discussion \textit{infra}.

\textsuperscript{64} \textsc{J. Leitch Wright, Jr., Creeks and Seminoles} 231-37 (1986).

\textsuperscript{65} It was the Jefferson administration that began planning for the Indian policy of removal. Jefferson argued that the United States should obtain land in the west and exchange such land with the Indians for their lands east of the Mississippi River. Indian removal is said to be the motive for Jefferson's purchase of the Louisiana territory. \textsc{Milligan, supra} note 61, at 30.

\textsuperscript{66} \textsc{Debo, supra} note 27, at 5-7.

\textsuperscript{67} The period of forcible removal of the Native American population from the southeastern region of the United States began in 1829 when Andrew Jackson, a noted Indian fighter of Tennessee, became President of the United States. See \textsc{Debo, supra} note 27, at 4; see also \textsc{Wright, supra} note 28, at 63. The Seminole tribe was the last to be removed, with their removal extending into the early 1840's.
Native Americans their lands, it also cost them thousands of lives. Often forgotten in this history is the suffering of those who accompanied the Native Americans in this forced migration to Oklahoma—their African slaves.

The Native Americans arriving in Indian Territory brought with them a strong belief in the institution of slavery. The institution of black slavery was not established in Indian Territory until the southern tribes brought their slaves with them in order to operate farms and plantations. Despite being geographically removed from the south, slavery in Indian Territory did not differ much from slavery in the southern states.

Once in Indian Territory, Native American slave ownership continued to grow, and there were a number of large slaveholders among the Native American population. More importantly, Native American slave ownership was not merely a practice adopted by elite mixed-bloods or "white Indians." It was a practice institutionalized by tribal law and culture. The history, law, and culture of each tribe are too unique and distinct to discuss in collective terms. To do so would either inadequately depict the experience of each tribe or would necessarily require constant notation of instances where one or more tribes' history and culture differed from the others.

KENNETH W. PORTER, THE BLACK SEMINOLES 111 (1996). The policy of removal was devastating to the Native American tribes who had occupied the southeastern region of the United States. None of the tribes wanted to be relocated to land west of the Mississippi river, but realizing that they had no other real alternative, they negotiated treaties with the United States government exchanging their lands in the Eastern United States for land west of the Mississippi river which became known as "Indian Territory" and later as "Oklahoma" which is derived from the Choctaw words "okla" meaning "people" and "homma" or "humma" meaning "red." See WRIGHT, supra note 28, at 4.

The journey from the southeastern United States to Indian Territory was made primarily on foot by the Native American people. Those who were too weak to make the journey or who fell ill during the journey were left to die. One quarter of the Cherokee and Choctaw populations died during this journey which became known as "The Trail of Tears." WRIGHT, supra note 28, at 58; see DEBO, supra note 27, at 5; MILLIGAN, supra note 61, at 74.

A census taken at the time of removal in February, 1831, reflected that the Choctaw tribe had 521 slaves among them when they made their journey to Indian Territory. MILLIGAN, supra note 61, at 56.


Id. at 29. While it has been stated by some historians that Indian owners were humane and devoted to their slaves and that the Negro slaves were "spoiled" because they led a life of relative freedom, evidence suggests this is an overgeneralization as discussed in more detail infra.

Id. Three Choctaw slaveholders have been deemed the most noteworthy—Robert M. Jones, Britt Willis and Peter Pitchlynn. Jones, a former ship captain, owned five plantations and over five hundred slaves. He was in the upper five percent of southern aristocracy based on the number of slaves he owned in southeastern Oklahoma. Pitchlynn, a chief of the Choctaws, also owned slaves. Willis is known for owning one slave in particular known as "Uncle Wallace." Wallace composed a number of Negro spirituals with his best known one probably being "Swing Low Sweet Chariot."

Again, the term "white Indian" is used to refer to persons who share both European and Native American ancestry.

For citations to the various tribal laws that served to preserve the institution of African slavery within the tribes, see infra notes 138-144 and 194-200.
Accordingly, it is necessary to briefly discuss the history of each tribe and its adoption of and participation in the crime against humanity—African slavery.\footnote{It is acknowledged that some black people also owned black slaves. The extent of black slave ownership is disputed. Some historians argue that black slave ownership was significant when viewed as a percentage of the free black population, and was economically motivated. Larry Koger, Black Slaveowners: Free Black Slave Masters in South Carolina 1790–1860 (1995). Other scholars argue that black slave ownership was primarily benevolent, meaning that it occurred primarily by blacks who purchased a loved one in an effort to save their loved one from a life of bondage and forced uncompensated labor. See Sherrill D. Wilson, New York City’s African Slaveowners: A Social and Material Culture History 21-22, 25-26 (1994). Regardless of which scholarly camp is correct, both should agree that blacks never institutionalized black slavery. In other words, blacks never formed governments and enacted laws creating, promoting and protecting black slavery as an institution. Some Native Americans, however, did just that.}

1. The Cherokee

The Cherokee\textsuperscript{77} Indian Tribe resided in the southern Appalachian Mountains in the southeastern part of the United States. The tribal region included the mountains of western North Carolina, eastern Tennessee, northeastern Alabama, and northern Georgia.\textsuperscript{79} By 1776, the Cherokee had given up large tracts of land along the eastern and northern boundaries of their tribal lands pursuant to "peace" treaties with the U.S. government.\textsuperscript{80} In 1835, after the passage of the Indian Removal Act and the Treaty of New Echota, the tribe was forced to move to Indian Territory (presently Oklahoma).\textsuperscript{81} However, approximately 5,000 members hid from the U.S. Army in the North Carolina mountains and their descendants, known as the Eastern Band of Cherokees, currently reside there today.\textsuperscript{82}

When the Europeans and Africans first appeared among the Cherokee Indians, the tribe had a semi-nomadic, hunting, fishing, gathering, and agricultural economy.\textsuperscript{83} They regularly cultivated fields of corn, squash, pumpkins, peas, gourds, beans, and tobacco.\textsuperscript{84} As the Cherokees gradually

\textsuperscript{76} See Virginia Pounds Brown & Laurella Owens, Southern Indian Myths and Legends 18-21 (1985).
\textsuperscript{77} R. Halliburton, Jr., Red Over Black 4 (1977).
\textsuperscript{79} Brown & Owens, supra note 77, at 14.
\textsuperscript{80} \textit{Id.} at 59.
\textsuperscript{81} \textit{Id.;} Billy M. Jones & Odie B. Faulk, Cherokees: An Illustrated History 70-71 (1984).
\textsuperscript{82} Brown & Owens, supra note 77, at 4.
\textsuperscript{83} Halliburton, Red Over Black, supra note 78, at 4.
\textsuperscript{84} \textit{Id.}
lost their land, they became increasingly sedentary and agrarian. The tribe slowly abandoned their traditional communal cultivation of land and began to operate farms on an individual basis. Black slavery both contributed to and made such change possible.

Slavery existed in parts of North America long before the arrival of Europeans. Early slavery among the Cherokee generally involved Indian or white slaves, who were taken in wars with other tribes or wars with white settlers as prisoners. This form of slavery, however, was considerably different from the European American conception of slavery. The newly obtained adult captives were usually handed over to the women for torture or death. The younger prisoners were generally absorbed into families by means of enforced adoption and later became members of the tribe, by an act of council, with all of the rights, privileges, and immunities as all other tribal members. Those adults who were not killed and the children who were not adopted remained in a form of slavery. This custom of adoption or slavery was later applied to Europeans and Africans respectively. Africans were introduced to the Cherokees through whites who offered to trade much needed goods in exchange for black slaves. "The Cherokees discovered that the capture of black slaves was particularly profitable, and by the American Revolution most Cherokees traded almost exclusively in black slaves."

"The Cherokee tribe exhibited no moral bias against slavery and was quick to accept numerous trappings of European civilization, including the institution of black slavery. Soon after the colonization of the southeastern part of the country, the Cherokees began to own African slaves. Black slavery was introduced to the Cherokee Indians chiefly through trading with white settlers. White settlers frequently married Cherokee women, accumulated property, and purchased slaves, which were

\[\text{85} \quad \text{Id. at 12.} \]
\[\text{86} \quad \text{Id.} \]
\[\text{87} \quad \text{Id.} \]
\[\text{88} \quad \text{Id. at 5; R. Halliburton, Jr., Origins of Black Slavery Among the Cherokees, 52 The Oklahoma Chronicles 483-84 (1974-75).} \]
\[\text{89} \quad \text{J. B. Davis, Slavery in the Cherokee Nation, in 11 The Oklahoma Chronicles 1056 (1933).} \]
\[\text{90} \quad \text{Halliburton, supra note 88, at 484.} \]
\[\text{91} \quad \text{HALLIBURTON, supra note 78, at 5; Davis, supra note 89, at 1056.} \]
\[\text{92} \quad \text{Halliburton, supra note 88, at 484.} \]
\[\text{93} \quad \text{Id.} \]
\[\text{94} \quad \text{THEDA PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY 1540-1866 35 (1979).} \]
\[\text{95} \quad \text{Id. at 38.} \]
\[\text{96} \quad \text{HALLIBURTON, RED OVER BLACK, supra note 78, at 6.} \]
\[\text{97} \quad \text{Davis, supra note 89, at 1057.} \]
\[\text{98} \quad \text{Halliburton, Origins of Black Slavery, supra note 88, at 484.} \]
left as an inheritance to their children. Other traders brought black slaves to the Cherokee Nation and then sold them to tribal members. The Indians were quick to perceive their value as servants and soon began buying and selling black slaves. The Cherokees used black slaves on the collective town farms before individual plantations replaced the communal system. The tribe also began acquiring more slaves by raiding colonial settlements and capturing runaway African slaves. Cherokee women immediately approved of black slavery because it lightened their traditional tasks of tilling the fields. Moreover, Cherokee warriors, who had always considered agricultural work and farm management degrading and appropriate only for women, used black slaves to compensate for the lack of manpower during extended periods of absence. By 1741, whites who were captured as prisoners of war eventually were adopted into the tribes; while the black captives maintained an inferior status as slaves. At this point, the Cherokees were exhibiting a color consciousness and were buying, selling and using black slaves as part of an accepted institution.

During the removal process, slave owning Cherokees brought their African slaves with them on the journey West to Indian Territory. Black slaves accompanying their Cherokee masters on the journey to Indian Territory performed various services for their Cherokee masters in order to alleviate the discomfort of the long tedious journey. Slaves carried personal effects, drove wagons, served as night watchmen protecting the camp from wild animals, and served as cooks and nurses.

Some scholars have opined that black slaves owned by the Cherokees were not treated as harshly as those owned by whites, and that the Cherokees regarded their black slaves as family members and as fellow human beings. Some historians have also argued that African slaves belonging to

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99 Id., see also DANIEL F. LITTLEFIELD, JR., THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP 8 (1978) (Mixed bloods were the largest group of individuals in the Cherokee Nation, many of whom "less than half Cherokee."). Wiley Briton, a member of the Union Army stationed in Indian Territory, noticing the bleaching of the Cherokee Nation wrote, "It will probably not be many generations before we shall be contriving means, not how to kill off the Indians, but how to preserve the few which are left." Id. "He noted the extensive amalgamation that had already taken place among the Cherokees and commented that "a considerable part of he population of the Nation' were of one-half Cherokee blood or less." Id.

100 See generally id.
101 Davis, supra note 89, at 1057.
102 Id.
103 Halliburton, Origins of Black Slavery, supra note 88, at 485.
104 HALLIBURTON, RED OVER BLACK, supra note 78, at 8-9.
105 Id.
106 Id.
107 Id.
109 Id. at 98.
the Cherokees enjoyed much more "freedom," and that the slave families were not separated. However, there appears to be significant evidence to the contrary, which refutes such commonly accepted, sweeping conclusions. Indeed, some Cherokee masters could be as vicious and cruel as their white counterparts. Moreover, as capitalistic values replaced the Cherokee's aboriginal values and the Cherokee slaveholders began to realize that they could not maintain their lifestyle without slave labor, the Cherokee planters moved to enact stringent slave codes, modeled after the slave codes of the South, to solidify the legal status of the slaves. The brutality and harshness of black slavery as practiced by the Cherokees is evidenced in their law. Cherokee slave codes denied slaves and free blacks the right to own property. Cherokee slave codes also forbade intermarriage between Cherokees and blacks, prohibited blacks from owning or carrying weapons, authorized the appointment of "patrol companies," prohibited the teaching of blacks to read and write, and prohibited blacks from participating in government.

111 HALLIBURTON, supra note 78, at 4.
112 The most notorious example of an opprobrious Cherokee slave master is James Vann who reportedly had a problem abusing alcohol and was known to evoke great cruelty on his slaves. The most flagrant incident was probably when a group of his slaves attacked him in response to his abuse. Jim Vann responded by burning one of the participants alive, and upon hearing that another slave was plotting against him, Vann shot him. PERDUE, SLAVERY AND THE EVOLUTION, supra note 94, at 98-99; HALLIBURTON, RED OVER BLACK, supra note 78, at 24-25. Apparently not all of Vann's slaves hated him. Lucinda Vann, a slave who enjoyed the favored status of being a "house Negro" as opposed to a "field Negro" and who reported being "part Indian and part colored" spoke with much affinity for her slave master Jim Vann. See THE WPA OKLAHOMA SLAVE NARRATIVES, supra note 31, at 435. I will not attempt to explain Lucinda Vann's romanticized account of her vicious slave master or her enslavement. I will leave that to those who possess expertise in the psychology which causes the victim to feel devotion and empathy toward her oppressor. For a discussion of the socio-psychological paradigm of the Stockholm syndrome and its application to African slaves, see Barbara A. Huddleston-Mattai & P. Rudy Mattai, The Sambo Mentality and the Stockholm Syndrome Revisited: Another Dimension to an Examination of the Plight of the African-American, 23 JOURNAL OF BLACK STUDIES No. 3, at 344 (March 1993); see also Paulo Freire, Pedagogy of the Oppressed, in THE POLITICAL ECONOMY OF DEVELOPMENT AND UNDERDEVELOPMENT 551 (Kenneth P. Jameson & Charles K. Wilber eds., 6th ed. 1996) (1970).
114 HALLIBURTON, supra note 88, at 494, 496.
116 Davis, supra note 89, at 1065; LITTLEFIELD, THE CHEROKEE FREEDMEN, supra note 99, at 9. LAWS OF THE CHEROKEE NATION 38 (Scholarly Resources, Inc. 1973) (1852) (stating that intermarriage shall not be lawful between a free male or female citizen with any slave or person of color not entitled to the rights of citizenship under the laws of this Nation, and that any colored male who may be convicted under this act shall receive one hundred lashes. Id.)
117 Davis, supra note 89, at 1066; LITTLEFIELD, supra note 99, at 9.
118 HALLIBURTON, supra note 78, at 35, 143. A patrol company was a police unit formed by the tribe to patrol the countryside, particularly after dark, to ensure that slaves did not attempt to escape.
Some historians have also opined that the Cherokee slave owners were particularly indulgent because they allowed their slaves to attend church services and Sabbath schools operated by white missionaries. However, the benevolence of this act is undermined by the fact that the church meetings served to solidify the institution of slavery by reference to Biblical scripture that condoned slavery. Through this mechanism, the Cherokee encouraged the slaves to be submissive to and obey their masters. Thus, in the Cherokee Nation, "a Cherokee Negro was always regarded as a Negro." Slavery in the Nation was, in many ways, the same as slavery in the surrounding Southern states. This fact should not be surprising in light of the European influence upon the Cherokees. By 1809, the Cherokees numbered 12,395, of whom an estimated half possessed European ancestry, and 341 were exclusively European, having no Native American ancestry.

2. The Chickasaw

According to ancient legend, the Chickasaw people came from "the land of the setting sun." Following the lead of a magic tent pole, the tribe's holy men led them on a quest eastward, until the pole rooted itself at the intersection of the Mississippi and Tennessee rivers. The original Chickasaw domain included what today would be known as western Tennessee and northern Mississippi, as well as parts of western Kentucky and Alabama.

The history of slavery within the Chickasaw tribe is long and pervasive. The Chickasaws practiced slavery long before being introduced to Africans by Europeans. Chickasaw agriculture centered upon the growing

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119 HALLIBURTON, supra note 78, at 81-82; Davis, supra note 89, at 1066; LAWS OF THE CHEROKEE NATION, supra note 116, at 55 (reprint 1973) (1852). "It shall not be lawful for any person . . . to teach any free negro or negroes not of Cherokee blood, or any slave belonging to any citizen or citizens of the Nation, to read or write...any person or persons violating this act, . . . shall pay a fine . . ." Id. Subsequently, this act was amended to provide that anyone caught teaching a black person to read would be subject to removal from the Cherokee Nation instead of a fine. Id. at 173-74.

120 Davis, supra note 89, at 1065; see generally LITTLEFIELD, supra note 99, at 9.

121 HALLIBURTON, supra note 78, at 28-29. Christian missionaries selected biblical scriptures which called for the slave to obey their masters. Primary among the scriptural teachings was: Titus 2:9-10; 1 Timothy 6:1-5; Ephesians 6:5-8; Colossians 3:22-24 and 1 Peter 2:17-20.

122 Halliburton, supra note 88, at 493.

123 Id. at 496; J. MILLING CHAPMAN, RED CAROLINIANS 341, 359 (1940).

124 Halliburton, Origins of Black Slavery, supra note 88, at 496.

125 LITTLEFIELD, THE CHEROKEE FREEDMEN, supra note 99, at 8. Whites who married into the tribe were adopted into the tribe and granted tribal citizenship. See United State v. Rogers, 45 U.S. 567, 572-73 (1846); Nofire v. United States, 164 U.S. 657, 658 (1897). This "adoption" mechanism explains how some recorded members of the tribe possessed no Native American ancestry.

126 GIBSON, supra note 58, at 10.

127 Id. at 4-6.
Tribes and Tribulations

of corn, and agricultural work was primarily the job of women and Indian slaves captured from other tribes, whereas Chickasaw men were hunters and warriors. Accordingly, the more Indian slaves a village owned, the greater the likelihood that the position of women was elevated to that of supervisor rather than laborer. Indian slaves were highly prized, and the Chickasaws were known throughout the region as warlike people, quick to enter conflict in order to secure more laborers for the field.

The appearance of French and English traders on the Mississippi in the early 1700s further increased the Chickasaw interest in slave raiding. English traders provided a huge demand for Indian slaves, whom they sold to plantations in Charleston and the West Indies. Chickasaws raided the Choctaws, Acolapissas, Chawashas, Yazoos and smaller tribes west of the Mississippi and in the Illinois area to provide large bands of captives for sale to the Europeans. It was during this intense period of slave trading that the Chickasaws were introduced to African slaves, who were brought by the English traders as servants. Over time, the amount of African slaves owned by the Chickasaws increased dramatically, so that by the time of removal to Oklahoma in 1861, "the Chickasaw Nation was an intensely dedicated slaveholding community."

African slaves were mostly held by Chickasaws who shared both European and Indian ancestry, and who were the wealthier families. It seems that these mixed blood families wanted to create plantations in the southern style, to imitate the southern elite. This appears to be true both pre- and post-removal. Chickasaw treatment of African slaves imitated that of southern white slaveholders. Chickasaws were known to be one of the most strict slaveholding tribes. Slaves were property of their owners, and families could be separated and sold for profit.

\[128 \text{Id. at 26.} \]
\[129 \text{Id. at 7.} \]
\[130 \text{Id. at 28.} \]
\[131 \text{Id. at 28-29.} \]
\[132 \text{GIBSON, supra note 58, at 40-41.} \]
\[133 \text{Id. at 40.} \]
\[134 \text{Id. at 41-42.} \]
\[135 \text{Id. at 65.} \]
\[136 \text{THE WPA OKLAHOMA SLAVE NARRATIVES, supra note 31, at 176.} \]

Such people are commonly referred to by historians as "mixed bloods." However, these same historians refer to people who share both Indian and African ancestry as "blacks" or "black slaves" or "Africans," often overlooking the fact that the term "mixed blood" could mean persons with any combination of mixed ancestry, and more importantly, often overlooking the racial multi-dimensionality of people of African descent. Id.

\[137 \text{Id. at 246.} \]
The Chickasaw Constitution of 1856 contained a section on slavery. This section provided that no slaves could be emancipated by the government of the tribe without the consent of their owners or without paying their owners for the "full equivalent in money of the slave so emancipated." The section further gave the government power to make laws against emancipation of slaves, a provision which seems to reflect a paranoia regarding abolitionism on the part of the Chickasaw government. This section also contained a provision giving the tribal government "full power to pass laws requiring slave owners to treat their slaves with humanity—to provide for their necessary food and clothing—to abstain from all injuries to them, extending to life or limb . . . ." Further, laws passed in 1857 made it illegal for Indians to harbor or assist runaway slaves. The Chickasaws also enacted laws aimed specifically at relegating blacks to a second class and almost sub-human status. For example, Chickasaw law prohibited slaves from holding property, voting, or holding public office. Laws passed the same year also reflected the same anti-abolitionist feelings as the Constitution, declaring abolitionists a danger to security and ordering their immediate removal from Chickasaw territory.

Concerns about the possible discontinuation of slavery, as well as dissatisfaction with the United States federal government, prompted the Chickasaws to join the secessionist cause in 1861. Despite their alliance with the Southern cause, the Chickasaws did little fighting in the Civil War and most of the engagements they were involved in were defensive. After the war, the number of freedmen in the Chickasaw nation was viewed as a great problem. Despite advice to the contrary from other tribes and the federal government, the tribe refused to adopt its own freedmen as tribal members. 

139 CONSTITUTIONS, LAWS, AND TREATIES OF THE CHICKASAWS 22 (Scholarly Resources, Inc. 1975) (1860). "The Legislature of this Nation shall have no power to pass laws for the emancipation of slaves without the consent of their owners, nor without paying their owners previous to such emancipation a full equivalent in money for the slave so emancipated. They shall have the right to pass laws to prevent the owners of slaves to emancipate them, saving the rights of creditors." Id.
140 CONSTITUTIONS, LAWS, AND TREATIES OF THE CHICKASAWS, supra note 139, at 22.
141 Id. at 57-58.
142 Id. at 79 ("... no negro slave in this Nation shall own any horse, mule, cow, hog, sheep, gun, pistol, or knife . . . . should any negro be caught with any property named in the above act, it shall be taken from him . . . . and sold . . . . to the highest bidder . . . . and the negro shall receive thirty-nine lashes on the bare back, by the sheriff or constable").
143 Id. at 81. "[N]o negro, or the descendant of a negro, shall hold any office in this Nation, or be allowed to vote." Id.
144 Id.
145 Id. at 80. "All white persons known to be abolitionists . . . shall be deemed unfriendly and dangerous to the interests of the Chickasaw people, and shall be forthwith removed from the limits of this Nation . . . ." Id.
146 GIBSON, supra note 58, at 260.
147 Id. at 266-69.
members. In addition, the tribal territory became overrun with freed slaves from Texas and the surrounding territories. Although the Chickasaw tribe made numerous requests of the federal government to remove the freedmen to an adjacent territory and provide them with a separate homeland, Congress turned a deaf ear to these pleas until well into the work of the Dawes Commission. By that point, the freedmen had become well settled in the Chickasaw territory and had no desire to move. The work of the Dawes Commission "solved" the Chickasaw freedmen problem through the allotment of private areas of land to Indians and freedmen alike.148

3. The Creek

Despite the designation "Creek" and historical references to the "Creek Nation," it is important to point out at the outset that there originally was no one tribe that could be called the Creek tribe. The term evolved among English traders to refer to those Indians who were "civilized" (i.e., they had some notions of personal property and governmental institutions which could be analogized to fit European ideas of government) but did not belong to one of the other, larger and more coherently defined "civilized" tribes, such as the Cherokees, Choctaws, and Chickasaws. Ethnic groups that were lumped together under the term "Creek" included the Muskogees, Yuchis, Cowetas, Coosas, Alabamas, Shawnees, Tuskogees, and sometimes even portions of the Seminole tribe.149 These tribes which bore the name "Creek" lived primarily, before removal, in parts of what today are Georgia, Alabama, and northern Florida.150 The Creeks were divided geographically and politically into two distinct divisions: the Upper Creeks and the Lower Creeks.151

This original lack of national unity may be somewhat responsible for the schizophrenic attitude the historical record shows on the part of the "Creeks" toward "slaves" and "Negroes." As there was no one Creek nation, there was no one Creek position on slavery. One distinction that may shed some light in this area is that between the "Upper Creeks" of Alabama and the "Lower Creeks" of Georgia and Florida. The "Upper Creeks" appear to have been the stricter slaveholders, conforming more to southern notions of chattel slavery.152 The "Lower Creeks" lived closer to the Seminole tribes

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148 Parthena Louise James, Reconstruction in the Chickasaw Nation: The Freedmen Problem, in THE CHRONICLES OF OKLAHOMA 56-57 (1967).
149 WRIGHT, supra note 64, at 2-6.
150 Id. at 7, 13.
152 Id.
(indeed, the distinction was sometimes arbitrary\textsuperscript{153}) and therefore, were probably more apt to treat "slaves" as members of the community in a Seminole fashion. Nevertheless, these distinctions do not in themselves always hold true.

Because much of the history of the 18\textsuperscript{th} and 19\textsuperscript{th} century was written by white observers, the classification of some black-skinned tribal members as "Negroes" or as "slaves" may have been erroneous. Racial intermarrying was common among the Muscogulge tribes (Creeks and Seminoles), and contemporary white observers tended to think in terms of free white and red men and bound black men, often unable to comprehend the notion of "black Indians" who enjoyed the rights and privileges of red or white Indians.\textsuperscript{154}

The Creeks were introduced to black slaves brought by the English traders in the mid-1700s. During the course of the 18\textsuperscript{th} and the early 19\textsuperscript{th} centuries, runaway slaves from plantations in Georgia and the Carolinas hid among the Creeks. Here, one first sees signs of the Creek schizophrenia with regard to slavery. Some runaway slaves intermarried and became members of tribal communities; some were given leave to create their own separate villages; and some were in fact recaptured, either to be returned to their white owners or to work for Indian masters. An even more interesting irony in Creek history is that some powerful members of the Creek tribe had African ancestors, yet owned African slaves themselves.\textsuperscript{155} Other Creeks were hired by whites as bands of slave-hunters, rounding up runaway slaves in return for bounty money.\textsuperscript{156}

Chattel slavery, as a strictly enforced institution, seems to have arrived in the Creek consciousness largely by the design of white political engineering—as a form of preventive psychological warfare. As mentioned above, racial intermarriage was common, and Creek bloodlines were a mixture of Indian, African, and European heritage. Slavery among the Creeks was originally a form of "convenience," a servitude that provided labor for wealthier tribe members.\textsuperscript{157} First English, and later American, political forces began to fear the "intimacy" of Indians with Africans.\textsuperscript{158} In an effort to undermine the ability of these groups to join forces and overtake their European/American neighbors, it was considered good policy to do whatever possible to stir up hatred between the two groups.\textsuperscript{159}

\textsuperscript{153} Id. at 5-6, 40.
\textsuperscript{154} Id. at 73-78.
\textsuperscript{155} Wright, Creeks And Seminoles, supra note 64, at 76.
\textsuperscript{156} Id. at 83-84.
\textsuperscript{158} Wright, supra note 64, at 84.
\textsuperscript{159} Id. at 84.
The primary methodology utilized by white settlers to accomplish their divide and conquer strategy was to hire Indians as slave-hunters. Native American tribes had become increasingly dependent on European goods, particularly guns and ammunition. Accordingly, white settlers offered ready-made goods that they could easily purchase in exchange for human beings who looked black and who would be returned to or sold into slavery.\textsuperscript{160} Slave-hunting expeditions were probably organized more for the purpose of creating racial hatred and dependence on European goods than for the purpose of returning slaves to their white masters, evidenced by the fact that slave-hunters were often paid for the scalps or heads of runaways that they produced to white settlers.\textsuperscript{161}

Cultural assimilation was another way in which the European/American goal of creating tension between the black slave population and the Creek Indian population was accomplished. Along with European goods and African slaves, there came the introduction of European ideas into the Creek ideology. The words "black," "Negro" and "slave" were interchangeable to the European colonists; by association, they came to be so in the parlance of Creeks as well.\textsuperscript{162}

Mixed blood Creeks with European heritage tended to run their plantations in a style like that of their white southern neighbors. In particular, they shared their European counterparts' fear of abolitionist Christians teaching religion to their slaves. As a result, many slave-owners forbade their slaves from having anything to do with Christian missionaries.\textsuperscript{163}

Prior to removal, the Creek institution of black slavery had not yet deteriorated to the excessively brutal and dehumanizing model of black slavery utilized in southern States. Prior to removal, free blacks lived within tribe lands and were permitted to own property and conduct businesses.\textsuperscript{164} Intermarriage between Africans and Indians was permitted and slaves were permitted to own property, which they could accumulate and subsequently use to purchase their freedom.\textsuperscript{165}

Because the Creek Nation was located in the heart of the slave-holding Confederacy, the slave or non-slave status of black people living in the Creek nation was uncertain.\textsuperscript{166} Blacks who were considered free under

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\textsuperscript{161} WRIGHT, supra note 64, at 84-85.
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\textsuperscript{162} Id.at 77.
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\textsuperscript{164} LITTLEFIELD, supra note 157, at 200.
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\textsuperscript{165} Id.
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\textsuperscript{166} WRIGHT, supra note 64, at 98.
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Creek law could find themselves being sold into slavery by Georgia whites whose conception of freedom was inextricably linked to race. This legal ambiguity was the source of much tension during the days of removal. Parts of the Creek tribe refused to pass through the white-owned "deep south" for fear that their dark-skinned tribe members might be taken by the white Southerners as slaves. These fears were legitimate as some families were torn apart by incidents of enslavement along the removal journey. The Creeks were not merely afraid of losing their property, as is evidenced by the fact that they seemed so concerned about the status of some of their "slaves" that they were willing to fight for them.167

After removal to Oklahoma, the Upper and Lower Creeks united into one nation.168 "The long-term effect of removal was to quicken acculturation and to encourage [Creeks] to adopt white racial attitudes toward Negroes."169 In the post-removal Creek society, laws governing slaves and slavery became more stringent and restrictive of human rights. Slaves were no longer allowed to hold property, and emancipation was permitted only if the slaveholder first took the slave outside of the Creek nation.170 Intermarriage with blacks or aiding runaway slaves was prohibited and punished by heavy fines and whipping.171 Missionaries and abolitionists were forbidden from teaching slaves.172

Creek attitudes of racial superiority over blacks increased to the point where free blacks were no longer safe within the boundaries of Creek lands. In the 1840s, United States soldiers at Fort Gibson reported numerous incidents of unrest between the Creeks and free blacks living in settlements on or near the Creek and Seminole reserves. Creeks threatened to round up free blacks from the surrounding area and sell them as slaves.173 Nevertheless, an anti-slavery agenda among some Creeks persisted. When the Civil War broke out, many slaveholding Creeks fought with the Confederacy, but the great Creek chief "Opoethleyohola," known as "Old Gouge," led a number of Creek and ex-slave soldiers in fighting for the Union army.174 Just as European American families were divided by the war, so too were Native American families with brother, often quite literally, fighting against brother.175

167 Id at 278-90.
169 Id. at 291.
170 Id.
172 LITTLEFIELD, supra note 157, at 201. See also WRIGHT, supra note 64, at 291-92.
173 LITTLEFIELD, supra note 157, at 98-115.
174 WPA OKLAHOMA SLAVE NARRATIVES, supra note 31, at 31.
175 WRIGHT, supra note 64, at 307-08.
After the war, the Creek freedmen were among the better provided for freedmen in Indian country. In contrast to the other Indian nations that fought for the Confederate cause, the Creek Nation yielded to U.S. government demands to adopt the freed slaves into the tribe. As a result, Creek freedmen enjoyed some rights as citizens of the Creek nation and even had representatives in both houses of the Creek National Council.176

There does not seem to be one simple formula with which to analyze the course of slavery or race relations among the Creeks, which may be due in part to the fact that there was originally no one "Creek" culture. Even after the adoption of that particular appellation, many cultures were at work beneath the surface. The oddity of the Creek history of slavery seems largely due to the political machine of the white man. The need to keep the races divided developed policies that were greatly in tension with the Creeks' cultural tendency towards tolerance. In trying to divide the Creeks against the blacks, white policy makers also divided the Creeks against themselves.

4. The Choctaw

The Choctaw Nation177 initially resided in the central and southern parts of Mississippi, the southwestern portion of Alabama and east of the Tombigbee River in Georgia.178 The tribe's land was adjacent to the Chickasaws and the Creeks, with whom the Choctaws shared common Muskogean ancestry.179 After removal in 1820, the Choctaws settled in southern Oklahoma and a southwestern section of Arkansas.180

The Choctaws were one of the largest and most prosperous Native American groups in the Southeast.181 Although they were mainly agricultural,182 the tribal members supplemented their diet by hunting, fishing, and gathering.183 The tribe worked together as a unit in their subsistence activities, allowing both men and women to participate in farming and hunting.184 As a result, the Choctaws successfully raised corn,

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176 LITTLEFIELD, supra note 157, at 203.
177 The Choctaws believe that people were created at a mound called Nanih Waiya located in Mississippi. The Muscogees, Cherokees, and Chickasaws all exited first and settled in various areas away from the mound. The Choctaws were the fourth and final tribe to exit Nanih Waiya. Upon exiting Nanih Waiya, the Choctaws dried themselves in the sun and settled directly outside of the mound. BROWN & OWENS, supra note 77, at 31-32.
179 Id. at 24.
180 Id. at 26; DEBO, supra note 178, at 49.
182 DEBO, supra note 178, at 59.
183 SEARCY, supra note 178, at 32.
184 Id. at 35.
beans, pumpkins, and melons, producing a surplus that they used in trading with nearby tribes.\textsuperscript{185} Slavery was not a new phenomenon to the Choctaws. \textsuperscript{186} Captives taken during wars with other tribes were frequently adopted by the Choctaws in order to boost their population.\textsuperscript{187} The tribe also used the captive Indians to assist the women by performing domestic chores and working in the fields.\textsuperscript{188}

As Europeans began to colonize the southeastern portion of the country, they also began acquiring Indian slaves.\textsuperscript{189} However, because nearby free Indians repeatedly assisted the captured Indians slaves in escaping, the British began to trade Indian slaves for black slaves.\textsuperscript{190} As the Choctaws began to intermingle with, and marry, the white traders,\textsuperscript{191} they eventually began to emulate the white farmers and planters, adopting many of the European's traditions.\textsuperscript{192} Thus, despite their own recent enslavement by the Europeans, the Choctaws, recognizing the worth of slaves as servants, readily adopted black slavery.\textsuperscript{193}

Recognizing that the tribe's economic welfare depended largely upon maintaining the institution of slavery, the Choctaw National Council passed stringent slave codes that illustrate how completely the Choctaws adopted the southern institution of African slavery.\textsuperscript{194} The laws of this time also reveal that by the 1830s, slavery was a black institution. The tribe adopted various laws proscribing conduct with "negro slaves." One such law prohibited tribal members from cohabitating with\textsuperscript{195} a black slave or marrying a black person.\textsuperscript{196} Slaves were also prohibited from owning

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\item \textsuperscript{185} Id. at 32-34.
\item \textsuperscript{186} JOHN D. W. GUICE, Face to Face in Mississippi Territory, 1798-1817, in THE CHOCTAW BEFORE REMOVAL 172 (Carolyn Keller Reeves, ed., 1985).
\item \textsuperscript{187} PATRICIA GALLOWAY, CHOCTAW GENESIS 1500-1700 201 (1995).
\item \textsuperscript{188} GUICE, supra note 186, at 172.
\item \textsuperscript{189} GALLOWAY, supra note 187, at 201.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Jeltz, supra note 71, at 25.
\item \textsuperscript{192} GUICE, supra note 186, at 172.
\item \textsuperscript{193} Id. at 172; Jeltz, supra note 71, at 25.
\item \textsuperscript{194} Jeltz, supra note 71, at 31.
\item \textsuperscript{195} CONSTITUTION AND LAWS OF THE CHOCTAW NATION 27 (Scholarly Resources, Inc. 1975) (1860). A Choctaw law, approved October 1838, provided "that if any person or persons, citizens of this Nation shall take up with a negro slave, he or she so offending shall be liable to pay a fine not less than ten dollars nor exceeding twenty-five dollars, and shall be separated. And for the second offense of a similar nature the party shall receive not exceeding thirty-nine lashes nor less than five on the bare back, as the court may determine, and be separated." Id.
\item \textsuperscript{196} CONSTITUTION AND LAWS OF THE CHOCTAW NATION, supra note 195, at 206. Section VIII of the Choctaw Laws provided: "Is shall not be lawful for a Choctaw and a negro to marry; and if a Choctaw man or Choctaw woman should marry a negro man or negro woman he or she shall be deemed guilty of a felony . . . and if proven guilty shall receive fifty lashes on the bare back." Id.; see also Jeltz, supra note 71, at 31.
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property, especially firearms.197 Moreover, the Council passed several laws with the purpose of keeping the slaves in a "position of peaceful servitude."198 Laws aimed at abolitionist missionaries prohibited the teaching of slaves to read, write, sing, or gather without the consent of their owners.199 Laws were also enforced to prevent slaves from attempting to run away. Choctaw law provided "for the apprehension and disposal of negroes suspected to be runaways, and punished any person found guilty of harboring 'runaway negroes.'"200 No slave owner was permitted to free his slave without the consent of the Choctaw General Council, which first had to ensure that the slave owner owed no outstanding unpaid debts.201 Other enacted laws refused to recognize freed blacks as equals by precluding them from even entering into Choctaw territory.202 Any black person found violating this law was subject to punishment consisting of "on the bare back, not less than one hundred lashes each."203 Choctaw law ensured that a black person brought into Indian Territory would hold the status of slave and would continue to hold such title into perpetuity.204 Thus, the Choctaw version of black slavery was not in any significant way discernable from black slavery in the southern states.205

After the Civil War, the freedmen of the Choctaw Nation found themselves socially and economically stranded.206 As the Choctaws transitioned from a slave system to a wage system, they probably blamed the former slaves, who were now demanding wages, as being directly responsible for their economically unfavorable situation.207 As a result, the

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197 CONSTITUTION AND LAWS OF THE CHOCTAW NATION § 5 (1836) provided "no negro slave shall be in possession of any property or arms." CONSTITUTION AND LAWS OF THE CHOCTAW NATION, supra note 195, at 21; Jeltz, supra note 71, at 31.

198 Jeltz, supra note 71, at 31.

199 CONSTITUTION AND LAWS OF THE CHOCTAW NATION, § 2 (1836), provided "that teaching slaves how to read, write or sing in meeting-houses or schools or in any open place, without the consent of the owner" was a punishable crime; CONSTITUTION AND LAWS OF THE CHOCTAW NATION, supra note 195, at 20; Jeltz, supra note 71, at 31.

200 CONSTITUTION AND LAWS OF THE CHOCTAW NATION, supra note 195, at 35. The law provided "it shall be the duty of any one in the [Choctaw] Nation to take up a negro whom he may suspect as a runaway . . . ." If no owner appeared to claim an apprehended runaway slave, the Choctaw police called "light-horse-men" were charged with selling the person back into slavery. "If no owner appears in six months after the apprehension of said runaway negro, it shall be the duty of the light-horse-men to expose such runaway or runaways to public sale." Id.

201 CONSTITUTION AND LAWS OF THE CHOCTAW NATION, § 8 (1843) provided "[t]hat any person who shall be guilty of harboring a runaway negro or negroes, shall, upon conviction, be made to pay the owner in any sum as the case may be determined by any court having jurisdiction of the same." Id. at 45.

202 Id. at 61.

203 Id.

204 Id.

205 Jeltz, supra note 71, at 31-32.

206 Id. at 30.

207 Id. at 34.

208 Id. at 35; DEBO, supra note 178, at 100.
Vigilance Committee, a secret organization akin to the Ku Klux Klan, was formed which perpetrated violent acts against the former slaves. These self-appointed vigilantes patrolled Indian country threatening, abusing and even lynching freedmen. Reports of these activities eventually reached United States officials at Fort Smith, Arkansas, causing them to report that the freedmen "were suffering from a reign of terror in the Choctaw country." In order to remedy this problem, General John B. Sanborn was appointed as special commissioner to Indian Territory to guard the freedmen.

Moreover, the government passed legislation regulating the employment of the former slaves. The freedmen were required to choose an employer and have a county judge approve a written wage agreement. Those who were found without employment were arrested and compelled to work, having their services sold to the highest bidder.

Despite these few instances of government invention with respect to the freedmen, the Choctaw freedmen remained in the Nation without a clearly defined legal status for more than twenty years after their emancipation. In general, the freedmen were treated as citizens of the United States because they had been freed pursuant to a Treaty with the Choctaw tribe in 1866. However, the Choctaw Nation did not follow the provisions of the treaty in its entirety. The Nation had passed no law that provided for the freedmen's emancipation because their constitution provided that slaveholders should be reimbursed for the manumission of their slaves. Furthermore, while the Choctaws provided the freedmen some suffrage and citizenship rights, they did not permit the freedmen to participate fully in the Nation's political process. Moreover, the freedmen were only allowed to hold minor political offices and to serve as witnesses on a few specified occasions. Finally, the freedmen were not entitled to equal social standing as evidenced by Jim Crow type laws passed by the tribe. For example, Choctaw Indians were prohibited from marrying a black

209 DEBO, supra note 178, at 100.
210 Jeltz, supra note 71, at 35.
211 DEBO, supra note 178, at 100.
212 Id.
213 Id.
214 Id. at 99.
215 Id.
216 Id.
217 Jeltz, supra note 71, at 33.
218 Id. at 33-34.
219 Id. at 34.
220 Id.
221 Id.
person and anyone of "mixed blood" seeking membership in the tribe had to be white; persons of Choctaw and African ancestry were not entitled to membership.  

5. The Seminole

In 1513, Juan Ponce de Leon claimed land for Spain and named it "Florida." At that time, there were hundreds of thousands of Native Americans living in Florida, but none of them were called Seminoles. When de Soto explored the region now known as the Southeastern United States, he brought disease and warfare, which decimated numerous ethnic groups of Indians living in the region. European settlement brought even more attacks on indigenous people. In an effort to survive, the remaining remnants of these pre-existing Indian tribes banned together to form a new unified government and culture. They included such tribes as the Yamasee, Tuckabatchee, Hitchiti, Koasati, Alabama, Timucua, Natchez, Shawnee and Yuchi. They also included refugee bands of Choctaws, Cherokees and Chickasaws.

After British colonization of the Americas, Africans were brought forcibly to the United States to serve as slaves. However, some slaves managed to escape from bondage in Alabama, Georgia and South Carolina. Those who escaped fled to Spanish-owned Florida seeking freedom and refuge in the hot swampland which was difficult terrain for slave catchers to navigate. Some Native Americans adopted African refugees who fled to Florida. Other African refugees formed communities of their own which became known as "maroon settlements." Maroon settlements of escaped slaves were of course outlawed communities so they existed in remote, difficult to find and difficult to defeat locations. Because maroon settlements were always vulnerable to attack by white slave catchers, many African maroon settlements befriended their Indian neighbors and sought protection from the Indians. In exchange for this protection, Africans offered

222 CONSTITUTION AND LAWS OF THE CHOC TAW NATION, supra note 195, at 206. "It shall not be lawful for a Choctaw and a negro to marry . . . and if proven guilty [he or she] shall receive fifty lashes on the bare back." Id.
223 Constitution and Laws of the Choctaw Nation, Acts of 1886 Bill XII Section 2 (1886) provides: "Be it enacted that all applicants for rights in this nation shall prove their mixture of blood to be white and Indian." Id. at 267.
225 Id.
226 WRIGHT, supra note 64, at 1.
227 Id. at 6.
229 Id. at 37.
their men as warriors to fight with the Indians against the Europeans, and they also offered instruction in African methods of planting, irrigation and harvesting in a tropical climate. Some maroon settlements remained independent of the Indian tribes in government and culture, while other maroon settlements were folded into the Indian tribe to create the circumstance of Africans living among the Indians and participating in tribal life and governance.

The African influence among these southeastern Indians was considerable and is evidenced by the black skin and African facial features of many Seminole Indians. These refugees, both African and Native American, united to form what has become known as the Seminole tribe, and established their community in the geographic region known as Florida. Hence, the term Seminole is used to refer to this group of people living in a community rather than to persons of the same ancestral lineage or racial group.

As a result of this historical connection between the Native Americans and the Africans, Indian Seminoles sometimes married black Seminoles, creating brown Seminoles. Indian Seminoles began to use the term "estelusti" to refer to the black Seminoles. Some estelusti were slaves while others were free and were adopted into the tribe. Perhaps because of this kinship with Africans, the Seminoles' pre-removal version of African slavery was significantly different than the institution in other Native American tribes. Black Seminoles were more like sharecroppers than slaves. Generally, the black Seminoles resided on and cultivated land in towns separate from the Indian or red Seminoles. Black Seminoles also owned herds of livestock. Because the red Seminoles depended on the Africans' greater agricultural skill and the resulting economic advantage, the red Seminoles allowed the black Seminoles "ownership" rights, in exchange for an annual share of their produce and livestock. Moreover, because most of the black Seminoles spoke Spanish, English, and Native American languages, they served as interpreters and intermediaries when the red Seminoles dealt with whites. Finally, the red Seminoles allowed black

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230 WRIGHT, supra note 64, at 6.
231 KATZ, supra note 228, at 57.
232 LITTLEFIELD, supra note 157, at 4.
233 Id. at 5.
234 Porter, supra note 67, at 5; LITTLEFIELD, supra note 157, at 5-6.
235 LITTLEFIELD, supra note 157, at 8.
236 Id.
237 Id. at 9.
238 Id. at 8.
239 Id.
male Seminoles to own guns, primarily because these men served as allied warriors in wars between the Seminole tribe and the Europeans.

By the time Spain ceded Florida to the United States in 1821, this form of "slavery" among the Seminoles was firmly established. But the characteristics of Seminole slavery, which allowed blacks to live in separate villages and serve essentially as sharecroppers and respected mediators, brought the Seminole tribe into conflict with both whites and the nearby Creeks, who believed that the black Seminoles were slaves who had run away from white or Creek slave owners. Both whites and Creeks viewed black settlements in Seminole territory as a threat to slavery throughout the South. Hence, whites began a campaign to divide and conquer the two groups. To disrupt the racial alliance between red and black people living in the Seminole Nation, the U.S government promoted black slavery by hiring wealthy slave owning Creek Indians to persuade Seminole chiefs to become true slave masters. Disagreement erupted in the tribe over how to treat the black Seminoles. Some red Seminoles wanted black Seminoles to hold the same status as black slaves in the southern confederate states. Other red Seminoles, probably those who had a kinship with the black Seminoles, wanted either equality for black Seminoles or at least free status. As a result of this inter-tribal division in philosophy, some Seminole Indians began practicing a truer form of black slavery by utilizing black Seminoles as field laborers.

In the early 1840s, the Seminole tribe began the process of removal to Indian Territory. Nearly five hundred Seminoles of African descent accompanied the Seminoles to Indian Territory. Black Seminoles who had separated from the Indians and surrendered to the U.S. government were promised by Major General Jesup that they would settle in a separate village in the Seminole Nation and would be under the protection of the United States and would never be separated or sold. However, after the Seminole tribe arrived in Indian Territory, their relationship with the black Seminole "slaves" changed. The Indian Seminoles, feeling pressure from some of their own tribal members, as well as the other four "civilized" tribes and

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240 Id.
241 LITTLEFIELD, supra note 157, at 6-7.
243 LITrLFEFELD, supra note 157, at 5, 7-9.
244 KATZ, supra note 228, at 56.
245 By 1837, Chief Osceola, who had a black wife, had become the leader of a band of black and red Seminoles who organized resistance to U.S. and Creek slaveholders. Osceola's band pledged to defend their black brothers and sisters to the death. Id. at 59.
246 Id. at 57.
247 Porter, supra note 67, at 118.
248 Id. See also, 4 Op. Att'y Gen. 720 (1848).
proslavery War Department officials, found it politically inexpedient to maintain their close relationship with the blacks.\textsuperscript{249} As a result, the black Seminoles became targets of slave hunters.\textsuperscript{250} Creek Indians raided the Seminole Nation and claimed many of the black Seminoles as slaves, asserting that they had fled from either them or their ancestors while in Florida.\textsuperscript{251} In 1848, the United States Attorney General ruled that black Seminoles were slaves under United States law.\textsuperscript{252}

Accordingly, the black Seminoles who were not taken by the Creeks were ordered to return to their proper Seminole owners to serve as true slaves.\textsuperscript{253} Rather than submit to a lifetime of bondage, in 1849, approximately 800 members of the black Seminole Wild Cat band, including their famous leaders, Wild Cat and John Horse, fled to Mexico.\textsuperscript{254} The black Seminoles who remained in Indian Territory were treated as true slaves and their struggle in Indian Territory to establish their freedom proved futile until after the Civil War.\textsuperscript{255}

\section*{B. The Dawes Commission}

\subsection*{1. The Purpose and Establishment of the Commission}

After the Indians had lived about thirty years in Indian Territory, the Civil War erupted.\textsuperscript{256} This placed the Indian tribes in the position of having to choose sides. Despite efforts to remain neutral, the slave holding tribes eventually allied with the Confederacy.\textsuperscript{257} After the defeat of the South, officials in Washington took the position that because the Indians had fought with the South, all former treaties and agreements with the U.S. government were nullified and the five tribes should be treated as defeated enemies.\textsuperscript{258} The U.S. government wanted the five tribes to enter treaties agreeing to end

\textsuperscript{249} Littlefield, supra note 157, at 13.
\textsuperscript{250} Katz, supra note 228, at 70.
\textsuperscript{251} Porter, supra note 67, at 119.
\textsuperscript{252} Katz, supra note 228, at 70; 4 Op. Att'y Gen. 720 (1848).
\textsuperscript{253} Littlefield, supra note 157, at 126-27.
\textsuperscript{254} Katz, supra note 228, at 71. Little has been written about the underground railroad leading to Mexico. On his journey to Mexico, Wild Cat also took along some Cherokee and Creek slaves who learned the route to the Rio Grande so that they could return to Indian Territory and lead other blacks to freedom. \textit{Id.}
\textsuperscript{256} Aldrich, supra note 36, at 17; Annie Heloise Abel, \textit{The American Indian As Slaveholder and Secessionist} (1919).
\textsuperscript{257} \textit{Id.}
Moreover, the U.S. government wanted the South and the Native American tribes to pay some form of reparation to the slaves. Toward this end, the government demanded that the tribes sign treaties ending slavery and making some provisions for the welfare of the freed slaves. In 1866, delegates of Indian tribes signed treaties agreeing with the demands of the U.S. government. Pursuant to these treaties, all Indian tribes agreed to abolish slavery and some agreed to adopt the freed slaves as citizens of the tribe. As a result of these treaties, the Choctaw and Chickasaw tribes agreed that the U.S. government would remove the freed slaves from their Indian territory. The Cherokee, Creek and Seminole agreed to adopt the freed slaves as citizens of their respective tribes.

After the Civil War, settlement in the United States continued, and white settlers began moving west. The U.S. government was again under pressure from white settlers to open up lands west of the Mississippi for white homestead settlements. In response to political pressure from whites to open up Indian lands for settlement and allegations that mixed blood Indians were exploiting the full bloods by monopolizing tribal lands and using them for their own individual gain, the government decided that private ownership of Indian land as opposed to communal ownership was the preferred course of action. In 1887, Congress passed the General Allotment Act, which provided generally that tribal lands of certain Indian

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259 Even though President Lincoln had signed the Emancipation Proclamation and the Civil War had ended, because the Indian Tribes were deemed as sovereign entities and the Indian Territory that they occupied was not a state, the Emancipation Proclamation had little effect on the Indians who were still holding slaves after the Civil War. ALDRICH, supra note 36, at 17-20.

260 ALDRICH, supra note 36, at 20.

261 See, e.g., Treaty with the Choctaws and Chickasaws, Apr. 28, 1866, 14 Stat. 769; see also Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799. These treaties also authorized the U.S. Government to survey the Indian lands for allotment purposes. See Treaty with the Choctaws and Chickasaws, Apr. 28, 1866, Art. XI, 14 Stat. 769.

262 See Treaty with the Choctaws and Chickasaws, supra note 261, at Art. III.

263 See id. at Art. IX; Treaty with the Seminole Indians, March 21, 1866, 14 Stat. 755; see also Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799.

264 This approach also promoted the Government’s policy of assimilation of the Indian into white American society. As early as 1866 the U.S. Government was concerned with this issue as evidenced in its treaty with the Choctaw and Chickasaw Nations. See Treaty with the Choctaws and Chickasaws, supra note 261, at Art. XI (stating that “whereas the land occupied by the Choctaw and Chickasaw nations, . . . is now held by the members of said nations in common, . . . it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, should the Choctaw and Chickasaw people . . . agree to the survey and dividing their land on the system of the United States, the land aforesaid east of the ninety-eighth degree of west longitude shall be, . . . surveyed and laid off . . . .”). For a discussion of how the U.S. Government used the mixed bloods’ alleged exploitation of tribal land as a paternalistic justification for the policy of allotment, see KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914 34 (1999). One example of such monopolizing was a Choctaw mixed-blood (meaning white and Indian) who accumulated much wealth through such practices. At one time he had 5,000 head of cattle on seventeen thousand acres. Id.at 7.

tribes should be allotted in 160 acre tracts to heads of families, 80 acres to unmarried adults, and 40 acres to children; and that the remaining lands should be purchased by the U.S. Government and opened up to homesteaders. Because the Five Civilized Tribes had effectively lobbied against allotment, the General Allotment Act did not apply to them. Nonetheless, the U.S. government desired to extinguish tribal title to lands in Indian Territory, by either cession or allotment in severality. To work toward this goal, Congress passed the Indian Office Appropriation Bill of 1893, which authorized the President of the United States to appoint three commissioners to negotiate the extinguishment of tribal title to tribal lands. Accordingly, President Grover Cleveland appointed Henry L. Dawes, Meredith Kidd and Archibald McKennon to the Commission to the Five Civilized Tribes (also known as the "Dawes Commission") to negotiate with each of the tribes for the allotment of their tribal lands. But tribal officials were unwilling to negotiate with the commission, and after three years of trying, the Commission returned to Washington D.C., where various committees of Congress were at work drafting legislation that would force allotment upon the five tribes. On June 10, 1896, after conducting hearings and reviewing evidence indicating that tribal leaders in Indian Territory were abusing their power and using tribal resources for personal gain rather than for the communal benefit of the tribe, Congress passed a law which gave the Dawes Commission the power "to hear and determine

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266 Id. at § 8 ("the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choc'taws, Chickasaws, Seminoles, . . . ."). The Five Civilized tribes did not want their tribal lands allotted to individual Indians, because they understood that doing so would make tribal lands freely alienable and thereby subject to acquisition by whites. White settlers purchasing allotted lands from individual Indians would result in the erasure of the geographic region over which each tribe claimed governance power. Effectively, allotment would mean the end of tribal life.


268 Id. at §16. ("The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choc'taw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes... to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.")

269 Henry L. Dawes was a lawyer and a former Republican Senator from Massachusetts who spoke out against slavery and considered himself a friend of the Indian people. For more information on Henry Dawes, see http://bioguide.congress.gov and http://www/hti.umich.edu.

270 The objectives behind the policy of allotment are clearly outlined in a letter of instructions sent by Secretary of Interior Hoke Smith to the commissioners and providing: "success in your negotiations will mean the total abolition of the tribal autonomy of the Five Civilized Tribes and the wiping out of the quasi-independent governments within our territorial limits. It means, also, ultimately, the organization of another territory in the United States and the admission of another state or states in the Union." CARTER, supra note 264, at 3.

271 Id. at 10-13.
the applications of all persons who may apply to them for citizenship."\textsuperscript{272} Although a March 18, 1901, opinion from the Attorney General's office held that the Dawes Commission was an administrative body, this bill effectively converted the Dawes Commission from a diplomatic committee into an adjudicative tribunal.

The power to determine tribal citizenship was crucial to the process of allotment, because before the allotment of plots of land to individual Indians could occur, the government had to ascertain the identity of the individual Indians who were entitled to receive an allotment of land. The process of creating a list of the Indians who were entitled to allotment was called "enrollment."

The Dawes Commission's first try at enrollment in 1896 and 1897 failed for several reasons. Tribal leaders refused to share tribal membership rolls with the Commission; individual Indians, particularly full bloods, refused to have anything to do with the enrollment process; and some tribal leaders and government officials were accused of engaging in fraud and allowing people on the roll in exchange for monetary remuneration.\textsuperscript{273} Because the tribes had demonstrated an unwillingness to cooperate and were effectively resisting the concept of allotment, Congress thought it necessary to give the Dawes Commission the power to subpoena tribal records and persons, as well as the contempt power of a court, in order to ensure the cooperation of tribal authorities.\textsuperscript{274} Accordingly, in 1898, Congress passed the Curtis Act,\textsuperscript{275} which mandated that the Dawes Commission "shall have access to all rolls and records of the several tribes and the United States court in Indian Territory, shall have jurisdiction to compel the officers of record to deliver the same to said commission, and on their refusal or failure to do so, to punish them for contempt."\textsuperscript{276}

2. The Process of Enrollment

Armed with the powers conferred on it by the Curtis Act, the Dawes Commission again set out to create a roll of all of the Indians. Enrollment

\textsuperscript{272} Appropriations, Indian Department, June 10, 1896, 29 Stat. 321. "That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled . . . ." Id. at 339.  
\textsuperscript{273} Id. CARTER, supra note 264, at 15-21.  
\textsuperscript{274} Id.  
\textsuperscript{275} Indian Territory, June 28, 1898, 30 Stat. 495. The act is known as the Curtis Act because it was authored and introduced by Charles Curtis, a Republican member of the House of Representatives from Topeka, Kansas who was part Kaw Indian. For a book about Charles Curtis' life see WILLIAM E. UNRAU, MIXED-BLOODS AND TRIBAL DISSOLUTION: CHARLES CURTIS AND THE QUEST FOR INDIAN IDENTITY (1989).  
\textsuperscript{276} Indian Territory, June 28, 1898, 30 Stat. 495.
was a long and tedious process. The Commission had to locate every Native American member of each of the respective tribes, verify his or her name, address, tribal membership and quantum of Indian blood. In many instances, there were disagreements about who was Indian. The Dawes Commission was a quasi-judicial body, and through its adjudicative process, it could determine the legal status of any applicant for enrollment. In order to be enrolled by the Commission as an Indian, the candidate for enrollment had to demonstrate that he or she was recognized by the tribe as a member of the tribe, and the candidate had to offer proof of his or her blood quantum. The Commission had the power to adjudicate the quantum of Indian blood by conducting a hearing and reviewing written and oral evidence. People who were mixed with Native American and European ancestry were included on the roll if they were recognized members of the tribe, and their blood quantum was stated on their enrollment card based on oral answers they gave about their parents and grandparents. Because the Indians had inter-married with whites to a great extent, much of the enrolled population was of mixed blood. In cases where an applicant’s parents were both Native American, but from different tribes, the commission, recognizing the tribes’ matriarchal culture, generally calculated the degree of blood based strictly on the mother’s tribe which resulted in some full blood Native Americans being enrolled as half bloods. After many evidentiary hearings, some people who claimed Indian status and sought to be enrolled were denied enrollment as a member of the tribe for lack of proof of their Indian status. On the other hand, the Commission faced resistance, particularly from the full bloods who refused to be enrolled. Even when faced with an enrollment officer asking them to sign an enrollment card, many full blood Indians, adhering to their

277 See Miller v. Allen, 229 P. 152, 153 (Okla. 1924).
278 Appropriations, Indian Department, June 10, 1896, supra note 272. In determining the legal status of applicants, the Dawes Commission was required by law to "respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes ...." Id. at 339.
279 Miller, 229 P. at 152 (holding that the Dawes Commission was empowered to determine the blood of a candidate for allotment and that such determination was final).
280 CARTER, supra note 264, at 49.
281 Id. See also Letter from the Department of Interior to the Dawes Commission dated August 31, 1839 7) stating that the Commission applied this rule because in the case of the tribes, "the descent is in the female line; every child belongs to the clan of its mother and not of its father." This letter also provides that this rule "rests in the fact that formerly the tribes were divided into bands, and that quite frequently an Indian man might be the husband of several women belonging to different bands; the children of these several women were enrolled with the mother as members of the band to which she belonged", because as the Indians often said, 'the mother of the children is always known,' while this may not be true as to the father." Id. at 2-3. The letter further provides that children born of a marriage between a Choctaw citizen and a Chickasaw citizen had the privilege to elect which tribe in which to be enrolled assuming a legal right to enrollment in both tribes). (Letter is available at the OHS archives and is on file with author).
cultural belief in communal ownership, refused to be enrolled and were therefore omitted from the roll of their tribe.\(^\text{282}\)

Adding to the problems faced by the Dawes Commission was the Indian tribes' agreement with the U.S. government to allot lands to the freed slaves or "freedmen."\(^\text{283}\) This agreement meant that the Commission also had to enroll the freedmen. To complicate matters even further, some freedmen had Indian blood, and claimed that they should be enrolled as "blood members" of the tribe and accorded the additional benefits that flowed from blood member status. But the Indian tribes had adopted racial classification laws\(^\text{284}\) similar to those enacted in many southern states, which provided that illegitimate children of Indian fathers and Negro mothers or mothers who had one drop of Negro blood\(^\text{285}\) were to be uniformly classed as Negro.\(^\text{286}\) In an effort to respect the laws of the tribes, the Dawes Commission recorded freed slaves ("freedmen") and their descendants on a segregated roll called the "Freedmen roll."\(^\text{287}\) The "Freedmen roll" did not

\(^\text{282}\) Carter, supra note 264, at 147.

\(^\text{283}\) For a fascinating and scholarly book on land allotment to the Freedmen in Oklahoma and their resulting development of all black towns, see Hannibal B. Johnson, Acres of Aspiration: The All-Black Towns in Oklahoma (2002).

\(^\text{284}\) Acts of the Choctaw Nation, November 6, 1885 (Sept. 18, 1896); see also Cherokee Constitution of 1839 providing who is eligible to hold a seat in the National Council states "descendants of Cherokee men by all free women except the African race." It further provides that "[n]o person who is of negro or mulatto parentage, either by the father or mother's side, shall be eligible to hold any office of profit, honor, or trust under this Government." Cherokee Const. Art. III., § 5 (1839); see also Alberty v. United States, 162 U.S. 499 (1896) (holding that the court had jurisdiction over a defendant claiming lack of jurisdiction of the court due to his Indian status, because the defendant was the illegitimate son of a Choctaw Indian by a negro woman who was a slave in the Cherokee Nation. The court said: "As his mother was a negro slave, under the rule partus sequitur ventrem, he must be treated as a negro by birth, and not as a Choctaw Indian.")


\(^\text{286}\) Alabama defined "negro" as including mulatto and meaning "a person of mixed blood, descended, on the part of the father or mother, from negro ancestors, to the third generation inclusive. . . ." Ala. Code § 2 (1876). For other references to southern one drop rules of law, see Hickman, supra note 285.

\(^\text{287}\) It was possible for a black Indian to make it onto the blood roll. Since most of the tribes had a matriarchal society, a child generally took the status of the mother. Accordingly, if the mother of the black Indian was Indian, that black Indian could have been regarded as a "blood" member of the tribe for purposes of enrollment. However, history tells us that this circumstance was extremely rare since most mixed raced persons of African descent were parented by a slave mother of African descent and an Indian slave master as father. This historical fact meant that the overwhelming majority of mixed raced persons of African descent or "black Indians," were placed on the freedmen rolls. In fact, in the case of Miller v. Allen, 229 P. 152 (Okla. 1924), the female plaintiff who was 7/8 Indian and 1/8 African who tried to challenge her position on the freedman roll was denied her Indian heritage. The racist judge/court cited Alberty v. United States, 162 U.S. 499 (1896), which held that if one's mother is a "Negro slave," he must be a Negro by birth and not Indian despite having an Indian father. The court in Miller, relying on Alberty
recognize or document the blood quantum of mixed blood freedmen. Hence, the freedmen were given no credit for having any degree of Indian blood.\textsuperscript{288} The determination of the Commission, as to who was entitled to be listed on the authoritative membership rolls of each of the five tribes, was final and could only be appealed in limited circumstances.

Because the tribes had adopted racist laws which refused to recognize the Native American ancestry of the freedmen, most freedmen with Native American ancestry, which was usually in the paternal line, were not recognized as members of the tribe even after the dismantling of slavery. Accordingly, when the Commission created its roll of Indians, listing the person’s name and Indian blood quantum, it generally did not include freedmen with Indian blood on this list. Instead, the Commission created the separate roll called the "Freedman roll," which listed by name each of the freed slaves and their living descendants. Not only is the "Freedman roll" problematic because it is segregated from the roll of whom the Dawes Commission considered to be the "official Indians," the "Freedman roll" is also problematic because the Dawes Commission failed to indicate whether any of the enrolled freedmen had a quantum of Indian blood.\textsuperscript{289} People who had an overwhelming majority of Indian ancestry, but who had some African ancestry, were placed on the "Freedman roll.\textsuperscript{289} Hence, the Dawes

\begin{quote}
\textsuperscript{288} Carter, supra note 264, at 49; see, e.g., \textit{Moore’s Seminole Roll} (portions of which are on file with author).

\textsuperscript{289} This is probably because it would have been virtually impossible to validate some claims of Native American ancestry given the fact that there were no paternity or marriage records kept for the slaves, and that those slave masters who had fathered children were not stepping forward to legitimize those children. For a discussion of racial hierarchy in America that includes Native Americans and opiates that blacks could not be seen an multi-racial because doing so would have undermined the racist ideology of the time, see generally, Jack D. Forbes, \textit{The Manipulation of Race, Caste and Identity: Classifying Afro-Americans, Native Americans and Red-Black People}, \textit{Journal of Ethnic Studies} 17:4.

\textsuperscript{290} One example of this is a woman named Annie Miller whose father was a full blood Creek Indian married to her mother (a former slave), who was three-quarter Creek Indian and one-quarter African or "Negro," making Annie only one-eighth Negro or an "octoroon" as such persons were frequently called. Despite her Indian ancestry, and her full blood father’s legitimization of her birth, the Supreme Court of Oklahoma held that the fact that Annie descended from a slave mother fixed her status
\end{quote}
Commission used the racist "one drop rule," or a version thereof, in compiling its list of the "real Indians." The Dawes Commission completed its task of enrollment, and the rolls were ultimately closed in 1907.291

3. The Modern Day Ramifications of a Racist Policy

Today the Dawes Rolls are still considered the exclusive authoritative benchmark for determination of membership in each of the respective Five Civilized Tribes. Presently, hundreds of people apply to various tribes each month seeking tribal membership and the concomitant benefits of such membership. In order to enjoy the federally granted rights and privileges that flow from being Native American, a citizen of the United States who claims Native American ancestry must obtain what is called a Certificate of Degree of Indian Blood (CDIB) card from the Bureau of Indian Affairs (BIA). A CDIB card will be issued to an applicant who can demonstrate that he or she is the lineal descendant of a CDIB card holder or the lineal descendant of one of the persons on the "Blood roll" created by the Dawes Commission. Today the Five Civilized Tribes population consists predominately of persons who look and often identify as white but who also have Native American ancestry.292 Because the Dawes Commission utilized the "one drop rule" in determining who was Indian at the time of creating the Rolls, use of the Dawes Rolls as the exclusive means of determining tribal membership and/or CDIB card eligibility is a modern day application of the "one drop rule." The effect of using the Blood rolls as the exclusive method of determining tribal membership is that most descendants of the freedmen and entitled her only to enroll as a Creek freedman, not as a person of Creek Indian blood. To quote the unenlightened Justice Threadgill, "If slavery were in force at this time, Annie Miller, the plaintiff, would be a slave. One drop of slave blood taints the stream, and makes it African in its descent." Miller v. Allen, 229 P. 152 (Okla. 1924). Another admission of the segregated nature of the Dawes Rolls is found in Davis v. United States, 199 F. Supp. 2d 1164 (D. Okla. 2002), wherein two bands of the Seminole Nation consisting of black Seminoles descended from African slaves challenged their exclusion from benefits and programs and the government's refusal to issue Certificates of Degree of Indian Blood (CDIB) cards to them. The court acknowledges that the Dawes commission used a racist method when it compiled the rolls. "The Seminoles of African descent were included in the 1906 Seminole Freedmen Roll, while the non-African descent Seminoles were included in the 1906 Seminole Blood Roll. A Seminole who was half Native American and half African was counted as a Freedman, while a Seminole who was merely one quarter Native American (but three quarters white) was included on the Blood Roll. The Dawes Commission made no effort to quantify and record the percentage of Native American blood of those listed on the Freedman Roll, though many historians agree that many of those listed on the Freedmen Roll had mixed Native American ancestry." Id. at 1168.

291 CARTER, supra note 264, at 65; see also Act of April 26, 1906, ch. 1876, 34 Stat. 137 (providing for the "final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes").

292 WRIGHT, A GUIDE, supra note 28, at 3.
who have Native American ancestry are precluded from attaining tribal membership.\footnote{293}

Hence, descendants of slaves are suffering present harm from a modern day application of the one drop rule prohibiting them from claiming their multi-dimensional heritage. The harm is not only dignitary or psychological, it is also economic and educational. The harm is dignitary in that the rule precludes black Indians from claiming their Native American heritage in a way that is legitimate. Sure, African Americans can claim to be "part Indian," but such claims are subject to suspicion and quickly dismissed as illegitimate and false, absent recognition of that person by the tribe. Moreover, without tribal recognition, African Americans are isolated and excluded from participation in the cultural aspects of the tribe. They are not entitled to send their children to Choctaw school to learn the language. They are not treated as part of the tribe. They have no voice in Choctaw government, and they are not invited to participate in celebrations of tribal culture. Most of all, their existence as black Indians is frequently denied by white Indians and full bloods. The harm is also economic because the black Indians are precluded from sharing in the tribal revenues and economic programs offered to Indians by both the tribe and the federal government.\footnote{294}

C. The Conversion of Native American Identity

European amalgamation with the Five Civilized Tribes had a bleaching effect on the tribes.\footnote{295} The people of the five tribes became whiter and whiter, not only in appearance, but also in culture and law. Persons

\footnote{293} Some descendants of Freedmen with Indian ancestry have been able to prove their blood connection to a person on the Blood Roll and therefore were issued a CDIB card. See Davis, 199 F. Supp. 2d at 1174 (wherein the court acknowledges that CDIB cards have been issued to descendants of freedmen with Indian blood). However, the overwhelming majority of descendants of Freedmen have either inadequate or no written documented proof of their ancestral connection to a person on the Blood Roll. Hence, these persons are unable, under the present paradigm, to meet the burden of proof necessary to receive a CDIB card and tribal membership.

\footnote{294} Undoubtedly some will ask: "Why give the blacks any special treatment when there were full blood Indians who were left off of the Dawes roll and their descendants are not recognized by the tribe?" If anyone deserves recognition by the tribe, it is the descendants of the full bloods who were omitted from the Dawes roll. However, the omission of some full blood Indians from the rolls differs from the omission of black Indians in one significant way. Full bloods who were omitted from the rolls were omitted either because they chose not to participate in the enrollment process or because they failed to adhere to an administrative rule establishing the process for enrollment. See CARTER, supra note 264, at 89. No full bloods were systematically omitted from the blood rolls as a matter of legal policy. Black Indians, on the other hand, were intentionally and systematically omitted from the blood rolls as a matter of legal policy jointly established by the federal government and the tribes and administered by the federal government. The tribes did not want to recognize black Indians as a matter of tribal law, even when the person's Indian ancestry was greater than their African ancestry. The tribes in conjunction with the U.S. government conspired to keep most black Indians from being recognized as members of the tribe.

\footnote{295} DEBO, supra note 27, at 293.
deemed "mixed bloods," who shared both European and Native American ancestry, imported European cultural norms into the native tribal culture. Full blood Native Americans fought within tribal structure to maintain the Native American way of life as evidenced by their efforts to resist allotment and maintain tribal communal land ownership and their efforts to resist the institution of black slavery. When tribal members of European descent became the majority, white American cultural and legal norms became dominant in the tribe, as evidenced by each tribe’s ultimate adoption of black slavery. Europeans who infiltrated the tribes brought with them certain ideas and practices that influenced the Native American conception of Native American identity and the outside world. One of the most harmful ideologies imported by Europeans was that of white supremacy. White Europeans wrote and spoke often about the savage and inferior nature of the Indian but predicted redemption of the Indian through white amalgamation. Because white Europeans were the people with power and economic resources, many Native Americans understandably began to believe in the myth of white supremacy. Indians began to marry whites in record numbers, creating generations of "white Indians." These white Indians began to dress in the attire of white Americans, and they began to value the ability to speak English over their tribe’s native language. Moreover, many white Indians elected to adopt and practice the dominant religion of white America, Christianity, rather than their own native religious beliefs and practices. Finally, white Indians moved away from traditional tribal laws and began adopting laws that more closely resembled the law of white America, including the laws of black slavery. Many full bloods identified primarily with native tribal culture and desired to preserve their tribal culture. Perceiving the bleaching effect that intermarriage with whites was having on their tribe, some full bloods tried to urge a Native American

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296 CARTER, supra note 264, at 144-47; DEBO, supra note 27, at 53-55.
297 The Cherokee organization of full bloods called the Keetoowah Society, sought to align the Cherokee nation with the Union in the Civil War rather than fight with the Confederacy to preserve the institution of slavery. LITTLEFIELD, supra note 99, at 10.
299 MILLIGAN, supra note 61, at 11; WRIGHT, A GUIDE, supra note 28, at 3.
300 MILLIGAN, supra note 61, at 56.
301 Id. at 56.
303 See discussion supra notes 283-293 and accompanying text.
304 But those full bloods who attempted to resist white dominance and white culture ultimately found themselves in the political minority within their own tribe, marginalized, often poor, and unable to effectuate any meaningful resistance to white dominance. After removal to Indian Territory, full bloods were relegated to a minority status within the tribe, meaning that they were outnumbered by white or "mixed blood" Indians. 305 The bleaching effect of white American amalgamation within each of the tribes perhaps explains why each of the tribes ultimately submitted to a culture that embraced the notion of black slavery. 306 In the end, both red Indians and black Indians suffered from the oppression of white supremacy. It is the hope of this author that white supremacy will no longer serve to divide persons of Native American heritage. It is my hope that those controlling the door to Native American heritage will open that door to those who were excluded by racism and white supremacy, in an effort to preserve and celebrate Native American culture.

III. RECLAIMING THE LOST: DETERMINING WHO IS INDIAN

Critics of the policy proposed herein will undoubtedly argue that even if we wanted to acknowledge African Americans with Native American ancestry as members of their respective Indian tribes, how would we determine which African Americans are Indian? Determining who is Indian is no easy task. 307 Some people can claim Indian status in some circumstances, but not in others. 308 For example, a person who can trace the majority of their ancestors to the Cherokee tribe is definitely an Indian ethnologically, but that person may not be recognized by the tribe and

304 Carter, supra note 264, at 72-73.
305 Id.
306 The five major tribes of Oklahoma are not the only tribes that were impacted by white supremacy. Other Native Americans learned to hate black people as a way of elevating themselves. The Lumbee tribe, for example, began practicing racial hatred "as a way to avoid being considered black themselves." Fergus M. Bordewich, Killing the White Man's Indian 76 (1997). Lumbees who married blacks or anyone with African ancestry were shunned from the tribe, and Lumbee children who had a black ancestor were excluded from Lumbee schools. Id.
307 For one of the most thoughtful works on Indian identity and race, see L. Scott Gould, Mixing Bodies and Beliefs: The Predicament of Tribes 101 Colum. L. Rev. 702 (2001). Professor Gould explores the possibility that cultural survival for most Indian tribes may depend upon eliminating race as a criterion for tribal membership. Hence Professor Gould and many race scholars might persuasively argue that race or ancestry should not be the test for Indian identity. While I appreciate these arguments, the practical reality is that the five major tribes of Oklahoma are presently using an ancestry based test. Hence, I try to argue for inclusion of black Indians using that test because I view it as the path of least resistance for effectuating change. For an enlightening discussion of the law of Indian Identity, see Mixed Race America and the Law 137-52 (Kevin R. Johnson ed. 2003).
Some tribes require a certain quantum of blood to be a member of the tribe and thus "Indian," while other tribes have no minimum blood quantum requirement. Determining who is Indian is no easy task because there is no uniform standard. However, the five major tribes of Oklahoma define who is Indian to some degree because they extend tribal membership only to those persons who can establish an ancestral connection to someone on the blood rolls. As such, ancestry becomes central to claiming Indian identity in one of the five major tribes of Oklahoma.

In most instances, there is no documented written record demonstrating the Native American ancestry of most descendants of African slaves. Absent documentary proof, courts routinely consider oral testimony under oath as evidence. But courts, legislatures, and Indian tribes are unlikely to simply take the word of an African American regarding his or her Native American status because there could be persons who intentionally or through genuine false belief assert false claims.

Modern science, however, can lend vital assistance in the quest to determine which African Americans possess Native American ancestry. Unfortunately, science has not developed to the point necessary to prove Native American ancestry for all African Americans with Indian ancestry. For the past few years, African Americans have been using science to trace their roots to a particular region in Africa. The science that has permitted this archeological and genealogical expedition is molecular biology, which focuses on DNA as the genetic material. The Native American DNA

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309 See Strickland, supra note 44, at 330-31 (arguing that there is constant pressure from the federal government to make "Indianness" a federal issue by converting the question of Indian identity into one of race rather than citizenship). Christine Metteer, The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian, 5 Rutgers Race & L. Rev. 53, 54 (2003).


311 Generally, Native Americans who produced offspring with African slaves did not legitimize their offspring, so there is no birth record documenting the Native American paternity of the mixed-race offspring.


313 DNA stands for "deoxyribonucleic acid." Genetic information is encoded in DNA and transmitted from generation to generation. It is a coiled molecule organized into structures called chromosomes which are located in the nucleus of cells. Segments along the length of a DNA molecule form genes, the molecular laborers that carry out all life-supporting activities in the cell. Although all humans share the same set of genes, individuals can inherit different forms of a given gene, making each
sequence has been mapped and is available for both males and females to determine whether they have Native American ancestry. Genetic science is statistically accurate in ascertaining whether people have a particular ancestral heritage. This is so because certain genetic markers either appear only in people of that particular heritage or they appear with such high frequency in a certain racial/ethnic population as compared to an exceptionally low frequency in other populations. Despite these great strides in genetic science, the science is not without limitation.

Presently, commercial DNA laboratories are capable of conducting three distinct tests to determine whether a DNA donor has Native American ancestry. The first test, which I will call the Y DNA test, relies on Y chromosome DNA analysis and takes advantage of the fact that some genetic material is passed down unchanged from father to son. This test maps polymorphisms on the Y chromosome to trace paternal lineage. The problem with this test is that the DNA that is tested is on the Y chromosome, which is only passed from father to son. Hence, an overwhelming majority of the candidate's ancestors are excluded from the test. If you conceptualize an individual's ancestry as a "family tree," the limitation of the Y test becomes apparent because this test only tests one branch of the donor's family tree. Accordingly, the Y test will only reveal Native American ancestry if the candidate is male and his father's paternal line had a Native American ancestor. This test could not be performed on a female candidate and would yield a false negative for a male candidate whose Native American ancestor was on his mother's side of the family or if his father's or one of his grandfathers' Native American ancestry was on the maternal side.

Another test being conducted is the DNA test for the maternal line of ancestry, which is called the mitochondrial DNA test. This test maps person genetically unique. In 1993, it was discovered through mitochondrial DNA ("mtDNA") (the DNA found in the mitochondria or the "power house" of a cell which is passed on only from the mother) research that present day American Indians can trace their descent to one of four maternal lineages originating in Asia. This was discovered by testing the mtDNA of fullblood Native Americans and other populations for comparison. The results of the study found that every fullblooded American Indian tested carries one of four different rare mtDNA variants that is also found in Asians, but not in Europeans or Africans. Ann Gibbons, *Molecular Anthropology: Geneticists Trace the DNA Trail of the First Americans*, 259 SCIENCE 312 (1993).

See http://www.virginiafamilyresearch.com/NativeAmerican.htm (last visited August 1, 2003) (indicating that males can be tested for Native American ancestry in either his male or female direct line of ancestors, and that females can be tested for Native American ancestry in their direct female line of ancestors).

Family Tree DNA in Houston, Texas offers a Native American ancestry test for $319 in which the company will analyze a candidate's DNA for specific genetic markers. See http://www.familytreedna.com. DNAPrint Genomics, Inc. in Sarasota, Florida DNA testing is also available through www.ancestrybydna.com for purposes of determining ancestry.

polymorphisms\textsuperscript{317} on the mitochondrial DNA to trace maternal lines. This
test is broader than the Y chromosome test because the DNA that it seeks is
passed from mother to child.\textsuperscript{318} Hence, the child may be of either sex and
receive the DNA markers, whereas with the Y chromosome DNA, only the
male child receives the unchanged DNA markers.\textsuperscript{319} Mitochondrial DNA
testing is also limited because this test does not capture the paternal lines of
ancestry. As such, the mitochondrial test would yield a false negative if the
candidate’s Native American ancestry was on the father’s side of the family.
Even if both the mitochondrial DNA test and the Y chromosome DNA test
are performed, they would not be conclusive if they yielded a negative result
indicating an absence of Native American ancestry. This is so because even
both tests combined do not test the total ancestry of a candidate.\textsuperscript{320} For
example, if the candidate is female and her Native American ancestor is on
her father’s side of the family, neither the mitochondrial DNA test, nor the Y
DNA test would yield a positive result.

There is however, a third test that does capture the broad spectrum of
a donor’s family tree. This test is known as the autosomal\textsuperscript{321} chromosome
test, meaning that it analyzes all DNA except that residing in the sex
chromosomes or in the mitochondria. "The test is accurate from 4-8% and
sensitive enough to detect . . . a single 100% Native American . . . great
grandparent," meaning that the test is highly accurate and reliable.\textsuperscript{322} The
test can determine the percentage of population ancestry for a human being
but only to the degree of differentiating between inter-continental
populations. In other words, the test can tell the candidate whose DNA is
being tested whether the candidate has ancestry from Europe, Asia, North
America, or sub-Saharan Africa by comparing the donor’s DNA to that of
the populations of each of these continents. But the autosomal DNA test is
also limited in its ability to determine ancestry, because DNA is diluted each
time it is transferred to a new generation. This dilution effect means that a
person who has only a single Native American ancestor and the remaining
ancestors are of African and/or European descent may receive a false
negative under the autosomal test. In other words, if the Native American

\textsuperscript{317} "The property of having more than one state or alternate sequence at a particular position. The
\textsuperscript{318} Elliott & Brodwin, supra note 316, at 1469.
\textsuperscript{319} Id.
\textsuperscript{320} See www.ancestrybydna.com/faqs.asp
\textsuperscript{321} An autosomal chromosome is a non-sex chromosome. See www.dictionary.com. Most
chromosomes are autosomes.
\textsuperscript{322} The science which laid the foundation for this test was developed by Penn State
Anthropological DNA Researcher, Dr. Mark David Shriver, who presently serves as a scientific advisor to
the company marketing the test which is called DNAPrint Genomics, Inc. The technology is now being
marketed by DNA Print Genomics, Inc. whose Senior Scientist Zack Gaskin, oversees ancestral testing.
DNA was from an ancestor removed several generations from the donor (beyond the great grandparent degree of kinship), the Native American DNA may have been sufficiently diluted by the African and/or European DNA so that the test will fail to report that the donor has a significant percentage of Native American DNA.

What does all of this mean? It means that DNA analysis is a tool which could be utilized by tribes to reclaim its lost members. Nonetheless, it also means that DNA science has not yet developed to the point of being able to determine with absolute certainty that a donor does NOT have Native American ancestry. Hence, some persons who are legitimately descended from a Native American ancestor may receive test results that fail to acknowledge their Native American ancestry. Why use DNA if it is not thorough and conclusive? Because, under either test, a candidate could not receive a false positive. In other words, if either of the above tests reveals that the candidate has Native American ancestry, that result is reliable and accurate as DNA evidence. Hence, a positive result could be relied upon by a court and/or a tribe as evidence of Native American ancestry, but a negative result would not be sufficient to demonstrate that a candidate does not have Native American ancestry.

In addition to the limitations mentioned above, none of the tests can discriminate on the basis of tribal origin. In other words, DNA cannot tell you whether you are part Choctaw or part Cherokee. Given these limitations, DNA cannot serve as the sole or conclusive evidence of tribal membership. Under the framework proposed by this article, a positive test, indicating the presence of Native American ancestry, and evidence indicating that a candidate for tribal admission has an ancestral connection to someone on a tribe’s “Freedmen roll” should be enough to establish, by a preponderance of the evidence, that the candidate is a "blood member" of that tribe, and thereby, entitled to membership in that particular tribe.

IV. THE LEGAL PROCESS OF REPARATION, RECLAMATION AND RECONCILIATION

A. Effectuating Change Through The U.S. Government’s Legislative Process

323 However, DNAPrint does caution that extremely low percentages of admixture (10% or less) should be viewed with caution, since low percentages are believed to indicate ancient events of admixture rather than recent events of admixture. See www.ancestrybydna.com/faqs.asp

The civil rights of African Americans have been improved greatly through civil rights legislation. As such, it is only logical to think of Congress as the mechanism for providing reparation to African Americans with Native American ancestry. Congress could, in theory, pass legislation mandating that Native American tribes afford African Americans with Native American ancestry the same membership and privileges as white Americans with Native American ancestry. Congress enjoys plenary power over the affairs of Federally Recognized Indian Tribes. 325

Such congressional plenary authority over Indian tribes is not based on any single enumerated Constitutional power, but rather, is considered an implied administrative power. 326 In order to legislate under this plenary power, Congress need only show that the exercise of the power is rationally related to the trust obligation it has to the Indian Tribes. 327 Congress has passed legislation relating to tribal membership in the past. 328 Accordingly, legislation mandating that African Americans who are descendants of black Indians be granted tribal membership arguably would be an act in furtherance of Congress’ special fiduciary obligations to Indians. Congress could use this plenary administrative power to make the descendants of the black Indians who were passed over by the Dawes rolls, eligible for membership by direct legislation.

In United States v. Kagama, 329 the Court sought to justify the source of congressional power over the internal affairs of Indian tribes. The Court reasoned that the treaty system had in effect made the Indian tribes "wards" of the federal government. "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." 330 Thus, at the turn of the twentieth century, when the chief of the Kiowa tribe sought to challenge Congressional abrogation of treaties through judicial review, the Supreme Court recognized a plenary administrative power based on the fiduciary relationship described in Kagama. 331 In essence, the paternalistic theory behind the use of

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325 For a well written comment giving an overview of the early history and theories of the plenary power see Comment, Federal Plenary Power In Indian Affairs After Weeks and Sioux Nation, 131 U. PA. L. REV. 235 (1982).
327 Id. at 716.
328 As discussed supra, the Curtis Act gave the Dawes Commission the power to determine membership in each of the Five Civilized Tribes.
330 Id. at 384.
Congressional power over the Indian tribes was that Congress would act inherently within the tribes’ best interest, like the actions of a parent on behalf of a child.

The broad nature of Congress’ plenary administrative power over the Indian tribes has been reiterated many times by the Supreme Court and the lower courts. In *United States v. Wheeler*, the Court even went so far as to imply that Congress could, if it so desired, take all sovereign power from the tribes: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." It would seem that Congress has unlimited power over Native American tribes, but the special fiduciary relationship that exists between Congress and Indian tribes, ensures that Congressional power is not wielded without limitation. In *Delaware Tribal Business Committee v. Weeks*, the Supreme Court suggested that Congressional action under the plenary administrative power is subject to judicial review. In the *Weeks* case, the Kansas Delawares, a subgroup of the Delaware tribe, challenged Congress’ separate classification of their group, alleging discrimination. The court held that Congress’ judgment on the issue should stand as long as "the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians." 334

Three years later, the court expanded upon this minimum standard of rationality in *United States v. Sioux Nation*. In *Sioux Nation*, the Court articulated three factors which should be examined to determine whether legislation had been made in furtherance of Congress’ unique obligation to the Indian tribes: (1) what are the effects of the statute; (2) does the statute abrogate an existing treaty; and (3) does the statute contain a conflict of interest between those of Congress and those of the Indian tribe. In addition to these limitations, the plenary power of Congress is also tempered by precedent which holds that Indian tribes have the right to determine their own membership. 336

Perhaps the strongest argument in favor of using the plenary administrative power to legislate new tribal membership requirements that would include the descendants of Indians with African ancestry is that Congress would be rectifying its own wrong. Congress used its plenary

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334 Id. at 74.
Tribes and Tribulations

administrative powers to create much of the system as it now stands—by enacting the legislation that created the Dawes Commission and the Curtis Act, and by subsequently allowing the administration of such legislation in a racially discriminatory manner.

Congress’ unique fiduciary obligation is arguably owed not only to the tribal governments, but to all Indian peoples. Congress should not allow those with power within the tribal government to exploit or otherwise violate the rights of Indian minority groups. Congress abused its power when it arguably conspired with the tribes to create a racially biased roll which excluded Indians with African ancestry from tribal membership. Therefore, there is a strong moral argument in favor of Congressional action to correct its past wrongs in accordance with its fiduciary obligation to the disenfranchised Indians. Any legislation based on this rationale meets the Weeks and Sioux Nation tests with ease.337

Although Congress is legally empowered with the ability to enact a law requiring the Five Civilized Tribes to grant membership to descendants of Freedmen who can prove an Indian ancestral connection, the political reality of whether such legislation is feasible remains to be seen. Legislative history provides that the Indians’ right of self-government and self-determination be respected. It arguably would be a paternalistic disrespect of the tribes’ right of self-determination for the United States to make any changes in its laws that would affect Indian tribal membership without seeking their consent to such legislation.338 Hence, it is understandable that Congress may be reluctant to pass legislation that would force tribes to share their identity, culture, and resources with persons they do not consider ethnically related to them. But Congress could find that the right of self-determination should yield at the point that self-determination becomes an oppressive tool used to exclude some Indians on the basis of race.339 Tribes

337 Tribal compliance could be ensured through a provision in the statute making the tribe’s retention of its status as a federally recognized tribe contingent upon its adherence to this and all laws applicable to the tribe. Such a mandate would almost certainly yield tribal cooperation because without recognition from the federal government, the tribe would not only lose its federal funding, but it would also lose all the privileges associated with being a federally recognized Indian tribe, such as the privilege of not having to pay federal income taxes, and the privilege of conducting gaming operations.

338 It is understandable that Indian Tribes would not want the federal government to define who is Indian because such action would undermine the tribes’ ability to define its own identity, and might ultimately lead to the tribe being unable to survive as a cultural entity.

339 I am not the first scholar to proffer this opinion. Much has been written in response to the alleged denial of equal protection to Mrs. Martinez, a Pueblo woman, whose marriage to a white man precluded her mixed race child from being a member of her tribe. See Robert Laurence, Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act, 10 CAMPBELL L. REV. 411, 436-37 (1988) (arguing that the substantive provision of ICRA granting Fourteenth Amendment type rights to Indians should be read with respect for both traditional tribal customs and modern constitutional jurisprudence). Some feminist scholars have criticized the decision while others have applauded it as respecting the Native American right of self-determination. For well articulated
should be free to determine whether a tribal member must possess, for example, a minimum quantum of "Indian blood." Restricting membership based on blood quantum serves to protect the ethnic identity and culture of the tribe which acts ultimately to protect the tribe as an ethnic and cultural institution. Accordingly, such a limitation is rationally related to self preservation and identity of the tribe. However, when the restriction or limitation on tribal membership is rooted in notions of racial superiority, it does not serve any legitimate purpose. If the rule treats a person of African ancestry differently from a person of European ancestry when both people have equivalent Indian blood quantum, enforcement of such a rule is simply racism for the sake of preserving white privilege within the tribe, which has nothing to do with preserving the Native American cultural identity of the tribe. So while I agree that Congress should defer to the right of Indian self-determination, it should not allow tribes to use this right as a tool to oppress black Indians and perpetuate the myth that black Indians do not exist.

B. Effectuating Change Through U.S. Courts

When diplomacy and political efforts have failed in the past, those seeking enforcement of their civil rights have historically resorted to the federal courts, so the logical place for black Indians to seek redress for this racial injustice is the federal courts. It would be easy to argue that Indian Tribal governments are violating the Equal Protection rights of black Indians, but arguably, the Thirteenth and Fourteenth amendments do not apply to Native American tribes. Apparently, the United States government recognized this after the end of the civil war, which is why the government negotiated treaties with each tribe in 1866 to end slavery within each tribal

critiques of ICRA as a failure to protect Native American women see Catherine MacKinnon, Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo, in FEMINISM UNMODIFIED 63 (1987) (arguing that the tribe's membership rule in the Martinez case is the result of male supremacy); Carla Christofferson, Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act (1991). For equally compelling articles arguing that the tribe's right of self determination must be respected in light of tribal tradition see Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 593-94 (1990).


One obvious place for seeking redress might be the tribal courts. However, not every tribe still maintains its own system of tribal courts today. Furthermore, the federal courts would probably be perceived as neutral ground for black Indian plaintiffs. Finally, federal courts are more familiar to civil rights lawyers, and given the constitutional protections afforded to federal judges, this forum is probably less influenced by political interests.

nation. In an 1880 case, United States v. Osborn, the applicability of the Fourteenth Amendment to Indians was directly tested. The Court said that Indians are not a portion of the political community called the people of the United States and have always been treated as distinct and independent communities.

Dozens of cases decided by state and federal courts have supported the proposition that the Constitution and its amendments do not apply to Indian Tribes. Moreover, the enactment of the Indian Self-Determination Act of 1975 gave tribes a more direct role in administering tribal programs. In 1968, however, Congress passed the Indian Civil Rights Act (ICRA), which takes some language from the Bill of Rights and makes some of the rights therein applicable to Indian tribal governments. Among the rights guaranteed by ICRA are free speech and assembly, the right to equal protection under the laws, and due process. Accordingly, even if the Fourteenth Amendment does not have direct application to Native American tribes, ICRA, which directly tracks the language of the Fourteenth Amendment, does. Nonetheless, Native American Indian tribes enjoy a level of sovereign immunity that may prove to be an impenetrable barrier to black Indians suing the tribes in federal court.

1. The Historical Basis for Tribal Sovereignty

The concept of tribal sovereignty existed prior to the formation of the United States and the ratification of the Constitution. It arose out of the historical independence of Native American tribes in creating institutions and systems to govern themselves as well as early European contact with Indian nations. By the time the Europeans "discovered" America, Native American tribes were already sovereign by nature. The British Crown, therefore, recognized tribes as foreign sovereigns and the newly formed United States also adopted this position.

The Supreme Court first articulated the concept of tribal sovereignty in Johnson v. M'Intosh. The Court acknowledged the existence of tribal sovereignty by recognizing that tribes, as "rightful occupants of the soil," had

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343 See Act of April 28, 1866, supra note 261, at Art. II (treaty with the Choctaws and Chickasaws); see also Act of August 11, 1866, Art. IX, 14 Stat. 799 (treaty with the Cherokee Indians).
344 United States v. Osborn, 2 F. 58 (1880).
345 DELORIA & WILKINS, supra note 342, at 139-48.
346 Id. at 157.
349 DELORIA & WILKINS, supra note 342, at 158.
351 Id.; Johnson v. M’Intosh, 21 U.S. 543 (1823).
a legal and just claim to possess and use tribal lands at their own discretion, subject only to the power of the discovering nation.\(^\text{352}\)

The Supreme Court expanded its view of tribal sovereignty in *Cherokee Nation v. Georgia*.\(^\text{353}\) In this case, the Court recognized that tribes did not surrender the independence and sovereignty inherent in their status as self-governing people.\(^\text{354}\) In holding that the Cherokee Nation was not a "foreign state" for the purposes of diversity jurisdiction, the Court defined tribes as "domestic dependent nations" with rights to occupy their lands subject only to the federal government's power to abrogate that right.\(^\text{355}\) Finally, the Supreme Court refined its articulation of the jurisdictional boundaries between tribes, states, and the federal government in *Worcester v. Georgia*,\(^\text{356}\) holding that an Indian tribe was not subject to the jurisdiction of the state in which it was located.\(^\text{357}\)

2. Federal Recognition of Tribal Sovereign Immunity

The doctrine of tribal sovereignty seeks to preserve the historical inherent sovereignty of Native American tribes. By allowing Native American tribes to maintain control over their internal affairs and precluding states from interfering with tribal governance, the doctrine of tribal sovereignty promotes Indian self-governance, including tribal self-sufficiency and economic development.\(^\text{358}\) While early Supreme Court cases\(^\text{359}\) provided a framework for acknowledging and defining basic tribal sovereignty, five significant cases, between 1940 and 1998, established and defined the doctrine of tribal immunity from suit as a principle of federal common law.\(^\text{360}\)

\(^{352}\) Johnson, 21 U.S. at 574; Seielstad, supra note 326, at 687.

\(^{353}\) *Cherokee Nation* v. *Georgia*, 30 U.S. 1 (1831).

\(^{354}\) Id. at 19-20; Seielstad, supra note 326, at 686.


\(^{356}\) Id. at 595-96. The *M’Intosh, Cherokee Nation* and *Worcester* cases are commonly referred to as the "Cherokee Cases." Professor Seielstad calls them the "Marshall Trilogy" because each opinion was authored by Chief Justice Marshall. Seielstad, supra note 326, at 686.


Tribal immunity from suit against all but the federal government was first recognized by the Supreme Court in *United States v. United States Fidelity & Guaranty Co.* In *Fidelity & Guaranty*, a coal company trustee filed a counterclaim against the Choctaw and Chickasaw Nations in a dispute involving the leasing of coal lands by the United States on behalf of the two tribes. The Court, focusing on protecting a quasi-sovereignty from judicial attack, held that "Indian Nations are exempt from suit without Congressional authorization." The Court also held that the immunity from direct suit also included immunity from counterclaims. The court further stated that absent consent to jurisdiction, any "attempt to exercise judicial power" over a sovereign is void.

Following its decision in *Fidelity & Guaranty*, the Supreme Court further refined its articulation of tribal sovereign immunity. In *Puyallup Tribe, Inc. v. Department of Game of Washington*, the Court found a tribe, but not its members, immune from a state court action seeking to enjoin off-reservation fishing activities in violation of state law. The Court reasoned that "[a]bsent an effective waiver or consent . . . a state court may not exercise jurisdiction over a recognized Indian tribe." This reference to a "waiver of consent" was significant because it removed any doubt that tribes possessed the power to voluntarily submit themselves to suit.

In the next relevant case, *Santa Clara Pueblo v. Martinez*, the Court preserved the doctrine of tribal sovereignty with respect to a claim brought by an individual tribal member against her tribal government for allegedly violating a federal substantive right to equal protection of the law guaranteed by the ICRA. Julia Martinez, a full-blooded member of the

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361 *American Indian Law Deskbook* 169 (Joseph P. Mazurek, et al., eds., 2d ed. 1998); EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001); United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987); United States v. Yakima Tribal Court, 806 F.2d 853, 861 (9th Cir. 1986); United States v. White Mountain Apache Tribe, 784 F.2d 917, 920 (9th Cir. 1986).

362 *American Indian Law Deskbook*, supra note 361, at 169 (citing *United States Fidelity & Guaranty Co.*, 309 U.S. at 511).

363 Seielstad, supra note 326, at 694; *United States Fidelity & Guaranty Co.*, 309 U.S. at 513 (citing *Turner v. United States*, 248 U.S. 354 (1919)).

364 *United States Fidelity & Guaranty Co.*, 309 U.S. at 513; *American Indian*, supra note 361, at 169.

365 *United States Fidelity & Guaranty Co.*, 309 U.S. at 514.

366 Seielstad, supra note 326, at 695.


368 Id. at 168 -69; *American Indian*, supra note 361, at 169.

369 *Puyallup Tribe*, 433 U.S. at 172; *American Indian*, supra note 361, at 169.

370 *American Indian Law Deskbook*, supra note 361, at 169; see *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) (remarking on the doubts some courts had expressed over the ability of tribes to waive their immunity but finding such authority present under *Turner* and *Puyallup*).


372 Id.; Seielstad, supra note 326, at 696.
Santa Clara Pueblo, and her daughter challenged a tribal ordinance that denied tribal membership and its associate rights and benefits to the children of female Pueblo members who married outside of the tribe but not to the children of male members who also married outside of the tribe. The Supreme Court held that ICRA did not authorize suits against either the tribe or tribal officers in federal courts. The Court stated that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." Thus, the Court made clear that congressional abrogation of tribal immunity "cannot be implied but must be unequivocally expressed."

In Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, the Court refused to reconsider its prior decisions on tribal immunity, noting that while "Congress has always been at liberty to dispense with such . . . immunity or to limit it," it "has instead consistently reiterated its approval of the immunity doctrine." The issue before the Court was whether a state had the power to tax sales of goods to Indians and nonmembers on federally recognized Indian trust lands. Chief Justice Rehnquist, writing for a unanimous court, held that "under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers."

Seven years later, the Court reaffirmed its commitment to protecting tribal immunity from suit in Kiowa Tribe v. Manufacturing Technologies, Inc. The Court extended the doctrine of sovereign immunity to tribal commercial activities that occurred outside of the boundaries of tribal lands. In Kiowa Tribe, Manufacturing Technologies sued the Kiowa Tribe after the Tribe's Industrial Development Commission defaulted on a promissory note executed outside of the Tribe's lands. The Court held that sovereign immunity shields the tribe from suit, regardless of whether the

373 Martinez, 436 U.S. at 51; Seielstad, supra note 326, at 696.
374 Martinez, 436 U.S. at 51; Seielstad, supra note 326, at 697.
375 Id. at 72.
376 Id. at 58; AMERICAN INDIAN LAW DESK BOOK, supra note 361, at 170.
377 Martinez, 436 U.S. at 58 (internal quotations marks omitted); AMERICAN INDIAN LAW DESK BOOK, supra note 361, at 170.
379 Id. at 510; AMERICAN INDIAN LAW DESK BOOK, supra note 361, at 170.
380 Oklahoma Tax Comm'n v. Citizen Band, 498 U.S. at 507; Seielstad, supra note 326, at 697.
381 Id.; Seielstad, supra note 326, at 698.
383 Id. at 760; Seielstad, supra note 326, at 678.
384 Seielstad, supra note 326, at 678-79; Kiowa Tribe, 253 U.S. at 753-54.
activity (governmental or commercial) occurred on tribal land or not. Justice Kennedy doubted "the wisdom of perpetuating the doctrine." He suggested the need for Congress to abrogate tribal immunity in order to protect "those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." The Court ultimately deferred to Congress as the sole entity with power to reform tribal immunity.

Despite concerns regarding the doctrine, the Supreme Court's decision in *Kiowa Tribe* solidifies its commitment to tribal immunity by preserving Congress's exclusive power to abrogate it and refusing to limit the scope of the doctrine based upon considerations that have justified limitations in other areas of sovereign authority. As a result of this decision, the sovereign immunity of Native American tribes has been reinforced to the point that tribes may now enjoy broader immunity than states, the federal government, and foreign nations.

3. Current Limitations on Sovereign Immunity: Waiver and Congressional Abrogation

The bottom line is that unless a tribe has expressly waived immunity or Congress has clearly and unequivocally abrogated it, an Indian tribe may not be summoned to court. Accordingly, it is necessary to examine when a tribe will be deemed to have waived its immunity from suit and under what circumstances Congress will be deemed to have abrogated tribal immunity. The Court has set forth principles that authorize suit against tribes or tribal entities in only a few narrowly construed circumstances, such as where a clear and unequivocal waiver may be construed from the actions and agreements of an authorized representative of a tribe or where Congress expressly abrogates immunity.

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387 *Kiowa Tribe*, 253 U.S. at 758; *supra* note 326, at 751.
389 Id. at 681; *Kiowa Tribe*, 253 U.S. at 760.
390 *Kiowa Tribe*, 253 U.S. at 765 (Stevens, J. dissenting); Seielstad, *supra* note 326, 681.
391 Seielstad, *supra* note 326, at 666.
393 Seielstad, *supra* note 326, at 700; see *Santa Clara Pueblo v. Martinez*, 436 US. 49 (1978) (noting that Congress is also required to provide for a cause of action).
The issue of whether a tribe has waived sovereign immunity has arisen in three general contexts: 1) enforcing arbitration clauses in individual contracts with the tribe; 2) determining sovereign or corporate status of tribal defendants, and 3) filing claims or taking positions during litigation. Because black Indians seeking tribal reclamation have no contract with the tribe and are dealing with the tribe directly rather than a corporate extension of the tribe, the only relevant context for black Indians to argue tribal waiver of sovereign immunity is with respect to claims or positions taken during litigation. Black Indians could argue that the tribe waives immunity when it considers and determines applications for tribal membership. However, in the context of litigation, courts have rarely found waiver. United States Fidelity & Guaranty Co. firmly established that the initiation of a lawsuit by a tribe does not constitute consent to a counterclaim. Nevertheless in Rupp v. Omaha Indian Tribe, a tribe was found to have waived its immunity against counterclaims to quiet title and for damages because the tribe in its complaint requested that the defendants assert any claim they had to the land at issue. Furthermore, intervention by a tribe in an action also has been held to bind the tribe to subsequent judicial determinations of any issue presented. The court stated that "[b]y intervening, the Tribe assumed the risk that its position would not be accepted, and that the Tribe itself would be bound by an order it deemed adverse." On the other hand, tribal participation in administrative proceedings that lead to judicial review does not constitute a waiver of immunity from suit in the later proceedings.
Accordingly, it is unlikely that the court will find that the tribe’s participation in administrative hearings on the issue of black Indian membership will be held to constitute tribal waiver of tribal sovereign immunity.

b. Congressional Abrogation

Historically, Congress has been conservative in exercising its plenary power in regulating tribal sovereign immunity.\(^4\) In those few circumstances that Congress has found it necessary to provide remedies to individuals injured by tribes, Congress has given the federal government the task of facilitating or making redress on behalf of tribes.\(^4\)

One early example of Congress’s attempt to abrogate tribal immunity is its enactment of the Indian Depredation Act, as a result of conflict between Native Americans and non-Indian settlers in Indian Territory.\(^4\) The Act provided a mechanism for victims to file claims for compensation with the U.S. Court of Claims for property taken or destroyed by Native Americans “without just cause or provocation.”\(^4\) While the Act set forth some circumstances in which tribes could be made to pay damages, it placed the primary burden of satisfying judgments on the United States.\(^4\)

The most relevant example of Congress’s attempt to abrogate tribal immunity from suit is its enactment of the ICRA. While the Act imposes on tribal entities several civil rights applicable to the state and federal government under the Bill of Rights and authorizes federal court review of petitions for writs of habeas corpus in determining the legality of detention by a tribe, the statute also limits the circumstances in which judicial remedy may be sought.\(^4\)

It could reasonably be argued that the provision in ICRA which grants Fourteenth Amendment type rights\(^4\) to Native Americans, and thereby requires tribes to honor such rights, constitutes congressional abrogation of sovereign immunity with respect to claims alleging that such

\(^{403}\) Seielstad, supra note 326, at 717; see Atkins v. Penobscot Nation, 130 F.3d 482 (1st Cir. 1997) (Maine Indian Claims Settlement Act subjected tribe to state jurisdiction except as to “internal tribal matters”); Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 921-23 (9th Cir. 1995) (tribe’s immunity against award of prejudgment abrogated under the Navajo-Hopi Settlement Act, which authorized courts to use “all available remedies” in enforcing judgments obtained pursuant to the Act).

\(^{404}\) See United States v. Gorham, 165 U.S. 316 (1897); Seielstad, supra note 326, at 717.

\(^{405}\) Seielstad, supra note 326, at 717; Indian Depredation Act of March 3, 1891, 26 Stat. 851-854 (1891); see United States v. Gorham, 165 U.S. 316 (1897).

\(^{406}\) See Seielstad, supra note 326, at 717-18; Gorham, 165 U.S. at 317-18.

\(^{407}\) Gorham, 165 U.S. at 319; Seielstad, supra note 326, at 718.


\(^{409}\) 25 U.S.C. § 1303 (1983); Seielstad, supra note 326, at 719. ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.") Id.
rights have been violated. However, this argument was proffered unsuccessfully by the plaintiff in Martinez, who claimed that her tribe's membership policies violated ICRA because the policy discriminated on the basis of gender. As previously stated, the merit of the plaintiff's argument was never determined because the court refused to entertain the substance of the claim on the ground of tribal sovereign immunity. The court held that Congress did not intend to abrogate sovereign immunity in cases involving alleged violations of its substantive provisions absent a deprivation of liberty that warranted petitioning for a writ of habeas corpus. However, at least one court has refused to apply the sovereign immunity holding in Martinez when the tribal courts deny jurisdiction over the matter and the plaintiff alleges serious allegations of personal restraint and deprivation of personal rights.

This departure from Martinez may create an opportunity for black Indians to be heard in federal court. Moreover, the holding in Martinez should arguably be limited to membership rules that discriminate on the basis of gender. In cases involving gender such as Martinez, there is at least the argument that the federal government should allow the tribe to discriminate on the basis of gender to the extent that doing so furthers a legitimate tribal custom or a legitimate tribal interest. The Santa Clara Pueblo tribe in Martinez has a history of suffering the loss of tribal lands to outsiders who used various methods, including marriage to Pueblo women, to obtain fee title to tribal land. Because tribal land is a primary source of Pueblo identity, a gender based rule of law that protects tribal land also serves to preserve tribal identity.

A membership rule that discriminates on the basis of race is more difficult for the tribe to defend. The tribe could argue that limiting membership to descendants of the blood rolls serves to preserve tribal identity by ensuring that only those persons who are ethnologically Indian can become members of the tribe. But such an argument is unpersuasive in light of the fact that some whites with no Indian blood made it onto the blood roll through intermarriage or fraud. Moreover, a rule that admits white

411 AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM CASES AND MATERIALS 490-491 (4th ed. Robert N. Clinton, et al. 2003) (citing Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) (In Dry Creek, the plaintiff was seeking monetary damages against the Tribe for blocking an access road to plaintiff’s business which forced the business to close)).
412 Id at 492 (citing Donna Goldsmith, Individual v. Collective Rights: The Indian Child Welfare Act, 13 HARV. WOMEN’S L.J. 1 (1990)).
414 Id.
415 CARTER, supra note 264, at 72-74.
people with Indian ancestry while excluding black people with Indian ancestry does not serve to promote, preserve or protect Indian or tribal identity, unless the tribe accepts the racist notion that blackness will destroy tribal identity in a way that whiteness does not.

4. Avenues for Circumventing Tribal Sovereign Immunity

a. Claims Against Tribal Officials

Despite the Supreme Court's unwavering support of tribal sovereign immunity, there are several possible ways to interpret the precedent that may permit remedies against Native American nations. In some limited circumstances, claims against tribal officers may provide a means for non-tribal entities to circumscribe the exercise of tribal power. In *Citizen Band Potawatomi*, the Court indicated that tribal officers or employees may not always be protected by tribal immunity. If tribal officers or employees act within the scope of their lawful authority, they are generally immune from suit. However, if their official acts are beyond the boundaries of their own authority or exceed tribal legal authority, some courts have held that individual officers or employees may be subject to suit. In contrast, other courts have held that tribal immunity operates as an absolute bar against claims for damages against tribal officials. Needless to say, tribal officials who deny membership in accordance with tribal law and U.S. federal law are not acting outside the scope of their lawful authority. Therefore, this avenue is probably a dead end for black Indians seeking to obtain redress in the federal courts.

b. Claims Against The United States Government

Tribal sovereign immunity would not bar a plaintiff from pursuing a claim against the U.S. BIA, which is the administrative arm that assists the tribes in perpetuating the exclusion of black Indians from the tribes. The U.S. government has waived sovereign immunity in this context and permits victims of racial discrimination to sue the government for such violations.

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417 See e.g., *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v White Mt. Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); Seielstad, *supra* note 326, at 701.
418 See *Baker Electric Coop. v. Chaske*, 28 F.3d 1466, 1471-72 (8th Cir. 1994); *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574-75 (10th Cir. 1984); Seielstad, *supra* note 326, at 701.
However, the problem with pursuing a claim against the BIA is that the tribe arguably is an indispensable party in any lawsuit alleging rights to tribal membership. Under the Federal Rule of Civil Procedure 19(b), if the court determines that a person or entity not joined in the action is an indispensable party, the court must dismiss the action. In determining whether a person or entity is an indispensable party, the court must consider several factors outlined in the rule: 1) the extent to which a judgment rendered in the person’s absence might be prejudicial to the person; 2) the extent to which prejudice to the non-joined person can be lessened or avoided; 3) whether judgment rendered in the person’s absence will be adequate; and 4) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. Courts have held that Rule 19(b) provides courts with considerable latitude in deciding whether, and in what circumstances, to allow a suit to proceed against tribal officers when the doctrine of tribal immunity insulates the tribe from being a defendant in the proceedings. While some courts have allowed suits to proceed against connected non-tribal defendants notwithstanding tribal immunity, others have been more restrictive.

The rule permits the court to allow a suit against the BIA to proceed if the tribe is not an indispensable party. Unfortunately for black Indians, at least one court has already determined that in suits claiming tribal membership and/or benefit rights, the tribe is an indispensable party thereby precluding the black Indian plaintiff from being able to proceed in federal court against the BIA.

In Davis, two bands of black Indians in the Seminole Nation sued the United States challenging their exclusion from certain benefits and programs established with tribal funds obtained from a land claim judgment and challenging the government’s refusal to issue CDIB cards to the black Indians. The U.S. District Court for the Western District of Oklahoma dismissed the action, holding that the Seminole Nation/Tribe was an indispensable party to the action, and therefore, the action could not proceed without the tribe. The court’s rationale for this holding was that it would be unfair to proceed in an action that would affect the interest of the tribe in such a significant way without including the tribe as a party. Failure of the

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420 Seielstad, supra note 326, at 703.
421 FED. R. CIV. P. 19(b).
422 Id.
423 See, e.g., Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 358-59 (2d Cir. 2000); Seielstad, supra note 326, at 703.
425 Id.
federal court to hear the case, however, will leave the black Seminoles without a remedy at law because sovereign immunity precludes them from being able to join the tribe as a party to the lawsuit. Factor number four of the Rule 19 test (the plaintiff's interest in having a forum in which to present its claims) weighs heavily in favor of finding that the tribe is not an indispensable party. In fact, in a previous case, the Oklahoma Federal District court referred to the fourth factor of the Rule 19 test as the most important and possibly conclusive. Nonetheless, the Davis court used tribal sovereign immunity as a basis to trump this precedent and the interests of the black Indian plaintiffs. Hence, the federal courts have allowed the tribes the right not only to assert the doctrine of sovereign immunity as a shield, but also to use the doctrine as a sword to eviscerate the civil rights of black Indians.

Accordingly, the Davis court's holding demonstrates that the Oklahoma federal district court privileged the interest of the European tribal members (who are the majority and politically control the tribe) in having immunity from suit, over the interests of the black Indians to be free from racial discrimination and to have their claims of racial discrimination adjudicated. Absent a federal court adjudication, the black Seminoles will have no opportunity for redress of their claims; a fact which the Oklahoma appellate court admitted. The Seminole tribe, on the other hand, has the option of waiving tribal sovereign immunity and joining the lawsuit if it is concerned that its non-participation will prejudice the tribe.

We see from the Davis case that the shield created by the doctrine of sovereign immunity is not easily penetrated and moreover, that tribal sovereign immunity serves not only to allow the tribes to practice racial discrimination, but also to allow a person or entity to conspire with the tribe to discriminate on the basis of race, in instances where a lawsuit against the tribe's co-conspirator will have an effect on the tribe. If Davis is law, African Americans with Native American ancestry actually have no right to expect equal protection of the law when "the law" is federal Indian law. In other words, the federal government has given Native American tribes a license to practice racial discrimination against African American Indians—that license is called sovereign immunity.

It seems that African Americans should be able to challenge this federal governmental action under the Fourteenth Amendment's equal protection clause. Such a challenge must necessarily be viewed independent of tribal sovereign immunity, because ultimately it is the extension of tribal sovereign immunity to racially discriminatory acts, which African Americans are challenging. In other words, sovereign immunity should not serve as a

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426 Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1260 (10th Cir. 2001).
barrier to race discrimination claims because sovereign immunity should not be interpreted by the federal government to extend so far as to shield tribes from racial discrimination claims. It is patently absurd and circuitously illogical for a court to hold that African Americans cannot challenge a racist policy because that same racist policy precludes the challenge.

c. Claims Independent of Existing Tribal Interests

Another palpable approach to circumventing the barrier created by tribal sovereign immunity is to pursue legal action in a way that does not make the tribe an indispensable party. A petition filed by freedmen descendants with the BIA that does not seek membership in established tribes but rather seeks federal recognition of the freedmen descendants as an independent tribe would be one way for black Indians to gain recognition of their Indian heritage.427 No existing tribe would be an indispensable party because the plaintiffs would not be seeking membership in the already existing tribe, but rather would be seeking to create a separate tribe which would be recognized by the federal government as such. There is presently a mechanism under federal Indian law for a group of people who claim that they are a Native American tribe to become recognized by the federal government as such.428

However, this approach is not one that I would favor for two reasons. First, it is unlikely that black Indians would qualify as a "tribe" as that term is defined under federal Indian law. Federal regulations require any group claiming to constitute an Indian tribe to demonstrate, among other things, that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present."429 This may be a difficult standard for black Indians to meet since they have been dispersed throughout the United States and they have not necessarily segregated themselves into a community distinct from the general African American community. Moreover, because federal recognition imposes certain financial obligations upon the federal government, the federal government has been extremely conservative and some would say even hostile to the notion of granting more groups recognition as federally recognized Indian tribes. The Lumbee Indians, who

427 See, e.g., Mark D. Myers, Federal Recognition of Indian Tribes in the United States, 12 STAN. L. & POL'Y REV. 271 (2001) (discussing the process for federal recognition of Indian tribes as well as recent petitions filed by groups seeking federal recognition as an Indian tribe).
428 See 25 C.F.R. § 83.4-83.7 (2004). Any Indian group that believes it should be acknowledged as an Indian tribe, and can satisfy the criteria set forth in these regulations, may submit a letter of intent to the Department of Interior requesting acknowledgment of the group as an Indian tribe. Id.
429 25 C.F.R. § 83.7 (b) (2004).
have been recognized as Indian by their home state of North Carolina since 1885, is continuously denied federal recognition. They are one example of how difficult it is to obtain federal recognition as an Indian tribe. The second problem with this approach is the "separate but equal" Plessy approach. This approach would send the message that black Indians are not worthy of being recognized by the "real" tribe that is constituted of the "real" Indians. It might even send a more sinister message that the claim that some blacks have Indian ancestry is false. It is a logical deduction because if they were really part Indian, they would be recognized by the tribe of "real" Indians. The government's creation of a black Indian tribe would serve to "ghettoize" or marginalize black Indians rather than grant them the recognition and reconciliation that they deserve. Accordingly, it is imperative that black Indians challenge the Davis court's application of sovereign immunity to claims of tribal racial discrimination.

d. An Action Seeking Injunctive Relief

A final approach that black Indians could pursue to circumvent the barrier of sovereign immunity is to argue that the U.S. government is a fiduciary for black Indians. The notion that the U.S. government is a fiduciary with respect to Native Americans is a principle well established in Federal Indian Law. Black Indians could argue that the U.S. government owes its fiduciary duty, not only to white or full blood Indians, but to all Indians, including black Indians. As a fiduciary, the U.S. government arguably has an affirmative duty to act on behalf of black Indians to correct the racist policy that was adopted by the Dawes Commission.

Accordingly, it, arguably, is the U.S. government's responsibility to bring suit against the tribes on behalf of the freedman descendants and challenge the tribes' practice of excluding them from tribal membership despite the applicant's ancestral connection to the tribe. Tribal sovereign immunity is no barrier to the U.S. government. Under established law, the U.S. government may sue Native American tribes. In light of this fact, black Indians could bring an action against the Department of Interior alleging that the U.S. government has breached its fiduciary duty to black Indians and seeking injunctive relief from the court ordering the Department of Interior

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430 For more information on the Lumbee culture and their fight for federal recognition as an Indian tribe, see The Official Site of the Lumbee Tribe of North Carolina, available at www.lumbeetribe.com.


432 See United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987) (concluding that "a tribe may not interpose its sovereign immunity against the United States").
to bring an action in federal court on behalf of black Indians excluded from tribal membership by the Dawes Commission.

V. TOWARD A MULTIDISCIPLINARY APPROACH FOR ACHIEVING INTERRACIAL JUSTICE

The problems with a strictly legal approach to repairing the damage to black Indians are not only in the form of limitations on the exercise of plenary authority and tribal sovereign immunity. The primary problem with a strictly legal approach to interracial justice is that it pits two minority groups against one another. As discussed previously, African Americans and Indians historically have both been principal targets of white supremacy. And historically, whites have successfully attempted to divide and conquer both groups by at various times aligning with each group to subjugate the other group to the extent that such subjugation promoted white interests. Examples of this divide and conquer strategy abound. One such example is the U.S. government’s use of black "buffalo soldiers" to fight the Indians of the western plains. Another example is the rhetoric used by the U.S. government to convince Americans that Indians were superior to blacks and the resulting differential treatment of the two groups by both law and society. Both the law and social behavior of whites reflected a desire to assimilate Indians into American culture, even if some Indians did not desire such assimilation. On the other hand, the law and social behavior of whites toward blacks has historically reflected an outright refusal to acknowledge blacks as worthy of true assimilation. One scathing example of this divisive treatment on a legal and social level is the law of marriage, which permitted, and some could argue encouraged, whites to marry Native Americans, but forbade whites from marrying blacks. A federal legal approach to repairing the injury to black Indians would again pit the two groups against one another, which is not an effective strategy for inter-racial healing between the two groups.

Moreover, if black Indians seek the assistance of the federal government in obtaining reparation, such action could ultimately serve to erode the tribes’ right of self-determination, which is a result that would ultimately harm black Indians when they become members of those tribes. Finally, a purely legal approach does not address the issue of healing injured minds and spirits and the broken relationship between red and/or white Indians and black Indians. While law might be able to force Indian tribes to grant membership to the freedmen descendants who can prove Native American ancestry, it cannot force the tribes to truly accept black Indians as

433 YAMAMOTO, supra note 28, at 154-56.
tribal brothers and sisters. Indeed, if federal law is the mechanism that brings about the change, the tribes may be resentful of black Indians and hostile to the idea of true integration of black Indians into tribal life. Law cannot address the dignitary injury suffered by black Indians whose Native American heritage has been denied. While law might be able to force the admission of black Indians into the tribes, it cannot create an "institutional reordering" of the tribe so that black Indians feel valued as tribal members and are treated as equals rather than second class citizens. As Professor Eric K. Yamamoto eloquently surmises in his book on interracial justice, "law misses the repairing of individual bodies, minds, and spirits and, equally important the rejuvenation of denigrated group identities and restoration of broken relationships." 434

Professor Yamamoto urges groups involved in interracial conflict to take a multidisciplinary approach to group healing, by using not only law, but also, social psychology, theology, political theory and indigenous healing practices to achieve restoration of group harmony. 435 Professor Yamamoto identifies four commonalities that emerge from these diverse disciplines that are relevant to interracial justice. First is "the notion that group healing requires some combination of acknowledgment of the humanity of the other and of the sources of the conflict..." Second is the notion that "healing of wounds from perceived wrongful acts is an interactive enterprise and, by virtue of its mutuality of effort, provides a foundation for future communal... action." The third conception is that non-legal interdisciplinary approaches to intergroup healing "incorporate legal concepts of equality and fairness in some fashion..." The final commonality is that "recognition of the danger of incomplete or insincere acknowledgments and ameliorative efforts [or empty apologies]... without institutional restructuring and attitudinal changes can mask continuing oppression." 436 Professor Yamamoto then delineates four praxis dimensions of interracial justice inquiry that I will seek to utilize here to construct a framework for black Indians to achieve interracial justice.

The first dimension is recognition. Recognition "asks racial group members to recognize, and empathize with, the anger and hope of those wounded; to acknowledge the disabling constraints imposed by one group on another and the resulting group wounds... and to critically examine stock stories of racial group attributes and interracial relations ostensibly legitimating those disabling constraints and justice grievances." 437 Recognition of the anger and hope of black Indians would come primarily

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434 Id. at 156.
435 Id. at 154-67.
436 Id. at 170-71.
437 Id. at 174.
from each tribe examining its history in detail, and conducting such reexamination at least in part, from the perspective of those wounded. Native Americans, black, red or white, need to understand the role that white supremacy has played in the division of Native Americans from Africans in the past, and that white supremacy has served to divide and conquer both groups. The federal government has effectively played Native Americans against African Americans. By seeking to assimilate the Native American into white American culture, while at the same time subjugating African Americans in slavery, the federal government offered Native Americans a position on the racial and social ladder, which Native Americans necessarily could not refuse. Native Americans were able to secure a place on the ladder of racial hierarchy that positioned them over blacks and possibly other minorities. By extending limited benefits of white privilege to Native Americans, whites were able to maintain supremacy over both groups in the newly forming United States. The question now is whether the tribes will continue to use their federally recognized power of tribal sovereign immunity as a tool to subordinate black Indians by continuing to exclude them from the tribe or to relegate them to second class citizen status as in the case of the Seminoles.

By first understanding each other’s pain, anger and hope, black Indians and red and white Indians can move to the second dimension of interracial healing which is responsibility. Responsibility recognizes that “amid struggles over identity and power, racial groups can be simultaneously subordinated in some relationships and subordinating in others.” Red Indians must understand that the fact that they were oppressed by whites does not mean that they have no responsibility or capability for oppressing others. Red and white Indians oppressed black Indians by holding them as slaves and subsequently illegitimating them and refusing them tribal membership. At this level, red and white Indians would be expected to accept group responsibility for healing the wounds to black Indians that resulted from slavery and the subsequent denial of black Indians as members of the tribe. Taking responsibility would include conducting a serious self-critical analysis of the treatment of black Indians and offering black Indians an intra-tribal method for dispute resolution rather than forcing them to resort to the federal courts or the federal legislature.

The third dimension of interracial justice is what Professor Yamamoto defines as reconstruction. Reconstruction "entails active steps (performance) toward healing the social and psychological wounds resulting

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\[438\] YAMAMOTO, supra note 28, at 175.
\[439\] Id.
This phase of interracial justice seeks apologies from the oppressors and forgiveness by those injured along with a "joint reframing of stories of group identities and intergroup relations." I call this phase the reclamation and reconciliation phase. It is the phase wherein each group can stop identifying as separate and start to identify as a singular unified unit. A tribal writing memorializing and acknowledging the lost black members of the tribe and apologizing to these lost members would go a long way toward reclaiming black Indians and reconciling them with red and white Indians.

The fourth, final and perhaps most crucial dimension of interracial healing and justice, is reparation. Reparation is not a hand out or simply a monetary payment aimed at compensating those harmed. "When reparation is little more than a monetary buy-off of protest, an assuaging of dominant group guilt without attitudinal and institutional restructuring, reparation can ultimately help perpetuate the institutional power structures and public attitudes that suppress freedom for those whom society views as different and vulnerable." In other words, when reparation is merely a monetary pay off, it can result in inflamed resentment by some people from the dominant group or another oppressed group, who perceive themselves worse off than some of the beneficiaries of the reparation payments. Accordingly, reparation must be multi-faceted, and it must focus on rebuilding "relationship through attitudinal changes and institutional restructuring." For Indian tribes seeking to make reparation to black Indians, it means teaching tribal members about their connection to black Indians, and teaching these members that tribal values require that they respect and value their black brothers and sisters. Reparation also requires institutional restructuring within the tribe to make room for black Indians within the tribe. It means changing tribal rules for membership to enable the tribe to embrace black Indians as members. It also means sharing the rights and responsibilities of tribal membership equally with black Indian members, and treating black Indians as legitimate, intelligent, respectable and valuable members of the tribe.

VI. CONCLUSION

Perhaps interracial justice begins with an invitation to begin a dialogue between the two groups. If so, I hope that the tribes will consider this article to be that invitation. Black Indians are waiting to be reunited with
the people who hold the key to the Indian dimension of black Indian identity. By allowing Indian tribes to exclude black Indians and then insulating them from suit, the federal government effectively continues its historical practice of relative subordination and necessarily pits black Indians against white Indians and the relatively few full blood Indians remaining in the tribes. The five major tribes of Oklahoma have replicated and redeployed white racism by excluding their black members from tribal blood membership rolls. It is my hope that they no longer wish to continue this practice and that they will come to the table of discussion with the traditional and admirable Native American aspiration of restoring harmony between their people.444

444 This form of harmony means an absence of disagreement, not the silencing of the dispute by the more powerful disputant. For a discussion of harmony models of dispute resolution see The Conflict and Culture Reader 38-44 (Pat K. Chew ed., 2001).