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## A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants

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A RACE OR A NATION? CHEROKEE NATIONAL  
IDENTITY AND THE STATUS OF  
FREEDMEN'S DESCENDANTS

S. Alan Ray\*

*Critics of tribal sovereignty increasingly point to perceived contradictions between the egalitarian ideals of modern democracies and the citizenship criteria of Indian nations to argue for diminished tribal sovereign immunity and increased federal intervention in Indian affairs. When tribal nations employ citizenship criteria based on Indian ancestry, they may be asked to explain why they are not engaging in immoral, if not unlawful, race-based discrimination. Assertions of tribal sovereignty alone, even when well-founded in the law, do not address how tribes should determine citizenship criteria from within their own norms and values.*

*The Cherokee Nation recently faced the challenge of determining its citizenship criteria as they pertain to the descendants of the Cherokee Freedmen. As former slaves of Cherokee citizens, the Freedmen were adopted by the Nation after the Civil War and given full rights of Cherokee citizenship consistent with the terms of a Reconstruction treaty. The incorporation of the Freedmen into the tribe was resisted from the start. When the Cherokee Nation's highest court affirmed the Freedmen's descendants' citizenship rights in 2006, the Nation called a special election, and on March 3, 2007, voted to approve a constitutional amendment imposing an "Indian blood" requirement for citizenship based on the federal Dawes Rolls of the allotment era. If the amendment stands, thousands of African-descended citizens will be eliminated from the tribal registry. In this Article, Professor Ray examines the legal and social history of the Cherokee Freedmen to criticize definitions of Cherokee political identity based on either the Dawes Rolls or notions of "Indian blood." Both, he argues, are heteronymous authorities for determining tribal citizenship criteria and should be replaced by the critical hermeneutic of indigenous cultural resources. The wise use of sovereignty, he suggests, requires sustained dialogue between Freedmen's descendants and Cherokees by "blood," not the quick-fix of the political process.*

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## INTRODUCTION

The Cherokee Nation<sup>1</sup> stands at a crossroads. On March 7, 2006, the Nation’s highest court in *Lucy Allen v. Cherokee Nation* reversed itself and ruled that the descendants of former slaves owned by Cherokee citizens—the Cherokee Freedmen—were citizens of the Nation under its Constitution of 1975.<sup>2</sup> The Court’s decision provoked immediate and strong

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1. Hereinafter “the Cherokee Nation” or “the Nation.” The entity is also known popularly as “the Cherokee Nation of Oklahoma.”

2. *Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04-09, 19 (Okla. Trib. Mar. 7 2006), available at <http://www.cherokee.org/docs/news/Freedman-Decision.pdf> [hereinafter “*Lucy Allen*”], *rev’g* *Riggs v. Ummerteskee*, JAT-97-03-K (Okla. Trib. Aug. 15 2001), available at [http://www.freedmen5tribes.com/pdf/Riggs\\_Vs\\_Ummerteskee\\_JAT97\\_03\\_K.pdf](http://www.freedmen5tribes.com/pdf/Riggs_Vs_Ummerteskee_JAT97_03_K.pdf).

“Constitution” when capitalized refers to the Constitution of the Cherokee Nation. “Court” when capitalized refers to the Judicial Appeals Tribunal (JAT), the supreme court of the Nation. The *Lucy Allen* Court addressed itself to the document variously referred to as the “the 1975 Constitution” or “the 1976 Constitution.” The same document was approved by the Commissioner of Indian Affairs on September 5, 1975, and was ratified by the Cherokee people on June 26, 1976. Cherokee Nation Tribal Government, <http://www.cherokee.org/home.aspx?section=government>. This Article will refer to “the 1975 Constitution” in deference to the Court’s preferred term. At the time the Court decided *Lucy Allen*, the Cherokee Nation had popularly approved a new organic document, drafted

reaction from tribal leadership, Freedmen's descendants, and many of the Nation's citizens. On June 12, 2006, the Tribal Council passed a resolution to amend the Constitution to grant citizenship only to Cherokees (or their descendants) with a degree of Cherokee "blood" or adopted Delawares or Shawnees (or their descendants) with a degree of Delaware or Shawnee "blood" as determined by the Dawes Rolls.<sup>3</sup> The amendment required approval by a majority of Cherokee voters, and following a successful initiative petition, a special election on the amendment was held on March 3, 2007.<sup>4</sup> By a clear majority, the amendment was approved.<sup>5</sup>

African Americans who trace their ancestry to the Cherokee Freedmen felt keenly the exclusionary effects of the Nation's action and anticipated their expulsion from the tribe's political life. The Nation performed its sovereign right to establish its citizenship criteria, therefore, in a social context marked by racial division. At issue was whether the Cherokee Nation should legally exclude members, present and future, who have no demonstrable "Indian blood," and more fundamentally, whether the political identity of the Cherokee Nation should center on biology or law.

This Article examines the Cherokee Freedmen controversy to assess whether law and biology can function as sufficient models for crafting Cherokee identity at this crucial moment in the tribe's history. I will argue that while law and biology are historically powerful frames for establishing tribal self-identity, they are inadequate to the task of determining who should enjoy national citizenship. The wise use of sovereignty, I will suggest, lies in creating a process of sustained dialogical engagement among all stakeholders in the definition of Cherokee citizenship on the question of Cherokee identity. This dialogue should ideally

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after constitutional convention in 1999 (hence "the 1999 Constitution") and approved by referendum in 2003. However, because the Bureau of Indian Affairs (BIA) had not approved the 1999 Constitution, the *Lucy Allen* Court was operating under the 1975 Constitution. The 1999 Constitution does not address itself to the status of the Freedmen's descendants and makes no substantive change to the 1975 Constitution regarding criteria for citizenship. See *The 1999 Constitution of the Cherokee Nation: A Review and Comparison between the 1976 and 1999 Constitutions of the Cherokee Nation in Preparation for the Ratification Vote On July 26, 2003*, <http://www.cherokee.org/TribalGovernment/Executive/CCC/ccc1999Changes.pdf> [hereinafter "Comparison of the 1976 and 1999 Constitutions"] (last visited Aug. 16, 2006).

3. *A Resolution Proposing an Amendment to Article III, Section I of the Cherokee Nation Constitution of 1975 and Article IV, Section 1 of Cherokee Constitution of 1999 Pursuant to Article 15, Section 2, Determining Criteria for Citizenship Into the Cherokee Nation/R#63-06*, in MINUTES OF TRIBAL COUNCIL MEETING—REGULAR SESSION, MONDAY, JUNE 12, 2006, <http://www.cherokee.org/TribalGovernment/Legislative/Online/images/JUNE-12-2006-regular-TCM-Minutes.pdf>.

4. SPECIAL ELECTION 2007 QUESTIONS AND ANSWERS, <http://www.cherokee.org/TribalGovernment/Election/home.aspx?section=faq-special&year=2007>.

5. Cherokee Nation Special Election Results, Cherokee Nation News Release, <http://www.cherokee.org/home.aspx?section=story&id=FGOzZCl+mNE=>.

have been undertaken before the Nation moved to the political solution of a vote on tribal citizenship criteria. The exclusion of the Freedmen's descendants without such a dialogue may have high political and social costs to the Nation, its members, and its apparently former members. The dialogue I propose could be constructed along the lines suggested by sociologist Eva Garrouette, whose model of Radical Indigenism offers one means of considering these complex issues from within the Cherokee community itself.

I will begin by providing an overview of the Court's decision in *Lucy Allen*, the response of the Tribal Council in seeking to amend the Constitution, and the vote of the Nation's citizens on the amendment itself. I will then examine the adequacy of legal and biological definitions to establish Cherokee identity in the context of the Freedmen controversy. Finding both inadequate to this larger task, I will present the alternative of Radical Indigenism and explore how it could be a resource for the tribe in resolving the current crisis of Cherokee identity.

### I. LUCY ALLEN AND THE CHEROKEE FREEDMEN CONTROVERSY

On March 7, 2006, the Judicial Appeals Tribunal of the Cherokee Nation issued its long-awaited opinion in the case of *Lucy Allen*. In a 2–1 decision,<sup>6</sup> the supreme court of the second-largest Indian nation in the country ruled that descendants of freed slaves of the Cherokee (“Freedmen”)<sup>7</sup> were entitled to citizenship. Cherokee Freedmen were African-descended people who had been owned by Cherokees until their emancipation by the Nation in 1863.<sup>8</sup> Under the terms of the Treaty of 1866 reconciling the Cherokees with the United States, the Nation agreed to adopt the Freedmen as citizens and amended its Constitution accordingly.<sup>9</sup> Many Freedmen and their descendants, though not all, were listed on the Final Rolls of the Dawes Commission which were, and are, the exclusive means by which to establish Cherokee Nation citizenship.<sup>10</sup>

Petitioner Lucy Allen “is a descendant of individuals listed on the Dawes Commission Rolls as ‘Cherokee Freedmen.’”<sup>11</sup> Allen sought a dec-

6. Lucy Allen, JAT-04-09 (Dowty, J., concurring; Matlock, J., dissenting).

7. In this Article “Freedmen” refers to the freed slaves themselves. I indicate their descendants separately (“Freedmen and their descendants”). Conventional denotation often uses “the Freedmen” to refer alternately to the historically emancipated class of persons and to their descendants, allowing context to make clear which group is meant.

8. The Cherokee National Council had emancipated all slaves “within the limits of the Cherokee Nation” in 1863. DANIEL F. LITTLEFIELD, JR., *THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP* 16 (1978).

9. See *infra* note 75 and accompanying text.

10. See *infra* notes 93–94 and accompanying text.

11. Lucy Allen, JAT-04-09 at 1.

laration that language in the Cherokee statutes requiring that citizenship be “derived only through proof of Cherokee blood”<sup>12</sup> was unconstitutional “because it is more restrictive than the membership criteria set forth in Article III of the 1975 Constitution.”<sup>13</sup> Article III, Section 1 of the 1975 Constitution provides:

[A]ll members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1969, and/or their descendants.<sup>14</sup>

All parties agreed that the Freedmen and their descendants, if they appeared on the Dawes Rolls, were “citizens” prior to the enactment of the 1975 Constitution. The Dawes Rolls consist of multiple rolls whose pages (apropos the Nation) are captioned, “Cherokee by Blood,” “Minor Cherokees by Blood,” “Cherokee Freedmen,” “Minor Cherokee Freedmen,” “Delaware Cherokee,” and “Intermarried Whites.”<sup>15</sup> The Nation argued that the voters intended to exclude the Freedmen and therefore no mention of them was made in Article III. The Court rebutted that argument, noting that Article III was also silent on the inclusion of Cherokees by “blood,” yet no one would argue that they were excluded from citizenship. In fact, the 1975 Constitution makes no legal distinction among the different Dawes Rolls and therefore does not single out for tribal citizenship only those who appear or whose descendants appear on a roll of Indians by “blood.” Consequently, the *Lucy Allen* Court held that the Freedmen and their descendants did not lose their citizenship as a result of the adoption of the 1975 Constitution and subsequent legislation imposing a “blood” requirement for tribal

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12. 11 C.N.C.A. § 12(A) (1993). The Court also struck down on the same grounds 11 C.N.C.A. § 12(B), which states, “The Registrar will issue tribal membership to a person who can prove that he or she is an original enrollee listed on the Final Rolls [Dawes Rolls] by blood or who can prove to at least one direct ancestor listed by blood on the Final Rolls.” 11 C.N.C.A. § 12(B) (1993).

13. *Lucy Allen*, JAT-04-09 at 1.

14. CONST. OF THE CHEROKEE NATION art. III, § 1 (1975).

15. Because the Cherokee Nation had agreed to the federal government’s request after the Civil War to adopt as citizens Shawnee and Delaware tribal members, there are also separate pages captioned “Delaware Cherokee,” while Shawnee are included on the Cherokee by Blood roll and indicated accordingly. *Lucy Allen*, JAT-04-09 at 7. Thus it is possible from the Dawes Rolls to determine to a legal if not moral certainty who is a person with “Indian blood” and, by the principle of exclusion, who is not. Under the taxonomy of tribal citizenship established by the Dawes Rolls it is not necessary to have “Cherokee blood”—the cases of the Shawnee and Delaware, intermarried Whites, and Freedmen demonstrate that legal relationships of adoption or marriage are sufficient to qualify one (and one’s descendants) for citizenship.

citizenship was unconstitutionally restrictive.<sup>16</sup> The Court made clear that the Dawes Rolls are the touchstone for all Cherokee political rights: “[T]he 1975 Constitution affirms these rights by linking citizenship to one single document: the Dawes Commission Rolls.”<sup>17</sup>

As a result of the *Lucy Allen* decision, as many as 45,000 people of African descent became eligible to be added to a citizenship base of approximately 240,000.<sup>18</sup> The decision provoked strong reaction from the Cherokee leadership. Concerned that “three people” could “change[] the last 30 years of Cherokee Nation governance,” Principal Chief Chad Smith called for a popular vote, where the issue of Cherokee citizenship could be answered “once and for all.”<sup>19</sup> Marilyn Vann, President of the Descendants of Freedmen of the Five Civilized Tribes, denounced such a move as a transparent effort to deny Black Cherokees their rightful place in the Cherokee polity. She asked, “Is the Cherokee Nation a ‘race’ or a ‘nation’?”<sup>20</sup>

Chief Smith, in a lengthy statement, rejoined that the delegates voting to approve the 1975 Constitution intended to exclude the Freedmen’s descendants, and those delegates believed “that an Indian nation should be composed of Indians.”<sup>21</sup> The Tribal Council agreed with Chief Smith that the question was ripe for political decision by the voters, and on June 12, 2006, in a 13–2 vote, approved an amendment “which will exclude

16. Lucy Allen, JAT-04-09 at 22 (“11 C.N.C.A. § 12 adds a ‘by blood’ requirement [for citizenship] that simply does not exist in Article III.”).

17. *Id.* at 4.

18. Between March 7, 2006 (the day *Lucy Allen* was decided) and May 1, 2006, approximately 800 Freedmen’s descendants became citizens of the Nation. S.E. Ruckman, *Freedmen’s Status Remains in Limbo*, TULSA WORLD, May 1, 2006, at A17.

19. *Citizen Views Fall on Both Sides of Freedmen Issue*, Cherokee Nation News Release, Mar. 27, 2006, <http://www.cherokee.org/home.aspx?section=chief&ID=/aoDjcgHYwk=> [hereinafter *Freedmen Statement*]. (“By a 2 to 1 vote, three people essentially changed the last 30 years of Cherokee Nation governance. . . . I believe the Cherokee people should answer the question once and for all of who should be entitled to Cherokee citizenship as well as the status of the Freedmen.”)

Chief Smith was officially neutral on the merits: “I want to make sure that my position on this is that I’m not advocating for or against the Freedmen. My position on this is that it’s such a monumental issue, the people should decide, and that’s the whole purpose.” Travis Snell, *Officials Call for Special Election at Jay Meeting*, CHEROKEE PHOENIX, Aug. 2006, available at <http://www.cherokee.org/home.aspx?section=phoenix&ID=pAr3mH5//4k=>. However, he was widely perceived in the press as supporting the amendment. See, e.g., *Cherokee Chief Wants Freedmen Out of Tribe*, Mar. 15, 2006, <http://www.indianz.com/News/2006/012980.asp>; *Cherokee Chief Criticized for Stance on Freedmen*, Apr. 6, 2006, <http://www.indianz.com/News/2006/013017.asp>; *Cherokee Leader Wants to Overturn Freedmen Decision*, 2006, <http://www.kten.com/Global/story.asp?S=4633347>.

20. *Cherokee Chief Calls for an “Indian” Nation by Blood*, Mar. 20, 2006, <http://indianz.com/News/2006/013060.asp>.

21. *Freedmen Statement*, *supra* note 19.

Freedmen from the tribe's rolls."<sup>22</sup> In the same meeting, so eager for political action were some proponents of the amendment that the Council narrowly turned back a motion that would have required a special election by November 4, 2006, to settle the question; undeterred, supporters of the special election began a petition drive to achieve their objective, and on October 5, 2006, the Cherokee Nation's highest court ruled that sufficient signatures had been obtained, and Chief Smith set March 3, 2007, as the date of the special election.<sup>23</sup> Because *Lucy Allen* affirmed Freedmen's descendants' citizenship, these African-descended Cherokees

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22. Will Chavez, *Council Amends Constitution to Exclude Freedmen*, CHEROKEE PHOENIX, July 2006, available at <http://www.cherokee.org/home.aspx?section=phoenix&ID=y9s9MNhgX48>. The *Phoenix* reported that "Councilors Bill Baker, Audra Conner, Jackie Bob Martin, David Thornton, Don Garvin, Linda O'Leary, Melvina Shotpouch, Johnny Keener, Meredith Frailey, Cara Cowan-Watts, Bill Johnson, Buel Anglen and Chuck Hoskin voted to amend the constitution. Councilors Joe Crittenden and Phyllis Yargee voted against the measure." *Id.*

23. *Id.* ("The vote on the resolution calling for a special election was 8-7. At least 10 votes or two-thirds of the council was needed to call for a special election."). Freedmen's descendants were relieved (prematurely, as it turned out) that a special election would not be held: "Leslie Ross of Suisun City, Calif., a Cherokee citizen by blood and a Freedmen, attended the council meeting to support other Freedmen and thought it was 'good we won't have a special election.' He said the councilors who want 'to kick us out' should read the tribe's history. Part of that history, he said, includes his great-grandfather Stick Ross who served on the Tribal Council." *Id.* On Freedmen's participation in Cherokee governance during the late nineteenth century, see *infra* note 110. The text of the March 3, 2007, ballot measure provides:

"This measure amends the Cherokee Nation Constitution section which deals with who can be a citizen of the Cherokee Nation.

A vote "yes" for this amendment would mean that citizenship would be limited to those who are original enrollees or descendants of Cherokees by blood, Delawares by blood, or Shawnees by blood as listed on the Final Rolls of the Cherokee Nation commonly referred to as the Dawes Commission Rolls closed in 1906. This amendment would take away citizenship of current citizens and deny citizenship to future applicants who are solely descendants of those on either the Dawes Commission Intermarried Whites or Freedmen Rolls.

A vote "no" would mean that Intermarried Whites and Freedmen original enrollees and their descendants would continue to be eligible for citizenship.

Neither a "yes" nor a "no" vote will affect the citizenship rights of those individuals who are original enrollees or descendants of Cherokees by blood, Delawares by blood, or Shawnees by blood as listed on the Final Rolls of the Dawes Commission Rolls closed in 1906.

SHALL THE MEASURE BE APPROVED?

FOR THE MEASURE—YES

AGAINST THE MEASURE—NO"

had the opportunity to vote on the amendment; many who were eligible but not yet members registered for tribal citizenship.<sup>24</sup>

When the votes were counted, however, supporters of citizenship for Freedmen's descendants had lost: by a vote of 6,693 (77%) for the measure to 2,040 (23%) against, the amendment was approved.<sup>25</sup> Chief Smith hailed the election as a victory for tribal sovereignty, stating, "The Cherokee people exercised the most basic democratic right, the right to vote. . . . Their voice is clear as to who should be citizens of the Cherokee Nation. No one else has the right to make that determination. It was a right of self-government, affirmed in 23 treaties with Great Britain and the United States and paid dearly with 4,000 lives on the Trail of Tears."<sup>26</sup> Marilyn Vann reacted differently: calling the election "fraudulent," she claimed Chief Smith "manufactured" the outcome, and promised a challenge.<sup>27</sup> Vann expressed disappointment that voters could not see past "the rhetoric and fear-mongering," adding that, "The majority [of the Cherokee people] know very little about the tribe's history, they look to their leaders for information. . . . With sufficient time we could have educated the people to what the election really was about."<sup>28</sup>

Despite the success at the polls enjoyed by the amendment's proponents, the history of the Freedmen's relationship with the Cherokee Nation does not suggest that the question of Cherokee political and social identity will be answered by a single election.

## II. THE FREEDMEN CONTROVERSY AS A CRISIS OF POLITICAL AND SOCIAL IDENTITY

### A. *A Race or a Nation? Identity by Blood or Base Roll*

Freedmen descendant Marilyn Vann's succinct statement of the problem, "Is the Cherokee Nation a 'race' or a 'nation'?",<sup>29</sup> offers a choice between a conception of the tribe as a genealogical club whose members share a common lineage, and a notion of the tribe as a political sovereign whose citizenship criteria do not discriminate on the basis of race. In support of the latter alternative, Vann observes that "[t]he federal govern-

24. See *supra* note 18.

25. Cherokee Nation Special Election Results, *supra* note 5.

26. *Id.*

27. Sheila K. Stogsdill, Cherokee Nation Votes to Remove Descendants of Freedmen, *THE OKLAHOMAN*, Mar. 3, 2007, available at <http://www.newsok.com/article/3021663>.

28. *Id.*

29. See *supra* note 20.

ment does not have government to government relationships with ‘races’ but with nations.”<sup>30</sup>

Vann’s otherwise valid point obscures the fact that such government-to-government relationships are, as to tribal governments, with *Indian* nations, thus begging the question, when, if ever, Cherokee Nation citizenship can be divorced from the Native American genealogy of Cherokee Nation members. As Chief Smith observed, some Cherokees believe “an Indian nation should be composed of Indians.”<sup>31</sup> Put in such stark terms, the choice for Cherokee Nation voters in 2007 came down to selecting a political identity based on biology or law—opting for tribal citizenship by a show of “Indian blood” or by the appearance of an ancestor of any race simply because they appear on one of the Dawes Rolls.

The latter point deserves elaboration. As employed in the rhetoric of Cherokee citizenship, “Indian blood” is a larger racial category than “Cherokee blood” and includes Dawes-enrolled Shawnees and Delawares and their descendants, who became Cherokee citizens as a result of treaties between the Nation and the United States after the Civil War.<sup>32</sup> Significantly, the listings of Shawnees and Delawares on the Dawes Rolls indicate only degrees of Shawnee or Delaware “blood,” not degrees of Cherokee “blood,” if any, so Shawnees and Delawares remain Cherokee citizens *by adoption*, like the Freedmen and intermarried Whites, not citizens “by blood.” Yet, as Shawnees and Delawares, they are indigenous people and therefore potentially members *by “Indian blood.”* “Cherokees by blood” are denominated as such on the “Cherokee by blood” and “Minor Cherokees by blood” rolls. Further, although many of the Freedmen or their descendants at the time of enrollment may in fact have had Native American ancestry, such lineage was not recognized by the agents of the Dawes Commission, who consistently enrolled these “[B]lack Indians” under the Freedmen Roll.<sup>33</sup>

Thus, amending the Constitution, as voters did, effectively eliminated only descendants of the Freedmen and intermarried Whites, while constructing a citizenship composed exclusively of “Indians by blood.” While “Indian blood” as established by the Dawes Rolls will now be sufficient for tribal citizenship, “Cherokee blood” is now, and will continue to be, a prerequisite for holding elective office in the Nation.<sup>34</sup> As a result

30. *Id.*

31. *Freedmen Statement, supra* note 19.

32. *See supra* notes 14–15 and accompanying text.

33. *See infra* notes 217–225 and accompanying text.

34. Lucy Allen, JAT-04-09 at 9 (“The only time a legal right, under Cherokee law, depends on Cherokee blood, is when a person decides to run for elected office. In that instance, we rely on the blood degree findings of the Dawes Commission to make sure our Principal Chief and Council members are Cherokee citizens by blood. That guarantees Cherokee control of government, but that government is ultimately elected by a larger and more diverse constituency of citizens.”).

of the restructuring, then, out of the Dawes Rolls' mixed taxonomy of race and law—"native Cherokees" and "adopted" citizens of various "bloods" and marital statuses—emerges a new race-based hierarchy of the Cherokee polity, with "Indians by blood" as its citizenry and "Cherokees by blood" as its leadership.<sup>35</sup>

The vote to impose a "blood" requirement for citizenship, with the consequence that more than 2,000 Freedmen's descendants who are citizens of the Nation will be expelled, and thousands more precluded from citizenship, signals that the Cherokee Nation may be entering—not exiting—a crisis of political identity. The risks to tribal sovereignty are real: by acting to expel "its Freedmen"<sup>36</sup> the Nation and its leadership will likely suffer severe reputational damages as a politically regressive and even racist enclave. Early in the controversy Oklahoma State Senator Judy Eason McIntyre and Representative Jabar Shumate wrote an "open letter" to Chief Smith, alleging that his support of a blood quantum requirement and expulsion of the Freedmen's descendants would create a "racist-based" citizenship system.<sup>37</sup> The Cherokee lay advocate who represented Lucy Allen before the JAT, David Cornsilk, has said of Smith, simply, "he's a racist."<sup>38</sup>

The perception that race is driving the issue of citizenship could only have been enhanced by statements like those of former Cherokee Nation Deputy Chief, John Ketcher, who toured local Oklahoma communities in the summer of 2006 to collect signatures on the petition that yielded the special election. In community meetings with tribal members, Ketcher said:

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35. Cognizant of the terms of the amendment and its impact on Cherokee citizenship, throughout this Article the phrase "Indians by blood rolls" or "blood rolls" refers to those Dawes Rolls which list Cherokees by blood (adults and minors), Shawnees, and Delawares.

36. The designation of "Freedmen" has been challenged by legal scholar Natsu Saito who argues that the term, as applied to the Seminoles of African descent, "implies that they were enslaved until freedom was bestowed upon them by an outsider or governmental source." Natsu Taylor Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILL. L. REV. 1135, 1173 (2000).

37. *Cherokee Leader Disputes Racially-tinged Allegations from Black Lawmakers*, NATIVE AMERICAN TIMES, Apr. 5, 2006, at 1; *Cherokee Chief Criticized for Stance on Freedmen*, *supra* note 19.

38. Donna Hales, *Chief Not Ready to End Fight to Keep Out Freedmen*, MUSKOGEE PHOENIX, Mar. 16, 2006, <http://www.aaanativearts.com/article1323.html>. In rejecting such an accusation, Principal Chief Smith said, "[It] is clear is that the Cherokee Nation Constitution is not based on race. People of many different ethnic backgrounds, African Americans, [W]hite Americans and Hispanic Americans, have Cherokee ancestors on the Dawes Roll; and they are unquestionably entitled to Cherokee Nation citizenship. However, someone will undoubtedly play the race card in this debate. The issue at hand is what classes of people should be citizens of the Cherokee Nation and who should make that decision, the courts or the Cherokee people themselves." *Freedmen Statement*, *supra* note 19.

[W]e've always been people with Native American blood. People now want to come in because in the past some Cherokees held slaves. After the Civil War, as part of a treaty, we were forced to accept the Freedmen. It was done by the government to punish us. We are trying to rectify this and allow Cherokee people to vote on Cherokee membership.<sup>39</sup>

Ketcher would accept admitting Freedmen's descendants who could establish their "Indian blood." As reported in the CHEROKEE PHOENIX, the Nation's paper of record, Ketcher "believes most Cherokee citizens have no problem with [B]lack citizens who have Cherokee blood or have blood from another tribe," stating, "I think the majority of the Cherokees would probably vote to have those Freedman who are part Cherokee to be citizens and rightfully so."<sup>40</sup> To Freedmen's descendants like Marilyn Vann, Ketcher's reliance on "Indian blood" as the *sine qua non* of citizenship surely sounded like reliance on a racial criterion aimed at eliminating African-descended citizens from the Nation.<sup>41</sup> Immediately following the election, Ketcher cited the historic significance of the result, stating, "I think it will be very important . . . for our children and grandchildren. . . . Hopefully they won't have to face this problem again. Those with Cherokee blood are still welcome in our Cherokee Nation," adding, "I'm going to sleep good."<sup>42</sup>

Ketcher's sleep may seem surprisingly untroubled in light of the recent example of the Seminole Nation of Oklahoma: in 2000 the Seminoles attempted to amend their constitution to impose a blood quantum requirement that would have excluded Freedmen's descendants from tribal citizenship. They did not submit the amendments to the BIA

39. Will Chavez, *Freedmen Debate Spreads to Communities*, CHEROKEE PHOENIX, Aug. 2006, available at <http://www.cherokee.org/home.aspx?section=phoenix&ID=Auv59ngcDXQ=>.

40. *Id.*

41. Vann countered by holding her own community meetings. Vann stated that

[T]he Freedmen want to retain citizenship rights they have had for more than 140 years, and many of them have Indian blood with the documents to prove it. "Freedmen for the most part are Cherokee people who had rights before by treaty and under the 1975 and 1999 constitutions," [Vann] said. Vann claims the Cherokee Nation has citizens on its rolls including Delawares, Shawnees and [W]hites, but the council has not denied their rights to Cherokee citizenship. "The Nation was built by not just Cherokees, but by Freedmen, Delawares and Shawnees," she said. "Now the council is saying, 'we don't need them anymore.'"

*Id.* In fact, Keeler's allowance for descendants of Dawes enrollees who have "blood from another tribe" would permit citizenship for adopted Shawnees and Delawares: it is a criterion based on "Indian blood" which would only exclude descendants of Freeman and intermarried Whites who lacked demonstrable indigenous ancestry. See *supra* notes 32–35 and accompanying text.

42. Cherokee Nation Votes to Remove Descendants of Freedmen, *supra* note 27.

for approval, as required by their constitution.<sup>43</sup> In 2001 the Seminoles relied on the unapproved amendments to conduct tribal elections for chief and council, thus disenfranchising Freedmen's descendants. The BIA refused to recognize the Nation's newly-elected leadership, and after a suit brought by the tribe, a federal district court agreed with the BIA.<sup>44</sup> The crisis was resolved only after the Seminoles dropped the blood quantum requirement and the affected Freedmen's bands held new elections.<sup>45</sup> Although the legal posture of the two tribes differs greatly (the 1999 Cherokee Constitution does not require federal approval of its amendments, the Seminole Constitution did; Cherokee Freedmen's descendants were allowed to vote on their nation's citizenship amendment, Seminole Freedmen's descendants' votes though cast were not counted), it is entirely conceivable that a federal court would find grounds for intervention into Cherokee governmental affairs, perhaps by an expansive reading of the Indian Civil Rights Act.<sup>46</sup> Even before the vote on the amendment, advocates for Freedmen's descendants had gone to federal court seeking relief, on the grounds that the election would violate the Cherokee Nation's treaty obligations and impose a "badge of slavery" in violation of the Thirteenth Amendment. In declining to intervene, Judge Henry Kennedy, of the District of Columbia Circuit, expressed respect for tribal sovereignty, but wondered why the Nation would proceed with an election that would "invite this court, or some other court, to intervene," if the outcome displaced Freedmen's descendants.<sup>47</sup>

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43. The Seminole Nation unsuccessfully challenged the authority of the Department of the Interior to review and approve the amendments to the Seminole Constitution. See *Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1, 3–5 (D.D.C. 2001) (holding DOI has authority, pursuant to Article XIII of the Seminole Constitution, to approve amendments to the Seminole Constitution before they could be adopted).

44. *Seminole Nation of Okla. v. Norton*, 223 F.Supp 2d 122, 147–48 (D.D.C. 2002) (upholding action of Secretary of the Interior to refuse recognition of newly-elected tribal government where votes of Freedmen's descendants were not counted, and otherwise eligible citizens were prevented from running for office because of unlawful amendments to Seminole constitution).

45. See Letter from Neal A. McCaleb, Assistant Secretary-Indian Affairs, to Seminole Chief Jerry G. Haney (Dec. 19, 2003) available at <http://www.indianz.com/docs/bia/mccaleb121902.pdf>.

46. See Angela Riley, *Sovereignty and Illiberalism*, 95 CAL. L. REV. (forthcoming 2007) (advocating against expansion of ICRA or similar laws that would impede tribal self-governance); FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[2][b] (LexisNexis 2005) (2005). ("[T]he Department of the Interior has taken the position that it may decline to continue government-to-government relations with a tribe's elected officials if it finds that the tribal membership laws underlying voter eligibility for the election violate [ICRA] or the tribe's own constitution.").

47. Judge Won't Stop Cherokee Election on Freedmen, Feb. 22, 2007, <http://www.indianz.com/News/2007/001496.asp>.

The political crisis of the Cherokee Nation also signals a crisis of social identity: what makes one a Cherokee? Indeed, the latter question underlies the political options of blood or base rolls, because how voters in 2007 determined tribal citizenship criteria depended upon how they variously recognized—and defined—their fellow Cherokees. In the following section I will look at how one primary means of definition, namely, legal status has defined the Cherokee Freedmen and circumscribed their rights.<sup>48</sup>

### *B. Cherokee Identity: Legal Definitions and their Limits*

Legal definitions play a prominent though not exclusive role in deciding Indian status. The object of definition may be collective (What is a tribe?) or individual (Who is an Indian?) and may be determined outside a tribe (by a state or the federal government) or within a tribe (through tribal citizenship criteria).<sup>49</sup> The history of the Cherokee Freedmen demonstrates, however, that legal definitions of citizenship that appear race-neutral (or more precisely, race-inclusive) have operated to enforce normative conceptions of the Cherokee Nation as a tribe properly by and for only persons possessing “Indian blood.”

#### 1. Collective Definitions: The Cherokee Nation

The Cherokee Nation is one of three federally-recognized Cherokee governments, the others being the Eastern Band of Cherokee Indians (composed of descendants of Cherokees who did not remove to Indian Territory in the 1830s) and the United Keetoowah Band of Cherokee Indians (situated in northeastern Oklahoma and Arkansas and consisting of Cherokee cultural traditionalists).<sup>50</sup> Not sited on a reservation, the

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48. In her study of Native American identity formation, sociologist Eva Garrouette, a citizen of the Cherokee Nation sets out four competing definitions through which individuals and communities negotiate Indian identity. Garrouette's definitions of legal, biological, cultural, and self-identification identity formation are highly useful in understanding the forms of Native American self-identity. See EVA MARIE GARROUTTE, *REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA* 14–98 (Univ. of Cal. Press 2003).

49. See *id.* at 14–37.

50. RUSSELL THORNTON, *THE CHEROKEES: A POPULATION HISTORY* 138–43 (Univ. of Neb. Press 1990). In the absence of direct congressional action, which is rare, collective legal definitions of Indians today result from the Federal Acknowledgment Process (FAP). The FAP requires a tribe to show its historical continuity, political and communal integrity, and application of citizenship criteria that preclude members from belonging to other tribes. See 25 C.F.R. § 83.7 (2007). A federally-recognized tribe receives the privileges and immunities incident to a government-to-government relationship with the United States. See 25 C.F.R. § 83.2 (2007). The Eastern Band has enjoyed federal recognition since 1889. The United Keetoowah Band (UKB) organized under the Indian Reorganization Act of

Cherokee Nation exercises sovereignty across its 14-county Tribal Jurisdictional Service Area in northeastern Oklahoma.<sup>51</sup> Although jeopardized by the anti-sovereignty Curtis Act in 1898,<sup>52</sup> the Cherokee Nation refers to the Five Civilized Tribes Act of 1906 and a key 1976 federal court decision<sup>53</sup> to establish its legal continuity with the tribe that walked the Trail of Tears in 1838–39. The Act of 1906 states that tribal governments “are hereby continued in full force and effect for all purposes authorized by law.”<sup>54</sup> In the words of Chief Smith in 2006 during an occasion celebrating the 100th anniversary of the Act of 1906, “There is a great myth that the [Five] tribes went away when Oklahoma became a state. . . . We have to remind ourselves and our neighbors that the five tribes have continued in full force and effect through this entire last century.”<sup>55</sup> Smith reinforced the point following the *Lucy Allen* decision, when he stated:

[R]egardless of one’s point of view, the *Lucy Allen* case reinforces the principle that the constitutional government of the Cherokee Nation is the same constitutional government formed in 1839. It properly destroys the falsehood that there is a new Cherokee Nation of Oklahoma created in 1975 and an older Cherokee Nation with a constitution dated 1839. There is only one constitutional government of the Cherokee people

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1934 and the Oklahoma Indian Welfare Act of 1936 and received federal recognition in 1950. The UKB self-describes as the “First Federally Recognized Tribe in Oklahoma.” UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, CHEROKEE HISTORY AS YOU’VE NEVER HEARD IT (Historic Preservation Program 2006), available at <http://www.unitedkeetoowahband.org/Documents/KeetoowahHistoryBooklet.pdf>. The Cherokee Nation would “awaken” its tribal government in the 1970s. See *infra* notes 59–61 and accompanying text.

51. Cherokee Nation, Demographics, <http://www.cherokee.org/home.aspx?section=demographics>.

52. See *infra* notes 57–58 and accompanying text.

53. See 34 Stat. 137, 59th Cong. (1906); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976). In a decision focused on the Creek Nation but applicable to all the Five Tribes, the court ruled,

[D]espite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and indeed that government was instead explicitly perpetuated.

*Id.* at 1118.

54. 34 Stat. 137, 59th Cong. (1906).

55. Will Chavez, *5 Tribes Meet to Commemorate Historical Act*, CHEROKEE PHOENIX, June 2006, available at <http://www.cherokee.org/home.aspx?section=phoenix&ID=R.KvSjW7+iiQ=>.

since 1839 and that simply is Cherokee Nation. The claim of Freedmen citizenship goes back to the 1866 amendment to the 1839 Cherokee Nation Constitution.<sup>56</sup>

A dramatic effect of the Curtis Act, however, was to deny the Nation the right to exercise autonomously its inherent sovereignty.<sup>57</sup> After the Curtis Act, the Cherokee Nation continued to exercise minimal governmental functions, but especially after the creation of the State of Oklahoma on November 16, 1907, the Nation and its leadership became instruments of the federal government for many years—Cherokees frequently speak of the period from the Curtis Act to 1970 as one when the Nation was “sleeping.” As Keetoowah Cherokee Robert Conley has written of the period following the Curtis Act, “Although nothing in the law prohibited Cherokees from electing their chief and council, a regime of bureaucratic imperialism had begun. For all practical purposes, the Cherokee nation had become dormant.”<sup>58</sup> Cherokee sovereignty finally awakened in 1970, roused in large part by President Richard Nixon’s watershed repudiation of the federal policy of tribal termination (“termination is morally and legally unacceptable”) and endorsement of a policy of tribal self-determination.<sup>59</sup> Congress, responding to President Nixon, quickly passed legislation giving tribes back the authority to elect their own leaders.<sup>60</sup>

Between 1970 and 1999, the Nation’s population rose from 40,000 to over 200,000; while once concentrated almost exclusively in Oklahoma, citizens today span the country with significant concentrations in

56. *Freedmen Statement*, *supra* note 19.

57. See Eric Lamont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention*, 28 AM. INDIAN L. REV. 1, 6 (2003–2004) (“From 1907 through 1970, the Cherokee Nation functioned without a government. During this time, the U.S. Government appointed a Principal Chief, who did little more than approve leases and sign documents transferring out the last of the allotments.”).

58. ROBERT J. CONLEY, *THE CHEROKEE NATION: A HISTORY* 202 (Univ. of N.M. 2005). The United Keetoowah Band (UKB) and the Nation have often clashed over Cherokee identity. See *Keetoowah History*, <http://www.unitedkeetoowahband.org/Documents/History/Essay1.htm> (“[T]he Keetoowahs have always been known to be the most traditional and conservative of the Cherokee, holding on to the old ways of the full-blood Cherokee. Legends say that if these ways ever discontinue, the Cherokee will be no more.”).

59. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970), in DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 218–20, 219 (5th ed. 2005). The legal basis for the resurgence of Cherokee tribal sovereignty had been laid years earlier, with the repeal of the Curtis Act by the Oklahoma Indian Welfare Act of 1936, which permitted tribes, inter alia, to adopt constitutions. 49 Stat. 1967, 74th Cong. (1936) (codified at 25 U.S.C. § 501 et seq.).

60. Principal Chiefs Act of 1970, Pub. L. No. 91-495, 84 Stat. 1091 (1970).

Arkansas, Texas and California.<sup>61</sup> Since 1971, the Cherokee Nation has emerged as a model of Indian economic and cultural self-determination. By its own financial indicators, the Nation is enjoying strong growth in revenues generated in part by Cherokee Nation Enterprises (CNE), a diversified business wholly-owned by the tribe.<sup>62</sup> CNE paid dividends of \$15.0 million into the Nation's discretionary budget in 2005, up from \$1.9 million in 1998. CNE employed 2811 people in 2005, compared with 511 in 1998. Cherokee Nation Industries (CNI), a second corporation wholly-owned by the Nation, was started 35 years ago and today focuses on high-tech aerospace and military assembly. CNI's profits have risen from \$1.6 million in 2003 to \$3.5 million in 2005.<sup>63</sup>

Between fiscal 2001 and 2004, the Nation opened two new community health clinics which contributed to an increase of 49,000 patient visits, and made plans to open three more clinics in neighboring towns. As federal funding for health care is decreasing, the Nation's contribution to health services for tribal citizens is rising: from \$49 million in fiscal year 2000, to \$76 million in fiscal 2004. In the 1997-98 academic year, the Nation supported 722 higher education scholarships for the Nation's citizens; in 2004-05, the number had grown to 2147. Under Chief Smith's leadership, the Nation has made a sustained and successful effort to revitalize Cherokee language study and renew traditional cultural activities and awareness, especially among Cherokee youth.<sup>64</sup> Today the Nation is widely recognized as a model of economic success and accounting integrity as well as a leader in innovative and effective cultural programming.<sup>65</sup>

Ironically, the revival of the Cherokee Nation was assisted by the same constituency that is now facing expulsion. Conley writes that "[i]n 1971, the Cherokee Nation held its first election for Principal Chief since before Oklahoma statehood in 1907. . . . Voter eligibility was determined

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61. Lamont, *supra* note 57, at 19.

62. Status Report 2005, Cherokee Nation Finances, available at <http://www.cherokee.org/home.aspx?section=SR&Name=SR2005&ID=BWTLdASilB4=>.

63. CNI recently suffered losses of an estimated \$6.3 million due to investments in failed or failing energy ventures. The SEC is investigating allegations of fraud in connection with the stock purchases. *Cherokee Nation Businesses Losing Millions*, July 28, 2006, <http://indianz.com/News/2006/015180.asp>.

64. See *Cherokee Speakers Sweep Youth Language Fair*, Status Report 2005, <http://www.cherokee.org/home.aspx?section=SR&Name=SR2005&ID=8NFaWSF0Pro=>.

65. See Financial Excellence Award Received Again, Status Report 2005, <http://www.cherokee.org/home.aspx?section=SR&Name=SR2005&ID=GNI//ZiYz00=> (the Nation received twelve awards of the Certificate of Achievement for Excellence in Financial Reporting by the Government Financial Officers Association and multiple awards by the Honoring Nations Program of the Harvard Program for American Indian Economic Development); HPAIED Honoring Nations Directory, [http://www.ksg.harvard.edu/hpaied/documents/HN\\_Directory\\_99-03.pdf](http://www.ksg.harvard.edu/hpaied/documents/HN_Directory_99-03.pdf).

by the Dawes Roll[s].”<sup>66</sup> Among the citizens whose eligibility was determined by the Dawes Rolls and who cast votes in that first election were descendants of the Nation’s Freedmen.<sup>67</sup>

## 2. Individual Definitions: Citizenship in the Cherokee Nation

Individual legal definitions of Indians are determined by the tribes themselves or, in some circumstances, by Congress.<sup>68</sup> The United States Supreme Court in *Santa Clara Pueblo v. Martinez* upheld the right of tribes to determine their own criteria for citizenship consistent with retained tribal sovereignty and Congress’s intent to promote Indian self-government.<sup>69</sup> Except where Congress has acted to abridge their authority, tribes may determine their criteria for citizenship, even where, as in *Martinez*, the result disadvantages a class that would be protected under the federal Constitution’s equal protection guarantee, were it applicable.<sup>70</sup> *Martinez* implicitly authorizes a host of different tribal citizenship-criteria: “blood quantum” is a common though not universal criterion; others include maternal or paternal descent, residency on the reservation, community participation, vote of the tribal council, community recognition or parental enrollment, performance of certain annual duties to the tribe, appearance of ancestors on specified base rolls, and marriage to or adoption by a tribal member.<sup>71</sup>

Once recognized as a citizen, individuals may receive numerous and varied rights, depending upon the tribe. They may include voting rights, the right to run for and hold tribal office, preferential hiring by the tribe,

66. CONLEY, *supra* note 58, at 217.

67. CIRCE STURM, *BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA* 178 (2002). The re-enfranchisement of the Freedmen’s descendants in 1971 was to be short-lived. In the 1983 tribal election, Black Cherokees like the Reverend Roger H. Nero who appeared at the polls were shocked to be informed that they could not vote: the tribe had determined that voter eligibility would be limited to Dawes Rolls descendants who possessed Indian blood. *Id.*, see *infra* notes 101–103 and accompanying text.

68. Garrouette observes that “[a] 1978 congressional survey discovered no less than *thirty-three* separate definitions of Indians in use in different pieces of federal legislation. These may or may not correspond with those any given tribe uses to determine its citizenship.” GARROUTTE, *supra* note 48, at 16 (emphasis in original).

69. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

70. *Id.* at 55. In *Martinez*, the disadvantaged class was women. The federal Constitution does not apply to federally-recognized Indian tribes except to the extent required by the Indian Civil Rights Act (ICRA). Significantly, *Martinez* held that federal courts’ power to review claims arising under ICRA was limited to the right of habeus corpus. *Id.* at 67.

71. GARROUTTE, *supra* note 48, at 15. See Christine Metteer, *The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian*, 5 RUTGERS RACE & L. REV. 53, 86 (2003) (arguing “tribes must be allowed to retain their various membership criteria because these criteria for determining who is and who is not a member are a statement of what makes the tribe unique.”).

access to tribal courts and subjection to tribal law, the right to receive tribal social services, the right to receive revenues generated by tribally-owned businesses, or the right to share in distributions derived from the exploitation of natural resources on or beneath tribal lands.<sup>72</sup>

Because establishing tribal citizenship criteria is a function of a tribe's political process, it is subject to all the vagaries of lawmaking and those who miss the opportunity, for example, to sign up when tribal base rolls are established are denied, and their descendants are denied, the chance for political participation "from the inside" unless the tribe makes an accommodation for them. As Garrouette observes, such persons, though perhaps culturally or biologically Native American, and desirous of an "official" Indian identity, are legally "not 'real Indians.' They are 'outalucks.'" <sup>73</sup>

The former slaves of Cherokees were legally defined as tribal citizens when the Cherokee Nation signed a Reconstruction treaty with the United States on July 19, 1886. By its terms, the Treaty of 1866 provided in relevant part that:

[A]ll freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants shall have the rights of native Cherokees.<sup>74</sup>

In consequence of the Treaty, the Cherokee Nation promptly amended its Constitution:

[A]ll native-born Cherokees, all Indians, and [W]hites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the

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72. See GARROUETTE, *supra* note 48, at 15–18 (various rights incident to tribal citizenship).

73. *Id.* at 22. The term "outalucks," coined by historian Kent Carter, refers to "people of Indian ancestry who are nevertheless unable to negotiate their identity as Indians within the available legal definitions." *Id.* at 14 (citing Kent Carter, *Wantabees and Outalucks*, 66 CHRON. OF OKLA. 94, 94–101 (1988)).

74. Charles J. Kappler, 2 INDIAN AFFAIRS: LAWS AND TREATIES 944 (1975–76 prtng.).

limits of the Cherokee Nation, shall be taken, and deemed to be, citizens of the Cherokee Nation.<sup>75</sup>

Rather than settle the issue of the Freedmen's legal status, however, the Treaty of 1866 and constitutional amendments of 1866 "set in motion what proved to be a torturous effort to determine precisely who qualified for the tribal rolls."<sup>76</sup> The confluence of the Treaty's and Constitution's six-month deadline for establishing residency, the dispersion of former slaves throughout the region due to war, and limited means of communicating vital information meant that many former slaves did not return in time to receive tribal citizenship—they were "outluck"—and entered Cherokee history as the "too-lates":

[T]he treaty specified that former slaves desiring Cherokee citizenship should present themselves by January 1867. During the war, however, many Cherokee slaves had fled the territory or had been taken out by their owners, and some freed people who otherwise qualified did not make it back in time.<sup>77</sup>

The challenge facing the Freedmen of establishing Cherokee social identities under the circumstances of Reconstruction were exacerbated by the early and sustained opposition of the Cherokee leadership to their legal identity as citizens.<sup>78</sup> As anthropologist Circe Sturm observed in 2002, "Despite the promises of this treaty [of 1866], the freedmen were never fully accepted as citizens of the Cherokee Nation, and Cherokees to

75. CONST. OF THE CHEROKEE NATION, art. III, § 5 (amended 1866).

76. ANDREW DENSON, DEMANDING THE CHEROKEE NATION: INDIAN AUTONOMY AND AMERICAN CULTURE 1830–1900 84 (2004).

77. *Id.* Denson adds that "[o]thers had trouble proving that they had been Cherokee slaves, while some of those claiming citizenship had never been owned by Cherokees but had migrated to the Indian Territory after the war in hopes of securing land." *Id.* The confluence of slavery, war, and treaty law hit families especially hard. To reach the territory in time, some parents left behind spouses and children, and if the families were reunited after the six-month window had closed, federal agents could treat the late arrivals as territorial intruders and expel them. Children who had been separated from their families during slavery and sold often could not be reunited in time. Some minors had been bound to service until their majority; they too could not return in time to establish their citizenship. See MORRIS L. WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION, 1838–1907 226 (1977) (citing Report of Captain John Craig, Federal Agent for the Cherokees, 1870, that "not a few [former slaves] were detained in slavery in Texas for one or two years after the war, or until they escaped. . ."). The harsh effects of the original deadline were partially mitigated in 1870 by amendments permitting slaves who had resided "in the Nation in 1861 [to] receive an allotment and citizenship whenever they returned to Indian Territory." THEDA PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, 1540–1866 143 (1979).

78. See KATJA MAY, AFRICAN AMERICANS AND NATIVE AMERICANS IN THE CREEK AND CHEROKEE NATIONS, 1830s TO 1920s 71 (1996) ("From 1866 to 1876 freedmen could vote and serve on juries. . . . After 1877 [and the election of traditionalist Principal Chief Oochalata], the exercise of citizenship rights became difficult.").

this day remain divided over the political status of their former slaves.”<sup>79</sup> The matter of “[B]lack access to tribal resources” quickly became a focal point of Cherokee resistance to Freedmen’s citizenship.<sup>80</sup> Sturm notes that “[i]n an attempt to solidify their own economic and political interests, in 1883 the Cherokee tribal council passed legislation that excluded the freedmen and other tribal citizens without Cherokee blood, such as the Shawnees, Delawares, and intermarried [W]hites, from sharing in tribal assets,” such as those realized from the sale of tribal lands.<sup>81</sup> Cherokee politicians argued that the Freedmen and their descendants had only the right of occupancy, not ownership of tribal lands, and therefore were not entitled to share in the distribution of any sale proceeds absent the Council’s permission.<sup>82</sup>

Congress responded, and passed legislation in 1888 that “required the tribe to share its assets equally with the freedmen and other adopted citizens.”<sup>83</sup> To foster compliance with the law and rationalize the distribution of tribal assets, Congress called for an enrollment of all eligible Freedmen by a federal agent. In 1889, the agent produced the Wallace Roll, a record of 3,524 Freedmen or their descendants.

The Nation continued to resist the legal definition of Freedmen as Cherokee Nation citizens, prompting Congress in 1890 to authorize adjudication of the Nation’s obligations to the Freedmen in the Court of Claims. In 1895 the Court of Claims ruled in favor of the Freedmen, holding that the grant of rights to Freedmen and their descendants by the Cherokee Nation under its Constitution (amended 1866), consistent with the Nation’s obligations under the Treaty of 1866, precluded the Nation from denying the Freedmen an equal share in the distribution of proceeds from the sale of communally-owned land:<sup>84</sup>

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79. STURM, *supra* note 67, at 171. The political history of Freedmen’s citizenship after the Civil War, which I summarize in this section, unless otherwise indicated, is found in *id.* at 170–78.

80. DENSON, *supra* note 76, at 85 (“Economic factors tended to drive the freedmen controversy.”).

81. STURM, *supra* note 67, at 171.

82. MAY, *supra* note 78, at 71. The irony of this position, of course, consists in its application of the same principles of Euroamerican property law used by the Marshall Court when it held tribes did not hold absolute title to aboriginal lands, only a right of occupancy. *Johnson v. McIntosh*, 21 U.S. 543, 591 (1823) (Indians “are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others”). On *Johnson* as a foundational case for United States legal colonization of Native Americans, see ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 51–58 (2005).

83. STURM, *supra* note 67, at 171 (citing 25 Stat. 608–609, 50th Cong. (1888)).

84. *Whitmire v. Cherokee Nation*, 30 Ct. Cl. 138, 156 (1895) (“If the common property was to be retained for the general welfare [of the Cherokee Nation], he [the

When the Cherokee people wrote into their constitution in 1866 “all native-born Cherokees, all Indians and [W]hites legally members of the nation by adoption, and all freedmen,” “shall be taken and be deemed to be citizens of the Cherokee Nation,” they fixed the status of the freedman and raised him to the same rank of citizenship which they themselves enjoyed. Thenceforth he was to be equal with themselves under the constitution, governed by the same laws, enjoying the same rights, possessed of the same immunities, and entitled to the same protection.<sup>85</sup>

The Court of Claims awarded the Freedmen \$903,365 as their share of \$7,240,000 that had been realized from tribal land sales. However, because the Nation had already distributed the entire amount to Cherokees “by blood,” and the United States was named as co-defendant, it fell to the federal government to pay the Freedmen. Not satisfied with the accuracy of the Wallace Roll, the government authorized a second recording, called the Kern-Clifton Roll, which was finished in 1896 and listed 5,600 Freedmen or their descendants. Based on the Kern-Clifton Roll, the federal government satisfied the *Whitmire* judgment and awarded the legally-defined Cherokee Freedmen shares of profits from the sale of their tribal lands.

The Freedmen’s rights to Cherokee Nation citizenship were defined once more when the federal government forced a new accounting on the Five Tribes in 1893, in furtherance of the General Allotment Act of 1887 (popularly known as the Dawes Act). The policy of the federal government in the nineteenth- and early twentieth centuries to assimilate Native Americans into the culture and ethos of non-Indian society included, at its heart, the inculcation of a love of private property, the *sine qua non* of “civilized” peoples. The Dawes Act called for the break-up of tribally-owned land into individual allotments and their award in severalty to individual Indians and other qualified tribal members, including the Freedmen and their descendants. President Theodore Roosevelt in 1901 called the Dawes Act “a mighty pulverizing engine to break up the tribal mass,”<sup>86</sup> seeing in its effects the end of tribal communities themselves and the assimilation of their members into mainstream, farming America, thus freeing the federal government of the anachronism of sovereign Indian

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Freedman] was to share equally in its benefits; if it was to be sold and its proceeds divided, the constitution [of the Cherokee Nation] made it as much his as theirs.”)

85. *Id.* at 155. Counsel for the Cherokee Nation distinguished between the Freedmen’s “rights in the soil” (and proceeds of its sale), which they vigorously resisted conceding, and Freedmen’s “right to vote, to sit on juries, to sue and be sued, to receive the benefits of public schools and charities,” which they readily acknowledged “has never been questioned or abridged in the slightest.” *Id.* at 148.

86. Theodore Roosevelt, *The Struggle for Self-Determination* (1901), reprinted at [http://www.digitalhistory.uh.edu/native\\_voices/voices\\_display.cfm?id=92](http://www.digitalhistory.uh.edu/native_voices/voices_display.cfm?id=92).

nations and ending the federal trust responsibility to their members. The Dawes Act, and its politically potent successor the Curtis Act,<sup>87</sup> represent the legal embodiment of the philosophical aspiration expressed in 1892 by the founder of the Carlisle Indian School, Colonel Richard Pratt, who stated that “all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”<sup>88</sup>

Significantly, the Dawes Act introduced the use of “blood quantum”—degrees of “Indian blood”—as a metric for alienability of allotments. On the theory that “full-blooded” Indians were less familiar with property ownership and therefore less competent to manage their affairs, Congress required that the land of any allottee of one-half degree “Indian blood” or more would be held in trust for a determined number of years, could not be sold, and would not be taxed; allotments to those with less than one-half-degree “Indian blood” (including intermarried Whites and Freedmen and their descendants) were subject to taxation but their owners could freely alienate their property.<sup>89</sup>

In 1893 Congress created the Dawes Commission and charged it with negotiating with the Five Tribes for the end of communal land ownership. New rolls were needed to determine who should receive allotments of land. Sturm states that after initial resistance to allotment, the governments of the Five Tribes gave in and the Commission’s agents “began taking oral and written testimony from applicants for tribal enrollment”:

[T]he final rolls of the Five Tribes were to list newborns, minors, and adults in three racial categories—freedmen, intermarried [W]hites, and Indians by blood, with only the latter specifying an Indian blood quantum. Sensing an

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87. See discussion *supra* at notes 57–58 and accompanying text. The Curtis Act of 1898 accelerated the federal government’s attack on tribal sovereignty. As legal scholar David E. Wilkins states:

[W]ith this act, Congress unilaterally and in direct violation of treaty and statutory law, terminated the legal existence of the Five Civilized Tribes. This detailed measure provided for the establishment and regulation of townships; for the management of leases of Indian mineral rights; authorized the Dawes Commission to create enrollment lists which would serve as the basis for deciding who received land allotments; prohibited the expansion of lands; and also abolished the court systems of the tribal governments in Indian territory. . . . [The Five Tribes were reduced] to a poverty status that would take decades for them to rise above.

DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 66–67 (1997).

88. Richard C. Pratt, <http://historymatters.gmu.edu/d/4929/> (last visited Aug. 16, 2006).

89. STURM, *supra* note 67, at 79.

opportunity to reverse the inroads the freedmen were making in the courts, the Cherokee Nation attempted to frustrate the enrollment of the freedmen, who may have been citizens by law but were not accepted in the minds of the majority. . . .<sup>90</sup>

A set number of acres per allottee, multiplied by the number of eligible allottees as determined by the Dawes Rolls, subtracted from the tribe's land base, invariably yielded unallotted acres of tribal land. Under the Dawes Act, however, this "excess land" was not held in trust for the tribes; instead, it was opened to non-Indian settlement.<sup>91</sup>

When the Dawes Commission completed its work in 1907, and prepared to parcel out allotments of land to Indians "by blood," intermarried Whites, and Freedmen or their descendants, the final rolls of the Cherokee Nation as approved by the Secretary of the Interior "contained the names of 41,798 citizens of whom 8,698 were [Cherokee] full-bloods. There were 31,400 Cherokees by blood, 197 registered Delaware-Cherokees, 286 intermarried [W]hites, 4,991 Cherokee minors, 4,305 freedmen, and 619 Cherokee freedmen minors."<sup>92</sup>

Because the Cherokee Nation today requires that prospective tribal citizens establish an ancestor on a subset of the Dawes Rolls, the Dawes Rolls have exclusive authority over the legal definition of who is a Cherokee.<sup>93</sup> Throughout the twentieth century persons claiming to be

90. *Id.* at 173.

91. ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 23 (1940).

92. WARDELL, *supra* note 77, at 333.

93. The Cherokee Nation's citizenship eligibility process provides:

[T]o be eligible for CDIB/Tribal Citizenship with the Cherokee Nation, you must be able to provide documents that connect you to an enrolled lineal ancestor, who is listed on the (DAWES ROLL) FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES, Cherokee Nation. This roll was taken between 1899–1906 of Citizens and Freedmen residing in Indian Territory (now NE Oklahoma). Many applicants do not qualify for CDIB/Citizenship as their ancestors did not meet the enrollment requirements and were not enrolled. Certain requirements had to be met in order to be placed on the Dawes Roll.

Cherokee Nation, *Registration Instructions Page*, <http://www.cherokee.org/home.aspx?section=services&service=Registration&ID=8sRG9ZCF7PE> (last visited Aug. 16, 2006). "CDIB" refers to a Certificate of Degree of Indian Blood, issued by the Bureau of Indian Affairs to establish the holder's Indian blood quantum based on information in the Dawes Rolls. The effect of requiring a CDIB in addition to showing an ancestor on the Dawes Rolls was to preclude non-Indians from registering as tribal members. See discussion *infra* notes 101–103 and accompanying text. After the *Lucy Allen* decision, the Nation created a separate registration procedure that did not require Freedmen's descendants to produce a CDIB but still required them to demonstrate their descent from an enrollee on the Freedmen's Roll of the Dawes Rolls. See *Dawes Freedmen Roll Application* (2006), [http://www.cherokee.org/docs/registration/Freedman\\_Registration.pdf](http://www.cherokee.org/docs/registration/Freedman_Registration.pdf).

descendants of former Cherokee slaves whose ancestors appear on the Kern-Clifton Roll or the Wallace Roll but not on the Dawes Rolls have fought in court to overturn this exclusive authority and be recognized as tribal citizens according to some other legal rubric. Their efforts have been consistently unsuccessful.<sup>94</sup>

During the early years of the “dormition” of the Cherokee Nation,<sup>95</sup> the Freedmen and their descendants, along with Cherokee Indians by “blood” and the rest of the Five Tribes, suffered the depredations of unscrupulous land-grabbers who defrauded the new allottees at every opportunity. So successful were these “grafters” that “by 1930 the Five-Tribes Indians owned less than 2 million acres of land, down from a total of 19,525,966 acres in 1890.”<sup>96</sup> In addition, Oklahoma during the early decades of the twentieth century was marked by collective violence against African Americans. Race riots occurred in several locations,<sup>97</sup> including the infamous Tulsa Riot of 1921, which took the lives of between 100 and 300 Black residents and charred an estimated 1256 homes and virtually all schools, churches, businesses, a library and a hospital in Tulsa’s Black neighborhood of Greenwood. Between 1907 and 1920, 33 Black persons were lynched in Oklahoma. During the 1920s, the Ku Klux Klan in Oklahoma boasted tens of thousands of members.<sup>98</sup> Notwithstanding these horrific circumstances, the Freedmen and their descendants who were included on the Dawes Rolls prospered as citizens of the Cherokee Nation.<sup>99</sup> According to Sturm:

94. See *Cherokee Nation and United States v. Whitmire*, 223 U.S. 108, 117 (1912) (upholding the legitimacy of the Dawes Rolls over the Kern-Clifton Roll “as an authentic identification of the individual freedmen”). See also STURM, *supra* note 67, at 173–78 (providing an overview of the legal history of the Freedmen’s descendants in the twentieth century).

95. See *supra* notes 57–60, 87 and accompanying text (discussing the Curtis Act of 1898, and President Nixon’s renunciation of termination in 1970).

96. STURM, *supra* note 67, at 174 (citations omitted). See DEBO, *supra* note 91, at 92–125 (describing the massive defrauding of the Dawes allotment recipients).

97. STURM, *supra* note 67, at 174.

98. DANNEY GOBLE, FINAL REPORT OF THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 (2001), <http://www.tulsareparations.org/FinalReport.htm>. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 41–63 (1997) (describing the history of lynching as a failure to secure equal protection under the law for African Americans, and racially motivated violence under Jim Crow).

99. Phyllis E. Bernard, *Oklahoma: The New Africa*, 26 OKLA. CITY U.L. REV. 901, 903 (2001) (“The widespread independent and self-governing Black settlements of Oklahoma created a confident individualism that fell outside the mean of racial stereotyping.”). See also Peter Wallenstein, *Native Americans Are White, African Americans Are Not: Racial Identity, Marriage, Inheritance, and the Law in Oklahoma, 1907–1967*, 39 JOURNAL OF THE WEST 55, 56 (2000) (“Oklahoma law defined as non[W]hite only residents who had African ancestry. . . . [W]hite [W]hites came to dominate, Indians moved into middle position.”). Oklahoma laws prohibited interracial marriage between Blacks and Whites until they were

[D]espite increased violence during the first three decades of the twentieth century, new freedmen citizens on the whole fared better than they had in the antebellum Cherokee Nation. Ever since allotment, they had increased civil rights and were able to get access to the Cherokee courts, sit on juries, serve as elected officials, have some security in their improvements, and enjoy limited school facilities.<sup>100</sup>

The Cherokee Freedmen's participation in the tribal elections in 1971—the first tribal election for the office of principal chief since before the Curtis Act—and the subsequent tribal elections of 1975 may be a high-water mark in the Freedmen's civic participation in the life of the Nation. For by the time of the election of 1983, the Nation's leadership had amended the tribal code to require voters to hold a Certificate of Degree of Indian Blood, or "CDIB," issued by the federal government. In an unpublished interview, former Principal Chief Ross Swimmer (Who served from 1975 to 1985) stated, according to Sturm, that:

[F]ive years earlier in 1977–78 both the voter registration committee and the tribal membership committee registration committee had established new rules. These rules declared that according to the new Cherokee Constitution of 1976, an individual must have a certificate degree of Indian blood (CDIB) to be registered as a tribal citizen or voter.<sup>101</sup>

The introduction of this requirement—possession of a federally-issued CDIB—into the formal criteria for Cherokee Nation citizenship in 1977–78 marked the first time since the Treaty of 1866 that the Nation

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struck down consistent with *Loving* in 1967. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

100. STURM, *supra* note 67, at 174.

101. *Id.* at 178. Because elections are held every four years, the change in voter eligibility in 1977–78 means the Freedmen's descendants would only have been permitted to vote in the 1971 and 1975 elections. In part because the Freedmen were not permitted to vote in the 2003 referendum on the 1999 Constitution, the BIA refused to approve the document. However, the 1999 Constitution removed the textual provision of the 1975 Constitution calling for federal approval of constitutional changes, and on June 7, 2006, the JAT ruled in a 2–1 decision (Leeds, J., dissenting) that due to the Nation's inherent sovereignty the new Constitution received all necessary approvals when it was passed by the voters. See Travis Snell, *JAT Rules 2003 Constitution Law*, CHEROKEE PHOENIX, July 2006; Comparison of the 1976 and 1999 Constitutions, <http://www.cherokee.org/TribalGovernment/Executive/CCC/ccc1999Changes.pdf> (last visited Aug. 16, 2006).

The exclusion of the Freedmen from the 2003 referendum sparked a lawsuit by Freedmen's descendants, including Marilyn Vann, against the United States (the Cherokee Nation intervened) which remains pending. Complaint, *Vann v. Norton*, No. 1:03cv01711 (HHK) (D.D.C. 2003), available at [http://www.freedmen5tribes.com/Plaintiffs\\_ResponseToMotiontoIntervene11.doc.pdf](http://www.freedmen5tribes.com/Plaintiffs_ResponseToMotiontoIntervene11.doc.pdf).

had officially predicated citizenship on biology: proof of “Indian blood” was now required for tribal citizenship.<sup>102</sup> The Dawes Rolls were effectively attenuated to “Indian blood”-based categories only, and in subsequent elections, Freedmen’s descendants were turned back from the polls.<sup>103</sup>

### 3. The Limits of Legal Definitions of Citizenship

The history of the Cherokee Freedmen presented above only begins to touch on the complex relationship between the Cherokee Nation in Reconstruction and a victorious United States. It does not do justice to the Nation’s fight against the insatiable demands of White settlers for “un-occupied” Cherokee land in Indian Territory, the consequent loss of much of the tribal land base through allotment and fraud, and the harsh impact of decades-long government policies, both federal and state, aimed at cultural assimilation and elimination of tribal sovereignty. The revival of the Cherokee Nation in the early 1970s should be understood as the political reawakening of a proud indigenous community. As former Principal Chief Wilma Mankiller (1985–95) has said of this period, “The tribal power base was dominated by men, but it was refreshing to see that at least a re-birth of our government, which the federal government had tried to suppress for seventy years, was in full swing.”<sup>104</sup> Yet the history sketched above reveals limitations on the capability of legal definitions to provide a coherent Cherokee identity today for all of the Nation’s stakeholders.

When the Freedmen were adopted into the Nation by the Treaty of 1866, they enjoyed in theory all the legal benefits of citizenship. Indeed, the Nation’s amendment of its Constitution that year indicates the tribe’s intent to confer those benefits on its former slaves and their descendants. However, no sooner were economic resources available than the tribe began to protest the inclusion of the Freedmen in their distribution, discriminating between political rights as citizens (which the tribe readily acknowledged belonged to the Freedmen) and economic rights that pertained only to “native Cherokees.” Time and again in the late 1800s, Congress and courts were called upon to enforce the economic rights of Freedmen and other “adopted” Cherokees. When confronted with the terms of the Treaty of 1866, the tribe countered that the Treaty was forced upon it, so its obligation to adopt the Freedmen and grant citizenship to

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102. The racial and biological underpinnings of the Dawes Rolls themselves are analyzed *infra* notes 217–241 and accompanying text.

103. See *supra* note 67 and accompanying text.

104. WILMA MANKILLER & MICHAEL WALLIS, *MANKILLER: A CHIEF AND HER PEOPLE* 217 (1993).

them and their descendants should not be binding;<sup>105</sup> an assertion the *Lucy Allen* majority considered and dismissed.<sup>106</sup> The resistance of tribal leadership to recognizing the Cherokees' former slaves and their descendants as Cherokee citizens meant that roll after roll of Freedmen was drawn up to ascertain eligible beneficiaries of financial distributions and allotments. Though legally on the same footing as "native Cherokees," both before and after the Dawes Rolls, the Freedmen were never recognized by the tribe as "real" Cherokees.

When the Nation officially reasserted itself in the early 1970s it quickly took steps to legally exclude an already marginalized social group, the Freedmen's descendants, by amending the tribal code to require Dawes Rolls-based proof of Indian "blood quantum" (the CDIB requirement). The Nation no longer admitted, as its counsel did before the Court of Claims in *Whitmire*, that the right of the Freedmen and their descendants to vote or enjoy other political rights of citizenship "has never been questioned or abridged in the slightest."<sup>107</sup> Freedmen's descendants who protested their exclusion have reportedly been told that "Freedmen were compensated with allotments, unlike freed slaves in the South after the American Civil War,"<sup>108</sup> as though they had bargained

105. The *Lucy Allen* dissent asserted that "the majority opinion fails to point out that the Treaty of 1866 and the 1866 amendment to the 1839 Constitution of the Cherokee Nation which was a direct result of the [fact that the] 1866 Treaty was brought about by duress from the United States Federal Government after the Cherokee Nation chose the losing side of the Civil War. . . . My colleagues in the majority opinion have failed to cite any instance where the Cherokee Nation voluntarily granted citizenship to the Cherokee Freedman prior to and after 1866." *Lucy Allen*, JAT-04-09 at 29 (Matlock, C.J., dissenting). See also *supra* note 39 and accompanying text (describing the comments of former Cherokee Nation Deputy Chief Ketcher).

106. The *Lucy Allen* majority stated that

[A]lthough this treaty was signed at the end of the Civil War, when the Cherokee Nation was in a weaker bargaining position, it is nonetheless an agreement between two sovereign nations. When the Cherokee Nation enters into treaties with other nations, we expect the other sovereign to live up to the promises they make. It is rightly expected that we will also keep the promises we make.

*Lucy Allen*, JAT-04-09 at 17-18. The Court also reminded the Nation that "[t]he fact that internal Cherokee laws were amended to acknowledge the Cherokee Nation's compliance with the 1866 Treaty should not be ignored." *Id.* at 19. Elsewhere, however, the majority seems to draw back from its flat conclusion that the Nation should "keep the promises we make," and questions "whether the Cherokee Nation, like other sovereigns, has the internal power to unilaterally abrogate treaties." *Id.* at 20. The majority adds in dicta that "[t]his Court sees no reason why the Cherokee Nation must be bound by a treaty until the end of time, particularly when that treaty has been broken by the other sovereign," but cautions that abrogation of any treaty must be done "by clear actions which are consistent with the Cherokee Nation Constitution," not by "mere implication." *Id.*

107. *Whitmire*, 30 Ct. Cl. at 148. See *supra* note 85 and accompanying text.

108. *Freedmen Statement*, *supra* note 19.

away their citizenship for land, or "Freedmen did not help during the last [one] hundred years to rebuild the Cherokee Nation and should not at this late date reap any benefits that Cherokees have earned,"<sup>109</sup> ignoring the counterpoints that either the Freedmen's help in rebuilding the Nation was seldom welcomed, or Freedmen did in fact help rebuild the Nation.<sup>110</sup>

From the above it is clear that the legal definition of Cherokee identity since 1866 has failed to produce legitimized Cherokee social identities for Freedmen's descendants.<sup>111</sup> Although the legal definition of Cherokees, as provided for by the Treaty of 1866 and the constitutional amendments of 1866, granted "native Cherokees," Freedmen, and other adoptees citizenship in one and the same polity, neither then nor since have Cherokees by "blood" and Freedmen shared the same Cherokee social identity or even compatible Cherokee social identities. My brief review of the history of the Cherokee Nation since Reconstruction indicates that each time major financial or political opportunities have arisen, "native Cherokees" have striven to distinguish themselves as a social subset of the common citizenry and accrue to themselves control of these opportunities to realize their vision of the Nation.

With the amendment of the Cherokee Constitution to impose an "Indian blood" requirement, the Cherokee Nation may be heading at last toward an isomorphism of one set of its members' social identities (as biological Cherokees) and their political identity (as Cherokee citizens). If the results of the election stand, the Freedmen's descendants will be hived off and rendered invisible from the standpoint of the Nation's organic document and tribal code. But the attempted resolution of the Nation's political crisis by legal simplification could come at a significant social cost, not least because the public debate thus far has avoided or disavowed the role of perhaps the most important variable of all: race.

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109. *Id.*

110. See, e.g., *supra* note 23 (describing the example of Freedman's descendant Leslie Ross whose grandfather Stick Ross served on the Council (the "lower" half of the Cherokee legislature, the "upper" half being the Senate)). The roster of Cherokee Council members in the late nineteenth century includes six who are designated as "negro" in Emmet Starr's authoritative history: Joseph Brown (1875), Ned Irons (1895) (from Tahlequah District); Frank Vann (1887), Samuel Stidham (1895) (both from Illinois District); Jerry Alberty (1889) (Cooweescowee District). EMMETT STARR, HISTORY OF THE CHEROKEE INDIANS AND THEIR LEGENDS AND FOLK LORE 277-83 (Kraus Reprint Co. 1977) (1921).

111. See STURM, *supra* note 67, at 105 ("Cherokee blood policies constitute the Cherokee Nation in a legal and political sense but . . . these legal definitions do not correspond with sociocultural realities at the local level.").

*C. Cherokee Identity: Biological Definitions and their Limits*

The *Lucy Allen* Court, in rejecting the validity of the tribal code's "Indian blood"-based citizenship criteria, distinguished the Nation as a political sovereign from the tribe as a biologically-linked community, and in so doing, pointed to the rich and complex network of races and societies that have traditionally made up the Cherokee Nation's polity:

[T]he Cherokee nation is a Sovereign. The Cherokee Nation is much more than just a group of families with a common ancestry. For almost 150 years, the Cherokee Nation has included not only citizens that are Cherokee by blood, but also citizens who have origins in other Indian nations and/or African and/or European ancestry. Many of these citizens are mixed race and a small minority of these citizens possess no Cherokee blood at all.<sup>112</sup>

I advert to the Cherokee Nation's traditionally varied racial and ethnic composition not to argue that tribal policies should reflect the past, and therefore efforts to amend the Constitution to impose a "blood" requirement for citizenship are inappropriate. As a citizen of the Cherokee Nation, I agree with legal scholar Carole Goldberg that the "contemporary concerns of tribal communities" must be the touchstone for setting citizenship criteria, and "there is no reason to deny" the legitimacy of criteria based on such concerns "merely because they depart from 'traditional' measures."<sup>113</sup> At the same time, clearing the field of methodological attachments to traditions of citizenship raises the question for the Cherokee Nation's voters—and for no one else—of how we should evaluate biology as a criterion for citizenship, especially where our tribal history includes slave-holding and our northeastern Oklahoma roots are still fed in significant ways by the culture of the South.<sup>114</sup>

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112. Lucy Allen, JAT-04-09 at 9. The Court continued: "People will always disagree on who is culturally Cherokee and who possess enough Cherokee blood to be 'racially' Indian. It is not the role of this Court to engage in these political or social debates." *Id.* at 10.

113. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 KAN. L. REV. 437, 438 (2002).

114. See STURM, *supra* note 67, at 14 ("Most Cherokees consider Oklahoma their home in the fullest sense of the word, but almost all look back to the South, to their aboriginal homeland. . . . Many never get a chance to go back, but those geographic, historical, and cultural origins continually visit their imaginations and shape their identities in complex ways.").

## 1. The Construction of the “Red” Race

“Race,” Circe Sturm writes, “is not a natural, biological, or scientific category. Instead, it is a social, historical, and political category defined in biological terms.”<sup>115</sup> In his important study of the construction of Whiteness as a prerequisite for United States citizenship, legal scholar Ian Haney Lopez defines “race” as “the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”<sup>116</sup> Lopez elaborates his understanding of race along three “interrelated levels, the physical, the social, and the material”:

[F]irst, race turns on physical features and lines of descent, not because features or lineage themselves are a function of racial variation, but because society has invested these with racial meanings. Second, because the meanings given to certain features and ancestries denote race, it is the social processes of ascribing racialized meanings to faces and forbearers that lie at the heart of racial fabrication. Third, these meaning-systems, while originally only ideas, gain force as they are reproduced in the material conditions of society. The distribution of wealth and poverty turns in part on the actions of social and legal actors who have accepted ideas of race, with the resulting material conditions becoming part of and reinforcement for the contingent meanings understood as race.<sup>117</sup>

The relationship of law to race is not merely regulatory, it is productive. On all three levels—physical, social, and material—law operates to assign meaning to bodies and ancestry. As Lopez states, “The legal system influences what we look like, the meanings ascribed to our looks, and the material reality that confirms the meanings of our appearances. Law constructs race.”<sup>118</sup>

The construction of racial identities through the dividing practices of plantation slave-holding and resistance to it established patterns of social interaction that would reproduce themselves long after 1866 and the end of slavery itself. My focus in this section and the next will be on the

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115. *Id.* at 14–15.

116. IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 14 (N. Y. Univ. Press 1996). See also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–45 (1993) (on evolution of Whiteness as a form of racial identity to a form of property and status); Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on “Indigeneity” and “Whiteness,”* 18 WASH. U. J.L. & POL’Y 55, 63 (2005) (arguing for expansion of dialogue on Whiteness to colonialism and its global power over indigenous peoples’ resources).

117. LOPEZ, *supra* note 116, at 14.

118. *Id.* at 19.

eighteenth and nineteenth centuries, when Cherokees developed their own forms of colonial and early-American slave-holding inflected by traditional Cherokee culture and Euroamerican notions of citizenship.<sup>119</sup> In the process, Cherokees reproduced and politically imbedded the practices by which racialized meanings were assigned to the faces and forbearers of African-descended men and women, Euroamericans, and themselves.

The construction of Cherokees as “red men” was not a self-reflexive act of an indigenous people, but was performed by Europeans and Euroamericans according to preexisting racial narratives, drawn from Christian monogenetic and Enlightenment sources, which esteemed Whiteness, loathed Blackness, and sought the salvation and civilization of all.<sup>120</sup> In 1728, for example, Virginia planter William Byrd wrote, “All Nations of men have the same Natural Dignity, and we all know that very bright Talents may be lodg’d under a very dark Skin. The principal Difference between one People and another proceeds only from the different Opportunities of Improvement.”<sup>121</sup> By the end of the eighteenth century, however, “Cherokees had begun to internalize some ideas of race as fundamental to their own identity.”<sup>122</sup> They had incorporated “an understanding of racial difference and racial prejudice that articulated with Western views. . . . [H]uman differences that Cherokees had once understood in terms of color symbolism, culture, politics, and kinship were now also understood in terms of race”:

[R]ed, [W]hite, and [B]lack had become racial categories “because the Cherokees described the origins of difference as [being] innate, the product of separate creations, and they

119. See JACK D. FORBES, *AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES 190–220* (Univ. of Ill. Press 1993) (documenting the early history of the social construction of African-Native American peoples). See also WILLIAM LOREN KATZ, *BLACK INDIANS: A HIDDEN HERITAGE 135–40* (Atheneum 1986) (examining slavery in the “Five Civilized Nations”).

120. Scholar of ethnicity and African American studies Tiya Miles writes, “[The] system of White superiority was nourished by an ideology of White supremacy that pervaded the rhetoric and writing of the seventeenth- and eighteenth-century English. Historian Winthrop Jordan [argues] that the English saw Africans as ‘[B]lack,’ a descriptor that, for them, connoted evil, bestiality, and filth.” Tiya Miles, *Uncle Tom Was an Indian: Tracing the Red in Black Slavery*, in *CONFOUNDING THE COLOR LINE: THE INDIAN-BLACK EXPERIENCE IN NORTH AMERICA* 137, 141–42 (James F. Brooks ed., 2002) (citing WINTHROP JORDAN, *THE WHITE MAN’S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* 48 (Oxford Univ. Press 1974)). See STURM, *supra* note 67, at 44 (describing monogenesis as a theological construct).

121. THEDA PERDUE, “MIXED BLOOD” INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH 71 (2003) (quoting WILLIAM BYRD, *WILLIAM BYRD’S HISTORIES OF THE DIVIDING LINE BETWIXT VIRGINIA AND NORTH CAROLINA* 120 (William K. Boyd ed., Dover Publications 1967) (1929)).

122. STURM, *supra* note 67, at 47.

spoke of skin color as if it were a meaningful index of difference.”<sup>123</sup>

Indeed, skin color *was* a meaningful index of difference: Cherokees of the late eighteenth century were engaged in “racial fabrication” by ascribing social meaning to their own “faces and forbearers” (Lopez) and the physiognomy and lineage of those around them. On some occasions, Cherokees attempted to simultaneously accept their classification as “red” and subvert the Euroamerican hierarchy of White over red by appealing to shared norms of theology and longevity on the land. For example, presiding over the Treaty of Hopewell in 1785, Cherokee Chief Old Tassel reminded his American interlocutors, “I am made of this earth, on which the great man above placed me, to possess it. . . . You must know the red people are the aborigines of this land, and that it is but a few years since the [W]hite people found it out. I am of the first stock, as the commissioners know, and a native of this land; and the [W]hite people are now living on it as our friends.”<sup>124</sup>

At the same time, with the support of American policies of “civilization,” Cherokees were increasingly intermarrying with Euroamericans. Indeed, the socially-approved practice of intermarriage between Euroamerican men and Native American women was of longstanding. For nearly two centuries, Euroamerican officials and missionaries held up the example of the Virginian John Rolfe, who married Pocahontas, the daughter of Algonquian Chief Powhatan, in 1614, as proof of the advantages that could accrue to both Euroamericans (in terms of peace and economic gain) and Native Americans (in terms of cultural and religious “betterment”) if they “blended their stocks” in marriage.<sup>125</sup> So beneficial were these unions regarded for British colonial interests that government officials in 1755 urged a policy of relocating Euroamerican soldiers and convicts to the frontier to serve as marriage partners for Native American

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123. *Id.* at 50 (quoting Nancy Shoemaker, *How Indians Got to Be Red*, 102 AM. HIST. REV. 625, 643 (1997)).

124. STURM, *supra* note 67, at 47–48 (quoting Old Tassel, Cherokee Chief, Remarks at the Council for the Treaty of Hopewell, in 1 AMERICAN STATE PAPERS, CLASS 2: INDIAN AFFAIRS 41 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832)).

125. PERDUE, *supra* note 121, at 72–73. As William Byrd expressed the point, “A sprightly Lover is the most prevailing Missionary.” *Id.* at 75. Before marrying Rolfe, Pocahontas converted to Christianity and changed her name to Rebecca, then followed her husband to England, where she lived the life of a Jacobean lady until her death. She is buried in England. Perdue states that “her son and his descendants ethnically identified as [W]hite even as they boasted descent from Pocahontas.” *Id.* at 73. See Pocahontas, Jamestown Rediscovery, <http://www.apva.org/history/pocahont.html> (showing a contemporary portrait of Pocahontas-Rebecca, Jacobean lady, and an account of her life).

women.<sup>126</sup> Similarly, early United States policy endorsed by Thomas Jefferson, among others, favored intermarriage between settlers and Native Americans as a means assimilating the latter to the “civilized” culture and mores of the former.<sup>127</sup> The phenomenon of Euro and Native American intermarriage may be attributed in part to the view prevalent through the eighteenth century that “red” skin resulted from environmental causes and did not reflect fundamental differences between the two groups: the Indians’ application of “bear’s oil, or grease, mixt with a certain red root, which, by a peculiar property, is able alone, in a few years time, to produce the Indian colour in those who are [W]hite born.”<sup>128</sup> “Europeans,” historian Theda Perdue states, “refused to admit that Indians possessed genetically darker skin.”<sup>129</sup>

The accommodation, indeed cultivation, of Indian-White intermarriage of this period illustrates Lopez’s point that race is physically constructed by laws and policies that constrain or facilitate reproductive choices:

[W]hile admittedly laws cannot alter the biology governing human morphology, rule-makers can and have altered human behavior that produces variations in physical appearance. In other words, laws have directly shaped reproductive choices.<sup>130</sup>

An example of such law-shaped variations is the phenomenon of “mixed bloods.” As a result of government-encouraged Indian-White intermarriage, and later the Cherokee’s own legal codes permitting White-Cherokee unions,<sup>131</sup> generations of Cherokee children were racially constructed as “mixed-bloods.” Purdue writes that, “Unlike their [W]hite neighbors, Native people had no category for ‘mixed-bloods’ and almost never used the term. On the rare occasion when they did, ‘half-breed’ described or personified departures from traditional ways of doing things

126. In 1755, Edmund Aikin, in a report on colonial Indian affairs, urged the intermarriage of soldiers stationed on the frontier with Indian women “by which means our Interest among the Indians will be strengthened.” Akins also recommended that “able bodied men *Convicts* of petty crimes, instead of being hanged, or incorporated among the People of our Colonies” be sent to the frontier to marry Indian women and “strengthen the peace.” PERDUE, *supra* note 121, at 73.

127. *Id.* at 73–74. Thomas Jefferson favored intermarriage of Indian women and White men to promote civilization, as did his Indian agents for the Creek and the Cherokee, Benjamin Hawkins and Return Meigs, respectively. *See id.* at 74–76.

128. PERDUE, *supra* note 77, at 47.

129. *Id.* at 46.

130. LOPEZ, *supra* note 116, at 14–15.

131. STURM, *supra* note 67, at 54 (“As citizens of a new multiracial nation, Cherokees were willing to accept intermarriages between themselves and [W]hites but not with African American slaves.”).

rather than identifying particular individuals by race.”<sup>132</sup> For Euroamericans of the early nineteenth century, however, mixed-bloods could be unsettling, liminal beings, confusing at times in their appearance,<sup>133</sup> constantly in need of authoritative surveillance<sup>134</sup> and racial coding.<sup>135</sup> At the same time, “mixed-blood” Cherokees who were familiar with Euroamerican culture could be especially effective in negotiating the interests of the Nation. The “mixed-blood” Cherokee Principal Chief John Ross, “[a]lthough only 1/8 Cherokee, . . . was reared traditionally and had a preference for native clothing and mode of dressing as a boy and young man. He was educated in mission schools and at private boarding schools.”<sup>136</sup> Ross was highly acculturated as a Cherokee, and moved easily between cultures during successive national crises during his nearly forty-year tenure as principal chief, serving in major leadership roles from 1828 to his death in 1886.<sup>137</sup>

132. PERDUE, *supra* note 121, at 90. The only group of “mixed-bloods,” according to Perdue, which Native people treated distinctively was children born to “Indian men and [W]hite women who had not been adopted into clans.” *Id.* at 94. Under the matrilineal rules of many tribes, including the Cherokee, children of Native American mothers are automatically members of their mother’s clan, regardless of their paternity. Children of Native American fathers and non-Native mothers, therefore, must be adopted into clans to receive Native American familial status.

133. In the case of mixed-blood Indian-White children, color was often a poor proxy for race. Perdue reports that “outsiders” often had difficulty “distinguishing ‘full-bloods’ and ‘mixed-bloods,’” adding, “the eccentricity of genes created a ‘diversity of complexion’ that made skin tone an . . . imperfect determinant of ancestry.” *Id.* at 91. See HARRY J. BROWN, *INJUN JOE’S GHOST: THE INDIAN MIXED-BLOOD IN AMERICAN WRITING* 20 (2004) (discussing “popular nationalist literature such as produced by Twain and Cooper registers Indian-[W]hite hybridity in images of degeneracy, atavism, madness, violence, or criminality.”).

134. Missionaries identified school children according to ancestry, on church rolls headed “pedigree,” and carefully noted their blood as “full” or “mixed blood.” See PERDUE, *supra* note 121, at 88.

135. See the anecdotes *id.* at 75 (missionaries in 1822 praise mixed-bloods “instructed in letters and religion . . . christianized and civilized” while criticizing White children “totally ignorant of letters and of religion”); 91 (missionaries in 1824 express perplexity that “some of the full Indians are so light, that, if protected from the weather as much of the people as our own country, they would not differ many shades from a dark Englishman.”).

136. John Ross, Cherokee Nation, <http://www.cherokee.org/home.aspx?section=culture&culture=culinfo&cat=yOCwb%207dfB4=&ID=8sRG9ZCF7PE>.

137. *Id.* Known in Cherokee as “Koo-wi-s-gu-wi” (or Cooweescoowee”), Ross is widely considered the greatest of the Cherokee chiefs for his leadership of the Nation during the trauma of Removal and the Civil War. Ross’s ancestry was seven-eighths Scottish and one-eighth Cherokee. See WILLIAM G. MCLOUGHLIN, *AFTER THE TRAIL OF TEARS: THE CHEROKEES’ STRUGGLE FOR SOVEREIGNTY, 1839–1880* 3 (Univ. of N.C. Press 1993). Nonetheless, Ross was widely respected among culturally conservative Cherokees for his resistance to Removal. See GRACE STEELE WOODWARD, *THE CHEROKEES* 132 (Univ. of Okla. Press 1963) (“though only an eighth-blood, [he] was inwardly all Cherokee.”).

In summary, as the nineteenth century began, Cherokees had adopted two, complementary race-based strategies for dealing with the new Republic and the insatiable demands of Euroamerican settlers for tribal lands. On the one hand, Cherokees appear to have accepted their racial construction as “red,” but resisted, even inverted, the Euroamerican hierarchy of races that subordinated red to White. On the other hand, Cherokees increasingly took on the customs, dress, manners and appearance of Euroamericans, and through intermarriage with them, “coded” increasingly as White. These Cherokees, many though not all of them of “mixed-blood,” ascended to leadership positions in the tribe, and, with “full-bloods,” endeavored to negotiate their traditional Cherokee self-understanding as “the principal people”<sup>138</sup> by participating in the vernacular of Euroamerican culture and the institutions of the Southern colonies, later states.<sup>139</sup> Consequently, the road to Cherokee prosperity for some would lead through the political institution of the nation-state, and the economic engine of plantation slavery.

## 2. The Construction of “Black” by “Red”

Lopez reminds us that the specification of faces and forbearers in terms of race relies upon social meaning-systems which, “while originally only ideas, gain force as they are reproduced in the material conditions of society.”<sup>140</sup> Cherokees, who adopted and strategically adapted Euroamerican notions of race and “redness” in the seventeenth and eighteenth centuries, appear to have easily embraced Euroamerican bias against Black skin when they encountered it in the bodies of African slaves, and to have interpreted it immediately as a sign of intrinsically inferior social status.<sup>141</sup>

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138. JAMES MOONEY, *MOONEY'S HISTORY, MYTHS, AND SACRED FORMULAS OF THE CHEROKEES* 15 (Historical Images 1992) (1900) (“The proper name by which the Cherokees call themselves [is *Ani-Yun-Wiya*] . . . signifying ‘real people’ or ‘principal people’ . . . [T]he word properly denotes ‘Indians,’ as distinguished from people of other races, but in usage it is restricted to mean members of the Cherokee tribe. . .”).

139. Historians McLoughlin and Conser caution, however, that “[o]ne must avoid the easy conclusion that the wealthy, mixed-blood elite was necessarily the ruling body or oligarchy of the Cherokee Nation at this time [ca. 1835].” William G. McLoughlin & Walter H. Conser, Jr., *The Cherokees in Transition: A Statistical Analysis of the Federal Cherokee Census of 1835*, 64 J. AM. HIST. 678, 698 (1977). As checks on any potential oligarchy, the Cherokee government functioned through a bicameral legislature, where “[b]y tradition and design, the Cherokees consistently gave the well-to-do a larger role in the upperhouse while retaining popular control of the lowerhouse,” and, in addition, the Cherokee followed their tradition “that all decisions affecting the general welfare of the tribe or nation should be taken only after long debate had produced a consensus.” *Id.*

140. LOPEZ, *supra* note 116, at 14.

141. See William G. McLoughlin, *Red Indians, Black Slavery and White Racism: America's Slaveholding Indians*, 26 AM. Q. 367, 371 (1974) (“The first time that Indians ever saw [B]lack men they appeared as the slaves of Spanish, French or English masters. Consequently, without any planned policy of divide and rule, the [W]hite man showed the

While Cherokees initially had no concept of race,<sup>142</sup> “[s]oon after their first contact with Africans . . . the Cherokees no doubt realized that Europeans regarded Blacks as inferiors and they were in danger of receiving the same treatment.”<sup>143</sup> Indeed, “[t]he English colonists purchased their first cargo of Africans at about the same time they began enslaving Indians.”<sup>144</sup>

The enslavement of Native Americans peaked during 1715–1717 and declined until it officially ended after the American Revolution.<sup>145</sup> While the Indian slave-trade flourished, the powerful Cherokees, while sometimes victims of capture and sale, turned away from their aboriginal system of warfare (which operated in the service of clan-based retributive justice)<sup>146</sup> and became adept market participants in the capture and trading of Indians of neighboring tribes, such as the Yuchi and Guale, to Europeans. As a result, traditional Cherokee society, which operated economically on subsistence farming and hunting, changed forever, as Cherokees became increasingly dependent on the Western market goods they received in exchange for captive Indians.<sup>147</sup>

As the market for Indian slaves declined, Cherokees shifted to capturing and trading Black slaves, having “discovered that the capture of [B]lack slaves was particularly profitable, and by the American Revolution most Cherokees traded almost exclusively in [B]lack slaves.”<sup>148</sup> When African slaves ran away, their owners commonly employed Native Americans, including Cherokees, to retrieve their lost property.<sup>149</sup> Fearing alliances between Native Americans and African slaves, the colonists “not only employed Indians to find escaped slaves but also used [B]lacks in military

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Indian by his actions that he considered darker people inferior to [W]hite-skinned people.”).

142. See PERDUE, *supra* note 77, at 3–18 (describing the tribal and ontological status of the *atsi nahsa’i*, or bondsmen, owned by aboriginal Cherokees, and why they should not be categorized as “slaves” in the modern sense).

143. *Id.* at 36.

144. *Id.* at 36–37.

145. *Id.* at 37.

146. See generally RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 10–39 (1975) (elaborating traditional Cherokee justice norms based on clan revenge); Rennard Strickland, *Wolf Warriors and Turtle Kings: Native American Law Before the Blue Coats*, 72 WASH. L. REV. 1043, 1045–46 (1997) (arguing traditional Cherokees were highly legalistic and lived under a value-based jurisprudence according to sacred norms).

147. PERDUE, *supra* note 77, at 22.

148. *Id.* at 38.

149. *Id.* at 39–40 (“In 1763 [W]hites agreed to pay Indians one musket and three blankets, the equivalent of thirty-five deerskins, for each [B]lack slave captured and returned.”).

campaigns against Indians.”<sup>150</sup> As historian William McLoughlin explains, “[W]hite colonial governors, settlers, and Army commanders in the Carolinas in the eighteenth century deliberately spread scare stories of Indian cruelty among their slaves, armed slaves to kill Indians and paid Indians to capture and return runaway slaves. . . . [all as] a conscious and calculated part of [W]hite policy in the years when the Indians and [B]lacks in the Southeast outnumbered the [W]hite settlers and could, together, have wiped out the [W]hites.”<sup>151</sup> Throughout the eighteenth century,

[c]onvinced that the European and native Americans were practically identical, [W]hites simultaneously insisted that Africans were the exact opposite of Europeans and Indians. By emphasizing the actual, exaggerated, and imagined differences between Africans and Indians, [W]hites successfully masked the cultural similarities of the two as well as their mutual exploitation by [W]hites.<sup>152</sup>

Their culture now deeply committed to the economic system of the colonists, Cherokees readily ascribed inferior status to Black skin, which they associated exclusively with objects of the hunt, capture, and trade with Whites; or as agents of warfare waged against them by White masters. Their early participation in the Indian slave-trade had taught Cherokees to transform certain persons into commodities. Now, at the end of the eighteenth century, whether as goods in the marketplace or tools of the fight, Black bodies were first and foremost instruments of labor under the exclusive control of another—the very definition of slaves. In contrast to slave-objects, Cherokees were subjects who enjoyed intersubjective relations with Whites, intermarrying with them, studying their language and culture, and benefiting from ideologies of philosophy, religion, and law that, for a while yet, classified “White men” and “red men” as brothers, if not equals, “under the skin.” The monogenetic premise of a common humanity, however, would soon change, and “blood would tell.”

### 3. Cherokee Slavery and Cherokee Nation

Two major shifts, one socio-economic, the other political, occurred in the Cherokee Nation in the nineteenth century that bear particularly on today’s Freedmen controversy. The first was the adoption of plantation slavery and the second was the adoption of the progressive political form of the nation. The two are historically related in that many of the same individuals who formed the economic, largely mixed-blood elite who owned significant landed estates were the most ardent supporters of nationhood and the

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150. *Id.* at 41.

151. McLoughlin, *supra* note 141, at 369–70.

152. PERDUE, *supra* note 77, at 47.

specification of Cherokee political identity in terms of citizenship. Cherokees of the antebellum South contributed to the empowerment of a race-based economy by simultaneously exercising authority over race-subordinates and negotiating their own identities under the conditions of White colonization.

*a. Race as Economics*

The Cherokees in the late eighteenth and early nineteenth centuries occupied aboriginal lands located largely in northwestern Georgia and southeastern Tennessee.<sup>153</sup> At an estimated 12,000–15,000 population, they were one of the largest tribes in the Southeastern United States.<sup>154</sup> They were also the wealthiest tribe, having sold extensive tracts of their land after 1777.<sup>155</sup> The availability of capital, combined with a government policy favoring Indian “civilization” through yeoman husbandry,<sup>156</sup> and their own ardent desire to acquire Western technical knowledge and equipment,<sup>157</sup> moved the Cherokees rapidly from an economy based on subsistence farming and hunting and to one based on the production of surplus agricultural products for market.<sup>158</sup> In the process, many Cherokees abandoned traditional gender roles which assigned agricultural cultivation and hunting to women’s and men’s labor, respectively. With game scarce and warfare ended, Cherokee men turned to agriculture, and in so doing, alienated Cherokee women from the “real economic power” they had previously enjoyed.<sup>159</sup> Once labor was re-gendered, and only

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153. McLoughlin, *supra* note 141, at 380.

154. *Id.*

155. *Id.* (“Though [the Cherokee] lost much of their original land after 1777 in various treaties, they generally struck shrewd bargains for it...”) See WILLIAM G. McLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* 19, 24, 46, 77, & 91 (Princeton Univ. Press 1986) (discussing annuities to the Cherokee generated by sales of tribal land and rights-of-way from 1777 to 1804 (proceeds included trade goods, cash, and annuities from federal government promised in perpetuity)).

156. PERDUE, *supra* note 77, at 53–54 (citing George Washington’s proposal to the Cherokees for transition to an agricultural economy, as a means of their “civilization”).

157. *Id.* at 54 (citing report of Indian agent that “the Cherokees avidly sought the tools of civilization”).

158. See McLoughlin & Conser, *supra* note 139, at 680 (“[By 1835] Cherokees were indeed far advanced in the acquisition of wealth and skills and . . . those with a high proportion of mixed Cherokee-[W]hite ancestry tended to have more skills and more wealth. It also appears that there was a definite trend toward an agrarian-capitalist social order, that economic classes were beginning to appear, and that communal life, the clan system, and the extended family were fading.”).

159. PERDUE, *supra* note 77, at 52. See generally MOONEY, *supra* note 138, at 242–48 (describing traditional Cherokee gender roles which associate agriculture with women and hunting with men, based in tribal stories of origination: Selu, the first woman, was

then, Perdue argues, the door opened for Cherokee slave labor and the plantation system: "Only when the identification of women with agriculture had ended was the introduction and utilization of slave labor for cultivation by even a minority of Cherokees possible."<sup>160</sup>

Statistics from the period show that as the Cherokee population grew in the first 60 years of the nineteenth century the number of slaves of Cherokees, and slaves of Cherokees as a percentage of the Cherokee population, grew as well. McLoughlin reports the following data:<sup>161</sup>

| YEAR | CHEROKEE POPULATION (ROUNDED) | SLAVES OF CHEROKEES (NUMBER) | SLAVES OF CHEROKEES (AS PERCENT OF CHEROKEE POPULATION) |
|------|-------------------------------|------------------------------|---|
| 1809 | 12,000                        | 583                          | 4.85%   |
| 1825 | 14,000                        | 1,277                        | 9.12%   |
| 1835 | 15,000                        | 1,592                        | 10.61%  |
| 1860 | 17,000                        | 4,000                        | 23.52%  |

According to the census of 1835, "[s]laveholders cultivated more acres and produced more corn than nonslaveholding Cherokees, and they owned most of the nascent industries in the Nation."<sup>162</sup> With profits from the sale of excess agricultural product, Cherokees invested in various enterprises, such as mills and ferries.<sup>163</sup> The number of slaves owned per plantation, however, was not large: of the 207 slaveholders in 1835, "168, or 83 percent, owned fewer than 10 slaves."<sup>164</sup> Nonetheless, in 1835, Cherokees were significant slave-holders compared to the other tribes of the southeastern United States, and after Removal, the Cherokee held more slaves than any other tribe in Indian Territory.<sup>165</sup>

Significantly, ownership of Black slaves was not evenly distributed across the Cherokee population according to race. "Mixed-bloods" owned a disproportionately high share of the slaves. Perdue reports that "[o]nly

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physically the source of corn, which she produced from her body, and Kana'ti, the first man, was the provider of game, which he stored in the ground and withdrew as needed).

160. PERDUE, *supra* note 77, at 53.

161. McLoughlin, *supra* note 141, at 380. Calculation of slaves as percent of Cherokee population my own. Other sources place the number of Cherokee slaves in 1860 lower than McLoughlin. See R. HALLIBURTON, JR., *RED OVER BLACK: BLACK SLAVERY AMONG THE CHEROKEE INDIANS* 117 (1977) (slaves of Cherokees in 1860 equal 2504); LITTLEFIELD, *supra* note 8, at 9 (slaves of Cherokees in 1860 equal 2511). Even assuming the lowest figure (2504), slaves as a percent of the Cherokee population rose significantly post-Removal. I do not mean to imply that slaves were counted as *part* of the Cherokee population; they were not. However, like illegal aliens in the United States today, their numbers were increasing significantly as a function of the majority (Cherokee) population and posing correspondingly greater challenges of cultural integration and social "management."

162. PERDUE, *supra* note 77, at 60.

163. *Id.*

164. *Id.* at 58.

165. LITTLEFIELD, *supra* note 8, at 8.

17 percent of the people living in the Cherokee Nation in 1835 had any [W]hite ancestors, but 78 percent of the members of families owning slaves had some proportion of [W]hite blood."<sup>166</sup> Missionaries of the time referred to "the half-breeds [who] have large plantations, which they cultivate by the aid of slaves."<sup>167</sup> It would be misleading, however, to suggest that Cherokee plantation slavery at this time was exclusively the provenance of wealthy "White-Cherokees" where some "full-bloods" (albeit a minority)<sup>168</sup> also participated in the system.

The emergence of "mixed-blood" Cherokees in Euroamerican society in the early part of the nineteenth century is nonetheless remarkable. In addition to success in the economic sphere, many "mixed-bloods" negotiated hybridic Cherokee identities<sup>170</sup> through intermarriage with [W]hites,<sup>171</sup> conversion to Christianity, adoption of Western-style manners and dress, and the achievement of fluency in written and spoken English.<sup>172</sup> As Perdue notes, "Contact with a [W]hite parent or grandparent gave these people a head start toward 'civilization,' and it influenced them to identify linguistically with [W]hite society."<sup>173</sup> Economic prosperity

166. PERDUE, *supra* note 77, at 60.

167. PERDUE, *supra* note 121, at 96.

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[S]lavery did not permeate the Cherokee tribe but was concentrated in the hands of a very few: only 7.4 percent of tribal members held slaves. Slaveholders were concentrated in the more mixed-blood Cherokee communities and among the more mixed-blood families: only 1 percent of all full-blood families owned slaves. . . . This, of course, was because more mixed-blood families were wealthier and engaged in plantation agriculture.

THORNTON, *supra* note 50, at 53 (analyzing data from the 1835 census).

169. STURM, *supra* note 67, at 56 ("Although we can discern some correlation between [W]hite racial ancestry, a higher class standing, and slave ownership, there were also significant exceptions.").

170. The term "hybridities" appears in postcolonial theory and refers to those moments "when the scenario written by colonialism is given a performance by the native that estranges and undermines the colonialist script." Benita Perry, *Problems in Current Theories of Colonial Discourse*, in *THE POST-COLONIAL STUDIES READER* 36, 42 (Bill Ashcroft et al. eds., 1995). See S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 *TEMP. L. REV.* 89, 117–18 (2006) (discussing examples of Cherokee hybridities in the nineteenth century).

171. Perdue reports that "[w]hen the United States government embarked on its policy of 'civilization' . . . many Cherokees came to view matrilineal kinship as an aspect of their 'savage' existence which had to be abandoned. Consequently Cherokees began practicing the European pattern of inheritance, and in 1808 the council pledged 'to give protection to children as heirs to their father's property and to the widow's share.'" PERDUE, *supra* note 77, at 51.

172. PERDUE, *supra* note 121, at 87.

173. PERDUE, *supra* note 77, at 60. The 1835 census shows English literacy positively correlated with slaveholding: "Among the people living in slaveholding families . . . 39

through the plantation economy and successful negotiation of Cherokee identities under the conditions of Euroamerican cultural colonialism, especially by “mixed-bloods,” gave the Cherokees their reputation at the time as “the ‘most civilized’ of all the Indian nations.”<sup>174</sup> As McLoughlin and Conser observe, “The Cherokees, in short, were acquiring by 1835, only a generation after giving up warfare against advancing [W]hite expansion, a bourgeois socioeconomic structure.”<sup>175</sup>

However, the establishment of Cherokee identities under the conditions of plantation slavery required Cherokee masters to reproduce and even intensify racial stigma. Though some scholars have concluded that Cherokees “probably treated their slaves much better on the average than did their [W]hite counterparts,”<sup>176</sup> perhaps harkening back to a time before Cherokees learned to code skin-color as a sign of inferiority,<sup>177</sup> others have argued that “slavery among the Cherokees was little different from that in the [W]hite South,”<sup>178</sup> and “some Cherokee masters could be as cruel and vicious as their [W]hite counterparts.”<sup>179</sup>

The success of plantation slavery among an elite of the Cherokees in the first three decades of the nineteenth century, therefore, required a constellation of factors, among which were: government policies favoring “civilization” through yeoman husbandry; an influx of capital from the sale of certain tribal lands; an adequate and reliable supply of productive forces (land, tools, agricultural knowledge, and African labor); the subordination of

percent could read English, while only 13 percent were proficient at reading Cherokee. In the case of nonslaveholding Cherokees, less than 4 percent were capable of reading English, and 18 percent could read Cherokee.” *Id.*

174. McLoughlin, *supra* note 141, at 379. Sturm notes that the plantation economy created a class-division within the Cherokees between slaveholding “full-bloods” and non-slaveholding “mixed-bloods” but cautions it would be simplistic to reduce racial orientation to a proxy for “cultural orientation and social values (i.e., that mixed blood equals progressive or that full blood equals traditional).” STURM, *supra* note 67, at 55–57.

175. McLoughlin & Conser, *supra* note 139, at 697.

176. PERDUE, *supra* note 77, at 98. See also McLoughlin, *supra* note 141, at 381 (“It is generally argued that the Cherokees treated their slaves very leniently.”). McLoughlin takes issue with this claim and asserts treatment of slaves by “red” and “White” masters was equally variable. *Id.*

177. “Race as we understand it now was not the determining factor in a person’s tribal identity or tribal membership. Instead, lineage determined belonging. A person who appeared ‘Black’ and had a Native American mother would have been defined and accepted as Indian.” Miles, *supra* note 120, at 145 (referring to early colonial-era matrilineal kinship systems of Southeastern tribes including the Cherokee).

178. LITTLEFIELD, *supra* note 8, at 9.

179. Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE R.E.A.L.J. 61, 81 (2005). See also Terrion L. Williamson, *The Plight of “Nappy-Headed” Indians: The Role of Tribal Sovereignty in the Systematic Discrimination against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233, 240 (2004) (“One explanation for the differential treatment of Cherokee Freedmen is the Cherokee Nation’s adoption of slavery in its most vicious form.”).

clan-based obligations to the rule of American law; the transformation of an economy based on hunting and subsistence farming, to one devoted to the production of surplus goods for sale; the transformation of gendered labor roles within Cherokee society; and intermarriage with Whites and the creation of corresponding bonds of intimacy and obligation with the dominant society.

The productive organization and deployment of these social and economic opportunities, however, required Cherokee elites to implement Euroamerican racial hegemonies and a corresponding ideology of “blood” purity.<sup>180</sup> The Cherokee system of plantation slavery was premised on the Cherokee construction of persons of African descent as ontologically “other” and inferior to both Indians and Whites, and therefore, like horses and oxen, as appropriate entities for service in the fields and marketplaces of their masters.<sup>181</sup> Cherokees had been primed to embrace slavery by their participation in the Indian slave market of the eighteenth century, and now, in the nineteenth century, the social place already created for Black men and women to occupy became an economic space for exploitation by largely “mixed-blood,” White-acculturated Cherokees.<sup>182</sup>

This picture of Cherokee social and economic arrangements in the early nineteenth century, however, has the quality of a negative: it demonstrates how a subset of White-acculturated, often “mixed-blood” Cherokees, a tribal elite of critical historical importance, deployed Euroamerican racial ideologies to enslave African Americans for profit. Yet this picture is partial.

180. As used in this Article, “hegemonies” refers to the “scripts” of a dominant culture which are uncritically accepted and enacted by that culture and by the people whom they oppress. Racial hegemonies, for example, might express themselves in the unreflective sorting of people into colors, and ranking those colors in terms of status, or assigning “naturally” good or bad attributes to persons in those categories. Ideologies are based in hegemonies and have the form of rationalizations, explanations, or justifications of the status quo. Race science and Social Darwinism in the nineteenth century would be examples of ideologies based in the mutually reinforcing hegemonies of White, male, Euroamerican supremacy. On hegemony and its relation to ideology, see STURM, *supra* note 67, at 19–26 and sources cited therein.

181. On the status of slaves as both property and (legally responsible) persons, see, e.g., MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATION OF HUMANITY AND INTEREST* 158–69 (1981); Arthur F. Howington, *Not in the Condition of a Horse or an Ox: Ford v. Ford, the Law of Testamentary Manumission and the Tennessee Courts’ Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249–63 (1975).

182. It is important to observe that significant opposition to Cherokee acculturation to White society and its institutions existed within the tribe. Usually associated with “full-bloods,” the antipathy to accommodation received spiritual and political form in the creation of the Keetoowah Society. The Society united Cherokee religious self-understanding and nationalism, and has been characterized as “abolitionist” by some, and by others, as “not being pro-slavery, rather than being anti-slavery.” PATRICK N. MINGES, *SLAVERY IN THE CHEROKEE NATION: THE KEETOOWAH SOCIETY AND THE DEFINING OF A PEOPLE 1855–1867* 83 (Routledge 2003).

It does not reveal in what sense these Native Americans retained and fought for their identities as *Cherokees*. To understand this side of the picture, it is necessary to examine the rationale for the Cherokee Nation.

*b. Race as Nation*

In the early 1800s, the destabilization of the traditional Cherokee clan system led to the consolidation of the tribe around the image of the nation-state.<sup>183</sup> As historian Fay Yarbrough observes, “[i]n the nineteenth century, the strength of the clan system waned, and the concept of legal citizenship substituted for clan in determining legitimate membership in the Cherokee Nation.”<sup>184</sup> Under the clan system, tribal membership was conferred by birth to a Cherokee woman; a matrilineal society, the Cherokee were indifferent to the race of the father where membership status was concerned.<sup>185</sup> The marginalization of the clan system by Cherokee engagement with Euroamerican social, cultural and economic systems opened the way for new definitions of Cherokee tribal membership; by adopting a Euroamerican model of government as the tribe’s organizing principle, membership in a Cherokee clan was put in tension with, and, for many, eventually replaced by, Cherokee citizenship.<sup>186</sup>

The model of the nation served the Cherokees by providing a dual vantage point from which they could alternately project *outward*, to the federal government and to the states of the Union, a self-conception as a government, one among many, possessing the rights and dignity appropriate to a sovereign.<sup>187</sup> The model of the nation also provided the vantage

183. See STURM, *supra* note 67, at 43 (“[The] appropriation and internalization of Euroamerican notions of racial identity, in addition to concurrent changes in political organization, helped set the stage for the emergence of Cherokee nationalism in the early nineteenth century.”).

184. Fay Yarbrough, *Legislating Women’s Sexuality: Cherokee Marriage Laws in the Nineteenth Century*, 38 JOURNAL OF SOCIAL HISTORY 385, 387 (2004).

185. See *id.* at 386–87 (“The offspring of unions between Cherokees became members of their mother’s clan. . . . Matrilineal kinship meant that Cherokee women who married non-Cherokee men knew their children would have an undeniable claim to membership in the Nation. Unions between Cherokee men and non-Cherokee women, however, produced children with no clan affiliation, and therefore no rights in the Cherokee Nation. For much of Cherokee history, being born Cherokee meant being born of a Cherokee woman.”).

186. The supplanting of the clan system by the model of national citizenship varies among the Cherokee Nation, Eastern Band of Cherokees, and the United Keetoowah Band. I also would emphasize that many Cherokees, then and now, retain clan affiliations which are strong sources of personal and group identity.

187. The Cherokee Nation’s negotiation of its sovereign identity vis-à-vis the United States and the State of Georgia resulted in the famous Cherokee Cases of the Marshall Court. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Because Indian tribes are “domestic dependent nations” not “foreign nations” the U.S. Supreme Court has no original jurisdiction over them under Const. Art. III, § 2); *Worcester v. Georgia*, 31 U.S.

from which the tribe could look *inward* and assign to itself an identity as a people according to its own lights. The political identity of the Cherokee Nation would reflect both: a sovereign among nations and a people set apart.

From the start the national design intentionally imitated key features of the United States federal government and the ideology of rights:

[I]n the first three decades of the nineteenth century, [Cherokee] leaders established a bicameral legislature, a national police force, a supreme court, a elective system of representation based on geographic districts rather than towns, and in 1828, a written constitution patterned after that of the U.S. federal government. They also adopted a concept of tribal sovereignty that “shared much of the ideology of the individual sovereign states of the Union.” . . . [T]he new Cherokee state gradually displaced town politics, becoming the official administrative, bureaucratic, and political center of the Cherokees’ newly emerging national community.<sup>188</sup>

Race, however, became “a cornerstone of the national identity,” and the Cherokee’s adoption of the ideology of “race as nation” implied “that race, or racial metaphors of blood or kinship, could be used to define a nation ‘as a collective subject, as a superorganism with a unique biological-cultural essence.’”<sup>189</sup> The “new Cherokee state would increasingly replicate the racial ideologies and practices of the U.S. federal and state governments.”<sup>190</sup> As one of its first steps, the new government, in its Constitution of 1827, denied persons of “the African race” the right to hold office and the right to vote:

[N]o person shall be eligible to a seat in the General Council, but a free Cherokee male citizen, who shall have attained to the age of twenty-five years. The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to

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515, 583 (1832) (Indian tribes are “a separate and distinct people . . . vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it.”).

188. STURM, *supra* note 67, at 52–53 (quoting McLoughlin, *supra* note 155, at xvii). See also FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 189 (Univ. of Neb. Press 1984) (Cherokees in 1827 Constitution “asserted that they were one of the sovereign and independent nations of the earth with complete jurisdiction over their own territory”).

189. STURM, *supra* note 67, at 53 (quoting Ana Maria Alonso, *The Politics of Space, Time, and Substance: State Formation, Nationalism, and Ethnicity*, 23 *ANNUAL REVIEW OF ANTHROPOLOGY* 379, 384 (1994)).

190. STURM, *supra* note 67, at 54.

the customs and laws of this Nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father or mother side, shall be eligible to hold any office of profit, honor or trust under this Government.<sup>191</sup>

Additionally, “[a]ll free male citizens, (excepting negroes and descendants of [W]hite and Indian men by negro women who may have been set free,) who shall have attained to the age of eighteen years, shall be equally entitled to vote at all public elections.”<sup>192</sup>

The exclusion of persons of African descent from Cherokee Nation office-holding was continued in the successor to the 1827 Constitution, the post-Removal 1839 Constitution.<sup>193</sup> The 1839 Constitution also carried forward the denial of the voting franchise to slaves and women.<sup>194</sup>

Even before adoption of the 1827 Constitution, the Cherokee Council in the early 1820s passed a series of antimiscegenation laws like the one enacted in 1824, which prohibited “[i]ntermarriages between negro slaves, and Indians, or [W]hites,” stating such marriages “shall not be lawful,” and providing that anyone permitting “their negro slaves, to intermarry with Indians or [W]hites” would be liable to “the Cherokee Nation” for a fine; and further:

[A]ny male Indian or [W]hite man marrying a negro woman slave, he or they shall be punished with fifty-nine stripes on the bare back, and any Indian or [W]hite woman, marrying a negro man slave, shall be punished with twenty-five stripes.<sup>195</sup>

Such statutes had the effect of intensifying the distinction between Cherokees, here referred to racially as “Indians,” in contrast to “negro slaves” and “Whites.” In this way, Cherokee statutory law assigned roles of

191. CONST. OF THE CHEROKEE NATION, art. III, § 4 (1827), *reprinted in* STARR, *supra* note 110, at 56.

192. CONST. OF THE CHEROKEE NATION, art. III, § 7 (1827), *reprinted in* STARR, *supra* note 110, at 57.

193. *See* CONST. OF THE CHEROKEE NATION, art. III, § 5 (1839), *reprinted in* STARR, *supra* note 110, at 123.

194. *See* CONST. OF THE CHEROKEE NATION, art. III, § 7 (1839), *reprinted in* STARR, *supra* note 110, at 124.

195. STURM, *supra* note 67, at 54. The case of Shoe Boots, a Cherokee male who successfully petitioned the Council in 1824 to grant citizenship and freedom to his three children by Doll, his slave, is often cited as an exception to the social prohibition of intimate partnerships between Cherokees and persons of African descent. In granting his petition, the Council admonished him to father no more children with Doll. *See* TIYA MILES, *TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM* 126 (2005) (examining the story of Shoebottoms, Doll, and their family as a study of race and power in the Cherokee Nation).

normative intimacy according to a race-based system of meanings. Further, while the code produced “Indians,” “White men,” and “White women” in terms of race and gender, for Blacks only the code produced “docile bodies,” to use Foucault’s famous phrase, along three axes—race, gender, and servitude: “negro woman slave” and “negro man slave.”<sup>196</sup> Finally, while the code constructs the objects of its control and stipulates their normative relationships, it simultaneously establishes “the Cherokee Nation” as an offended sovereign, whose authority opposes lawbreakers per se, regardless of race or gender, and whose “stripes” produce, in Foucault’s terms, “the effect, in the rites of punishment, of a certain mechanism of power: of a power that not only did not hesitate to exert itself directly on bodies, but was exalted and strengthened by its visible manifestations.”<sup>197</sup>

The elimination of licit marriages between “negro slaves” on the one hand, and “Indians” or “Whites” on the other, focuses on slave-status: the 1827 Constitution “permitted citizenship, albeit with restrictions, for descendants of Cherokee women and free [B]lack men.”<sup>198</sup> If the 1827 Constitution can be said to look *backwards*, to the older clan system, in this recognition of citizenship, the action of the Council in 1825, to grant citizenship to the children of Cherokee men married to White women, looked *forward*, to the nation-model of citizenship: “The Cherokee Council extended citizenship to ‘the children of Cherokee men and [W]hite women living in the Cherokee Nation as man and wife’ and made them ‘entitled to all the immunities and privileges enjoyed by citizens descending from the Cherokee race, by the mother’s side.’”<sup>199</sup> As Yarbrough summarizes, “Cherokee men could now create Cherokee citizens.”<sup>200</sup>

Following the Removal Act of 1830, the pressure of the federal government and the State of Georgia, its militia, and lawless White settlers to obtain Cherokee land became overwhelming, and in 1835, an unauthorized group of Cherokees, a minority of citizens known as the Treaty Party, and the United States entered into the Treaty of New Echota for the sale of all remaining Cherokee lands east of the Mississippi. Leaders of the Treaty Party, an elite group of some of the wealthiest plantation owners,

196. On “docile bodies” as the objects of disciplinary systems peculiar to the modern age, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 136 (Vintage Books 1977) (“A body is docile that may be subjected, used, transformed and improved.”).

197. *Id.* at 57. Other laws passed by the Cherokee Council prior to Removal reflect similar attempts to objectify African descendants by denying them the liberties enjoyed by Euroamericans: “no contract or bargain entered into with any slave or slaves without the approbation of their masters shall be binding. . . .” (1819); “no one may purchase any item of property from a slave without permission from his owner” (1820); “no slave shall be allowed to sell or buy spiritous liquor” (1820). McLoughlin, *supra* note 141, at 381.

198. Yarbrough, *supra* note 184, at 389.

199. *Id.* at 388.

200. *Id.* at 389.

and their slaves immediately decamped for Indian Territory.<sup>201</sup> Though both the leadership of the Treaty Party and the majority political body, the National Party, owned slaves, the remaining Cherokees, who were more culturally conservative, now “associated slavery with the [W]hite southerners who had forced them from their homes and with the slaveholding Cherokees who had signed the fraudulent treaty.”<sup>202</sup> Attempts by Principal Chief Ross to retain their land base failed, and in the winter of 1838–39, at the bayonet-point of thousands of federal troops, approximately 16,000 Cherokee citizens and their slaves embarked for Indian Territory (present day northeastern Oklahoma) on what became known to Cherokees as *Nunna daul Isunyi*, “the trail where we cried.” An estimated one-quarter of the tribe and an unknown number of slaves perished on route.

The trauma of their forced march, displacement from ancestral lands, anger at their betrayal by fellow Cherokees, and ardent desire to survive as a nation led almost immediately to two defining political events: the confrontation and killing of most of the leaders of the Treaty Party and the signing of the 1839 Constitution. In these large gestures of sovereignty, the Cherokee Nation symbolically witnessed the end of one phase of its political life and announced the start of another.<sup>203</sup> When, in a ceremony in 1846, Principal Chief Ross finally accepted the Treaty of New Echota as a *fait accompli*, he shook hands with his arch enemy, Stand Watie, the sole surviving leader of the Treaty Party, and deftly acknowledged the biological and nationalistic fundaments of their bond, saying, “We are all of

201. ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 124 (Univ. of Okla. Press 1970). In 1808, a contingent of some 1130 Cherokees, known as the “Cherokees West” or “Old Settlers,” migrated west of the Mississippi. WOODWARD, *supra* note 137, at 131. Some 2,000 Cherokees joined the Old Settlers between 1836–38 in what is today eastern Oklahoma. *Id.* at 195. The promulgation of the Constitution of 1839 is significant to the Cherokee Nation today in part because it represents the political reunification of the Old Settlers (captioned the “Western Cherokees” in the Preamble) and the majority National Party (“Eastern Cherokees”) under a single government: “The Eastern and Western Cherokees having again re-united, and become one body politic, under the style and title of the Cherokee Nation . . .” STARR, *supra* note 110, at 122.

202. PERDUE, *supra* note 77, at 68.

203. While Chief Ross and the Cherokee government were not implicated in the assassinations of the Nation’s political enemies, the killings “by a group of Cherokees” were performed “in accordance with the law of 1829 which had made the cession of Cherokee land a capital offense.” *Id.* at 73 (describing the deceased as “executed”). Treaty Party leader John Ridge had stated, immediately after signing the traitorous Treaty of New Echota, “I feel as if I had just signed my own death warrant.” CONLEY, *supra* note 58, at 143. No one was ever charged in connection with the deaths, because contemporaneous with the signing of the Constitution, the Cherokee National Convention made a blanket grant of pardon and amnesty to “all persons, citizens of the eastern and western Cherokee nation, who may be chargeable with the act of murder or homicide . . .” STARR, *supra* note 110, at 119. The legal predicate of the killings in Cherokee law, known to all, the attendant political circumstances, and the grant of pardon and amnesty, make the deaths symbolic of an act of sovereignty, even if the killings were performed by individuals not acting under color of Cherokee law.

the household of the Cherokee family and of one blood . . . embracing each other as Countrymen, friends, and relatives.”<sup>204</sup>

In the years preceding the Civil War, the Cherokee Nation enacted increasingly severe slave codes. These codes re-entrenched the position of the “mixed-blood” elite who once again owned the majority of slaves, operated plantations (albeit on a smaller scale), and sought to control the Nation’s blood-based political and social identities. Slave rebellions in 1841, 1842, and 1850<sup>205</sup> prompted enactment of even harsher penalties on disobedient slaves and those would assist them in emulating the lifestyle of the Nation’s citizens. From 1841 to 1859, the following laws were passed by the Council (as summarized by McLoughlin):

1841—[N]o slave shall be allowed to carry firearms, knives, dirks, or other dangerous weapons

1842—[A]ny free negro or slave aiding another slave to run away shall receive 100 lashes and be removed from the Cherokee Nation

1848—[A]nyone teaching a negro to read or write shall be banished from the Cherokee Nation

1855—[N]o public school teacher “suspected of entertaining sentiments favorable to abolitionism” shall be allowed in the Nation

1859—[A]ll free [B]lacks in the Nation shall be required to leave (this bill though passed by both houses of the Cherokee legislature was vetoed by the chief).<sup>206</sup>

As McLoughlin observes, “it can be shown very easily that the status of [B]lack slaves and [B]lack freedmen among the Cherokees declined steadily over the years. Accepting the standards of neighboring [W]hite civilization, the Cherokees gradually adopted all the worst features of Southern [B]lack slave codes (including the mounted, armed patrols to enforce them).”<sup>207</sup> Yarbrough states:

[T]hroughout the nineteenth century, Cherokee authorities sharpened the line between Indians and people of African descent. The Nation also more closely aligned itself with the [W]hite race and adopted a racial ideology that focused on the difference between [B]lack and non-[B]lack instead of [W]hite and non-[W]hite. That is, whereas American society defined its members in terms that distinguished between those who were

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204. STURM, *supra* note 67, at 66.

205. McLoughlin, *supra* note 141, at 381.

206. *Id.*

207. *Id.*

[W]hite and everyone else, the Cherokees chose to focus on the similarities among all non-[B]lack peoples, making the distinction between those who were [B]lack and everyone else. This new racial identification was a great ideological shift for Cherokees who had seen themselves as not only distinct from [W]hites, but distinct from other Indian tribes as well.<sup>208</sup>

Expanding but also fundamentally revising the antimiscegenation law of 1824, the first law that the Council passed after Removal, on September 19, 1839, was entitled, "An Act to Prevent Amalgamation with Colored Persons," which specified more repressive restrictions on intermarriage, including the prohibition of intermarriage "between a free male or female citizen with any slave or person of color."<sup>209</sup> Significantly, where the 1824 law penalized White or Indian intermarriage with slaves, the post-Removal law, while retaining this prohibition, conceived the crime as one of Cherokee citizens' "amalgamation with colored persons." Thus, the first act of the new Cherokee government was to impose *as a civic obligation* the avoidance of inter-racial marriage when the citizen's partner was *other than White or Cherokee*. By statutory implication, to be a "pure blood" Cherokee was not to be a "person of color" and to be a good Cherokee citizen was to marry within racial boundaries (that is to say, to marry a White or another Cherokee). Further, to underscore the gravity of this racial-civic injunction, the penalty for violating the new statute was "fifty stripes for convicted females of both races and a hundred lashes for [B]lack males whereas the [pre-Removal laws] had punished [B]lack and Cherokee males equally but more severely than females."<sup>210</sup>

Yarbrough argues that the anti-amalgamation law "may have reflected a larger legal effort to protect the racial purity of the Cherokee Nation" by deterring men of African descent from forming intimate unions with Cherokee women, or by creating an incentive for Cherokee women to seek out Cherokee men.<sup>211</sup> Sturm echoes this theme in the context of citizenship criteria, when she observes that "[b]y excluding African Americans from the body politic, the Cherokee state was reproducing nineteenth-century Euroamerican racial ideologies in its own

208. Yarbrough, *supra* note 184, at 389.

209. PERDUE, *supra* note 77, at 84.

210. *Id.*

211. Yarbrough, *supra* note 184, at 393. Cherokee legislation in the 1840s and 1850s also made it increasingly difficult for White men to marry Cherokee women. The legal obstacles, involving a license application, a petition to the Council, testimonials of character from Cherokees, a significant fee, and, finally, an oath of allegiance of the Cherokee Nation, may have been promoted more by a desire to police national boundaries against dangerous White males than by a desire for racial purity. No corresponding obstacles existed for White women wishing to marry Cherokee men. Nonetheless, the laws had the effect, for Cherokee women, of concentrating the pool of easily-available suitors to Cherokee males. *See id.* at 398–400.

legislation, including the idea that national identity was linked to racial identity and the notion that ‘race-mixing’ with African Americans was polluting.”<sup>212</sup> In 1840 the Cherokees went even further, to make it unlawful for “any free negro or mulatto, *not of Cherokee blood*, to hold or own any improvements within the limits of this Nation.”<sup>213</sup> As Sturm explains, “The wording of this legislation is significant because it marks the first time when Cherokees officially began to conflate ideas of race and blood in their own political discourse and practices.”<sup>214</sup> Finally, historian Karen Woods writes that “[t]he regulation of ‘tribal blood’ through miscegenation laws was part of a policy to keep Cherokee property in the hands of Cherokee citizens and to protect sovereignty through the preservation of ‘Indian-ness.’”<sup>215</sup>

In summary, the rise of the Cherokee Nation effected a displacement of the traditional clan system, and with it, the exclusive right of Cherokee women to define, by their bodies, who would become members of the tribe. As my review of Cherokee law has shown, however, the construction of Cherokee identity along lines of race did not abandon biology when it assumed the form of nation. Rather, Cherokee law, as represented in its Constitution of 1827, Constitution of 1839, slave codes, and other acts of the legislature established Cherokee citizenship criteria as the elaboration of possibilities inherent in biological lineage, opening up the strictly matrilineal system to allow Cherokee men to generate new citizens through exogamy. The commitment of the Nation’s mixed-blood elite to the economic system of plantation slavery, however, presented dangerous opportunities for class-transgressions with slaves and miscegenation with [B]lacks, free or slave. In response, the Nation devoted considerable energy and attention to constructing and policing racial boundaries for the good of the Nation and, by 1840, for the purity of “Cherokee blood.” Indeed, by then, they were one and the same.<sup>216</sup>

#### 4. The Limits of Biological Definitions of Citizenship

The utility of “Cherokee blood” as a marker for citizenship is limited by the inaccuracy of the Dawes Rolls and by the Rolls’ reliance on

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212. STURM, *supra* note 67, at 70–71.

213. *Id.* at 71 (emphasis in original).

214. *Id.*

215. Karen M. Woods, *A “Wicked and Mischievous Connection”: The Origins of Indian-White Miscegenation Law*, 23 LEGAL STUD. FORUM 37, 68 (1999).

216. Legal scholar Ariela Gross writes, “For Native Americans [in the early nineteenth century], the conflation of ‘race’ and ‘nation’ offered some hope of avoiding being lumped together with African Americans as ‘people of color.’” Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 681 (2001).

nineteenth-century race science. The Rolls' inaccuracy is especially evident in three areas.

First, though purporting to separately identify Cherokees by blood and Freedmen, many on the Freedmen's roll descended from persons with "Indian blood." Despite the best efforts of the Nation's laws to prevent miscegenation, persons of African and Cherokee descents did marry and have children: the 1835 census reveals a small percentage of self-identified "Mixed 'Negro'" Cherokees in North Carolina, Georgia, Alabama, and Tennessee.<sup>217</sup> Following Removal, missionaries "reported that intermarriage continued and [antimiscegenation] laws were not enforced."<sup>218</sup> Historian Tiya Miles summarizes the matter, stating, "Interracial marriage in the slave quarters and in free communities of color meant that the Black population and the Indian population were overlapping and expanding and that the slave population included more and more persons of Black and Native descent."<sup>219</sup> This does not even take into account the descendants of persons born outside of marriage, perhaps as slaves, whose parents were of African and Cherokee descent.<sup>220</sup> Indeed, in an anthropological study conducted between 1926 and 1928, more than 25 percent of the African American population reported having Native American ancestry.<sup>221</sup>

Yet, the Freedmen's roll systematically excluded evidence of Native American ancestry, and agents refused to record it, even when proffers of proof of "Indian blood" were made by enrollees themselves. For example, Mary Walker, a woman of African-Cherokee heritage, attempted to enroll as a Cherokee citizen "by blood," after reciting her Cherokee ancestry to an agent of the Dawes Commission. She was refused by a second agent present, who insisted she be enrolled as a Freedman's descendant, saying, "She ain't no Cherokee. She's a nigger. That woman is a nigger and you are going to put her down as a nigger."<sup>222</sup> If not excluding enrollees from the "blood" rolls based on their appearance alone, Dawes agents channeled

217. Percentage of Cherokee "Mixed 'Negro'" population by state (1835): North Carolina (0.5), Georgia (0.01), Alabama (0.3), Tennessee (1.2). THORNTON, *supra* note 50, at 53.

218. PERDUE, *supra* note 77, at 85.

219. Miles, *supra* note 120, at 145.

220. On the history of the use of African-descended women's bodies by their Native American slave masters, see Miles, *supra* note 120, at 149–53. When the Cherokee Council passed a rape law in 1839, it mandated the death penalty for the rape of a free woman "lacking negro blood," regardless of the race of the perpetrator; however, "the statute is maddeningly silent" on whether the Nation even recognized the crime of rape of a Black woman, free or slave. See Yarbrough, *supra* note 184, at 393; see also SCOTT L. MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* 98 (Farrar Straus Giroux 2000) ("Out-of-wedlock mixed-race children [i.e., African-Cherokee] were not uncommon.").

221. Miles, *supra* note 120, at 144 (citing MELVILLE HERSKOVITS, *THE AMERICAN NEGRO: A STUDY OF RACE CROSSING* (1928)).

222. STURM, *supra* note 67, at 189.

enrollees like Mary Walker onto the Freedmen's roll by applying the rule of hypodescent, the so-called "one drop" rule, devised by Euroamerican slave owners, whereby "a person who has one drop of Black blood is Black,"<sup>223</sup> and therefore ineligible for inclusion on the Cherokee "blood" rolls.<sup>224</sup> Because the Freedmen's roll systematically omits proof of Cherokee ancestry where such ancestry could be established by independent evidence, and because there is no other Dawes roll on which such ancestry can appear, the Dawes Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by "blood."<sup>225</sup>

Second, the Dawes Rolls elided the Cherokee ancestry of African-descended persons by accepting only proof of Cherokee "blood" through the applicant's mother.<sup>226</sup> Although, as we have seen, the Anti-Amalgamation Act penalized intermarriage of both male and female Cherokee citizens with "persons of color," and imposed capital punishment for the rape of Cherokee women by men of any race, it is unknown, as historian Yarbrough states, whether Cherokee statutory law even penal-

223. Miles, *supra* note 120, at 147. On the presumptions of White "blood" superiority that underpin the rule of hypodescent, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 26 (1991) ("[H]ypodescent imposes racial subordination through its implied validation of [W]hite racial purity."). For a response to Gotanda which argues for "a more balanced view of the one drop rule" in the context of multiracial classifications by the U.S. Census, see Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census,* 95 MICH. L. REV. 1161, 1166 (1997).

224. At the same time, Dawes agents confronted with persons of Euroamerican-Cherokee ancestry systematically *included* them on the Cherokee by blood rolls. This selective use of hypodescent illustrates that the method operated within a larger hierarchy of races and "bloods." Some Freedmen or descendants sued to establish their Native American heritage according to biology, but were consistently rebuffed by the courts, who ruled that "the Dawes Commission was a quasi-judicial tribunal and that its findings concerning the amount of blood or the existence of Indian blood could not be attacked by outside evidence." Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935,* 51 S.D. L. REV. 1, 43 (2006).

225. As legal scholar Carla Pratt states, regarding the enrollment of the Seminoles, "The creation of the Blood Roll as the official record of all Indians generated the false cultural belief within the tribe, the federal government, and American society that all of the 'real' Indians were named on the Blood Roll, and the people on the Freedmen Roll were 'just [B]lack.'" Carla D. Pratt, *Tribal Kulturkampf: The Role of Race in Constructing Native American Identity,* 35 SETON HALL L. REV. 1241, 1255 (2005).

226. See DEBO, *supra* note 91, at 42.

[A]pparently at the time of the enrolment the Dawes Commission regularly enrolled all with apparent Negro blood as freedmen. If any of them had Indian blood they were not recognized as Indians by tribal law, for there was no way by which a valid marriage could be contracted. Illegitimate children of [W]hite fathers and Negro mothers are, of course, uniformly classed as Negroes by [W]hite Americans, and the Indians had followed the same rule.

ized sexual intercourse, consensual or non-consensual, between Cherokee men and African-descended women.<sup>227</sup> Given the unequal positions of power between Cherokee masters and their African slaves, and the disincentives created by Cherokee law for intermarriage between [B]lack men and Cherokee women, or rape of Cherokee women by [B]lack men, it is reasonable to expect that the typical descendant of otherwise prohibited interracial unions would be African-descended through the mother's line. The Dawes registration system, based on its own "amalgamation" of Indian blood and matrilineal preference-making, shunted descendants of Cherokee men and African women onto the Freedmen's roll. Because this "amalgamation" of race and matrilinearity resulted in reducing the roster of persons otherwise eligible for inclusion on the Cherokee "blood" rolls, the Dawes Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by "blood."

Third, biology is limited in its ability to establish citizenship when otherwise-eligible persons choose not to participate in the legal process by which biology-based citizenship is established. When the Dawes Commission came to enroll tribal members, many culturally conservative Cherokees refused to participate, on the grounds that land severance violated basic principles of Cherokee society. These Cherokees, like similar-minded members of other tribes in Indian Territory, saw clearly that the break-up of their tribal land base was just the first step in a larger federal project to destroy their indigenous cultures. Called "irreconcilables," and often associated with "full-bloodedness," these tribal members adopted individual and coordinated strategies to discourage other Cherokees from enrolling, and to try to avoid the federal agents sent to seek them out.<sup>228</sup> However, as Garrouette points out, "the descendants of those traditionalists find themselves worse off, in the modern, legal context, for their forbearers' success in the fight to maintain cultural integrity. By the criteria their tribes have established, they can never become enrolled citizens."<sup>229</sup> The plight of the "irreconcilables" shows that biology is a problematic predicate for Cherokee citizenship when the legal regime establishing citizenship faces a legitimacy-crisis in the eyes of a significant number of biologically-eligible Cherokees. The story of the "irreconcilables" also indicates that biology-based citizenship requirements were problematic

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227. See Yarbrough, *supra* note 184, at 393. See also Miles, *supra* note 120; MALCOMSON, *supra* note 220.

228. See DEBO, *supra* note 91, at 54 ("With the Indian genius for collective action, the Creek, Cherokee, Choctaw, and Chickasaw irreconcilables formed the Four Mothers Society, said at one time to have twenty-four thousand members."); *id.* at 57 ("When they refused to register their choice, the Dawes Commission made the selection for them . . . but the Indians refused to accept the selections, and when the certificates and patents were mailed to them, they returned them."); *id.* at 98 ("The fullblood Cherokees were brought from the remote hill settlements and guided through the land office by the real estate speculators in the same manner as the Choctaws.").

229. GARROUETTE, *supra* note 48, at 22.

not only to the Freedmen, but to a wider social constituency of the Nation. To the extent that biological Cherokees refused to grant legitimacy to the Dawes Rolls by participating in enrollment, the Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by “blood.”

The problems of hypodescent, race-matrilinearity, and social legitimacy identified above point to a more fundamental limitation on using biology to establish Cherokee citizenship. The Dawes Rolls’ taxonomy of possible Cherokee citizens is flawed because it rests upon the “long-discredited belief that each race [has] its own blood type, which [is] correlated with physical appearance. . . .”<sup>230</sup> It is quite likely that the Dawes agents who denied Mary Walker enrollment on the “blood” rolls would have agreed with the postulate of nineteenth-century race science that “blood will tell.”

The roots of race science can be traced to Samuel Morton, the American scientist whose work from 1831 to 1851 rejected monogenesis and the biblically-inspired single-origin theory of “the races” in favor of a polygenetic theory of multiple human origins in multiple races, which was still, however, based in Christian scripture.<sup>231</sup> Morton ranked “the races” in terms of intelligence and cultural superiority based on various features (circumference, volume) of their skulls. Morton’s conclusions, which placed Caucasians at the top of the hierarchy, consigned members of the “colored races”—including both Indians and Blacks—to the lower ranks, and squared neatly with the racist ideology of southern planters, who welcomed Morton’s work. On his death in 1851, a leading scientific journal praised him, saying, “We of the South should consider him as our benefactor, for aiding most materially in giving to the negro his true position as an inferior race.”<sup>232</sup>

Morton was succeeded by Lewis Henry Morgan, whose Darwin-inspired theories of social evolution would prove highly influential in the period when the Dawes Rolls were constructed. Morgan predicted the imminent extinction of Native Americans as being biologically weaker and frailer than their White competitors, “the fittest,” who would “survive” them.<sup>233</sup> The notion that “races” compete for survival, and fare better or worse based in part on their intrinsic qualities, readily tracked the racist

230. Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46. See also Steve Russell, *The Racial Paradox of Tribal Citizenship*, 46 AM. STUDIES 147, 149–57 (2005) (criticizing race and blood quantum as the basis for Cherokee citizenship and identity).

231. DAVID HURST THOMAS, *SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY* 36–43 (Basic Books 2000); STEPHEN JAY GOULD, *THE MISMESURE OF MAN* 62–104 (W.W. Norton & Co. 1996) (1981) (“American Polygeny and Craniometry before Darwin: Blacks and Indians as Separate, Inferior Species”).

232. THOMAS, *supra* note 231, at 42.

233. *Id.* at 44–51, 102–20.

ideologies of the day and did nothing to disturb either the racial essentialism underlying American public policy and popular opinion<sup>234</sup> or anthropologists' rankings of "the races" according to physiognomy.<sup>235</sup> As a result, "blood" still past from generation to generation, albeit now under the twin constraints of inter-race competition and its own inherent, biological limitations.

Progressive social science at the end of the nineteenth century, therefore, carried forward the Euroamerican racial significations of previous centuries,<sup>236</sup> but authorized them within a new disciplinary matrix of federal Indian law and policy. The plan of the federal government to allot tribal lands to Indians in severalty, despite its often clumsy or corrupt implementation in the field,<sup>237</sup> represents the operation of law under the conditions of race science: both science and "common sense" showed Indians to be a weak and vanishing race, whose only hope lay in assimilation and the embrace of private property; and "negroes" to be even less evolved than Indians and naturally suited only for the subsistence farming that their allotments would provide.<sup>238</sup> That the biological theories underpinning

234. High fertility rates among recent U.S. immigrants from southern and eastern Europe during the period 1880 to 1920, and an influx of Irish immigrants, created great distress among "native born" Americans, who articulated their fears in terms of race and decried the "suicide of race." See Barry Edmonston & Jeffrey S. Passel, *How Immigration and Intermarriage Affect the Racial and Ethnic Composition of the U.S. Population*, in IMMIGRATION AND OPPORTUNITY: RACE, ETHNICITY, AND EMPLOYMENT IN THE UNITED STATES 373, 374 (Frank D. Bean & Stephanie Bell-Rose eds., Russell Sage Foundation 1999). See also L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 752 n.329 (2001).

235. "Although Morton's belief in separate racial creations was largely forgotten after the Civil War, the almost obsessive urge to classify human skulls into fixed, unchanging races or hereditary 'types' continued undiminished. During this period . . . mainstream anthropology was still dividing humanity into a fixed number of races . . ." THOMAS, *supra* note 231, at 103.

236. See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1940 (2000) ("By the late nineteenth century, the connection between [W]hiteness and the ability to be part of the American body politic had been underscored by race scientists, some working from the humanist traditions of history and philosophy, and others working in the new fields of natural history opened up by Charles Darwin and others.").

237. See Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 280 (2001) (stating that Dawes Rolls' "blood quantum determinations were carelessly performed and routinely inaccurate.").

238. The "common sense" that accepted the rule of hypodescent in early twentieth century America, for example, is reflected in views on the intelligence of persons of African-European ancestry. As historian Murray Wickett reports, "[M]ost [W]hites did believe that they [Black-White persons] were more intelligent than pure [B]lacks. One [Oklahoma] settler referred to a mulatto family that lived close by as 'clean colored folks, you know, they wasn't . . . real dark. They . . . weren't niggers you know. Just mulattos.'" MURRAY R. WICKETT, *CONTESTED TERRITORY: WHITES, NATIVE AMERICANS AND AFRICAN AMERICANS IN OKLAHOMA, 1865-1907* 40 (La. State Univ. Press 2000). See also Michael A. Elliott, *Telling the Difference:*

these social policies and their racist ideologies are utterly false is now virtually beyond challenge.<sup>239</sup> As Garrouette states:

A final concern [with] biological definitions of [Native American] identity is their inextricable entanglement with the notion of race. Biological definitions promote the notion that “race” constitutes an objective, genetically based difference between groups of people. Most Americans accept this assumption, unaware that it runs contrary to most current scientific knowledge, which tends to view racial distinctions as significant social, but not biological, realities.<sup>240</sup>

Consequently, the wisdom of employing the Dawes Rolls as a determinant of Native American identity must be questioned; especially, though not only, the use of those rolls which claim to denote “Indians by blood.” They should be questioned not because they are inaccurate indicators of Native American ancestry for those listed (though they may be that as well),<sup>241</sup> but because they recapitulate a system of race hierarchies based on bogus science.

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*Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 *LAW & SOC. INQUIRY* 611, 617 (“[L]aws that defined race through biological ancestry became more common only after Reconstruction, and the fraction of ‘blood’ requisite for African American identity most often decreased after the turn of the twentieth century.”).

239. In the following quotation from legal scholar Scott Gould, “the Dawes Rolls” may be substituted for “the census” to the same effect:

[C]onsiderable doubt exists whether race can even be quantified scientifically. Prior to the science of genetics, racial characteristics were believed to be inherited by blood, hence the preoccupation with blood quanta in the census. References to Indians as “full-bloods” and “mixed bloods” in the nineteenth century (and persisting into the twenty-first) stem from this misconception. Racial divisions based on genes are also proving to be unreliable. . . . Indeed, the recently completed mapping of the human genome suggests that humans and their nearest primate relatives, the chimpanzees, may share an almost identical set of genes. There is no taxonomic basis in biology or physiology to support the racial distinctions used by the U.S. Census.

Gould, *supra* note 234, at 754–55. See also Wright, *supra* note 230 (“Whatever the word ‘race’ may mean elsewhere in the world, or to the world of science, it is clear that in America the categories are arbitrary, confused, and hopelessly intermingled.”).

240. GARROUTTE, *supra* note 48, at 58.

241. See *id.* at 24 (discussing the phenomenon of “five-dollar Indians”—White homesteaders who bribed Dawes agents to be listed on the blood rolls).

## D. From Biology to Ancestry, From Legal Fetishism to Law

The foregoing analysis demonstrates that a tribal citizenship system, like that of the Cherokee Nation, which relies exclusively on the Dawes Rolls, necessarily authorizes membership determinations based on nineteenth-century categories of race.<sup>242</sup> The system does so not because of the personal animus of present-day tribal leaders or registration officials toward persons of color.<sup>243</sup> The Dawes Rolls reflect in very specific ways, however, the effects of race hierarchies (and normative assumptions of gender, legitimacy, property, and law) which are reproduced anew each time the Nation processes an application of tribal citizenship and each time the federal government does, or does not, issue a Certificate of Degree of Indian Blood. For the Cherokee Nation, and perhaps for other Indian nations who look to the Dawes Rolls for citizenship criteria, what seems to be required is no less than the rescue of ancestry from biology.<sup>244</sup>

By “biology,” I mean the social construction of racial identities upon heredity, as demonstrated in the history of Cherokee self-identity and Cherokee citizenship requirements in the eighteenth and nineteenth centuries. If Cherokee national identity is to escape its continued construction upon the effects of a spurious race science, Cherokees must be attentive to their “official” genealogy’s structural and historical affiliation with that false god, and re-imagine criteria of citizenship based not on “Indian blood” but on new, non-racialized understandings of and appreciation for Cherokee ancestry.<sup>245</sup>

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242. “Southern historians should not be surprised that the concern with ‘blood’ that Indians throughout the nation now share originated in the antebellum South where the economic, social, and political system rested on the enslavement of one race by another. The legacy of slavery was a regional obsession with race as a signifier of power.” PERDUE, *supra* note 121, at 98.

243. Nonetheless, Cherokee people, like others in the United States, are not immune to color bias. Sturm’s interviews with individual Cherokees identified “a long-held Cherokee bias against dark skin” and a bias toward light-skinned persons. STURM, *supra* note 67, at 189–90. One of her informants, speaking in the late 1990s, said, “Cherokees have always prided themselves in being a light-skinned people.” *Id.* at 190. Sturm comments on this statement, saying, “A Cherokee bias against dark skin, the result of their adaptation of a system of African racial slavery in the eighteenth and nineteenth centuries, provides the simplest and more direct explanation for their social treatment and racial classification of multiracial individuals with [B]lack ancestry even today.” *Id.*

244. On the distinction of race and ancestry in Native American tribes as it pertains to federal protections against race-based discrimination under the Fifteenth Amendment, see Gavin Clarkson, *Not Because They Are Brown, but Because of Ea: Rice v. Cayetano*, 528 U.S. 495 (2000), 24 HARV. J.L. & PUB. POL’Y 921, 950 (2001) (“The [concurring Justices’] fixation on race is ill-founded when dealing with the political status of Indian tribal membership. The color of one’s skin is not the determining factor for tribal membership; it is one’s ancestry. For Indian tribes, ancestry need not be a proxy for race.”).

245. See Joyce A. McCray Pearson, *Red and Black—A Divided Seminole Nation: Davis v. U.S.*, 14 KAN. J.L. & PUB. POL’Y 607, 630 (2005) (“Yes, ancestry is important. But when the

But Cherokees must also rescue law from legalism—an attachment to the authority of the Dawes Rolls that borders on fetishism.<sup>246</sup> The power of the Dawes Rolls over Cherokee political identity is evident in the citizenship provisions of the 1976 Constitution,<sup>247</sup> the 1999 Constitution,<sup>248</sup> the opinion of the *Lucy Allen* majority,<sup>249</sup> and in the following statement by Chief Smith, defending the race-impartiality of Cherokee citizenship criteria:

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truth about ancestry is obscured by man-made constructs and rules that divide people purely along racial lines and the way they look, as in the case of the Dawes [R]olls, it is imperative that we take time to try and undo those wrongs.”); John Rockwell Snowden, Wayne Tyndall & David Smith, *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 236 (2001) (calling on tribes to reject race-based citizenship criteria); Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture: The Harry Batchelor Address*, 13 ST. THOMAS L. REV. 11, 15 (2000) (on the irrational and culturally destructive effects of the Dawes Rolls today).

246. On the idea of “legal fetishism” as a regard for legal regimes such as the Dawes Rolls which fails to give sufficient attention to the role of the subject in producing, interpreting, or organizing those regimes, see Anthony Paul Farley, *The Apogee of the Commodity*, 53 DEPAUL L. REV. 1229, 1233 (2004) (“We have been trained to see, and do in fact see, the rules as if they determine the circumstances of their own application. This is legal fetishism.”). Farley understands Euroamerican law in North America since the seventeenth century as devoted to the commodification of Blacks by Whites:

[A] fetish is an artifact that is treated as if it were not the product of human work. . . . Law, looked upon as if it were something other than the *force* of the system of marks and the system of property, is a fetish. Law, looked upon as if it were something other than [W]hite-over-[B]lack, is a fetish. Law is [W]hite-over-[B]lack, [W]hite-over-[B]lack only, and that continually.

*Id.* at 1236. See also Jack M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 108–109 (1993) (“When jurisprudential discussions neglect what the legal subject brings to the object of interpretation, they project the subject’s contribution onto the object, thereby manifesting this contribution as a feature or property of law.”).

247. CONST. OF THE CHEROKEE NATION art. III, § 1 (1976) (“All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls . . .”).

248. CONST. OF THE CHEROKEE NATION art. IV, § 1 (1999) (“All citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls . . .”).

249. “[T]he 1975 Constitution affirms these rights by linking citizenship to one single document: the Dawes Rolls.” *Lucy Allen*, JAT-04-09 at 4. The *Lucy Allen* majority affirms the importance of Cherokee ancestry (which it calls “blood”) while challenging the legal hegemony that the Dawes Rolls exercises over Cherokee citizenship, stating, “It is not clear that the Dawes Commission had any appreciation for the fact that Indian blood, of the various tribes, is different. Shawnee blood is not Cherokee blood. Delaware blood is not Cherokee blood. It is important for this Court to question whether all these federal blood degrees really matter today, for purposes of Cherokee citizenship laws.” *Id.* at 8–9.

[T]he other thing that is clear is that the Cherokee Nation Constitution is not based on race. People of many different ethnic backgrounds, African Americans, [W]hite Americans and Hispanic Americans, *have Cherokee ancestors on the Dawes Roll*; and they are unquestionably entitled to Cherokee Nation citizenship. However, someone will undoubtedly play the race card in this debate.<sup>250</sup>

The attachment of Cherokee law to the Dawes Rolls is reminiscent of the authority attached to another artifact of colonialism, the Bible (“the English book”), when it was introduced to the people of India, as presented by postcolonial theorist, Homi Bhabha:

[T]he discovery of the book is, at once, a moment of originality and authority. It is, as well, a process of displacement that, paradoxically, makes the presence of the book wondrous to the extent it is repeated, translated, misread, displaced . . . [T]he emblem of the English book—‘signs taken for wonders’—[is] an insignia of colonial authority and a signifier of colonial desire and discipline.<sup>251</sup>

The Dawes Rolls, too, are such an “insignia” of colonial authority (over Native Americans), desire (for land), and discipline (of Indians “by blood,” and the “adopted” peoples: “Freedmen,” “Intermarried Whites,” and “adopted” Shawnee and Delaware). Like the enunciation of “the English book,” the action of Congress to close the rolls of the Cherokee Nation as of March 4, 1907<sup>252</sup> was a moment of “originality and authority” for the tribe, and, with each new member created, each Freedmen lawsuit, each struggle over the right to set citizenship criteria, the authority of the Dawes Rolls has grown ever more “wondrous.”<sup>253</sup>

In place of this legal fetishism of the Dawes Rolls, which alienates Cherokees from their sovereign power of self-determination, I believe the Cherokee Nation should begin to consider alternative criteria for establishing national citizenship.<sup>254</sup> In short, I believe Cherokees must reclaim

250. *Freedmen Statement*, *supra* note 19 (emphasis added).

251. HOMI BHABHA, *THE LOCATION OF CULTURE* 145–46 (Routledge 1994).

252. The rolls of the Cherokee Nation were closed by Act of Congress, April 26, 1906. 34 Stat. 137, 59th Cong. (1906). After 1907, “some duplications were . . . canceled, and 312 names were added by act of Congress in 1914.” DEBO, *supra* note 91, at 47.

253. See Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 696 (1995) (“[T]hat federal practices that were designed to assimilate the Indian population employed blood quantum as the measure of Indian identity suggests a deep irony in tribal acceptance of similar blood quantum requirements.”).

254. The irony that the displaced tribes of Oklahoma, who lost much of their land bases through allotment based on the method of “blood quantum,” would fixate on “blood quantum” as an indicia of citizenship in their own nations is not lost on Perdue, who

ancestry from biology and articulate a new political relationship to their individual and collective pasts, one which does not use law to deploy categories based on colonialist racial ideologies to exclude potential citizens.

To decide the question of the Freedmen's descendants' status, I suggest, Cherokees by "blood" and the Freedmen's descendants should engage in a searching dialogue on political and social identity, one that expressly includes race. In the following part, I will elaborate a version of the model of Radical Indigenism, articulated by Cherokee sociologist Eva Garrouette, as one way in which such a dialogue might be conducted, and explore how it could organize discussion around the Freedmen controversy.

### III. RADICAL INDIGENISM AS A RESOURCE FOR RESOLVING THE FREEDMEN CONTROVERSY

#### A. Foundational Commitments

The model of Radical Indigenism set forth by Garrouette attempts to offer a way for academics to engage in scholarly research about Native Americans while respecting the worldviews of the indigenous peoples they study.<sup>255</sup> As Garrouette explains, "radical" does not intend to connote either a commitment to Marxist theory or an unnecessarily confrontational stance, but rather a focus on the "root" (*radix*) of indigenous knowledge, and its sources in the community and tradition:

[R]adical Indigenism illuminates differences in assumptions about knowledge that are at the root of the dominant culture's misunderstanding and subordination of indigenous knowledge. It argues for the reassertion and rebuilding of traditional knowledge from its roots, its fundamental principles.<sup>256</sup>

I propose it, and adapt it, as a possible model by which indigenous communities like the Cherokee Nation, who are struggling to define their political identities, may do so from within their own assumptions and methods and not in response to heteronomous criteria.<sup>257</sup>

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writes, "[A]llotment rolls with their 'blood quantum' became the basis of modern tribal membership, and in a great historical irony, the language of blood permeates tribal politics into the twenty-first century." PERDUE, *supra* note 121, at 98.

255. GARROUETTE, *supra* note 48, at 101–104 (identifying Radical Indigenism and distinguishing it from both "academic colonialism" and postcolonial theory).

256. *Id.* at 101.

257. The version of Radical Indigenism that I propose has resonance with the project set forth in Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine*:

Consistent with the above, therefore, a foundational commitment of the model as I propose it is to the right of federally-recognized tribes to determine their criteria for citizenship.<sup>258</sup> A corollary of this commitment is the rejection of the view, expressed by some scholars, that Congress should exercise its plenary power over Indian tribes, or federal courts should expand their interpretations of existing statutes, to abrogate tribal sovereign immunity and limit the scope of permissible tribal citizenship criteria.<sup>259</sup>

A second basic commitment of the model is to the rationality of indigenous worldviews, “that American Indian (and other indigenous) philosophies of knowledge are rational, articulable, coherent logics for ordering and knowing the world.”<sup>260</sup> Thus, no matter how different from Euroamerican conceptions of the world an indigenous worldview may

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*Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 196 (2001) (“[Cultural sovereignty is] the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures”); and *id.* at 197 (“[T]he central challenge of cultural sovereignty is to reach an understanding of sovereignty that is generated from *within* tribal societies and carries a cultural meaning consistent with those traditions.”) (emphasis in original). This Article presumes that tribal self-governance—political sovereignty—is a necessary condition for robust cultural sovereignty, hence my first foundational commitment, *see infra* notes 258–259 and accompanying text.

258. The first foundational commitment is my own and does not necessarily reflect Garrouette’s understanding of Radical Indigenism, though I believe it is consistent with the version of the model she presents in *REAL INDIANS*.

259. *See, e.g.*, Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes’ Sovereign Power over Membership*, 92 VA. L. REV. 793, 863 (2006) (“Bearing in mind the destructive potential of plenary membership power . . . Congress should exercise its power over federally recognized Indian tribes and abrogate, at least in part, tribal citizenship power.”); Williamson, *supra* note 179, at 262–68 (urging action by executive agencies, Congress, and courts to protect Freedmen’s descendants from “discriminatory tribal policies” by imposing federal equal protection guarantees); Pratt, *supra* note 179, at 113–14 (urging action by Congress to grant citizenship to Freedmen’s descendants where “self-determination becomes an oppressive tool used to exclude some Indians on the basis of race. . . . [W]hen the restriction or limitation on tribal membership is rooted in notions of racial superiority, it does not serve any legitimate purpose.”); Pratt, *supra* note 225, at 1260 (“The use of sovereign immunity to protect tribal identity . . . ignores the racist origins of the legal rules that define Indian Seminole identity and serves to further subjugate people of color, specifically [B]lack Indians, by continuing the enforcement of the corrupt rule of hypo-descent.”). For arguments rejecting the abrogation of tribal sovereign immunity and the compromise of the right of tribes to set citizenship criteria, *see* Riley, *supra* note 46 and accompanying text; Goldberg, *supra* note 113 and accompanying text. *See also* Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 958–66 (2002) (analyzing arguments that Indian classifications are political, not social, when they rely on tribal citizenship, not ancestry); Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1394 (2002) (“Courts should frankly acknowledge and affirm the kinship- and descent-based nature of tribal communities, recognizing that the Constitution allows Congress to legislate for communities defined on that basis.”).

260. GARROUETTE, *supra* note 48, at 113.

be,<sup>261</sup> it remains possible in theory to specify that worldview in terms of tribal or band membership criteria, and in the case of indigenous groups that are patterned after nations, in terms of citizenship criteria.

A third strong commitment of the model is to the modest role any one person should play in the articulation of both problems and solutions affecting one's tribe; in this regard, I echo Garroutte, herself a citizen of the Cherokee Nation, when she says that "[w]hat follows is not meant as a *prescription* for how tribes should think about identity issues; rather, it is a *suggestive exploration* of a place from which they might begin to work out their own definitions of identity with the participation of all their members."<sup>262</sup> This implies a corresponding commitment on the part of individual tribal members to submit individual notions of citizenship criteria to the test of collective deliberation by the tribe as a whole.

### B. Assumptions of the Model

The version of Radical Indigenism that I propose offers three assumptions for guiding dialogue about tribal political identity. The first two, practicality and spirituality, are derived from Garroutte; the third, reflection on the effects of colonialism, is my own.

#### 1. Role of Practical Knowledge

The first assumption of the model emphasizes the practical quality of the pursuit of knowledge. Knowledge exists first and foremost for the sake of making a concrete difference in the lived world of tribal members. This means, as Garroutte states, that the definition of tribal identity must

[B]e *robust*, allowing for sufficiently strong community boundaries. But it should be *flexible* as well, because flexibility allows for the embrace of those who truly belong to the community, even if they do not satisfy certain technical criteria

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261. For literature on the differences between Euroamerican and Native American worldviews and spiritual traditions from indigenous perspectives, see, e.g., VINE DELORIA, *GOD IS RED: A NATIVE VIEW OF RELIGION* 237–55 (30th anniversary ed. 2003) (examining impact of contemporary American culture on tribal religions); HUSTON SMITH, *A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM* 162–83 (Univ. of Calif. Press 2006) (conversation with Chief Oren Lyons [Onandaga] on Traditional Instructions of spiritual law); Maureen E. Smith, *Crippling the Spirit, Wounding the Soul: Native American Spiritual and Religious Suppression*, in *AMERICAN INDIAN THOUGHT* 116–29 (Anne Waters ed., Blackwell Publishing 2004) (overview of Euroamerican and Native American conflicts over religious belief systems and recent shifts in the law favorable to indigenous peoples' spiritual practices).

262. GARROUTTE, *supra* note 48, at 113 (emphasis in original).

of membership. Flexibility allows the community to remain open to the entry of new and valued resources.<sup>263</sup>

Freedmen's descendants, as well as members of the other "adopted" groups who contribute to the life of the Nation, have a stake as citizens in constructing membership criteria that are robust: clear, bright-line rules that establish boundaries between citizens and non-citizens. For the reasons discussed above, the exclusive authority of the Dawes Rolls should be abandoned.<sup>264</sup> In dialogue with Cherokees by ancestry, new legal touchstones could be identified for citizenship. These might include Cherokee census rolls prepared prior to the Dawes Rolls by Cherokees themselves;<sup>265</sup> rolls in dispute that allegedly include names of Freedmen or their descendants that were elided by the Dawes Rolls (Wallace Roll, Kern-Clifton Roll); some combination of these rolls; or rolls plus other indicia of genealogical connection deemed reliable by the Nation (on analogy with the "ancient documents" exception to the hearsay rule).<sup>266</sup>

The aim of this reform is two-fold: to decenter the Dawes Rolls as the exclusive authority for Cherokee citizenship and subordinate the Dawes Rolls to a larger genus, determined by the tribe, which might be called, simply, "reliable records"; and, second, to introduce flexibility into citizenship criteria by creating a range of authorities through which a prospective tribal member could attempt to establish citizenship. One can imagine a default system which privileged a certain set of rolls for citizenship, accompanied by a principled mechanism for vetting special cases, where those whose ancestors had failed to enroll, or whose enrollment allegedly had been lost, could attempt to establish ancestral relationship

263. *Id.* at 115 (emphasis in original).

264. I acknowledge it would be difficult to achieve this decentering. As Carole Goldberg has observed, "Once a roll is established as the basis for citizenship, it becomes politically difficult to expand citizenship beyond its confines." Goldberg, *supra* note 113, at 458. Nonetheless, the assumption of practicality requires citizenship criteria to be flexible, as well as bounded, and for that reason I propose the alternatives set forth above.

265. Justice Leeds, writing for the *Lucy Allen* majority, noted that

[T]he Dawes Commission Rolls were not created by the federal government from scratch. When the Dawes Commission compiled its rolls, they referred to previous Cherokee Nation census records which also included a broad citizenry. Most of the people listed on the Dawes Rolls will also appear on the Cherokee Nation's own tribally controlled censuses that pre-date the Dawes Rolls. The Cherokee Nation's own censuses included Freedmen in addition to 'native Cherokees,' intermarried [W]hites, and Indians of other tribes, all of whom were recognized by the Cherokee Nation as citizens.

Lucy Allen, JAT-04-09 at 6.

266. The "ancient documents" exception to the hearsay rule as codified in the Federal Rules of Evidence allows into evidence probative "[s]tatements in a document in existence twenty years or more the authenticity of which is established." FED. R. EVID. 803(16).

with the Nation, perhaps by means of “ancient documents.” This would respect the role of practical knowledge to establish citizenship criteria that are both robust and flexible.

## 2. Relationship to Spiritual Heritage

The second assumption of Radical Indigenism focuses on the “attentiveness” of Native American communities to “the distinctly *spiritual* dimensions of inquiry.”<sup>267</sup> Garrouette focuses on the sense of many tribes that they have “a specific spiritual role to play in the world: a particular place to occupy and a particular task to perform.”<sup>268</sup> Tribal stories of origin often embody charges variously called “Original Instructions” or “First Instructions,” which “usually concern coming into relationship with other beings—human and nonhuman—in the natural world in particular ways. . . .”<sup>269</sup> Garrouette observes that “[a] definition of identity that acknowledges this spiritual heritage will recall each tribal community to its Original Instructions—to its specific teachings about the nature of the world and how its members are to live in it.”<sup>270</sup> Further, because tribes routinely interact with non-members, those engaged in dialogue on the spiritual dimensions of their identity will ask who should be invited “to join them in their sacred work,” that is, who should be asked to share the burden of executing the Original Instructions that frame their lives.<sup>271</sup>

The Cherokee Nation expressly understands itself as performing a unique and sacred mission in the world. In a document entitled *Declaration of Designed Purpose*, prepared by the “Chad Smith-Hastings Shade administration” and dated 2001, the Cherokee Nation elaborates a statement of “vision, mission and guiding principles to lead the Cherokee Nation for the 21st century.”<sup>272</sup> Citing the words of early-twentieth century Cherokee traditionalist Redbird Smith (“I have always believed that the Great Creator had a great design for my people, the Cherokees”), the *Declaration* lists “Spirit” as the first “guiding principle” for “the decisions that drive the behaviors, feelings, and attributes necessary” for achieving desired tribal outcomes.<sup>273</sup> Under “Spirit,” the *Declaration* states, “We be-

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267. GARROUTTE, *supra* note 48, at 114 (emphasis in original).

268. *Id.* at 115.

269. *Id.*

270. *Id.* at 115–16.

271. *Id.* at 116.

272. *Declaration of Designed Purpose*, CHEROKEE PHOENIX, Fall 2001, [http://www.cherokee.org/Phoenix/XXVno4\\_Fall2001/ddp1.htm](http://www.cherokee.org/Phoenix/XXVno4_Fall2001/ddp1.htm).

273. *Id.* (The “Desired outcomes” are listed as “Exercise Sovereignty,” “Achieve Operational Performance—[by setting] benchmarks . . . for each operating team,” “Build Cherokee Nation Employees,” “Encourage Tribal Members,” and “Use Culture/Knowledge.”).

lieve that the Creator has a great design for us and acknowledge that every Cherokee is part of the ever-renewing, ever-expanding, upward progressive movement of life."<sup>274</sup> The *Declaration* is consistent with other official statements of the Nation in acknowledging the significance of spirituality for Cherokee identity, but not imposing a specific theology, creed, or set of religious practices as a litmus-test for citizenship.<sup>275</sup> Other Cherokees put it more plainly: in the words of Julie M., a Keetoowah grandmother interviewed by Garroute, "We [Cherokees] . . . have a *special* place in the world. God put us here."<sup>276</sup>

The construction of Cherokee Nation citizenship criteria according to Radical Indigenism, therefore, would assume the salience of Cherokee spiritual self-understanding to the dialogue. Whether the *Declaration of Designed Purpose* endures is less important for a dialogue on citizenship than the legitimacy of religious discourse found among many Cherokee people as a means of expressing their fundamental orientation in the world. Sturm points out while "many Cherokees share a common spiritual cosmology," the religious beliefs and practices of Oklahoma Cherokee are complex, and practitioners typically consist of Cherokee Baptists (a variation of Southern Baptists, inflected by elements of traditional Cherokee culture and religion) and practitioners of traditional Cherokee religion centered on the Sacred Fire (the Keetoowah Society).<sup>277</sup> Cherokees, whether descendants of Freedmen, "blood Indians," or others, would be expected to engage in a conversation where citizenship is understood as more than the negotiation of a social contract, but rather represents the interpretation of sacred "Original Instructions."<sup>278</sup> Understood as a discussion guided by Cherokee assumptions about their place in the world, a conversation on citizenship would explore whether the Freedmen's descendants have a civic role to play in the Nation's "designed purpose," and how that role, if it exists, might best be performed.

274. *Id.*

275. Article III, Section 4 of the 1999 Cherokee Constitution provides "[t]he Council shall make no law prohibiting the free exercise of religion. . . ." The 1999 Constitution includes no correlate to the Federal Establishment Clause. The Preamble of the 1999 Constitution "acknowledg[es] with humility and gratitude the goodness, aid and guidance of the Sovereign Ruler of the Universe" in allowing the "People of the Cherokee Nation" to "preserve our sovereignty, enrich our culture, achieve and maintain a desirable measure of prosperity and the blessings of freedom." See Comparison of the 1976 and 1999 Constitutions, <http://www.cherokee.org/TribalGovernment/Executive/CCC/cc1999Changes.pdf>.

276. GARROUETTE, *supra* note 48, at 115 (emphasis in original).

277. STURM, *supra* note 67, at 127. See *id.* at 124–31 (discussing the complexities of race, religion, and Cherokee identity).

278. In 1996 the Nation reported that approximately 39 percent of its citizens lived outside Oklahoma. *Id.* at 11. This large non-resident population poses particular difficulties for such a dialogue, since one cannot assume a common religious culture among residents of states as diverse as California and Texas (to name two states where many Cherokees reside), where Cherokee identity may be predicated on different values.

### 3. Effective History of Colonialism

Third, I would add to Garrouette's model the assumption that the social construction of Native American identities proceeds within a political, legal, and rhetorical matrix that embodies centuries of Euroamerican domination and indigenous peoples' resistance.<sup>279</sup> As a result, tribal members' constructs of themselves and "others" may consciously or unconsciously reflect ideologies of race, class, and other divisions, which implicitly devalue Native Americans themselves and marginalize Native Americans' access to their own histories and cultures.<sup>280</sup> The assumption of the effective history<sup>281</sup> of colonialism, therefore, also will inform the model.

The dialogue on Cherokee citizenship would presume the relevance of Euroamerican history for the Nation, not as a story of Cherokee victimhood or triumphalism, but as a story of colonization cutting across lines of tribe, race, gender, and economic status. The dialogue would be difficult and would of necessity include a searching look at how Cherokee government has been influenced by and at times embraced (in academic jargon) Euroamerican racial hegemony and ideology. Of necessity, the dialogue would ask participants to consider the history of the Freedmen, and explore how their history and that of the Cherokees "by blood" have intersected under the influence of colonialism, and how that influence may continue to shape even the dialogue itself.

The three assumptions stated above—practicality, spirituality, and an effective history of colonialism—may be described as three values for Cherokee citizenship criteria: a good criterion must serve the practical function of distinguishing members and non-members while remaining flexible to changing circumstances; it must respond to an overarching Cherokee vision of the tribe's purpose in the world; and it must be at-

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279. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 325–33 (Oxford Univ. Press 1990) (critical legal history of Euroamerican engagement with indigenous peoples of the Americas).

280. On the uses and limits of critical social theory for understanding Native American identity politics, see STURM, *supra* note 67, at 19–26. See also Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 279–91 (1993) (arguing that American Indians have internalized colonialist values of materialism and isolationism to the detriment of their traditions).

281. "Effective history" is a concept taken from the work of philosopher Hans-Georg Gadamer, and means, in this context, the abiding impact of Euroamerican colonization on indigenous peoples and their apprehension of the world. See Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur* 68 B.U. L. REV. 523, 529 (1988) ("understanding is never subjective behaviour toward a given 'object,' but towards its effective history—the history of its influence. . .") (quoting HANS-GEORG GADAMER, *TRUTH AND METHOD* xix (Eng. trans. 1975)).

tuned to how the inheritance of colonialism may be at work in the Nation today. How, then, to proceed?

### C. Critical Hermeneutics of Ancestry and Reciprocity

The point of departure for many tribal communities seeking to understand themselves, Garrouette, writes, is tradition. "A common assumption of American Indian knowledge pursuits," she states, "is that the seeker always looks backward."<sup>282</sup> The bearers of tradition include tribal elders, whose reflections on tribal identity should be central to the dialogue; oral and written narratives of the tribe's history, its creation myths, and other bodies of teachings; and the "records of historic practice and forms of community life or social structure."<sup>283</sup> By triangulating among elders' statements, oral and written tribal narratives, and community social forms, testing each body of evidence against the others, tribal members, acting collectively, can identify traditional tribal principles. With Garrouette, I propose that a useful principle of identity, which is consonant with the traditional principles of many tribes, is that of *kinship*.<sup>284</sup> Below I will examine how kinship operates in two modes for determining tribal citizenship: the relationship to ancestry and the responsibility to reciprocity.

#### 1. Relationship to Ancestry

Legal scholar Angela Riley writes, "Indian tribes reflect the most intimate associations in the human experience: they are, by definition, families. Indian tribes are bound by bloodlines, clan identifiers, and kinship. Ancestry or descent often constitutes the dominant factor in determining whether one belongs to an Indian tribe."<sup>285</sup> Carole Goldberg observes, "biological relationship has always formed some part, often a significant part, of tribal belonging."<sup>286</sup> Garrouette notes that for some Native Americans, such as author Scott Momaday, the relationship to one's ancestors can only be expressed as a "memory in the blood," a heritable "racial memory" that flows from one generation to the next.<sup>287</sup> Rather than reject such expressions out of hand as fragments of colonialist racial hegemony, Garrouette finds that when understood in the context of traditional authorities (elders' statements and sacred stories), claims such as Momaday's do not exhibit the characteristics of nineteenth-century race science, but show "a sacred logic to which notions of genealogical distance

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282. GARROUTTE, *supra* note 48, at 117.

283. *Id.*

284. *See id.* at 118.

285. Riley, *supra* note 46, manuscript at 39.

286. Goldberg, *supra* note 113, at 460.

287. GARROUTTE, *supra* note 48, at 120.

and blood quantum are foreign and even irrelevant.”<sup>288</sup> Garroutte invites us to consider the possibility of indigenous (sacred) and non-indigenous (colonialist) essentialisms, and to embrace the former as legitimate modes of establishing Native American kinship and thus identity.<sup>289</sup>

Garroutte’s efforts to distinguish race-based notions of ancestral affinity such as Momaday’s from the racist notions of biological hierarchies criticized earlier in this Article are intriguing, but would be more persuasive, I believe, had she incorporated the third assumption of an effective history of colonialization. Taken alone, the traditional authorities of elders’ testimony, sacred texts, and community practices are not exempt from the influences of colonialism:<sup>290</sup> as Garroutte herself clearly sees, there are no “pristine” tribal cultural resources to draw on.<sup>291</sup> Therefore, a critical-historical perspective is needed to prevent the hermeneutic of traditional principles such as kinship from automatically reproducing and re-trenching colonialist ideologies as the basis for citizenship criteria.

Such a critical hermeneutic of tribal tradition would operate within tribes themselves, to identify and discard—or retain—notions of race, gender, and other forms of difference that have inflected and formed their traditional authorities over the course of, perhaps, centuries. An exploration of operative colonialist essentialisms would also create the logical space within which tribes could identify and discuss examples of kinship consistent with Garroutte’s “indigenous essentialism.” The resulting citizenship criteria may not satisfy critics of tribal sovereign immunity, who

288. *Id.* at 125.

289. *See id.* at 122–25.

290. Examples of tribal stories of origin or revelation inflected by the race-values of colonialism are common. *See, e.g.,* McLoughlin, *supra* note 141, at 378 (describing the syncretic Shawnee-Christian version of the Garden of Eden story, in which the Great Spirit (God) visits punishments on his three disobedient children—[W]hite, red, and [B]lack—appropriate to “an ineradicable hierarchy of races.”). *See also id.* at 373–74 (Seneca and Shawnee theological constructs incorporating racial hierarchies). On issues raised today by the religious syncretism of Christian and indigenous spiritualities, *see, e.g.,* Theresa S. Smith, *The Church of the Immaculate Conception: Inculturation and Identity among the Anishnaabeg of Manitoulin Island*, in *NATIVE AMERICAN SPIRITUALITY: A CRITICAL READER* 145–56 (Lee Irwin ed., Univ. of Neb. Press 2000).

291. Garroutte criticizes very effectively the myth of Indian essentialism in GARROUTTE, *supra* note 48, at 68–69, referencing the trial of the Mashpees, who failed to establish sufficient “Indian-ness” to assert a claim for lost ancestral lands. *See also* JAMES CLIFFORD, *Identity in Mashpee*, in *THE PREDICAMENT OF CULTURE* 337–38 (1988) (logic of cultural “authenticity” makes no allowance for “sharp contradictions, mutations, or emergencies” that comprise lived history); GARROUTTE, *supra* note 48, at 136–39 (disavowing static notions of tradition and defining indigenous traditions as modes of thinking and acting that correspond to tribes’ sacred Original Instructions); *see also* Gerald Torres & Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 642–49 (Mashpees’ story rendered unintelligible and thus legally irrelevant by dominant culture’s history and social practices).

would utilize extra-tribal criteria to avoid outcomes “anathema in a society ruled by laws”<sup>292</sup> (and their own preferences), but the criteria *would* be the result of an intra-tribal process where traditional principles, such as kinship, were generated only after the effective historical consequences of colonialization had been “named” and debated.

While kinship ties are typically obtained by birth within a tribal community, they sometimes can be created through adoption. Although the clan system operated as the primary unit of society, Cherokee “[c]lans frequently adopted prisoners of war to supplement their own numbers and to replace kinsmen who had died or been killed.”<sup>293</sup> White men in the late 1700s who associated themselves with Cherokee towns were occasionally, but usually not, adopted by clans.<sup>294</sup> In the nineteenth century, as the clan system was overtaken by the model of citizenship, “American men who married Cherokee women could then seek legal rights in the Cherokee Nation without participating in the traditional ritual of adoption.”<sup>295</sup> When the Cherokees adopted the Freedmen and their descendants into the Nation by the Treaty of 1866 and constitutional amendments of 1866, and later extended citizenship to intermarried Whites, Shawnee, and Delaware, they did so against a background of Cherokee adoption practices which, while never extensive or a challenge to the primacy of descent were nevertheless sufficiently common to have engendered their own rituals.<sup>296</sup>

Garrouette argues that the “kinship substance” communicated through birth may also be ritually transferred through adoption ceremonies. Referring to the rituals of the Iroquois, she states, “[adoptees] entered the ceremony as one kind of being, and they emerged another. The kinship substance thus acquired is real and consequential, enabling new relationships—both social and physical.”<sup>297</sup> Examples of Native American adoption practices, she argues, “challenge the accusation that essentialist claims are necessarily racist: the essentialisms explored here

292. Reitman, *supra* note 259, at 804.

293. PERDUE, *supra* note 77, at 8. Captives who were not killed were either adopted into clans, or existed as servants in a kind of social limbo outside the clan system. *See id.* at 3–18 (discussing the social status of such captives, called the *atsi nahsa’i*); *see also* Goldberg, *supra* note 113, at 460 (arguing “tribes may have been more willing to adopt outsiders at a time when they were less likely to feel threatened that the adoptees’ worldview and culture would overwhelm their own by virtue of material power and sheer numbers” and “earlier practices of adoption and incorporation may also have been shaped by concerns for population loss due to warfare and disease that do not preoccupy some tribes today”).

294. McLoughlin, *supra* note 155, at 31.

295. Yarbrough, *supra* note 184, at 387.

296. Yarbrough, in her discussion of slavery and citizenship, stresses that “[a]ncestry was an important component of Cherokee identity and legitimate membership in the Nation, and the Council passed laws that recognized ancestry and its connection to the privileges of citizenship.” *Id.* at 395.

297. GARROUETTE, *supra* note 48, at 127.

have nothing to do with the idea of race, a concept rooted in the same biologicistic assumptions that have driven social scientific studies of kinship."<sup>298</sup>

Garrouette's analysis of the traditional principle of kinship leads her to conclude that ancestry is not the only way that some tribes establish full-fledged membership. While genealogical relationship remains primary for most tribes, the possibility exists, "at least in principle, for people of any race to be brought into kinship relations through the transformative mechanism of ceremony."<sup>299</sup> Here again, however, it would seem advisable to avoid the unreflective application of adoption practices, perhaps developed for a different age or under the conditions of colonialism, to tribal communities.<sup>300</sup> Ceremonies of transformation (e.g., baptisms and bar mitzvahs, to choose two common non-indigenous examples) exist to perform operative acts on individuals through correct ritual performance: when properly done, the individual is a substantially different person with new social rights and obligations.<sup>301</sup> The model of Radical Indigenism, as I propose it, assumes the critical assessment of tribal ceremonies of adoption and the identification of their implicit or express assignment of social, racial, and gender roles prior to their implementation.

A question that a Cherokee dialogue with the Freedmen's descendants might wish to ask is whether the Nation possesses, or cares to recover or create, such transformative mechanisms of adoption, and make them available to the Freedmen's descendants, particularly inasmuch as the descendants' *political* identity as citizens appears to hinge on successfully negotiating their *social* identity as Cherokee "kin." Claiming political membership in the polity based on what some regard as a "shot-gun" treaty and an unpopular judicial decision is no substitute for negotiating social legitimacy as Cherokees. Without the latter, achieved through difficult, face-to-face dialogues among all affected parties, it is doubtful whether citizenship status, if brought about through federal intervention, can long be maintained. The responsibility to reciprocity, described below, may offer hope for such a negotiation of social legitimacy.

298. *Id.*

299. *Id.* (emphasis in original).

300. See John Comaroff & Jean Comaroff, *The Colonization of Consciousness*, in *A READER IN THE ANTHROPOLOGY OF RELIGION* 493, 507 (2002) (in the context of South Africa, there exists two levels in the colonization of consciousness: conversion by an ideological message, and "inculcation of the hegemonic forms, the taken-for-granted signs and practices, of the colonizing culture.").

301. JOHN SKORUPSKI, *SYMBOL AND THEORY: A PHILOSOPHICAL STUDY OF THEORIES OF RELIGION IN SOCIAL ANTHROPOLOGY* 101 (Cambridge Univ. Press 1976) ("Operative actions are performed in order to create or cancel a set of rights and obligations.").

## 2. Responsibility to Reciprocity

If, as Garrouette notes, relationship to ancestry represents Native American *being*, the second dimension of kinship, responsibility to reciprocity, indicates Native *doing*: what religious studies scholar Christopher Jocks describes as the “ability to participate in kinship.”<sup>302</sup> To understand this dimension I believe it is necessary to appreciate how very differently indigenous communities and Euroamerican societies conceive the basis of social obligation. For those acculturated in the Enlightenment’s tradition of atomistic agency, obligations arise paradigmatically through the free actions of autonomous individuals, represented in the classic notion of contract as a “bargained-for exchange of promises.”<sup>303</sup>

Tribal communities, on the other hand, often understand themselves as existing in fundamental relationship with their physical surroundings; not as societies floating in incidental or accidental relation to particular geographic *spaces*, but as distinct peoples dwelling within a web of physical, spiritual, and moral relationships with *places*.<sup>304</sup> Native American spiritual traditions are often, though not always, site-specific, meaning that the religious and cultural identities of the people, and their ethical obligations,<sup>305</sup> depend upon particular places where the Original Instructions—the purpose of the tribe for the world—can be competently interpreted by the elders, medicine men and women, and other qualified tribal members, or effectively performed in ceremonies of renewal.<sup>306</sup>

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302. See GARROUTTE, *supra* note 48, at 118, 129 (quoting Christopher Jocks, *American Indian Religious Traditions and the Academic Study of Religion: A Response to Sam Gill*, 65 J. AM. ACAD. RELIGION 169, 172 (1997)).

303. “Contract. An agreement between two or more persons which creates an obligation to do or not to do a particular thing.” BLACK’S LAW DICTIONARY 291–92 (5th ed. 1979).

304. See KEITH H. BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* 3–153 (Univ. of N.M. Press 1996) (on Apache place-making); see also *id.* at 106 (“dwelling is said to consist in the multiple ‘lived relationships’ that people maintain with places, for it is solely by virtue of these relationships that space acquires meaning.”).

305. Deloria writes, “Spatial thinking requires that ethical systems be related directly to the physical world and real human situations, not abstract principles, are believed to be valid at all times and under all circumstances. One could project, therefore, that space must in a certain sense precede time as a consideration for thought.” DELORIA, *supra* note 261, at 72.

306. There is an extensive literature addressing the efforts of Native Americans to negotiate their spiritual traditions within the constraints of Anglo-American law. See, e.g., Kristin A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1065 (2005) (arguing that “Indian nations can assert that even as nonowners, they may have enforceable rights at sacred sites located on federal public lands.”); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, U. COLO. L. REV. 413, 414 (“The land has represented an

Further, for many tribes, dwelling implies engagement in highly interpersonal relations with a broader ontology than that recognized by Western philosophy and science: animals, plants, people, gods, geological forms, meteorological events, celestial entities, and spirit beings, to name but a few.<sup>307</sup> This dwelling, and these relationships, constitute a web of life which serves as the basis for reciprocal interactions. As Garroutte notes, while social science defines kinship in terms of human descent, many Native Americans view kinship, and the obligations of kinship, much more broadly to encompass all that is.<sup>308</sup>

The critical interpretation of what Deloria calls the “Indian attitude” toward people, land, and other life forms does not require one to bracket the truth or falsity of indigenous claims about reality, much less deny them. The elders’ accounts of aboriginal history, stories of origination (of the cosmos, people, animals, and other kin), the complex medicines that keep the world in balance, and the social structures and rituals that embody the teaching and continuation of the “Indian attitude” cannot be challenged from within a critical hermeneutics oriented by the assumptions of Radical Indigenism.

At the same time, it is appropriate to ask, from within one’s tribal community, to what extent the tribe’s present-day understanding of indigenous kinship relations reflects Euroamerican biases of, for example, space, time, history, and community.<sup>309</sup> It is especially important in this regard to examine the influence of Christianity on understandings of kinship, where many tribal spiritual traditions for centuries came under the

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unparalleled bulwark against the otherwise inevitable effects of colonization—tribal eradication and assimilation.”). The leading case in this area remains *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–52 (1988) (Free Exercise Clause not implicated where logging road’s construction on government land would devastate tribal cultures and religions but not coerce Indians to change their beliefs). *But see Navajo Nation v. U.S. Forest Serv.*, No. 06-15371, 2007 U.S. App. LEXIS 5710, at \*3, \*46, \*57–62 (9th Cir. Mar. 12, 2007) (distinguishing *Lyng* to find that government approval of development permits violated rights of Navajo and Hopi under Religious Freedom Restoration Act, where expansion of snowmaking on sacred San Francisco Peaks using treated sewage effluent would devastate tribal cultures and religions).

307. Deloria expressly describes the relationship of humans and other species as one of kinship: “The essence of the Indian attitude toward peoples, lands, and other life forms is one of kinship relations in which no element of life can go unattached from human society. . . . With respect to other life forms, this attitude manifests itself in what one could call ‘kinship’ cycles of responsibility that exist between our species and other species.” VINE DELORIA, JR., *Native American Spirituality*, in *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 131 (James Treat ed., Routledge 1999).

308. GARROUTTE, *supra* note 48, at 132 (“Humans are simply one set of participants in the vast cycles of giving and receiving, of covenant and celebration, that constitute relationship to a tribal kinship community.”).

309. See, e.g., DELORIA, *supra* note 261, at 75–89, 111–128; see also DELORIA, *supra* note 307, at 145–61.

influence of missionaries.<sup>310</sup> Indeed, the critical examination of such understandings of kinship may serve as an act of cultural recovery. Critical assessment of traditional source material and dialogue with the community and its elders can reveal where, for example, Western dichotomies between irreconcilable “spiritual” and “material” worlds, “souls” and “bodies,” “rational animals” and “irrational nature,” or incompatible “subjects” and “objects” may have elided indigenous worldviews and attenuated the scope of kinship responsibilities, including responsibilities of political participation, that tribes may wish to resume, insofar as they can.

The “common spiritual cosmology”<sup>311</sup> shared by many Cherokees, often foregrounded by individual commitments to Christianity or the Keetoowah Society, provides the basis for strong indigenous kinship relations which bear directly on Cherokee identity. Sturm’s informants emphasize that “[s]pirituality is the most important thing in the traditional Cherokee world because we use it to maintain life as we know it and to survive through periods of turmoil” and “[a] Cherokee has to be brought up knowing their culture, the medicine way of life. They have to go out into the woods and know roots and foods and medicine,” but also state that “[Cherokees] also need to be able to survive with European ways,” and “Cherokee religion is real important to me. . . . Me and my family, we visit with the medicine man and the little people. I know the difference between good and bad medicine, even though I have a college degree.”<sup>312</sup> For these Cherokees, negotiating Euroamerican “ways” occurs against the background of a rich and expansive kinship system which implies relationships of reciprocity.

The Cherokee Nation in its *Declaration of Designed Purpose* appears to allude to such a larger notion of kinship, when it states, in a section captioned “Identity”:

[T]he government of the Cherokee Nation acknowledges that Cherokee identity has been formulated over time and consists of shared patterns of behavior that include language, ceremony,

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310. See, e.g., Marie Therese Archambault, *Native Americans and Evangelization, in NATIVE AND CHRISTIAN: INDIGENOUS VOICES ON RELIGIOUS IDENTITY IN THE UNITED STATES AND CANADA* 132–53 (James Treat ed., Routledge 1996) (Native-Christian author arguing that Native Americans should be “de-evangelized” in order to facilitate religious self-determination); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776–805 (1997) (presenting history of federal governmental policy to Christianize Indians and suppress indigenous religious practices).

311. STURM, *supra* note 67, at 127. See also MOONEY, *supra* note 138 (providing an Euroamerican account of the Cherokee cosmology).

312. STURM, *supra* note 67, at 126–27. The reference to “the little people” or *Yunwi Tsunsi*, refers to a fixture of Cherokee culture, that “race of spirits” who inhabits Cherokee woodlands and offers assistance or harm depending on whether their customs and privacy are respected. See MOONEY, *supra* note 138, at 333–34.

customs, values, beliefs, traditions, wisdom and knowledge, along with other tangible and intangible forces, that combined are referred to as the Cherokee lifeways or culture.<sup>313</sup>

More specifically, the *Declaration* declares that “[t]he Mission of the Cherokee Nation is ‘ga du gi’—working together as individuals, families and communities for a quality of life for this and future generations by promoting confidence, Cherokee culture and an effective sovereign government.”<sup>314</sup> Chief Smith and his administration have made *gad-du-gi* the organizing principle of national life. In his 2005 Status Report to the Nation, Chief Smith stated:

[A]s Cherokees well know, the best way to get anything done is the traditional way of working together, ga-du-gi. In order to keep our communities strong now and into the next century, we are applying the concept of ga-du-gi in every department, program and business at the Cherokee Nation. To do this we have passed a law that requires a self-help component for all of our programs. . . . Community. Jobs. Language. Deputy Principal Chief Joe Grayson and I continue our commitment to the true community spirit of Cherokee people, ga-du-gi, to providing economic opportunity, and to our distinct Cherokee Culture.<sup>315</sup>

I would argue that *ga-du-gi*—“all working together”—is a particular manifestation of a Cherokee kinship system which links citizens with that larger world referenced by the Cherokee cosmology. As prosaic and “Western” as a call for cooperation and self-help may seem to be, it would be a mistake to infer from the *Declaration* or Status Report that either its author or intended audience understands *ga-du-gi* as merely an exhortation to “pitch in and pull together”: the invocation of a formative Cherokee concept in the sacred Cherokee language would evoke for both speaker and listener an obligation to realize their “designed purpose” for the sake of the world.<sup>316</sup>

This second dimension of kinship, relationship to reciprocity, challenges Cherokees “by blood” and Freedmen’s descendants who are interested in citizenship to discuss and determine their respective roles in

313. *Declaration of Designed Purpose*, *supra* note 272.

314. *Id.*

315. *Message from Prināpal Chief Chad Smith*, Cherokee Nation Status Report 2005, <http://www.cherokee.org/home.aspx?section=SR&Name=SR2005&ID=NazMZK/vU/g=>.

316. See *Declaration of Designed Purpose*, *supra* note 272 (“We are endowed with intelligence, we are industrious, we are loyal, and we are spiritual but we are overlooking the particular Cherokee mission on earth, for no man nor race is endowed with these qualifications without a designed purpose.”).

the world according to *ga-du-gi* as the social expression of the traditional Cherokee cosmology, as interpreted by the elders and found in the tribe's texts, stories, and communal structures. Many Freedmen's descendants "possess as much if not more Cherokee culture" than "many [W]hite-Cherokees enrolled in the tribe."<sup>317</sup> As Marilyn Vann has said, Freedmen's descendants "know a lot more about a stomp dance, hog fry, and wild onion dinner than anything about Africa."<sup>318</sup> This suggests that some descendants may share assumptions with "blood" Cherokees regarding the cosmos and its familial interconnections. There may be shared cultural roots to sustain the moral imperatives of *ga-du-gi*. Stated differently, how would Freedmen's descendants contribute to *ga-du-gi*, the up-building of the Nation, and the articulation and performance of the Nation's "designed purpose"? And what, in turn, are the obligations of *ga-du-gi* from "blood" Cherokees to the descendants of (for some) their former slaves, who were until recently their fellow citizens? A dialogue between these groups, as difficult as it would be, could strive to identify and articulate shared cultural roots to help them assess whether the political definition of Cherokees today ought to continue to include citizenship for the Freedmen's descendants.

## CONCLUSION

To return to Marilyn Vann's pointed question, is the Cherokee Nation "a race or a nation?" Clearly, it is a nation. But will it be a nation based on race? At this crossroads in Cherokee history, the controversy in the Cherokee Nation over the political status of the Freedmen's descendants has tended to frame the options as a choice between "blood" or base rolls: citizenship as a reflection of Cherokee lineal descent or citizenship as a function of a legal regime embedded in the federal Dawes Rolls. Though the two options intertwine in effect—the Dawes Rolls authorize which "blood" will lead to citizenship—they are analytically distinct. As I have attempted to show in this Article, neither alternative is adequate to resolve the crisis of Cherokee political and social identity.

The rights of citizenship promised to Freedmen and their descendants by the Treaty of 1866 and the 1866 amendments to the Cherokee Constitution have been consistently and effectively resisted by tribal leadership virtually since they were announced. The listing of Freedmen or their descendants on the Dawes Rolls in the early twentieth century provided no protection against resistance to their citizenship rights, including

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317. STURM, *supra* note 67, at 196. Malcomson observes that "many of the [B]lack slaves of Indians identified with Indian culture. They often spoke the tribal language. They prepared Indian dishes and participated, however peripherally, in Indian festivities such as the Cherokees' Green Corn celebration." MALCOMSON, *supra* note 220, at 98–99.

318. CLAUDIO SAUNI, *BLACK, WHITE, AND INDIAN: RACE AND THE UNMAKING OF AN AMERICAN FAMILY* 65 (Oxford Univ. Press 2005).

the right to vote in tribal elections, up to the day *Lucy Allen* was decided in 2006 and Freedmen's descendants were recognized as citizens. That Cherokees went to the polls in 2007 and amended their Constitution to exclude Freedmen's descendants indicates both the strength of the Cherokee political process to effect the will of the people and the weakness of the Dawes Rolls to secure rights promised in 1866.

On the other hand, biological definitions of Cherokee identity—"blood"-based identities—are inextricably indebted to the effective history of colonialism and its race-based hierarchies. The ready adaptation to and deployment of Euroamerican systems of racial classification by Cherokees in the eighteenth and nineteenth centuries led to Cherokee slave-holding and strict slave codes that permitted Cherokee-White intermarriages but prohibited and punished severely relations of intimacy between Cherokees and "people of color." The Cherokee construction of a national identity after 1839 melded a racial commitment to the preservation of Cherokee "blood" and the prosperity of the Cherokee Nation. This "blood"-based sense of Cherokee identity fit well with the race science of the nineteenth century and with the philosophy and public policy of assimilation which guided the Dawes Commission in its work of tribal enrollment and allotment of land. The resulting Dawes Rolls established race-based categorizations of complex social and biological identities for both Native Americans and African Americans. When, as now, the Cherokee Nation turns to the Dawes Rolls as its exclusive authority for citizenship, it is perpetuating those categorizations and their race-value significations by embedding them in the very body of the Nation.

This Article has proposed that a version of the model of Radical Indigenism created by sociologist Eva Garrouette could provide an alternative to biology or legalism as the basis for Cherokee political identity. Ancestry is rescued from biology when it is reconceived as a mode of kinship. Law is saved from fetishism to the Dawes Rolls when sovereignty is exercised to frame new citizenship criteria that are both robust and flexible. Engaging the resources of Radical Indigenism would require Cherokees "by blood" and Freedmen's descendants to participate in a sustained and candid dialogue on Cherokee political identity from within indigenous norms and authorities and the critical evaluation of Cherokee history and culture.

The sovereign right of the Cherokee Nation to determine its criteria for citizenship should never be denied or compromised by federal intervention. The "hard case" of whether to sustain a decision of the Cherokee Nation to exclude the Freedmen's descendants, were the issue to reach federal court or the floor of Congress, would surely "make bad law." The wise use of Cherokee sovereignty, however, counsels patience, not a rush to the polls. It requires honest, sustained, and, no doubt, diffi-

cult dialogue, not politicking, and the critical reinterpretation of cultural resources in the service of kinship, not the blind reproduction of divisive racial hegemonies—in short, *ga-du-gi*, “all working together.”