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

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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

Terrion L. Williamson*

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In April 2000, Dartmouth College hosted the “Eating Out of the Same Pot” Black Indian Conference devoted to the subject of Indian-Black relations. During the conference, a phenotypically Black woman who identified herself as Indian became involved in a verbal altercation with an Indian man over the presence of slaves within the Cherokee Nation. In the heat of the argument, the woman asked why she, a “nappy-headed” Indian, and others similarly situated were often mistreated by other Native Americans.

This scenario is illuminating for several reasons. First, although much scholarship focuses on the relationships between Whites and African Americans and between Whites and Native Americans, the relationships between African Americans and Native Americans receive significantly less attention. The existence of the Dartmouth Black Indian Conference evidences the need for further dialogue between Native American and African American communities, especially as pertains to individuals who identify with both groups.

Second, the existence of persons who identify themselves as “Black Indians” may, for a multitude of reasons, be a fact startling or difficult to accept for people from a variety of ethnicities. However, it is especially

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2. The terms Black and African American will be used interchangeably throughout this Note.
3. Id. at 381.
4. Id. at 381–82.
7. See generally Tiya Miles, Uncle Tom Was an Indian: Tracing the Red in Black Slavery, in CONFOUNDING THE COLOR LINE, supra note 1, at 137, 146 (“Given the prevailing understanding of racial categories, many of us find the notion of Indians who are also Black
important for dual members of the groups to understand the struggles playing out between them. A significant number of African Americans have Indian ancestry. Thus, what happens within Native American communities directly or indirectly affects a number of African Americans.

Third, and most important to the analysis presented here, the discussion of slavery within Native American communities is insufficient. As one scholar stated, "the popular story of slavery in America . . . is a story without American Indians in it." This popular story does not include Native Americans either as slaves or as slave owners, even though they were both. This note addresses the history of Native Americans as slave owners and its lingering effects on Black members of some Native American tribes.

The Black descendants of African American slaves and free Blacks are commonly known as Freedmen. Historically, Freedmen within the Seminole Nation have enjoyed many of the same benefits and privileges of tribal membership as their non-Black counterparts, while Freedmen among the other four "Civilized Tribes" have not enjoyed the same privileges as the Seminole Freedmen and have consistently been marginalized.

difficult to accept.


9. Miles, supra note 7, at 138.


11. Id. at 138–39.

12. Josephine Johnston, Resisting a Genetic Identity: The Black Seminoles and Genetic Tests of Ancestry, 31 J.L. MED. & ETHICS 262, 262 (2003); Circe Sturm, Blood Politics, Racial Classification, and Cherokee National Identity: The Trials and Tribulations of the Cherokee Freedmen, in CONFOUNDING THE COLOR LINE, supra note 1, at 223, 223. While Johnston states that the Black Seminoles are known as Freedmen, the term "Freedmen" refers to the descendants of Black slaves of members of other tribes as well. See Sturm, supra. Black Freedmen should be distinguished from those persons with mixed African American and Native American heritage who are not necessarily descended from those who were on the "Freedmen Rolls." See Welburn, supra note 6. While the term "Freedmen" has historically been used to refer to any non-slave Blacks, in this context it will refer to descendants of Black slaves and free Blacks within Indian nations.

13. While the Freedmen in nations other than the Seminole Nation have also been treated unfairly and have similar claims to those of the Seminole Freedmen, this Note concentrates primarily on the Seminole Freedmen due to their unique status within the Seminole Nation and because of the recent Davis litigation.


Furthermore, Seminole Freedmen traditionally have played leading roles within the Seminole Nation. 16

Recently, even the Seminole Freedmen nearly lost the privileges they have always enjoyed. In 2000, the Seminole Nation government decided to change the Tribe's constitution so that Freedmen would no longer be recognized by the Seminole General Council. 17 The new requirement that tribal members have at least one-eighth Seminole Indian blood effectively expelled most Freedmen from the Nation, as many were unable to show that they possessed the requisite amount of Indian blood. 18 Although this procedure was deemed invalid in Seminole Nation v. Norton, 19 it exemplifies the lengths to which some Indian tribes have gone to divest Freedmen of tribal citizenship.

This Note concerns the role the government has played in the exclusion of Black Freedmen from Native American nations through its implementation and interpretation of the doctrine of tribal sovereign immunity ("tribal sovereignty" or "tribal immunity"). Part I discusses the background of the Freedmen within the Five Civilized Tribes and provides an overview of the doctrine of tribal sovereign immunity, including its role in the controversy concerning the status of Black Indians. Part II discusses the interpretations given to the doctrine of tribal sovereign immunity by United States courts and executive agencies and the effects of those interpretations on relations between Native Americans and Freedmen.

Part III discusses the roles that Congress, executive agencies, and the courts must take to halt and reverse the discriminatory practices that have stripped Freedmen of their rights and privileges as members of Native American communities. Specifically, this Part argues that the Bureau of Indian Affairs ("BIA") should intervene in the case of the Cherokee Freedmen and that Congress has the power to address the problems with tribal immunity by appropriately limiting the boundaries of the doctrine and strengthening the Indian Civil Rights Act ("ICRA"). 20 Furthermore, federal courts have the power to recognize a cause of action in tribal sovereignty cases arising under the ICRA and the ability to protect Black Freedmen by distinguishing their race-based claims from previously advanced gender discrimination claims.

16. Daniels, supra note 8.
I. BACKGROUND

A. Freedmen Within the Seminole Nation

The Seminole Indian Freedmen formally became members of the Seminole Nation in 1866 when the Nation signed a treaty with the United States government that emancipated the Freedmen and allowed them to participate as voting members of the Tribe. However, evidence suggests that there have been members of the Seminole Nation with African descent since its inception. The Seminole Freedmen hold a truly unique place in the context of Indian-Black relations. While other Nations have consistently marginalized Freedmen to varying degrees, historically the Seminole Nation has embraced persons of African descent.

As early as 1763, free Black slaves and fugitive slaves began to settle among the Seminole Indians. Additionally, some Seminoles purchased slaves from Whites, received slaves as rewards from the British, or captured slaves during their raids on the British. However, the form of slavery practiced by the Seminoles differed markedly from the plantation-style slavery commonly practiced in the southern states.

The lifestyles of these Seminole slaves were “virtually indistinguishable” from those of Free Blacks who joined the Seminole communities. Blacks soon began to intermarry within the Nation and took on leadership roles in its development. Seminole-owned slaves lived in villages adjacent to those of the tribal members and were given tools to build their own huts and seeds to plant their own crops. In return, they were

23. See infra Part I.C.
24. KATZ, BLACK INDIANS, supra note 14, at 135 (“Only the Seminoles . . . firmly rejected bondage in favor of a system of friendship and alliance with their [B]lack members.”); MAY, supra note 5, at 4 (stating that Seminoles were most tolerant of African Americans, while the Creeks and Cherokees were in the middle of the spectrum and the Choctaws and Chickasaws were at the opposite end of the spectrum).
25. Johnston, supra note 12, at 263.
26. Id.
expected to share a small part of their harvests with their owners. Moreover, due to Black slaves' superior knowledge of the customs of White men and their ability to serve as interpreters and liaisons for the Indians, they played such invaluable roles in the early days of the Nation that one scholar said Seminole slaves "might even lay claim to being the true rulers of the nation."

Even though Blacks played significant roles in the everyday operations of the Nation, "[t]he Freedmen have traditionally relied on the wars in which their ancestors fought with the Seminole Indians to explain and validate their membership in the Seminole Nation." Most significantly, Black Seminoles fought side-by-side with their non-Black brethren during the Second Seminole War, which began in 1835 and became the longest and costliest Indian war fought against the United States. Black Seminoles were involved so extensively that one Majord remarked that the war was a Negro war, not an Indian war.

Some dispute exists regarding the extent to which Black Seminoles were allowed to participate in the Nation. While some people, including members of the Seminole Nation, believe that Blacks within the Nation were always on equal footing, others do not share that view. Some scholars argue that although Blacks had it much easier within the Seminole Nation than within other Native American nations, they were still seen as inferior and thus were never completely accepted by the Seminole Nation.

Regardless of the view taken, the Freedmen clearly have strong ties to the Seminole Nation and therefore should be able to make compelling claims for their inclusion as full members of the Nation. The Seminole Nation has better integrated Blacks from the very beginning than any other Indian Nation. Blacks within the Seminole Nation obtained higher stature than Blacks in any of the other Five Civilized Tribes.

32. See McLoughlin, supra note 31, at 369.
33. PORTER, The Negro, supra note 27, at 47.
34. Johnston, supra note 12, at 269.
35. See id. at 264, 269.
36. Id. at 264; Saito, supra note 22, at 1156–57.
37. KENNETH W. PORTER, THE BLACK SEMINOLES: HISTORY OF A FREEDOM-SEEKING PEOPLE 6 (1996) ("Indeed, the relationship between the Black[] Seminoles and the tribespeople might be described as primitive democratic feudalism, with basically no personal inequality between the two groups."); Mary Pierpoint, Jim Crow Legacy Still Disrupts Oklahoma Seminoles, INDIAN COUNTRY TODAY, Mar. 6, 2002, at D1 ("The Seminoles never treated the people of African descent as slaves; they were really equals.").
38. McLoughlin, supra note 31, at 370 ("[E]ven if [B]lack slaves had a somewhat easier and freer life among the Seminoles, they were still slaves, not equals.").
39. PORTER, The Negro, supra note 27, at 44.
In September of 2003, the United States Court of Appeals for the Tenth Circuit dealt the Seminole Freedmen a crushing blow when it decided *Davis v. United States.* The two Freedmen bands of the Seminole Nation, the Dosar-Barkus and Bruner Bands, sought declaratory and injunctive relief against the United States and several government agencies because they claimed to have been "systematically denied benefits routinely provided other members of the Tribe." The case centered on the release by Congress of a $56 million judgment fund award that was granted to the Nation in payment for Florida lands taken in 1823. Congress allowed the Tribe to develop its own distribution plan for the money. The General Council of the Tribe then established programs to be funded by the award. Many of those programs required that any eligible participant "be an enrolled member of the Seminole Nation of Oklahoma who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823." Eligibility requirements of this sort are highly problematic for the Freedmen because they were not expressly recognized as members of the Seminole Nation until the Treaty of 1866. Thus, this requirement has effectively excluded them from participating in programs that assist with, among other things, school clothing, burial expenses, elder care, and educational expenses. The Freedmen argued throughout the litigation that the United States government allowed the Nation to discriminate against them. However, neither the district court nor the appellate court ever reached the merits of the Freedmen's claims. Because of its tribal sovereignty, the Seminole Nation itself could not be joined in the litigation, and the Tenth Circuit found that the Seminole Nation had interests in the litigation that would be prejudiced if the litigation moved forward without it. Therefore, the Freedmen were left without a remedy and without a court to hear their claims. Although the Freedmen clearly have been a part of the Seminole Nation from its inception, the Tenth Circuit's holding in *Davis* prevents

40. *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003).
41. *Id.* at 1285.
42. *Id.* at 1287.
43. *Id.*
44. *Id.*
45. *Id.* at 1288 (citation omitted).
46. *Id.*
47. *Id.*
48. *Id.* at 1285.
49. *Id.* at 1289.
50. *Id.* at 1292.
them from participating fully as members. The Freedmen helped to build the Nation and were essential in allowing it to thrive. Yet by invoking the doctrine of tribal sovereignty, the Nation has been able to deny the Freedmen, who make up at least one-third of the Nation’s membership, their bona fide rights as members.

C. Freedmen Within the Cherokee, Creek, Choctaw, and Chickasaw Nations

1. Cherokee Freedmen

Indian–Black relations within the Cherokee Nation have never been as favorable to Blacks as Indian–Black relations within the Seminole Nation. Despite the treaty of 1866, which purportedly granted Freedmen all the same rights as other native Cherokees, the Freedmen were never fully accepted as citizens of the Cherokee Nation. Cherokee Freedmen cannot vote on tribal matters or participate in tribal activities unless they demonstrate a certain percentage of Cherokee blood. Unlike in the Seminole Nation, Cherokee Freedmen have rarely held leadership positions within the Cherokee Nation and the status of Freedmen has continued to decline over time within the Nation.

One explanation for the differential treatment of Cherokee Freedmen is the Cherokee Nation’s adoption of slavery in its most vicious form. The Cherokees held more slaves than any other Indian Nation, and slavery within the Cherokee Nation closely resembled slavery in the Deep South. The Nation’s unfettered adoption of slavery undoubtedly contributed to what one commentator referred to as a “long-held Cherokee bias against dark skin.” The dark skin bias cultivated a social distance between Cherokees and former slaves that continues to manifest itself today through the Cherokee Nation’s attempts to keep Freedmen from fully participating in the Nation.

The Cherokee Freedmen argue that the Cherokee Nation is violating an 1866 treaty with the United States that gave Cherokee Freedmen

51. See 60 Minutes II (CBS television broadcast, July 10, 2002).
52. Seminole Nation v. United States, 78 Ct. Cl. 455, 472 (1933).
53. Sturm, supra note 12, at 226.
54. MAY, supra note 5, at 72.
55. McLoughlin, supra note 31, at 381.
56. Sturm, supra note 12, at 225 (quoting DANIEL F. LITTLEFIELD JR., THE CHEROKEE FREEDMEN: FROM EMMANICATION TO AMERICAN CITIZENSHIP 8, 9 (1978)).
57. Id. at 243.
58. Id.
59. Id.
“all the rights of native Cherokees.”60 Pursuant to this treaty, Cherokee Freedmen were able to hold political office, vote, and participate fully within the Cherokee Nation.61 The Nation, however, distinguishes its case from Davis v. United States.62 A spokesperson from the Cherokee Nation claimed that although the Seminole Nation changed its constitution to evict its Black members, Freedmen able to document Cherokee ancestry have always been eligible for membership within the Cherokee Nation.63 However, a history of racism has been entrenched within the Cherokee Nation since its beginnings.

The Cherokee Freedmen are now embroiled in a legal battle very similar to the one begun by the Seminole Freedmen.64 They are also suing the BIA and are represented by the same attorneys who represented the Seminole Freedmen.65 In addition, the Cherokee Freedmen recently established a Legal Defense Fund to support their case.66 Unless Congress or the appropriate executive agencies intervene, or the courts take a position different from that of the Tenth Circuit, the Cherokee Freedmen will fare no better than the Seminole Freedmen.67

2. Creek Freedmen

At least one scholar places the Creeks in the middle of the race-relation spectrum of the Five Civilized Tribes, alongside the Cherokee Nation, stating that “the Creeks and Cherokees impeded the political and social equality of their African American citizens.”68 While many full-blooded Creeks apparently treated Black slaves like free people and only required them to pay a “tribute,”69 life for Blacks living among the Creeks

60. Celia E. Naylor-Ojurongbe, “Born and Raised among These People, I Don’t Want to Know Any Other”: Slaves’ Acculturation in Nineteenth-Century Indian Territory, in CONFOUNDING THE COLOR LINE, supra note 1, at 176.


63. Id.

64. See id.


67. See supra Part I.B for discussion of Davis outcome.

68. May, supra note 5, at 4.

69. Id. at 45.
was more difficult than that of Blacks living among the Seminoles. The Creeks passed "slave codes" that restricted the activities of Blacks, forbade slaves from owning property, and prevented the offspring of Indian and Black unions from inheriting.70

There is evidence, however, that the Creeks did accept and embrace Blacks to a certain extent.71 For example, Blacks at times held office within the Creek Nation.72 In addition, other tribes sometimes regarded the Creeks as less civilized because of their relative lack of prejudice toward Blacks.73 Thus, while the Creeks did not welcome Blacks as equal citizens, they did not reject them to the extent that other tribes did.

3. Choctaw and Chickasaw Freedmen

Blacks traditionally have been least respected within the Choctaw and Chickasaw Nations. Both Nations were "great sticklers for racial purity,"74 and both had "a 'decided aversion' to intermixture with [Blacks]."75 One southern White even praised the Chickasaw Nation for its insistence on racial integrity and its refusal to adopt the Freedmen into the tribe.76

During the Civil War, the vast majority of the Choctaw and Chickasaw supported the Confederacy.77 These tribes generally felt that Blacks were to blame for the South's inability to succeed in the War.78 Although all of the Indian tribes were opposed to the idea of Black colonization after the war, the Choctaw and Chickasaw most resisted the idea.79 Both tribes were eventually forced to give their Freedmen land, limited rights, and the electoral franchise.80

The Choctaw lynched and terrorized their Black Freedmen to drive them off of tribal land.81 Those Choctaw Freedmen who chose to stay with the tribe were treated similarly to non-Indian Blacks. The tribe restricted them to patronizing "Black-only" businesses and attending

70. Id.
71. Id. at 255–64.
72. Id. at 256.
73. PORTER, THE NEGRO, supra note 27, at 44.
74. Id. at 43.
75. Id. at 73.
76. Id. at 78.
77. Id. at 73. In comparison, the Seminoles and Creeks were generally opposed to the Confederacy and the Cherokees were evenly divided.
78. Id. at 74.
79. Id. at 76.
80. Id.
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They never attained full and equal tribal rights. 

D. The Legacy of Slavery in the United States

As one commentator noted, "this country was founded on the backs of Black slaves and Indian lands." While Indians practiced their own brand of slavery for centuries before White settlers arrived in America, the racist nature of the slavery practiced by Whites made it different from anything in which the Indians had formerly engaged. The introduction of slavery both in White and Indian settings in its most virulent form still has legal, cultural, and social ramifications for Blacks today, including the Freedmen's fights for equal rights within Indian nations. The effects of slavery are so evident in the Freedmen battles that one scholar has argued that "there have been no systematic efforts to remove the vestiges of slavery from the law.

1. Remnants of Slavery

Some individuals have maintained that Freedmen do not have, and have never had, sovereignty or land base as an argument for tribal membership. This assertion is premised on ideas of personhood that are traceable back to the days of slavery. Before 1866, when Indian nations signed treaties granting their Black members citizenship status, Blacks were generally thought of as property, and the assumption was that all people of African descent had been slaves before 1866.

Therefore, when the Seminole Nation establishes programs open only to those members who descended from members of the Seminole Nation

82. Id.
83. Id.
86. See RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 76 (2000) ("The discriminatory attitudes spawned to justify slavery ultimately guaranteed that, even after emancipation, [B]lacks would be concentrated at the bottom of American society indefinitely.").
87. Saito, supra note 22, at 1172.
88. David Melmer, Dialogue Opens on Black Indians in Indian Country: Going to the Heart of Most Discussion is Tribal Sovereignty, INDIAN COUNTRY TODAY (LAKOTA TIMES), Nov. 29, 2000, at A8.
89. Saito, supra note 22, at 1172–74.
90. Id. at 1172–73.
"as it existed in ... 1823," it is "tracing current rights back to people's status at a time when they were considered 'property' under the law." These eligibility requirements cultivate the idea that Blacks are not entitled to any tribal benefits that stem from their place in history before 1866 when they were formally recognized as citizens of Indian nations. As one scholar stated: "[T]he United States government ... defines [Seminole Freedmen], in the eyes of the law, as unworthy of rights today because they were legally considered [W]hite people's property yesterday."

Slavery was also a driving force behind the manipulation of relations between Indians and Blacks by southern Whites during the colonial period. Because they were fearful of both slave uprisings and Indian retaliations against them, "[W]hites attempted to keep [slaves and Indians] separate and sowed distrust among them in order to prevent concerted actions against [W]hites." This is one of the earliest examples of racial animosity being deliberately created between Indian and Black groups, and the remnants of that dissention are still obvious today in the interplay between Indian nations and their Freedmen members.

White slaveholders also contributed to the strife between Indians and Blacks by offering awards to Indians for the capture of runaway slaves. In some instances, slaves were also armed to fight Indians. Because they were so invested in keeping slave and Indian groups apart, it was particularly disturbing for United States officials to learn that some Indian tribes were harboring escaped slaves. White slaveholders were especially angered by the freedoms enjoyed by Blacks within the Seminole Nation because they felt such independence undermined the system of slavery upon which they so heavily relied. Slaves did not flee to any one Indian nation, however—throughout Indian communities in the South, "Whites ... found [B]lack faces staring back at them."

Although some Indian groups embraced Blacks to a certain extent and even provided shelter to runaway slaves, the seeds of discrimination

91. Davis v. United States, 343 F.3d 1282, 1287 (10th Cir. 2003) (emphasis omitted) (citation omitted).
92. Saito, supra note 22, at 1174.
93. Id.; see also Henry, supra note 7 ("The United States ... is utilizing the legal concept of slavery that [B]lacks could not own land rights in 1823 to distribute the money in a discriminatory factor by not including the [Seminole Freedmen]").
94. See MAY, supra note 5, at 19-20.
95. Id. at 19.
96. Id. at 20 (discussing the various "divide and rule" tactics used by Whites in attempts to create fear and suspicion between Indians and slaves).
99. See DRAMER, supra note 81, at 30.
100. KATZ, BLACK INDIANS, supra note 14, at 126.
had already been sown. Because of the lengths Whites went to in creating hostility between Indians and Blacks, it comes as no surprise that “the objects of prejudice (Native Americans and African Americans in the perception of [W]hites) became themselves prejudiced against each other.”

Eventually, Indian nations that more actively shunned Blacks became known as the “higher class.” The perception of an Indian civilization went hand-in-hand with that particular nation’s treatment of Blacks, and at one point a federal Indian agent remarked that “the fastest way to civilize the Indians would be to give each Indian family a couple of [B]lack slaves.”

Whites accepted Blacks living within Indian tribes so long as they were being used as slaves and thereby helping to civilize the Indians within those tribes. Thus, Blacks were “welcomed as slaves and discarded as free people.”

2. The One-Drop Rule

The one-drop rule, or the rule of “hypodescent,” defines any person with even “one drop” of Black blood as Black. The one-drop rule allowed slaveholders to claim ownership of any person with Black ancestry regardless of any White ancestry. In effect, White slaveholders developed the one-drop rule to further the expansion of their slave populations.

The one-drop rule had implications for Whites in their dealings with Indians as well. While Blacks did not originally have land ownership claims, Native Americans did. Thus, Whites would benefit from a reduction in Indian populations. By using the one-drop rule, Whites

101. May, supra note 5, at 7.
102. Wilton Marion Krogman, The Racial Composition of the Seminole Indians of Florida and Oklahoma, 19 J. Negro Hist. 412, 424 (1934) (noting that the Cherokee, Chickasaw, and Choctaw tribes were once regarded as the “higher class” among the Five Civilized Tribes and did not “mix with the Negroes”).
103. McLoughlin, supra note 31, at 375.
106. Id.
107. See id.
108. See Miles, supra note 7, at 147 (“[The one-drop rule] ensured an ever-growing slave population fattened by the children of Black slaves and White masters, even as it protected White people from legitimizing ‘mulattos,’ ‘quadroons,’ and ‘octoroons’ as White.”).
109. May, supra note 5, at 146.
110. Id.
111. Id.
could categorize mixed Black-Indian persons as Black and therefore have fewer "real" Indians with whom to negotiate land deals and treaties.  

While the one-drop rule has been used as an inclusory device to define Blacks, Native Americans use a much more exclusionary standard in defining tribal membership. As one Freedman put it, "[t]his is America, where being to any degree Black is the same thing as being to any degree pregnant." However, in order to be recognized by the federal government as Indian, applicants must go through tedious and sometimes futile procedures to prove the existence of the appropriate degree of Indian blood.

The one-drop rule helps explain the differential treatment Indians with Black blood experience in relation to those Indians who claim to be mixed with White blood. The majority of Indian nations were made up of "full bloods," but they had little power. Because of their White ancestry, "mixed bloods" were somehow superior, and in contrast, those with Black blood were inferior. During the days of slaveholding, it was the Indians with White ancestry that usually owned slaves and held power on Indian lands and reservations. Even today, there exists a group of persons known as "Intermarried Whites" within the Cherokee Nation that do not have any Indian blood but are considered tribal citizens. Thus, to a certain extent, Whiteness has been revered in Indian nations just as it has been in dominant society.

112. Id.
113. Garroutte, supra note 105, at 231 (explaining that only the "slightest trace" of "Black blood" is required for an individual to be placed in the category of African American while American Indians must show proof of substantial amounts of "Indian blood" in order to be considered Native American); see also Welburn, supra note 6, at 293 ("I wondered how an Indian who was three-quarters or more White could be Indian while Indians who were a quarter Negro had to be Negro.").
114. Sturm, supra note 12, at 241 (quoting a Cherokee Freedmen descendent).
115. Cherokee Freedmen Protest, supra note 61 (explaining the routines that Cherokee Freedmen are often put through in order to enroll themselves and their children, including being sent to obtain Certificate of Indian Blood cards that they are ultimately unable to obtain because they are unable to show that they have the requisite blood quantum).
116. KATZ, BLACK INDIANS, supra note 14, at 137–38.
117. Id.
118. Cherokee Nation Hears, supra note 104 (noting also that the Delaware Indians have been adopted into the Cherokee Nation and have been granted citizenship, while the Freedmen who were also adopted into the Nation have not been granted citizenship).
Tribal sovereign immunity protects the right Indian tribes have to "exercise supreme and independent power in their decision making." This immunity is a bedrock principle of Indian Law that has become crucial to Indian nations as a means of protecting their ways of life. Accordingly, "sovereignty, the inherent right of self-government and self-determination, is the focal point in all Indian issues."

Like the federal government, tribal governments have the authority to structure their governments and court systems as they wish. Tribal immunity is a product of settled case law and "not subject to diminution by the States." The same rationales that are used to defend state and federal immunity from suit are used to explain and defend tribal immunity. While there are limits on tribal jurisdiction, tribal governmental authority is expansive and includes the powers to define tribal membership or citizenship; create and apply criminal and civil codes; and allocate, regulate, and protect tribal lands. Therefore, due to the important governmental functions that they perform, tribal governments are allowed the same immunity from suit as the federal government.

123. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 197 (1989).
124. Id. at 101.
126. One author cites the following four reasons why the arguments in support of state and federal immunity also support immunity for Indian tribes:

First, tribes did not participate in the creation of the constitutional system of government and therefore their interests are in a much more precarious position than those of the states. . . . Second, while states have generally prospered since their inclusion in the Union, such is not the case for Indian tribes. . . . Third, tribes often lack the legal resources states have at their disposal when they need to defend themselves from lawsuits. Finally, even the Supreme Court has stated that federal judicial interference in tribal actions can do little more than "unsettle a tribal government's ability to maintain authority."

Wilson, supra note 119, at 102–03.
127. Id. at 198, 292.
128. Id. at 200.
129. Id. at 205.
130. Id. at 215.
Although they enjoy certain powers as sovereign entities, Indian nations may also be characterized as "domestic dependent nations." Tribes are "domestic" because they are located within the physical boundaries of the United States and "dependent" because their authority is restricted. They are allowed to yield a somewhat limited form of governmental power and independence.

Currently, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Moreover, the Supreme Court has stated that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." The Court has also indicated that because of the uniqueness of tribal cultures, whose dictates are largely unfamiliar to federal courts, the judiciary should be hesitant to intrude upon the domain of Indian governments.

The limitations on tribal governments are important considerations in the Freedmen controversy because the tribes are using their power as government entities and the benefit of sovereign immunity that comes with such status in denying Freedmen rights as tribal citizens. Due to the nearly unfettered control that Indian tribes have in determining tribal membership and involvement, the Supreme Court has held that Indian tribes are necessary parties in litigation, such as that brought by the Seminole Freedmen, that directly challenges the tribe's ability to decide who may participate in its programs. Therefore, any case brought by a Freedmen group must join the particular tribe in question as a party. However, the Supreme Court disfavors judicial intervention when an Indian nation asserts its tribal sovereignty to avoid litigation. Courts place great emphasis on the ability of tribal governments to remain "culturally and politically distinct entities." Tribal sovereign immunity is an important consideration in the Freedman controversy, where tribal sovereign immunity blocks Freedman from the ability to contest the denial of full tribal membership.

132. Id.
133. Id.
136. Id.
137. See infra Part II.A (exploring the tribal use of sovereign immunity to discriminate against Black Freedmen); see also Cherokee Freedmen Caught, supra note 62 (quoting Jon Velie, an attorney for the Seminole and Cherokee Freedmen, who points out that some Indian nations are using sovereignty as a mechanism for denying Black Freedmen their rights).
139. See supra text accompanying notes 49–50.
140. See Martinez, 436 U.S. at 72.
141. See id.
II. Analysis

A. Interpreting the Tribal Sovereign Immunity

Doctrine in the Courts

1. The Development of Tribal Immunity and
   the Assessment of Fault

Although the doctrine of tribal immunity is a product of case law, “its development was purely accidental and purely a creation of the judiciary.”\(^{142}\) In *Kiowa Tribe v. Manufacturing Technologies, Inc.*,\(^{143}\) the Court noted that although the doctrine purportedly comes from the Court’s opinion in *Turner v. United States*,\(^{144}\) that case does not actually support the doctrine.\(^{145}\) The *Turner* Court made “an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.”\(^{146}\) The Court then noted that the legislation passed by Congress authorizing the suit in *Turner*\(^{147}\) was premised not on the Tribe’s sovereign status, as is widely believed, but because without it, the Tribe could not have been sued in any court without its consent.\(^{148}\) Hence, *Turner* “is but a slender reed for supporting the principle of tribal sovereign immunity.”\(^{149}\)

*Kiowa* is important because it leaves no doubt that the Court generally dislikes the doctrine of tribal immunity\(^{150}\) but retains it because Congress has not taken any steps toward abolishing it.\(^{151}\) *Kiowa* explicitly recognizes that “tribal immunity extends beyond what is needed to safeguard self-governance.”\(^{152}\) It also makes clear the Court’s belief that Congress has the duty of determining the appropriate boundaries of tribal immunity because it has the sole power to alter the limits of tribal immunity through explicit legislation.\(^{153}\)

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142. Wilson, *supra* note 119, at 125.
144. 248 U.S. 354 (1919).
146. *Id.* at 757.
147. Congress passed a law allowing Turner, a non-Indian, to sue the Creek Nation in the Court of Claims for the destruction of his property. *Id.* at 756.
148. *Id.* at 757.
149. *Id.*
150. See Wilson, *supra* note 119, at 124, 126.
151. See *id.* at 125 ("[T]he Supreme Court retained the doctrine because Congress often chose not to abrogate tribal immunity in order to promote tribal economic development and self-sufficiency"); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).
152. 523 U.S. at 758.
153. *See id.* at 759.
In 2002, *Seminole Nation v. Norton*\(^{154}\) indicated a tentative willingness by the judiciary to intervene on behalf of the Seminole Freedmen. In *Norton*, the Seminole Nation sought a declaration that the Department of the Interior violated the Administrative Procedure Act ("APA") and the "Principal Chief" Act when it refused to recognize the Nation's General Council or its newly elected Chief.\(^{155}\) The Department of Interior's ("DOI") refusal came after the Nation submitted amendments to the Seminole Constitution that would have excluded the Freedmen from membership in the Nation and held an election in which the votes of Freedmen tribal members were not counted.\(^{156}\)

The court held that the DOI had not acted contrary to law in refusing to recognize the newly elected Chief or those General Council members who ran for office in violation of the original Seminole Constitution.\(^{157}\) In so holding, the court stated that "the Nation [had] blatantly disregarded the requirements of its own Constitution and sought to exclude longtime members of its own tribe from seeking office and participating on the General Council."\(^{158}\)

In response to the argument that the case was about the Nation's sovereignty and its "unequivocal" desire to remove the acting Chief, the court held that the Secretary of the Interior had the duty to protect individual members of the tribe whether the infringement was by members or nonmembers of the tribe.\(^{159}\) Furthermore, the exclusion of the Freedmen from participation in the election was sufficient justification for the refusal of the DOI to recognize the newly elected members.\(^{160}\)

At first glance, this case suggests that courts may intervene in actions such as those currently brought by Freedmen groups. However, *Norton* treads a fine line between upholding the DOI's decision and protecting the sovereign rights of the Seminole Nation.\(^{161}\) Moreover, the court decided the case pursuant to the authority provided to it under the APA, which allows it to set aside agency actions, findings, or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."\(^{162}\) The court made clear that it could not issue any

\(^{155}\) Id. at 125.
\(^{156}\) Id. at 125–26.
\(^{157}\) Id. at 147–48.
\(^{158}\) Id. at 144.
\(^{159}\) Id. at 146.
\(^{160}\) Id.
\(^{161}\) Id. at 147.
\(^{162}\) Id.; see also Harrison v. Dep't of Interior, No. 99-7108, 2000 WL 1217841, at *2 (10th Cir. Aug. 28, 2000) (declining to set aside the BIA's action under an "arbitrary and capricious" standard in a case arising out of a dispute between the Choctaw Nation and a plaintiff who was seeking membership in the Nation).
order purporting to impose a certain form of government on the Seminole Nation. 163

The Norton court essentially claimed that its hands were tied in matters dealing exclusively with the sovereign immunity of tribal governments. The court was able to intervene only because the case involved government agency actions and implicated federal statutes. The case suggests, however, that Congress, as well as government agencies such as the DOI and BIA, should be involved in assessing the proper boundaries of tribal immunity.

While Congress has plenary power over tribes, 164 the DOI and BIA play a large role in fashioning and interpreting Indian Law. 165 Since courts review DOI actions according to an “arbitrary and capricious” standard, 166 rulings made by the Department are accorded great deference and are important in deciding the fate of Indian nations and individuals within those nations.

Although the Court mentioned the “accidental” beginnings of tribal sovereign immunity, 167 courts have continued to adhere to its strictures. The Supreme Court has affirmed the power of tribal governments to set their own membership criteria, 168 and courts generally have recognized that one of an Indian tribe’s most elemental powers is its authority to establish its own membership criteria. 169 Thus, Freedmen groups may find it quite difficult to attain relief by looking solely to the judicial branch of government.

2. Santa Clara Pueblo v. Martinez

An important example of judicial acceptance, however reluctant, of tribal immunity is found in Santa Clara Pueblo v. Martinez. 170 Martinez is directly applicable to the immunity issue because it also deals with a form of discrimination—gender discrimination.

164. Wilson, supra note 119, at 127; see F. Cohen, Handbook of Federal Indian Law 219 (1982 ed.) (noting that the term “plenary” does not mean “absolute” or “total” but is used to describe the congressional power over Indians).
165. See Thomas v. United States, 189 F.3d 662, 664 (7th Cir. 1999) (noting that the United States Secretary of the Interior must call, hold, and approve of elections to adopt, revoke, or amend tribal constitutions); see also Johnston, supra note 12, at 265 (stating that the Seminole Nation’s constitution requires the BIA to approve any changes to its membership criteria).
166. Norton, 223 F Supp. 2d at 147.
167. See supra text accompanying note 142.
Julia Martinez, a full-blooded member of the Santa Clara Pueblo, brought suit under Title I of the Indian Civil Rights Act\(^ {171} \) against the Santa Clara Pueblo and its governor.\(^ {172} \) The suit resulted from a membership ordinance passed by the tribe two years before Martinez married a man who was not a Santa Clara Pueblo member.\(^ {173} \) The ordinance held that children born of marriages between female members of the Santa Clara Pueblo and male non-members of the Santa Clara Pueblo were not members of the tribe, while children born of marriages between male members of the Santa Clara Pueblo and female non-members were members.\(^ {174} \) As a result of this ordinance, even children raised on the reservation were excluded from participation and lost all property rights once their mother died.\(^ {175} \)

The Court never reached the merits of the case,\(^ {176} \) instead holding that Title I of the ICRA does not authorize a federal cause of action against a tribe or its officers either expressly or by implication.\(^ {177} \) The Court also said that "[i]n the absence ... of any unequivocal expression of contrary legislative intent, ... suits against [a] tribe under the ICRA are barred by [the tribe's] sovereign immunity from suit."\(^ {178} \)

The Court noted that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."\(^ {179} \) However, it is reasonable to assume that it would be extremely difficult, if not impossible, for a plaintiff such as Julia Martinez—one who is challenging the well-protected right of a tribe to determine its own membership—to attain relief in a tribal court. Presumably, tribal courts would be invested in protecting the sovereignty of tribal nations to the detriment of a plaintiff like Martinez.

*Davis v. United States*\(^ {180} \) illustrates this point. The district court found that the Seminole Freedmen would not have an appropriate remedy if their case were dismissed.\(^ {181} \) While noting the existence of tribal courts, the *Davis* court expressed that it "[would] be futile for the [Freedmen] to

\( \)\(^ {172} \) *Martinez*, 436 U.S. at 51.
\( \)\(^ {173} \) *Id.* at 52.
\( \)\(^ {174} \) *Id.* at 52 n.2.
\( \)\(^ {175} \) *Id.* at 52-53.
\( \)\(^ {176} \) Ferguson, supra note 131, at 275-76.
\( \)\(^ {177} \) *Martinez*, 436 U.S. at 51-52; see also Nero v. Cherokee Nation, 892 F.2d 1457, 1461-62 (10th Cir. 1989) (holding that the only federal remedy provided by the ICRA is habeas corpus relief).
\( \)\(^ {178} \) *Martinez*, 436 U.S. at 59.
\( \)\(^ {179} \) *Id.* at 65.
\( \)\(^ {180} \) 343 F.3d 1282 (10th Cir. 2003).
\( \)\(^ {181} \) *Id.* at 1290.
seek adjudication in [those] tribal forums." The Tenth Circuit did not need to disturb that finding because the Defendants did not challenge it, indicating that even government agencies understand the futility of bringing a claim in a tribal court when that claim directly disputes the sovereignty of a tribe. Courts have explicitly recognized that persons claiming discrimination at the hands of Indian tribes may not have a forum in which to express their grievances, yet they continue to uphold the broad reading of tribal sovereignty and thereby leave the affected persons without a remedy.

B. Regulation by Congress and Executive Agencies

1. The Definition of "Indian" and Blood Quantum Requirements

Many of the problems associated with determining who will be recognized as an Indian for governmental purposes stem from the various definitions of the word "Indian" found within federal legislation. The result of these myriad and often conflicting definitions is that some individuals may be deemed Indian for one purpose but not for another. Generally, legislation concerning Indians uses definitions based either on blood quantum or tribal status, or in some cases, it does not use any definition at all.

The federal government and many tribal governments currently characterize their relationship to Indians in terms of race through blood quantum requirements. Such requirements demand that individuals be able to prove a minimum degree of Indian ancestry to be eligible for certain programs or to be granted membership in certain tribes. The

182. *Id.* at 1293.
183. *Id.*
184. See, e.g., Martinez, 436 U.S. at 72 (finding that Congress' extraordinarily broad authority over tribal matters constrains judicial authority).
185. See Garroute, *supra* note 105, at 227 (noting that a 1978 congressional survey found at least thirty-three separate definitions of the word "Indian" in different pieces of federal legislation).
186. Brownell, *supra* note 122, at 277 (comparing the use of different definitions of the word "Indian" in determining whether individuals are eligible to participate in various government programs).
187. *Id.* at 278.
188. *Id.* at 277; Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 Notre Dame L. Rev. 1461, 1482–83 (1991); see also Brown, *supra* note 21, at 116–18 (discussing the ramifications of using racial composition as a determinative factor in deciding who is Indian).
The Seminole Nation recently has used both blood quantum and tribal status to deny Freedmen membership in the tribe. Davis exemplifies how the Nation has used tribal status to prevent the Freedmen from participating in the Judgment Fund Award by only allowing descendents of those who were tribal members in 1823 to participate in the program. In addition, Norton discusses how the Nation attempted to implement a constitutional amendment that would have required members to show that they have at least one-eighth Seminole Indian blood.

Blood quantum requirements work hand-in-hand with the one-drop rule. While "[t]he 'one-drop rule' ensured that there would be more Black laborers for slavery's human machine ... blood quantum ratios ensured that there would be more available land for White settlement and development." Due to intermarriage between tribes, blood quantum requirements were difficult criteria for Indians to meet. As fewer Indians were actually categorized as Indians, fewer could make land ownership claims. Both means of determining group identity, the one-drop rule and blood quantum requirements, originated in the nineteenth century with White policy-makers who were looking for ways to broaden their own land base while ensuring that there were as few hindrances as possible. As a result, Indian and Black identities are defined by methods that originated outside of both Indian and Black communities.

One problem with the government's use of blood quantum requirements is that "by requiring enrollment and the possession of a certain degree of blood quantum ... the federal government is providing services and benefits to only a portion of the citizenship." Moreover, some commentators have argued that the government uses blood quantum requirements to reduce the costs of federal programs.

The BIA has been a leader in using blood quantum requirements to determine eligibility for federal benefits. The BIA has also relied dispo-

190. Garrouette, supra note 105, at 224 (explaining that "one-quarter blood degree" is the most frequent standard for minimum "blood quantum" required for legal citizenship).
191. See supra Part I.B.
192. See supra text accompanying notes 155–56; see also Johnston, supra note 12, at 262.
193. Miles, supra note 7, at 146–47.
194. Id. at 147.
195. Id.
196. Id.
197. Id.
198. Id.
199. O'Brien, supra note 188, at 1490.
200. Murg, supra note 17, at 5.
201. See Brownell, supra note 122, at 288–92.
portionately on physical characteristics to determine blood quanta.\textsuperscript{202} For example, during the 1930s, the BIA sent a Harvard anthropologist to North Carolina to determine whether the Lumbee group was actually Indian.\textsuperscript{203} The anthropologist's method of determination was to place a pencil in each person's hair, noting "Indian" if the pencil slipped through the hair and "Negroid" if it did not.\textsuperscript{204} Even recently, the BIA has continued to rely heavily on blood quantum requirements without formally publishing its certification procedures, violating a requirement under the Administrative Procedure Act.\textsuperscript{205} Thus, the government agency most responsible for implementing federal programs on behalf of Indians has, throughout its history, irresponsibly handled certification methods crucial to Indians who assert claims for federal benefits.\textsuperscript{206}

Furthermore, the use of blood quantum requirements is a convenient way for tribes to reduce the number of persons to whom they must distribute scarce resources. One scholar has noted that "[a] tribe's decision to rely on blood quantum (and its decision regarding which blood quantum to use) is frequently linked to the struggle for tribal survival [or] the desire to maximize wealth or political advantage."\textsuperscript{207} But some individuals are concerned that blood quantum requirements are often used simply to keep Blacks from membership in tribes.\textsuperscript{208} The Seminole Freedmen situation in \textit{Davis} substantiates this argument. Obviously, not until the Seminole Nation looked for a way of excluding Blacks from its membership did blood quantum become a viable option for the tribe to regulate membership and participation within the Nation.\textsuperscript{209}

\textsuperscript{202} Id. at 288.

\textsuperscript{203} Id.

\textsuperscript{204} Id.

\textsuperscript{205} Id. at 290.

\textsuperscript{206} See id. at 288–92 (discussing various shortcomings of the BIA in its handling of blood quantum requirements, including exceeding its administrative authority by imposing different, and more restrictive, blood quantum requirements than the authorizing statutes allow).

\textsuperscript{207} Id. at 309.

\textsuperscript{208} 60 Minutes II, supra note 51 ("This whole business of degree of Indian blood is just a concoction. It's just an excuse now that's been dreamed up of late in order to exclude the Blacks from membership in the tribe.") (quoting Joe Opala, a professor at James Madison University).

\textsuperscript{209} See id.; see also Johnston, supra note 12, at 267 (arguing that while the Seminole Nation may have been bringing itself into line with Indian politics generally when it introduced a blood quantum requirement, the requirement had the "unusual" effect of excluding a significant portion of the tribe).
2. The Dawes Commission

In 1893, Congress passed the Dawes Commission Act, which created the Dawes Commission and granted it the authority to procure agreements for allotment and for the subsequent dissolution of the tribal governments of the Five Civilized Tribes. The Act was passed in preparation for Oklahoma statehood. The Dawes Commission also created what became known as Dawes Commission Rolls ("Dawes Rolls") to certify Indians within the Five Tribes.

In 1906, Congress authorized the Dawes Commission to create membership rolls for the Seminole Nation. The Commission placed individuals on two separate rolls—the "Freedmen Roll" and the "Seminole Blood Roll." Although the Seminole Nation attempted, unsuccessfully, to change its constitution in 2000, membership in the Nation has always been determined by whether or not the person seeking membership can trace his or her lineage to either the Freedmen Roll or the Seminole Blood Roll. Thus, notwithstanding the efforts of the tribe to expel them, the Seminole Freedmen remain bona fide members of the Seminole Nation.

The widely held assumption by those wishing to oust Freedmen from tribal membership is that Seminole Freedmen have little or no Indian blood. Due to intermarriage, some Freedmen actually had Seminole blood, yet the Dawes Rolls rarely recognized this ancestry. In some cases, Blacks were all treated the same and placed on the Freedmen Rolls regardless of whether or not they had ever been slaves. This held true whether they were part-Indian, and thus could prove some degree of Indian blood, or whether they were without any Indian ancestry whatsoever. Moreover, "because the Seminole Nation is matrilineal, if an individual's mother was a Freedmen and [her] father was Indian by blood,

210. See generally O'Brien, supra note 123, at 129 ("[In 1893] Congress created the Dawes Commission to negotiate with tribes for the allotment of their lands and the eventual creation of the state of Oklahoma.").
211. Dawes Commission Began in Late 1800s, CHEROKEE ADVOC., Aug. 31, 1994, at 4.
212. Id.
213. Id.; see May, supra note 5, at 77-78 (discussing the Dawes Allotment Act and the various tribal rolls established by the Dawes Commission).
214. Davis v. United States, 192 F.3d 951, 954 (10th Cir. 1999).
215. Id.
216. See supra text accompanying notes 154-62.
217. Davis, 192 F.3d at 955.
218. See Johnston, supra note 12, at 267.
219. Id.; see also Garroutte, supra note 105, at 232-34 (discussing a variety of reasons why individuals may not have been correctly enrolled on the Dawes Rolls).
220. May, supra note 5, at 79.
that individual was enrolled [on] the Freedmen Roll.”

Yet, if the individual’s mother was Indian by blood and father was Black, she would be enrolled on the Seminole Blood Roll.

Some commentators have characterized blood quantum requirements and tribal rolls as modern-day grandfather clauses. Grandfather clauses were used in the Deep South to disenfranchise Blacks during the Jim Crow Era by only allowing them to vote if their grandfathers had voted. This requirement effectively prevented most Blacks from voting because their grandfathers had been legally prevented from voting. Thus, southern legislatures were able to use facially non-discriminatory procedures to strip Blacks of their rights in extremely discriminatory ways.

Similarly, blood quantum requirements prevent Blacks from being recognized by Indian nations because such requirements are frequently based upon tribal rolls that may have misrepresented the status of individual Blacks or excluded them altogether. Just as racist practices prevented Blacks from voting in the Jim Crow South, some Black Freedmen now cannot receive federal benefits because of discriminatory practices utilized years ago when tribal rolls were created.

3. Congressional Power and Agency Authority

As previously noted, Congress has very broad powers over Indian tribes, and only Congress possesses the Constitutional power to restrain Indian tribes. The authority for this power is usually derived from the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause of the Constitution. Consequently, tribal sovereignty “exists only at the sufferance of Congress,” and any potential adjustments to the relations between tribal and federal governments are within the

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221. Saito, supra note 22, at 1171.
222. Id.
223. Legal Defense Fund, supra note 66.
224. See id.
225. Id.
226. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (“Congress’ authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.”); see supra text accompanying notes 134, 164.
228. U.S. CONST. art. I, § 8, cl. 3.
229. Id. at art. II, § 2, cl. 2.
230. Id. at art. VI, cl. 2.
231. Cohen, supra note 164, at 211.
232. Ferguson, supra note 131, at 279.
unique domain of Congress. While Congress' plenary power over Indian tribes may have some limitations, the Supreme Court has never held an act of Congress against an Indian tribe to be unconstitutional. Presumably courts will uphold any potential changes Congress makes in the law of tribal sovereignty immunity.

The DOI and BIA also exert a tremendous amount of power over Indian tribes. The Seminole Nation's constitution requires that any changes made to it be approved by the BIA, and the DOI has asserted "that it has 'broad and possibly nonreviewable authority to disapprove or withhold approval of [any] tribal constitutional amendment regarding membership criteria.' As previously noted, the standard of review for BIA actions requires only that its decisions be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Thus, the BIA and DOI have the authority to block actions taken by tribal nations, and their decisions will rarely be overturned by federal courts due to the high standard of proof involved.

While Indian tribes have been most active in excluding Black Freedmen from Indian nations, the problem of discrimination also lies within those agencies charged with administering federal policy. In the Seminole case, BIA and DOI officials recommended to the Seminole Nation that the Black Freedmen be excluded from participating in the Judgment Fund Award. However, the DOI maintains that it was simply "advising" the tribe as it sought to make its own decisions under the authority of its sovereignty.

While the DOI and BIA were active in fighting the exclusion of Seminole Freedmen from participation in tribal elections in Norton, the agencies have breached their duty to do the same for the Cherokee

234. Ferguson, supra note 131, at 279.
235. See generally O'BRIEN, supra note 123, at 262-63 (discussing the responsibilities of the BIA).
236. Johnston, supra note 12, at 265.
239. Daniels, supra note 8 ("The BIA has consistently refused to honor the request of any Black Seminole who has applied for benefits under [the Judgment Fund] award, thereby systematically discriminating against Seminoles of African descent.").
241. Glaberson, supra note 240.
In 2003, the BIA recognized a Cherokee election that excluded 25,000 Cherokee Freedmen from participation. The election was held in direct violation of a statute requiring the Cherokee Nation to submit any changes in election procedure prior to the election. Thus, the BIA has been undeniably schizophrenic in its treatment of Black Freedmen and has blatantly ignored precedent that it helped to set.

The problem with congressional and agency disregard for Freedmen claims may be political. The government may not be as concerned with the merits of the claims brought by the Freedmen as it is with the repercussions of providing a remedy to them. The government may fear that if it were to provide a remedy for, say, the Seminole Freedmen, then it would be bombarded with claims of discrimination by Blacks within other Indian nations. However, this argument suggests that Congress would be forced to find a remedy for the problem if enough political pressure were brought to bear on the outcome. The argument also suggests that African American communities must become more involved in supporting the Freedmen cause if that pressure is ever to become a reality. If African Americans band together as cohesive political groups with an agenda that recognizes the plight of Black Freedmen, they will be better able to advocate for the needs of those who are being denied access to their tribal resources.

4. The Indian Civil Rights Act

In 1968, Congress passed the ICRA, a more limited version of the constitutional rights guaranteed by the federal government that applies to members of Indian tribes. The ICRA's requirements are "arguably ... the most pervasive limitation that the federal law places on the actions of tribal officials." It is also the only federal statute that directly addresses the civil rights of persons under tribal jurisdiction. Title I of the Act holds that, in exercising the powers of self-government, an Indian tribe

244. Id.
245. Id.
246. Daniels, supra note 8.
247. Id.
248. Id.
249. Id.
250. Id.
252. COHEN, supra note 164, at 666.
254. COHEN, supra note 164, at 670.
may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 255

The ICRA would seem to provide the Freedmen's strongest claim against Indian governments. However, Martinez illustrates the weaknesses of the Act, since Julia Martinez lost her Title I gender discrimination suit against the Santa Clara Pueblo. 256 The Martinez Court made it clear that the ICRA is primarily enforceable in tribal courts. 257 This holding severely limits the civil rights claims of Freedmen, because Freedmen will likely find it nearly impossible to obtain relief in tribal courts. 258

Some might argue that automatically assuming that tribal courts would not treat individuals bringing equal protection claims under the ICRA fairly or with the same amount of judicial respect that persons bringing other types of claims might receive is inappropriate. 259 Evidence suggests that tribal courts are greatly concerned with issues of due process and have developed sophisticated systems of dispute resolution similar to those found in traditional American courts. 260 Yet tribes have their own unique notions of due process, in keeping with their right of self-determination, 261 and are not bound by the dictates of the dominant society. 262 Also, because ICRA cases have been brought so infrequently in tribal courts since Martinez, 263 it is difficult to assess just how fair tribal courts may be when confronted with ICRA claims.

255.  Id. at 667.
257.  COHEN, supra note 164, at 668-69.
258.  See supra text accompanying notes 179-83.
259.  See Robert J. McCarthy, Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years, 34 IDAHO L. REV. 465, 513 (1998) ("The evidence suggests that efforts to strip tribes of sovereign immunity or to greatly expand federal review of tribal courts are overbroad remedies for an exaggerated problem unfairly based on anecdote and cultural prejudice.").
261.  See Jennifer S. Byram, Civil Rights on Reservations: The Indian Civil Rights Act and Tribal Sovereignty, 25 OKLA. CITY U. L. REV. 491, 499 (2000) (discussing the view that civil rights guarantees should not be mandated for tribes because of tribal traditions that value the collective good over the rights of individuals); Freitag, supra note 260, at 857 ("Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law.").
262.  Freitag, supra note 260, at 864 ("Even when they apply principles of due process in ways that mirror Anglo-American courts, the tribal courts remain almost vehemently aware of their ability to differ at their own discretion to protect cultural traditions and tribal sovereignty.").
263.  Byram, supra note 261, at 494, 501; Freitag, supra note 260, at 843.
Moreover, the ICRA, in the rare times that it has been implicated, is most often used in criminal proceedings. Little, if any, research specifically tracks the results of civil cases brought before tribal courts dealing with equal protection claims challenging the correctness of membership requirements—such as those that would presumably be brought by Freedmen groups. Thus, it is still fair to assume that Black Freedmen would face prejudice in tribal courts, especially when considering the history of discrimination within many Indian tribes.

Another example of the shortcomings of the ICRA is exposed by the Supreme Court's refusal in *Martinez* to find a federal cause of action to enforce the statute within federal courts. Although it did recognize that causes of action are often implied when enforcing civil rights statutes, the Court found the right of tribal self-determination to be a more compelling policy. Moreover, because the ICRA does not limit tribes' immunity from suit, the ICRA cannot be directly enforced against Indian tribes. In sum, the federal government has created a statute that, on its face, appears to protect Julia Martinez, Black Freedmen, and persons similarly situated. Yet by failing to create a mechanism that allows claims brought under the ICRA to be heard in federal courts, the government leaves individuals claiming discrimination at the hands of Indian tribes to fend for themselves in tribal courts.

C. Breakdown of Indian–Black Relations

The Tenth Circuit recognized that the ordinance in question in *Martinez* was "an arbitrary and expedient solution" to the "practical economic considerations" that had arisen within the tribe. The same may be said for the Black Freedmen within Indian nations. As one Seminole Freedman explained, "[w]hen money and the government entered the picture, everything changed." Indian tribes possess a strong interest in thwarting claims made by Freedmen groups because scarce governmental resources are allotted to them to share within the tribe.

The controversy surrounding the Freedmen has contributed to the growing animosity between "blood" Indians and Freedmen. Black

264. McCarthy, supra note 259, at 506.
265. COHEN, supra note 164, at 668.
266. Id.
267. Id.
269. 60 Minutes II, supra note 51.
270. Brownell, supra note 122, at 304, 309 ("A tribe's decision to rely on a blood quantum (and its decision regarding which blood quantum to use) is frequently linked to the struggle for tribal survival, the desire to maximize wealth or political advantage, or other outside forces affecting the tribe.").
271. See generally supra text accompanying note 4.
Seminoles are no longer welcome or accepted within the Seminole Nation, and Cherokee Freedmen "continue to be one of the most marginalized groups in Native North America." Furthermore, many Freedmen identify themselves as both African American and Indian, causing some resentment among Indians who do not believe that a person may be both. Because Freedmen challenge prevailing racial ideologies, they may be forced to choose only one racial or ethnic identity.

III. Resolution

A. The Role of Executive Agencies

In Seminole Nation v. Norton, the Tenth Circuit held that, "[w]here [an Indian tribe] will not protect the Constitutional rights of its minority members, the BIA has the responsibility, and indeed, the duty, to intervene and attempt to protect those rights through appropriate remedies." The government needs to fulfill this duty on behalf of the Cherokee Freedmen. It should respond as it did for the Seminole Freedmen by refusing to recognize the Cherokee election that excluded the Cherokee Freedmen from participation. Based on Norton, courts would uphold such action.

The BIA and DOI also must invalidate any proposed ordinances or mandates similar to the Usage Plan proposed by the Seminole Nation. That Plan effectively excluded the Seminole Freedmen from participating in the Judgment Fund Programs funded by the Judgment Fund Award. However, invalidating tribal ordinances is difficult because agency review is limited to facial invalidity and regulations such as blood quantum requirements that do not appear at first glance to unfairly discriminate against particular groups may often slip through the cracks. Historically, government agencies have been more responsive when the tribal ordinance or legislation in question has involved more blatant discrimination. For example, the DOI once invalidated a tribal ordinance that excluded illegitimates—children born out of wedlock—from

272. Melaku, supra note 240, at 552.
273. Sturm, supra note 12, at 223.
275. Sturm, supra note 12, at 224.
277. See supra text accompanying notes 155-56.
278. Davis v. United States, 192 F.3d 951, 955 (10th Cir. 1999) (discussing the distribution fund prepared by the Seminole Judgment Fund Committee that was approved by the Seminole Nation General Council).
279. Id. at 956.
280. See Cohen, supra note 164, at 669 n.54.
281. See Davis, 192 F.3d at 956.
The Plight of "Nappy-Headed" Indians

Although ironically, this is a form of discrimination similar to that practiced by Indian tribes in the current controversy.

However, government agencies can stop history from repeating itself by refusing to allow tribal ordinances that mask discriminatory policies to stand. In the case of the Seminole Freedmen, the Usage Plan formulated by the Seminole Nation did not explicitly mention race, Freedmen, or any other term that to a person unfamiliar with the history of the tribe might signal discrimination toward Blacks, yet the Freedmen were still excluded from the Judgment Fund Programs and denied tribal benefits based upon their race.

Ultimately, executive agencies may face difficulties in preventing Indian tribes from implementing discriminatory programs. Yet if the BIA and DOI challenge such proposals, tribes will realize that executive agencies fight discrimination instead of passively accepting it. Moreover, Congress may eventually resolve the problem by either expanding or further limiting agency review of tribal ordinances. Although Congress could choose to stop agencies from reviewing tribal mandates at all, Congress more likely would expand agency review and thereby give agencies greater power to invalidate discriminatory legislation.

B. The Role of Congress

Congress holds the most federal power over Indian tribes and thus bears responsibility for ensuring that tribal nations do not unfairly discriminate against individuals. Congress could help to rectify the wrongs experienced by Freedmen by either limiting tribal sovereign immunity or strengthening the ICRA. However, neither option is easy, and scholars and practitioners have widely debated both.

1. Limiting Tribal Sovereign Immunity

Limiting the boundaries of tribal sovereign immunity would be an effective way for Congress to ensure a forum for Freedmen to bring their claims. However, many problems inhere in such a proposal. While gender- and race-based discrimination are "bad," tribal sovereignty, at least as a theoretical concept, is "good." Traditional Anglo-American law has shaped a legacy of White patriarchy that does not appreciate many of the

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282. See Cohen, supra note 164, at 669 n.54.
283. See Davis, 192 F.3d at 955–56.
284. See id.
285. See Laurence, supra note 170, at 315–16 (discussing the difficulty of coming to terms with Martinez because of the tension between condemning sex discrimination and protecting tribal self-determination).
286. Id. at 326.
values fundamental to tribal ways of life.\textsuperscript{287} Tribal sovereignty protects native customs and lifestyles that are grounded in cultural perspectives that differ radically from the views of dominant society.\textsuperscript{288} As shown above, because of the important interests that tribal sovereign immunity serves, well-founded opposition to limiting the doctrine exists.

Scholars have argued extensively over the boundaries of tribal sovereign immunity. Some, like the Supreme Court, contend that tribal sovereignty should be limited so that individuals suffering harm at the hands of tribes may obtain relief;\textsuperscript{289} some would even completely abrogate the doctrine.\textsuperscript{290} Others believe that tribal sovereignty should either stay as it is or be further expanded because of a concern for the rights of Indian tribes and their need for cultural and political autonomy.\textsuperscript{291} Still others prefer a middle-of-the-road approach that attempts to find a solution amenable to all by balancing the equal protection concerns of individuals with the need for tribal autonomy.\textsuperscript{292}

One might imagine many different ways that Congress could restrict the boundaries of tribal immunity to protect the Freedmen. For example, Congress could create legislation specifically prohibiting membership or program participation requirements that discriminate on the basis of race or effectively exclude certain racial groups. However, Congress has not indicated any desire to alter the boundaries of tribal

\textsuperscript{287} See id. at 324.
\textsuperscript{288} See id. at 325.
\textsuperscript{289} See supra text accompanying notes 150–52.
\textsuperscript{290} See John W. Borchert, Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification, 13 EMORY INT’L L. REV. 247, 251 (1999) (“The Congress should end ‘sovereign immunity’ before a Tribe does something so inherently unfair or radical that there is no alternative…. The Tribes with their sovereign immunity are no longer the victims of discrimination, they are the victimizers.”) (quoting Tribal Rights in Private Property Cases: Hearing Before the Senate Comm. On Indian Affairs, 103d Cong. (1996) (statement of Lane E. Marcussen)); Byram, supra note 261, at 498 (discussing the “American Indian Equal Justice Act” proposed by Senator Gorton that would have forced tribes to waive their sovereign immunity and amended the ICRA so that federal district courts would have jurisdiction over ICRA claims); Thomas P. McLish, Note, Tribal Sovereign Immunity: Searching for Sensible Limits, 88 COLUM. L. REV. 173, 193 (1998) (“The current breadth with which the doctrine of tribal immunity is applied is inconsistent with the policies that underlie it, and inappropriately denies plaintiffs the ability to seek redress in courts of law.”).
\textsuperscript{291} See McCarthy, supra note 259, at 514 (“Any proposal which truly values extension of civil rights to tribal members must recognize the need for increased tribal court advocacy.”); Steve Russell, Seeking Justice: Critical Perspectives of Native People: A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse, 4 GEO. PUB. POL’Y REV. 129, 130 (1999) (“The key to preserving Indian sovereignty is to make it unnecessary to resort to federal or state courts.”).
\textsuperscript{292} See Laurence, supra note 170, at 339 (arguing that although tribes should have the power to make citizenship rules that reach all persons who come on reservations, those persons should have a federal forum to complain about their treatment by tribes).
immunity, and the logistical considerations of such a proposal render it a truly monumental task.

2. Strengthening the Indian Civil Rights Act

Congress could also provide Freedmen groups a remedy by strengthening the ICRA. As it stands, the ICRA serves no practical use to Freedmen seeking relief against discriminatory tribal policies. If Congress amended the ICRA to provide a federal cause of action, the Freedmen would be able to take their issues to federal courts under Title I, the equal protection clause of the ICRA.

Some commentators have argued that the ICRA, like the doctrine of tribal sovereign immunity generally, is overbroad and should be amended so that individuals alleging that tribes have violated the ICRA’s guarantees have an impartial court to which they may appeal. Others have argued that an expansion of the ICRA is necessary to protect Indian women from discriminatory tribal treatment so that they will have access to unbiased non-tribal courts in which to bring their claims. Certainly, if expansion is necessary to protect women from gender discrimination, it is also necessary to protect the Freedmen from racial discrimination, as the same types of concerns about impartial and unbiased courts are implicated.

Of course, some oppose any expansion of the ICRA. Much of this opposition comes from Indian groups, many of whom were averse to the implementation of the ICRA in the first place. While the statute was being considered in Congress, some Indians stated that the ICRA was merely unnecessary legislation while others worried that it would unduly formalize tribal court systems and encroach upon tribal sovereignty. Some Indian groups have argued that proposals purporting to allow federal judicial review of complaints under the ICRA further assault tribal sovereignty.

293. See supra text accompanying notes 256–57.
294. See Cohen, supra note 164, at 668.
295. See, e.g., Byram, supra note 261, at 504 (discussing how Congress should empower federal courts to enforce civil violations of ICRA when plaintiffs are not able to get a fair adjudication of ICRA claims in tribal courts).
297. See id. at 179, 180.
299. Id.
300. Id. at 529.
In 1991, the United State Commission on Civil Rights ("The Commission") concluded five years of hearings and investigations into the deprivations of Indian civil rights.\textsuperscript{301} The Commission documented abuses of rights guaranteed to individuals under the ICRA\textsuperscript{302} and found that the ICRA "required \ldots procedural protections of tribal governments without providing the means and resources for their implementation."\textsuperscript{303} Yet, even after making those observations and claiming that the United States government had failed to provide adequate funding for the operation of tribal judicial systems, the Commission declined to recommend legislation providing for review of ICRA claims by federal courts.\textsuperscript{304}

Thus, the government has recognized a problem yet—beyond making blanket assertions of fault—refuses to rectify the problem. The fact that the Commission studied the on-going problem of abuses of Indian civil rights for five years and still would not advocate any form of remedial legislation suggests that the government is content to retain the ICRA in its flawed form. In addition, Congress created the ICRA to establish what it felt were necessary civil rights protections, so it is unlikely the ICRA will be repealed any time soon. Still, the creation of a federal cause of action in the ICRA would allow Black Freedmen the opportunity to express their grievances and would provide American-style protections to them.\textsuperscript{305}

C. The Role of the Courts

Because massive hurdles confront any potential congressional attempts to strengthen the ICRA or scale back tribal immunity, Freedmen must also look to the courts for assistance. The judiciary has the power to make a difference in the Freedmen struggle by taking a more active role in solving the problem of discrimination within Indian tribes and may actually be able to provide the most expedient solution to the problem of tribal discrimination against Blacks.

1. Charge Congress and Find a Federal Cause of Action

The Supreme Court primarily holds Congress and, to a lesser extent, executive agencies responsible for solving the problems with tribal sovereign immunity.\textsuperscript{306} The overly broad reach of tribal immunity frustrates the Court, which also has shown a tentative willingness to intervene

\begin{itemize}
  \item 301. See id.
  \item 302. Id.
  \item 303. Laurence, supra note 170, at 344.
  \item 304. See Getches, supra note 298, at 529-30.
  \item 305. Byram, supra note 261, at 502.
  \item 306. See supra Part II.A.1.
\end{itemize}
in cases where a tribal nation has blatantly discriminated. At the same time, the Court has utilized a hands-off approach to the doctrine of tribal sovereign immunity, thereby relieving itself of the responsibility of finding a resolution to the problem of tribal discrimination.

In his dissent in *Santa Clara Pueblo v. Martinez*, Justice White expressed his disbelief that Congress meant to leave the enforcement of Indian rights solely within the hands of tribal authorities, as tribal authorities are often the ones charged with violating those rights. Courts should follow Justice White's lead and become more active in halting the discriminatory practices of Indian tribes. One scholar noted that if the Supreme Court wanted to, it could have found a federal cause of action in *Martinez*. Yet instead of doing so, the Court hid behind the doctrine of tribal sovereignty, thus proving that the equal protection of Indian citizens does not concern it greatly.

2. Distinguishing *Martinez*

The Freedmen could possibly distinguish their case from *Martinez* using principles of constitutional law. Constitutional law treats sex-based classifications differently from classifications based upon race. While race-based classifications are subject to strict scrutiny and are only permissible if "they are necessary to promote a compelling or overriding interest of government," sex-based classifications are subject to an intermediate standard of review that only "requires the government to demonstrate that a classification has a substantial relationship to an important interest."

Therefore, the Freedmen could argue that the ICRA should apply because the discrimination here is based on race, and race is constitutionally different. Directly attacking the ICRA using constitutional theories may be difficult because of the state action problem and the necessity of showing that the United States government caused the harm in order to

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307. See supra text accompanying note 150-51.
308. See supra Part II.A.1.
309. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 82 (1978) (White, J., dissenting) ("Given Congress' concern about the deprivations of Indian rights by tribal authorities, I cannot believe, as does the majority, that it desired the enforcement of these rights to be left up to the very tribal authorities alleged to have violated them.").
310. *Ferguson*, supra note 131, at 300.
311. *Id.* at 301.
313. *Id.*
314. *Id.* at § 14.8.
315. *Id.* at § 14.20.
attain relief. However, the Freedmen could argue that because race is a suspect classification, any race-based discrimination claims should be examined under a heightened degree of scrutiny. Thus, a federal cause of action could be found in such instances because the interest in preventing racial discrimination outweighs the interest in shielding tribal sovereignty from judicial encroachment.

CONCLUSION

The United States often prides itself on its efforts towards ending discrimination, and the government has made numerous attempts to redress the harms that minority groups have suffered at the hands of the dominant majority. However, the United States has a long way to go if it truly wants to be a nation in which all people are created equal.

Most people today would agree that American slavery was a horrific system of bondage that mars the history of this country. Yet many do not truly understand how the effects of slavery are still felt by persons of African descent today. One of the many unfortunate consequences of this lack of understanding is that the movement toward equal rights for Black Freedmen has gone virtually unnoticed by persons not connected to Native American communities.

Certainly tribal sovereignty is important to the maintenance of tribal independence and integrity. However, the guarantees of equal protection under the law are important to persons of African descent who have historically fought for every right they now enjoy. Judicial and governmental recognition of the rights of Black Freedmen, and opposition to the discrimination being practiced against them, will go a long way in righting the wrongs that have, for too long, kept Blacks from enjoying the full rights given to them under the United States Constitution.

316. *Id.* at § 12.1 (explaining the concept of "state action" and expounding on the idea that "[m]ost of the protections for individual rights and liberties contained in the Constitution and its Amendments apply only to the actions of governmental agencies").