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## Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop, 47 J. Marshall L. Rev. 1227 (2014)

Jeremiah Chin

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# RED LAW, WHITE SUPREMACY: CHEROKEE FREEDMEN, TRIBAL SOVEREIGNTY, AND THE COLONIAL FEEDBACK LOOP

JEREMIAH CHIN\*

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## I. INTRODUCTION<sup>1</sup>

Sovereignty and self-determination are cornerstones of arguments for Indigenous rights in the geographic United States. Both concepts assert an existence as Indigenous peoples, and reinforce status as nations with citizens and governments, rights and responsibilities, determined by Indigenous communities. In 2006, the Judicial Appeals Tribunal of the Cherokee Nation recognized that Lucy Allen and fellow Cherokee Freedmen, descendants of African slaves once owned by Cherokee, are citizens of the Cherokee Nation and had been citizens of the Cherokee Nation since the 1866 treaty with the United States.<sup>2</sup> Less than a year later, the Cherokee Nation amended its constitution to limit citizenship to descendants of those listed on the Dawes Roll as Cherokee, Delaware or Shawnee—effectively terminating the citizenship of all 2,800 citizens who are Cherokee Freedmen descendants.<sup>3</sup> This new amendment effectively excludes Blacks who cannot identify an ancestor who was listed as “Cherokee by Blood” on the Dawes Rolls, even though Cherokee Freedmen often maintain deep cultural connections to Cherokee values and ways of being.<sup>4</sup> Cherokee Freedmen therefore exist at

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<sup>1</sup> Playing on Frantz Fanon’s classic *BLACK SKIN, WHITE MASKS* (1952), the title of this article suggests that laws enacted by the Cherokee Nation to exclude Cherokee Freedmen are rooted in White Supremacist conceptions of property, doctrines of slavery, and nationality. Fanon described the conditions of Black peoples who took on White colonial attitudes to cope with the hostility they face in anti-Black environments. This article argues that the 2007 Cherokee Amendment solidified the Jeffersonian fantasy of Indian assimilation by adopting one of the key features of White Supremacy in U.S. Laws: anti-Blackness and Black exclusion.

<sup>2</sup> *Allen v. Cherokee Nat’l Tribal Council*, No. JAT-04-09, 1, 9 Okla. Trib. 255, 2006 WL 6122535 (Cherokee Nation Jud. App. Trib., Mar. 7, 2006).

<sup>3</sup> Associated Press, *Cherokees Vote to Limit Tribal Membership*, WASH. POST, Mar. 4, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/03/AR2007030301705.html>

<sup>4</sup> S. Alan Ray particularly notes the cultural connections between Cherokee values and norms and Freedmen who have been raised as part of Cherokee culture: “Many Freedmen’s descendants ‘possess as much if not more Cherokee culture’ than ‘many [W]hite-Cherokees enrolled in the tribe.’ 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.’ This suggests that some descendants may share assumptions with ‘blood’ Cherokees regarding the cosmos and its familial interconnections.” Ray, A

a troubling intersection of race and sovereignty, connecting conversations on slavery and reparations to self-determination and nation building. Are there limits to the power to define membership and exclude? Who has authority to determine those boundaries? What are the rights and remedies of those who are *defined out* of a nation; Blacks who had their citizenship terminated by peoples who once called their ancestors property? Are U.S. federal courts the proper forum to address or remedy discriminatory legislation in Indian Country?

This paper attempts to unpack these questions at the intersections of race and sovereignty by analyzing two federal court cases involving Cherokee Freedmen<sup>5</sup> and citizenship: *Vann v. United States DOI*<sup>6</sup> and *Cherokee Nation v. Nash*.<sup>7</sup> As a sovereign nation, the Cherokee have the inherent power and authority to determine membership by defining citizenship. In 2011, the Supreme Court of the Cherokee Nation, formerly the Judicial Appeals Tribunal of the Cherokee Nation,<sup>8</sup> found the 2007 Amendment constitutional, dismissing the Cherokee Freedmen's claims for lack of standing and subject matter jurisdiction.<sup>9</sup> The federal case, *Vann*, thus became the only pending lawsuit to restore the Freedmen's citizenship. I argue that the Cherokee Nation's reliance upon the Dawes Rolls—rather than treaties—in redefining citizenship to exclude Blacks whose ancestors were not considered “Cherokee by blood,” by U.S. surveyors, the Cherokee Nation has entered what I call the “colonial feedback loop:” reaffirming the history of colonization and White Supremacy in implementing U.S. White Supremacist concepts of citizenship that are anti-Black. This paper therefore aims to expand international

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*Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 Mich. J. Race & L. 387, 461 (2007) (quoting CLAUDIO SAUNT, BLACK, WHITE, AND INDIAN: RACE AND THE UNMAKING OF AN AMERICAN FAMILY 65 (Oxford Univ. Press 2005)).

<sup>5</sup> I use the terms “Cherokee Freedmen” and “Freedmen” to refer to the descendants of Africans enslaved by Cherokee citizens who were later freed and adopted into the Cherokee Nation. Though I recognize the gendered implications of “Freedmen,” I use the term to respect the name choice by Marilyn Vann and the “Descendants of the Freedmen of the Five Civilized Tribes” who are at the center of the litigation discussed in this article.

<sup>6</sup> *Vann v. U. S. Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012) *rev'g* *Vann v. Salazar*, 883 F. Supp. 2d 44 (D.D.C. 2011) (rehearing of previous appellate decision in *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008),) *aff'g in part rev'g in part*, *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006)).

<sup>7</sup> *Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159 (N.D. Okla., 2010).

<sup>8</sup> The Cherokee Nation changed the name of its highest appeals court from Judicial Appeals Tribunal to Supreme Court in 2006, effectuating changes made in 1999 to the Cherokee Constitution. *Compare* Cherokee Nation CONST. art. VII (1975) (creating and describing the Cherokee Nation's highest court, the Judicial Appeals Tribunal), *with* Cherokee Nation CONST. art. VIII § 1 (1999) (changing the name to the Supreme Court of the Cherokee Nation).

<sup>9</sup> *Cherokee Nation Registrar v. Nash*, No. SC-2011-02, 10 Am. Tribal Law 307 (Cherokee Nation S.C., Aug. 22 2011).

conceptions of indigeneity under the Declaration of the Rights of Indigenous Peoples (DRIP), offering potential solutions outside U.S. courts by using DRIP's protections in Cherokee courts.

Section I lays out the historical background and discusses legal cases and legislation surrounding the 2007 Amendment and current federal litigation, then outlines the current litigation in federal courts, including important political and judicial decisions in the Cherokee Nation along the way. Section II describes the underlying doctrines of Federal Indian Law and establishes a Critical Race Theory (CRT) framework for analyzing these decisions. Section III therefore places the current litigation in context of Federal Indian Law and CRT. Finally, in section IV, I present an argument for Cherokee Freedmen citizenship through U.N. Declaration on the Rights of Indigenous Peoples, rather than federal courts.

## II. CONFLICT IN CONTEXT: HISTORICAL ORIGINS OF CHEROKEE FREEDMEN AND PENDING LITIGATION

The telling of this past (history), like all stories, is replete with meanings, and as with most narratives, its very telling is an expression of power.<sup>10</sup>

Although litigation is often defined by finite boundaries—from filing to hearings and rulings—cases like that of the Cherokee Freedmen are deeply tied to complex histories of oppression, colonization and racialization that unfortunately have no sign of finality. Gerald Torres and Kathryn Milun note that the legal storytelling in courts “is more like a gathering of material for an index than the telling of a classic narrative. Facts are assembled to tell a story whose conclusion is determined by others.”<sup>11</sup> Stories in the “confines of legal discourse”<sup>12</sup> can obfuscate important histories, particularly for oppressed peoples, in a search for finite evidence. Stories of “‘otherness’ can be told in several ways. Whether that story could be told in a way that is legally relevant, while still encompassing the multiple paradoxes of general inquiry, remains the central problem.”<sup>13</sup> Therefore, in

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<sup>10</sup> Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625, 627.

<sup>11</sup> *Id.* at 646.

<sup>12</sup> *Id.* at 647.

<sup>13</sup> *Id.* at 652. Torres and Milun's discussion of the Mashpee's struggle for recognition is particularly salient to the Cherokee Freedmen litigation. The Mashpee's suit initially was a claim to recover lands taken from the tribe in violation of the Non-Intercourse Act of 1790, yet once the trial began the defendant Town of Mashpee responded by challenging and denying the Mashpee's status as a Tribe under federal standards.

[T]he defense argued (to the all-white jury) that "black intermarriage made the Mashpees' proper racial identification black instead of Indian."

Because of the racial composition of the community, that the jury would be

order to contextualize the current Cherokee Freedmen litigation, this section begins with a brief historical overview of the development of chattel slavery in the Cherokee Nation and emancipation, then move briefly through the 20th century and conclude with the ongoing litigation in Cherokee and Federal courts.

### A. *Slavery and Reconstruction in the Cherokee Nation and the United States*

#### 1. Slavery in the Cherokee Nation and the beginnings of African enslavement

Slavery in the Cherokee Nation predates contact with Europeans. Originally, Cherokee would take prisoners of war as indentured workers, some of whom were adopted into the Cherokee Nation.<sup>14</sup> However, this form of slavery, by most historical accounts, greatly differed from the chattel slavery brought through European colonization since it did not involve the use of people as a commodity for individual profit and did not exist as a structured institution.<sup>15</sup> European colonists in North America

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composed exclusively of white people virtually was guaranteed by the voir dire in which prospective jurors were asked whether they were themselves Indian, had any known Indian relatives, or had ever been identified with organizations involved in "Indian causes." White inter-marriage was mentioned only in passing. . . .

The court interpreted Mashpee adaptation to the dominant culture, necessary for their survival as an independent people, as proof the Tribe had surrendered its identity. That interpretation incorporates a dominant motif in the theory and practice of modern American pluralism. Ethnic distinctiveness often must be sacrificed in exchange for social and economic security.

*Id.* at 650-51 (footnotes omitted). The First Circuit's inability to recognize that the Mashpee could actually grow and change over time while still remaining a distinct people and nation highlights that the way courts, particularly White, United States courts, recognize tribes as distinct feeds into a colonial paradigm that denies tribal nations any type of cultural pluralism while forcing assimilation.

<sup>14</sup> Historian Celia L. Naylor notes that:

[i]f a clan chose not to adopt a war captive, however, this person would remain outside the clan and thus without any formal or informal kinship connection. The Cherokees patently distinguished between those war captives who had been adopted within a clan and those without any clan affiliation. The Cherokees granted no rights to *di ge tsi na tla ti*, who had no clan association. Whereas the Cherokees conferred tribal membership to adopted captives, neither membership nor related liberties were extended to unadopted *di ge tsi na tla i*.

CELIA L. NAYLOR, *AFRICAN CHEROKEES in INDIAN TERRITORY: FROM CHATTEL TO CITIZENS* 8 (2008) (footnotes omitted).

<sup>15</sup> *See id.* (stating that captives without any clan association increased productivity in certain aspects of Cherokee society, but this was not done to

originally relied on European indentured servants and often took Indians as slaves.<sup>16</sup> Cedric J. Robinson observes that “African labor in the Western hemisphere became necessary only when native labor was exhausted and European labor became evidently inadequate.”<sup>17</sup> The proximity of Indigenous Nations to European Colonies made the enslavement of natives difficult to institutionalize as enslaved natives would often escape to their homelands or start wars with colonial slavers.<sup>18</sup> This problem did not cease with the growth of African slavery in North America as 18th century advertisements for runaway slaves often described people escaping to Indian nations, occasionally with Native partners.<sup>19</sup>

Though it would be easy to romanticize Native nations as a safe harbor for escaped Africans and an early collaboration based on shared oppression under slavery, historian Tiya Miles explains that the relationship is far more complex:

[A]s Cherokees took note of the fixed and inferior position of the Africans, a position increasingly connected to their ‘blackness’ in the minds and laws of the British, they may have begun to associate dark skin with low status. . . . Thus, even as Cherokees and Africans developed alliances and dependencies in the early decades of their encounters, they also betrayed and battled one another, vying for liberty and authority in the expanding morass of European colonial rule.<sup>20</sup>

Members of the Cherokee Nation participated not only in the institution of slavery in incorporating Africans as slaves in

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create surplus to sell in external markets); *Id.*; R. HALIBURTON, JR., RED OVER BLACK: BLACK SLAVERY AMONG THE CHEROKEE INDIANS 5 (1977) (suggesting that many early historians interchanged the words “slavery” and “prisoner” in reference “to those in possession of various Indian tribes.”).

<sup>16</sup> JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 4 (1979).

<sup>17</sup> CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 124 (2d. 2000).

<sup>18</sup> See BLASSINGAME, *supra* note 16, at 5 (illustrating the difficulties European colonists encountered when trying to enslave Africans).

<sup>19</sup> Historian Tiya Miles notes that enslaved Africans and Natives were often grouped under the same categorization as “Negro” and indicated that:

[N]ewspaper advertisements for runaway slaves indicate not only the routes that slaves took to find their freedom but also the reality of intermarriage between blacks and Indians in the colonial and early national periods. [Public Historian William Loren] Katz observed: “[r]eward notices in colonial newspapers now told of African slaves who ‘ran off with his Indian wife’ or ‘had kin among the Indians’ or is ‘part-Indian and speak their language good.’”

Tiya Miles, TIES THAT BIND: THE STORY OF AN AFRA-CHEROKEE FAMILY SLAVERY AND FREEDOM 29 (2005).

<sup>20</sup> *Id.* at 30-31.

plantation economies, but also in the capture and trade of escaped African slaves.<sup>21</sup> Still other Cherokees “valued slaves not just for their physical labor but also for intellectual skills such as knowledge of English and of Euro-American mores. A few Cherokees even married slaves or free blacks and enfolded them into their kinship circles.”<sup>22</sup> These interpersonal relationships were discouraged by British colonists. Part of the civilizing mission of colonization was the incorporation of European styled agricultural and social practices, including the acquisition of African slaves.<sup>23</sup> Intermarriage with European colonists brought “entrenched and systematized” slaveholding in Cherokee territory.<sup>24</sup> White men who married into the Cherokee Nation, frequently bringing slaves with them, were granted formal, legal adoption into Cherokee Nation through a constitutional provision, which simultaneously barred the citizenship of Blacks or descendants of Black Cherokee.<sup>25</sup> Children of white men and Cherokee women would gain the benefits of matrilineal Cherokee citizenship in the traditional clan system and patrilineal, European-styled, property inheritance.<sup>26</sup>

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<sup>21</sup> Halliburton recounts a delegation of Cherokee to London who agreed to exchange escaped African slaves for “shall receive a Match [Watch] Coat whereupon we give a Box of vermillion, 10,000 Gun Flints and six Dozen of Hatchets.” HALLIBURTON, *supra* note 15, at 8. Miles notes that this history is somewhat dubious as the delegation “was not fully transparent, officially sanctioned, or unilateral. . . . Interaction between Africans and Cherokees was like the proverbial box of chocolates: you never knew what you were going to get.” MILES, *supra* note 19, at 31-32.

<sup>22</sup> MILES, *supra* note 19, at 33.

<sup>23</sup> *Id.* at 36; NAYLOR, *supra* note 15, at 13; HALLIBURTON, *supra* note 15, at 20.

<sup>24</sup> MILES, *supra* note 19, at 34.

<sup>25</sup> FAY A. YARBROUGH, RACE AND THE CHEROKEE NATION: SOVEREIGNTY IN THE NINETEENTH CENTURY 29 (2008).

<sup>26</sup> Yarbrough notes that the adoption of White men into the Cherokee Nation helped to dramatically shift traditional notions of gender and property: “For instance, Cherokee legislators adopted some American understandings of property and inheritance laws so that white men could leave property to their Cherokee children. This shift was a revolutionary change in thinking for a traditionally matrilineal society in which children inherited property and clan identity through their mothers.” *Id.* (footnotes omitted).

Ray further suggests that this led to racialized class systems within the Cherokee nation itself:

[O]wnership of Black slaves was not evenly across the Cherokee population according to race. “Mixed-bloods” owned a disproportionately high share of the slaves. . . . 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) also participated in the system. . . . 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 . . . ; the subordination of clan-based



## 2. Removal and Civil War Alliances

Despite conflicts with colonial, and later State governments, the Cherokee Nation remained entrenched in the systematized enslavement of Africans for their economy. Though the majority of Cherokee did not own slaves, the lack of individualized property within Cherokee Territory made slaves “one of the most valuable kinds of property a Cherokee person could own.”<sup>27</sup> The U.S. Agent assigned to the Cherokee Nation particularly felt that the adoption of slavery was crucial to colonization or “civilizing” of Native peoples: “I believe if every family of the wild roving tribes were to own a negro man and woman who would teach them to cultivate the soil . . . it would tend more to civilize them than any other plan that could be adopted.”<sup>28</sup>

By the time of the Indian Removal Act in 1830, the institution of slavery caused fissures within the Cherokee Nation. Wealthy, slave owning Cherokee removed early and voluntarily to Indian Territory in 1835 with their slaves, while a group of traditionalist and middle-to-lower class Cherokee, some of whom owned slaves, remained in the Cherokee homelands.<sup>29</sup> Three years later, the remaining Cherokee in the South were forced to remove, taking African slaves with them along the Trail of Tears. The Cherokee Nation thus became the largest slaveholders in Indian Territory, with a slave code comparable in comprehension and severity to many southern States.<sup>30</sup> Over two hundred Black slaves from the Cherokee and Creek Nations rebelled in 1842, attempting to escape to the Southwest and Mexico, but many were tracked and returned to slavery by a search party organized by the Cherokee National Council.<sup>31</sup> By 1860, the Cherokee Nation consisted of approximately 17,000 Cherokee and 4,000 Slaves, making Black

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obligations to the rule of American law; . . . 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.

Ray, *supra* note 4, at 425-28 (internal citations omitted).

<sup>27</sup> MILES, *supra* note 19, at 39.

<sup>28</sup> William G. McLoughlin, *Red Indians, Black Slavery and White Racism: America's Slaveholding Indians*, 26 AM. Q. 367, 375 fn. 11 (Oct. 1974) (quoting George M. Butler, Cherokee Indian Agent, in 1859).

<sup>29</sup> See Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* 62-63 (2002) (discussing how in the face of removal slavery caused increasing class division among the Cherokee).

<sup>30</sup> *Id.* at 68; Halliburton, *supra* note 15, at 69. Halliburton notes that the motive for the Cherokee slave codes were “comprehensive and comparable in its harshness to the laws of the southern states. The motive for these laws was the same also. They were designed to preserve the slave mentality, protect against insurrection, control free blacks, prevent miscegenation, and control virtually all personal and group activities of slaves.” *Id.*

<sup>31</sup> *Id.* at 84; STURM, *supra* note 29, at 69; MILES *supra* note 19, at 172.

slaves over 20% of the total Cherokee population.<sup>32</sup>

The large number of Black slaves and slave-owning Cherokee within the Nation caused further fractionalization at the start of the U.S. Civil War. Slave owning Cherokee desired to maintain their ownership of people and side with the Confederacy, organizing as the secretive Knights of the Golden Circle; Blacks enslaved by Cherokees generally supported the Union, while conservative traditionalists, the Keetowah Society, favored non-intervention and “opposed the ‘whitening’ of Cherokee culture and the political influence of mixed-race white Cherokees.”<sup>33</sup> Cherokee leadership at first supported the Confederacy to maintain slave owning interests, signing a treaty with the Confederacy in 1861 promising to “unite their fortunes now and forever with those of the Confederate States, and take up arms for the common cause.”<sup>34</sup> Many Cherokee never approved of the short-lived alliance with the Confederacy; two years later the expansion of war into the west and the capture of Principal Chief John Ross brought pro-Union Thomas Pegg to power in the Cherokee Nation.<sup>35</sup> Pegg soon mirrored Abraham Lincoln’s Emancipation Proclamation in 1863, repudiating alliances with the Confederacy and nominally freeing all Blacks enslaved within the Cherokee nation, though many slave-owning Cherokee simply ignored the proclamation.<sup>36</sup> Like the emancipation proclamation, the Cherokee declaration granted only freedom—Freedmen were still not citizens under Cherokee law.

At the end of the Civil War, the Cherokee Nation and United States began negotiations on a peace treaty. Historian R. Halliburton, Jr. explains there were four potential forms for a peace treaty: a segregated district for colonization by Freedmen; a removal plan for separate Freedmen colonies funded by the Cherokee Nation and the United States; adoption and citizenship

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<sup>32</sup> See McLoughlin, *supra* note 28, at 380; Ray, *supra* note 4, at 425.

<sup>33</sup> MILES, *supra* note 19, at 186; See e.g., STURM, *supra* note 29, at 72; HALLIBURTON, *supra* note 15, at 126; and NAYLOR, *supra* note 13, at 136-37 (explaining generally the values of the Keetowah society).

<sup>34</sup> HALLIBURTON, *supra* note 15, at 127. The Cherokee Nation Council would issue a declaration a few days later:

Whatever causes the Cherokee people may have had in the past to complain of some of the Southern States, they cannot but feel that their interests and destiny are inseparably connected with those of the South. The war now waging is a war of Northern cupidity and fanaticism against the institution of African servitude; against the commercial freedom of the South, and against the political freedom of the States, and its objects are to annihilate the sovereignty of those states and utterly change the nature of the General Government.

*Id.*

<sup>35</sup> *Id.* at 131; STURM, *supra* note 29, at 73-74; MILES, *supra* note 19, at 187-88.

<sup>36</sup> HALLIBURTON, *supra* note 14, at 132; STURM, *supra* note 29, at 73-74; MILES, *supra* note 19, at 188.

of the freedmen; and finally, opening Indian Territory for colonization by Black Freedmen from across the United States.<sup>37</sup> The final treaty was signed on July 19, 1866, ceding areas of Cherokee territory to the United States for White settlement and building of railroads, while granting a right for Cherokee Freedmen to “settle in and occupy the Canadian District,”<sup>38</sup> abolishing slavery in terms mirroring the United States’ Thirteenth Amendment, and most importantly mandating that “all freedmen . . . and their descendants, shall have all the rights of native Cherokees.”<sup>39</sup> The Cherokee Nation amended its constitution to reflect the terms of the treaty, legally recognizing the Freedmen as members of the Cherokee Nation.

### 3. “Cherokee by Blood” and the Dawes Rolls

Yet, like the United States’ emancipation amendments and Reconstruction,<sup>40</sup> the freedom and rights proscribed by the 1866 Treaty and Cherokee Constitution were not easily upheld within the Cherokee Nation. The Cherokee Nation resisted the incorporation of Freedmen, despite the terms of the Treaty and Cherokee Constitution, creating citizenship courts to determine citizenship on a case-by-case basis.<sup>41</sup> The Cherokee census of 1880<sup>42</sup> “did not include a single Cherokee freedman, ‘it being the position of those of Cherokee blood that the Treaty of 1866 had granted freedmen civil and political rights but not the right to share in tribal assets.’”<sup>43</sup> “Tribal assets” in this context represent per capita distribution of profits from sales of tribally held land, thus even though Freedmen may have had some form of political

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<sup>37</sup> Halliburton further notes that: “The Cherokees were willing to make some provisions for their freedmen but were opposed to adoption.” HALLIBURTON, *supra* note 15, at 134.

<sup>38</sup> Treaty with the Cherokee, U.S.-Cherokee Nation, art. IV, July 19, 1866. Importantly this district was also the site of the slave uprising of 1842. HALLIBURTON, *supra* note 15, at 84; STURM, *supra* note 29, at 74; MILES, *supra* note 19, at 188.

<sup>39</sup> Treaty with the Cherokee, U.S.-Cherokee Nation, art IX, July 19, 1866.

<sup>40</sup> W.E.B. Du Bois wrote poetically of the failures of reconstruction in the United States:

One reads the truer, deeper facts of Reconstruction with a great despair. It is at once so simple and human, yet so futile. There is no villain, no idiot, no saint. There are just men; men who crave ease and power, men who know want and hunger, men who have crawled. They all dream and strive with ecstasy of fear and strain of effort, balked of hope and hate.

W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880* 728 (1935).

<sup>41</sup> STURM, *supra* note 29, at 75.

<sup>42</sup> This census was an accounting measure “for making per capita distributions of communal funds received from” the sale of tracts of land in the Cherokee Outlet. *Id.*

<sup>43</sup> *Id.* (quoting Bill Sampson, *Justice for the Cherokees: the Outlet Awards of 1961 and 1972* (1972) (Master’s thesis, Department of History, University of Tulsa).

recognition at the time, they were not deemed eligible for the full, economic, benefits of citizenship.

Cherokee racial attitudes towards Blacks were not kind; many believed “that the blacks were intellectually and morally inferior,” and feared increases in the Black population in the Cherokee Nation as Freedmen from the U.S. South moved west to escape Southern racism.<sup>44</sup> The Freedmen attempted to solve their struggle for citizenship within the Cherokee Nation through Cherokee and U.S. federal courts, organizing to ensure their rights under the 1866 treaty and winning a few victories.<sup>45</sup>

By 1887, the United States passed the General Allotment Act, also known as the Dawes Act, that sought to restructure Tribal land holdings to individuals—breaking down existing Tribal powers on reservations and increasing White settlement. Part of the allotment of land was the creation of rolls to list the members of the Cherokee Nation by standards of blood quantum, listing people either as “Cherokee by Blood,” “Freedmen” or “Intermarried white.”<sup>46</sup> This categorization of peoples was primarily to account for, and divide Tribal lands among, individual citizens of the Cherokee nation, but how people were grouped was largely determined by an application process that did not recognize overlapping, intersecting identities among those in the Cherokee Nation.<sup>47</sup> Miles observes that “there was no . . . category for intermarried blacks” and the “Freedmen” roll was overbroad,

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<sup>44</sup> DANIEL F. LITTLEFIELD, JR., *THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP* 68 (1978). See also MILES, *supra* note 19, at 193 (discussing actions taken by the Cherokee to regain authority over African Americans living in Cherokee territory including denial of citizenship); STURM, *supra* note 29, at 75 (noting the Cherokee Nation’s resistance to recognizing freedmen as citizens).

<sup>45</sup> LITTLEFIELD, *supra* note 44, at 133. Littlefield details the conflict primarily to ensure their per-capita payments as citizens of the Cherokee nation, primarily for shares of Congressional appropriations for farming and sustenance in Oklahoma. For a more detailed analysis, see generally Littlefield, *supra* note 44.

<sup>46</sup> The Rolls would account for the name, age, sex, blood quantum, and census card number of each person listed. Interestingly only those individuals appearing on the “Cherokee by Blood” or similar rolls of American Indians contain any indication of blood quantum. The Cherokee by Blood rolls for example list “Blood” ranging from “1-128” to “Full,” while some on the “Final Roll Delaware Cherokee” would range from “Full” to “White,” with no explanation of their status or reasoning for why they are listed. Freedmen and “Intermarriage” rolls only list name, age, sex, and census card number. This is particularly troubling for Freedmen who may have intermarried, or been descended from Cherokee and African parents, yet still remained enslaved. See, e.g., The Commission and Commissioner to the Five Civilized Tribes, Index to the Final Rolls of Citizens and Freedmen of the Five Civilized Tribes in Indian Territory, 239, 469, 470, 472 (June 21, 1906), available at <http://research.archives.gov/description/300321>.

<sup>47</sup> STURM, *supra* note 29, at 80-81; LITTLEFIELD, *supra* note 44, at 239; MILES, *supra* note 1819, at 194-95.

including “former slaves of Cherokees, Afro-Cherokees, and free blacks who had lived in Cherokee territory at least since the start of the Civil War.”<sup>48</sup>

Though a significant number of blacks in the Nation claimed and could demonstrate Cherokee ancestry and identity, the vast majority would not be listed on the ‘Cherokee by Blood’ roll. Because they appeared ‘black’ to Dawes commissioners and because they were usually identified as former slaves, Afro-Cherokees were listed on the “freedmen” roll, which did not record degree of Cherokee ‘[B]lood.’<sup>49</sup>

Circe Sturm also recounts the stories of Black Cherokees who were listed on the Freedmen roll for economic greed and to rebuke multiracial peoples resulting from unions which broke taboos over interracial sex.<sup>50</sup> Sturm tells the story of Mary Walker, “a woman of multiracial heritage who was supposedly one-eighth black, three-eighths Cherokee, and four eighths white.”<sup>51</sup> Although Walker was able to describe her parent’s names, and degree of Indian blood to the Dawes commission, “someone comes in and says, ‘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>52</sup> Dawes rolls thus followed the one-drop rule of hypodescent, anyone with “one drop” of Black blood” was Black,<sup>53</sup> and would not be considered for any sort of multiracial status, leaving people like Walker to the Freedmen roll, despite mixed Cherokee lineage.<sup>54</sup>

Cherokee citizens with mixed White, European ancestry and Cherokee ancestry were deemed citizens “by blood,” while Cherokee citizens with Black, African ancestry or Black and Cherokee ancestry were given distinct statuses in federal records—despite shared Cherokee heritage. Even though the Dawes commission reviewed applications and heard testimony from witnesses who could verify the heritage and status of individuals to be listed, phenotype and blood quantum became instruments of categorization, assimilation and allotment. These final rolls, fully completed in 1914, would become the basis of Cherokee Citizenship for the 20th Century, incorporated into Cherokee Constitutional definitions of citizenship that ostensibly included anyone who could trace their heritage to some section of the Dawes rolls.

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<sup>48</sup> MILES, *supra* note 19, at 195.

<sup>49</sup> *Id.*

<sup>50</sup> STURM, *supra* note 29, at 189.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See Id.* at 188; Ray, *supra* note 4, at 47.

<sup>54</sup> The Dawes Final Rolls do list Mary Walker, a 51 year old woman, as Cherokee Freedmen, with no indication of quantum. *See* Roll No. 1329, The Commission and Commissioner to the Five Civilized Tribes, *supra* note 46, at 480.

*B. Interlude: The Cherokee Nation and Freedmen in the 20th Century*

Near the end of the Allotment era, the United States Federal government prepared to recognize the Indian Territory as the new state of Oklahoma. In order to incorporate Oklahoma as a state, Congress dissolved the Indian Territory through separate acts for each tribe.<sup>55</sup> The governing structures of the Tribes, however, remained somewhat intact under the Five Tribes Act which continued “the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations . . . in full force and effect for all purposes authorized by law, until otherwise provided by law.”<sup>56</sup> Oklahoma statehood also codified segregation in the territory along a Black/White binary, recognizing Cherokee and other American Indians as White. The Oklahoma Constitution provided a “Definition of Races” which followed the one drop rule: defining “colored” or “negro” to apply to “all persons of African descent. The term ‘white race’ shall include all other persons.”<sup>57</sup> Historian Ceclia Naylor notes that the codified racialization of Oklahoma instituted an early reign of White Supremacy: “by conceding honorary white status to Indians of the Five Tribes, the ‘civilization’ process has concluded with the legal whitening of Indians in the new state of Oklahoma.”<sup>58</sup> Thus although Cherokees and Freedmen continued to live in Oklahoma, Oklahoma’s statehood limited the exercise of Cherokee authority over Freedmen. Still, Freedmen continued to participate in Cherokee ceremonies, traditions and ways.<sup>59</sup> Segregation operated within Oklahoma state laws and institutions until legal victories in the mid-twentieth century.<sup>60</sup>

However in 1970, Congress passed the Principal Chiefs act which restored the electoral and constitutional authority of the Cherokee Nation, subject to the approval of the Secretary of the Interior.<sup>61</sup> The Cherokee Nation formed a new constitution in 1975 which defined citizenship broadly based on “reference to the Dawes Commission Rolls.”<sup>62</sup> Thus all Cherokee citizens, including those whose ancestors are listed “by Blood” or “Freedmen” under

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<sup>55</sup> Act of July 1, 1902, ch. 1375, 32 Stat. 716, 725, § 63 (dissolving the Cherokee Nation government and territory).

<sup>56</sup> Act of Apr. 26, 1906, § 28, 34 Stat. 148.

<sup>57</sup> NAYLOR, *supra* note 14, at 308 fn. 64 (quoting Murray R. Wickett, *The Fear of ‘Negro Domination’: The Rise of Segregation and Disenfranchisement in Oklahoma*, 78 CHRON. OF OKLA. 18, 57 (Spring 2000)).

<sup>58</sup> *Id.* at 198.

<sup>59</sup> See STURM, *supra* note 29, at 198.

<sup>60</sup> See generally, *Sipuel v. Board of Regents of the University of Oklahoma*, 322 U.S. 631 (1948); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

<sup>61</sup> Pub. L. No. 91-495, 84 Stat. 1091.

<sup>62</sup> Cherokee Nation Const. Art. VII (1975).

the original rolls, participated in the 1975 elections ratifying that constitution.<sup>63</sup> However in 1993, the Cherokee Nation Tribal Council passed a resolution limiting tribal membership to “proof of Cherokee blood on the Final Rolls.”<sup>64</sup> Although some Freedmen were denied citizenship under the 1993 council resolution and filed suit, the Cherokee Courts did not rule on the matter until 2001,<sup>65</sup> when the Cherokee Judicial Appeals Tribunal (“JAT”) decided *Riggs v. Ummerteskee*.<sup>66</sup> In a brief, 3 page opinion, the JAT decided the council resolution “is consistent and permitted by [the Cherokee Constitution]. . . . The Cherokee Nation need not go beyond it’s [sic] Constitution to determine citizenship.”<sup>67</sup> Thus the Cherokee Nation’s highest court decided that the disenfranchisement of Freedmen, despite treaty and constitutional provisions which appear to read to the contrary, was within the sovereign authority of the Cherokee Nation.

*C. Pending Litigation: Vann v. United States DOI and Cherokee Nation v. Nash*

1. Case Origins 2003-2006: *Vann v. Kempthorne* and *Allen v. Cherokee Nation*

In 2003, Marilyn Vann and four other Cherokee Freedmen descendants filed suit in U.S. federal court seeking declaratory judgment invalidating the 2003 election of Cherokee leaders because Freedmen were unconstitutionally prohibited from voting as a badge of slavery, in violation of the Thirteenth and Fifteenth Amendments to the U.S. constitution (*Vann D*).<sup>68</sup> One year later, while a decision in *Vann I* was still pending, Lucy Allen, another descendent of Cherokee Freedmen, filed suit in the Judicial Appeals Tribunal of the Cherokee Nation (JAT). Allen argued that the 1983 code amending citizenship, 11 C.N.C.A. §12, violated the 1975 Cherokee Constitution by redefining membership to exclude Freedmen.<sup>69</sup> Both cases drew on the 1866 Treaty between the Cherokee Nation and the United States, abolishing slavery in

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<sup>63</sup> See STURM, *supra* note 29, at 196.

<sup>64</sup> 11 C.N.C.A. §12 (1993).

<sup>65</sup> This is, in part, due to a general “constitutional crisis” in the Cherokee nation when in 1997 the Principal Chief attempted to impeach the entire Judicial Appeals Tribunal, who was in turn investigating the Principal Chief for criminal libel and misappropriation of funds. See generally, Denette A. Mouser, *A Nation in Crisis: The Government of the Cherokee Nation Struggles to Survive*, 23 AM. INDIAN L. REV. 359, 359-66 (1998-1999).

<sup>66</sup> *Riggs v. Ummerteskee*, J.A.T. No. 97-03-K, 9 Okla. Trib. 653, 2001 WL 36169899 (Cherokee, Dec. 7, 2001).

<sup>67</sup> *Id.*

<sup>68</sup> *Vann v. Kempthorne*, 467 F. Supp. 2d 56, *aff’d in part rev’d in part*, *Vann v. Kempthorne*, 534 F.3d 741.

<sup>69</sup> *Allen*, No. JAT-04-09, at 1, 9 Okla. Trib. 255, 2006 WL 6122535.

Cherokee lands and guaranteeing Freedmen “all the rights of native Cherokees.”<sup>70</sup>

The JAT was first to rule in March of 2006, holding that Allen had been wrongfully denied membership because the 1983 legislation was an unconstitutional restriction on membership. Writing for the majority, Justice Stacy L. Leeds overturned *Ummerteske* and recognized that the 1866 Treaty and 1975 constitution granted Freedmen full citizenship in the Cherokee Nation, noting that after the 1866 Treaty the Cherokee Nation amended its constitution “to extend citizenship to the Freedmen as a matter of tribal law.”<sup>71</sup> This commitment was reaffirmed in the 1975 constitution that has no blood requirement and could not be undone by an act of the Tribal Council.<sup>72</sup> Justice Leeds held that only a constitutional Amendment could redefine membership: “if the Cherokee people wish to limit tribal citizenship, and such limitation would terminate the pre-existing citizenship of even one Cherokee citizen, then it must be done in the open. It cannot be accomplished through silence.”<sup>73</sup> Freedmen are therefore citizens under the 1866 Treaty and remain citizens.<sup>74</sup> Justice Matlock, the lone dissenter and author of the majority opinion in *Ummerteske*, argued that “common word definitions and elementary language construction” of the 1975 constitution meant that “Cherokee members” could only mean “Cherokee Indians,” implicitly excluding Freedmen from citizenship and upholding the constitutionality of 11 C.N.C.A. §12.<sup>75</sup>

Months later, the District Court in *Vann I* denied Cherokee Nation’s motion to dismiss under principles of Sovereign Immunity and granted the Plaintiff Freedmen’s motion to add the Cherokee Nation and its officials as defendants.<sup>76</sup> Although the court only briefly acknowledges the JAT ruling recognizing Freedmen’s Cherokee citizenship, the court finds that the Freedmen may sue the Department of Interior, Cherokee Nation and their respective officials for violations of the Thirteenth Amendment. The court found that “Congress has unequivocally indicated its intent to abrogate the tribe’s immunity with regard to racial oppression prohibited by the Thirteenth Amendment,”<sup>77</sup> asserting federal supremacy over Cherokee membership.

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<sup>70</sup> Treaty with the Cherokee, U.S.-Cherokee Nation, art. IX, July 19, 1866.

<sup>71</sup> *Allen*, No. JAT-04-09, at 18.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2.

<sup>74</sup> *Id.* at 22.

<sup>75</sup> *Id.* at 28.

<sup>76</sup> *Vann v. Kempthorne*, 467 F. Supp. 2d at 56.

<sup>77</sup> *Id.* at 69.



2. Appeals and Amendments 2007-2009: 2007 Amendment, Vann II and H.R. 2824

After two apparent victories in both U.S. and Cherokee courts, the Freedmen were effectively terminated from the Cherokee Nation by a 2007 constitutional amendment. The Cherokee constitution now restricts membership to people who can trace their ancestry to someone listed on the “Cherokee by blood” section of the Dawes Commission Rolls.<sup>78</sup> However, even the Amendment vote was clouded with suspicion as e-mails campaigning for the 2007 Amendment “invoked the old fear of interracial sex” by asking Cherokee voters to “FIGHT AGAINST THE INFILTRATION” and vote to exclude Black Cherokee Freedmen from membership.<sup>79</sup> The Amendment passed by a 77% majority vote.<sup>80</sup> Principal Chief of the Cherokee Nation Chad Smith claimed it was an “unexpectedly high turnout,”<sup>81</sup> but commentators argued the turnout was relatively low and not representative of “The Cherokee People.”<sup>82</sup> Of 35,000 registered voters, 8,743 total votes were cast with 6,702 voting in favor of the Amendment,<sup>83</sup> in other words less than one-fourth of the Cherokee voting population even voted, and only 19% of the total registered voting population voted to disenroll the Freedmen.<sup>84</sup>

On May 14, 2007, a Cherokee District Court temporarily enjoined Cherokee leaders from enforcing the Amendment, which reinstated full citizenship for Freedmen and safe guarded their right to vote in the upcoming Cherokee national election.<sup>85</sup> A group of Freedmen sued Cherokee Registrar Lee Ummerteskee, seeking a preliminary injunction of the 2007 Amendment because it was “flawed, . . . cannot be enforced . . . [and] denie[s] one of the most fundamental rights of a citizen—the right to vote for

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<sup>78</sup> Cherokee CONST. art. IV, §1. *See also* YARBROUGH, *supra* note 25, at 130 (discussing the sentiments among the Cherokee after this Amendment was passed as well as the implications of the *Allen* case on this issue).

<sup>79</sup> YARBROUGH, *supra* note 25, at 130.

<sup>80</sup> Cherokee Nation Special Election Results, Cherokee Nation News Release, (Mar. 3 2007) *available at* <http://www.cherokee.org/News/Stories/23303.aspx>; *see also* Will Chavez, *Voters amend Cherokee Constitution*, CHEROKEE PHOENIX, April 2007, at A1, *available at* [http://www.cherokeephoenix.org/uploads/2007/4/4636\\_2007-04-01.pdf](http://www.cherokeephoenix.org/uploads/2007/4/4636_2007-04-01.pdf)

<sup>81</sup> *Id.*

<sup>82</sup> Steve Russell, *Tsunami Warning from the Cherokee Nation*, INDIAN COUNTRY TODAY (Sept. 14, 2011), *available at* <http://indiancountrytodaymedianetwork.com/opinion/tsunami-warning-from-the-cherokee-nation-54005>.

<sup>83</sup> *Id.*

<sup>84</sup> Of the estimated 268,000 enrolled Cherokee members, only 35,000 are registered to vote, or 13% of the Cherokee Nation. In total, 2.5% of the total population voted to disenroll Cherokee Freedmen. *Id.*

<sup>85</sup> NAYLOR, *supra* note 14, at 213-14.

governmental leaders.”<sup>86</sup> The Cherokee Registrar had no objection, and the Freedmen were allowed to vote. Shortly after the injunction was issued, U.S. Representative and Congressional Black Caucus member Diane E. Watson of California introduced H.R. 2824, proposing to sever all relations between the Cherokee Nation of Oklahoma and the United States until the citizenship of Freedmen is restored.<sup>87</sup> The bill did not make it out of committee,<sup>88</sup> but effectively expressed the support of the Congressional Black Caucus for the Cherokee Freedmen as Cherokee citizens, though through a federal mechanism and proposing a dangerous precedent.

With the Cherokee District Court injunction in effect, Freedmen were allowed to vote in the 2007 Principal Chief election between Stacy L. Leeds (the Cherokee Justice who decided *Allen v. Cherokee Nation*) and incumbent Principal Chief Chad Smith (who proposed the constitutional amendment to disenfranchise and disenroll the Freedmen).<sup>89</sup> With 59% of the 13,710 votes, Chad Smith was reelected.<sup>90</sup> As historian Celia Naylor notes, “[d]escendants of Cherokee freedpeople, and many other Cherokee citizens, could only consider Smith’s reelection a blow to the Cherokee freedpeople’s fight for full citizenship rights.”<sup>91</sup>

By 2008, the D.C. Court of Appeals decided the *Vann v. Kempthorne* appeal (*Vann II*), finding that the Cherokee Nation’s sovereign immunity had not been expressly or unequivocally abrogated by an act of Congress, though Vann may sue officials under the doctrine of *Ex parte Young*. The Cherokee Nation argued that the entire suit should be dismissed since the requested relief, invalidating Cherokee elections, “implicates special sovereignty interests.”<sup>92</sup> Judge Griffith strongly disagreed, writing that “[t]he tribe does not just lack a ‘special sovereignty interest’ in discriminatory elections-it lacks *any* sovereign interest in such behavior.”<sup>93</sup> The court held that the Cherokee Nation was protected by sovereign immunity and was required to be joined under Federal Rule of Civil Procedure 19(a), and remanded for a determination of whether the suit could proceed without the

<sup>86</sup> *Id.* at 213.

<sup>87</sup> H.R. 2824, 110th Cong. § 2 (2007). NAYLOR, *supra* note 14, at 215.

<sup>88</sup> See Govtrack.us, *To Sever United States’ Government Relations with the Cherokee Nation* . . . <https://www.govtrack.us/congress/bills/110/hr2824>. H.R. 2824 was reintroduced in 2009 as H.R. 2761, 111th Cong. (2009). H.R. 2761 also died in committee.

<sup>89</sup> NAYLOR, *supra* note 14 at 216

<sup>90</sup> Cherokee Nation General Election Results, Cherokee Nation News Release (June 24,2007), available at <http://www.cherokee.org/News/Stories/23391.aspx>.

<sup>91</sup> NAYLOR, *supra* note 14 at 255.

<sup>92</sup> *Vann*, 534 F.3d at 755 (quoting *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 281 (1997)).

<sup>93</sup> *Id.* at 756 (emphasis in original).

Cherokee Nation as a necessary party.<sup>94</sup>

3. Cherokee Nation Responds 2009-2012: Cherokee Nation v. Nash and Vann

With Smith continuing as Principal Tribal Chief and ongoing litigation in Cherokee and federal courts,<sup>95</sup> the Cherokee Nation filed suit against the Freedmen in 2009 in the Northern District of Oklahoma. In *Cherokee Nation v. Nash*, the Cherokee Nation sued a group of Cherokee Freedmen, the U.S. Department of Interior and Secretary Ken Salazar seeking a declaratory judgment that the Five Tribes Act, 34 Stat. 137, § 3 (1906), had effectively abrogated Cherokee citizenship for all descendants of Freedmen.<sup>96</sup> Filed “shortly after Chief Smith filed his motion to dismiss” in *Vann v. Salazar (Vann III)*,<sup>97</sup> the court transferred the proceedings to the D.C. Circuit court hearing *Vann*, because that judge presumably had a firmer understanding of the facts and issues involved in the case.<sup>98</sup> However, simply because the Cherokee Nation waived its immunity from suit in the *Nash* action, does not mean that it has been joined as a party in the *Vann III* case or “otherwise deprive the Cherokee Nation of immunity asserted in” *Vann III*.<sup>99</sup>

In 2011, the Supreme Court of the Cherokee Nation vacated the injunction of the 2007 Amendment in *Cherokee Nation Registrar v. Nash*.<sup>100</sup> In an opinion authored by Justice Matlock, the dissenting Justice in *Allen v. Cherokee Nation*, the court found that the 2007 Amendment was constitutional as “[t]he latest sovereign expression of the Cherokee people concerning the Freedmen.”<sup>101</sup> However, Justice Matlock is quick to hedge against the pending federal actions, noting that the 2007 Amendment does not violate the Thirteenth Amendment as a “Badge or Incident of Slavery” since “the Cherokee Nation Constitution does not exclude people from citizenship in the manner the Thirteenth Amendment protects against. It includes for eligibility those whose verifiable ancestors are listed on the Dawes Rolls as Cherokees by Blood.”<sup>102</sup> With two concurrences, the unifying message of the Majority was clear: “the issue at bar was not about race.”<sup>103</sup> Justice Dowty, who sided with Justice Leeds in the *Allen* decision, dissented but did

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<sup>94</sup> *Id.*

<sup>95</sup> *Vann v. Salazar*, 883 F. Supp. 2d 44, *rev'd by Vann v. U.S. DOI*, 701 F.3d 927.

<sup>96</sup> 724 F. Supp. 2d 1159, 1163 (N.D. Okla. 2010).

<sup>97</sup> *Id.* at 1163.

<sup>98</sup> *Id.* at 1173.

<sup>99</sup> *Id.* at 1172.

<sup>100</sup> *Nash*, No. SC-2011-02, at 10.

<sup>101</sup> *Id.* at 7.

<sup>102</sup> *Id.* at 9.

<sup>103</sup> *Id.* at 15.

not file a written opinion.

This left *Vann* as the only active litigation on the citizenship of the Cherokee Freedmen. The case was dismissed by the D.C. Circuit in September of 2011 (*Vann III*),<sup>104</sup> but the D.C. Court of Appeals reversed and remanded in December of 2012 (*Vann IV*). Following the instructions of the Court of Appeals in *Vann II*, the District Court found that the Cherokee Nation was a necessary party to be joined in the litigation and dismissed under Federal Rules of Civil Procedure 19(b).<sup>105</sup> Because the Cherokee Nation had not waived sovereign immunity, it could not be joined in the suit. Without the Cherokee Nation as a party to the litigation, the court found that “the Nation’s interests would be prejudiced,”<sup>106</sup> such prejudice could not be lessened or avoided by the court’s eventual ruling and any ruling would be inadequate because only the Chief would be bound by the judgment of the court.<sup>107</sup> The court held that *Nash* offered not only “an adequate alternative forum, but a superior one” because the Cherokee Nation had waived immunity by filing suit, and could thus be bound by the ruling of the court.<sup>108</sup> All claims were therefore dismissed and leave to file an amended complaint was denied.

On appeal, the Court of Appeals reversed, applying the *Ex parte Young* doctrine as an important legal “fiction” that allows suits to contest the legitimacy of government action without violating sovereign immunity.<sup>109</sup> Any decision would be binding on ensuing elected officials and the Principal Chief “can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party.”<sup>110</sup> The court concluded that the joinder of the Cherokee Nation was therefore not necessary and decided not to reach the question whether the Cherokee Nation implicitly waived sovereign immunity by filing suit in Oklahoma.<sup>111</sup> Reversal may also imply that the *Nash* litigation may be stayed. The Cherokee Nation voluntarily dismissed the Department of Interior and Secretary of State as defendants in *Nash*, but both remains parties to the suit because they have filed a counterclaim in that action.

The *Vann* litigation has yet to reach the substantive claims of the case in federal court after nearly a decade of litigation on procedure. Once the case reaches the D.C. Circuit Court for argument and gathering of evidence, the issue becomes what

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<sup>104</sup> *Vann v. Salazar*, 2011 U.S. Dist. LEXIS 113313 (D.D.C. 2011), 883 F. Supp. 2d 44.

<sup>105</sup> *Vann v. Salazar*, 883 F.Supp. 2d 44 (D.D.C. 2011).

<sup>106</sup> *Id.* at 50.

<sup>107</sup> *Id.* at 50.

<sup>108</sup> *Id.* at 51-52.

<sup>109</sup> *Vann v. U.S. DOI*, 701 F.3d at 929.

<sup>110</sup> *Id.* at 930.

<sup>111</sup> *Id.*

elements of the Cherokee Nations and Cherokee Freedmen's history are sufficient for a court? Just as Torres and Milun asked in the *Mashpee* case that began this section: "So what kind of story can be told within the confines of legal discourse?"<sup>112</sup> The long histories of slavery in the United States and the Cherokee Nation are not likely to be heard and the majority of the current case revolves around the Freedmen's rights under the Treaty of 1866. In order to reach the merits of the case, the Cherokee Nation, Freedmen, and the Department of the Interior have filed a joint motion for summary judgment to reach the core question: "whether the Freedmen possess a right to equal citizenship in the Cherokee Nation under the Treaty of 1866."<sup>113</sup>

### III. STORY FRAMES: DOCTRINES OF FEDERAL INDIAN LAW AND CRITICAL RACE THEORY

As the previous section illustrates, the current Cherokee Freedmen litigation in federal courts is a densely tangled web of opinions from three different jurisdictions on one key question: Is it a proper exercise of sovereignty to exclude a racialized group from membership in an Indian nation? The D.C. Circuit Court was set to hear oral argument on the issue in April of 2014. Cherokee courts have expressed mixed opinions, but most recently held such exclusion to be valid.<sup>114</sup> Because this article focuses on pending federal Cases, I first will present some guiding cases in Federal Indian Law that should impact the *Vann* and *Nash* proceedings, followed by a Critical Race Theory lens for analyzing both cases as strange mixtures of sovereignty, U.S. paternalism, and White Supremacy.

#### A. *Doctrines of Federal Indian Law arising in Vann and Nash*

Three interrelated areas of Federal Indian Law should play a

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<sup>112</sup> Torres & Milun, *supra* note 10, at 647.

<sup>113</sup> Joint Motion for Entry of Order Setting Briefing Schedule for Summary Judgment on Core Issue and Staying Case on All Other Matters, Case No. 1:13-cv-01313 (TFH) (*available at* <http://turtletalk.files.wordpress.com/2013/09/2013-09-13-joint-motion-for-order-setting-briefing-schedule-for-summary-judgment-on-core-issue-and-staying-case-on-all-other-matters.pdf>). Oral argument was set for April 29, 2014. Freedmen, the Cherokee Nation, and the United States Department of the Interior have filed briefs (*all available at* <http://turtletalk.wordpress.com/2014/02/03/summary-judgment-briefs-in-cherokee-freedmen-matter/>). Both the Freedmen and Department of Interior's briefs contained detailed history of the status of Freedmen, leading up to and through the Civil War, the Treaty of 1866 and into the modern claims. Unfortunately the history described in the Cherokee Nation's brief is less than 3 pages long and only discusses the treaty itself.

<sup>114</sup> See *Nash*, No. SC-2011-02, at 10 (finding the 2007 amendment changing requirements for Cherokee citizenship constitutional).

key role in reaching the merits of the Cherokee Freedmen cases: Federal power, treaty construction and Tribal sovereignty—specifically the power to determine membership and immunity from suit. Federal Indian Law’s foundational Marshall Trilogy establishes two particularly relevant doctrines: first, Indian nations are “domestic dependent nations,” subservient to federal law in a “state of pupilage,”<sup>115</sup> and second, Indian nations have always been “distinct, independent political communities, retaining their original natural rights,” including the power to make treaties.<sup>116</sup> As Robert Williams Jr. notes, these foundational doctrines of Indian law “embrace[] and perpetuate[] a racist language of Indian savagery to rationalize the recognition of these retained rights of a limited form of tribal sovereignty.”<sup>117</sup> Yet from these racist, paternalistic, though still valid foundations of Federal Indian Law, the United States Supreme Court has decided that Congress has absolute plenary power to make law concerning Indian Nations and to unilaterally abrogate treaties with Indian Nations at the will of Congress.<sup>118</sup> Recognizing that treaties are important agreements between nations, *Worcester v. Georgia* established the current standard for treaty construction in federal courts: treaties are construed sympathetic to Indian interests (or what the Court deems Indian interests) and “[t]he language used in treaties with the Indians should never be construed to their prejudice.”<sup>119</sup> Yet, Congress may still unilaterally abrogate treaties expressly or impliedly by “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”<sup>120</sup> Supreme Court doctrines of Indian Law have thus granted the U.S. federal government broad power to define and interpret treaties and the boundaries of Tribal Sovereignty, often at the expense of Indian nations.

The Supreme Court has also previously determined that Cherokee Citizenship, at least for purposes of criminal jurisdiction, does not extend to those considered “intermarried whites.” In *United States v. Rogers*, the Supreme Court ruled that Rogers, a White man who married a Cherokee woman and was subsequently adopted into the Cherokee Nation, was subject to federal criminal jurisdiction for killing another White man who

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<sup>115</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>116</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

<sup>117</sup> ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA* 69 (2005).

<sup>118</sup> See generally *United States v. Kagama*, 118 U.S. 375 (1886) (discussing Congressional power over Indian tribes); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding the plenary power doctrine).

<sup>119</sup> 31 U.S. at 582.

<sup>120</sup> *United States v. Dion*, 476 U.S. 734, 738-40 (1986).

was adopted into the Cherokee Nation.<sup>121</sup> Although Rogers was “entitled to certain privileges in the tribe, and ma[d]e himself amenable to their laws and usages” through his adoption, the Court held: “he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race.”<sup>122</sup> Furthermore, “[w]hatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception [in the Treaty of New Echota of 1835, recognizing Cherokee jurisdiction over Cherokee territory, subject to federal law].”<sup>123</sup> Thus, the Court recognized that even though citizenship in the Cherokee Nations extended to varied groups of peoples, the Court held firm that race, Whiteness, and U.S. Citizenship are determinative for criminal jurisdiction.

Though these early opinions are heavily rooted in “[a]n overtly racist, hostile, and violent language of Indian savagery,”<sup>124</sup> some Supreme Court decisions have recognized the inherent sovereignty of Indian nations, including the power to determine membership and immunity from suit in federal courts. For example, in *Santa Clara Pueblo v. Martinez*, the Court recognized that while “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess,”<sup>125</sup> “[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.”<sup>126</sup> *Martinez* involved a dispute very similar to the issues raised by *Vann*, as petitioner Julie Martinez sought federal declaratory and injunctive relief against the decision of the Santa Clara Pueblo to define membership as descending from male enrolled members.<sup>127</sup> Under the Indian Civil Rights Act (ICRA), certain federal rights are applied to Indian nations, including due process and equal protection.<sup>128</sup> *Martinez* argued that the Pueblo violated the equal protection guarantee of ICRA by redefining membership to exclude women, creating a “presumptively invidious” classification.<sup>129</sup>

Justice Marshall, writing for the majority, disagreed. Using underlying doctrines of Federal Indian Law, Marshall found that

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<sup>121</sup> *United States v. Rogers*, 45 U.S. 567, 571-72 (1846).

<sup>122</sup> *Id.* at 573.

<sup>123</sup> *Id.*

<sup>124</sup> WILLIAMS, *supra* note 117, at 39.

<sup>125</sup> 436 U.S. 49, 56-57 (1978).

<sup>126</sup> *Id.* at 65.

<sup>127</sup> *Id.* at 51.

<sup>128</sup> 25 U.S.C. § 1302(8).

<sup>129</sup> *Martinez*, 436 U.S. at 55.

the Pueblo had not “unequivocally expressed” a waiver of sovereign immunity,<sup>130</sup> and under *Ex parte Young*, officers of the Pueblo are still liable for suit, but “a federal forum for issues arising under [25 U.S.C.] § 1302 constitutes an interference with tribal autonomy and self-government.”<sup>131</sup> Thus, claims under the Indian Civil Rights Act are limited to a petition of habeas corpus in criminal matters, while Tribal Courts are the most appropriate forum for civil matters. Crucial to the *Vann* litigation, Justice Marshall notes 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.”<sup>132</sup>

Though *Vann* is not an ICRA claim, the principles in *Santa Clara Pueblo* may still apply due to the factual similarity of the cases, upholding the Cherokee Nation’s inherent sovereign power to define its own membership. *Martinez* touches on the crucial issue of sovereign immunity and the *Ex parte Young* doctrine that permits suits against government officials. However, the most recent decision in *Vann IV* means that sovereign immunity is no longer an issue. Although neither the 1866 treaty nor the Thirteenth Amendment expressly or unequivocally waive the Cherokee Nation’s sovereign immunity,<sup>133</sup> the Cherokee Nation is no longer necessary to be joined, and thus, its immunity remains intact. As a “typical *Ex parte Young* scenario,” the officers of the Cherokee Nation are sufficient parties to reach the merits and remedy in that case.<sup>134</sup> Even though expressly or implicitly waived, in *Nash* the Cherokee Nation acknowledges an explicit waiver of sovereign immunity as the plaintiff in the action. Thus, following *Martinez* and *Vann IV*, the merits of the case are left to be determined surrounding: (1) the Cherokee Nation’s inherent sovereign power to define membership, and (2) whether the appropriate venue for remedy is in federal or Cherokee courts.

### B. *The Mancari Paradox: Critical Race Theory and Federal Indian Law*

Embedded in the Cherokee Freedmen’s legal claims is the intersection of Blackness, Indianness and Federal Indian Law. In *Vann*, the Freedmen plaintiffs hope to apply the Thirteenth Amendment to the Cherokee Nation through the 1866 treaty, while the Cherokee Nation defendants are almost arguing an inverse *Lone Wolf*, that Indian nations may unilaterally abrogate treaties. The Supreme Court addressed intersections of race and Indianness in *Morton v. Mancari*, unanimously finding that an

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<sup>130</sup> *Id.* at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

<sup>131</sup> *Id.* at 59.

<sup>132</sup> *Id.* at 72 n.32 (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

<sup>133</sup> *Vann v. Kempthorne*, 534 F.3d at 748 (citing *Martinez*, 436 U.S. at 59).

<sup>134</sup> *Vann v. U.S. DOI*, 701 F.3d at 930.



Indian hiring preference law was not a “racial preference,” but a political determination “reasonably designed to further the cause of Indian self-government” by ensuring more Indians are employed in the BIA.<sup>135</sup> By distinguishing “racial” and “political” the court effectively promoted the important work of ensuring American Indians would be selected for control of federal departments dealing with American Indian affairs. But in the context of the 2007 Cherokee Amendment, I would argue *Mancari* also creates an apparent paradox—because Freedmen were disenrolled for not being “Cherokee by Blood” on the official Dawes rolls, their political status was likely terminated *because of* their race in an exercise of Cherokee self-government.

In order to unpack the intersections of race and sovereignty represented by the Freedmen litigation, I adopt a CRT framework for analyzing the *Vann* and *Nash* litigation. Professor Kimberlé Crenshaw explains that, while there is no “canonical set of doctrines,” CRT is rooted in two common interests.

The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as . . . ‘equal protection.’ The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it.<sup>136</sup>

Thus, CRT “rejects the prevailing orthodoxy that scholarship should be or could be ‘neutral’ and ‘objective’” to pursue “engaged, even adversarial, scholarship.”<sup>137</sup>

Racism is a socially and legally constructed manifestation of power used to create ideologies to “reproduce the structures and practices of racial domination.”<sup>138</sup> Michael Omi and Howard Winant argue that race “has no fixed meaning, but is constructed and transformed sociohistorically through competing political projects, through the necessary and ineluctable link between structural and cultural dimensions of race in the United States.”<sup>139</sup> Racism, on the other hand, connects notions of race with hierarchal structures of “domination based on essentialist categories of race.”<sup>140</sup> Professor Charles Lawrence explains that racism is not an abnormal or even rare occurrence in the United States; racism “is a part of our common historical experience and,

<sup>135</sup> *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

<sup>136</sup> Kimberlé Crenshaw, *Introduction* in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (1995) (emphasis in original).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at xxv.

<sup>139</sup> MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S, 71 (1994).

<sup>140</sup> *Id.*

therefore, a part of our culture.”<sup>141</sup> Racism is therefore hegemonic, constructing a deviant “other” to “legitimate the oppression of blacks” while defining and privileging “membership in the white community, creating a basis for identification with dominant interests.”<sup>142</sup> Even when courts are used to contest racial discrimination, Derrick Bell’s principle of “interest convergence” observes that decisions benefitting people of color, and Blacks in particular, only occur when such a decision maintains the privilege and self-interests of Whites.<sup>143</sup>

Because CRT deals primarily with issues of race, Professor Bryan Brayboy suggests an American Indian variation on CRT in Tribal Critical Race Theory (TribalCrit).<sup>144</sup> Drawing from the CRT assertion that racism is endemic to U.S. society, TribalCrit recognizes that “colonization is endemic to society,” and argues U.S. policies toward Indigenous peoples are rooted in imperialism, white supremacy, and capitalism.<sup>145</sup> As Professor Bethany Berger notes, the racialization of American Indians was part of a civilizing ideology geared towards “denigrating the tribe, assimilating the individual” while maintaining “the moral superiority of Anglo-American identity and democracy.”<sup>146</sup>

Race and racism are defined and experienced differently by different racialized groups. Vine Deloria Jr. notes that the United States’ treatments of Blacks and Indians, through laws and policies, had distinct strategies:

The white man adopted two basic approaches in handling blacks and Indians. He systematically excluded blacks from all programs, policies, social events and economic schemes. . . . With the Indian the process was simply reversed. . . . Indians were therefore subjected to the most intense pressure to become white. Laws passed by Congress had but one goal—The Anglo-Saxonization of the Indian.<sup>147</sup>

Cedric J. Robinson adds that “racial capitalism,” or the use of slavery in founding the material, commercial and capital development of the United States, relies on the construct of “the

<sup>141</sup> Charles Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism* 39 STAN. L. REV. 317, 330 (1987).

<sup>142</sup> Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369-70.

<sup>143</sup> Derrick Bell, “Brown v. Board of Education and the Interest-Convergence Dilemma,” 93 HARV. L. REV. 518 (1980).

<sup>144</sup> Bryan Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37.5 THE URB. REV. 425, 429 (2006).

<sup>145</sup> *Id.*

<sup>146</sup> Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L.Rev. 591, 654 (2009).

<sup>147</sup> VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO, 172 (1969).

Negro” to render Blacks as a slaveable, domestic enemy.<sup>148</sup> As constructed by White Europeans colonizing through slavery, “the Negro had no civilization, no cultures, no religions, no history, no place, and finally no humanity that might command consideration.”<sup>149</sup> American Indians on the other hand were assimilationist projects, forced to adopt White conceptions of property, identity, and nation<sup>150</sup> while Whites were free to “play Indian” and appropriate Indian identities.<sup>151</sup> Cheryl Harris notes the centrality of “establishing a form of property contingent on race,” under a propertied Whiteness that was able to take, own, sell or possess Black life and Indian land.<sup>152</sup>

Combining CRT and TribalCrit therefore recognizes intersection of race, colonization, property and White Supremacy as constitutive ideologies in the current Cherokee Freedmen litigation. Similarly Kimberlé Crenshaw’s notion of “intersectionality”<sup>153</sup> provides a central framework in discussing the history and present day identities of Cherokee Freedmen. Crenshaw argues that oppression does not occur along a single axis that excludes others, but people can inhabit multiple group identities simultaneously.<sup>154</sup> Thus, Blackness and Indianness need not be mutually exclusive or totalizing identities for peoples. Recognizing intersectional identities may require a complete rejection of political sovereignty and acceptance of Wallace Coffey and Rebecca Tsosie’s notion of “cultural sovereignty: that is, the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures.”<sup>155</sup> Cultural Sovereignty repositions arguments of self-determination within the context of Indigenous cultural traditions, history and stories to reaffirm Indigenous communities to redefine “the nature of our sovereignty as Indian nations.”<sup>156</sup>

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<sup>148</sup> ROBINSON, *supra* note 17, at 81.

<sup>149</sup> *Id.*

<sup>150</sup> Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1717 (1993).

<sup>151</sup> Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing*, in INCITE! WOMEN OF COLOR AGAINST VIOLENCE 67 (2006), *see also* Berger, *supra* note 146, at 594 (discussing the interplay between white supremacy, capitalism, colonialism, and orientalism in its effects on Native, Black, and peoples constructed as “exotic”); Phillip Deloria, *Playing Indian* 12-39 (1998) (analyzing the history of appropriation of Native cultures by whites in the United States).

<sup>152</sup> Harris, *supra* note 150, at 1716.

<sup>153</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

<sup>154</sup> *Id.*

<sup>155</sup> Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y Rev. 191, 196.

<sup>156</sup> *Id.* at 210.

Using CRT, TribalCrit and Cultural Sovereignty as theoretical guides, the remaining portions of this paper engage the shared histories of Africans and Cherokees to contextualize the ongoing *Vann* and *Nash* litigation, before applying CRT and Cultural Sovereignty to these lawsuits to problematize the approaches of the courts and searching for solutions.

#### IV. THE COLONIAL FEEDBACK LOOP: *VANN* AND *NASH* THROUGH A CRT LENS

Returning to the litigation that began this paper, the present status of the Cherokee Freedmen represents what I call a “Colonial Feedback Loop,” where the Cherokee Nation is regurgitating assimilationist philosophies of White Supremacy as Tribal Sovereignty, opting to exclude Black Cherokee Citizens under the same ideology of nationhood the United States historically used to exclude, segregate, and marginalize Black U.S. Citizens. Importantly, I am not making generalized, essentialist assertions of inherent anti-black racism on the part of the Cherokee Nation, but presenting my take on what the current status of the Cherokee Freedmen represent from my own theoretical perspective informed by the history of the suit and Cherokee Freedmen. What the Colonial Feedback Loop does suggest is that the Cherokee Nation’s decision to disenroll Freedmen represents an ongoing coloniality in of Cherokee policy by relying on the Dawes Rolls to enact self-determination.

##### A. “*Judicial Notice of Racial Diversity:*” Cherokee Nation *Registrar v. Nash*

In a brief opinion, Chief Justice Matlock of the Cherokee Supreme Court dismisses all claims and injunctions filed by the Freedmen in Cherokee courts, —validating the 2007 Amendment and subsequent disenrollment of the Cherokee Freedmen. Justice Matlock’s opinion boils down to four principle holdings: (1) Cherokee Freedmen were never citizens under the 1866 Treaty, (2) the 2007 Amendment is a valid exercise of sovereign power, (3) the Dawes Rolls are a valid means of determining citizenship, and (4) “the Court takes judicial notice of the extensive racial diversity of the citizenry of the Cherokee Nation.”<sup>157</sup>

First, Justice Matlock asserts that the 2007 Constitution, as amended, is the “latest sovereign expression of the Cherokee people.”<sup>158</sup> The referendum was part of a valid Cherokee election, and it cannot be revisited because the court lacks “jurisdiction or power to order what the constituents of a sovereign can set forth in

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<sup>157</sup> *Nash*, No. SC-2011-02, at 8-9.

<sup>158</sup> *Id.*, at 7.

their organic documents.”<sup>159</sup> Though the court is not required to acknowledge skepticism over voter irregularities (described in section I.b. of this paper), Justice Matlock is still stretching the term “Cherokee People” since so few Cherokee voted in that election. Additionally, the court makes no effort to address the racist propaganda that lead up to the passage of the 2007 Amendment. When e-mails specifically reference daughters and avoiding interracial relationships, certain controlling images of Blacks are invoked, drawing on hegemonic conceptualizations of black deviant otherness and criminality raising suspicions of racist, White Supremacist motivations behind the Amendment.<sup>160</sup>

Second, Justice Matlock almost overrules *Allen sub silentio*<sup>161</sup> by holding that “Cherokee Freedmen were never afforded citizenship in the Cherokee Nation by the Treaty of 1866,” emphasizing it was the 1866 Cherokee Amendment that granted Freedmen citizenship.<sup>162</sup> While the 1866 Cherokee Amendment affirmed the citizenship of the Cherokee, the Court in *Allen* noted the importance of honoring treaties as promises between sovereigns, but stressed that the 1866 Treaty is the basis for Freedmen, Delaware and Shawnee citizenship in the Cherokee Nation.<sup>163</sup> The 1866 Amendment extended citizenship “as a matter of tribal law.”<sup>164</sup> Justice Matlock’s “fair reading of the Treaty” excludes only one group: Freedmen.<sup>165</sup>

Third, despite language regarding the exclusive sovereign power of the Cherokee Nation, Justice Matlock affirms the Dawes Commission Rolls as the defining documents of citizenship. While the *Allen* litigation noted that many Cherokee created rolls and censuses of membership exist, Justice Matlock holds out the Dawes Rolls as unequivocally valid and does not question their authority or role in Cherokee processes. The presence of colonial tools have gained hegemonic, ideological acceptance that is neither questioned nor doubted.

Finally, the Court attempts to preempt future accusations of racism or discrimination under the Thirteenth Amendment by claiming the 2007 Amendment is not:

A [b]adge or [i]ncident of [s]lavery which violates the Thirteenth Amendment to the United States Constitution in light of the facts that there are Cherokee Freedmen who have and can prove they are also descendants of Cherokees listed on the Dawes Rolls as Cherokees by Blood and who are either citizens or eligible

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<sup>159</sup> *Id.*

<sup>160</sup> See YARBROUGH, *supra* note 25.

<sup>161</sup> Latin phrase meaning “in silence,” used to refer to courts which overturn existing precedent without addressing the issue.

<sup>162</sup> *Nash*, Case No. SC-2011-02, at 8-9.

<sup>163</sup> *Allen*, No. JAT-04-09, 18.

<sup>164</sup> *Id.*

<sup>165</sup> *Nash*, No. SC—2011-02 at 8.

for citizenship if they so desire.<sup>166</sup>

Thus, in Justice Matlock's view, the 2007 Amendment is not an exclusionary law but "includes for eligibility those whose verifiable ancestors are listed on the Dawes Rolls as Cherokees by blood."<sup>167</sup> Yet as Justice Leeds pointed out in *Allen*, the effect of such a law ignores that Shawnee and Delaware are also included in the Cherokee model of citizenship, despite not having any Cherokee blood, excluding only those who lack Cherokee Blood *and* have African Blood: Cherokee Freedmen.<sup>168</sup> Justice Matlock makes one final attempt to hedge against concerns of racism in the 2007 Amendment by taking "judicial notice of the extensive racial diversity of the citizenry of the Cherokee Nation."<sup>169</sup> The statement comes off as a little absurd, considering that the court has interestingly shifted language from Cherokee by Blood to the citizenry of the Cherokee Nation, which could acknowledge the presence of non-Cherokee Shawnee and Delaware who are still fully recognized by the Cherokee Nation. To my eyes, the court's sudden "judicial notice" feels like someone claiming they have "a black friend" in order to deflect allegations of racism or White Supremacy. The fact that Justice Matlock finds the need to note the "racial diversity" of the Cherokee Nation recognizes the implications of disenrolling *only* (Black) Cherokee Freedmen.

But now the Colonial Feedback Loop is complete. The highest court in the Cherokee Nation has accepted two features of White Supremacy and colonization as "sovereign" exercises: the Dawes Rolls and the exclusion of Blacks (who are also Cherokee). By historical and cultural ties,<sup>170</sup> Nowhere in the Cherokee Supreme Court's opinion is an assertion of cultural sovereignty that reflects on the traditions, histories or stories of the Cherokee People. The court does use the Cherokee Constitution and one instance Cherokee case law, but the bulk of the argument is grounded in a 2007 Amendment tinged with racist, White supremacist overtones, and United States federal laws and policies. The court has accepted the ideological exclusivity of U.S. law, including

<sup>166</sup> *Id.* at 9.

<sup>167</sup> *Id.*

<sup>168</sup> *Allen*, No. JAT 04-09, 8-9. Descendants of Intermarried Whites are logically, and ironically, included within this constitutional scheme since their descendants, i.e. the products of their intermarriage, would include a Cherokee Ancestor in some way. I am not aware of any enrollment, or contested enrollment, of the descendant of an intermarried white, without Cherokee ties, seeking citizenship. In some ways Justice Matlock's decision also mirrors the racial definitions under the original Oklahoma Constitution, which defined Black as the "other" to be excluded, while everyone else within the political community (there Whites and Natives, here Cherokee, Shawnee and Delaware) are left to be included. See NAYLOR, *supra* note 15, at 308 fn. 64.

<sup>169</sup> *Nash*, No. SC-2011-02, at 9.

<sup>170</sup> See Ray, *supra* note 4, at 461.

concomitant commitments to White Supremacy and Black exclusion.<sup>171</sup> Colonization is thus not only endemic to U.S. society,<sup>172</sup> but manifests in this determination by the Cherokee Supreme Court.

*B. The Right to Exclude: Martinez, Vann and CRT*

Returning to the Federal Cases, a threshold point of interest is that the court consistently applies Federal Indian Law to Cherokee Freedmen, continuing at least a bare recognition of their adoption by the 1866 Treaty and setting the stage for Indigenous solutions described in the next section. But under U.S. doctrines of Federal Indian Law, the *Vann* litigation (and subsequently the *Nash* litigation in Oklahoma) raises important questions of U.S. paternalism and supremacy over Indian legal codes within Indian Nations.

At first glance, *Vann* appears factually similar to *Santa Clara Pueblo v. Martinez*,<sup>173</sup> as both *Martinez* and *Vann* represent peoples who were legally defined out of existence by their respective communities. *Vann* was defined out by her Freedmen descent, while *Martinez's* children were defined out by virtue of having a Pueblo mother and no Pueblo father, leaving them without Pueblo affiliation. Yet the two cases are otherwise very distinct. *Martinez* involved a question of equal protection under the Indian Civil Rights Act, and foreclosed all non-habeas claims stemming from that act in federal courts. Perhaps knowing that ICRA claims would be sent back to Tribal Courts, the *Vann* litigation invokes the Thirteenth Amendment, attempting to merge U.S. post-slavery jurisprudence with Federal Indian law. Similarly, the ruling in *Vann IV* gives the litigation special significance by strengthening the *Martinez* application of *Ex parte Young* to Tribal Officials, allowing the substantive issue to be fully litigated in federal courts.<sup>174</sup>

While the *Cherokee Nation v. Nash* claims and counterclaims are still pending in Oklahoma, the fact that the *Vann IV* Court decided there was no need to reach the question of the waiver of sovereign immunity,<sup>175</sup> suggests that, based on the similarity of claims, parties and substantive underlying issues, the cases are likely to be merged. In one sense, this is beneficial by ensuring that all parties are part of a litigation that will have finality on this issue. The problem is the forum is federal courts, which, under

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<sup>171</sup> Crenshaw, *supra* note 142, at 1370. See also ROBINSON, *supra* note 17 (discussing generally the interplay of white supremacy, antiblackness and capitalism).

<sup>172</sup> Brayboy, *supra* note 14.

<sup>173</sup> 436 U.S. 49.

<sup>174</sup> *Vann*, 701 F.3d at 929.

<sup>175</sup> *Id.* at 930.

*Martinez*, are inappropriate forums for decisions of membership or the constitutionality (Cherokee or U.S.) of the 2007 Cherokee Amendment. Yet under the plain language of the Thirteenth Amendment, a United States Court may follow the domestic dependent nation model of Federal Indian law and find that not only is the Cherokee Nation “within the United States” but is “subject to its jurisdiction.”<sup>176</sup> Thus, the Cherokee Nation would be submitted to a Thirteenth Amendment jurisprudence that questions whether an action is a “badge or incident” of slavery.<sup>177</sup>

If the court finds for the Freedmen, it could use injunctive and declaratory relief to nullify the 2007 Amendment. This would return the Cherokee definition of membership to treaty terms by recognizing the Freedmen, but under an incredibly paternalistic enforcement that undermines any sense of sovereignty or self-determination within the Cherokee Nation. In essence, it would set the precedent that the United States Courts can assert U.S. Constitutional authority over substantive constitutional provisions of Indian nations, absent any express agreement. Perhaps recognizing the destructive force of this precedent, *Martinez* is crafted to respect the inherent sovereignty of Indian Nations and leave determinations of membership to Tribal Courts.<sup>178</sup> The *Vann* litigation could easily be dismissed under this principle, sending the remedy back to Cherokee courts for adjudication, although the Cherokee Supreme Court may have already adjudicated the issue through *Cherokee Nation Registrar v. Nash*. This outcome reaffirms the Colonial Feedback Loop in Cherokee courts, but allows the U.S. Courts to avoid a lengthy interrogation of the lasting effects of slavery and questions of reparations that could extend beyond Cherokee Freedmen. From an interest convergence,<sup>179</sup> perspective this seems the most likely outcome. Thus, the Colonial Feedback Loop extends interest convergence to notions of Tribal Sovereignty, in that Tribal Sovereignty is preserved only if it reflects colonial, White supremacist structures of power: in *Nash* by concluding that White supremacist documentation like the Dawes Rolls become features of sovereignty, while in *Vann* it potentially means that the sovereign right to exclude necessarily encompasses the discriminatory exclusion of Freedmen. While a number of Indian Law scholars have applied interest convergence to Indian Law,<sup>180</sup> I only slightly

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<sup>176</sup> U.S. CONST. amend. XIII, § 1.

<sup>177</sup> See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (discussing how the Thirteenth Amendment also granted Congress the power to enact legislation to eradicate existing badges or incidents of slavery).

<sup>178</sup> 436 U.S. at 72 n.32 (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

<sup>179</sup> Bell, *supra* note 143.

<sup>180</sup> See Matthew M. Fletcher, *On Black Freedmen* in JUSTICE UNVEILED: AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 3-4 (2007), available at <http://ssrn.com/abstract=1015282> (taking a Critical Race Theory approach to Federal Indian Policy in the Freedmen cases); Sara Krakoff, *Undoing Indian*



alter the subjects in Professor Bell's thesis to adapt to Indian Law: federal courts affirm tribal sovereignty only when it maintains colonial, White Supremacist structures of power and privilege, for example Congressional plenary power or Domestic Dependent status.

## V. ENDING THE COLONIAL FEEDBACK LOOP OR: HOW I LEARNED TO STOP WHITE SUPREMACY AND LOVE THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Recalling CRT's commitment to change, I want to conclude by exploring potential avenues of change that would recognize the Cherokee Freedmen as Cherokee citizens and the White Supremacist effects of the 2007 Amendment, without relying on a federal court decision to override the sovereignty of the Cherokee Nation and, which would set a dangerous precedent in Federal Indian Law. "Solutions" to the disenfranchisement of Cherokee Freedmen rarely represent a commitment to change and mutual benefit to both Indian Nations and Freedmen, involving punitive measures like H.R. 2824 which deny federal funds, extending federal constitutional law to Indian Nations beyond the Indian Civil Rights Act, "and other carrot-and-stick style proposals." 181 Therefore, in this section I look at two persuasive proposals for remedying the disenfranchisement of the Cherokee Freedmen, one rooted in Federal recognition and the other in Cherokee ways of knowing, and in turn, I offer one of my own rooted in the United Nations Declaration on the Rights of Indigenous Peoples.

### A. *Proposals for Recognizing Cherokee Freedmen*

One suggestion for affirming the intersectionality of Cherokee Freedmen (as Indian citizens and as Black people) has been to recognize the Freedmen as an Indian tribe. Professor Matthew Fletcher argues that because the U.S. federal government "forced the Cherokee Nation to sign an 1866 treaty—a treaty of punishment because the Nation signed on to the Confederacy during the Civil War—that placed the Freedmen on the Cherokee rolls," the Freedmen "problem" requires a federal solution.<sup>182</sup> "Professor Fletcher argues this solution is "a simple one. . . . The

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*Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. UNIV. L. REV. 1177 (2001) (analyzing the culmination of Federal Indian Law and policy); Steve Russell & Terri Miles, *One-Sided Interest Convergence: Indian Sovereignty in Organizing and Litigation*, 23.1 WICAZO SA REV. 7-24 (2008) (discussing interest convergence and Nation Building within Native Nations); WILLIAMS, *supra* note 117, at xxxv (advocating independence for Tribal Governments rather than dependence on Federal Indian Law).

<sup>181</sup> Fletcher, *supra* note 1, at 21.

<sup>182</sup> *Id.*

Cherokee Nation has exercised its sovereign right to exclude the Freedmen. These Freedmen are Indians, a discreet grouping of people that have significant blood quantum and a continuing manifestation of tribal culture. Why not?"<sup>183</sup> Professor Fletcher's argument is incredibly reasonable. I would also add that the U.S. government created the underlying systems of property that brought the Freedmen population to the Cherokee, both in privatized plantation system of land ownership and ownership of Black people through the Atlantic Slave Trade. Thus, by providing federal recognition, the Cherokee Nation is not terminated, the United States does not infringe on the Cherokee Nation's sovereignty by extending Federal Law, and the Freedmen are once again members of an Indian Nation. Why not?

However, this solution misses what I consider to be some of the central problems of the Cherokee Freedmen. First, their expulsion from the Cherokee Nation is connected to coloniality and White Supremacy that dates back long before the 1866 treaty. Recognizing the Freedmen would validate and legitimize the decision by the Cherokee Nation to expel Freedmen, allowing the Cherokee and U.S. legacy of slavery, Black labor and death, to be swept back under the carpet as an "ugly" period in our nation's past that we have overcome with written, formal legal documents. Second, this also overlooks the terms of a treaty between the Cherokee Nation and the United States. Many Indigenous nations and the United States depend on treaties and treaty rights in U.S. courts. Blatantly avoiding, or directly voiding, the terms of the 1866 treaty could set dangerous precedent in modern policies of Federal Indian Law.

Third, the Freedmen self-identify as "the Freedmen Band of the Cherokee Nation" in legal documents and publications. To me, this indicates that they are more interested in being recognized as Cherokee than as a separate Indian Nation. To create the Freedmen Nation from the Cherokee alone would skirt the unique status of Freedmen in different Indian nations that owned slaves, neglect the significance of *Cherokee* culture to the *Cherokee* Freedmen, and reaffirm federal constructions of Indian Nations as the most valid or just option, which I disagree with. Additionally Professor Fletcher's argument still relies on a blood quantum standard, which was not included on the Freedmen rolls, perpetuating the legitimacy of a method that was seemingly designed to allot land and limit inheritance among Indian peoples. If the Freedmen were granted separate federal recognition, they would need a land base in order to exercise their newly recognized sovereign status as a Nation. This would likely require taking lands from the Cherokee Nation (which would lead to even more hostility) or a forced relocation to territory that would have to be

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<sup>183</sup> *Id.*, at 22.

taken from someone else.

S. Alan Ray, on the other hand, suggests an anti-colonial or post-colonial solution rooted in Cherokee ways of knowing. Rather than relying upon the Dawes Rolls, “an attachment . . . that borders on fetishism . . . which alienates Cherokees from their sovereign power of self-determination,”<sup>184</sup> Ray suggests a “radical indigenism” to forge political identities “from within their own assumptions and methods and not in response to heteronomous criteria.”<sup>185</sup> This means subordinating the Dawes Rolls as one standard of identifying citizenship, along with practical knowledge, Cherokee spirituality, and dialogue to create an effective history of colonialism.<sup>186</sup> Thus, Ray’s solution requires divorcing citizenship from the strict legalisms of nationhood, established through colonial mechanisms like Dawes Rolls, into a more holistic understanding of citizenship, which recognizes the unique histories of the Cherokee and Freedmen through culture and kinship.<sup>187</sup> Ray’s approach, as a Cherokee citizen, is deeply rooted in Cherokee values that extend beyond the colonial mechanisms, and offer a potent solution for ending the colonial feedback loop. A large part of the process in recognizing the citizenship status of Freedmen is recognizing the connection to Cherokee history, values, culture and ways of knowing. Ray concludes that “[t]he wise use of Cherokee sovereignty, however, counsels patience, not a rush to the polls; honest, sustained, and no doubt difficult dialogue, not politicking, and critical reinterpretation of cultural resources in the service of kinship, not the blind reproduction.”<sup>188</sup>

Ray’s analysis is powerful and considers the multifaceted nature of citizenship, but unfortunately is rooted in 2006, after the *Allen* decision, but prior to the 2007 disenrollment amendment. Although it may be “fetishistic” in Ray’s views to use legal mechanisms to resolve the disenrollment of the Freedmen, the 2007 amendment creates a textual, legal basis for disenrollment that makes the dialogue on citizenship and belonging difficult, if not improbable, within the Cherokee Nation.<sup>189</sup> The disenrollment

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<sup>184</sup> Ray, *supra* note , at 52-54.

<sup>185</sup> *Id.* at 55.

<sup>186</sup> *Id.* at 58.

<sup>187</sup> *Id.* at 63.

<sup>188</sup> *Id.* at 70 (emphasis supplied).

<sup>189</sup> The Keetowah Society opposed any sort of racial mixing and sought to remove all those of mixed racial descent. Miles, note 19 at 186; Sturm, note 29 at 72; Halliburton, note 15 at 126; Naylor, note 14 at 148. However, the Cherokee nation is not likely to adopt such a perspective today, particularly in light of the recent struggles under the Indian Child Welfare Act, which seek to preserve the Cherokee Nations ability to protect citizens and descendants while determining membership, despite federal skepticism over blood connections which discount cultural affiliation. Compare *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013) with Bethany R. Berger, *In the Name of the*

of the Freedmen has been given the force of Cherokee law, and thus would require some measure of legal solution within the Cherokee constitution. Instead both the Freedmen and the Cherokee Nation have sought resolution in Federal courts, leaving a determination of Cherokee treaties, constitutionalism, and treaties in federal hands.

*B. Reciprocal Recognitions: Realizing the DRIP for Cherokee Freedmen*

I ask that I be taken into consideration on the basis of my desire. I am not only here-now, locked in thinghood. I desire somewhere else and something else. I demand that an account be taken of my contradictory activity insofar as I pursue something other than life, insofar as I am fighting for the birth of a human world, in other words, *a world of reciprocal recognitions*.<sup>190</sup>

Returning to Fanon's *Black Skin, White Masks* that this article is named after, Fanon recognizes that the otherization of Blackness under White supremacist colonialism cannot be remedied through a simple recognition of humanity. Rather, recognition must be obtained through struggle.<sup>191</sup> Cherokee Freedmen have been struggling for legal recognition in Cherokee and United States courts for nearly two decades, from the first council resolution that formally disenrolled freedmen to the current constitutional amendment.

Rather than Federal Intervention, I want to offer a solution that recognizes the legal struggles of Freedmen and applies International standards: recognizing that Cherokee Freedmen are "indigenous" and utilizing the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) through Cherokee Courts.

*Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl* 28-38 (2014)(unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?params=/context/bethany\\_berger/article/1000/type/native/&path\\_info=](http://works.bepress.com/cgi/viewcontent.cgi?params=/context/bethany_berger/article/1000/type/native/&path_info=) (describing the colonial rhetoric in media and the Supreme Court's skepticism over baby Veronica's Cherokee ties due to a low blood quantum—despite deep cultural, geographic and practical ties to Cherokee citizenship).

<sup>190</sup> Fanon, *supra* note 1, at 193.

<sup>191</sup> Though for Fanon this requires militant agitation or revolution that upsets dominant paradigms. The Cherokee's constitutional crisis was created by a militant reaction to established legal norms; however this was in order to entrench the authority of a principal chief while upsetting the authority of the Cherokee courts. See Mouser, *supra* note 65. Because of my own ideals of the potential for radical changes in legal structure through dialogue, rather than pure militant revolution, that I do not suggest a militant uprising of Freedmen against the Cherokee, since, in my mind, this could be counterproductive for the Freedmen's efforts to be recognized and participate in existing Cherokee laws and ways. Again, my understanding of the Freedmen's current legal struggle is recognition as *Cherokee Freedmen*, an intersectional status—not simply Freedmen, Black, or Cherokee alone.

The immediate drawback is of course that, based on my reading of *Cherokee Nation Registrar v. Nash*, this would not be an easy case to make before the current Cherokee Supreme Court who appears unfriendly, if not hostile, to the claims of the Cherokee Freedmen. Additionally, this solution would not solve the problem of anti-black racism within Indian country demonstrated by Darren Buzzard's letters petitioning for the 2007 Amendment<sup>192</sup> that invoked old narratives of dangerous Black sexuality.<sup>193</sup> Recognizing these drawbacks, I would argue that the solution is more attainable than it seems as the Cherokee Nation has consistently expressed support for DRIP and urged its application to the United States.<sup>194</sup> If the Cherokee Nation is serious about making DRIP a real manifestation of the power of Indigenous peoples, why not set the example and begin by recognizing it within the Cherokee Nation and apply the principles to Freedmen?

In some ways, this builds on the ideal Fanon describes as reciprocal recognition. Utilizing the drip would not only serve to recognize the citizenship of the Freedmen, the history of slavery within the Cherokee Nation, and importantly, the Cherokee Nation as a Nation above the conventional domestic dependent status assigned by federal law. Instituting international principles in Cherokee legal structures can transcend federal norms in Cherokee Laws, while keeping connection with Cherokee ways of knowing, like the notion of "*ga-di-gui*, all working together," described by Ray.<sup>195</sup> Thus recognizing the Cherokee Freedmen also provides international recognition for the Cherokee Nation as a political nation internationally.

The first and underlying step is recognizing that the Freedmen are Indigenous peoples—in the international, political sense—regardless of federally recognized Indian blood quantum.<sup>196</sup>

<sup>192</sup> YARBROUGH, *supra* note 25, at 130.

<sup>193</sup> Patricia Hill Collins describes these as "controlling images" of sexuality, particularly for Black women, as Blackness is linked to sexual behavior deemed aberrant, unnatural, and therefore necessarily excluded. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 72 (2nd. Ed., 2000). See also PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (2005) (describing and critically analyzing how Black sexualities have historically and presently been marginalized through social representations to facilitate oppression).

<sup>194</sup> See generally Melanie Knight, Testimony before the Senate Committee on Indian Affairs, (June 9, 2011), *available at* <http://www.cnwo.org/Portals/74/Cherokee%20UND RIP%20Testimony.pdf>; Cherokee Nation, *UN Declaration on the Rights of Indigenous Peoples*, The Official Site of the Cherokee Nation Washington Office, *available at* [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>195</sup> Ray, *supra* note 4, at 70.

<sup>196</sup> Cherokee Freedmen's blood quantum status is also contested, noted earlier in section I.A and B. The Dawes Rolls not only discounted any relationship between Blackness and a Cherokee identity, but also discounted

As the direct, traceable descendants of freed slaves, Cherokee Freedmen are descendants peoples who did not immigrate to the United States, but were forcibly taken from their ancestral lands, where they had lived since time immemorial, forced to relocate and enslaved by the United States, the Cherokee Nation and other sovereigns.<sup>197</sup> While Freedmen may not be considered “Indian” under United States standards for federal recognition, they are Indigenous in under the terms of the DRIP as peoples who “have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”<sup>198</sup> Although the term “indigenous” is contested among different peoples and scholars, “[i]t has become an umbrella enabling communities and peoples to come together transcending their own colonized contexts and experiences, in order to learn, share, plan, organize and struggle collectively for self-determination on the global and local stages.”<sup>199</sup> Linda Tuhiwai Smith, a Maori scholar, notes that the use of the term “indigenous peoples” has become a term of identification and resistance in encapsulating shared struggles with colonization and the resulting status of indigenous peoples:

Thus the world’s indigenous populations belong to a network of peoples. They share experiences as peoples who have been subjected to the colonization of their lands and cultures, and the denial of their sovereignty, by a colonizing society that has come to dominate and determine the shape and quality of their lives, even after it has formally pulled out.<sup>200</sup>

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those who could claim Cherokee and Black heritage, limiting intersectional identities to a one-drop rule. See STURM, *supra* note 29, at 80-81; LITTLEFIELD, *supra* note 39, at 239; MILES, *supra* note 19, at 194-95; NAYLOR, *supra* note 14, at 308 fn. 64.

<sup>197</sup> Cherokee Freedmen are not alone in their status at the intersections of “Indian” and “African” identities, not only in the United States, considering the presence of Freedmen in Seminole, Choctaw, Chickasaw, and Creek Nations, but also throughout the Americas in the formation of Maroon societies that melded African and American indigenous traditions and resisted White Supremacist colonization. See BLASSINGAME, *supra* note 16, at 209 (describing Maroon societies formed by escaped and freed slaves in the Southern United States); RICHARD PRICE, MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS 15 (1996) (providing a collections of articles describing the different Maroon Societies of the Americas, ranging from Freedmen of the United States to the Miskito of Honduras and Nicaragua “who kept a large group of maroons as domestic slaves in the seventeenth century, intermarrying with them and gradually absorbing them into their general population.”).

<sup>198</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

<sup>199</sup> LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 7 (2nd Ed. 2012).

<sup>200</sup> *Id.*

Applying the notion of cultural sovereignty can help expand conceptions of Freedmen as Indigenous peoples adopted by treaty, by force, or by default as participants in racial capitalism through the ownership of Black slaves. Cherokee Freedmen, and other Freedmen groups among Native Nations in the United States, exist at the intersections of cultural identity with ties to cultural traditions of Cherokee and other peoples as their ancestors were raised in, and deeply connected to, these ways of knowing.<sup>201</sup> Importantly, Freedmen do not appear to threaten the cultural integrity of the Cherokee Nation. The Freedmen's assertion of citizenship as *Cherokee* Freedmen connects them to Cherokee ways and traditions, not as a colonizing force.<sup>202</sup> Thus it becomes a political, and even moral, imperative that the Cherokee Nation recognize the citizenship of the Freedmen not only to consistently honor terms of treaties which preserve crucial rights, but also in terms of recognizing that the Cherokee Nation still profited from and capitalized on Black slave labor in building, or even preserving, its economic interests prior to 1866 and allotment. Thus in the interests of cultural Intersectionality, and the equitable interest in preserving treaty obligations and recognizing citizenship of those formerly exploited, the Cherokee Nation should recognize Freedmen as fellow indigenous peoples and citizens.

This recognition is also reciprocal. Recognizing Freedmen citizenship can also serve to affirm the "Nation" status of the Cherokee Nation, above pejorative connotations under United States federal law. The DRIP contains three provisions central to citizenship of indigenous peoples. Article six of the DRIP asserts simply that "every indigenous individual has the right to a nationality."<sup>203</sup> Article nine states that "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."<sup>204</sup> Finally Article 33 provides that:

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<sup>201</sup> See Ray, *supra* note 4, at 461; Miles, *supra* note 19. See also TIYA MILES AND SHARON P. HOLLAND, CROSSING WATERS, CROSSING WORLDS: THE AFRICAN DIASPORA IN INDIAN COUNTRY (2006) (collecting essays describing the cultural, political, and social connections formed between Black and Native peoples in the United States, including Freedmen, children of American Indians and African Americans, or even reggae and hip-hop in Hawai'i).

<sup>202</sup> I also recognize that there is colonization when the Cherokee Freedmen are utilizing Federal Law to impose rights on the Cherokee Nation. Thus, I offer this as an alternative to the *Vann* litigation in federal courts.

<sup>203</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

<sup>204</sup> *Id.*

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Although the Cherokee Nation is not internationally recognized as a Nation-State, the Cherokee Nation self-identifies a Nation, thus “nationality,” “citizenship,” and “membership” can apply to those who are legally recognized by the Cherokee legal and political structures. The plain language of Article 6, read together with Article nine, support a broad assertion of nationality, not only in Nation-States but also in indigenous nations.<sup>205</sup> Compare the broad “nationality” and “identity” participation in Indigenous cultural and political structures of Articles six and nine with the more targeted conception of “citizenship of the States in which they live” in Article 33. Article 33 appears more as an admonition against the Nation-State in denying citizenship to Indigenous peoples, than a constraint on Indigenous ways of determining membership.

By legally redefining membership to exclude *only* Cherokee Freedmen, the Cherokee Nation has violated Article Six by removing the Freedmen’s right to a Cherokee Nationality. Their removal through the 2007 amendment was not based on Cherokee customs or traditions described by Articles 9 and 33, as the Cherokee Clan and adoption systems which predate the Dawes Rolls were not implemented.<sup>206</sup> Rather, the Cherokee Nation’s

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<sup>205</sup> Article 6 was one of the earliest measures adopted by the Sub-Commission for the Protection and Promotion of Human Rights in 1994, and one of the few adopted prior to the full drafting of the declaration in the 21st century. See Adelfo Regino Montes & Gustavo Torres Cisneros, *The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies*, in MAKING THE DECLARATION WORK: THE UNITED NATION DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 138, 141 (Claire Charters and Rodolfo Stavenhagen eds., 2009), available at <http://www.internationalfund.org/documents/MakingtheDeclarationWork.pdf>.

<sup>206</sup> For more description of the Cherokee Clan system and prior systems of adoption see Ray, *supra* note 4, at 425-28; NAYLOR, *supra* note 15, at 8; YARBROUGH, *supra* note 25, at 29; MILES, *supra* note 18, at 56-57 (describing the adoption of Black women into the Cherokee Clan system). Were the Cherokee to return to a strict Clan system with its matrilineal connections it would end up disenrolling all Cherokee who rely solely on patrilineal ties to the Cherokee Nation. This would likely disenroll a much larger percentage of the population than the Freedmen represent, but also contradict the Cherokee Nation’s assertions of membership and relationality in the *Adoptive Couple* case where the child’s ties were patrilineal, see Berger, *supra* note 189 at 8-9, disrupting a large body of advocacy on behalf of maintaining relationships



reliance on identification “by blood” in the Dawes rolls picks up a colonial tool to build Cherokee Nationhood by wielding it against Freedmen—disenrolling a political group of peoples who are culturally and politically tied to the Cherokee nation. The DRIP on the other hand provides a source of rights defined by international groups and Indigenous peoples, and removed from the colonial baggage the Dawes Rolls carry in defining citizenship “by blood.” Rodolfo Stavenhagen, former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, asserts that “the full import of the collective rights of indigenous peoples can empower indigenous peoples, build multicultural citizenship and ensure their effective participation in national society and the polity.”<sup>207</sup>

However Stavenhagen notes the institutional implementation issues, considering “it will require institutional, economic, political and judicial reform.” The United States has not implemented the drip other than declarations of policy in the nation-to-nation relationship between the United States and Indigenous nations.<sup>208</sup> This would be a unique implementation, creating a political status of citizenship that is more divorced from notions of blood quantum or blood ties, since the instrument used to define those connections, here the Dawes Rolls, is so bound to colonial mechanisms that it cannot be an accurate guide for self-determination and sovereignty. Rather, ending the colonial feedback loop requires a shift away from tools like Dawes Rolls, replacing the colonial tools of Federal Indian Law with international principles established by the DRIP.

Recognizing the Freedmen’s claim under the DRIP in the Cherokee Supreme Court has some unique advantages. First, put simply, it avoids federal laws, federal courts and Federal Indian Law. Second, recognizing the Freedmen’s right to nationality asserts Cherokee Nationhood, as a distinct nationality from the United States, transcending the Domestic Dependent status inscribed by Federal Indian Law. Third, it recognizes the shared

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with children through the Indian Child Welfare Act.

<sup>207</sup> Rodolfo Stavenhagen, *Making the Declaration Work*, in MAKING THE DECLARATION WORK: THE UNITED NATION DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 352, 367 (Claire Charters and Rodolfo Stavenhagen eds., 2009), available at

<http://www.internationalfund.org/documents/MakingtheDeclarationWork.pdf>.

<sup>208</sup> Even when the United States signed the DRIP in 2010, four years after the initial passage of the declaration, some scholars noted the patriarchal overtones in years prior in presenting the “aspirational” goals of the declaration, rather than recognizing it as an international document with concrete obligations. See Aileen Moreton-Robinson, *Virtuous Racial States: The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples*, 20 GRIFFITH L.REV. 641 (2011).

and intertwined histories of Black Cherokee Freedmen and those who identify as “Cherokee by Blood,” in building the Cherokee Nation. Fourth, recognizing the Cherokee’s history of slavery is not an acceptance of the colonial feedback loop, but recognizes one of the crucial themes of CRT, TribalCrit, and Cultural Sovereignty: stories have the power to effect change. Recognizing the shared history of colonization, White Supremacy and oppression, and looking for remedy through the DRIP can begin the process of healing; validating historical experiences with oppressions, without discounting one’s historical condition as apriori or most oppressed, sharing strengths and sadness in building a “collective future.”<sup>209</sup> Fifth, though precedent has been deadly to American Indians and Blacks in the United States federal courts,<sup>210</sup> setting the precedent of an Indigenous Nation fully recognizing and implementing the DRIP as a remedy for legacies of oppression can enable future avenues of collective success without imposing sovereignty. Recognizing the Freedmen under DRIP transforms the Declaration from a global, verbal commitment to a legal, material force that can be applied for the benefit of indigenous peoples from all continents. Thus, there is reciprocal recognition: in recognizing Freedmen as Cherokee citizens under the DRIP, the Cherokee Nation pushes for recognition as a Nation which adopts, participates in, and abides by international laws.

## VI. CONCLUSION

*For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master’s house as their only source of support.*<sup>211</sup>

The Cherokee Nation has the undeniable, sovereign power to determine membership and set parameters for citizenship within its nation. However in relying upon the Dawes Rolls to exclude only those whose ancestors are listed as “Freedmen,” the Cherokee Nation has become caught in the colonial feedback loop: reifying

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<sup>209</sup> Coffey and Tsosie, *supra* note 155, at 208.

<sup>210</sup> See generally Williams, *supra* note 117, at 23 (discussing trends in Supreme Court Jurisprudence that have harmed racialized minorities).

<sup>211</sup> AUDRE LORDE, *SISTER OUTSIDER* 112 (2007) (emphasis in original). Although Lorde is speaking to feminists who would distance otherized women (Black women, Lesbians, Black Lesbians, or any non-White non-heteronormative woman) from a liberation movement in the late 20th century, the principles are the same: instruments of oppression were designed for oppression, they should not be rescued to be used in an agenda of change and liberation. Rather, acknowledgement of difference is a source of strength that is necessary for social change.

histories of anti-Blackness and White Supremacy by using colonial mechanisms of power under the guise of self-determination. The histories of Freedmen and the Cherokee Nation are intertwined. With *Vann v. Jewell* pending before the D.C. circuit court, it appears their futures are intertwined as well. Although the Cherokee Nation has the sovereign power to exclude, exercising that power to exclude Freedmen could potentially lead to Federal backlash that would limit the powers of Indigenous Nations in the United States. Instead of seeking federal remedy, there should be a reciprocal recognition using international standards in local courts: when the Cherokee Nation recognizes the DRIP as a part of its principle laws, it places the Cherokee Nation as an international actor and elevates its status as Nation. Under the DRIP, Freedmen have a right to Cherokee citizenship based on their status as indigenous peoples, whether by blood which was ignored in the drafting of the Dawes Rolls or as a political, historical identity as descendants of Africans who were once enslaved and exploited by the Cherokee Nation. In either case, the recognition of Freedmen and the recognition of the Cherokee Nation become intertwined, laying the foundation for a future of collaboration.