Judicial Abrogation: Montana and Its Progeny’s Effect on Freedmen’s Treaty Rights

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JUDICIAL ABROGATION: MONTANA AND ITS PROGENY’S EFFECT ON FREEDMEN’S TREATY RIGHTS

Steven Foster *

I. INTRODUCTION

Bullets whizzing by in the background, federal agents giving chase, and the classic Will Smith slow motion running scene. He dodges danger and runs through congested street corners. He meets an imposter on his tribulation. His character nearly dies. To top it off, the federal agents kill a former girlfriend and frame him for the murder. The real killers from the National Security Agency sit back and watch as Will’s character runs from the local police as well as the National Security Agency’s tacticians.

While detailing Will Smith’s movies would be compelling, the plot in Enemy of the State provides a glimpse into how antagonists can conjure up animosity between third parties that benefit the real killer. Native American colonization and the Freedmen controversy are closer to this fictional story than the reality constructed and propagandized by the federal government.

The Treaty with the Cherokee of 1866 (“1866 Treaty”) rights litigation began over ten years ago, and the issue is not fundamentally

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1 ENEMY OF THE STATE (Touchstone Pictures Nov. 20, 1998).

2 Id.

3 Id.

4 Id.

5 Id.

6 Id.

7 Id.

8 Id.; see Claudio Saunt, Jim Crow and the Indians, SALON (Feb. 21, 2006, 7:29 AM), http://www.salon.com/2006/02/21/cherokee/.
resolved. Courts have not yet determined the nature of Freedmen’s rights, and the federal government continues to either actively create or permit controversy between the parties. The government has not taken responsibility, adhered to inherent sovereignty, or utilized plenary power to solve a problem over fifty years old. Federal policy continues to make Native Americans and Freedmen, with support from the Black Caucus, enemies when the government caused the problems. The Freedmen controversy is enemy creation at its best.

Enemy creation continues in public opinion without any analysis of the true rights of the Cherokee Nation or the Freedmen. Society and law professors demonize Cherokee as racists. However, no one analyzed the 1866 Treaty text or subsequent history to determine whether the Cherokee displaced Freedmen rights or rights diminished through other means. This Article will attack the task of determining the current status of Freedmen’s treaty rights.

The discussion begins with the controversy’s background. In Part I the facts surrounding the 1866 Treaty and the subsequent perceived restriction by the Cherokee Nation are addressed. Since the 1866 Treaty granted citizenship rights, Part III looks to the historical definition of “native citizenship” during the treaty period. Part IV

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10 See Saunt, supra note 8.
11 Id.
13 See Saunt, supra note 8 (assuming that Cherokee action is a vestige of slavery); see also Lydia Edwards, Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?, 8 BERKELEY J. AFR.-AM. L. & POL’Y 122, 153-54 (2006) (utilizing the Thirteenth Amendment abolishing slavery to enforce treaty rights). The article’s foundation is the assumption that the 1866 treaties provided rights currently existing and current native actions are a continuation of slavery. Id. at 122-23.
14 See Edwards, supra note 13, at 154; see also Saunt, supra note 8.
16 See infra Part III.
addresses the type of citizenship rights Freedmen received,\textsuperscript{17} and Part V discusses how the Supreme Court’s decisions in \textit{Montana v. United States}\textsuperscript{18} and subsequent cases changed the nature of citizenship status for tribes.

\section*{II. \textbf{HISTORY OF THE FREEDMEN CONTROVERSY}}

The Freedmen controversy began long before the Civil War and emancipation.\textsuperscript{19} The federal government attempted to colonize the minds of Native Americans long before removal, so during the slave trade Southern tribes began mimicking the European slavery model.\textsuperscript{20} Individual Cherokee built plantations and held slaves similar to Caucasian counterparts.\textsuperscript{21}

Indian removal and the Trail of Tears invokes massive emotion and remembrance for the atrocities and death that the government inflicted on the Cherokee Nation, but many do not depict slave suffering in that diorama.\textsuperscript{22} Research is sparse on how many slaves died during the Trail of Tears, but most know massive numbers of Cherokee died.\textsuperscript{23} While the slave death numbers are unclear, equating similar percentages of death, disease, and destruction to the slaves is more than imaginable, it is likely.\textsuperscript{24}

After removal, Cherokee established the Cherokee Nation in the new Indian Territory.\textsuperscript{25} Individual Cherokee still held slaves, and the slaves embarked on both manual labor and nation-building activities.\textsuperscript{26} The slave perspective has not been articulated thoroughly, but many

\textsuperscript{17} See infra Part IV.
\textsuperscript{18} See infra Part V (discussing Montana v. United States, 450 U.S. 544 (1981)).
\textsuperscript{19} See generally CELIA E. NAYLOR, AFRICAN CHEROkees IN INDIAN TERRITORY: FROM CHATTel TO CITIZENS 1-23 (2008) (discussing the history of slavery and Freedmen in the Cherokee Nation).
\textsuperscript{20} Id. at 9-15.
\textsuperscript{21} Id. at 16-17.
\textsuperscript{22} Id. at 1.
\textsuperscript{23} Id.
\textsuperscript{24} See id. at 1-2.
\textsuperscript{25} Id. at 16-18.
\textsuperscript{26} Id. at 18-19.
scholars believe the enslaved were treated better within Indian Territory due to the collective nation-building process.\textsuperscript{27}

The Civil War erupted and changed the Cherokee Nation forever.\textsuperscript{28} Chief John Ross diligently opposed choosing sides and attempted to keep the tribe neutral.\textsuperscript{29} The Cherokee Nation abolished slavery in 1863 before the end of the war, but the Confederacy would not allow them to remain neutral.\textsuperscript{30} The Confederacy infiltrated the Cherokee to establish factions within the tribe.\textsuperscript{31} Stand Waite, a native Cherokee who joined the Confederacy, led a pro-Confederacy party within the Cherokee Nation and eventually coerced the tribe into signing a treaty with the South.\textsuperscript{32} The Union abdicated from Indian Territory, so while Chief Ross vehemently advocated for neutrality, Stand Waite’s party aligned with the South.\textsuperscript{33}

Union negligence led to traitor rhetoric during treaty negotiations following the war.\textsuperscript{34} The government sent commissioners to Indian Territory to negotiate new treaties with the tribes who signed treaties with the Confederacy, including the Cherokee.\textsuperscript{35} The commissioners and federal officials said that the tribes relinquished all previous treaty rights because they aligned with the South.\textsuperscript{36} The government would not allow the tribes to continue without new treaties, and the new treaties required significant concessions due to perceived

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 19-20.
\item \textsuperscript{28} \textit{See id.} at 21.
\item \textsuperscript{29} John Ross, \textit{Letter to Albert Pike, July 1, 1861, in 2 The Papers of Chief John Ross} 476 (Gary E. Moulton ed., 1985); \textit{see J.B. Davis, Slavery in the Cherokee Nation, in 11 Chronicles of Oklahoma} 1056-72 (1993), \textit{available at} http://digital.library.okstate.edu/Chronicles/v011/v011p1056.html.
\item \textsuperscript{30} Davis, \textit{supra} note 29.
\item \textsuperscript{31} ROBERT J. CONLEY, THE CHEROKEE NATION: A HISTORY 174 (2005).
\item \textsuperscript{32} \textit{Id.} at 175-76.
\item \textsuperscript{33} \textit{Id.} at 174-76.
\item \textsuperscript{34} \textit{Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, Nat’l Archives} (Sept. 13, 1865), \textit{available at} http://digital.library.wisc.edu/1711.dl/History.Unrat1865no41.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.}
\end{itemize}
treaty.\textsuperscript{37} Negotiations commenced in 1865 at Fort Smith without a formal treaty, but continued negotiations in 1866 produced the 1866 Treaty with the Cherokee.\textsuperscript{38} The new treaty required abolition of slavery, even though the Cherokee abolished slavery in 1863, and a renewed commitment to the United States, even though many Cherokee stayed loyal to the Union during the war.\textsuperscript{39} Finally, the 1866 Treaty provided citizenship rights to freed slaves within the Cherokee territory, which is where the controversy lies.\textsuperscript{40}

After years of turmoil and destruction of sovereignty at the hands of the federal government, the Cherokee Nation started operating as a full nation again and passed a law requiring citizens to trace racial lineage to a person on the “Cherokee by blood” Dawes Rolls, which prevented approximately 130,000 Freedmen from becoming Cherokee citizens.\textsuperscript{41} Lucy Allen, a Freedmen descendant, challenged the law in Cherokee Court.\textsuperscript{42} The Cherokee Nation’s highest appeals court ruled for the Freedmen and granted them citizenship status.\textsuperscript{43} However, the government responded with a constitutional referendum in 2007 to amend the Cherokee Constitution requiring tracing lineage back to the by-blood Rolls.\textsuperscript{44} Since the rule passed and became a constitutional amendment, the Cherokee Court must subsequently follow the voters’ decision.\textsuperscript{45}

\textsuperscript{37} Id.
\textsuperscript{38} Id.; CONLEY, supra note 31, at 180-81.
\textsuperscript{39} CONLEY, supra note 31, at 180.
\textsuperscript{40} Cherokee Treaty of July 19, 1866, 14 Stat. 799, 801 [hereinafter Cherokee Treaty] (“All freedmen . . . as well as all free colored persons . . . shall have all the rights of native Cherokees . . . .”).
\textsuperscript{41} Sean Murphy, Cherokee Freedman Controversy: Court Lets Slaves’ Descendants Sue Cherokee Chief, HUFFINGTON POST (Feb. 13, 2013, 5:12 AM), http://www.huffingtonpost.com/2012/12/14/cherokee-freedmen-court-slaves-descendants-sue-chief_n_2302124.html; Saunt, supra note 8.
\textsuperscript{42} Saunt, supra note 8.
\textsuperscript{45} Id.
Marilyn Vann, another displaced descendant of former Cherokee slaves, continually challenged the exclusion in federal courts. The 2011 Cherokee elections witnessed another round of controversy. Freedmen were not allowed to vote in the elections, and the Bureau of Indian Affairs ("BIA") threatened to withhold payment to the tribe unless the Freedmen were reinstated. The Freedmen were reinstated and voted against Principal Chief Chad Smith, who held the chief’s position during the constitutional amendment election.

The reinstatement did not end the controversy though. Freedmen are still seeking remuneration and rights they believe the 1866 Treaty provides. The 2011 compromise only counted Freedmen votes, but the compromise did not grant the Freedmen all the services and benefits associated with the tribe, nor did the compromise guarantee voting in the 2015 Principle Chief election. The controversy does not end with the current litigation. The BIA’s monetary threat forced the Cherokee to acknowledge a status that may be inconsistent with current Supreme Court precedent. The federal government is playing games with tribes once again. Tribes must acknowledge Freedmen citizenship rights for the BIA, but the Supreme Court may not permit governing the new citizens. Federal Indian policy is a
Torquemadian\textsuperscript{57} rack, pulling tribes in numerous directions until eventual destruction.\textsuperscript{58}

III. FEDERAL AND TRIBAL DEFINITIONS OF THE INDIAN CITIZEN

The 1866 Treaty grants rights similar to native Cherokee citizens, so the analysis begins with the identity of the native citizen prior to and during the 1866 Treaty negotiations.\textsuperscript{59} The native citizen is not a static concept throughout tribal history or Federal Indian law.\textsuperscript{60} Tribes governed vast constituencies during the early years of the new Union.\textsuperscript{61} However, as the conqueror grew stronger, tribal governments lost considerable power to regulate both certain actions and particular individuals.\textsuperscript{62} This Article examines the understanding of tribal citizenship leading up to the Treaty of 1866 to provide the foundation for determining the nature of the rights granted to Freedmen.

Freedmen argue that since the 1866 Treaty granted them the same rights as Cherokee citizens,\textsuperscript{63} Freedmen are forever guaranteed a right of membership in the tribe.\textsuperscript{64} Currently, the definition of citizenship in Indian Country\textsuperscript{65} generally identifies any individual under

\textsuperscript{57} Torquemada was the infamous torturer during the Spanish Inquisition. Ed Grabianowski, \textit{10 Medieval Torture Devices}, HOW STUFF WORKS, http://history.howstuffworks.com/history-vs-myth/10-medieval-torture-devices3.htm (last visited Jan. 28, 2015). He used a device that pulled victims’ arms and legs in opposite directions until dislocation or dismemberment. \textit{Id.}

\textsuperscript{58} \textit{See United States v. Lara, 541 U.S. 193, 202 (2004).}

\textsuperscript{59} Cherokee Treaty, \textit{supra} note 40, 14 Stat. at 799.

\textsuperscript{60} \textit{Infra} Part III.A-B.


\textsuperscript{62} \textit{See infra} Part V.

\textsuperscript{63} Cherokee Treaty, \textit{supra} note 40, 14 Stat. at 800-01.


Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian county”, as used in this chapter,
consistent tribal jurisdiction as an Indian because tribes maintain limited jurisdiction over non-Indians. Thus, a current grant of broad jurisdiction over Freedmen would most likely confer Indian status because current jurisdiction follows racial status; however, Indian Country did not always follow the same citizen conceptualization. Since the Freedmen requested the federal court to grant them membership in the Cherokee Nation, the court must either determine Freedmen are Indian or the category of citizenship rights granted in the 1866 Treaty still exist today in Indian Country.

Numerous authors and critics assume the 1866 Treaty granted Freedmen rights still in existence today without analyzing the nature means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. 66 Id. §§ 1151-53. While tribal jurisdiction is contingent upon the type of tribal action, criminal, civil regulatory, civil adjudicatory, or taxation, the ability of the tribe to exert power over non-Indians is consistent throughout each category. See United States. v. Lara, 541 U.S. 193, 210 (2004) (explaining that tribes retain jurisdiction to punish Indians who commit crimes against other Indians, but the tribes may not exercise jurisdiction over non-Indians under certain facts); see also Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989) (reiterating the Montana rule preventing tribes from regulating non-Indian activity on non-Indian fee land within the reservation without consent or significantly harming tribal interests); Bryan v. Itasca Cnty., 426 U.S. 373, 384 (1976) (creating a dichotomy between civil regulatory and civil adjudicatory jurisdiction).


68 See Krehbiel-Burton, supra note 44.
and extent of the rights conferred. The discussion of Freedmen rights begins with the federal definition of Indian citizenry during the nineteenth century. Many documents and histories detail the tensions between native Cherokees and former Cherokee slaves, but Cherokee-Freedmen relations do not explain the reach of the conferred rights. After the Civil War, the United States punished Indian tribes that signed treaties with the Confederacy. The federal government abrogated all previous treaties and required tribes to sign new agreements of loyalty to the United States. President Johnson sent commissioners to Fort Smith, Arkansas, in 1865 to reach new agreements with the Plains tribes. The Five Tribes of Oklahoma were unprepared for the new treaty negotiations and did not have authority from the members to sign new agreements. As will be discussed in more detail in Part IV, the tribes vehemently argued over many of the major treaty provisions, including Freedmen's rights. The Civil War and reconstruction treaties


71 See generally Carla D. Pratt, Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity, 35 Seton Hall L. Rev. 1241 (2005) (discussing the Seminole-Freedmen relations and the construction of the different racial identities).

72 Id. at 1248.

73 Id.

74 Conley, supra note 31, at 179-82.

75 While I do not intend to engage in a discussion of my intentional exclusion of references to the Five "Civilized" Tribes, as a point of clarity, my references to the "Five Tribes" include the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations of Oklahoma. See, e.g., John L. Williams, The Effect of the EPA's Designation of Tribes as States on the Five Civilized Tribes in Oklahoma, 29 Tulsa L.J. 345, 353 (1993).

76 Francis P. Prucha, American Indian Treaties: The History of a Political Anomaly 266 (1994).
provided a unique recipe of interpretation problems.\textsuperscript{77} The federal
government unilaterally abrogated previous agreements and forced the
nations to accept new terms.\textsuperscript{78} The new federal terms require analyzing
the treaty from the federal government's perspective. However, the
1865 treaties were never ratified.\textsuperscript{79} Those treaties laid the groundwork
for the ratified 1866 treaties, and the 1866 treaties included
compromises and different language advocated for by the Indians.\textsuperscript{80}
Since a small level of negotiation occurred, Indian understanding of the
treaty can determine the final categorization of rights.\textsuperscript{81} Since both
federal government terms and Native American negotiations ended up
in the final treaty, both the federal and native perspective on Indian
citizenship is important.

Throughout history, Indian nations adopted non-Indians and
granted pseudo-naturalized status.\textsuperscript{82} The native nations viewed
themselves as sovereign governments with similar powers as the United
States.\textsuperscript{83} Cherokees allowed non-Cherokees into the tribe through
adoption and naturalization.\textsuperscript{84} The tribes did not view those members as
racially Indian, but they could still be members of the tribe.\textsuperscript{85} The
critical question then becomes, did the federal government have the
same view of tribes during the treaty period? Unfortunately, the federal
government altered the treatment of naturalized Indians depending on
the then-existing overarching policy.\textsuperscript{86} As the government progressed

\textsuperscript{77} See id. at 266 (explaining that the original delegates to the treaty negotiations were
the loyal factions of the tribes, but the government began the negotiations discussing
tribal disloyalty even though only factions of tribes were disloyal).
\textsuperscript{78} See id. at 266-67.
\textsuperscript{79} See id. at 266.
\textsuperscript{80} Id. at 267.
\textsuperscript{81} See id.
\textsuperscript{82} Snowden et al., supra note 67, at 199.
\textsuperscript{83} See, e.g., id. at 196.
\textsuperscript{84} MORRIS L. WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION 3-20, 100-
03 (Univ. of Okla. Press 1938) (referring to adopted whites throughout the book
without discussing the nature of citizenship in depth).
\textsuperscript{85} Id.
\textsuperscript{86} See Carole Goldberg, Members Only? Designing Citizenship Requirements for
Indian Nations, 50 U. KAN. L. REV. 437, 446-48 (2002) (discussing the progression of
native citizenship requirements); see also Paul Spruhan, A Legal History of Blood
towards termination, the government classified fewer individuals as Indians.\textsuperscript{87} This Article will attempt to semi-cohesively illustrate the consistent Native American view and federal progression of defining Indians' citizenship\textsuperscript{88} to set up a framework for determining the type of rights provided to Freedmen in the 1866 Treaty.

\textbf{A. The Indian Citizen Before United States v. Rogers\textsuperscript{89}}

Indian nations' demographic up to 1846 included some diversity.\textsuperscript{90} Assuming all the tribes adopted non-natives would be irresponsible, but after contact, many nations adopted Caucasians and allowed them to marry within the tribe.\textsuperscript{91} Treaty negotiations and a few state laws regulated Indians and tribal land, so the status of naturalized Indians started to appear in the late 1700s and early 1800s.\textsuperscript{92}

\textsuperscript{87}See Goldberg, supra note 86, at 458; see also Spruhan, supra note 86, at 18.

\textsuperscript{88}Unfortunately, the federal definition of “Indian” and the “Indian citizen” was not consistent in any era. Brownell, supra note 70, at 278. Different departments and branches within the federal government utilized different definitions during the same period. Id. I try to discover the most common theme of an era to generalize the federal treatment. See Spruhan, supra note 86, at 9 (“Inconsistency is the main theme in federal applications of blood quantum. The branches of the federal government took different positions and applied different approaches to the definition of Indian and tribal membership.”).

\textsuperscript{89}United States v. Rogers, 45 U.S. (4 How.) 567 (1846). Rogers is the most definitive decision on Indian citizenship. See Bethany R. Berger, “Power Over This Unfortunate Race”: Race, Politics and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957, 1959-61 (2004). The Court moves beyond recognizing different categories of individuals within a reservation; it creates different rights and obligations for naturalized Indians in Cherokee Territory. See Rogers, 45 U.S. (4 How.) at 572-73. The Rogers decision occurs during a voluminous period of federal government treaty negotiations with native tribes leading up to the 1866 Treaty. Spruhan, supra note 86, at 9-18.

\textsuperscript{90}Goldberg, supra note 86, at 459.

\textsuperscript{91}Id. (stating that some, but not all, tribes defined citizenship status based on social connections to the tribe); see also Spruhan, supra note 86, at 4-5 (tracing blood law from pre-colonization as early as 1785, in which states passed laws regulating non-full-blooded Indians).

\textsuperscript{92}Spruhan, supra note 86, at 10-11.
The first significant introduction to the non-full-blooded Indian occurred during removal of the Five Tribes.\(^{93}\) During the removal process, President Jackson noticed considerable resistance from non-full-blooded Indians.\(^{94}\) Federal officials, including the President, began describing different people within Indian Country in terms of blood.\(^{95}\) The descriptions did not always include a particular blood quantum (i.e., one-fourth Indian); instead, officials quarreled with "mixed-bloods" or "half-breeds."\(^{96}\) While the non-full-blooded Indians were not excluded from federal government-native relations, the recognition of segments within the Indian population provided the foundation for subsequent establishment of differing rights.\(^{97}\)

The late 1700s to early 1800s do not illustrate many concrete federal illustrations of the Indian citizen, but a state construction of Indian provides a glimpse at the possible federal direction.\(^{98}\) In *Inhabitants of Andover v. Inhabitants of Canton*, Massachusetts tackled the mixed-blood Indian status issue.\(^{99}\) The controversy involved the status of a homeless child.\(^{100}\) The child's mother was half-Caucasian and half-Indian, and the case required the court to decide whether the mother was Indian.\(^{101}\) The court concluded that she was a tribal member because "it [was] immaterial, whether she was a mulatto or not, provided she associated with the tribe, making one of their number."\(^{102}\)

Massachusetts demonstrates the early treatment of Indian tribes as sovereign entities with naturalization power.\(^{103}\) The federal government treated the tribes similarly in early treaty negotiations.\(^{104}\)

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\(^{93}\) *Id.* at 9-10.

\(^{94}\) *Id.*

\(^{95}\) *Id.*

\(^{96}\) *Id.* at 10-11.

\(^{97}\) *See id.*

\(^{98}\) *See id.* at 9-11.

\(^{99}\) *See Inhabitants of Andover v. Inhabitants of Canton*, 13 Mass. 547, 549-51 (1816).

\(^{100}\) *Id.* at 548.

\(^{101}\) *Id.* at 551.

\(^{102}\) *Id.* at 553.

\(^{103}\) *See Spruhan, supra* note 86, at 7.

\(^{104}\) *Id.* at 9-11.
Federal categorization of Indian citizens began with treaties because the
government initially conducted political relations with the tribe on a
government-to-government basis. Subsequent court cases and
interpretations derive from early treaty negotiations, so the foundations
of the Indian citizen categorization commenced with early treaty
rights.

Treaties reference mixed-bloods or less-than-full-blooded
Indians as early as 1817 in treaties with the Sac and Fox, Sioux, Omaha,
Iowa, and Ottoe. Some treaties provided different reservations for
mixed-blooded Indians and others granted particular monetary rights to
half-breeds. However, the treatment of mixed-blooded Indians was
inconsistent. After granting mixed-blood reservation to the Sioux,
the federal government rejected further land negotiations because
senators believed mixed-bloods were U.S. citizens, not sovereign
tribes. The digression of mixed-blood status foreshadows the non-
full-blood and non-Indian federal identity within the Indian
community.

The landmark decision in *Worcester v. Georgia* transitioned

105 *Id.* at 9.
106 *Id.* at 7-9.
107 *Id.* at 10.
108 *Id.* (stating that treaties with Sac and Fox, Sioux, Omaha, Iowa, and Ottoe created
different reservations for “half-breeds,” and the Chippewa, Ottawa, and Menominee
treaties included monetary compensation to non-full-blood members).
109 See *id.* at 14-15 (stating that the Sac and Fox “half-breed” tract was later dissolved,
and half-breed attempts at negotiating treaties generally failed with reports stating that
many senators did not believe half-breeds were sovereign tribes).
110 *Id.*
111 See *id.* at 11.
112 See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 521 (1832) (holding that
Cherokees were separate sovereigns where Georgia’s laws could not be applied); *see also*
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (defining tribes as
“domestic dependent nations” with a guardian-ward relationship with the United
States); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 603-05 (1823) (deciding that
the federal government owns native land through conquest and that aboriginal title
only includes the right to occupy the land). These three landmark cases are known as
the Marshall Trilogy, which established principles in federal Indian law that define
United States-Native relations. *See, e.g.*, Matthew L.M. Fletcher, *The Iron Cold of the
the federal discussion of Indian identity from mixed-blood centered to naturalization. Vermont citizen Sam Worcester lived within the Cherokee Nation’s boundaries, which was within Georgia. Georgia passed laws prohibiting non-Indians from living within Indian nations without a permit from the state, and Worcester did not obtain a permit. He was subsequently arrested, convicted of violating the statute, and sentenced to four years of hard labor.

While the Supreme Court confronted Georgia’s application of state law within Cherokee territory, Justice Marshall illustrated the view of Indian citizens. During the initial introduction, Justice Marshall defined Worcester as a Vermont citizen, not a citizen of the Cherokee Nation. Justice Marshall quoted Worcester’s state court argument characterizing his presence in the Cherokee Nation as an individual sent to civilize the aborigines. Worcester and the Court never defined him as a Cherokee, but the Court did analyze federal-Cherokee history to establish Cherokee jurisdiction over Worcester’s actions. Worcester was identified as a non-Indian living within Cherokee territory.

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113 See Worcester, 31 U.S. (6 Pet.) at 529 (the issue involves non-Indian participation in the Cherokee Nation, not mix-blood participation).
114 Id. at 536.
115 Id. at 537-38.
116 Id. at 536.
117 Id. at 537.
118 Id. at 556.
119 Id. at 536.
120 Id. at 529 (“And the said Samuel A. Worcester . . . was, and still is, a resident in the Cherokee nation . . . [a]nd this defendant saith, that he is a citizen of the state of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation in the capacity of a duly authorised [sic] missionary . . . [and] that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language . . . with the humane policy of the government of the United States, for the civilization and improvement of the Indians . . . .”).
121 Id. at 555-56 (discussing the Treaty of Holston, which states “that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee nation . . . . (emphasis added) The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands . . . .”).
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Cherokee territory, and the Court concluded that Cherokee law governed him.122

The *Worcester* decision provides the judicial groundwork for categorizing Indian citizens.123 The Court could have refrained from describing Worcester outside of his relationship with the Cherokee, but throughout the opinion, Justice Marshall clearly defined him as a non-Indian living within Indian Territory.124 While Cherokee laws applied to him, the justification for the application was the Cherokee Nation’s sovereignty within its territory, not because the Court believed he was an Indian.125 The first step to providing different benefits, rights, obligations, and rules is prescribing different identities upon people within the same nation. While not the first instance of recognizing differences between individuals residing within Indian boundaries, *Worcester* solidifies the federal view that non-Indians may live within Indian boundaries, but an individual does not lose his or her original status as non-native by merely residing with Indians.126

**B. The Indian Citizen From Rogers to the Treaty of 1866**127

Immediately following the recognition of different identities within Cherokee boundaries, the federal government commenced prescribing different rights to the different categories of individuals within both traditional and federally created native boundaries.128

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122 *Id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .").


125 *Id.* at 561.

126 *Id.* at 561-62.

127 See generally Cherokee Treaty, *supra* note 40 (containing a discussion of the federal dichotomy of the Indian citizen that illuminates the considerations and underlying beliefs of the government during treaty negotiations, and it also illustrates subsequent changes that occurred to the categorization of Indian citizens after the rights conferred in the 1866 Treaty).

128 See United States v. Rogers, 45 U.S. (4 How.) 567, 567-68, 573 (1846) (holding
Naturalized or adopted Indians were explicitly recognized by the courts, and these individuals could consent to tribal governance. However, naturalized Indians did not retain the same rights and privileges under Indian sovereignty as racially identified Indians.

United States v. Rogers begins the prescription of different rights to different groups of individuals within Indian “owned” land. William Rogers was racially a Caucasian individual with European ancestors but he lived within the Cherokee Nation in Oklahoma. He insisted he voluntarily relinquished his United States citizenship and became a Cherokee Indian by naturalization. The Cherokee adopted him into the tribe after he married a Cherokee woman and committed himself to participating in Cherokee culture. Rogers is the epitome of a naturalized Indian. His actions within Cherokee Territory are indistinguishable from native Cherokees. He married a Cherokee woman and produced several Cherokee children.

that a white man is allowed to live within Cherokee Territory in Oklahoma and be governed by Cherokee law, but also holding that the defendant will always be required to follow the federal law applicable to whites).

See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 603-05 (1823). I am using the term “owned” loosely. The doctrine of discovery used in Johnson v. M'Intosh clearly indicates that Indians did not own the land. However, Cherokees did not merely occupy the land in 1846 because the tribe governed the majority of the activity occurring within the granted territory. Rogers, 45 U.S. (4 How.) at 572. Also, if the treaties with the Cherokee were remotely valid and truthful at that time, then the tribe retained the right to govern the activities within the prescribed boundaries. Id. at 603-04. Subsequent congressional abrogation and illogical reasoning in the Supreme Court does deny those original proclamations, but during 1846 the Cherokee acted more similar to owners with governing rights than mere occupiers governed by the United States. Id. at 603-05.

Rogers, 45 U.S. (4 How.) at 571-72.

Id. at 571.

Id.

Id. at 568.


Id.; see also Rogers, 45 U.S. (4 How.) at 568.

Lomayesva, supra note 136; Phil Norfleet, Cherokee Social Customs, CHEROKEE
Rogers and his family lived in Indian Territory even after his wife died in 1843. The only lens that could possibly identify Rogers as Caucasian is a race lens looking at his ancestors and skin color.

In 1846, William Rogers created an opportunity for the Supreme Court to progress Indian law beyond racial categorization, but the Supreme Court failed. For unknown reasons, Rogers killed another naturalized Indian, Jacob Nicholson. The federal court sought jurisdiction, so Rogers received a federal court trial under the 1834 Act regulating commerce with tribes, which provided jurisdiction to federal courts for crimes within Indian Territory. However, the 1834 Act included an exception to jurisdiction if the crime was committed by an Indian against an Indian. Rogers argued both he and Nicholson were Indians by adoption, so the federal court did not have jurisdiction.

The Supreme Court confronted whether Rogers was Indian and whether his naturalized status secured similar rights to racial Cherokee. The Supreme Court answered both questions in the negative. Justice Taney vehemently stated that Rogers was a “white man” living within Cherokee Territory, and while he could consent to Cherokee laws, he was not an Indian. The decision’s reference to Rogers’ consent to Cherokee law recognizes the tribe’s ability to naturalize non-Indians and govern the non-Indian actions. While implicitly recognizing Rogers’ naturalized status, the Court swiftly


139 Lomayesva, supra note 136.
140 See id.
141 See Rogers, 45 U.S. (4 How.) at 572-73.
142 Id. at 571.
143 Id. at 572.
144 Id.
145 Id. at 571.
146 Id. See id. at 572.
147 Id. at 572-73.
148 Id. at 571-73.
149 Id. at 573 (“Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption . . . .”) (emphasis added).
ascribes different rights to different Indian citizens.\textsuperscript{150} Racial Cherokee meet the Indian requirement to satisfy the Indian crime exception and thus are exempt from federal criminal proscriptions against other racial Indians.\textsuperscript{151} However, naturalized Cherokee, who the Court clearly described as “white,” must obey two sovereigns, the Cherokee and the United States.\textsuperscript{152} Justice Taney reaffirms and solidifies the identification of naturalized Cherokee, and essentially naturalized Indians anywhere, as a distinct category of individuals living within Cherokee jurisdiction that have different obligations than native Cherokee.\textsuperscript{153}

Justice Taney also illustrated the method for construing treaties and future jurisdictional issues.\textsuperscript{154} The opinion did not limit the Cherokee government’s power to only racial Cherokee, and Justice Taney explicitly stated that the Cherokee may provide citizenship to non-Cherokee.\textsuperscript{155} The decision purports to only construe the term “Indian” from the 1834 statute.\textsuperscript{156} In doing so, the decision created a dichotomy between Indians and Indian citizens.\textsuperscript{157} Thus, treaties and rules referring to Indians only refer to racial Indians but references to the tribe include the entire citizenry.\textsuperscript{158}

After the Supreme Court established the Rogers precedent, district courts followed both the literal and broad interpretation of the Court’s decision, but using either method, the courts routinely identified different categories of native citizenship.\textsuperscript{159} The Arkansas district courts confronted similar facts to Rogers in United States v. Rogers, 45 U.S. (4 How.) at 572-73; see Snowden et al. supra note 67, at 206.

\textsuperscript{150} See id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 572-73.
\textsuperscript{153} Id. at 573.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 572-73; see Snowden et al., supra note 67, at 205-06.
\textsuperscript{156} Rogers, 45 U.S. (4 How.) at 572-73; see Snowden et al. supra note 67, at 206.
\textsuperscript{157} Rogers, 45 U.S. (4 How.) at 572-73; Snowden et al. supra note 67, at 206.
\textsuperscript{158} Snowden et al., supra note 67, at 206 (citing United States v. Ragsdale, 27 F. Cas. 684, 686 (C.C.D. Ark. 1847) (holding that the Treaty of Washington referenced citizens of the Cherokee Nation, so Ragsdale, a naturalized Cherokee, fell within the pardon provision of the treaty)).
\textsuperscript{159} Snowden et al., supra note 67, at 205-06.
While reaching a different conclusion, the decision utilized the Rogers dichotomy to justify the result. In *Ragsdale*, the defendant murdered a naturalized Indian within Cherokee Territory. However, the Treaty of Washington pardoned all crimes by Cherokee against a “citizen or citizens of the Cherokee Nation,” so the court was required to decide whether the treaty provision included naturalized citizens. The court recited the Rogers rule to demonstrate the ability of individuals to become naturalized citizens of the tribe and construed citizens in the current treaty to include both racial Indians and naturalized Indians. While *Ragsdale* seems to acknowledge the Cherokee status as a nation, the Court’s justification is entrenched in the Rogers dichotomy by distinguishing between “Indian” in one treaty and “Indian citizen” in another. While only a few decisions occurred prior to the 1866 Treaty, the categorization of Indian citizens is clear. Two identities, racial Indian and naturalized Indian, exist within Indian Territory, and naturalized Indians do not adhere to the same principles as racial Indians unless the statute or treaty specifically refers to all “Indian citizens.”

Jurisprudence leading up to the 1866 Treaty created a racial dichotomy within Indian Territory. Naturalized Indians were permitted to intermingle with Native Americans only to the extent that the federal government would allow. Caucasians could consent to

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160 *Ragsdale*, 27 F. Cas. at 685; *see also* Snowden et al., *supra* note 67, at 205.
161 *Compare* *Ragsdale*, 27 F. Cas. at 685-86 (explaining that the district court found a Caucasian was a naturalized citizen subject to Cherokee laws), *with* Rogers, 45 U.S. (4 How.) at 572-73 (acknowledging the ability of a non-racial individual to adhere to Cherokee laws, but the individual was not racially Cherokee).
162 *Ragsdale*, 27 F. Cas. at 685.
163 *Id.* at 686.
164 *Id.* at 685-86.
165 *Id.*
166 *See* Snowden et al., *supra* note 67, at 206; *see also* Lomayesva, *supra* note 136, at 71-72.
167 *Ragsdale*, 27 F. Cas. at 686.
168 United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846); *see Ragsdale*, 27 F. Cas. at 686.
169 Rogers, 45 U.S. (4 How.) at 573.
tribal governance, but they were never Indian.\textsuperscript{170} Thus, the federal view of the Cherokee during the 1866 Treaty negotiations included both a racial and a tribal view.\textsuperscript{171}

\section*{C. Indian Law as a Racial Law Dispute}

Prior to determining Freedmen’s category under the 1866 Treaty, the political Indian dispute must be addressed.\textsuperscript{172} While this discussion does not intend to delve into the many inconsistencies within Supreme Court jurisprudence, this Article must address the notion that federal Indian law is mischaracterized as racial law.\textsuperscript{173} If Indian law merely interacts with a unique race through political status, then naturalized Indian categorization could potentially garner similar rights to racial Indians, and any rights within the 1866 Treaty are homogenous.\textsuperscript{174}

After Rogers, the Supreme Court did not address the naturalized Indian issue until significantly after the 1866 Treaty.\textsuperscript{175} Few lower court decisions, including Ragsdale, occurred prior to 1900, so the Rogers racial dichotomy is the foundation for racial Indian jurisprudence.\textsuperscript{176} However, one prominent Native American scholar disputes the notion that Indian law is race law.\textsuperscript{177} Matthew Fletcher argues, “all elements of Indian affairs can be traced to the decision of the United States to recognize Indian tribes as political entities and to make Indian law and policy based on this political status.”\textsuperscript{178}

\begin{flushright}
\textsuperscript{170} Id.
\textsuperscript{171} See id.
\textsuperscript{172} See Matthew L.M. Fletcher, \textit{The Original Understanding of the Political Status of Indian Tribes}, 82 ST. JOHN’S L. REV. 153, 153 (2008) (arguing that portraying Indian law as race law ignores the political aspects of federal interaction with Indian tribes).
\textsuperscript{173} See id. at 157.
\textsuperscript{174} See Snowden et al., \textit{supra} note 67, at 211.
\textsuperscript{175} See id. at 206 (“It would be fifty years before another issue of a naturalized or adopted non-racial citizen of an Indigenous nation came before the Supreme Court in a matter of Indian nation or United States jurisdiction.”).
\textsuperscript{176} See id.
\textsuperscript{177} See Fletcher, \textit{supra} note 172, at 157.
\textsuperscript{178} Id. at 155.
\end{flushright}
His first illustration utilizes Morton v. Mancari\textsuperscript{179} indicating the federal government and Supreme Court committed to treating tribes as sovereign political entities.\textsuperscript{180} The Court refused to apply strict scrutiny\textsuperscript{181} to a BIA Indian preference because the preference focused on the BIA’s constituency.\textsuperscript{182} While accurate, Morton is a relatively recent decision in the grand scheme of Federal Indian law.\textsuperscript{183} Fletcher subsequently navigates Federal Indian law history to justify the Supreme Court’s announcement.\textsuperscript{184} The historical thesis lists numerous examples of government-to-government treaty making with individual Indian tribes, not the Indian race as a whole.\textsuperscript{185} Since each individual tribe is treated different, he concludes:

Congress’s continuing presumption was that Indian affairs involved the political relationship of the federal government to Indian tribes. Indian people were not American citizens—and could not be—because of their own political relationship with their own Indian tribes. . . . [T]he relationship of Indian people to the United States was purely political in the sense that it existed through their membership with Indian tribes that

\textsuperscript{179} Morton v. Mancari, 417 U.S. 535 (1974). The Mancari decision is the foundation for the majority of future arguments and Supreme Court decisions stating Indian preferences are political preferences based on tribes’ quasi-sovereign status not a racial preference similar to affirmative action. Id. at 554.

\textsuperscript{180} Fletcher, supra note 172, at 157-58.

\textsuperscript{181} Morton, 417 U.S. at 536. The Equal Protection Clause requires strict scrutiny when the government utilizes race as a factor when implementing policies even if the policies benefit minorities. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007); see also Grutter v. Bollinger, 539 U.S. 306, 326 (2003), superseded by constitutional amendment, U.S. CONST. amend. XIV. The Court applied strict scrutiny when analyzing Michigan Law School’s admissions policy that included race as a factor in admissions decisions; however, the Court did find that the policy satisfied strict scrutiny. Grutter, 539 U.S. at 326.

\textsuperscript{182} Fletcher, supra note 172, at 157-59.

\textsuperscript{183} See Morton, 417 U.S. at 541. While I understand that thirty-seven years is a significant amount of time, federal Indian law developed over a period of hundreds of years of interaction. See id.

\textsuperscript{184} Fletcher, supra note 172, at 153 n.1.

\textsuperscript{185} See id. at 164-79.
maintained a political relationship with the federal government.\textsuperscript{186}

The depiction of tribal interaction with the federal government is an accurate account of history.\textsuperscript{187} The description of government-to-government interaction in treaty making did occur, and tribes did govern within tribal territorial limits.\textsuperscript{188} However, the discussion ignores the dichotomy between racial Indians and naturalized Indians.\textsuperscript{189} Indian citizens with some degree of Indian blood were not treated as United States citizens and were subject only to the Indian sovereign.\textsuperscript{190} For racial Indians, Federal Indian law is comprised of political interactions; however, naturalized Indians did not receive the same treatment.\textsuperscript{191} The federal government and Supreme Court almost universally treated Indian citizenship questions as racial issues.\textsuperscript{192} The tribe adopted Rogers and he became a citizen, but his relation to the federal government did not end.\textsuperscript{193} Justice Taney specifically stated that a relationship to the tribe would not change Rogers' status in relation to the federal government.\textsuperscript{194} A racially Caucasian person that is naturalized as an Indian will never be a full citizen of the tribe under solely the tribe's jurisdiction.\textsuperscript{195} Fletcher's conclusion that Indian citizens' relationship to the United States travels through the tribe is inaccurate for naturalized Indians.\textsuperscript{196} Rogers clearly identifies different obligations for different individuals within Indian Territory, and the categorization of Indian citizens occurs along racial lines.\textsuperscript{197}

\textsuperscript{186} Id. at 177.
\textsuperscript{187} See id. at 156.
\textsuperscript{188} See id. at 170-71.
\textsuperscript{189} See id.
\textsuperscript{190} See Lomayesva, supra note 136, at 71.
\textsuperscript{191} See United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846) (finding that a white man is not an Indian if the tribe adopts him); United States v. Ragsdale, 27 F. Cas. 684, 685-86 (C.C.D. Ark. 1847); Lomayesva, supra note 136, at 67-72; Snowden et al., supra note 67, at 195-96.
\textsuperscript{192} See, e.g., Rogers, 45 U.S. (4 How.) at 572-73; Fletcher, supra note 172, at 164-65.
\textsuperscript{193} Rogers, 45 U.S. (4 How.) at 572-73.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} See id.
\textsuperscript{197} Id.
recognition of citizenship within a tribe is racial law, which alters the landscape of the political interactions during treaty making.\textsuperscript{198}

\textbf{IV. FREEDMEN'S RIGHTS IN THE TREATY OF 1866 WITH CHEROKEE}

The Freedmen controversy is polarizing, with many indicating that the Cherokee are ignoring basic treaty text.\textsuperscript{199} The Cherokee do not have valid arguments that the treaty does not grant any rights to the Freedmen because provisions providing for the Freedmen do exist; however, the 1866 Treaty may not be as clear as Freedmen suggest.\textsuperscript{200} The provisions at issue include:

All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee nation prior to June first, eighteen hundred and sixty-one,\ldots shall have the right to settle in and occupy the Canadian district southwest of the Arkansas river .\ldots

The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian territory under the provisions of this treaty .\ldots

The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with

\textsuperscript{198} See id.


\textsuperscript{200} See Cherokee Treaty, \textit{supra} note 40, 14 Stat. at 800-01.
laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, [t]hat owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.201

The Freedmen receive rights similar to native Cherokee, but the text does not say on its face that Freedmen are Indian or racially Cherokee.202 The distinctly racial categorization of Indian citizens during this era requires a determination of the category of citizenship provided to Freedmen.203 The 1866 Treaty must be analyzed to discover whether Freedmen were granted racial Indian status or whether Freedmen are naturalized Indians similar to the adopted citizens in Rogers. The different categories prescribe different rights, and subsequent policies significantly affected naturalized citizen status.204 Indian treaty interpretation is inconsistent.205 Previously, courts would interpret treaties through the spirit and purpose of the treaty in favor of Indian sovereignty and reservation of rights.206 Courts would consider the Indian understanding and the legislative purpose in government-to-government relations.207 Using the Indian canon of construction

201 Id.
202 See id.
203 See id.; Sturm, supra note 199, at 575-77.
204 See infra Part V (discussing the current status of rights).
206 See id. at 411; Scott C. Hall, The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem, 37 CONN. L. REV. 495, 496 (2004).
207 Frickey, supra note 205, at 400-04.
approach, Indians retained some of the original treaties' benefits.\textsuperscript{208} Looking at language disparities and other circumstances, courts would interpret the treaty most favorably to the Indians.\textsuperscript{209} After determining the original purpose, courts could then ask whether subsequent actions abrogated the treaty’s terms.\textsuperscript{210}

Unfortunately, the most recent Supreme Court decisions moved away from the Indian canon.\textsuperscript{211} The Court now uses more statutory construction tools.\textsuperscript{212} The Court focuses on textualism and surrounding history before looking to the Indian canon.\textsuperscript{213} If a plain meaning or federal history is clear, the Court stops.\textsuperscript{214} The Indian canon is now relegated to a small tiebreaker if a clear meaning is not present.\textsuperscript{215}

Not only does the Court find plain meaning more, the 1866 Treaty was forced upon the Cherokee.\textsuperscript{216} The Supreme Court’s preoccupation with the plain meaning rule is further compounded by the fact that the Cherokee did not possess much bargaining power because the government required all tribes to sign new treaties. The 1866 Treaty procured most of the Cherokee’s land for white settlers and required the Northern and Southern Cherokee factions to reside in one territory.\textsuperscript{217} Negotiations occurred, but commenced with abrogation of all previous treaties and a requirement that tribes must acquiesce to new

\textsuperscript{208} Id. at 413-15; Hall, supra note 206.
\textsuperscript{210} Singel & Fletcher, supra note 209.
\textsuperscript{211} Frickey, supra note 205, at 418; Hall, supra note 206, at 496.
\textsuperscript{212} Frickey, supra note 205, at 421-26.
\textsuperscript{213} Id. at 433.
\textsuperscript{214} Id. at 428-30.
\textsuperscript{215} Id. at 414.
\textsuperscript{216} See Cherokee Treaty, supra note 40, 14 Stat. at 799 (beginning the preamble with traitor rhetoric); \textit{Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians}, supra note 34; ANNIE H. ABEL, THE SLAVEHOLDING INDIANS, 305-07 (Arthur H. Clark Co. 1925); see also Pratt, supra note 71, at 1248; PRUCHA, supra note 76, at 266-67.
\textsuperscript{217} See ABEL, supra note 216, at 361-62; PRUCHA, supra note 76, at 267-68.
agreements. The forced nature of the 1866 Treaty makes it more likely that courts will look to the federal understanding and intent during negotiations, especially since the Indian canon is not widely used.

A. Clear Congressional Intent

The majority of the analysis will focus on clear congressional intent since courts will most likely find a plain meaning. Congressional intent can include both textual and legislative construction tools. The analysis will commence with the text of the 1866 Treaty and then proceed to legislative history and the purpose.

Article IX is the direct grant of rights to the Freedmen, so the analysis should begin in that article. The article acknowledged that the Cherokee Nation abolished slavery before granting Freedmen rights. The granting clause states, “all freedmen . . . shall have all the rights of native Cherokees.” The clause is quite clear. Freedmen received rights similar to racial Cherokees; however, the clause also defined Freedmen racially different from Cherokees.

The Rogers Court made it clear that non-racial individuals could live within the territorial limits of the tribe and be governed by the tribe. The Court discussed their status as citizens, but the Court ultimately recognized them racially as Caucasian. The granting clause in the 1866 Treaty follows the same pattern. The clause

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218 See ABEL, supra note 216, at 345; PRUCHA, supra note 76, at 267.
219 See Frickey, supra note 205, at 414.
222 Id. at 801.
223 Id.
224 See id.
225 See id.
227 Id. at 573.
228 See Cherokee Treaty, supra note 40.
discusses Freedmen having rights within the Nation.\textsuperscript{229} The Nation can govern them similar to other individuals within the tribe.\textsuperscript{230} Freedmen gain freedoms within the territory, and the government may regulate Freedmen’s actions.\textsuperscript{231} However, the clause refers to native Cherokee, which is similar language to how the \textit{Rogers} Court described racial Cherokee and how \textit{Ragsdale} differentiated between Indians and Indian citizens.\textsuperscript{232} Freedmen receive rights similar to Indians as Indian citizens, but the text does not indicate that Freedmen are Cherokee by blood.\textsuperscript{233}

Using common canons of construction, separating Freedmen from native Cherokee indicates that Freedmen are different from racial Cherokee.\textsuperscript{234} The treaty writers, federal agents, used different words for the racial Cherokee and the Freedmen.\textsuperscript{235} Rules of statutory construction indicate that all words in the treaty text are intentional choices, so the drafters intended to delineate between groups of people that would eventually live within Cherokee Territory.\textsuperscript{236}

Other language in article IX supports that the treaty granted naturalized citizenship rights but did not recognize Freedmen as racially Cherokee.\textsuperscript{237} Prior to the granting clause, article IX also permitted “all free colored persons who were in the country at the commencement of

\textsuperscript{229} See id.
\textsuperscript{230} See id.
\textsuperscript{231} See id.
\textsuperscript{232} Compare id. (differentiating between native Cherokee and Freedmen in the 1866 Treaty), \textit{with Rogers}, 45 U.S. (4 How.) at 572-73 (referring to race as white man by the Court), \textit{and} United States v. Ragsdale, 27 F. Cas. 684, 685-86 (C.C.D. Ark. 1847) (finding that the treaty referring to Indians only confers rights on racial Indians, but other treaties referring to Indian citizens would include naturalized Indians).
\textsuperscript{233} See Cherokee Treaty, \textit{supra} note 40.
\textsuperscript{234} See \textsc{Norman J. Singer & J.D. S. Singer, Statutes and Statutory Construction} 230 (7th ed. 2007) (presenting the premise that all sentences and words within a statute must have meaning). None of the information should be deemed superfluous, and thus, different words have different meanings. \textit{Id.}
\textsuperscript{235} See, e.g., Cherokee Treaty, \textit{supra} note 40, 14 Stat. at 800-01.
\textsuperscript{236} \textsc{Singer & Singer, supra} note 234.
\textsuperscript{237} See Cherokee Treaty, \textit{supra} note 40.
the rebellion" to reside within Cherokee territory.\textsuperscript{238} Article IX refers to these groups as having rights similar to native Cherokee.\textsuperscript{239} The federal government did not see all former slaves as Cherokee, but the treaty permitted the Cherokee to live in the Cherokee Nation, thus allowing the Cherokee Nation to regulate them and recognize different categories of citizens within Indian Territory.\textsuperscript{240}

Article IV provided new, smaller settlement areas for Cherokees and Freedmen.\textsuperscript{241} This article begins with "[a]ll the Cherokees and freed persons who were formerly slaves to any Cherokee."\textsuperscript{242} The remainder of the article demarcates the geographical boundaries for where they could settle.\textsuperscript{243} The language delineates Cherokees from Cherokee former slaves and establishes territory for a new nation including both Cherokees and non-racial Cherokees.\textsuperscript{244}

Courts often look to other sections of the same text to construe the document as a whole for a common purpose.\textsuperscript{245} Looking at the treaty as a whole, it should be interpreted as creating a new regulatory

\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{See id.}
\textsuperscript{240} \textit{See id.}
\textsuperscript{241} \textit{Id. at 800.}
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{See SINGER \& SINGER, supra note 234, at 206-12} ("The 'whole statute' interpretation has been expressed in a number of ways by the courts. For example, statutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme; a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter; courts should not rely too heavily upon characterizations such as 'disjunctive' or 'conjunctive' forms to resolve difficult issues but should look to all parts of the statute; when interpreting a statute all parts must be construed together without according undue importance to a single or isolated portion. A Tennessee court has stated that the meaning of a statute is to be determined, not from special words in a single sentence or section, but from the statute as a whole and viewing the legislation in light of its general purpose. If doubt or uncertainty exists as to the meaning or application of a statute's provisions the court should analyze the act in its entirety and harmonize its provisions in accordance with legislative intent and purpose.") (footnotes omitted).
government with multiple racial groups within the territory.\textsuperscript{246} Individual constituents are limited to particular boundaries in article IV.\textsuperscript{247} The article goes further and uses language to describe the new entity.\textsuperscript{248} The article states that those individuals may live within the Cherokee Nation.\textsuperscript{249} The use of Cherokee Nation, in addition to native Cherokees and Freedmen, illustrates that the nation will include multiple racial groups within a new sovereign.\textsuperscript{250}

The following articles continue setting up the new entity.\textsuperscript{251} Article V establishes election rules, police regulations, and judicial procedures.\textsuperscript{252} Article VII provides more rules and information regarding the United States court within the new Indian Territory.\textsuperscript{253} Article VII references both the Cherokee Nation and the citizens within the nation, so the language is consistent with the rest of the treaty.\textsuperscript{254} Article X specifically states, "[e]very Cherokee and freed person resident in the Cherokee nation" illustrating a new sovereign exists and contains the composition of the nation.\textsuperscript{255} Article XIII solidifies this understanding by referring to "members of the nation, by nativity or adoption."\textsuperscript{256}

Both the language of the treaty and the structure of the document illustrate the composition of the new Cherokee Nation.\textsuperscript{257} The treaty created a new nation with multiple different racial groups governed by the nation.\textsuperscript{258} Freedmen were neither seen as racially

\textsuperscript{246} See Cherokee Treaty, supra note 40, 14 Stat. at 800-01 (referring to "Cherokee Nation" in articles IV, VII, IX, and X in addition to discussing the different individual constituents within the nation).
\textsuperscript{247} Id. at 800.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} See id.
\textsuperscript{251} See id.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 800-01.
\textsuperscript{254} Id.
\textsuperscript{255} Id. at 801.
\textsuperscript{256} Id. at 803.
\textsuperscript{257} See id. at 800.
\textsuperscript{258} See id.
Cherokee nor did the treaty prescribe racial Cherokee status.\textsuperscript{259} The treaty guaranteed a certain amount of rights to everyone within the new nation.\textsuperscript{260} However, the grant of rights was not a guarantee of Cherokee status if the nation could no longer govern adopted Indians.\textsuperscript{261}

While the current court will most likely look to the text for the answer, other federal history and purpose illuminates the treaty's intent.\textsuperscript{262} Legislative history, negotiations, and directives to the negotiators from the government provide context and information to the treaty-making process.\textsuperscript{263}

After the Civil War, the federal government's negotiations included the significant opening of previously owned native lands to settlers.\textsuperscript{264} The Secretary of the Interior, James Harlan, provided instructions and parameters to Dennis Cooley\textsuperscript{265} and others to negotiate new treaties with the tribes.\textsuperscript{266} President Johnson provided the instructions to Harlan, so the pronouncements were the crux of federal policy during 1865 and 1866 treaty meetings.\textsuperscript{267}

The instructions from Harlan delivered the negotiations’

\textsuperscript{259} See id. at 801.
\textsuperscript{260} See id.
\textsuperscript{261} Id. at 803-04.
\textsuperscript{262} See Frickey, supra note 205, at 400-02. The author indicates interpreting treaties included outside sources regarding the negotiation. Id. at 395-402. The article does indicate the Court is not using the Indian Canon of Construction, but similar to legislative history, other information outside the text may be used to interpret the treaty. Id.
\textsuperscript{263} See SINGER & SINGER, supra note 234, at 542-43 ("Historical information is an important source of insight and enlightenment about most human affairs. One need not be a trained historian to use the historical method or appreciate the worth of historical knowledge for making decisions. Everyone does it every day. Certainly anyone faced with a legal problem can appreciate the relevance of information about circumstances which led to the enactment of a statute.").
\textsuperscript{264} See ABEL, supra note 216, at 224.
\textsuperscript{265} See id. at 219 (stating that Dennis Cooley was the Commissioner of Indian Affairs during treaty negotiations).
\textsuperscript{266} See id.
\textsuperscript{267} See id.
goals. The government first wanted the tribes to act peacefully within the tribe and towards the federal government. After peace, the government sought American-style governments within the territory. The document referred to creating “civilized” nations with civil governments. Harlan intended to create a nation with multiple Indian tribes with representatives on a general council similar to the Senate or House of Representatives. The instructions made it clear that the goal of the federal government was to create a multiracial nation within Indian Territory.

The instructions from Harlan also addressed slavery within the tribes. The document states that former slaves shall be incorporated into the tribe similar to original members. Harlan tried to also incorporate other non-Cherokee tribes within the territory and secure spots for those tribes on the general council. Not only did the federal government fail to see individuals within the territory as homogeneous, the government also intentionally attempted to push as many individuals to the area as possible.

Harlan’s letter further delineates the racial composition of the new Indian Nation. The letter references “red children” while discussing Indians within the territory. The reference to “red” is distinctly different from the historical descriptions of African Americans. During the treaty making and the Congressional debate

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268 See id. at 220-26.
269 See id. at 220-21.
270 See id. (“A common or central government should be established, with jurisdiction and authority coextensive with said territory, and limited to general purposes.”).
271 See id.
272 Id.
273 See id.
274 Id. at 221.
275 Id.
276 Id. at 221-22.
277 See id. at 221-23.
278 See id. at 223.
279 Id.
280 Id. at 253. Senator Lane refers to African Americans and Freedmen as “black persons” and “negroes” within the tribe. Id. Senator Pomeroy refers to them as
surrounding this treaty, African Americans were described as colored, black, negroes, and other racially derogatory terms, but the Freedmen were never described as red.281

The instructions also identified another group of individuals within the new nation.282 White persons were proscribed from entering the territory unless the federal government employed them or they were “admitted and incorporated” into the tribe.283 The incorporation language is the same language used in the previous section referring to Freedmen after the abolition of slavery.284 Incorporation of different racial groups illustrates that the incorporation’s intended meaning is similar to naturalization.285 The recognition of different races within the Cherokee Nation followed the federal practice of creating categories of citizenship and naturalization.286 Cherokees adopted or naturalized individuals within the tribe, but the incorporation did not make those members native or racially Cherokee.287 Since the language for Freedmen and Caucasians is the same, Freedmen’s rights under the 1866 Treaty are the equivalent of naturalized citizens within the Cherokee Nation.288

Negotiations between the State Department and the Plains Tribes used similar language.289 The State Department required the

“negroes.” Id. The discussion references intermarriage between Indians, African Americans, and “whites.” Id. They refer to each category as a different race and discuss how marriage between individuals of the different groups creates “half breeds.” Id. The debate illustrates the clear demarcation of different races within the Cherokee Nation. See id.

281 Id. at 253, 273.
282 See id. at 223.
283 Id.
284 See id. at 221, 223.
285 See id. at 221.
286 See supra Part III.B.
288 See id.; Cherokee Treaty, supra note 40.
289 See Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34 (finding that government representatives indicate that Freedmen must be incorporated into the tribes, which is similar language as documents referring to whites that are allowed to live within the
abolition of slavery and Freedmen to be “suitably provided for.” The government continued to stress that Freedmen must have rights similar to native Indians, but the language never strayed from the naturalized citizen language.

Subsequent history follows the same delineations. Government policy in the late 1880s into the 1890s shifted away from Indian sovereignty and moved to terminate and assimilate tribes into Anglo-American culture. Congress passed the General Allotment Act in 1887, which allowed the President to dismantle Indian reservations and provide individual Indians with tracts of land to live on within American society. The Act did not initially apply to the Cherokee, but in 1893 Congress created the Dawes Commission to allot Cherokee lands.

The Dawes Commission worked for numerous years to negotiate a settlement with the tribes. Each tribe resisted allotment knowing Indian sovereignty was slipping away. The Curtis Act eventually dismantled the tribal structure and allotted lands to members within the tribe. To allot the land, the commissioners needed a tribal census. The Dawes Commission created what is now referred to as the Dawes

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290 Id.
291 See id. (showing that the government agents used language such as “adopted,” “suitably provided for,” “equal footing,” “incorporated,” and “reside in the territory” but never referred to Freedmen as “Indians”).
293 See id. at 179.
294 See id. The General Allotment Act is also known as the Dawes Act. Id.
295 Id.
296 Id. The Dawes Commission did not only apply to Cherokee. Id. at 179-80. This Article only refers to the interaction of the commission with the Cherokee; however, the commission was also instructed to negotiate and terminate other tribes, including the Chickasaw, Choctaw, Creek, and Seminole tribes. Id.
297 Id. at 180.
298 Id.
299 Id.
300 Id. at 180-81.
The rolls are significant to understand the federal view of Indian citizens. The commissioners did not list every individual in one document and describe each individual as Cherokee. The commissioners created three separate rolls: Indians by-blood, Freedmen, and intermarried whites. A congressional act in 1908 removed the sale restrictions on portions of the allotment to Freedmen and intermarried whites with less than one-half Indian blood, but full-blood Indian allotments were still inalienable for the life of the original allottee. The government treated intermarried whites, low blood quantum Indians, and Freedmen similarly so their statutes were similar. Rogers made clear that intermarried whites were naturalized citizens. The Cherokee Nation could govern their activities, but intermarried whites were not racially Indian. Treating Freedmen similar to the non-racial citizens meant that Freedmen rights were as naturalized citizens of the larger Cherokee Nation.

Current courts ignore traditional Indian treaty interpretation and use more statutory construction tools, so the initial analysis of the 1866 Treaty focused on statutory construction. Clear congressional intent can be found in the text of the treaty. The granting clause delineated between Freedmen and racial Cherokee. The 1866 Treaty’s structure illustrates a commitment to establishing a nation with numerous racial constituents. Even nontextualists can find the delineations within

301 Id.
302 See id.
303 See id.
304 Id.
305 Id. at 186.
306 See id.
308 Id.
309 See id. at 573.
310 Frickey, supra note 205, at 421.
312 Id. at 801.
313 See id.
treaty negotiations and subsequent history. 314 Congress debated the rights and nature of the different groups, and the subsequent Dawes Commission created rolls for the different constituents. 315 The federal government followed the practice of creating categories of Indian citizenship and used language at every step that equated Freedmen to naturalized citizens not racial Cherokee. 316

B. Indian Canon of Construction

Traditional Indian treaty interpretation utilized the Indian canon of construction to begin the analysis, but the recent decisions relegated it to the tiebreaker if the text and federal legislative history did not clearly prescribe parties' rights. 317 The text, history, and purpose approaches in the previous section do not seem ambiguous, but the Court could use the Indian canon or at least placate tribes by analyzing the canon if the result is consistent with the above-mentioned approaches. 318

The Indian canon focuses on the Indian understanding during the treaty making process. 319 The canon realizes the reality of most treaty making situations. 320 Indians did not completely understand English, and most of the negotiations included interpreters for both

314 See ABEL, supra note 216, at 253.
315 See id.
316 See id. at 253-54.
318 See Frickey, supra note 205, at 413-14.
319 See id. at 418 n.158. The author provides the original reasoning behind the Indian canons. Id. at 397-98. Tribes required interpreters to understand the terms, and the interpretations were inexact. See id. The resulting treaties varied from the Indian understanding, so courts tried to err on the side of the Indians. Id.; see also Kristen A. Carpenter, Interpretive Sovereignty: A Research Agenda, 33 AM. INDIAN L. REV. 111, 117 (2008-09) (discussing language barriers and other problems interpreting native treaties).
Language differences make translating documents difficult. The meaning for the Indians and the strict construction of words by courts in English can change the entire meaning of the agreement. The canon directs courts to move away from a strict English construction and interpret it how the Indians understood the document.

The Indian understanding is difficult to determine because the recorded documents are in English. However, Indian arguments and responses during both the 1865 and 1866 negotiations are recorded, so the language barrier can be decreased by the tribes’ legitimate advocacy. The language barrier did not prevent strong Cherokee advocacy because an eastern journalist commented that the Indians held the oratory advantage. Letters from Cherokee government members to tribal citizens, even though translated, provide highlights of the basic Cherokee understanding of the 1866 Treaty.

Cherokee leaders understood the negotiations with the federal

321 Id. at 551.
322 See Frickey, supra note 205, at 400.
323 See id. The author illustrates a great example with the Treaty of Hopewell with the Cherokee. Id. The treaty discussed hunting and fishing rights within a certain area. Id. The strict construction in our laws and our society would understand hunting and fishing rights as a mere license to enter and do a particular action. See id. The Western understanding of land use included significantly more purposes for land than hunting and fishing. See id. However, the Indian understanding would be much different. Id. Hunting and fishing was the primary use of the land and was the lifeblood of the tribe. Id. The Cherokee would understand those rights as owning the property, not merely a right of access. Id.
324 Id.
325 See generally Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34 (explaining that the transcriptions and notes are all in English).
326 See id.
327 WARDELL, supra note 84, at 185-86.
328 See Ross, supra note 29, at 618-78 (providing letters to and from members of the Cherokee government and federal government regarding the 1865 negotiations and 1866 treaty).
government as a government-to-government enterprise. The leaders believed concessions were required, but the Cherokee would still retain the sovereignty status they previously held and would be able to govern Cherokee territory.

The original negotiations began in 1865 with a meeting between Interior Department representatives and representatives from the Plains Tribes. The 1865 negotiations did not result in a final treaty, but the discussions laid the foundation for the final 1866 Treaty. The representatives were similar in both negotiations, so the understanding of the final document requires looking at both discussions.

The grand pronouncement to begin the 1865 negotiations vilified the Plains Tribes, calling them traitors for signing treaties with the Confederate troops, and announced that all previous treaties with the federal government were abrogated. The tribes began the discussions from a defensive posture due to the initial pronouncement and argued about whether particular factions within each tribe stayed loyal to the Union. Cherokee continually disputed the disloyalty but only vaguely addressed the Freedmen issue. Cherokee leaders indicated slavery was abolished, but the Cherokee did not address what rights would be provided.

329 WARDELL, supra note 84, at 200-07. The author chronicles the interaction between the federal government and Cherokee delegations. Id. The Cherokee presented proposals from the government to the tribal council and acted similar to the federal government approval process. Id. at 206-07.

330 Id. at 198.

331 Id. at 183-85.

332 Id. at 203.

333 See id. at 199-203.

334 CONLEY, supra note 31, at 179-80; Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34.

335 CONLEY, supra note 31, at 180; Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34.

336 See Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34.

337 See id.
The negotiations included all the tribes together, so while the Cherokee may not have addressed the Freedmen issue as much as other tribes, multiple tribes provided the foundation for the Indian understanding. The government agents focused on Freedmen’s incorporation into the tribe not Freedmen as racially Indian. After the Department of Interior representatives provided a framework for the treaty, which included Freedmen rights, each tribe responded to the provisions. The interpreters for each tribe provided responses to the proposal, so the responses are the best evidence of the Indian understanding of the document and what each tribe agreed to provide.

Seminole representatives agreed to assist Freedmen and provide for them. The agents were skeptical that Freedmen would receive the appropriate rights, so they continued to push the rights issue. The Seminoles finally agreed to adopt Freedmen into the tribe, similar to naturalization, but the Seminoles never discussed Freedmen as racially Seminole.

The other delegations referred to Freedmen in the same manner. The Chickasaw refugee delegation commented that Freedmen would be incorporated into the tribe and provided for. The loyal Choctaw delegation referred to Freedmen as having African descent, and the Shawnee delegation agreed to adopt Freedmen into the tribe. The Creeks did not want Freedmen participating in the “body politic” of the Creek Nation. The tribes saw themselves as nations

338 See id. at 1, 52, 56.
339 See id.; see also supra note 291 and accompanying text.
340 Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34, at 56.
341 Id.
342 Id. at 52.
343 Id.
344 Id.
345 Id. at 56.
346 Id.
347 Id.
348 Id. at 150.
naturalizing individuals within the tribe. 349

Due to numerous contentious interactions in the final days, the 1865 negotiations did not produce a ratified treaty. 350 The government required new accords from the tribes, so the Secretary demanded tribes send representatives to Washington in 1866 to finalize a treaty. 351 The Cherokee sent a delegation that included John Ross, and while he did not survive through signing, the Cherokee agreed to terms with the United States that included new language relating to Freedmen rights. 352

The 1865 language at Fort Smith required Freedmen incorporation. 353 The language illustrated that the government did not view Freedmen as Cherokee, but the Cherokee would not agree to full incorporation. 354 Ross still viewed the Cherokee as a nation and even described the Cherokee government as better than "white" government. 355 He rejected numerous attempts to force treaty provisions on the Cherokee, and, in the end, the 1866 Treaty included compromises from both sides. 356

The Freedmen rights in the final 1866 Treaty differed

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349 See, e.g., id.
350 See Abel, supra note 216, at 216-18. The government delegation chose to no longer recognize Chief John Ross for the Cherokee party because they believed he persuaded other tribes to not sign the agreement. See id. at 199-201. The commissioners' action caused the Cherokee and other tribes to stop negotiating with the government. Id. at 212-16. The tribes also could not formally agree on all of the language for Freedmen. Id. at 269. Finally, the government could not get factions within the tribes to agree either, so many southern tribal factions agreed to anything the commissioners said to attempt to find favor with the federal government, while northern factions desired more compromise. See id. at 208-15.
351 Id. at 345.
352 Id. at 345-46.
353 Id. at 270 (stating that "[i]ncorporation within the tribe was one way of settling it, the easiest, no doubt, but not necessarily the best . . .").
354 Id. at 361.
355 Ratified Treaty No. 358, Documents Relating to the Negotiation of the Treaty of July 19, 1866, with the Cherokee Indians, Nat'L Archives 11 (July 19, 1866), available at http://digital.library.wisc.edu/1711.dl/History.IT1866no358.
356 Abel, supra note 216, at 361.
significantly from the 1865 initial document. The original document required incorporation of all Freedmen. Seminole delegates argued incorporation was too strong and only wanted to provide for Freedmen. Cherokee abolished slavery prior to the negotiations and also wanted only to provide for Freedmen, so the delegates argued for less onerous language. The final treaty codified the lower standard and obligated Cherokee to provide rights similar to native Cherokee.

The change to the final treaty illustrates the Cherokee’s understanding of the final Freedmen rights. Incorporation language posed an obstacle to formalizing an agreement, so Cherokee negotiated fewer rights for Freedmen. Total incorporation under the federal view would not categorize Freedmen as racially Cherokee and would only prescribe naturalized rights because the federal government recognized multiple categories of citizenship. Even if Cherokee did not understand the exact language, the strong debate would not indicate an increase of Freedmen’s rights to racial Cherokee status. The Indian understanding of the situation would be, at most, “naturalized” or “adopted” status, terms used during negotiations. The delegation fought for less than adopted rights, which were closer to allowing Freedmen to reside in the territory and providing the same access to services as native Cherokee. The Cherokee understanding of Freedmen rights never approached racial Indian status.

357 Id. at 361-63.
358 See Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34.
359 Id. at 52.
360 See ABEL, supra note 216, at 361.
361 See Cherokee Treaty, supra note 40.
362 See id.
363 See ABEL, supra note 216, at 359-61.
364 See id. at 361.
365 See id.
366 See Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34 and accompanying text.
367 See ABEL, supra note 216, at 361.
368 See supra notes 289-91 and accompanying text.
Article IX prescribed rights within the Cherokee Territory, but rules governing Indian Territory never homogenized individual rights of the inhabitants. Indian Territory always included categorized citizens with different rights and obligations, so while Article IX guaranteed rights, the nature of those rights must be determined. The federal view produces naturalized citizen rights for the Freedmen. The text of the treaty and history surrounding negotiations illustrates that the federal government did not view Freedmen as racially Cherokee, so the federal status would be adopted citizen.

If the Court followed traditional Indian treaty interpretation rules, the Indian canon of construction would produce even less Freedmen rights. All of the incorporation language that illustrates federal categorization as naturalized citizen was struck from the final treaty. The Cherokee negotiated for even less rights for Freedmen, so the Cherokee understanding would not be naturalized or racial Cherokee. With either view, Freedmen are not racially Cherokee and at best received naturalized citizenship rights.

V. JUDICIAL ABROGATION OF FREEDMEN'S RIGHTS

The constantly changing federal policy towards Indians affected Freedmen even though Freedmen were not considered during the policy or judicial process. The previous section of this Article illustrated that Freedmen received rights in the 1866 Treaty, but trying to enforce rights from Indian treaties is mostly a futile fight.

The constant control and amputation of the Indian Nation's ability to govern changed who can now be Indian citizens. Nation-state

369 See Snowden et al., supra note 67, at 191-93 (illustrating the historical differences of the inhabitants within tribal territory).
370 See Cherokee Treaty, supra note 40.
371 See id.
372 See ABEL, supra note 216, at 253.
373 See Cherokee Treaty, supra note 40.
374 See ABEL, supra note 216, at 361.
376 See Frickey, supra note 205, at 395; see also Hall, supra note 206, at 501-02 & n.52.
sovereignty manifests itself as jurisdiction over the nation’s citizenry. To govern a group of individuals and create societal order, governments must regulate and punish individuals acting outside societal norms. Native sovereignty over individuals within Indian country devolved through time to alter the status of naturalized Indians. While the 1866 Treaty granted naturalized Indian rights to Freedmen, subsequent judicial jurisdiction decisions removed tribal authority over non-Indians.

Chief Justice John Marshall laid the foundation for the Indian nations’ ability to regulate civil and criminal activities within Indian Territory. In the *Worcester* decision, Chief Justice Marshall prevented Georgia from applying state laws within Cherokee Territory. Samuel Worcester was not racially Indian, so the Cherokee Nation could regulate his activities by allowing him within the territory. They could have excluded Worcester and proscribed any of his actions in the same way they could have challenged racially Indian actions. *Worcester* concedes that tribes can naturalize Indians and regulate their activities.

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377 See *id.* at 220.
379 See Snowden et al., *supra* note 67, at 200, n.130, 212. Authors define “naturalized Indian” as an individual who does not possess any quantum of blood from a tribe that recognizes him or her as a citizen or member. *id.* at 173. However, the article does note that native tribes do not follow the western notion of naturalization. *See id.* at 193.
380 In the United States, two actions occur for naturalization. *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/us-citizenship/citizenship-through-naturalization (last visited May 20, 2015). First, people accept or “adopt” someone else, and then, the state recognizes the adoption through naturalization. *Id.* However, “what many would call naturalization Indian people often call adoption.” *See Snowden et al., supra* note 67, at 193.
381 See *supra* Part IV.
383 *Id.* at 539.
384 *Id.* at 537-39.
385 See *id.* at 539.
386 *See id.* at 556-57.
The 1866 Treaty follows the same jurisdictional logic. Not only did the treaty delineate between groups of individuals within the tribe, the treaty created a governmental structure for tribal regulation. The treaty prescribed elections with representatives from different districts with a regulatory state similar to the federal government. Formal government is necessary to keep peace within the territory, regulate actions, and appropriate funds. Rogers acknowledged that non-Indians lived within Cherokee Territory and the non-Indians could bind themselves to Cherokee laws. Cherokee Territory and the Cherokee Nation were set up to provide services and regulate tribal society. Since naturalized Indians were part of society they could be regulated.

If current jurisdiction decisions followed the same pattern and tribes regulated all activities within Indian Country the analysis would end here because Freedmen would be citizens under the treaty. However, federal Indian policy significantly changed during the late 1800s and early 1900s.

The first shift went from government-to-government interaction to federally controlled tribal actions. The thirst for more land and the racist perception that Indians were an uncivilized race led to the General Allotment Act where the government divested tribal titles and reservations and provided the land to individual members. After allotting land, the government opened the remaining parcels for west-

387 E.g., Cherokee Treaty, supra note 40, 14 Stat. at 800.
388 Id. at 800, 802.
389 Id. at 802.
390 See Bethany R. Berger, Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems, 37 ARIZ. ST. L.J. 1047, 1098-1100, 1105-08 (2005) (discussing the jurisdiction problems within Indian Country and how nonmembers and non-Indians have the same rights because they cannot be regulated).
392 E.g., Cherokee Treaty, supra note 40, 14 Stat. at 800.
393 See, e.g., id.
394 See CONLEY, supra note 31, at 193-205 (discussing how the federal government took over schools and dictated much of how the Cherokee Nation could govern).
395 See id. at 193-99.
traveling settlers.\textsuperscript{396} The shift made it more difficult for the Cherokee Nation to govern properly because the territorial units were scattered and government policies began assimilating natives into western culture.\textsuperscript{397} Tribal governments did not govern the citizenry in the same manner during this period.\textsuperscript{398}

Federal Indian policy plunged further into terminating tribal governments during the Termination Era.\textsuperscript{399} This era eliminated formal tribal governments.\textsuperscript{400} Not only were the Cherokee not allowed to govern its citizens, but the policy also destroyed the native government.\textsuperscript{401} The Cherokee Nation could not regulate racial Cherokee on the allotted lands, much less previously naturalized citizens.\textsuperscript{402} At this point in history a dormant Cherokee Nation did not govern or possess a traditional citizenry.\textsuperscript{403} Freedmen could not logically argue that the 1866 Treaty guaranteed any rights during this period because no one possessed citizenship rights in the Cherokee Nation.\textsuperscript{404}

The 1960s brought some relief for tribes.\textsuperscript{405} Federal policy transitioned to self-determination, so federally recognized tribal governments reestablished themselves.\textsuperscript{406} Some tribes created constitutions, laws, branches of governments, and other necessary entities to become fully functioning nations.\textsuperscript{407} The new governments regulated tribal territory and admitted citizens or members of the

\textsuperscript{396} Id. at 193.
\textsuperscript{397} Id. at 196-97.
\textsuperscript{398} WARDELL, supra note 84, at 319-23.
\textsuperscript{399} CONLEY, supra note 31, at 213-14.
\textsuperscript{400} Id.
\textsuperscript{401} See id.
\textsuperscript{402} See id.
\textsuperscript{403} Id.
\textsuperscript{404} See id. at 197, 213-14.
\textsuperscript{405} Id. at 214-16.
\textsuperscript{406} Id. at 215-17, 219-22.
\textsuperscript{407} Id. at 217-21 (noting that the Cherokee held the first Chief election since Oklahoma achieved statehood in 1907 and rewrote the Cherokee Nation's constitution).
Tribal reestablishment provided an opportunity to create similar entities that existed prior to allotment. In theory, tribes could naturalize citizens and regulate all reservation activities. Many tribes followed the federal recommendation to require a blood quantum for membership, but whether a blood quantum is required or whether naturalization can occur should be a tribal decision. Following this model, Freedmen's rights could only be terminated through Cherokee actions.

The political climate changed for tribes, but judicial decisions did not favor Indians. Self-determination provided a good slogan, but in reality, the former government-to-government model was permanently dead. In decisions that can best be described as judicial wizardry, the Court fundamentally altered the tribal authority over non-racial Indians, so the Cherokee no longer determine Freedmen rights and obligations within tribal territory.

The new jurisdictional framework for tribal power magically appears in *Bryan v. Itasca County, Minnesota*. Itasca County wanted
to tax Indians living within the reservation.\textsuperscript{417} The County sent Russell Bryan a property tax bill for his mobile home located on the reservation.\textsuperscript{418} The unique issue dealt with Public Law 280 ("PL 280"), which conferred civil law jurisdiction to the listed states over the tribes within the state.\textsuperscript{419} The Court needed to interpret whether taxing laws were civil laws within the meaning of the statute.\textsuperscript{420} \textit{McClanahan v. State Tax Commission of Arizona} already decided that states did not enjoy inherent authority to tax tribes.\textsuperscript{421} States could tax tribes or tribal actions within the reservation if Congress delegated that authority to the states; so, Minnesota, as a PL 280 state, attempted to tax Bryan.\textsuperscript{422}

Similar to many decisions in federal Indian law, the Court caused havoc by attempting a nuanced approach.\textsuperscript{423} The Court analyzed legislative history and decided that civil law within the statute only referred to adjudication between parties to an action, not taxing or regulatory authority.\textsuperscript{424} The decision initially looked favorable to Indians because even PL 280 states could not encroach on tribal sovereignty in regulation or taxing.\textsuperscript{425} As later decisions emerge, \textit{Bryan} eventually creates delineations and different tests for jurisdiction depending on the action.\textsuperscript{426} Tribal, state, and federal authority within Indian Country is not uniform for each actor.\textsuperscript{427} Whether the action adjudicates, regulates, or taxes will influence the action’s legality.\textsuperscript{428}

\textit{Bryan} did not change Cherokee power to naturalize citizens because the Court focused on PL 280 states, and Oklahoma is not a PL 280 state.\textsuperscript{429} However, the case provided the foundation for one of the

\textsuperscript{417} Id. at 375.
\textsuperscript{418} Id.
\textsuperscript{419} See id.
\textsuperscript{420} See id. at 375-76.
\textsuperscript{422} See \textit{Bryan}, 426 U.S. at 375.
\textsuperscript{423} See id. at 385.
\textsuperscript{424} Id.
\textsuperscript{425} Id.
\textsuperscript{426} See id. at 383-86.
\textsuperscript{427} See id.
\textsuperscript{428} See id.
\textsuperscript{429} See id. at 375.
most significant decisions regarding tribal jurisdiction within the reservation.

In 1981, Justice Stewart further confiscated tribal authority in *Montana v. United States.* The Crow Tribal Council passed a resolution preventing nonmembers from hunting or fishing within the reservation. The prohibition applied to all land within the reservation, which included land held in trust for the Crow and land that the federal government granted in fee to nonmembers. The Crow believed it could regulate all activities within the territorial bounds of its reservation. Focusing on the territory for authority is not unusual, and the Crow view followed the *Worcester* idea that laws of the state did not apply within the reservation. The Court did not follow *Worcester* and instead relied heavily on *Oliphant v. Suquamish Indian Tribe* to declare that tribes did not have authority to regulate nonmembers unless Congress expressly granted the authority.

Territorial authority lost some significance in *Montana,* so now the person being regulated became a major factor in determining whether the tribe’s action was within its sovereign power. The general rule for civil regulatory jurisdiction is that a tribe may not regulate a nonmember on non-Indian fee simple land within the reservation. The decision’s two exceptions are if the activity

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431 See id. at 548-49.
432 See id. at 548-49, 557.
433 See id.
434 See, e.g., id. at 558-59. The basic structure of current governance is based on territory limits. See id. Individual states have authority to regulate activities within the state, but the regulations change when traveling to another state. Id. Municipalities follow the same pattern. Id. Sales tax within the state can be vastly different depending on the location of the sale. Id. Within a ten-mile radius in Oklahoma City, there are at least three different sales tax rates including Warr Acres, Oklahoma City, and Bethany. Id.
437 See *Montana,* 450 U.S. at 549.
438 See id. at 562-66.
439 See id.
threatens "the political integrity, the economic security, or the health or welfare of the tribe," or if the nonmember consents to regulation. The Court extended the Montana doctrine to civil adjudicatory jurisdiction in subsequent cases; so generally, a tribe cannot regulate or adjudicate nonmembers.

Self-determination may have been the executive policy, and the Court continually restricted tribal rights. The only hope for tribes was the strict construction of the Montana line of decisions. Montana, Strate, Brendale, and others continued to espouse the rule that tribes could not regulate nonmembers on non-Indian fee land within Indian Country. The language specifically referred to non-Indian fee land, so many thought tribes could regulate or adjudicate nonmembers on Indian land within the reservation boundaries.

Nevada v. Hicks dispelled any hope that the Court would end its colonization of Indian Country. Hicks, an Indian tribal member on Indian land, sued a non-Indian in tribal court for trespass and other torts. The case displayed clear facts; the person was non-Indian, but all the critical actions occurred on Indian land held in trust by the government for Indians. If the distinction between non-Indian fee land within a reservation and Indian land within the reservation

440 See id. at 565-66.
444 See generally Strate, 520 U.S. at 438 (disallowing tribal adjudication over nonmember activity within tribal land); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (finding that one of the narrow Montana exceptions were met, but only for a small parcel of land). The tribe could not regulate non-Indians on the majority of the land. Montana, 450 U.S. at 544 (prohibiting tribal regulation of nonmember hunting and fishing activities on non-Indian fee simple land within the reservation).
445 Montana, 450 U.S. at 547.
446 See Nevada, 533 U.S. at 361-62 (stating that tribal lands are often considered as part of the territory of a state).
447 Id. at 356-57.
448 Id. at 355.
mattered, the Court could make that distinction in *Hicks*.\(^{449}\) Unfortunately, the Court failed to follow the strict *Montana* construction and stated that the *Montana* rule requiring consent or threat to political integrity, economic security, or health or welfare of the tribe to regulate nonmembers applied to all of Indian Country without regard to who owned the land.\(^{450}\) Land ownership is a factor, but it is not a dispositive factor.\(^{451}\) Tribal authority devolved from the ability to regulate tribal land, so now, tribes can only regulate tribal members without extraordinary circumstances.\(^{452}\)

The new jurisdictional reality complicates 1866 Treaty rights.\(^{453}\) Cherokee may not regulate all the activities occurring on Cherokee land.\(^{454}\) The actor’s status determines Cherokee authority unless one of the exceptions is satisfied.\(^{455}\) Freedmen have two options:\(^{456}\) (1) they can claim to be naturalized members of the tribe since the original language in *Montana* discussed nonmembers;\(^{457}\) or (2) they can seek membership that consents to all Cherokee laws, satisfying the consent exception to *Montana*.\(^{458}\) However, the *Montana* line makes it clear that Cherokee authority will not extend to all activities within the tribe’s territorial limits.\(^{459}\) Freedmen’s first option is to assert that they are naturalized members and thus do not fall in the nonmember category that has been judicially abrogated.\(^{460}\) The Court began the *Montana* line

\(^{449}\) *Id.* at 360.

\(^{450}\) *Id.*

\(^{451}\) *Id.*

\(^{452}\) See Berger, *supra* note 390, at 1067 (explaining that jurisdiction over nonmembers is virtually nonexistent).

\(^{453}\) Cherokee Treaty, *supra* note 40, 14 Stat. at 803 (stating that the Cherokee Nation shall have exclusive jurisdiction where causes of action arise on tribal land).

\(^{454}\) See *Montana v. United States*, 450 U.S. 544, 565 (1981) (holding that Indian tribes do not have the inherent sovereign power to regulate activities of nonmembers in all instances).

\(^{455}\) See *id.* at 565-66.

\(^{456}\) *Id.* at 565.

\(^{457}\) *Id.* at 567.

\(^{458}\) See *id.* at 565.

\(^{459}\) See *id.*

\(^{460}\) See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (inferring that using “nonmember” and “non-Indian” interchangeably
delineating between members and nonmembers, but now, the Court conflates nonmembers with non-Indians.\textsuperscript{461} The Chief Justice, with a stroke of the pen, stated, "[b]ut tribes do not, as a general matter, possess authority over non-Indians who come within their borders."\textsuperscript{462} The following sentence discussed nonmember activity, but three paragraphs later the decision reverted back to proscribing tribal authority over all non-Indians.\textsuperscript{463} Through either poor drafting or intentional degradation, \textit{Plains Commerce Bank} conflated nonmembers and non-Indians.\textsuperscript{464} While tribes can in theory determine membership of the tribe,\textsuperscript{465} tribes cannot regulate non-Indian activities without a \textit{Montana} exception.\textsuperscript{466}

The previous decisions in the \textit{Montana} line began conflating the terms, but \textit{Plains Commerce Bank} completely destroyed the naturalized Indian status.\textsuperscript{467} Tribes can no longer regulate non-Indian activity, which essentially means that a non-Indian member is not under tribal authority.\textsuperscript{468} Societal norms, regulations, and conflict management are essential to a functioning political body.\textsuperscript{469} Conflating nonmember with non-Indian means naturalized non-Indian member is no longer a status within Indian Country.\textsuperscript{470} Freedmen received naturalized citizen rights throughout the opinion indicates that the Court does not draw a distinction between nonmembers and non-Indians).

\textsuperscript{461} Compare \textit{Montana}, 450 U.S. at 545 (specifying nonmembers, not non-Indians, by the Court) with \textit{Plains Commerce Bank}, 554 U.S. at 327 (using "nonmember" and "non-Indian" interchangeably throughout the entire third section discussing the general rule for tribal jurisdiction by the Court); see Berger, \textit{supra} note 390, at 1049, 1055-57.

\textsuperscript{462} \textit{Plains Commerce Bank}, 554 U.S. at 328.

\textsuperscript{463} Id. at 328-30.

\textsuperscript{464} See id. at 330.


\textsuperscript{466} \textit{Montana}, 450 U.S. at 565-66.

\textsuperscript{467} See \textit{Plains Commerce Bank}, 554 U.S. at 328.

\textsuperscript{468} Id.

\textsuperscript{469} See Snowden et al., \textit{supra} note 67, at 187-88 (discussing how individuals form a political sovereign).

\textsuperscript{470} See \textit{Plains Commerce Bank}, 554 U.S. at 328 (conflating "nonmember" with "non-Indian" by using the words interchangeably).
within the Cherokee Nation in the 1866 Treaty because they are not racially Indian.\textsuperscript{471} Without contemplating the gravity of his language, the Chief Justice extended the \textit{Montana} rule to non-Indians, and thus, he judicially abrogated Freedmen’s 1866 Treaty rights.\textsuperscript{472}

The general rule in \textit{Montana} does include a consent exception, so Freedmen can argue seeking membership consents to tribal authority, making naturalization possible.\textsuperscript{473} However, the Court is extremely reluctant to find general consent to all tribal authority.\textsuperscript{474} The Court in \textit{Atkinson Trading Co. v. Shirley} did not allow general tax jurisdiction over a non-Indian even though the non-Indian agreed to become an Indian trader knowing the commercial nature of the transaction.\textsuperscript{475} The Court said that a non-Indian could not be “in for a penny, in for a Pound.”\textsuperscript{476} \textit{Plains Commerce Bank} used the phrase again when the family argued that the bank had numerous commercial dealings with tribal members, so the bank consented to all litigation in relation to those dealings.\textsuperscript{477}

The Court continually refuses to allow general consent to all tribal regulation.\textsuperscript{478} In every consent case the Court finds an area that the non-Indian would not foresee or would not consent to, and the Court uses remote possibilities to not find the exception satisfied.\textsuperscript{479} The

\textsuperscript{471} Cherokee Treaty, \textit{supra} note 40.
\textsuperscript{472} \textit{Plains Commerce Bank}, 554 U.S. at 328.
\textsuperscript{474} See \textit{Plains Commerce Bank}, 554 U.S. at 342 (holding that a non-Indian bank did not consent to tribal court jurisdiction when it sought the tribal court’s assistance in serving a notice to quit).
\textsuperscript{475} \textit{Atkinson Trading Co. v. Shirley}, 532 U.S. 645, 656 (2001).
\textsuperscript{476} \textit{id.} (quoting \textsc{E. Ravenscroft, The Canterbury Guests; Or A Bargain Broken}, act 5, sc. 1.).
\textsuperscript{477} \textit{Plains Commerce Bank}, 554 U.S. at 338.
\textsuperscript{478} See \textit{id.} at 342; \textit{Atkinson Trading Co.}, 532 U.S. at 655 (holding that the consent exception was not satisfied).
\textsuperscript{479} See \textit{Plains Commerce Bank}, 554 U.S. at 342 (holding that a nonmember seeking the tribal court’s assistance in serving process on a tribal member did not constitute consent); \textit{Atkinson Trading Co.}, 532 U.S. at 655 (holding that “a nonmember’s actual or potential receipt of tribal police, fire, and medical services” does not amount to a consensual relationship with the tribe); \textit{Strate v. A-I Contractors}, 520 U.S. 438, 457 (1997) (holding that a nonmember engaging in subcontract work on the Indian
Court may not have wanted the exceptions to swallow the rule, but the decisions functionally nullified the exception’s existence beyond very limited situations.

Freedmen’s best argument is consent, but two major hurdles exist that allow the Court to continue nullifying the exception. The first problem is the conflation of nonmember and non-Indian. The Court indicates that all non-Indians are nonmembers of the tribe. Not only did the conflation make regulating all non-Indians difficult, conflating the terms means naturalizing non-Indians is no longer a reality. Non-Indians are presented as nonmembers in every situation. While consent is an exception, the Court never finds general consent to all regulations. Non-Indians are always perceived as nonmembers, and there is no general consent to tribal laws that makes naturalization possible.

Those that become members of a tribe should consent to the laws of the tribe and allow a non-Indian to become a member. However, the Court construed that exception to require specific knowledge of the specific regulated activity and consent to it. Membership should in theory satisfy consent, but the average person would not know exactly what power the sovereign would gain with reservation does not create a consensual relationship with a tribal member when a tribal member was not a party to the subcontract).

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480 Plains Commerce Bank, 554 U.S. at 330.
482 See Montana v. United States, 450 U.S. 544, 565 (1981) (establishing the consent exception to the general rule that a tribe cannot regulate the activities of nonmembers).
483 See Plains Commerce Bank, 554 U.S. at 328.
484 See id.
485 See id.
486 See Montana, 450 U.S. at 565.
487 See supra note 479 and accompanying text.
488 See supra note 479 and accompanying text.
490 See, e.g., Plains Commerce Bank, 554 U.S at 342.
The tribe could potentially tax income, tax activity within the reservation, zone land, prohibit certain otherwise legal activity, and adjudicate disputes with other tribal members.\textsuperscript{492} The new specific consent requirement makes the Court’s job easy. If the Court found even one event that a person would not foresee then the general consent fails.\textsuperscript{493} Once general consent fails naturalization as a member is unavailable.\textsuperscript{494} The Court’s tribal civil jurisdiction decisions focus on non-Indians and completely eliminate the tribes’ ability to naturalize citizens.\textsuperscript{495}

Tribal criminal jurisdiction more clearly illustrates the complete divestiture of naturalization ability.\textsuperscript{496} \textit{Oliphant v. Suquamish Indian Tribe} states a tribe may not prosecute non-Indians for crimes within Indian Country.\textsuperscript{497} The Court never wavered from that statement and momentarily constricted the rule even further in \textit{Duro v. Reina}.\textsuperscript{498} In \textit{Duro}, the Court held that the tribes could not prosecute nonmember racial Indians for crimes within the tribal territory.\textsuperscript{499} Congress objected to the decision and passed 25 U.S.C. §1301, which permitted tribal criminal jurisdiction over any Indian, even if the Indian’s affiliation was with another tribe.\textsuperscript{500} The statute focused solely on racial Indians.\textsuperscript{501} It did not state that tribes could prosecute non-Indian members of the tribe.\textsuperscript{502} Tribes can only prosecute Indians.\textsuperscript{503}

Once again, tribal authority is permitted only against racial

\textsuperscript{491} See supra notes 473-81 and accompanying text.
\textsuperscript{493} See, e.g., Plains Commerce Bank, 554 U.S. at 337-38.
\textsuperscript{494} See supra notes 479-80 and accompanying text.
\textsuperscript{495} See supra notes 479-80 and accompanying text.
\textsuperscript{499} See id.
\textsuperscript{500} See § 1301(2) (stating that tribes can now “exercise criminal jurisdiction over all Indians”).
\textsuperscript{501} See id. §1301.
\textsuperscript{502} See id.
\textsuperscript{503} See id.
Indians. All the evidence surrounding the 1866 Treaty illustrated that Freedmen are not racially Indian. Tribes' naturalization ability would be a facade at best. The new tribal members could not be criminally prosecuted by the tribe for crimes committed within the tribes' territory. Freedmen could not be proscribed from particular actions, and the only potential sanctions could come from the federal government. The ability to govern territory and limit individual actions is a necessary component of self-government. A nation cannot be sovereign without the ability to coerce actions within the sovereign's sphere of influence. A sovereign without the ability to control individual actions through coercion, either criminally or by civil means, can no longer establish relationships with the individuals outside the scope of power. The basic idea of the social contract requires individuals to submit to power or form a higher entity. Without that basic relationship citizen status is impossible.

The jurisdiction decisions abrogated naturalization ability and in the process eliminated Freedmen's citizen rights. Tribes cannot regulate the civil actions or punish criminal conduct of racially non-

504 See id.
506 Documents Relating to the Negotiation of an Unratified Treaty of September 13, 1865, with the Cherokee, Creek, Choctaw, Chickasaw, Osage, Seminole, Seneca, Shawnee, and Quapaw Indians, supra note 34.
507 See §1301.
508 See id.
510 Id.
511 See id.
513 See id.
514 See id.
515 See supra Part V.
Since racial non-Indian status is paramount in the decisions, naturalizing non-Indians is no longer feasible. Freedmen are not racially Indians. Without access to jurisdiction, Freedmen’s citizenship category is no longer recognized in Indian Country. The Court circumscribed tribal rights and eliminated Freedmen’s 1866 Treaty rights by limiting tribal jurisdiction to racial Indians.

The Court did proclaim the tribes’ ability to determine tribal membership, and thus, naturalizing non-Indians is within tribal authority. In Santa Clara Pueblo v. Martinez, the Court decided that tribes could not be sued over membership issues. The internal sovereignty and immunity from suit prevents individual suits against the tribe for Indian Civil Rights Act violations, so most scholars adhere to the notion that tribes retain near-limitless ability to determine tribal membership.

Tribal authority to determine membership and naturalize is a hollow announcement. Determining membership is within the purview of the tribe when the individual in question is racially an Indian. Indians are within the jurisdictional confines of tribal authority and can be included or excluded at will. Tribes can change blood quantum requirements and even expatriate members without worry of federal intervention. Tribes cannot unilaterally expand the jurisdiction of the tribe to non-Indians. In all of the civil and criminal jurisdiction cases,

516 See supra Part V.
517 See supra Part V.
518 See supra Part V.
519 See supra Part V.
520 See supra Part V.
522 Id. at 58-59.
524 See Santa Clara Pueblo, 436 U.S. at 72.
525 See id.
526 See id.
the tribe attempted to act upon a non-Indian and coerce particular conduct. The court in each case denied tribal authority. Tribes cannot regulate activities of non-Indians, so a membership contract with non-Indians is unavailable.

Freedmen’s complaint of losing 1866 Treaty rights is legitimate. The 1866 Treaty included provisions for everyone affected by the blatant intervention within the Cherokee Nation, so Freedmen should receive benefits from the original treaty. Freedmen should be allowed to participate in a robust Cherokee government and territory. However, Freedmen are attacking the wrong entity. Their complaint that the Cherokee Constitutional Amendment, disenrollment, and lack of voting privileges is the root of the problem ignores clear judicial history. The Court decisions over the past twenty to thirty years make Freedmen rights nonexistent. The federal courts could not simultaneously force the Cherokee to admit Freedmen in the tribe and prevent them from regulating Freedmen activities.

529 See supra Part V.
530 See supra Part V.
531 See supra Part V.
532 See, e.g., Cherokee Treaty, supra note 40, 14 Stat. at 800-01.
533 See Marcos Barbrey, Slave Descendants Seek Equal Rights from Cherokee Nation, SALON (May 21, 2013), http://www.salon.com/2013/05/21/slave_descendants_seek_equal_rights_from_cherokee_nation_partner/ (addressing thoughts for the equality of Freedmen and expressing the notion that Freedman citizens want to be reinstated as Cherokee Nation citizens).
536 See, e.g., Plains Commerce Bank, 554 U.S. at 327-28; see also United States v. Rogers, 45 U.S. (4 How.) 567, 572-74 (1846) (holding that a white man, who had been adopted into the Cherokee Nation with Cherokee Nation permission by marriage, was...
The real solution for both the tribe and Freedmen is against the original aggressor. Federal decisions and policies that create animosity between the two groups help cement the status quo. The Congressional Black Caucus comes out against tribal rights and begins lobbying against pro-tribal regulation. The tribes and Congressional Black Caucus continue fighting among themselves. The two groups never put together the votes, power, or resources to fight the original slaveholder and colonizer. The conqueror continually prevails and displaces the minority groups through easy and swift enemy creation.

Cherokee and Freedmen goals are consistent. Cherokee want a Cherokee Nation that governs all activities within a specific territory where the laws of outside forces are banished. Freedmen want citizenship rights from the 1866 Treaty. The way to receive treaty rights is to expand sovereignty of the tribe. Increased sovereignty is a pipedream unless everyone possible begins advocating and fighting for it. Combining the minority groups with a singular purpose is the only hope for change. No one can guarantee the outcome, but a reasonable hypothesis is that the Cherokee Nation would be willing to naturalize many different citizens, including potentially the Freedmen, if the Cherokee Nation was once again a powerful entity with broad powers within a Cherokee domain.

VI. CONCLUSION

The colonization of Native Americans continually degrades the sovereignty of tribes. Tribal authority and governance are restricted by

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537 See NAYLOR, supra note 19, at 165-66.


539 See generally NAYLOR, supra note 19, at 165-66 (showing that since federal involvement caused tension in the past, more federal involvement may cause future harm to the relationship).


541 Barbery, supra note 533; Cherokee Treaty, supra note 40, 14 Stat. at 799-801.
judicial determinations without Congress using plenary authority. The judicial abrogation of tribal authority over nonmember Indians finally affected someone other than the tribe. Preventing native sovereignty over nonmembers nullified any rights Freedmen received in the 1866 Treaty.

Unfortunately, the colonizer perpetrates another conquest through judicial abrogation. Freedmen see Cherokee actions as antithetical to the 1866 Treaty rights and are fighting the Cherokee. African American advocates see the action as racist, so the tension between the two groups increases. The colonizer can sit back and watch the groups fight each other over a situation created by continued conquest. Tribes cannot regulate Freedmen, and Congress will not increase sovereignty to allow regulation.

The animosity is understandable. However, the target of the frustration is misguided. The Cherokee removed Freedmen from the tribe and passed the Constitutional Amendment that prevents Freedmen from becoming members. Those are specific actions that can be argued over. Animosity toward the actor is easy. The United States is the puppet master that created the situation though. Cherokee cannot regulate Freedmen because justices haphazardly wrote opinions indicating tribes did not retain the power to regulate non-Indians. The conflation of nonmember and non-Indian removed Cherokee authority over Freedmen, and thus, eliminated their ability to become members. Freedmen should receive all the rights and benefits from the 1866 Treaty. The only entity with the ability to produce those rights is the same entity that decimated native sovereignty. Redress is only available from the federal government.